Proposition 47:

Analysis and Emerging Issues

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by

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Replaces Previous Editions

WHAT'S NEW SINCE THE NOV. 5 "POST–ELECTION EDITION":

- Handling New Cases, Filed After Nov. 4.
- Vehicle Code section 10851 and Theft
- After Misdemeanor Reduction: Do One-Year Prison Priors Still Count
- After Misdemeanor Reduction, Do DNA Samples Get Destroyed?
- Does Resentencing Violate Plea Bargains?
- Selected Juvenile Issues
- Selected Immigration issues
- Improved and Expanded Discussion of Many Topics Covered in Previous Editions, including Probation and Statute of Limitations.

Table of Contents

I. Summary

- Proposition 47, the "Safe Neighborhoods and Schools Act, passed with a 59% "Yes" vote, on Nov. 4, 2014. Its full text, including three uncodified sections, is in the Official Voter Information Guide for that election, and, likewise, at the Secretary of State's elections web site.

- Where the value is $950 or less, reduces the punishment for most people convicted of forgeries, bad checks, thefts, and shoplifting (defined as entry with intent),

from a straight felony, or a wobbler, to a straight misdemeanor. The main exception is for people with certain prior convictions.

- Reduces the punishment for most people convicted of the drug possession offenses listed in 11350, HS 11357, subd. (a), and HS 11357, from a straight felony or a wobbler, to a straight misdemeanor. The main exception is for people with certain prior convictions.

- People (without certain prior convictions) with open charges pending as of election day get the benefit of the reductions.

- For people with new charges filed on or after Prop 47's effective date, Nov. 5, 2014, the amended and new statutes are charged as misdemeanors, unless they are elevated to wobbler felonies or straight felonies on account of certain prior convictions.

- Creates a mechanism for most people previously convicted of felonies for offenses that are now be misdemeanors, to obtain reductions. People who are currently serving a sentence who would have gotten a misdemeanor under Prop 47, can petition to have their convictions reduced. People thus released way may be on parole for one year. Petitions will be granted unless the court determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety. People whose sentence is completed, who would have gotten a misdemeanor under Prop 47 can apply for reductions which will be automatically granted.

- Not discussed in Prop. 47 are people on probation, people whose conviction is not final on appeal as of November 4, 2014, and juvenile adjudications. This paper discusses mechanisms for such people to obtain, or at least petition for, reductions.

- People excepted from these reductions:

  (1) People with a prior conviction for the offenses listed in Pen. Code §667, subd. (e)(2)(C)(iv) [see Appendices 1 and 2] **or**

  (2) People convicted of an offense requiring registration under Pen. Code §290, subd. (c). [see Appendix 3].

A limited number of other specific exceptions appear in some of the statutes defining each offense. Some statutes are slightly recast, as well, in other ways.

- Creates the "Safe Neighborhoods and Schools Fund." Monies saved by the state from this Proposition are deposited into this fund. Monies from the fund are distributed, according to a formula, to (1) schools, for designated uses; (2) the Victim Compensation Fund, for designated uses; and (3) the Board of State and Community Corrections, to administer a grant program to public agencies, for designated purposes.

- Juveniles should be entitled to the reductions in new petitions. Query whether they are also entitled to post-adjudication relief similar to that for adults.

- Immigration effects, and strategies, for non-citizens are discussed in this paper.

II. The two types of priors that elevate new charges from misdemeanors to wobblers or straight felony; and that prohibit convicted defendants from obtaining misdemeanor reductions.

A. Prior convictions of offenses listed in Pen. Code §667, subd. (e)(2)(C)(iv)

The first group is those:

> "... with one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 ....

The introductory clause in the above, "one or more prior convictions," or its equivalent, is found at each of the substantive amended or added statutes in Prop. 47, including new Pen. Code §1170.18, subd. (i), except for Pen. Code §§ 666 and 1170.18, subd. (c).

In Pen. Code § 666, the introductory phrase is "prior violent or serious felony conviction [under Pen. Code § 667, subd. (e)(2)(C)(iv)].

And in Pen. Code § 1170.18, subd. (c), the introductory clause is "violent." Query how these different formulations will be treated by the courts.

A full list of the offenses listed in Penal Code section 667, subdivision (e)(2)(C)(iv) is in Appendices 1 and 2.

These offenses are, mainly, murders and attempts, sexually violent offenses, non-violent felony child molestation, assault with a machine gun on a peace officer, and possession of a weapon of mass destruction.

*Notice that **not all prior serious and violent felonies are disqualifiers**; only those listed in Pen. Code § 667, subd. (e)(2)(C)(iv). Thus, for example, a prior first degree (residential) burglary, even though it is a serious felony under Pen. Code § 1192.7, subd. (18) does not disqualify a person.*

Curiously, Pen. Code § 667, subd. (e)(2)(C)(iv) includes two felonies that are not listed as serious or violent in Pen, Code §§ 1192.7, subd. (c) or 667.5, subd. (c). Those are (V) Solicitation to commit murder as defined in [Pen. Code §] 653f, and (VII) Possession of a weapon of mass destruction, as defined in [Pen. Code § 11418, subd. (a)(1)]. See discussion in this Subpart above, about the different formulations used in amended and added Pen. Code §§ 666 and 1170.18. Query how the courts will handle these anomalies.

B. Prior convictions of offenses requiring registration under Penal Code §290, subdivision (c).

The second group are people who have one or more prior "convictions":

> "... for an offense requiring registration pursuant to subdivision (c) of Section 290."

*Note that **not all persons required to register as sex offenders are disqualified**. Thus, for example, a person required to register only because the court exercised its discretion under Pen. Code § 290.006, is not disqualified, because that person is not required to register under Pen. Code § 290, subd. (c).*

A full list of the offenses listed in Penal Code section 290, subdivision (c) is in Appendix 3.

Notice that other offenses for which registration is required under the Sex Offender Registration Act, such as those from other states (for which Pen. Code §290.005 requires registration), or for which the court exercises its discretion to order registration under Pen. Code §290.006, are not exceptions to these reductions.

Likewise, juveniles are not convicted, they are adjudicated, and will, if they meet the criteria in Pen. Code § 290.008, be required to register. But this is not because of a conviction under Pen. Code § 290, subd. (c). This is discussed again, below, in the section on Juveniles.

Note an additional ambiguity: what if the registration requirement has been ended under Pen. Code § 290.5? Is that still an offense "requiring registration pursuant to Pen. Code § 290, subdivision (c)?" The Act does not answer this question.

C. Must the prior be pled and proved? Can it be dismissed under Pen. Code §1385?

Prop. 47 does not expressly state that the prior must be pled and proved. See, e.g., section 5 of Prop. 47, creating the new crime of "shoplifting," in new Pen. Code § 459.5:

> *"... except that a person with one or more prior convictions for an offense specified in [Pen. Code § 667, subd. (e)(2)(C)(iv)] or for an offense requiring registration pursuant to [Pen. Code § 290, subd. (c)]may be punished pursuant to subdivision (h) of Section 1170."*

And see, e.g., section 6 of Prop. 47, amending Pen. Code § 473, forgery:

> *"... except that such person may instead be punished pursuant to subdivision (h) of Section 1170 if that person has one or more prior convictions for an offense specified in [Pen. Code § 667, subd. (e)(2)(C)(iv)] or for an offense requiring registration pursuant to [Pen. Code § 290, subd. (c)]."*

This lack of an express pleading and proof requirement, however, does not necessarily bring into play the sometimes–rule that, generally, unless the legislature requires pleading and proof, there is no such requirement. See, e.g., *People v. Griffis* (2013) 212 Cal.App.4th 956 (stating that there is no requirement that a prior conviction for a serious or violent felony or for a sex-registerable offense be pled and proved to disqualify a de-

fendant from being required to serve in state prison a conviction for what is normally a County Jail Felony under Pen. Code § 1170, subd. (h).)

That is because Prop. 47 works like the offense commonly called "petty with a prior," Pen. Code § 666. That section elevates a misdemeanor petty theft to a wobbler (an alternate felony or misdemeanor) if the person has certain designated prior theft or theft-related felony convictions.

It is necessary that the defendant have some notice of the enhanced penalty, that elevates the offense from a misdemeanor to a felony. See *People v. Robinson* (2004) 122 Cal.App.4th 275 (even though no prior conviction was proven at a preliminary hearing for both robbery and petty theft – which was amended after the preliminary hearing to petty with a prior – a probation ineligibility portion of the accusatory pleading, alleging four prior convictions including theft, put the defendant on notice.)

An implied pleading and proof requirement also stems from *People v. Lo Cicero* (1969) 71 Cal.2d 1186, 1192–1193, in which the court held that "before a defendant can properly be sentenced to suffer the increased penalties flowing from ... [a] finding ... [of a prior conviction] the fact of the prior conviction ... must be charged in the accusatory pleading, and if the defendant pleads not guilty thereto the charge must be proved and the truth of the allegation determined by the jury, or by the court if a jury is waived."

At first blush, it might seem like Prop. 47 acts like drug–Prop. 36, which, in 2000 (eff. 2001), passed Pen. Code §1210.1, that says that, inter alia, if the defendant does not have certain disqualifying priors, then despite the base sentence of jail or prison, the sentence is <u>reduced</u> to probation with imposition of sentence suspended..

Prop. 47 has a similar sentence-reduction effect only for those who have current affected charges pending, or who were previously convicted.

For all charges filed after Nov. 4, 2014, Prop 47 does exactly what its statutes say it does: it states that a number of crimes are misdemeanors; but if the defendant has certain priors, then the penalty is, or can be, <u>increased</u> to a felony.

People v.Woodward (2011) 196 Cal.App.4th 1143, 1152 stated "Any fact serving to increase the penalty must be pled.... The converse is not true. The prosecution need not allege the absence of a factor, such as eligibility for probation, that may lighten the punishment on defendant."

Under that general rule, because the absence of priors reduces the sentence under Pen. Code §1210.1, their presence need not be pled and proved. But because the pres-

ence of priors increases the sentence for those crimes effected by Prop. 47, those priors should have to be pled and proved.

D. Can the court strike, or dismiss, the priors, thus making the person eligible? Pen. Code § 17 is Not Affected.

The first issue on this question is whether those priors are "charges or allegations in a criminal action [or are] sentencing factors" *In re Varnell* (2003) 30 Cal. 4th 1132, 1134-35 (internal quotation marks, citation, and footnote omitted).

If they are charges or allegations, then, unless the statute states otherwise, or unless the legislature (i.e., the voters) have clearly indicated otherwise, than they can be dismissed under Penal Section 1385 in furtherance of justice.

If they are sentencing factors, then they cannot be disregarded. *In re Varnell, supra,* 30 Cal.4th at 1138 ("Our conclusion [is] that [Pen. Code §]1385 may be used to dismiss sentencing allegations—but not sentencing factors—...."

A "sentencing factor[ ] [is, for example] those that are relevant to the decision to grant or deny probation (e.g., Cal. Rules of Court, rule 4.414(b)(1)) or to select among the aggravated, middle, or mitigated terms (e.g., *id.*, rule 4.421(b)(1))." *In re Varnell, supra,* 30 Cal. 4th at 1139

The prior convictions here seem clearly charges or allegations, that elevate a covered present offense from a misdemeanor to a felony.

The next question is whether Prop. 47 can, or should, be interpreted as including "a legislative direction" that the court cannot dismiss a prior conviction under Pen. Code §1385. The courts "will not interpret a statute as eliminating courts' power under section 1385 "absent a clear legislative direction to the contrary." Internal quotation marks and citation omitted).

Uncodified Sections 2 and 3 of Prop. 47 (found, most easily at this writing, at "California General Election November 4, 2014, Official Voter Information Guide," page 70), state:

> SEC 2.... The People of the State of California find and declare as follows:... [Prop. 47] ensures that sentences for people convicted of dangerous crimes like rape, murder, and child molestation are not changed.

> SEC. 3.... In enacting this act, it is the purpose and intent of the people of the State of California to: (1) Ensure that people convicted of murder, rape, and child molestation will not benefit from this act.... (3) Require misdemeanors instead of felonies for [the covered crimes] ..., unless the defendant has prior convictions for specified violent or serious crimes.

The Analysis by the Legislative Analyst states, at page 35 of the Voter Information Guide, "The measure limits these reduced penalties to offenders who have not committed certain severe crimes listed in the measure—including murder and certain sex and gun crimes."

The Arguments in Favor of Proposition 47, at the Voter Information Guide (available at the Secretary of State's elections web site, page 38, states "*Keeps Dangerous Criminals Locked Up:* Authorizes felonies for registered sex offenders and anyone with a prior conviction for rape, murder or child molestation." Accord, Voter Information Guide, page 39, Rebuttal to Argument Against Proposition 47.

All of these seem to constitute legislative statements of intent to prohibit the court from dismissing a listed prior conviction.

However, there is no flat statement in Prop 47 that the court cannot dismiss a prior listed felony.

And, although Three Strikes Law, Pen. Code §§ 667 and 1170.12, also contains many statements that seem to say that the court cannot dismiss prior strikes, but, despite that, the California Supreme Court, in *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 504, held that

> "Although the Legislature may withdraw the statutory power to dismiss in furtherance of justice, we conclude it has not done so in the Three Strikes law. Accordingly, in cases charged under that law, a court may exercise the power to dismiss granted in section 1385, either on the court's own motion or on that of the prosecuting attorney...."

The question in this Subpart, can the court dismiss a prior allegation, should be distinguished from the question of whether the court can exercise its discretion under Pen. Code § 17, subd. (b), to reduce a wobbler from a charged felony to a misdemeanor. Prop. 47 does not have any stated legal effect on that discretion, one way or the other. So

even if the court could not dismiss the charged–prior, the court can still, under the conditions listed in Pen. Code §17, subd. (b), reduce a wobbler from a felony to a misdemeanor.

E. People convicted of Prop 47 charges, made felonies because of priors, who are denied probation, will get state prison.

Although most people sentenced "pursuant to subdivision (h) of Pen. Code § 1170" get county jail sentences of more than one year, those whose cases are elevated from misdemeanor to wobbler-felonies or straight felonies, and those previously convicted who are denied reductions, because of prior convictions under Pen. Code § 667, subd. (e)(2)(C)(iv), or for an offense requiring registration under Pen. Code § 290, subd. (c), will, if probation is denied, get state prison because Paragraph (3) of Subdivision (h) provides that people who have a prior serious or violent felony, or are required to register as convicted sex offenders, must go to state prison. (With the apparent exception of the two rare Pen. Code §667, subd. (e)(2)(C)(iv) offenses that are not serious or violent; see discussion above.)

Note also, that people with serious or violent felonies listed in Pen. Code §667, subd. (e)(2)(C)(iv), or for offenses requiring registration under Pen. Code § 290, subd. (c), must get state prison, even if that prior conviction is dismissed for purposes of sentence length. Pen. Code § 1170, subd. (f);

III. Effective and Operative Date.

Prop. 47 does not state when, after passage, it will be effective. Accordingly, the general rule of Cal. Const. art. II § 10 applies: "An initiative statute ... approved by a majority of votes thereon takes effect the day after the election...."

Unless a different date is stated, a law becomes operative on its effective date. See, e.g., *People v. Henderson* (1980) 107 Cal.App.3d 475, 488.

Prior to enactment of Cal. Const. art. II, § 10, the California Constitution provided that Initiative measures "shall take effect five days after the date of the official declaration of the vote by the Secretary of State...."

Cal. Const. art. II, § 10, took out any language that delayed the effective date until the Secretary of State declares the vote.

The California Attorney General, at 65 Ops. Cal. Atty. Gen. 656 (Dec. 30, 1982), at footnote 1, states "This amendment appears to have been to avoid the necessity of distinguishing between the effective date of a measure and its operative date."

IV. Prop. 47's Application to Incidents Committed Before It Became Effective, But That Did No Go to Sentence Until After its Effective Date?

*For cases in which there was a sentence **before** Prop. 47's effective date, see Part XVI, below, discussing Prop. 47's section 14, and new Pen. Code § 1170.18.*

A. Basic Application.

If Prop. 47 had no "savings" clause, that is, a clause stating whether, or the extent to which, its operation is prospective only, then under well-settled law, it would apply in cases where the incident occurred before its effective date, but the plea or verdict of guilty did not occur until after. *People v. Nasalga* (1996) 12 Cal.4th 784, 789 (offense committed before amendment; sentence came after amendment; defendant was "entitled to the ... lesser punishment [of] the amended version"); *In re Estrada* (1965) 63 Cal.2d 740 (the lead California case); *In re Kirk* (1965) 63 Cal.2d 761 (companion case to *Estrada*; dollar limit before Pen. Code § 476a could be charged as a felony raised from $50 to $100).

The normal rule is that if there is no savings clause, then an ameliorating amendment applies to everyone whose conviction is not final on appeal.

But Prop. 47 does have what can be construed as the "functional equivalent of a savings clause," that is, a clause stating the extent to which it applies to people who are already convicted as of its effective date.

That clauses is new Pen. Code § 1170.18, giving eligible people serving, or who already served, a sentence under old law a right to petition for recall of sentence, or for designation of the conviction as a misdemeanor; that clause is discussed in Part XVI, below.

People v. Yearwood (2013) 213 Cal.App.4th 161, 172 held that a similar clause in the 3KR (Three Strikes Reform Law), Pen. Code § 1170.126, "operates as the functional equivalent of a saving clause.")

Prop. 47's savings clause applies to (1) people who are "*currently serving a sentence for a conviction"* for an amended offense, and (2) to people "*who ha[ve] completed [their] sentence for a conviction* " Prop. 47, section 14, enacting new Pen. Code § 1170.18, subd.s (a) and (f) (discussed in Part XVI, below.)

It appears, therefore, that the savings clause does not apply to people who have, as of Prop. 47's effective date, not yet suffered a plea or verdict of guilty.

Of people whose crime was committed before 3KR's effective date, but who had not yet been sentenced as of its effective date, *Yearwood*, *supra*, 213 Cal.Ap.4th at 168, said, "It is undisputed that if [a person whose crime was committed before 3KR's effective date] had been sentenced ... after the effective date ... [then a sentence under the law as it existed before 3KR's effective date] would not have been imposed."

Nothing in Prop. 47 suggests that there should be any dispute here either. Contrast *In re Pedro T.* (1994) 8 Cal.4th 1041 (an ameliorating amendment did not apply to a person whose conviction was not final on appeal, despite the absence of an express savings clause, because legislative intent <u>*did*</u> appear, that the amelioration should not apply retrospectively).

Moreover, giving such people the benefit of Prop. 47's reductions would further the purpose of Prop. 47's uncodified section 3, item, to "Require misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession," See this paper, Part V, below.

In *In re May* (1976) 62 Cal.App.3d 165, a defendant who had been placed on probation, apparently with imposition of sentence suspended, before an ameliorating amendment, but was found in violation of probation after the amendment, was held entitled to the benefit of the lower sentence.

Note, however, that the question decided by *Yearwood* is pending in the California Supreme Court in the lead case of *People v. Conley* S211275, formerly published at 215 Cal.App.4th 1482, and the grant–and–hold case of *People v. Lester* S211494, formerly published at 220 Cal.App.4th 291. The supreme court's web site says that this case "presents the following issue: Does [3KR] apply retroactively to a defendant who was sentenced before the Act's effective date but whose judgment was not final until after that date?"

B. Speedy trial rights for newly reduced charges.

Of course, U.S. and California Constitutional speedy trial rights surely apply to existing felony and wobbler charges that will be designated as straight misdemeanors if Prop. 47 passes.

Also, surely, if the charge on a wobbler was a misdemeanor to begin with, statutory speedy trial rights under Pen. Code § 1382 are not affected.

Penal Code section 1382, subd. (a), states the time deadlines, following which the court "shall order the action to be dismissed" "unless good cause to the contrary is shown." Those rights as they apply to misdemeanors are in Pen. Code § 1382, subd. (a)(3).

Pen. Code § 1382, subd. (a)(3) does not state a time limit for bringing a person to trial after a felony is reduced to a misdemeanor.

So: does this mean that there is no statutory time limit at all? That is not what the cases say.

In the felony case of *Sykes v. Superior Court* (1973) 9 Cal.3d 83, the supreme court ordered dismissal of the case where the defendant had not been brought to trial for 228 days following the granting of his petition for a writ of habeas corpus, and remand to the trial court for rearraignment.

In reaching this result, *Sykes, supra*, 9 Cal.3d at 88, said that "[Pen. Code §] 1382, subd. 2 [the felony time limit part], implements the ... constitutional [speedy trial] guarantees ...." The court applied the "1382" time limits even though they did not expressly apply. By applying the time limits specified by Pen. Code § 1382, *Sykes, supra,* 9 Cal.3d at 93, "we have reached an interpretation which gives the same protection to all persons who have established the right to [a speedy trial] ... even though that protection is not expressly provided by statute."

At least two appellate divisions of the superior court have held that Pen. Code § 1382 misdemeanor statutory time limits apply to misdemeanor situations not expressly covered by Pen. Code § 1382..

A leading case is *People v. C.F. Braun & Co.* (1977) 71 Cal.App.3d Supp. 12. In that case the question was what statutory speedy trial limit, if any, applied in a misdemeanor case upon a remand from a denied writ petition. The court held, at page 15, that

although Pen. Code § 1382 did not cover that specific situation, nonetheless, "section 1382 is the applicable statute," and that because the defendant was not in custody, the applicable time to bring the defendant to trial was within 45 days of the remand.

Braun, supra, 71 Cal.App.3d at Supp., 15-16, relied on *Sykes v. Superior Court, supra,* to reach that result.

Braun, supra, was followed in *People v. Denmen* (1983) 145 Cal.App.3d Supp. 40, *Denman* dismissed the case of an in-custody defendant who was not brought to trial for 33 days after he was denied diversion under a program similar to today's Pen. Code § 1000, DEJ program.

Accordingly, Pen. Code § 1382 should be used to determine the date by which a defendant who does not waive time should be brought to trial following a reduction to a misdemeanor.

Which time limit applies: the felony time limit of, generally, 60 days; or the misdemeanor time limits of, generally 30 days if in custody, and 45 days of out?

If the defendant has not been arraigned on an information or indictment, it seems plain that the misdemeanor time limits of Pen. Code §1382, subd. (a)(3) apply.

But, where the defendant has been arraigned on an information or indictment, do the felony time limits of Pen. Code §1382, subd. (a)(2) (generally, 60 days) apply? Pen. Code section 1382, subd. (c), states that it applies in "a felony case." And Pen. Code § 691, subd. (f), defines a " 'Felony case' [as] a criminal action in which a felony is charged...."

If a misdemeanor complaint is filed to replace the felony indictment or information, *People v. Morales* (2014) 224 Cal.App.4th 1587, and *People v. Scott* (2013) 221 Cal.App.4th 525, which discuss "felony case" and "misdemeanor case" at length seem to say that the case has become a misdemeanor case. If so, the misdemeanor time limits will apply.

If there is no actual amendment, so that the accusatory pleading on which the misdemeanor proceeds is still an information, the argument seems stronger that the felony time limit applies.

C. Statute of Limitations

The statute of limitations applicable to the felony, which was punishable by less than eight years in prison, is three years under Pen. Code § 801.

The statute of limitations applicable to the misdemeanor is one year, under Pen. Code § 802.

Suppose the defendant was arrested more than a year ago for possession of cocaine, a violation of Health and Safety Code section 11350, subd. (a), a straight felony, and misdemeanor charges are filed on or after Prop. 47's effective date of November 5, 2014.

In that situation, it seems straightforward that the misdemeanor statute should apply. After Nov. 4, the charge (assuming D has no disqualifying priors) the case could no longer charged as a felony.

Suppose, however, that the charge was filed as a straight felony before Nov. 5, 2014, within the three years applicable to the felony, but after the one year applicable to the misdemeanor. And then after November 4, 2014, the original felony charge is reduced to a misdemeanor.

Has the prosecution abated because it is now a misdemeanor, and was not filed within the one year period applicable to misdemeanors under Pen. Code § 802?

Or can the prosecution continue because it was timely when filed, within the three year period applicable to felonies punishable by less than eight years in prison, Pen. Code § 802?

As of this writing, I have not discovered any cases on all fours.

It is settled California law that when an amendment moderates the punishment for an offense, the ordinary and reasonable inference is that the Legislature determined imposition of the lesser penalty on offenders from then on will sufficiently serve the public interest. See, e.g., *In re Pedro T.* (1994) 8 Cal.4th 1041, 1045 (finding a contrary intent in the law at issue there).

But the cases do discuss whether the lower punishment also means that the prosecution should abate entirely if, applying that decreased punishment, the statute of limitations lapsed before charges were filed.

Section 3, subd. (3) of Prop. 47, states the "Purpose and Intent" to require misdemeanors instead of felonies" for the effected crimes, but do not state an intent to abate prosecutions.

Pen. Code § 805 states, in relevant part,

> (a) An offense is deemed punishable by the maximum punishment prescribed by statute for the offense, regardless of the punishment actually sought or imposed. Any enhancement of punishment prescribed by statute shall be disregarded in determining the maximum punishment prescribed by statute for an offense.
>
> (b) The limitation of time applicable to an offense that is necessarily included within a greater offense is the limitation of time applicable to the lesser included offense, regardless of the limitation of time applicable to the greater offense.

Regarding Pen. Code § 805, subd. (a), see People v. Superior Court (Ongley) (1987) 195 Cal.App.3d 165 (this provision applies to wobblers).

Regarding Pen. Code § 805, subdivision (b), see *People v. Mincey* (1992) 2 Cal.4th 408, 453 (applying this provision.)

The case posited here seems more like *Mincey* than like *Ongley*, because the amended and new statutes are not wobblers; they are only wobblers if the defendant has one of the listed prior convictions.

V. Sections 1, 2, and 3 of Prop. 47: Title; Findings and Declarations; Purpose and Intent.

These sections are uncodified, that is they do not become new or amended Code sections. At this writing, the easiest place to find them is in the "California General Election November 4, 2014, Official Voter Information Guide." The full text of Proposition 47, including its uncodified sections, is found at pages 70 to 74.

Note that although uncodified, these Sections are part of the statute law, passed by the voters, not merely a part of Prop. 47's legislative history. See, e.g., *Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 927 (distinguishing between the two).

Proposition 47's formal title is "the Safe Neighborhoods and Schools Act." (Section 1)

These sections state that "sentences for people convicted of dangerous crimes like rape, murder, and child molestation are not changed" (section 2); and that Prop 47 will "Ensure that [such] people... will not benefit from this act" (section 3).

One purpose and intent is to "Require misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession, unless the defendant has prior convictions for specified violent or serious crimes." Section 3, item (3).

Among the other purposes are (1) to use prison resources for serious and violent offenses, (2) to "maximize alternatives" for nonserious, nonviolent crime," and (3) to fund various school and other services directed to reducing crime and helping crime victims. (Sections 2 and 3).

VI. Section 4. The "Safe Neighborhoods and Schools Fund:

This fund is created and described in new Government Code sections 7599 to 7599.2.

State savings from this Act, calculated or estimated as described, are deposited into this fund, as described, beginning on or before July 31, 2016, and, before August 15, 2016, and annually thereafter, transferred from the General Fund to this fund. Gov. Code § 7599, subds. (a) and (b).

Only state savings are covered. This Act places no restrictions on the use that counties and other localities can make of savings from this Act. Although state funds "shall not be used to supplant existing state or local funds utilized for these programs", Local agencies are not obligated to provide programs or levels of service for the described-programs. Gov. Code §7599.1, subds. (e) and (f)

Monies in the Safe Neighborhood and Schools Fund can only be used for the purposes designated in the Act. Gov. Code §7599, subd. (c).

Twenty-five percent goes to the State Department of Education to administer a grant program to public agencies aimed at reducing school truancy, and supporting students at risk of dropping out, or are crime victims. Gov. Code §7599.2, subd. (a)(1).

Ten percent goes to the California Victim Compensation and Government Claims Board, to make grants to trauma recovery centers to provide services to crime victims. Gov. Code §7599.2, subd. (a)(2).

Most of the funds, sixty-five percent, goes to the Board of State and Community Corrections to administer a grant program to public agencies aimed at supporting mental health and substance abuse treatment, and diversion programs for people in the criminal justice system. Gov. Code §7599.2, subd. (a)(3)..

VII. Section 5. Adds Pen. Code § 459.5. Defines "Shoplifting" as entry with intent; sets the punishment, and restricts charging authority.

A. Subdivision (a): Definition and Punishment.

> "... [S]hoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950).
>
> "Any other entry into a commercial establishment with intent to commit larceny is burglary."
>
> "Shoplifting shall be punished as a misdemeanor, except that a person with one or more prior convictions for [1] an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 **or** [2] for an offense requiring registration pursuant to subdivision (c) of Section 290 may be punished pursuant to subdivision (h) of Section 1170."

(For a discussion of the priors that can elevate shoplifting from a misdemeanor to a wobbler felony , see Part II, above.

Note that since no other punishment is specified for this new misdemeanor, the general misdemeanor punishment statute, Pen. Code § 19, specifies that the punishment is by "county jail not exceeding six months, or by fine not exceeding one thousand dollars ($1,000), or by both."

B. Subdivision (b), limitation on charging authority.

> "Any act of shoplifting as defined in subdivision (a) shall be charged as shoplifting.
>
> "No person who is charged with shoplifting may also be charged with burglary or theft of the same property."

Notice that if only the theft, but not the entry with intent, is charged, then the offense, if the value is less than $950, can still only be charged as a misdemeanor, under existing Pen. Code §488, or new Pen. Code §490.2 discussed in "Section 8," below.

VIII. Section 6 amends the punishment for forgery in Pen. Code § 473.

Section 473 is the general punishment statue for forgery. Formerly, it was not divided into Subdivisions.

Prop. 47 labeled the former text of Section 473, as Subdivision (a), without change: generally, forgery is a wobbler misdemeanor or County Jail Felony under Pen. Code §1170, subd. (h).

Prop. 47 added a new Subdivision (b) to Pen. Code § 473 (emphasis, paragraph break, and other editorial features added):

> (b) [If the forgery relat[es] to a *check, bond, bank bill, note, cashier's check, traveler's check, or money order*, where the value ... does not ex-

ceed nine hundred fifty dollars ($950), [that forgery] shall be punishable by imprisonment in a county jail for not more than one year,

except that such person may instead be punished pursuant to subdivision (h) of Section 1170 if that person has one or more prior convictions for an offense specified in [Pen. Code § 667, subd. (e)(2)(C)(iv) or for an offense requiring registration pursuant to [Pen. Code § 290, subd. (c)].

[**Additional exception:]** This subdivision shall not be applicable to any person who is convicted both of forgery and of identity theft, as defined in [Pen. Code §] 530.5.

Note that section 6 of Prop. 47 only amends Pen. Code § 473.

It appears, therefore, that only crimes punishable under Pen. Code § 473 are affected.

These include Pen. Code § 470; 471; 472; 475; and 476, 484f; 484i, subd. (b), *if* what was done "relat[es] to" on one the instruments listed in Pen. Code § 473. All of these statutes state that the crime is "forgery," and do not specify the punishment. They must be punishable under Pen. Code § 473, which states the punishment for "forgery."

This does not include Pen. Code § 470a; 470b; 471.5; 474; and 476a to 483.5. None of these statutes state that they are forgery, and all of them contain their own punishment (in that or an adjoining statute).

IX. Section 7 amends the punishment for non–sufficient funds (NSF) checks in Pen. Code § 476a, subd. (b).

Subdivision (a) of Pen. Code § 476a provides that this offense is generally a wobbler.

Under former law, however, the offense was a generally a misdemeanor (if the defendant does not have certain related priors), if the amount was under $450.

Prop 47 has amended Subdivision (b) of Pen. Code § 473 to read as follows:

However, if the total amount of all checks, drafts, or orders that the defendant is charged with and convicted of making, drawing, or uttering does not exceed ... [$950], the offense is punishable only by imprisonment in the county jail for not more than one year, except that such person may instead be punished pursuant to [Pen. Code § 1170, subd. (h)] if that person has one or more prior convictions for an offense specified in [Pen. Code § 667, subd. (e)(2)(C)(iv)] or for an offense requiring registration pursuant to [Pen. Code § 290, subd. (c)].

So now, issuing NSF checks that total $950 or less can (if the defendant is not disqualified) be charged only as a misdemeanor.

[Additional change concerning priors]. Under the former version of Pen. Code § 476a, even if the bad check is under the misdemeanor amount, it remained a felony punishable under Pen. Code §1170, subd. (h), if the person had one or more prior convictions of violation of Pen. Code § 470, 475, 476, or this section, or certain other related priors.

Prop. 47 changed that number from one to three. So if the person has only one or two priors under Section 470 and the others, this offense remains a misdemeanor.

It is not clear whether the total of all checks amounting to over $950 would have be charged in one count, or whether several counts could charge checks under $950 with a total over $950. It seems more in keeping with Prop 47's purpose and intent that they would have to all be charged in one count, resulting in, at most, one felony conviction.

X. Section 8 adds Pen. Code § 490.2, amending the punishment for theft, generally.

The effect of this added Section is to make all the specialty thefts that are defined as "grand theft," such as car theft (Pen. Code §487, subd. (d)(1), firearm theft (Pen. Code §487, subd. (d)(2), or theft of agricultural products (Pen. Code §487, subd. (b), into misdemeanors if the value of the property is not over $950.

Here is the text [paragraph break, emphasis, and other editorial features added]:

> (a) Notwithstanding [Pen. Code §] 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hun-

> dred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor,
>
> **except** that such person may instead be punished pursuant to subdivision (h) of Section 1170 if that person has one or more prior convictions for an offense specified [Pen. Code § 667, subd. (e)(2)(C)(iv)] or for an offense requiring registration pursuant to [Pen. Code § 290, subd. (c)]. 290.
>
> (b) This section shall not be applicable to any theft that may be charged as an infraction pursuant to any other provision of law.

Query if this applies to all thefts of "money, labor, real or personal property," or only those in the opening clause of new Pen. Code § 490.1, "Notwithstanding [Pen. Code §] 487 or any other provision of law defining grand theft."

Statutes defining certain crimes as "grand theft" include: Pen. Code § 484e, subds. (a), (b), and (d); 484g' 484h; 487; 487a; 487b; 487d; 487e; 487h; 487i; 487j; 489.

The general definition of "value" for theft offenses is found in Pen. Code § 484, second and third sentences:

> "In determining the value of the property obtained, for the purposes of this section, the reasonable and fair market value shall be the test, and in determining the value of services received the contract price shall be the test. If there be no contract price, the reasonable and going wage for the service rendered shall govern."

In addition, some specialized theft statutes have their own definitions of "value."

Is taking a vehicle worth $950 or less, with intent to permanently deprive the owner to possession is covered by Prop 47's new Pen. Code § 490.2?

Vehicle Code section 10851, subdivision (a), reads (emphasis added):

> (a) **Any person who** drives or **takes a vehicle** not his or her own, without the consent of the owner thereof, and **with intent** either **to permanently** or temporarily **deprive the owner** thereof **of his or her title to or possession of the vehicle**, **whether with or without intent to steal the vehicle**, or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a [wobbler] public offense...."

The legislature, the voters, and the courts have all recognized that some violations of VC 10851 are thefts.

Penal Code section 666, subdivision (a), both before (i.e., the legislature) and after (i.e., the voters) passage of Prop. 47 refers to "… auto theft under Section 10851 of the Vehicle Code, …."

And *People v. Garza* (2005) 35 Cal.4th 866, 881 states "If the conviction is for the *taking* of the vehicle, with the intent to permanently deprive the owner of possession, then it is a theft conviction."

However, one superior court has ruled that it would not divide the statute, so Vehicle Code section 10851 is not covered by Pen. Code § 490.2.

XI. Section 9 amends the punishment for receiving stolen property in Pen. Code § 496, subd. (a).

The general punishment for this offense is a wobbler.

Formerly, if the value of the property was not over $950, the offense could be charged as a misdemeanor.

Prop. 47 has provided that the offense, if the value is not over $950, is now a straight misdemeanor only, unless the person has one or more prior convictions under Pen. Code § 667, subd. (e)(2)(C)(iv), or has a prior registerable offense under Pen Code § 290, subd. (c).

XII. Section 10 amends the punishment for petty theft with a prior in Pen. Code § 666.

The former complex formula under which petty theft with a prior listed theft, or similar, offense was raised from a misdemeanor to a wobbler felony, which depended both on how many prior theft or similar convictions the person had, and on whether the

person had serious or violent felony priors, or Pen. Code § 290-registerable priors, has been simplified.

It is still complex, however, and it is best understood by (1) reading Subdivision (b) before reading Subdivision (a) (emphasis explanatory remarks added)

> **(b)** *Subdivision (a) [which follows] shall apply to* any person who is required to register pursuant to the Sex Offender Registration Act, or who has a prior violent or serious felony conviction, as specified in [Pen. Code § 667, subd. (e)(2)(C)(iv)] or has
>
> **(a)** ... *[A]ny person described in subdivision (b) [which is above]* who, having been convicted of petty theft, grand theft, a conviction pursuant to [Pen. Code § 368] subd. (d) or (e) ..., auto theft under [Vehicle Code] Section 10851 ..., burglary, carjacking, robbery, or a felony violation of [Penal Code] Section 496, and having [been in custody for that offense, either as a sentence or as a probation condition] and who is subsequently convicted of petty theft, is punishable by imprisonment in the county jail not exceeding one year, or in the state prison.

In other words, all petty thefts are misdemeanors, even if the person has a prior theft or similar offense specified in Subdivision (a), *unless* the person also has a prior under Pen. Code § 667, subd. (e)(2)(C)(iv), or a conviction for an offense requiring registration under Pen. Code § 290, subd. (c).

Note, however, that Subdivision (c) of Pen. Code § 666 also provides that the person can still be prosecuted or punished under Strike Law, Pen. Code §§ 667, subdivsions (b) to (i), or 1170.12.

Additional Exception Also an exception to the offense being a straight wobbler is if the person has a prior conviction of elder or dependent adult abuse under Pen. Code §368, subds. (d) or (e). If the person has any of those priors, the offense is a wobbler, an alternate misdemeanor or State Prison Felony (not punishable under Pen. Code §1170, subd.(h.)).

Note that shoplifting, as defined by Prop. 47, is not listed in Pen. Code § 666 as amended. Query if a prior shoplifting, because it might also be said to be a petty theft, can not serve to elevate a misdemeanor to a wobbler felony. *Query,* likewise, if a current

shoplifting (which might also be said to be a petty theft) can be elevated to a felony by amended Pen. Code § 666.

XIII. Section 11 amends the punishment for drug possession under Health and Safety Code section 11350.

Under former law, possession of the many drugs (the most common being heroin and cocaine) listed in Health and Safety Code section 11350, subd. (a) was a straight felony, punishable under Pen. Code §1170, subd. (h)).

Also under former law, possession of the drugs listed in Health and Safety Code section 11350, subd. (b), is a wobbler, an alternate misdemeanor or County Jail Felony.

Prop. 47 made possession of any of the drugs listed in Health and Safety Code section 11350 into straight misdemeanors, **unless** the person had a prior listed in Pen. Code §667, subd. (e)(2)(C)(iv), or for a registerable offense in Pen. Code §290, subd. (c).

This amendment probably does not prevent charging possession while armed as a felony under Health and Safety Code section 11370.1. That section creates a separate crime:

> (a) Notwithstanding [Health and Safety Code] Section 11350 or 11377 or any other provision of law, every person who unlawfully ... cocaine base, a substance containing cocaine, a substance containing heroin, ... methamphetamine, ... [or] phencyclidine, ... while armed with a loaded, operable firearm is guilty of a felony punishable by imprisonment in the state prison for two, three, or four years.

XIV. Section 12 amends Health and Safety Code section 11357, subd. (a)

Under current law, possession of concentrated cannabis is a wobbler, an alternate misdemeanor or County Jail Felony (Pen. Code §1170, subd. (h)).

Prop. 47 made this a straight misdemeanor, unless the person has a prior listed in Pen. Code §667, subd. (e)(2)(C)(iv), or for a registerable offense listed in Pen. Code §290, subd. (c).

XV. Section 13 amends the punishment for drug possession under Health and Safety Code section 11377.

Under former law, possession of any of the many drugs listed in Health and Safety Code section 11377, subd. (a) (most commonly, methamphetamine) was a wobbler, an alternate misdemeanor or County Jail Felony (Pen. Code §1170, subd. (h).

Also under former law, possession of any of the many drugs listed in Health and Safety Code section 11377, subd. (b), are straight misdemeanors.

Prop. 47 has made possession of any drug listed in Health and Safety Code section 11377 a straight misdemeanor unless the person has a prior listed in Pen. Code §667, subd. (e)(2)(C)(iv), or for a registerable offense listed in Pen. Code §290, subd. (c).

This amendment probably does not prevent charging possession while armed as a felony under Health and Safety Code section 11370.1. See discussion above, concerning Health and Safety Code section 11350.

XVI. Section 14 adds Penal Code section 1170.18 permitting most persons already convicted to seek reductions.

A. Provisions common to all person who apply for post conviction reductions, both currently serving a sentence, or whose sentence is completed.

This section does not apply to the standard group: persons who have one or more prior convictions for an offense listed in Pen. Code § 667, subd. (e)(2)(C)(iv), or for an offense requiring registration under Pen. Code § 290, subd. (c). *Pen. Code § 1170.18, subd. (i).*

Under no circumstances can resentencing result in a longer sentence. *Pen. Code § 1170.18, subd. (e).*

The petition must be filed within three years of the effective date of this act (if passed, the Act will be effective November 5, 2014), unless there is good cause for a later date. *Pen. Code § 1170.18, subd. (j).*

Any felony conviction that is reduced shall be considered a misdemeanor for all purposes, *except* that the person still cannot own, possess, or have in custody or control any firearm; and the person can be convicted under Pen. Code § 29800 et seq. *Pen. Code § 1170.18, subd. (k).*

B. People who have already completed their sentence can petition for reduction.

These people are covered in *Pen. Code § 1170.18, subd.s (f) to (h).*

People who have already completed their sentence for a felony that would have been a misdemeanor under Prop 47 (and who don't have any disqualifying prior) can file an application with the court, and, the matter will be reduced.

Unless the "applicant" requests one, no hearing is "necessary" for the application to be granted or denied. Pen. Code § 1170.18, subd. (h). Some people interpret this to mean that no hearing can be held at all unless the defendant requests one, but the actual text only says that no hearing is "necessary." Query if the court can hold one on its own motion, or request of the district attorney, anyway.

Presumably, when there is no hearing, these do not constitute "post–conviction hearings under Marsy's Law, Cal. Cons. Art. I, sec. 28, subd. (b)(7). Compare the post–conviction hearings for those who are currently serving a sentence, discussed below.

Note that this covers only a "*person who has completed his or her sentence for a conviction....*" Query if this requires a completed prison sentence, or if this also includes those who received probation without prison?

C. People who are currently serving a sentence.

Persons who are "currently serving a sentence" for a felony that would have been a misdemeanor can petition for a recall of sentence. *Pen. Code § 1170.18, subd. (a).*

Although the parole provision (see below) indicates that the drafters contemplated that these would be people in prison, the language "currently serving a sentence" is broad

enough to cover those serving a Realigned County Jail Felony sentence under Pen. Code §1170, subd.s (h)(1) or (h)(2).

This may also include those on Mandatory Supervision, under Pen. Code § 1170, subd. (h)(5)(B).

Less clear is whether this also covers those on parole or postrelease community supervision; or whether those people are considered to have already served their sentence.

The court will recall the sentence and resentence the defendant to a misdemeanor, unless the court, in it is discretion, determines that "resentencing the petitioner would pose an unreasonable risk of danger to public safety." *Pen. Code § 1170.18, subd. (b).*

"Unreasonable risk of danger to public safety" is defined to mean "an unreasonable risk that the petitioner will commit a new violent felony under [Pen. Code § 667, subd. (e)(2)(C)(iv)]. " *Pen. Code § 1170.18, subd. (c)*

- Missing from this definition entirely is one of the two standard groups who, in other respects do not benefit from Prop 47, persons convicted of an offense for which registration is required under Pen. Code § 290, subd. (c).
- Most registerable sex offenses, and most serious and violent felonies are not mentioned in this definition.
- This definition is specified to be "As used throughout this Code...." Query whether this definition will now be held to apply to new, or to already-decided, petitions for resentencing under the recent Three Strikes Reform initiative, now codified at Pen. Code § 1170.126. One superior court has ruled that it does not; a petition for appellate review has been filed on that issue in the court of appeal.

"In exercising its discretion [in deciding of the person would pose an unreasonable risk of danger to the public safety, the court may consider all of the following:" The petitioner's criminal history, including (1) victim-injuries, length of prison commitments, and remoteness, (2) prison record, (3) "Any other evidence the court, within its discretion, determines to be relevant." *Pen. Code § 1170.18, subd. (b).*

If the petitioner is resentenced, the person will get credit for time served, and be released on parole for one year under Pen. Code § 3000.08, under the supervision of the California Department of Corrections and Rehabilitation, and the local court. *Pen. Code § 1170.18, subd. (d).*

The court, in its discretion, can release the person from parole. *Pen. Code § 1170.18, subd. (d).*This parole requirement is surprising because most people serving a felony sentence that is eligible for resentencing as a misdemeanor will be serving a County Jail Felony sentence under Pen. Code § 1170, subd. (1) or (2), and, if not resentenced, would not be subject to any supervision after release.

This parole requirement is also surprising because it seems more in line with the low level of the felony to place the person on postrelease community supervision under Pen. Code § 3451, than under parole monitored by CDCR.

A resentencing *hearing* is a "post-conviction release proceeding" under "Marsy's Law" (Cal. Const. Art. I, sec. 28, subd. (b)(7). Pen. Code § 1170.18, subd. (o) (italics added).

D. Does Resentencing Violate Plea Bargains?

Suppose the defendant is serving a prison sentence for grand theft, person, of $50, violation of Pen. Code § 487, subd. (c), plea-bargained down from a robbery, Pen. Code § 211. Under Prop. 47, the defendant can petition under Pen. Code § 1170.18, subd. (a), for recall of sentence is now a misdemeanor.

Suppose that the district attorney opposes the recall of sentence on the ground that this violates the district attorney's plea agreement. What result?

In *People v Collins* (1976) 21 Cal.3d 208, the defendant pled guilty to one count of consensual oral copulation, back when that was a felony, and 14 other counts were dismissed. Before the defendant was sentenced, however, that law was repealed. The trial court sentenced the defendant to prison on the original plea, and the defendant appealed.

The Supreme Court reversed the sentence and conviction, but also reinstated one of the fourteen dismissed counts. The court reasoned as follows, Collins, supra, 21 Cal.3d at 216:

> [The] prosecution has been deprived of the benefit of its bargain by the relief granted herein.... hence the dismissed counts may be restored..... Under the circumstances ... however, the defendant is also entitled to the benefit of his bargain.... Accordingly, we must fashion a remedy that restores to the state the benefits for which it bargained without depriving defendant of the bargain to which he remains entitled. This may best be effected by ... limit-

ing defendant's potential sentence to not more than three years in state prison, the term [set by then-applicable law for his plea bargain].

In *Doe v. Harris* (2013) 57 Cal.4th 64, the defendant contended that his plea bargain was violated by a change in the law concerning registration of sex offenders. In 1991, when the defendant pled no-contest to one count of child molestation, registration as a sex offender under Pen. Code § 290 was kept confidential. That law was later amended, allowing publication of much information about the defendant.

The California Supreme Court denied the defendant relief. The court held that the "general rule" in California is that plea agreements are deemed to contemplate no only the existing law, but the reserve power of the state to amend the law "for the public good and in pursuance of public policy." *Doe v. Harris*, supra, 57 Cal.4th at 66 The court said this general rule is subject to (1) limitations imposed by the federal and state constitutions; and (2) "... [T]he parties to a particular plea bargain might affirmatively agree or implicitly understand the consequences of a plea will remain fixed despite amendments to the relevant law." Doe v. Harris, supra, 57 Cal.4th at 71.

Doe v. Harris, supra, does not mention *Collins*, supra.

Prop. 47 provides that "Under no circumstances may resentencing under this section result in the imposition of a term longer than the original sentence." New Pen. Code § 1170.18, subd. (c).

Suppose the defendant is permitted to withdraw the plea and the status quo ante is restored. Probably that would no longer be considered "resentencing under this [Pen. Code § 1170.18] section.

E. What about persons who are on probation with no pending appeal?

Prop. 47 does not state whether people on felony probation, with no pending appeal, as of Nov. 4, 2014, are entitled to petition for reduction of their conviction.

Nor does Prop. 47 state whether a person on felony probation before Nov. 4 who violates after Nov. 4 is, if probation is not reinstated, entitled to a misdemeanor sentence.

Prop. 47's provisions for persons "currently serving a sentence," or those who have "completed a sentence" (see discussion of new Pen. Code § 1170.18, immediately above) do not seem, technically, to cover probationers.

Under a literal reading of the statutes, probation is, technically, not "serving a sentence." Probation is granted by either suspending imposition of sentence, or imposing sentence and suspending its execution. Pen. Code §§ 1203, subd. (a), and 1203.1, subd. (a).

It would be anomalous indeed, however, if, although a person denied probation can petition for a misdemeanor reduction, but a person granted probation could not.

The case of *People v. Scott* (2014) 58 Cal.4th 1415, may provide an analogy for the otherwise qualified person who was on probation with a suspended sentence as of November 4, 2014, and who later violates probation.

Scott, supra, 58 Cal.4th at 1419, held that Realignment "is not applicable to defendants whose state prison sentences were imposed and suspended prior to October 1, 2011. Upon revocation and termination of such a defendant's probation, the trial court ordering execution of the previously imposed sentence must order the sentence to be served in state prison according to the terms of the original sentence, even if the defendant otherwise qualifies for incarceration in county jail under the terms of the Realignment Act."

Under *Scott*'s, *supra*'s, reasoning, an otherwise qualified person on probation with a suspended sentence on Nov. 5, 2014, who violates on or after that date will not be entitled to an automatic reduction to a misdemeanor. If that person is not reinstated on probation, the person will then be currently serving a sentence, and will have to petition for a reduction, which the court could deny if the court found that granting the petition would pose an unreasonable risk to public safety.

It is not certain, however, that *Scott, supra,* will be applied. *Scott, supra,* 58 Cal.4th at 1421, relied on a provision of Realignment, Pen. Code § 1170, subd. (h)(6), stating that "[t]he sentencing changes made by the [Realignment Act] ... shall be applied prospectively to any person sentenced on or after October 1, 2011." Prop. 47 has no such express language.

Regardless of how that issue comes out, it seems that qualified people whose pre–Nov. 4 probation was granted by suspending imposition of sentence entirely, and who violate after that would be entitled to a misdemeanor sentence.

It would be anomalous to grant reductions for persons whose sentence is completely done, and those who are incarcerated because they are currently serving a sentence, but not for those who are on a grant of probation.

Also, granting resentencing to those currently on a grant of probation would further the purpose and intent at Prop 47's section 3, item (3) discussed above, to "Require misdemeanors instead of felonies for [covered crimes] for [qualified defendants]."

It appears straightforward, that people whose probation was granted by suspending imposition of judgment, can apply for a declaration that their offense is a misdemeanor, under Pen. Code § 17, subd. (b)(3). See also *Meyer v. Superior Court* (1966) 247 Cal.App.2d 133 (Section 17 reduction is available even after the case is "dismissed" under Pen. Code § 1203.4)

People whose probation was granted by imposing sentence and suspending its execution would seem to have an equal protection claim that they also should be entitled to recall of sentence. There does not seem to be a rational basis to grant that to eligible people who are serving, or have completed, a sentence, but not deny this to eligible people who got probation by executing but suspending the sentence. C.f. *People v. Hofsheier* (2006) 37 Cal.4th 1185 (no rational basis for the mandatory required of sex offender registration for those who commit voluntary oral copulation with a minor age 16 or 17, but not requiring it for those who commit voluntary intercourse with such a person.)

Statutory methods by which a defendant on probation can of getting the case reduced to a misdemeanor,

If imposition of sentence was suspended: then defendant should ask to be treated like others with pending charges. If the defendant is in violation, and terminated, then court would abuse its Pen. Code § 17 discretion not to reduce.

If sentence was imposed, with execution suspended:

Many people point out that Pen. Code § 1170.18, subd. (a) applies to people "currently serving a sentence." A person who was sentenced with execution suspended, they continue, is, as a matter of law, not serving a sentence. So some people argue that Pen. Code § 1170.18 cannot apply to a person on probation.

Accordingly, the probationer should, according that, apply for a reduction just the same as those with currently pending charges.

If the local court, however, requires defendants to make application under new Pen. Code § Pen. Code § 1170.18, subd. (a), for recall of sentence, the attorney should consider whether to go along with that custom, or to demand treatment like those with pending charges.

The main question is whether it is worth the delay and extra litigation that would take.

Many people express concern about "dangerousness hearings" under Pen. Code § 1170.18, subd. (b) and (c). But is there a serious risk that the court will find that resentencing a person who is on felony probation to misdemeanor probation (with possible parole supervision) presents an unreasonable risk that the person will commit an offense under Pen Code § 667, subd. (e)(2)(C)(iv)?

If the attorney believes there is, the attorney should probably counsel the person to wait until probation is concluded. After that application will be made under Pen. Code § 1170.18, subd. (f), and no dangerousness hearing can be conducted at all.

Equal Protection claims by which a defendant on probation can seek a reduction:

"[If] two classes [are] 'similarly situated with respect to the purpose of the law in question, but ... treated differently .... the state must ... provide a rational justification for the disparity. *P v. Lynch* (2012) 209 Cal.App.4th 353, 358.

The classes here are people convicted before Nov 5 [One denied, the other granted probation] of an offense that would have been a misdemeanor if P47 had been in effect.

F. Timing of the Petition for Resentencing; Limitations on Gun Rights; Is Pen. Code §17 an Alternative?

See also the Part on Immigration, for special considerations for non-citizens.

The petition for sentence recall, or application for misdemeanor declaration must be filed within three years of Nov. 5, 2014; for good cause they can be filed later. New Pen. Code §1170.18, subd. (j).

"If the [judge who] originally sentenced the petitioner is not available, the presiding judge shall designate another judge to rule on the petition or application." New Pen. Code §1170.18, subd. (l)

Some people currently serving a sentence, such as those whose felony sentence is almost completed, may want to wait until their sentence is done, and file an application to designate the offense as misdemeanor. That would avoid the one-year parole required for persons currently serving a sentence. People considering this should also consider the extra adjustment hardships of release with a felony conviction; the possibility of adjustment assistance that parole might offer, and the court's discretion to release the person from parole.

The main limitation of this reduction is that it does not apply to gun possession. New Pen. Code §1170.18, subd. (k) provides that:

> "Any felony conviction that is [reduced to a misdemeanor under Pen. Code §1170.18] shall be considered a misdemeanor for all purposes, except that [this] shall not permit that person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under [Pen. Code §29800 to 29875]."

A claim that this limitation violates equal protection, because a person sentenced for a felony under old law lost gun rights, but under new law, the person, now convicted of only a misdemeanor, does not lose gun rights, (such as Health and Saf. Code §11350), will have to confront such cases as *People v. Yearwood, supra,* 213 Cal.App.4th 161.

Yearwood, supra, was discussed in Part IV, above. *Yearwood* considered, inter alia, 3KR's (Three Strikes Reform's) new Pen. Code §1170.126, which is similar to Prop 47's new Pen. Code §1170.18: both provide for resentencing, with limitations, for persons already convicted.

Yearwood held, 213 Cal.App.4th at 168, that limiting the relief available to a person already convicted to the resentencing provisions of §1170.126, rather than giving such people the full benefit of 3KR as though they had not yet been sentenced, was not an equal protection violation.

A discretionary reduction of a felony wobbler to a misdemeanor under Pen. Code §17, subd. (b) restores the person's right to firearms. *People v. Gilbreth* (2007) 156 Cal.App.4th 163.

Pen. Code §17, by its terms, is not available, however, to people who have already been sentenced to state prison. So only people who received probation by having imposi-

tion of sentence suspended, could try to avail themselves of Pen. Code §17 relief. That relief is discretionary, however, and so might not be granted.

G. After Reduction, Do DNA Samples Get Expunged?

As of this writing, November 20, 2014, I am informed that officials at the

Penal Code section 296 states who is subject to DNA collection for inclusion in the California DNA Database and Data Bank Program. Pen. Code § 296, subd. (a), includes

> "Any person, including any juvenile, who is convicted of or pleads guilty or no contest to any felony offense... or any juvenile who is adjudicated under [Welfare and Institutions Code section 602] of any felony offense."

Pen. Code § 299 states who can get their DNA profile expunged. Pen. Code § 299, subd. (f) provides:

> "Notwithstanding any other provision of law, including [Penal Code] Sections 17, 1203.4 and 12034a, a judge is not authorized to relieve a person of the separate administrative duty to provide [DNA] specimens, ... required by this chapter if a person has been found guilty or was adjudicated a ward of the court by a trier of fact of a qualifying offense as defined in subdivision (a) of [Penal Code] Section 296, or was found not guilty by reason of insanity or pleads no contest to a qualifying offense as defined in subd. (a) of [Penal Code] Section 296."

However, Prop 47 is not directed to an individual case, as are Pen. Code § 17, 1203.4 and 1203.4a; nor was Prop 47 contemplated by the legislature when it promulgated Pen. Code § 299.

By enacting Prop 47, the voters have determined that the "new lighter penalty [is] now deemed to be sufficient." *People v. Nasalga* (1996) 12 Cal.4th 784, 795. That should be considered on the question of whether the DNA should be expunged in light of Prop 47's relief.

H. ***After Reduction, Do One Year Prison Priors Still Count?***

Suppose someone who (1) is *currently serving a prison term* when Prop 47 became effective, and had the sentence recalled, and was resentenced to a misdemeanor; or who (2) *completed a prison term*, and, under Prop 47, had the offense designated a misdemeanor, then is convicted, within the next five years, of a new felony.

Does this person's prison term get increased by one year for a prison prior under Pen. Code § 667.5?

The general provision that prior prison terms enhance a new prison term by one year is Pen. Code § 667.5, subd. (b).

But Pen. Code § 667.5, subd. (g) provides that: "A prior separate prison term ... shall mean a continuous completed period of prison incarceration imposed for the particular offense ...."

Query if the prison term was "completed" if it was cut short by a resentencing under Pen. Code § 1170.18, subd. (b).

And if it is held that a prior prison term was not "completed" by a person whose term was cut short by Prop 47, is there a rational basis for imposing a prior prison term enhancement on a person who completed the prison term before Prop 47 was enacted?

One purpose of the prior prison term enhancement is to deter recidivism. See, e.g., *People v Fielder* (2004) 114 Cal.App.4th 1221, 1229.

By enacting Prop 47, however, the voters have determined that the "new lighter penalty [is] now deemed to be sufficient." *People v. Nasalga* (1996) 12 Cal.4th 784, 795. That should be considered on the question of whether the prison prior should not be alleged at all as a matter of law; or if the prison prior should normally be dismissed by the court in its discretion.

XIX. Sections 15 and 18: Permissible Amendments to Prop. 47; Construction

This must be "broadly [and liberally] construed to accomplish its purposes."

It can be amended by a two-thirds vote of each house of the Legislature if the amendments are consistent with and further the intent of this act.

The Legislature can by majority vote amend, add, or repeal provisions to further reduce the penalties for any of the offenses addressed by this act.

XX. Section 16 Standard severability clause

A standard severability clause, stating that if part of the act is declared unconstitutional, the rest of the act survives.

XVII. Juveniles

A. New Petitions

Concerning actual custody, for new cases at least, Prop 47 applies to juveniles. Welfare and Institutions Code section 726, subdivision (d), provides, in relevant part,

> (a) [A] minor may not be held in physical confinement for a period in excess of the maximum term of imprisonment which could be imposed upon an adult convicted of the offense or offenses which brought or continued the minor under the jurisdiction of the juvenile court.
>
> ….
>
> (d) …. "Physical confinement" means placement in a juvenile hall, ranch, camp, forestry camp or secure juvenile home pursuant to [Welf. & Inst. §] 730, or in any institution operated by the Youth Authority.

So for new cases, if they would be misdemeanors if charged against an adult, they will have to be misdemeanors, with no greater time, if charged against a juvenile.

What about prior juvenile adjudications to a violation of an offense listed in the standard P47 elevating, or predicate, offenses, that is to an offense listed in Pen. Code § 667, subd. (e)(2)(C)(iv), or to an offense for which registration is required under Pen. Code § 290, subd. (c).

The answer is that a juvenile adjudication is not a conviction.

Welfare and Institutions Code section 203 states, in relevant part, "An order adjudging a minor to be a ward of the juvenile court shall not be deemed a conviction for any purpose…."

Accord, *People v. West* (9184) 154 Cal.App.3d 100, 110 (holding that the word "juvenile" in Cal. Const. Art. I, sec. 28, subd. (f)(4), concerning a prior conviction of an "adult or juvenile" refers to the age of the person convicted in adult court, not to an adjudication in juvenile court).

Moreover, Prop 47 does not have a provision like that in Pen. Code § 667, subd. (d)(3) and Pen. Code § 1170.12, subd. (b)(3), stating when a juvenile adjudication can be used as though it were an adult conviction.

In addition, particularly concerning conviction of an offense requiring registration pursuant to Pen. Code § 290, subd. (c), juveniles who are ordered to register as sex offenders are not ordered to do so pursuant to Pen. Code § 290, subd. (c), but pursuant to Pen. Code sec. 290.008. (A predicate offense in Pen. Code § 666, however, can be any person who is required to register pursuant to the Sex Offender Registration Act.....")

B. Do Already–Confined Juveniles Get a New Prop 47 Disposition?

Are juveniles who are already in "physical confinement" for a felony offense that would have been a Prop 47 offense, entitled to resentencing, that is, to a new disposition?

Prop 47 enacted Pen. Code § 1170.18, which granted qualified persons currently serving, a sentence, "for a conviction" the right to petition for recall of sentence, and resentence as a misdemeanor. Pen. Code § 1170.18, subd. (a). This will generally result in a reduction in custody time. Pen. Code § 1170.18, subd. (d).

Prop. 47 does not have any express provisions concerning juveniles, or juvenile adjudications.

However, as noted above, Welf. & Inst. Code § 26, subd. (d), provides, in relevant part, as follows (emphasis added):

If the minor is removed from the physical custody of his or her parent or guardian as the result of an order of wardship made pursuant to Section 602, **the order shall specify that the minor may not be held in physical confinement for a period in excess of the maximum term of imprisonment which could be imposed upon an adult** convicted of the offense or offenses which brought or continued the minor under the jurisdiction of the juvenile court.

….

"Physical confinement" means placement in a juvenile hall, ranch, camp, forestry camp or secure juvenile home pursuant to Section 730, or in any institution operated by the Youth Authority.

Accordingly, even if the order of confinement does not expressly specify "that the minor may not be held in physical confinement for a period in excess of the maximum term of imprisonment which could be imposed upon an adult," by operation of law, that term must be implied in the order.

Our question, therefore, is whether where the maximum term of imprisonment for an adult is reduced, must the minor's maximum term for an identical offense also be reduced?

The voters have determined, by enacting Pen. Code §1170.18, that qualified adults currently serving a sentence for a Prop 47 felony that would have been a misdemeanor, are entitled to resentence.

Welfare and Institutions Code section 726, subdivision (d) was enacted to conform with the holding in *People v. Olivas* (1976) 17 Cal.3d 326, that youthful offenders sentenced to the Youth Authority cannot be held in excess of the maximum term that might be imposed upon an adult for the same offense. See, e.g., *In re Aaron N.* 70 Cal.App.3d 931, 937.

Prior to *Olivas, supra,* California's Juvenile Law permitted a youthful misdemeanant confined to the Youth Authority for a misdemeanor to be confined two and even more times longer than an adult for the same misdemeanor. *Olivas, supra,* 17 Cal.3d at 242.

The court "concluded that the selective process which permits the extended incarceration of youthful misdemeanants constitutes a denial of equal protection of the law." *Olivas, supra,* 17 Cal.3d at 239.

Now that Prop 47 offenses are misdemeanors for qualified adults, and the court orders that confine them to custody are subject to recall and resentencing, no reason appears why the orders that confine juveniles to custody should not be reconsidered accordingly.

After all, as pointed out, there is either an express or implied term in those juvenile orders, that "that the minor may not be held in physical confinement for a period in excess of the maximum term of imprisonment which could be imposed upon an adult," *Olivas, supra s*hould be applied to those orders also; there is no rational basis not to.

In re Estrada (1965) 63 Cal.2d 740, and its progeny, probably do not apply at all. *Estrada* is the first in a long line of California cases holding that an ameliorating amendment, unless there is a savings clause, applies to all cases not final on appeal. *Estrada* has been applied in juvenile cases. See, e.g., *In re Aaron N., supra*.

Of course, if the juvenile case is final on appeal, *Estrada* does not apply by its terms.

If the case is not final on appeal, the could must consider whether Prop 47 includes a savings clause that precludes its application to anything but new cases.

Pen. Code § 1170.126, enacted by 2012's Prop 36, the Three Strikes Reform initiative, is a clause similar to that in Prop 47's Pen. Code § 1170.18: both provisions permit a person already sentenced to apply for a reduction in sentencing.

People v. Yearwood (2013) 213 Cal.App.4th 161, 172 held that a similar clause in the 3KR (Three Strikes Reform Law), Pen. Code § 1170.126, "operates as the functional equivalent of a saving clause." That holding will probably be applied to Prop 47's Pen. Code § 1170.18.

However, the question decided by *Yearwood, supra*, is pending in the California Supreme Court in the lead case of *People v. Conley, supra,* S211275, formerly published at 215 Cal.App.4th 1482, and the grant–and–hold case of *People v. Lester, supra*, S211494, formerly published at 220 Cal.App.4th 291. The supreme court's web site says that this case "presents the following issue: Does [3KR] apply retroactively to a defendant who was sentenced before the Act's effective date but whose judgment was not final until after that date?"

At this writing, November 20, 2014, the *Conley, supra,* case is fully briefed, but no oral argument date is set. If the Supreme Court does rule opposite to *Yearwood, supra,* then probably *Estrada, supra,* would apply to juveniles in this situation.

XVIII. Immigration considerations for non-citizens.

Consider delaying reduction to misdemeanor until after Jan. 1, 2015: Then the maximum for a misdemeanor is 364 days, so non-citizens need not worry about a 1-year sentence. SB 1310, Stats. 2014, Ch. 174, adding Penal Code section 18.5. See, generally, CEB, *California Criminal Defense of Immigrants* (2014) § 16.3 "Length of Sentence Imposed.

Misdemeanor second degree burglary, Pen. Code § 459, might have fewer adverse immigration consequences that the new shoplifting offense of Pen. Code § 459.5. That is because shoplifting requires intent to commit larceny, which is a crime or moral turpitude under immigration law, while second degree burglary requires an intent to commit larceny or any felony; "any felony" might not involve moral turpitude. See, generally, CEB, *California Criminal Defense of Immigrants* (2014) Ch. 7 ("Burglary Offenses), particularly § 7.7 ("Crime involving moral turpitude")

Reduction of a drug offense to a misdemeanor can keep a young person eligible for Deferred Action for Childhood Arrivals (DACA). (At this writing, November 20, 2014, President Obama is announcing a new Executive Order concerning non-citizens. That should be studied for a possible like effect.) But, in general, a drug misdemeanor still can make some deportable and keep people from being able to get a green card through close relatives. See, generally, CEB, *California Criminal Defense of Immigrants* (2014) Ch. 8 ("Controlled Substance Offense"), particularly § 8.3 ("Deportable Offense"); and See, generally, website: "Consideration of Deferred Action for Childhood Arrivals" http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca (last accessed Nov. 16, 2014).

Appendices

Appendix 1: Penal Code section 667, subdivision (e)(2)(C)(iv)

(iv) The defendant suffered a prior serious and/or violent felony conviction, as defined in subdivision (d) of this section [i.e., a prior strike], for any of the following felonies:

(I) A "sexually violent offense" as defined in [Welf. & Inst. Code § 6600, subd. (b); see Appendix 3 for a list of those offenses].

(II) Oral copulation with a child ... under 14 ... who is more than 10 years younger than [defendant] as defined by [Pen. Code §] 288a, sodomy with [a child] under 14 years ... and more than 10 years younger than [defendant] as defined by [Pen. Code §] 286, or sexual penetration with [a child] under 14 ... who is more than 10 years younger than [defendant] as defined by [Pen. Code§] 289.

(III) A lewd or lascivious act involving a child under 14 years of age, in violation of [Pen. Code §] 288.

(IV) Any homicide[or] ... attempted homicide ... in [Pen. Code §§] 187 to 191.5....

(V) Solicitation to commit murder as defined in [Pen. Code §] 653f.

(VI) Assault with a machine gun on a peace officer or firefighter, as defined in [Pen. Code § 245, subd. (d)(3)]....

(VII) Possession of a weapon of mass destruction, as defined in [Pen. Code § 11418, subd. (a)(1)].

(VIII) Any serious and/or violent felony offense punishable in California by life imprisonment or death.

Appendix 2: The Sexually Violent Offenses in Welfare and Institutions Code section 6600, subdivision (b)

(b) "Sexually violent offense" means the following acts when committed by force, violence, duress, menace, fear of immediate and unlawful bodily injury on the victim or another person, or threatening to retaliate in the future against the victim or any other person, ... and result in a conviction, or a finding of not guilty by reason of insanity ... :

felony violation of [Pen. Code §§] 261, 262, 264.1, 269, 286, 288, 288a, 288.5, or 289...,

or any felony violation of [Pen. Code §§] Section 207, 209, or 220..., committed with the intent to ... violat[e] [Pen. Code §§] 261, 262, 264.1, 286, 288, 288a, or 289....

Appendix 3: The Offenses Requiring Registration under Penal Code section 290, subdivision (c).

Notes: (1) Offenses are listed in the order they appear in Pen. Code §290, subd. (c); so [HH] to [JJ] are not in numerical order. (2) Offenses [KK] and [LL] are generic offenses.

[A] § 187 ... in the perpetration, or an attempt to perpetrate, rape or any [violation of] §§ 286, 288, 288a, or 289;

[B] §§ 207 or 209 ... with intent to violate §§ 261, 286, 288, 288a, or 289;

[C] § 220, except assault to commit mayhem;

[D] § 236, subd. (b) or (c); [E] § 243.4;

[F] § 261, subd. (a)(1), (2), (3), (4), or (6);

[G] § 262, subd. (a)(1) involving the use of force or violence for which the person is sentenced to the state prison;

[H] § 264.1; [I] § 266; [J] § 266c; [K] § 266h, subd. (b);

[L] § 266i, subd. (b); [M] § 266j; [N] § 267 [O] § 269;

[P] § 285; [Q] § 286; [R] § 288; [S] § 288a; [T] § 288.3;

[U] § 288.4; [V] § 288.5; [W] § 288.7; [X] § 289;

[Y] § 311.1; [Z] § 311.2, subd (b), (c), or (d);

[AA] § 311.3; [BB] § 311.4; [CC] § 311.10; [DD] § 311.11;

[EE] § 647.6, [FF] former § 647a; [GG] § 653f, subd. (c);

[HH] § 314, subd. 1 or 2; [II] § 272 involving lewd or lascivious conduct; [JJ] felony § 288.2;

[KK] any statutory predecessor that includes all elements of one of the above ...offenses;

[LL]... any ... attempt or conspiracy to commit any of the above ...offenses.