PROPOSITION 47

By

Kathryn B. Storton
Santa Clara County District Attorney's Office
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I. EFFECTIVE DATE

A proposition is typically effective the day after the election, unless otherwise specified in the measure. Since the election took place on November 4, 2014, Proposition 47 is effective on November 5, 2014. (See Section 10(a) of Article II of the California Constitution.)

II. RETROACTIVITY

Because it lessens punishment, Proposition 47 applies to all pending cases regardless of when the crime was committed, and all convictions not yet final as of 11/5/2014 (e.g., cases in which defendants were sentenced during the 60-day period preceding 11/5/2014 or cases with appeals pending). (See *In re* Estrada (1965) 63 Cal.2d 740.)

Proposition 47 also creates, in new P.C. 1170.18, a procedure for any defendant currently serving a sentence for a felony that would be a misdemeanor under Prop. 47, to petition for recall of the sentence and request resentencing "in accordance with Sections 11350, 11357, or 11377 of the Health & Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act." P.C. 1170.18 also provides a procedure for a defendant who has completed his or her sentence to file an application to have a felony conviction designated a misdemeanor. [See Section XII in this publication for more about resentencing.]

III. OVERVIEW

A. Misdemeanor Offenses

Proposition 47 provides that a number of forgery, theft, grand theft, and drug crimes

that were chargeable as misdemeanors or felonies (commonly known as "wobblers"), can now be charged only as misdemeanors, unless the defendant has a specified prior conviction or the value of the property (in theft cases) is over $950. The list of specified prior convictions that take a defendant out of Proposition 47 is very narrow (P.C. 667(e)(2)(C)(iv) and P.C. 290(c)). Many people in the legal community refer to these priors as "superstrikes."
(See Storton's List of Proposition 47 Prior Convictions, a separate document.)

B. Serious &/Or Violent Offenders

Many repeat offenders and serious/violent offenders can no longer be charged with a felony when they commit forgery, theft, or drug crimes. For example, a defendant who has a prior misdemeanor conviction for indecent exposure (P.C. 314.1) from thirty years ago and no other criminal history, can be charged with a felony for stealing $950 worth of merchandise, or less, from a small business. However, a career criminal or violent offender who was released from state prison last week after serving a lengthy sentence for multiple armed robberies, multiple residential burglaries, arson or gang crimes, human trafficking, assault with a deadly weapon, witness intimidation, or even voluntary manslaughter can only be charged with a misdemeanor crime. Theft of a gun has been a long-time non-alternative felony and a strike, but Prop. 47 provides that unless the value of the gun is over $950, or the defendant has a specified prior conviction from Prop. 47's very narrow list, the theft of a gun is only a misdemeanor. Possession of dangerous and illegal drugs, such as cocaine, heroin, PCP, and methamphetamine is only a misdemeanor under Prop. 47, unless the defendant has a specified prior conviction from Prop. 47's very narrow list.

C. Punishment Pursuant to P.C. 1170(h) (Realignment)

Throughout Prop. 47, it is provided that a defendant who has a prior conviction specified in P.C. 667(e)(2)(C)(iv) or P.C. 290(c) may be punished pursuant to P.C. 1170(h) (Realignment) even if the value of the property involved is $950 or less. In other words, the defendant may be charged with a felony crime regardless of the value of the item involved in the crime. However, punishment pursuant to P.C. 1170(h) is limited by paragraph (3) of P.C. 1170(h), which provides a list of Realignment disqualifiers (prior or current serious felony (P.C. 1192.7(c)), prior or current violent felony (P.C. 667.5(c)), required to register as a P.C. 290 sex offender, or a P.C. 186.11 aggravated white collar crime enhancement is imposed.)

Therefore, a defendant charged with a felony who has a Prop. 47 prior will not qualify for Realignment sentencing in most cases because all but two of the specified Prop. 47 priors are also Realignment disqualifiers. All crimes that subject a defendant to P.C. 290 registration as a sex offender are Realignment disqualifiers.

And, all of the crimes listed in P.C. 667(e)(2)(C)(iv) are serious and/or violent felonies, and thus strikes and Realignment disqualifiers, except P.C. 653f solicitation to commit murder and P.C. 11418(a)(1) possession of a weapon of mass destruction. A felon who is disqualified from P.C. 1170(h) Realignment sentencing is eligible for a state prison sentence.

Hundreds of felonies were specifically redesignated in October 2011 by AB 109 as felonies that are punishable pursuant to P.C. 1170(h), and the disqualification provisions of P.C. 1170(h)(3) apply to all of these felonies. It is no different for Proposition 47.

IV. THEFT

Proposition 47 creates new P.C. 490.2, which provides, in its entirety:

"(a) Notwithstanding Section 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 hundred 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 in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 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."

New P.C. 490.2 does several things:

(1) It provides that any theft that is not over $950 is considered petty theft and only a misdemeanor (unless the defendant has a specified prior).

(2) It creates an over- $950 threshold for grand theft crimes that currently have a lesser threshold or no threshold; without the threshold being met, the crime is considered petty theft.

Examples of crimes that had a lesser threshold: P.C. 487(b)(1) & (b)(2) farm crop or animal/fish thefts had a $250 threshold; P.C. 487b conversion by severance of real property had a $250 threshold; P.C. 487i defrauding a housing program had a $400 threshold.

Examples of crimes that had no threshold: P.C. 487(c) grand theft person; P.C. 487(d)(1) grand theft automobile; P.C. 487(d)(2) grand theft firearm; P.C. 487a grand theft of a specified animal; P.C. 484e grand theft involving access cards. Therefore,

the theft of a gun that is worth $950 or less is a misdemeanor. A grand theft person where the property's value does not exceed $950 is a misdemeanor.

(3) It authorizes charging any theft misdemeanor as a felony if the defendant has a prior conviction for a crime specified in P.C. 667(e)(2)(C)(iv) or P.C. 290(c). For example, the theft of a $300 bicycle by a defendant who has a Prop. 47 prior, can be charged as a felony rather than misdemeanor petty theft.

P.C. 490.2 provides that it does not apply to any theft that may be charged as an infraction. P.C. 490.1 (theft of $50 value or less) is an example of this type of infraction.

Because P.C. 490.2 merely says "shall be considered petty theft" and "shall be punished as a misdemeanor " and does not provide for a particular range of jail sentence, such as "county jail not exceeding one year", existing P.C. 19 and P.C. 490 limit misdemeanor petty theft crime punishment to six months in jail. P.C 19 provides that except in cases where a different punishment is prescribed, every offense declared to be a misdemeanor is punishable by up to six months in jail and/or by a fine of up to $1,000. P.C. 490 provides that petty theft is punishable by up to six months in jail and/or by a fine of up to $1,000.

A Note About Charging:

It is preferable to charge the most specific theft section possible, so that the charging document, at a glance, and the defendant's rap sheet, indicate what type of property or conduct the theft involves. The language of P.C. 490.2 supports this: "Notwithstanding Section 487 or any other provision of law defining grand theft. . . ." For example, in a P.C. 487(c) (theft from the person) or P.C. 487(d)(2) (theft of a firearm) case involving property worth $950 or less, charge P.C. 487(c) or P.C. 487(d)(2) as a misdemeanor, rather than generic petty theft (P.C. 484-488). An allegation within the meaning of P.C. 490.2 could be considered, or the property value could be specified as $950 or less. In a P.C. 487j case (theft of copper exceeding $950 value) involving $300 worth of property where the defendant has a Prop. 47 prior and thus is chargeable with a felony, charge P.C. 487j copper theft as a felony and allege the Prop. 47 prior. Based on the language of P.C. 490.2, it also appears that P.C. 484-488 could be charged as a felony with the Prop. 47 prior alleged, but the code section itself would not provide any information as to the type of theft.

Theft Chart

Value of Property is $950 or Less & Defendant Has *No* Specified Prior:
A misdemeanor theft violation is chargeable.

Value of Property is $950 or Less & Defendant *Has* a Specified Prior:
A felony theft violation is chargeable.

Value of Property is Over $950, Regardless of Priors:
A felony grand theft violation is chargeable.

V. SHOPLIFTING: P.C. 459.5

Proposition 47 creates new P.C. 459.5, the crime of shoplifting. Shoplifting 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)." (emphasis added) Any other entry into a commercial establishment with the intent to commit larceny is burglary (e.g., when the establishment is closed). P.C. 459.5 is a misdemeanor, unless the defendant has a specified prior conviction, in which case the defendant can be charged and convicted of a felony violation of P.C. 459.5.

Note that it would be extremely difficult to prove the dollar value of what a shoplifter intended to steal, unless the shoplifter actually steals something. Therefore, if the defendant actually takes property of a value of $950 or less it is simpler to charge misdemeanor petty theft (P.C 484-488) and avoid having to prove entry with intent to commit larceny and/or intent to take a specific dollar value of property.

P.C. 459.5 also prohibits charging burglary or theft if the defendant is also charged with shoplifting.

Since the misdemeanor punishment language in P.C. 459.5 is "shall be punished as a misdemeanor," punishment for shoplifting as a misdemeanor carries a maximum of six months in jail pursuant to existing P.C. 19, which provides that every offense declared to be a misdemeanor is punishable by up to six months in jail unless a different punishment is prescribed. P.C. 484-488 petty theft also carries a maximum jail sentence of six months.

P.C. 459.5 Chart:

Value of Property is $950 or Less & Defendant Has *No* Specified Prior:
A misdemeanor violation of P.C. 459.5 is chargeable, but P.C. 484-488 petty theft is easier to prove and carries the same maximum 6-month jail punishment. With new P.C. 459.5, entry with the intent to commit larceny must be proved, but there is no such requirement for P.C. 484-488. As long as P.C. 459.5 is not charged, theft can be charged.

Value of Property is $950 or Less & Defendant *Has* a Specified Prior:
A felony violation of P.C. 459.5 is chargeable.

Value of Property is Over $950, Regardless of Priors:
By definition, the crime is not shoplifting since the value is greater than $950. Possible charges include felony grand theft (P.C. 487(a)), felony burglary (P.C. 459-460(b): 2nd degree burglary)), etc.

VI. FORGERY

Before Proposition 47, P.C. 473 provided that forgery crimes were wobblers (felony/misdemeanor crimes) punishable by up to one year in jail or 16 months, two years, or three years pursuant to P.C. 1170(h) Realignment. There was no threshold value required. Proposition 47 creates a new subdivision (b) pertaining only to seven items and adding a $950 threshold value in order to be able to charge forgery as a felony. New subdivision (b) provides that any person guilty of forgery relating to one of seven specified items (check, bond, bank bill, note, cashier's check, traveler's check, or money order) where the value of the item is $950 or less, is punishable by up to one year in jail (i.e., is guilty of a misdemeanor). However, if the defendant has a prior conviction specified in P.C. 667(e)(2)(C)(iv) or P.C. 290(c), he or she may be punished pursuant to P.C. 1170(h) Realignment (i.e., a felony may be charged).

Note that existing P.C. 470(d) specifies many more items than the seven items specified in P.C 473(b). And, other forgery sections, such as P.C. 484f(a), apply only to items, such as access cards, that are not one of the seven items that Prop. 47 addresses. It appears that these are the main forgery statutes that are affected by Prop. 47, but only if one of the seven specified items is involved:
P.C. 470(a)
P.C. 470(d)
P.C. 475(a)
P.C. 475(b)
P.C. 475(c)
P.C. 476

It appears that these forgery statutes are *not* affected by Prop. 47, because they do not involve any one of the seven specified items in P.C. 473(b) (i.e., check, bond, bank bill, note, cashier's check, traveler's check, or money order):
P.C. 470(b) (the seal or handwriting of another)
P.C. 470(c) (will, codicil, conveyance, judgment of court)
P.C. 484f(a) (access card)
P.C. 484f(b) (access card, sales slip, sales draft)
P.C. 484i (access cards and card making equipment)
(These lists are not exhaustive.)

Forgery Chart:

One of Seven Specified Items is Involved & Value of Property is $950 or Less & Defendant Has *No* Specified Prior:
A misdemeanor forgery violation is chargeable.

One of Seven Specified Items is Involved & Value of Property is $950 or Less & Defendant *Has* a Specified Prior:
A felony forgery violation is chargeable.

One of Seven Specified Items is Involved & Value of Property is Over $950, Regardless of Priors: A felony forgery violation is chargeable.

An Item **Other** Then One of the Seven is Involved & Value is Any Amount, Regardless of Priors:
A felony forgery violation may be charged.

VII. BAD CHECKS: P.C. 476a

Proposition 47 amends P.C. 476a(b) to increase, from $450 or less, to $950 or less, the threshold amount of all checks, drafts, or orders a defendant has made, drawn, or uttered that must be charged as a misdemeanor P.C. 476a, unless an exception applies. If the total amount does not exceed $950, a felony can be charged only if:
(1) Def has a prior conviction for a P.C. 667(e)(2)(C)(iv) offense or a P.C. 290(c) offense; or
(2) Def has three or more California or foreign prior convictions of P.C. 470, P.C. 475, P.C. 476, P.C. 476a, or petty theft in a case in which def's offense was a violation also of P.C. 470, P.C. 475, P.C. 476, or P.C 476a. [Previously, when the threshold amount was $450, only one prior conviction was required in order to be able to charge a felony. Prop. 47 requires three.]

P.C. 476a Chart

Value is $950 or Less & Defendant Has *No* Specified Prior:
A misdemeanor violation of P.C. 476a is chargeable

Value is $950 or Less & Defendant *Has* a Specified Prop. 47 Prior:
A felony violation of P.C. 476a is chargeable.

Value is $950 or Less & Defendant *Has* Three Specified Forgery Priors:
A felony violation of P.C. 476a is chargeable.

Value is Over $950, Regardless of Priors:
A felony violation of P.C. 476a is chargeable.

VIII. POSSESSING, BUYING, RECEIVING STOLEN PROPERTY: P.C. 496

Proposition 47 eliminates the specific provision in subdivision (a) that had permitted the district attorney or grand jury to specify that a violation of P.C. 496 is a misdemeanor if the value of the property is not over $950, and instead requires a misdemeanor charge of P.C. 496(a) if the value is not over $950 and the defendant does not have a specified prior. In other words, a felony violation of P.C. 496(a) may be charged if the value of the property is over $950 or if the defendant has a prior conviction specified in P.C. 667(e)(2)(C)(iv) or P.C. 290(c).

P.C. 496(b) remains as is. It pertains to swap meet vendors and second hand dealers and permits a felony charge if the value of the property is over $950.

Keep in mind that the ability to reduce a P.C. 459 1st degree residential burglary to a felony P.C. 496 is affected by Proposition 47. If the value of the property is not over $950 and the defendant does not have a specified Prop. 47 prior, the defendant is subject to a misdemeanor P.C. 496 only. However, the defendant may wish to stipulate that the value of the property exceeds $950 so that he/she can be convicted of felony P.C. 496 rather than a P.C. 459 1st, which is a serious felony strike.

P.C. 496 Chart

Value is $950 or Less & Defendant Has *No* Specified Prior:
A misdemeanor violation of P.C. 496 is chargeable

Value is $950 or Less & Defendant *Has* a Specified Prior:
A felony violation of P.C. 496 is chargeable.

Value is Over $950, Regardless of Priors:
A felony violation of P.C. 496 is chargeable.

IX. PETTY THEFT WITH A PRIOR: P.C. 666

Subdivision (a) of P.C. 666 is eliminated by Proposition 47. It was the felony/ misdemeanor crime of petty theft with three specified theft priors. Former subdivision (b) is now subdivision (a) and remains the crime of petty theft with one specified theft prior and one more serious, specified prior. It remains a felony/misdemeanor punishable in state prison, but narrows the types of serious priors that will make a defendant eligible for prosecution under P.C. 666. Previously, any serious (P.C. 1192.7(c)) or violent (P.C. 667.5(c)) prior felony conviction or any offense requiring P.C. 290 sex registration would qualify a defendant for a felony charge of P.C. 666 and a potential prison sentence. Now, for P.C. 666 to apply, the defendant must have a prior conviction specified in P.C. 667(e)(2)(C)(iv) or be required to register as a sex offender, or have a misdemeanor or or felony conviction pursuant to P.C. 368(d) or P.C. 368(e) (elder or dependent adult fraud). And, of course, the defendant must still have one specified theft prior. Prop. 47 adds P.C. 368(d) and P.C. 368(e) as applicable priors, but only for P.C. 666.

Note that for P.C. 666 to apply, a defendant must have a specified theft prior and a prior conviction specified in P.C. 667(e)(2)(C)(iv) or in P.C. 290(c), UNLESS the prior is a P.C. 368(d) or P.C. 368(e) elder fraud. Both P.C. 368(d) and P.C. 368(e) qualify as the required theft prior and as the required, more serious prior, since both are listed in P.C. 666(a) and P.C. 666(b). So, a defendant with a single prior misdemeanor or felony conviction of P.C. 368(d) or P.C. 368(e) for which a term of imprisonment was served is chargeable with a violation of P.C. 666 as a felony or a misdemeanor.

P.C. 666 Chart

Defendant Has a Specified Theft Prior For Which a Term of Imprisonment was Served **And** a Prior Specified in P.C. 667(e)(2)(C)(iv) or Must Register as a Sex Offender or Has a Misd or Felony Prior for P.C. 368(d) or P.C. 368(e):

A felony or misdemeanor violation of P.C. 666 is chargeable.

Defendant Has One Misd. or Felony Prior for P.C. 368(d) or P.C. 368(e) and Served a Term of Imprisonment: :

A felony or misdemeanor violation of P.C. 666 is chargeable.

X. DRUG POSSESSION: H&S 11350, H&S 11357, & H&S 11377

A. H&S 11350

H&S 11350(b) is deleted and it provisions cross-referencing H&S 11054(e), are added to H&S 11350(a). H&S 11350(b) had been the felony/misdemeanor crime of possessing a controlled substance specified in H&S 11054(e) (mecloqualone, methaqualone, or gamma hydroxybutyric acid (GHB). GHB, a date rape drug, is now a misdemeanor only, unless the defendant has a Prop. 47 prior.

H&S 11350(a) (possession of a controlled substance such as cocaine, cocaine base, heroin, codeine, and oxycodone) is amended to change it from a non-alternative felony to a misdemeanor, unless the defendant has a prior conviction for an offense specified in P.C. 667(e)(2)(C)(iv) or P.C. 290(c). If the defendant has such a prior, the offense is a non-alternative felony.

Note that the other provisions of Prop. 47 (P.C. 459.5, P.C. 473, P.C. 476a(b), P.C. 490.2, H&S 11357(a), and P.C. 11377(a)) use the phrase “may instead be punished” or “may be punished” pursuant to P.C 1170(h) if the defendant has a specified prior. However, H&S 11350 provides that a person with a specified prior “shall instead be punished” pursuant to P.C. 1170(h). This appears to make H&S 11350 with a specified prior a non-alternative felony rather than a wobbler.

H&S 11350 Chart

Defendant Has *No* Specified Prior

The H&S 11350 violation is a misdemeanor.

Defendant *Has* a Specified Prior

The H&S 11350 violation is a non-alternative felony.

B. H&S 11357

H&S 11357(a) (possession of concentrated cannabis) is amended from a felony/misdemeanor crime (a "wobbler") to a misdemeanor only, unless the defendant has a Prop. 47 prior, in which case the crime is a wobbler. H&S 11357(b), (c), (d), and (e) are unchanged.

H&S 11357(a) Chart

Defendant Has *No* Specified Prior
A misdemeanor violation of H&S 11357(a) is chargeable.

Defendant *Has* a Specified Prior
A felony violation of H&S 11357(a) is chargeable.

C. H&S 11377

H&S 11377(a) (possession of a controlled substance such as methamphetamine or phencyclidine (PCP)) is amended from a felony/misdemeanor ("wobbler") crime to a misdemeanor only, unless the defendant has a prior conviction for an offense specified in P.C. 667(e)(2)(C)(iv) or P.C. 290(c), in which case the crime is a wobbler.

H&S 11377(b) is deleted. It had provided that the possession of these substances constituted a misdemeanor crime only: anabolic steroids and chorionic gonadotropin (H&S 11056(f)); ketamine (H&S 11056(g)); khat and cathinone (H&S 11055(d)(7) & (d)(8)); and cathine (H&S 11057(f)(8)). Now, all of these substances are covered in existing cross-references in H&S 11377(a).

Khat and cathinone are covered in H&S 11377(a) because there is an existing cross-reference to H&S 11055(d).

Cathine, ketamine, anabolic steroids, and chorionic gonadotropin are covered in H&S 11377(a) in the following existing cross-reference: " . . . any controlled substance which is (1) classified in Schedule III, IV, or V, and which is *not* a narcotic drug . . . " H&S 11056 is Schedule III and H&S 11057 is Schedule IV.
[Note that if any of these drugs is a narcotic, possession without a prescription would still be illegal pursuant to H&S 11350(a): " . . . any controlled substance classified in Schedule III, IV, or V which *is* a narcotic drug . . . " Whether these substances are narcotic or non-narcotic drugs, their possession without a prescription is still a

crime.]

H&S 11377 Chart

Defendant Has *No* Specified Prior

A misdemeanor violation of H&S 11377 is chargeable.

Defendant *Has* a Specified Prior

A felony violation of H&S 11377 is chargeable.

XI. CHARGING A PROP. 47 PRIOR CONVICTION

Since a specified prior conviction pursuant to P.C. 667(e)(2)(C)(iv) or P.C. 290(c) elevates to a felony what would otherwise be a misdemeanor crime, it appears to be an element of the felony offense and therefore should be pled and proved. And, it should be proved at a preliminary hearing. Similar to a V.C. 23550 "super deuce" case where three misdemeanor driving under the influence offenses elevate to a felony a DUI that would otherwise be a misdemeanor, these elevating priors should be proved at a preliminary hearing. (Of course, the burden of proof is only a preponderance of the evidence at a preliminary hearing.) The case of *People v. Casillas* (2001) 92 Cal.App.4th 171, held that misdemeanor DUI priors in a V.C. 23550 case must be proved at a preliminary hearing.

This is a sample allegation that can be added to a charging document directly below the allegation of the felony crime:

"It is further alleged that prior to the commission of the foregoing offense, the defendant was convicted of an offense specified in P.C. 667(e)(2)(C)(iv) and/or in P.C. 290(c), to wit: a violation of _____(*code section*) of the _____Code, _____(*insert common name of the crime),* in _____County under Docket #_____ and is therefore charged with a felony violation pursuant to Proposition 47."

XII. RESENTENCING: P.C 1170.18

[This overview of P.C. 1170.18 points out some problems and issues, but it is not a detailed analysis of all of the issues and problems created by this new section.]

A. Defendants Currently Serving a Sentence for a Felony ConvictionThat Would Be a Misdemeanor Pursuant to Proposition 47 May File A Petition for Resentencing

New P.C. 1170.18 permits a defendant who is currently serving a sentence for a felony or felonies, and would have been guilty of a misdemeanor under Prop. 47 had it been in effect when the crime was committed, to petition for recall and resentencing before the original sentencing judge "that entered the judgment of conviction." It requires the court to determine if the defendant is eligible for resentencing (which will obviously necessitate a thorough review of all of the defendant's rap sheets). If the defendant is eligible for resentencing, the court is required to resentence the defendant to a misdemeanor "unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." [This is the same language used in P.C. 1170.126, the Three Strikes resentencing provision created by Proposition 36, which was on the ballot in November 2012.]

Note that as P.C. 1170.18 is actually worded, these recall and resentencing provisions apply to defendants serving a sentence pursuant to P.C. 1170(h) Realignment or serving a state prison sentence. They do not apply to a probationer who is serving a felony sentence subject to Prop. 47, because subdivision P.C. 1170.18(a) requires that judgment of conviction have been entered. In cases where probation is granted, judgment is not imposed. Rather, the imposition of sentence is suspended (see definition of probation in P.C. 1203(a)). This may present an equal protection issue.

Note also that because the actual language of the resentencing and recall provisions is worded in terms of a defendant who is currently serving a sentence for a *conviction* of a felony, juvenile adjudications are technically not included. Pursuant to W&I 203, a juvenile adjudication is not a conviction. This may present an equal protection issue.

P.C. 1170.18(b)(1) – (3) sets forth three things the court may consider (same language as P.C. 1170.126): (1) the defendant's criminal history, including the types of crimes committed, the extent of the injury to victims, the length of prior prison commitments, and the remoteness of the crimes; (2) the defendant's disciplinary record and record of rehabilitation while incarcerated; and (3) any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety.

P.C. 1170.18(c) provides a narrow definition of "unreasonable risk of danger to public safety." It means "an unreasonable risk that the petitioner will commit a new violent felony within the meaning of" P.C. 667(e)(2)(C)(iv). In other words if there is a risk that the defendant will commit armed robbery or human trafficking or arson or assault with a firearm, or domestic violence, or assault with great bodily injury, those crimes do not come within this restrictive definition.

P.C. 1170.18(d) provides that a defendant who is resentenced pursuant to Prop. 47 shall be subject to parole supervision for one year by the California Dep't of Corrections & Rehabilitation (CDCR). However, the court can choose to not place a resentenced defendant on parole: ". . . unless the court, in its discretion, as part of its resentencing order, releases the person from parole." [Note: under Realignment (effective October 2011), defendants released from state prison after serving a term for a serious or violent felony are placed on parole (P.C. 3000.08) while defendants released from state prison after serving a term for a non-serious/non-violent felony are placed onto postrelease community supervision (PRCS) (P.C. 3451) and supervised by the local probation department. Yet, Prop 47 provides for parole supervision for defendants who were convicted of non-serious felonies later reduced to misdemeanors.]

P.C. 1170.18(o) provides that a resentencing hearing constitutes a "post-conviction release proceeding" pursuant to Marsy's Law (Section 28(b)(7) of Article One of the California Constitution) which means the victim is entitled to notice of the resentencing hearing and to be present. Sec. 28(b)(7) of Article 1 provides that a victim is entitled "to reasonable notice of all public proceedings, including delinquency proceedings, upon request, at which defendant and the prosecutor are entitled to be present and of all parole or other post-conviction release proceedings, and to be present at all such proceedings."

Note that if a defendant has other convictions that are not affected by Prop. 47, resentencing may not reduce the defendant's overall sentence. Note also that P.C. 1170.18 does not provide for resentencing on a misdemeanor conviction. Therefore, as it is actually worded, P.C. 1170.18 does not provide an avenue for resentencing for a defendant who is currently serving a sentence for a misdemeanor P.C. 666 with three theft priors (which no longer exists after Prop. 47 unless one of the theft priors is for P.C. 368(d) or P.C. 368(e) elder fraud.) This may present an equal protection issue.

B. Defendants Who Have Completed Their Sentences For a Felony Conviction May Apply to Have It Designated a Misdemeanor Without a Hearing

P.C. 1170.18(f) permits a defendant who has completed his or her sentence for a felony that would have been a misdemeanor had Prop. 47 been in effect at the time of the offense, to file an application "before the trial court that entered the judgment of conviction," in order to have the felony designated a misdemeanor. Because subdivision (f) requires that judgment have been imposed, defendants who were granted probation technically do not qualify for redesignation to a misdemeanor because the imposition of sentence was suspended (definition of probation in P.C.1203(a)) rather than judgment being imposed, as it is when a defendant is sentenced to state prison or to jail pursuant to P.C. 1170(h). This may present an equal protection issue.

Note that because the actual language of the redesignation provision is worded in terms of a defendant who has completed a sentence for a felony *conviction*, juvenile adjudications are technically not included. Pursuant to W&I 203, a juvenile adjudication is not a conviction. This may present an equal protection issue.

Subdivision (g) provides that if the application satisfies the criteria in subdivision (f), "the court shall designate the felony offense or offenses as a misdemeanor." Subdivision (h) specifically provides "unless requested by the applicant, no hearing is necessary to grant or deny an application filed under subdivision (f)." [In other words, there apparently won't be any hearings, unless a defendant is denied relief and asks for a hearing in order to complain about the denial.] Note that there is no restriction on the age of a felony conviction that could be the subject of an application for designation to a misdemeanor.

C. Miscellaneous Provisions

P.C. 1170.18(e) provides that "under no circumstances may resentencing under this section result in the imposition of a term longer than the original sentence."

P.C. 1170.18(i) provides that P.C. 1170.18 does not apply to anyone who has a prior conviction for an offense specified in P.C. 667(e)(2)(C)(iv) or P.C. 290(c).

P.C. 1170.18(j) provides that any petition or application must be filed within three years after the effective date of Prop. 47 (thus, before November 5, 2017), unless the defendant can show good cause for not doing so.

P.C 1170.18(k) provides that any felony conviction that is recalled and resentenced under subdivision (b) or designated a misdemeanor under subdivision (g) shall be

considered a misdemeanor for all purposes, except that the defendant is still subject to P.C. 29800 – 29875 and is not permitted to own, possess, or have in his or her custody or control any firearm: "shall be considered a misdemeanor for all purposes, except that such resentencing 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 Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part.6" Therefore, even though a felony has been reduced to a misdemeanor, it still operates, apparently indefinitely, to subject a defendant to prosecution for being a felon in possession, control, or ownership of a firearm, even though an element of the crime is a felony conviction. In cases involving the possession, ownership, or control of a firearm, rap sheets should be carefully reviewed to determine whether a misdemeanor conviction was reduced from a felony pursuant to Prop. 47.

P.C. 1170.18(*l*) provides that if the original sentencing judge is not available, the presiding judge shall designate another judge to rule on the petition for resentencing or the application for a misdemeanor designation.

THE END