

PROPOSITION 47

MODIFICATIONS TO FELONY–WOBBLER–MISDEMEANOR LAW

PREPARED BY APPELLATE DEFENDERS, INC.

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ADI – NOVEMBER 2014

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PROPOSITION 47

MODIFICATIONS TO FELONY–WOBBLER–MISDEMEANOR LAW

ADI – NOVEMBER 2014

In the November 4, 2014, election the voters approved Proposition 47, entitled the Safe Neighborhoods and Schools Act. It became effective the following day.

PROVISIONS OF PROPOSITION 47

Proposition 47 (1) reduces various felony or wobbler offenses to misdemeanors; (2) provides a procedure for inmates serving felony sentences for such offenses to petition for misdemeanor resentencing; and (3) provides a procedure for individuals who have completed felony sentences to petition to have such felony convictions deemed misdemeanors.¹ In applying its provisions, counsel should consult both the [text](#)² and the [ballot pamphlet](#),³ which includes the report of the Legislative Analyst and arguments for and against the proposition. [Appendix A](#) of this memo includes excerpts from the initiative.

Reduction in Severity of Enumerated Offenses

Proposition 47 adds or amends various statutes, downgrading specified wobblers or felonies to misdemeanors. Each such reduction excludes cases in which the defendant has suffered a prior conviction for what is called colloquially a “[super strike](#),” enumerated in either Penal Code [section 667, subdivision \(e\)\(2\)\(C\)\(iv\)](#) or [section 290, subdivision \(c\)](#); in those situations, the offense is a wobbler or straight felony, punishable under section [Penal Code 1170, subdivision \(h\)](#).

The offenses so modified are:

Shoplifting: Penal Code section 459.5: Commercial burglary when a business is open during regular business hours is shoplifting, a misdemeanor, if the value of the

¹This summary does not cover section 4, the amendment to the Government Code creating the “Safe Neighborhoods and Schools Fund.”

²<http://vig.cdn.sos.ca.gov/2014/general/pdf/text-of-proposed-laws1.pdf#prop47>

³<http://www.voterguide.sos.ca.gov/en/propositions/47/>

property taken does not exceed \$950 and the defendant has no “[super strike](#),” priors. No one charged with shoplifting may also be charged with burglary or theft.⁴ [See text.](#)

Forgery: Penal Code section 473: if the amount of the forgery of the specified item(s) does not exceed \$950 and the defendant has no “[super strike](#),” priors, the offense is a misdemeanor, punishable up to a year. This change is inapplicable if the defendant is convicted of both forgery and identity theft (Pen. Code, § 530.5). [See text.](#)

Insufficient funds check with intent to defraud: Penal Code section 476a: If the total of all funds does not exceed \$950 and the defendant has no “[super strike](#),” priors, the offense is a misdemeanor, punishable up to a year. This provision is unavailable if the defendant has three or more such prior offenses. [See text.](#)

Petty theft: Penal Code section 490.2: Notwithstanding Penal Code section 487 or any other definition of grand theft, if the value of the property does not exceed \$950 and the defendant has no “[super strike](#),” priors, the theft is petty theft. In other words, this provision eliminates the automatic classification of “grand theft” based on a category, such as grand theft person or grand theft firearm. The section is not applicable to any theft that may be charged as an infraction. [See text.](#)

Receiving stolen property: Penal Code section 496: Previously a felony or a misdemeanor, the act of buying or receiving stolen property of a value not in excess of \$950 is now a misdemeanor, punishable up to a year, if the defendant has no “[super strike](#),” priors. [See text.](#)

Petty theft with specified priors: Penal Code section 666, petty theft: Petty theft is a wobbler if committed by a person:

- (a) who is required to register as a sex offender **or** who has a prior conviction under Penal Code [section 667\(e\)\(2\)\(C\)\(iv\)](#) **or** who has a prior conviction under Penal Code [section 368\(d\) or \(e\)](#) [certain property crimes against elders],
and
- (b) who has served a prior *term of incarceration* for designated theft offenses.⁵

⁴The restriction is specifically phrased as “charged” – not “convicted” or “punished.” What effects if any this unusual wording will have on trials is unclear.

⁵Petty theft, grand theft, a conviction under [subdivision \(d\) or \(e\) of Penal Code section 368](#) [certain property crimes against elders], auto theft under Vehicle Code section 10851, burglary, carjacking, robbery, or felony receiving stolen property.

In other words, there is no longer a simple “petty theft with prior theft offenses” wobbler. Instead, section 666 now is a rather complicated and eclectic mixture of unrelated offenses that have to be present in a specific combination to qualify as a wobbler. That combination is likely to be very rare, and therefore persons with a section 666 conviction almost surely will be entitled to relief (below). [See text.](#)

Possession of narcotic: Health and Safety Code section 11350, possession of a designated narcotic controlled substance (e.g., heroin, cocaine): Formerly this offense was a straight felony for almost all substances. Now it is a misdemeanor punishable by no more than a year, unless the defendant has a prior “[super strike](#),” conviction, and then it is a felony. [See text.](#)

Possession of concentrated cannabis: Health and Safety Code section 11357, subdivision (a): It would be a wobbler for a defendant with a prior “[super strike](#),” conviction. [See text.](#)

Possession of non-narcotic controlled substance: Health and Safety Code section 11377, unauthorized possession of substances (e.g., methamphetamine): It would be a wobbler for a defendant with a prior “[super strike](#),” conviction. [See text.](#)

New Remedies for Those Already Sentenced

Proposition 47 adds new [Penal Code section 1170.18](#), which provides for a petition for resentencing for those still serving a sentence for an offense affected by this initiative (subd. (a)). Those who have completed their sentence may apply to have the felony designated a misdemeanor ([subd. \(f\)](#)). The petition or application is made before the trial court that entered judgment (subds. (a), (f)). Neither resentencing nor re-designation is available to an individual with a prior “[super strike](#)” conviction. ([Subd. \(i\)](#)). [See text.](#)

For those currently serving a sentence for one of the enumerated felonies: resentencing

Petition for resentencing: Defendants currently serving a sentence for an offense affected by the proposition may petition the trial court for recall of sentence for a felony that would have been a misdemeanor had this act been in effect at the time of the offense.

Time to file: The petition or application must be filed within three years of November 5, 2014, or later “upon a showing of good cause.” (§ 1170.18, [subd. \(j\)](#).) As always, it is inadvisable to rely on a discretionary excuse for an untimely filing, unless circumstances leave no choice.

Resentencing decision: If the offense qualifies for reduction, the sentence must be recalled and reduced, unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety. (§ 1170.18, [subd. \(b\).](#))

Meaning of unreasonable risk: “[U]nreasonable risk of danger to public safety” means an unreasonable risk that the petitioner will commit a new violent felony within the meaning of [Penal Code section 667, subdivision \(e\)\(2\)\(C\)\(iv\)](#). (§ 1170.18, [subd. \(c\).](#))

Factors to consider: In exercising its discretion, the court may consider all of the following (§ 1170.18, [subd. \(b\)](#)):

- (1) the petitioner’s criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes;
- (2) the petitioner’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.

After resentencing: A person who is resentenced is given credit for time served and is subject to one year parole, unless the court as part of resentencing releases the person from parole. (§ 1170.18, [subd. \(d\).](#))

For those who have already served their sentence: application for felony conviction to be deemed a misdemeanor

Under section 1170.18, [subdivisions \(f\) through \(h\)](#), if a person has already completed a sentence for a felony that would have been a misdemeanor had this act been in effect at the time of the offense, the person may file an application to have the offense deemed a misdemeanor. If the person and offense meet the criteria, the court must designate the offense a misdemeanor. Unless requested by the applicant, no hearing is necessary.

Effects of resentencing or re-designation

Any felony conviction resentenced as or re-designated a misdemeanor will be deemed a misdemeanor for all purposes, except that “such resentencing” does not permit the person

to own or have custody of a firearm or prevent firearm convictions under Penal Code section 29800 et seq. (§ 1170.18, [subd. \(k\)](#)).⁶

WHAT COUNSEL CAN DO

The steps to be taken depend on the stage of the case (a) when Proposition 47 became effective (November 5, 2014), and (b) when relief is sought.

Preliminary Considerations

Before discussing the particulars, ADI renews the customary warnings:⁷

Adverse consequences: Always analyze whether any potential adverse consequences could come from pursuing a remedy. If seeking Proposition 47 relief could make the defendant even worse off in some way, counsel the client and ask for a decision on whether to go forward. (See [ADI Manual](#), § 4.91 et seq.)

Time-sensitive cases: Always consider whether the case is time-sensitive and adjust the strategy accordingly. If the defendant would be entitled to immediate release on resentencing, for example, a speedier remedy than appeal could well be called for. (See [ADI Manual](#), § 1.30 et seq.)

Contact with client and trial counsel: Appellate counsel should contact trial counsel to determine whether he or she plans to take any action and to ensure that the attorneys do not work at cross-purposes. Appellate counsel should also advise the client what is going on, both to keep the client informed and to guard against the possibility the client might attempt to do something without counsel’s approval.

Defendant Not Yet Sentenced When Proposition 47 Passed

Defendants who were not yet sentenced on November 5, 2014, should automatically be sentenced under Proposition 47. Appellate counsel should make sure the sentencing court has correctly applied the new law.

⁶The use of the word “resentencing” in subdivision (k) introduces an ambiguity – do the continued firearm prohibitions apply to the person whose term had already been served and thus whose remedy was redesignation of the offense as a misdemeanor?

⁷[Potentially Favorable Changes in the Law](#) (PDF), Part One, section on “Preliminary Responsibilities.”

Defendant Already Sentenced But Case Not Yet Final on November 5, 2014: Estrada Remedies

An extremely significant issue in applying Proposition 47 to this class of defendants is whether *In re Estrada* (1965) 63 Cal.2d 740 applies. *Estrada* creates a presumption that the Legislature intended a reduction in punishment for a given crime or group of crimes to apply retroactively to cases not yet final. It is a judicially recognized principle of statutory construction, not a constitutional mandate, and may be rebutted by evidence the Legislature intended otherwise.

Conley: The applicability of *Estrada* to the closely analogous Proposition 36 is before the California Supreme Court in *People v. Conley*, [S211275](#),⁸ which presents this issue: “Does the Three Strikes Reform Act of 2012 . . . apply retroactively to a defendant who was sentenced before the Act’s effective date but whose judgment was not final until after that date?” The following discussion is of course subject to considerable modification after that decision is filed.

Raising *Estrada*

On appeal: For qualifying cases in the California courts, counsel may file a brief or petition arguing the new law applies to all cases not yet final under the principles of *Estrada*. ADI’s article on [Potentially Favorable Changes in the Law](#) (Part One, section on “Pre-Remittitur Cases”) outlines procedures at the various stages of appeal.

On habeas corpus: If a case was not final when Proposition 47 was passed but the remittitur has since issued, the defendant is still entitled to relief. A habeas corpus petition may be filed. (*In re Pine* (1977) 66 Cal.App.3d 593, 596.) *Estrada* itself was a habeas case.

Points to include in *Estrada* argument: Pending the decision in *Conley*, counsel should preserve an argument that *Estrada* applies to Proposition 47, if the client meets its condition, making these points:

- The *Estrada* presumption applies to voter-enacted, as well as legislative, amendments. (E.g., *People v. Trippet* (1997) 56 Cal.App.4th 1532, cited with approval in *People v. Wright* (2006) 40 Cal.4th 81, 93-95.)

⁸http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2047890&doc_no=S211275&search=party&start=1&query_partyLastNameOrOrg=conley

- Although *People v. Brown* (2012) 54 Cal.4th 314 limited *Estrada* to situations in which the new law lowers the sentence for a given offense or groups of offenses, that is exactly what Proposition 47 does. Unlike the credits law in *Brown*, Proposition 47 reflects the electorate’s explicit determination that a reduced sentence is adequate to protect society.
- Unlike the initiative in *People v. Floyd* (2003) 31 Cal.4th 179, which had an express “prospective application” provision, Proposition 47 does not negate retroactive application and indeed manifests an affirmative intent for full retroactivity in Penal Code section 1170.18, which allows defendants in even long-final cases to petition the court for resentencing. (See [subdivision \(m\)](#), which provides: “Nothing in this section is intended to diminish or abrogate any rights or remedies otherwise available to the petitioner or applicant.”)
- *People v. Babylon* (1985) 39 Cal.3d 719, 722, held a defendant is entitled to the benefit of a change in the law during the pendency of the appeal; it reversed his convictions because the amendment had made defendant’s acts non-criminal.

Finality for *Estrada* purposes: By definition, cases now on appeal are not “final.” For other situations, these principles likely apply:⁹

- If the defendant did not appeal, the case is final when the time for appealing expires. (See *United States v. Plascencia* (5th Cir. 2008) 537 F.3d 385 [when federal prisoner fails to file an effective notice of appeal, the prisoner’s conviction becomes “final,” for AEDPA purposes, upon expiration of period for filing direct appeal, and prisoner not entitled to 90-day period for certiorari].)
- If the defendant appealed but did not file a petition for review, it becomes final when the time for the California Supreme Court to grant review expires. (See *Gonzalez v. Thaler* (2012) 565 U.S. ____ [132 S.Ct. 641] [90-day certiorari time is not included for AEDPA purposes if defendant did not petition for review to highest state court]; *Roberts v. Cockrell* (5th Cir. 2011) 319 F.3d 690, 694 [conviction becomes

⁹California does not have to apply the federal rule or AEDPA cases in defining its own rules of statutory interpretation and retroactivity, but in this area state principles tend to be congruent with federal ones. (See *Bell v. Maryland* (1964) 378 U.S. 226, 230 [referring to “universal common-law rule” of applying ameliorative change in punishment or outright decriminalization to any “proceeding which, at the time of the supervening legislation, has not yet reached final disposition in the highest court authorized to review it”].)

final under AEDPA when time for seeking further direct review in state courts expires]; see also Cal. Rules of Court, rule 8.512.)

- If the defendant appealed and petitioned unsuccessfully for review, a case is final when certiorari in the U.S. Supreme Court is denied or the time for seeking it expires (90 days after review in the California Supreme Court is denied). (*People v. Vieira* (2005) 35 Cal.4th 264, 306; *People v. Nasalga* (1996) 12 Cal.4th 784, 789, fn. 5; see also *Beard v. Banks* (2004) 542 U.S. 406, 411; see *Nix v. Secretary for the Department of Corrections* (11th Cir. 2004) 393 F.3d 1235, 1237 [for purposes of triggering AEDPA statute of limitations, certiorari time is included even if defendant did not raise a federal issue in state court].)

Defendant Already Sentenced – Case Final or Not: Section 1170.18 Petition

Filing of petition: New Penal Code section 1170.18 allows a petition for resentencing within three years for persons already sentenced when the initiative passed.

Timing: A petition can be filed during the three-year limitations period. If the client would be entitled to virtually immediate release, that need would of course trump other considerations. If immediacy is not a need, however, counsel should investigate whether some delay might be advisable. If the defendant has had recent disciplinary problems or needs time to build a more persuasive case for rehabilitation, it might be advisable for the client to work on developing a good record before petitioning. It is unclear when or whether successive petitions would be allowed. Whether it can be adjudicated in the trial court while an appeal from the judgment is pending is discussed below.

Contents: The contents of the petition, unlike the contents of the otherwise analogous petition under section 1170.126 for Proposition 36, are not prescribed. Presumably it at least should state the current offense and indicate the defendant does not have any prior convictions designated as “[super strikes](#).”

Conduct of proceedings: Section 1170.18 does not prescribe the procedures to be followed upon the filing of a petition. The questions of burden of proof, rules of evidence, etc., under Proposition 36 are being litigated, and these decisions are likely to be applied to Proposition 47 cases, as well.

Counsel: Quite arguably, once a defendant establishes prima facie eligibility under section 1170.18, counsel should be appointed for any adjudicative issues, including dangerousness and resentencing. (See *Mempa v. Rhay* (1967) 389 U.S. 128, 134-137 [sentencing is critical phase of prosecution to which right to counsel attaches]; *People v. Clark* (1993) 5 Cal.4th 750, 780 [if habeas petition attacking judgment states prima

facie case, appointment of counsel is demanded by due process concerns]; *People v. Shipman* (1965) 62 Cal.2d 226, 231 [right to counsel at coram nobis proceeding when defendant has stated prima facie case for relief.] [Couzens and Bigelow](#) (PDF) so concluded as to section 1170.126 under Proposition 36 (pp. 29, 30).

Presence at hearing: The defendant has the right to be present at a hearing, as do the People. (*People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279.) The victim likewise has the right to appear, as explicitly provided by section 1170.18, [subdivision \(o\)](#), incorporating California Constitution, article I, section (b), paragraph 7) (Marsy's Law).

Appeal from Order in Section 1170.18 Hearing

Defendant's appeal: An order issued after a section 1170.18 petition is filed should be appealable under Penal Code section 1237, subdivision (b), as an order after judgment affecting the substantial rights of the defendant. *Teal v. Superior Court*¹⁰ (Nov. 6, 2014, S211708) ___ Cal.4th ___ [2014 WL 5771825] held a finding that the defendant is legally ineligible for Proposition 36 resentencing is appealable. There is no reason to suppose that a denial on the merits of dangerousness or an erroneous new sentence imposed after a hearing under section 1170.18 is less appealable.

People's appeal: Arguably the People do not have a parallel right to appeal to contest a trial court's finding of no dangerousness or the new sentence in a section 1170.18 recall hearing. The provisions of Penal Code section 1238 that they might invoke could be subdivision (a)(5) (order after judgment), or (a)(6) (order reducing punishment), or (a)(10) (unlawful sentence):

- Subdivisions (a)(5) and (a)(6) of section 1238 apply to *orders*. But arguably resentencing is a new judgment, not just an "order." *People v. Rivera* (1984) 157 Cal.App.3d 494, 497-498 held the People cannot appeal a lower sentence after a section 1170, subdivision (d) recall, because resentencing is not an "order," but rather a new judgment. *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279 allowed a People's appeal in a Proposition 36 case; it distinguished *Rivera* because of differences in wording between 1170(d) and 1170.126.
- Subdivision (a)(10) allows a People's appeal only from those sentences that are "unlawful" and specifically excepts such decisions as choice of upper-middle-lower term and consecutive versus concurrent. It defines "unlawful" as unauthorized by law or based on unlawful order striking or

¹⁰<http://www.courts.ca.gov/opinions/documents/S211708.PDF>

modifying an enhancement or prior. An unjustified finding of no dangerousness is judicial error, not an “unlawful sentence.”

Navigating Between *Estrada* and Section 1170.18

Arguably *Estrada* and section 1170.18 are *both* available to defendants whose cases were post-sentencing but not yet final on November 5, 2014.¹¹ That issue, as applied to Proposition 36 and Penal Code section 1170.126, is potentially before the California Supreme Court in [Conley](#).

***Estrada* for cases on appeal:** For cases on appeal, counsel should raise *Estrada* while *Conley* is pending.¹² Relief under *Estrada* is stronger and more complete than section 1170.18 relief, since *Estrada* resentencing is not contingent on lack of dangerousness.

Section 1170.18 petition for final cases: If a case was [final for *Estrada* purposes](#) when Proposition 47 became effective on November 5, 2014, *Estrada* relief is unavailable. A petition under section 1170.18 is the appropriate remedy. Similarly, if an *Estrada* argument is unsuccessful on appeal and the case becomes final, the defendant may then file a section 1170.18 petition.

Pursuing both remedies at the same time: Although normally it would be cleaner to assert *Estrada* first on appeal and then to file a section 1170.18 petition if that avenue was unsuccessful, there may be some situations in which the normal process is not an adequate option. Most often, this would occur if the defendant would be entitled to release from custody virtually immediately if resentenced under Proposition 47. Because appeals typically take a number of months before finality, counsel may want to file a section 1170.18 petition while the appeal is going on.

Jurisdiction: The trial court may decline to entertain the petition on the ground it lacks jurisdiction during the appeal. (*People v. Espinosa* (2014) 229 Cal.App.4th 1487; *People v. Yearwood* (2013) 213 Cal.App.4th 161, 177 [no jurisdiction to hear section 1170.126 petition during appeal].)

- There are exceptions to that rule, among which arguably the closest to this situation is recall of the sentence under Penal Code section 1170,

¹¹Subdivision (m) of section 1170.18 expressly provides: “Nothing in this section is intended to diminish or abrogate any rights or remedies otherwise available to the petitioner or applicant.”

¹²*Conley* is fully briefed as of the original date of this article (November 13, 2014) but is not yet set for oral argument.

subdivision (d). (*People v. Karaman* (1992) 4 Cal.4th 335; *People v. Espinosa* (2014) 229 Cal.App.4th 1487, 1496-1497; *People v. Alanis* (2008) 158 Cal.App.4th 1467, 1473-1474; *Portillo v. Superior Court* (1992) 10 Cal.App.4th 1829; see also *People v. Meloney* (2003) 30 Cal.4th 1145, 1153, fn. 5.)

- Other exceptions include Penal Code section 1237.1 credits corrections, modifications of probation or juvenile court orders, corrections of unauthorized sentences or other void judgments or clerical errors, etc.

Abandonment of appeal: If the trial court refuses to accept jurisdiction and defendant’s entitlement to immediate relief under section 1170.18 is very strong – with little chance of a dangerousness finding – it may be desirable to abandon the appeal. That decision is the *client’s*. Counsel has a special obligation to provide accurate advice on it – weighing carefully the possible benefits and drawbacks of the alternatives. Counsel should consider, for example, what other issues there are in the appeal that would be given up by abandonment, and the risk of a dangerousness finding under section 1170.18, and weigh those against the inherent delays of appeals.

Possible mootness if section 1170.18 petition is granted: If the trial court accepts concurrent jurisdiction and grants relief while the appeal is still going on, counsel should advise the appellate court. The *Estrada* issue on appeal may or may not be moot, depending on the People’s position below and the possibility they might appeal (assuming they have the right to appeal).

Alternatives to filing section 1170.18 petition and abandoning appeal: There are alternative ways of addressing the inherent slowness of an appeal and the uncertainties of the “dangerousness” exception in section 1170.18 proceedings. ADI’s [Appellate Practice Manual](#), chapter 1, § 1.30 et seq. explores some of these, including release pending appeal, motion to expedite the appeal, motion for summary reversal, habeas corpus petition as an alternative to appeal, and immediate finality and issuance of remittitur. Another possibility is a motion under Penal Code section 1170, subdivision (d), for recall of the sentence and resentencing within 120 days of the judgment.¹³ Counsel should consider these before advising the client.

¹³Although as noted above, the trial court does have jurisdiction to recall a sentence under [section 1170\(d\)](#) pending appeal, there is no *right* to make the motion nor to appeal the refusal to recall. (*People v. Elder* (2014) 227 Cal.App.4th 1308, 1318; *Portillo v. Superior Court* (1992) 10 Cal.App.4th 1829, 1836.) But the defendant may ask the trial court to recall and resentence on its own motion.

Compensation: A section 1170.18 petition should be compensable if (a) appellate counsel determines trial counsel cannot or will not be doing it and (b) it is roughly contemporaneous with the appeal. Appropriate steps to expedite the appeal would also be compensable.

RELATED ISSUES

It is impossible to foresee at this point the multiple issues that might arise from Proposition 47. We review only a few here.

Intersection of Proposition 36 and 47 issues: Many of the issues that arose under Proposition 36 will be relevant to Proposition 47, as well. See ADI’s [webpage and materials on Proposition 36](#). The preceding discussion has noted issues concerning the applicability of *In re Estrada* (1965) 63 Cal.2d 740 on appeal, the [conduct](#) of section 1170.18 proceedings, including procedures and the burden of proof; [appealability](#) of section 1170.18 orders by both the defendant and the People.

Apprendi-Blakely: Another “crossover” issue is whether the principles of *Apprendi-Blakely* apply to a finding of dangerousness. The structure of section 1170.18, [subdivision \(b\)](#) – the court *shall* change the sentence to a misdemeanor one *unless* it finds dangerousness – is arguably analogous to the mandatory presumption of the middle term in the former DSL struck down in *Cunningham*.¹⁴ This argument was rejected as to Proposition 36 in *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1334-1336.

Guilty pleas: Not yet resolved for either proposition is the question whether resentencing – *Estrada* or section 1170.18 or 1170.126 – is available to defendants who *pled guilty under a plea bargain*. [Couzens and Bigelow](#)¹⁵ discuss this question, as applied to Proposition 36, on pages 26-27 of their article. Citing *People v. Collins* (1978) 21 Cal.3d 208, they suggest that if the defendant seeks resentencing, the prosecution may revive some or all of the charges dismissed as part of the bargain.

“Hybrid” sentences: Under Proposition 36, if the defendant sought resentencing on a qualified count while at the same time serving a sentence for a disqualifying crime,

¹⁴*Apprendi v. New Jersey* (2000) 530 U.S. 466, *Blakely v. Washington* (2004) 542 U.S. 296, and *Cunningham v. California* (2007) 549 U.S. 270.

¹⁵[http://www.adi-sandiego.com/news_alerts/pdfs/2012/Three Strikes Amendment Couzens-Bigelow approved for public distribution.pdf](http://www.adi-sandiego.com/news_alerts/pdfs/2012/Three_Strikes_Amendment_Couzens-Bigelow_approved_for_public_distribution.pdf)

the question came up: did the disqualifying crime apply only to that count or to the whole sentence? The issue is pending in *Braziel v. Superior Court*, [S218503](#),¹⁶ and *People v. Machado*, [S219819](#).¹⁷ There are no parallel “disqualifying current crimes” as such under Proposition 47, and so we do not think the “hybrid” issue will arise under Proposition 47.

Definition of “unreasonable risk of danger to public safety”: [Subdivision \(c\)](#) of section 1170.18 defines “unreasonable risk of danger to public safety” as “*an unreasonable risk that the petitioner will commit a new violent felony within the meaning of [clause \(iv\)](#) of [subparagraph \(C\)](#) of [paragraph \(2\)](#) of [subdivision \(e\)](#) of [Section 667](#).*”

Scope of term: The literal definition is extraordinarily narrow. Although a number of homicide-related and sex offenses are in section 667(e)(2)(C)(iv), property and assaultive offenses, including those frequently involving force or violence, such as carjacking and robbery and simple kidnapping, are not. On an appeal from a section 1170.18 ruling (or a ruling under section 1170.126 – see next topic), counsel will have to parse the trial court’s findings carefully, to ensure the terms of the statute have been applied correctly.

Effects of Proposition 47 on section 1170.126 proceedings: Section 1170.18, subdivision (c)’s definition of “unreasonable risk” presumably applies to section 1170.126 proceedings, because the text goes out of its way to specify that the definition applies “throughout this *Code*” (emphasis added). The original, undefined term used in section 1170.126 can be, and has been, interpreted to mean a risk the defendant will commit any number of offenses. A risk the defendant will commit one of a limited number of specific offenses is often far lower. In addition to its effect on future section 1170.126 hearings, the new definition may be raised as ground for remand on appeal and make it possible to reopen *previous* findings, whether through appeal¹⁸ or new petition, on the ground of a change in the law.

Application to juvenile cases: Proposition 47 speaks of criminal convictions, not juvenile adjudications. But the juvenile court does have the responsibility to set a maximum term of confinement and declare a wobbler to be a felony or misdemeanor. (Welf. & Inst. Code, §§

¹⁶http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2076808&doc_no=S218503

¹⁷http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2081753&doc_no=S219819

¹⁸Sample briefs on our ADI’s web page treatment of Proposition 47:
http://www.adi-sandiego.com/news_alerts/recent_changes_statutes.asp

702, 726, subd. (d); *In re Manzy W.* (1997) 14 Cal.4th 1199, 2009.) This determination is necessarily linked to the corresponding criminal provision and so is affected, directly or indirectly, by Proposition 47. The court has continuing jurisdiction over the minor and may modify the judgment as needed. (See Welf. & Inst. Code, § 778.)

Application to enhancements for priors: Proposition 47 applies retroactively and so should affect the validity of enhancements for felony priors. (Pen. Code, § 667.5, subd. (b), for example.) Counsel may be able to assert Proposition 47 directly to have the enhancements stricken in the case on appeal, but they also may have to proceed under section 1170.18 to have the priors reduced for all purposes.

RESOURCES

General

ADI's practice article on [Potentially Favorable Changes in the Law](#),¹⁹ which discusses procedures at each stage of an appeal and post-remittitur remedies, plus basic principles of retroactivity.

Proposition 47 materials

On ADI's web page for Proposition 47 ([RECENT CHANGES IN THE LAW, STATUTES](#))²⁰

ADI Materials for clients: Proposition 47 handout and section 1170.18 form petition.

Garrick Byers' analysis

FDAP's and SDAP's briefs seeking reversal of section 1170.126 finding of dangerousness to allow application of new definition in section 1170.18(c).

[CCAP analysis for panel](#)²¹

¹⁹http://www.adi-sandiego.com/news_alerts/pdfs/2008/Favorable-changes-11-08.pdf

²⁰http://www.adi-sandiego.com/news_alerts/recent_changes_statutes.asp

²¹http://www.capcentral.org/criminal/sentencing/prop47/docs/prop_47_panel_announcement.pdf

Proposition 36 materials potentially applicable in part to Proposition 47

ADI's article on [The Battle Is Joined: *Estrada v. 1170.126*](#) (PDF)²²

[Brad O'Connell of FDAP](#) (PDF)²³

[Judge Couzens and Justice Bigelow](#) (PDF)²⁴

[Garrick Byers of the Contra Costa Public Defender](#) (PDF)²⁵

²²http://www.adi-sandiego.com/news_alerts/pdfs/2013/The_Battle_Is_Joined.pdf

²³http://www.fdap.org/downloads/articles_and_outlines/Prop36FDAP.pdf

²⁴http://www.adi-sandiego.com/news_alerts/pdfs/2012/Three_Strikes_Amendment_Couzens-Bigelow_approved_for_public_distribution.pdf

²⁵<http://www.claraweb.us/wp-content/uploads/2012/11/3Strikes-What-to-do-Now-2012-Nov-7-Byers.pdf>

APPENDIX A

PROPOSITION 47

(Selected text)

(Brief descriptions and annotations have been added by ADI. All footnotes are by ADI, not part of original text. Some formatting is changed to aid readability.)

Section 1. Title

The act shall be known as “The Safe Neighborhoods and Schools Act.”

Section 2. Findings and Declarations

The people of the State of California find and declare as follows:

The people enact the Safe Neighborhoods and Schools Act:

To ensure that prison spending is focused on Violent and Serious offenses.

To maximize alternatives for nonserious, nonviolent crime.

And to invest the savings generated from this act into prevention and support programs in K-12 schools, victim services, and mental health and drug treatment.

This act ensures that sentences for people convicted of dangerous crimes like rape, murder, and child molestation are not changed.

Section 3. Purpose and Intent

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.
- (2) Create the Safe Neighborhoods and Schools Fund, with 25 percent of the funds to be provided to the State Department of Education for crime prevention and support programs in K-12 schools, 10 percent of the funds for trauma recovery services for crime victims, and 65 percent of the funds for mental health and substance abuse treatment programs to reduce recidivism of people in the justice system.
- (3) 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.
- (4) Authorize consideration of resentencing for anyone who is currently serving a sentence for any of the offenses listed herein that are now misdemeanors.
- (5) Require a thorough review of criminal history and risk assessment of all individuals before resentencing to ensure that they do not pose a risk to public safety.
- (6) This measure will save significant state corrections dollars on an annual basis. Preliminary estimates range from \$150 million to \$250 million per year. This measure will increase investments in programs that reduce crime and improve public safety, such as prevention programs in K-12 schools, victim services, and mental health and drug treatment, which will reduce future expenditures for corrections.

Section 4. Fund

Chapter 33 (commencing with Section 7599) is added to Division 7 of Title 1 of the Government Code, to read: * * * [text omitted].

Section 5. Shoplifting – new Penal Code section 459.5

If <\$950, misdemeanor, except with “super strike” prior it is wobbler.

459.5. (a) Notwithstanding Section 459, 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). 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 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](#) may be punished pursuant to subdivision (h) of Section 1170.

(b) 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. [Return to article](#)

Section 6. Forgery

If <\$950, misdemeanor, except with “super strike” prior it is wobbler. Inapplicable if both forgery and identity theft.

Section 473 of the Penal Code is amended to read:

473. (a) Forgery is punishable by imprisonment in a county jail for not more than one year, or by imprisonment pursuant to [subdivision \(h\)](#) of Section 1170.

(b) Notwithstanding subdivision (a), any person who is guilty of forgery relating to a check, bond, bank bill, note, cashier's check, traveler's check, or money order, where the value of the check, bond, bank bill, note, cashier's check, traveler's check, or money order does not exceed nine hundred fifty dollars (\$950), 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 [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](#).

This subdivision shall not be applicable to any person who is convicted both of forgery and of identity theft, as defined in Section 530.5. [Return to article](#)

Section 7. Insufficient funds check with intent to defraud

If <\$950, misdemeanor, except with “super strike” prior it is wobbler. Inapplicable if three prior forgery offenses.

Section 476a of the Penal Code is amended to read:

476a. (a) Any person who, for himself or herself, as the agent or representative of another, or as an officer of a corporation, willfully, with intent to defraud, makes or draws or utters or delivers a check, draft, or order upon a bank or depository, a person, a firm, or a corporation, for the payment of money, knowing at the time of that making, drawing, uttering, or delivering that the maker or drawer or the corporation has not sufficient funds in, or credit with the bank or depository, person, firm, or corporation, for the payment of that check,

draft, or order and all other checks, drafts, or orders upon funds then outstanding, in full upon its presentation, although no express representation is made with reference thereto, is punishable by imprisonment in a county jail for not more than one year, **or** pursuant to [subdivision \(h\)](#) of Section 1170.

(b) 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 ~~four hundred fifty dollars (\$450)~~ nine hundred fifty dollars (\$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 [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](#).

This subdivision shall not be applicable if the defendant has previously been convicted of three or more violations of Section 470, 475, or 476,²⁶ or of this section, or of the crime of petty theft in a case in which defendant's offense was a violation also of Section 470, 475, or 476 or of this section or if the defendant has previously been convicted of any offense under the laws of any other state or of the United States which, if committed in this state, would have been punishable as a violation of Section 470, 475, or 476 or of this section or if he has been so convicted of the crime of petty theft in a case in which, if defendant's offense had been committed in this state, it would have been a violation also of Section 470, 475, or 476, or of this section.

* * *

[Return to article](#)

Section 8. Petty theft

If <\$950, misdemeanor, except with "super strike" prior it is wobbler. Inapplicable if theft may be charged as infraction.

Section 490.2 is added to the Penal Code, to read:

490.2. (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.

[Return to article](#)

Section 9. Receiving stolen property

If <\$950, misdemeanor, except with "super strike" prior it is wobbler.

Section 496 of the Penal Code is amended to read:

496. (a) Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a county jail for not more than one year, or imprisonment pursuant to [subdivision \(h\)](#) of Section 1170. However, if the value of the property

²⁶Various forgery offenses.

does not exceed nine hundred fifty dollars (\$950), the offense shall be a misdemeanor, punishable only by imprisonment in a county jail not exceeding one year,

if such person has no 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](#).

* * *

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Section 10. Petty theft with priors

If petty theft is committed by defendant with specified priors and other conditions, it is a wobbler.

Section 666 of the Penal Code is amended to read:

666. (a) ~~Notwithstanding Section 490, every person who, having been convicted three or more times of petty theft, grand theft, a conviction pursuant to subdivision (d) or (e) of Section 368, auto theft under Section 10851 of the Vehicle Code, burglary, carjacking, robbery, or a felony violation of Section 496 and having served a term therefor in any penal institution or having been imprisoned therein as a condition of probation for that offense, and who is subsequently convicted of petty theft, is punishable by imprisonment in a county jail not exceeding one year, or imprisonment pursuant to subdivision (h) of Section 1170.~~

(a) Notwithstanding Section 490,²⁷ any person described in subdivision (b) who, having been convicted of petty theft, grand theft, a conviction pursuant to subdivision [\(d\) or \(e\) of Section 368](#),²⁸ auto theft under Section 10851 of the Vehicle Code, burglary, carjacking, robbery, or a felony violation of Section 496,²⁹ and having served a term of imprisonment therefor in any penal institution or having been imprisoned therein as a condition of probation for that offense, 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.

(b) Subdivision (a) 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 [clause \(iv\) of subparagraph \(C\) of paragraph \(2\) of subdivision \(e\) of Section 667](#) or has a conviction pursuant to [subdivision \(d\) or \(e\) of Section 368](#).

(c) This section shall not be construed to preclude prosecution or punishment pursuant to subdivisions (b) to (i), inclusive, of Section 667 or Section 1170.12. [Return to article](#)

Section 11. Possession of narcotic

Misdemeanor, except felony if “super strike” priors.

Section 11350 of the Health and Safety Code is amended to read:

11350. (a) Except as otherwise provided in this division, every person who possesses (1) any controlled substance specified in subdivision (b), (c), (e), or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or specified in subdivision (h) of Section 11056, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, unless upon the written prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state, shall be punished by imprisonment in a county jail for not more than one year,

²⁷Section 490: Petty theft is punishable by fine not exceeding one thousand dollars (\$1,000), or by imprisonment in the county jail not exceeding six months, or both.

²⁸Property crimes against elders.

²⁹Receiving stolen property.

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except that such person shall instead be punished pursuant to [subdivision \(h\)](#) of Section 1170 of the Penal Code 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](#) of the Penal Code or for an offense requiring registration pursuant to subdivision (c) of Section [290](#) of the Penal Code.

~~(b) Except as otherwise provided in this division, every person who possesses any controlled substance specified in subdivision (e) of Section 11054 shall be punished by imprisonment in a county jail for not more than one year or pursuant to subdivision (h) of Section 1170 of the Penal Code.~~

* * *

[Return to article](#)

Section 12. Possession of concentrated cannabis

Misdemeanor, except wobbler if “super strike” priors.

Section 11357 of the Health and Safety Code is amended to read:

11357. (a) Except as authorized by law, every person who possesses any concentrated cannabis shall be punished by imprisonment in the county jail for a period of not more than one year or by a fine of not more than five hundred dollars (\$500), or by both such fine and imprisonment,

except that such person may instead be punished pursuant to [subdivision \(h\)](#) of Section 1170 of the Penal Code 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](#) of the Penal Code or for an offense requiring registration pursuant to subdivision (c) of Section [290](#) of the Penal Code.

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Section 13. Possession of non-narcotic controlled substance

Misdemeanor, except wobbler if “super strike” priors.

Section 11377 of the Health and Safety Code is amended to read:

11377. (a) Except as authorized by law and as otherwise provided in subdivision (b) or Section 11375, or in Article 7 (commencing with Section 4211) of Chapter 9 of Division 2 of the Business and Professions Code, every person who possesses any controlled substance which is (1) classified in Schedule III, IV, or V, and which is not a narcotic drug, (2) specified in subdivision (d) of Section 11054, except paragraphs (13), (14), (15), and (20) of subdivision (d), (3) specified in paragraph (11) of subdivision (c) of Section 11056, (4) specified in paragraph (2) or (3) of subdivision (f) of Section 11054, or (5) specified in subdivision (d), (e), or (f) of Section 11055, unless upon the prescription of a physician, dentist, podiatrist, or veterinarian, licensed to practice in this state, shall be punished by imprisonment in a county jail for a period of not more than one year ~~or pursuant to subdivision (h) of Section 1170 of the Penal Code;~~

except that such person may instead be punished pursuant to [subdivision \(h\)](#) of Section 1170 of the Penal Code 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](#) of the Penal Code or for an offense requiring registration pursuant to subdivision (c) of Section [290](#) of the Penal Code.

~~(b) (1) Any person who violates subdivision (a) by unlawfully possessing a controlled substance specified in subdivision (f) of Section 11056, and who has not previously been convicted of a violation involving a controlled substance specified in subdivision (f) of Section 11056, is guilty of a misdemeanor.~~

~~(2) Any person who violates subdivision (a) by unlawfully possessing a controlled substance specified in subdivision (g) of Section 11056 is guilty of a misdemeanor.~~

~~(3) Any person who violates subdivision (a) by unlawfully possessing a controlled substance specified in paragraph (7) or (8) of subdivision (d) of Section 11055 is guilty of a misdemeanor.~~

~~(4) Any person who violates subdivision (a) by unlawfully possessing a controlled substance specified in paragraph (8) of subdivision (f) of Section 11057 is guilty of a misdemeanor.~~

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~~(b) In addition to any fine assessed under subdivision (b), the~~ The judge may assess a fine not to exceed seventy dollars (\$70) against any person who violates subdivision (a), with the proceeds of this fine to be used in accordance with Section 1463.23 of the Penal Code. The court shall, however, take into consideration the defendant's ability to pay, and no defendant shall be denied probation because of his or her inability to pay the fine permitted under this subdivision.

[Return to article](#)

Section 14. Resentencing

Section 1170.18 is added to the Penal Code, to read:

1170.18. (a) A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ("this act") had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377³⁰ of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code,³¹ as those sections have been amended or added by this act.

(b) Upon receiving a petition under subdivision (a), the court shall determine whether the petitioner satisfies the criteria in subdivision (a). If the petitioner satisfies the criteria in subdivision (a), the petitioner's felony sentence shall be recalled and the petitioner resentenced to a misdemeanor pursuant to Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, those sections have been amended or added by this act, unless the court, in its discretion, determines that resentencing the petitioner would pose an [unreasonable risk of danger to public safety](#). In exercising its discretion, the court may consider all of the following:

(1) The petitioner's criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes.

(2) The petitioner's disciplinary record and record of rehabilitation while incarcerated.

(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.

(c) As used throughout this Code, "unreasonable risk of danger to public safety" means an unreasonable risk that the petitioner will commit a new violent felony within the meaning of [clause \(iv\) of subparagraph \(C\) of paragraph \(2\) of subdivision \(e\) of Section 667](#).

(d) A person who is resentenced pursuant to subdivision (b) shall be given credit for time served and shall be subject to parole for one year following completion of his or her sentence, unless the court, in its discretion, as part of its resentencing order, releases the person from parole. Such person is subject to Section 3000.08 parole supervision by the Department of Corrections and Rehabilitation and the jurisdiction of the court in the county in which the parolee is released or resides, or in which an alleged violation of supervision has occurred, for the purpose of hearing petitions to revoke parole and impose a term of custody.

(e) Under no circumstances may resentencing under this section result in the imposition of a term longer than the original sentence.³²

³⁰Possession of narcotic, concentrated cannabis, non-narcotic.

³¹Shoplifting, forgery, fraudulent insufficient funds check, petty theft, receiving stolen property, petty theft with prior.

³²Counsel should not assume this provision would immunize the client from adverse consequences in the form of correction of unauthorized sentences during the section 1170.18 proceeding.

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(f) A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors.

(g) If the application satisfies the criteria in subdivision (f), the court shall designate the felony offense or offenses as a misdemeanor.

(h) Unless requested by the applicant, no hearing is necessary to grant or deny an application filed under subsection (f).

(i) The provisions of this section shall not apply to persons who have 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](#).

(j) Any petition or application under this section shall be filed within three years after the effective date of the act that added this section or at a later date upon a showing of good cause.

(k) Any felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) 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.

(l) If the court that originally sentenced the petitioner is not available, the presiding judge shall designate another judge to rule on the petition or application.

(m) Nothing in this section is intended to diminish or abrogate any rights or remedies otherwise available to the petitioner or applicant.

(n) Nothing in this and related sections is intended to diminish or abrogate the finality of judgments in any case not falling within the purview of this act.

(o) A resentencing hearing ordered under this act shall constitute a “post-conviction release proceeding” under paragraph (7) of subdivision (b) of Section 28 of Article I of the California Constitution (Marsy’s Law).

[Return to article](#)

Section 15. Amendment.

This act shall be broadly construed to accomplish its purposes. The provisions of this measure may be amended by a two-thirds vote of the members of each house of the Legislature and signed by the Governor so long as the amendments are consistent with and further the intent of this act. The Legislature may by majority vote amend, add, or repeal provisions to further reduce the penalties for any of the offenses addressed by this act.

Section 16. Severability.

If any provision of this measure, or part of this measure, or the application of any provision or part to any person or circumstances, is for any reason held to be invalid, the remaining provisions, or applications of provisions, shall not be affected, but shall remain in full force and effect, and to this end the provisions of this measure are severable.

Section 17. Conflicting Initiatives.

(a) This act changes the penalties associated with certain nonserious, nonviolent crimes. In the event that this measure and another initiative measure or measures relating to the same subject appear on the same statewide election ballot, the provisions of the other measure or measures shall be deemed to be in conflict with this measure. In the event that this measure receives a greater number of affirmative votes, the provisions of this measure shall prevail in their entirety, and the provisions of the other measure shall be null and void. However, in the event that this measure and another measure or measures containing provisions that eliminate penalties for the possession of concentrated cannabis are approved at the same election, the voters intend such provisions relating to concentrated cannabis in the other measure or measures to prevail, regardless of which measure receives a greater number of affirmative votes. The voters also intend to give full force and effect to all other applications and provisions of this measure, and the other measure or measures, but only to the extent the other measure or measures are not inconsistent with the provisions of this act.

(b) If this measure is approved by the voters but superseded by law by any other conflicting measure approved by the voters at the same election, and the conflicting ballot measure is later held invalid, this measure shall be self-executing and given full force and effect.

Section 18. Liberal Construction.

This act shall be liberally construed to effectuate its purposes.

APPENDIX B

SELECTED STATUTES REFERENCED IN INITIATIVE

SUPER STRIKES

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

* * *

(e)(2)(C)(iv) The defendant suffered a prior serious and/or violent felony conviction, as defined in subdivision (d) of this section, for any of the following felonies:

(I) A "[sexually violent offense](#)" as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code.

(II) Oral copulation with a child who is under 14 years of age, and who is more than 10 years younger than he or she as defined by Section 288a, sodomy with another person who is under 14 years of age and more than 10 years younger than he or she as defined by Section 286, or sexual penetration with another person who is under 14 years of age, and who is more than 10 years younger than he or she, as defined by Section 289.

(III) A lewd or lascivious act involving a child under 14 years of age, in violation of Section 288.

(IV) Any homicide offense, including any attempted homicide offense, defined in Sections 187 to 191.5, inclusive.

(V) Solicitation to commit murder as defined in Section 653f.

(VI) Assault with a machine gun on a peace officer or firefighter, as defined in paragraph (3) of subdivision (d) of Section 245.

(VII) Possession of a weapon of mass destruction, as defined in paragraph (1) of subdivision (a) of Section 11418.

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

Penal Code section 290

* * *

(c) The following persons shall be required to register:

Any person who, since July 1, 1944, has been or is hereafter convicted in any court in this state or in any federal or military court of a violation of Section 187 committed in the perpetration, or an attempt to perpetrate, rape or any act punishable under Section 286, 288, 288a, or 289, Section 207 or 209 committed with intent to violate Section 261, 286, 288, 288a, or 289, Section 220, except assault to commit mayhem, subdivision (b) and (c) of Section 236.1, Section 243.4, paragraph (1), (2), (3), (4), or (6) of subdivision (a) of Section 261, paragraph (1) of subdivision (a) of Section 262 involving the use of force or violence for which the person is sentenced to the state prison, Section 264.1, 266, or 266c, subdivision (b) of Section 266h, subdivision (b) of Section 266i, Section 266j, 267, 269, 285, 286, 288, 288a, 288.3, 288.4, 288.5, 288.7, 289, or 311.1, subdivision (b), (c), or (d) of Section 311.2, Section 311.3, 311.4, 311.10, 311.11, or 647.6, former Section 647a, subdivision (c) of Section 653f, subdivision 1 or 2 of Section 314, any offense involving lewd or lascivious conduct under Section 272, or any felony violation of Section 288.2; any statutory predecessor that includes all elements of one of the above-mentioned offenses; or any person who since that date has been or is hereafter convicted of the attempt or conspiracy to commit any of the above-mentioned offenses.

OTHER STATUTES

(SELECTED)

Penal Code section 368**(property crimes against elders)**

* * *

(d) Any person who is not a caretaker who violates any provision of law proscribing theft, embezzlement, forgery, or fraud, or who violates Section 530.5 proscribing identity theft, with respect to the property or personal identifying information of an elder or a dependent adult, and who knows or reasonably should know that the victim is an elder or a dependent adult, is punishable as follows:

(1) By a fine not exceeding two thousand five hundred dollars (\$2,500), or by imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment, or by a fine not exceeding ten thousand dollars (\$10,000), or by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years, or by both that fine and imprisonment, when the moneys, labor, goods, services, or real or personal property taken or obtained is of a value exceeding nine hundred fifty dollars (\$950).

(2) By a fine not exceeding one thousand dollars (\$1,000), by imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment, when the moneys, labor, goods, services, or real or personal property taken or obtained is of a value not exceeding nine hundred fifty dollars (\$950).

(e) Any caretaker of an elder or a dependent adult who violates any provision of law proscribing theft, embezzlement, forgery, or fraud, or who violates Section 530.5 proscribing identity theft, with respect to the property or personal identifying information of that elder or dependent adult, is punishable as follows:

(1) By a fine not exceeding two thousand five hundred dollars (\$2,500), or by imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment, or by a fine not exceeding ten thousand dollars (\$10,000), or by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years, or by both that fine and imprisonment, when the moneys, labor, goods, services, or real or personal property taken or obtained is of a value exceeding nine hundred fifty dollars (\$950).

(2) By a fine not exceeding one thousand dollars (\$1,000), by imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment, when the moneys, labor, goods, services, or real or personal property taken or obtained is of a value not exceeding nine hundred fifty dollars (\$950).

Penal Code section 1170, subdivision (h)**(sentence to state prison)**

(h) (1) Except as provided in paragraph (3), a felony punishable pursuant to this subdivision where the term is not specified in the underlying offense shall be punishable by a term of imprisonment in a county jail for 16 months, or two or three years.

(2) Except as provided in paragraph (3), a felony punishable pursuant to this subdivision shall be punishable by imprisonment in a county jail for the term described in the underlying offense.

(3) Notwithstanding paragraphs (1) and (2), where the defendant (A) has a prior or current felony conviction for a serious felony described in subdivision (c) of Section 1192.7 or a prior or current conviction for a violent felony described in subdivision (c) of Section 667.5, (B) has a prior felony conviction in another jurisdiction for an offense that has all the elements of a serious felony described in subdivision (c) of Section 1192.7 or a violent felony described in subdivision (c) of Section 667.5, (C) is required to register as a sex offender pursuant to Chapter 5.5 (commencing with Section 290) of Title 9 of Part 1, or (D) is convicted of a crime and as part of the sentence an enhancement pursuant to Section 186.11 is imposed, an executed sentence for a felony punishable pursuant to this subdivision shall be served in state prison.

(4) Nothing in this subdivision shall be construed to prevent other dispositions authorized by law, including pretrial diversion, deferred entry of judgment, or an order granting probation pursuant to Section 1203.1.

(5) (A) Unless the court finds that, in the interests of justice, it is not appropriate in a particular case, the court, when imposing a sentence pursuant to paragraph (1) or (2) of this subdivision, shall suspend execution of a concluding portion of the term for a period selected at the court's discretion.

(B) The portion of a defendant's sentenced term that is suspended pursuant to this paragraph shall be known as mandatory supervision, and shall begin upon release from custody. During the period of mandatory supervision, the defendant shall be supervised by the county probation officer in accordance with the terms, conditions, and procedures generally applicable to persons placed on probation, for the remaining unserved portion of the sentence imposed by the court. The period of supervision shall be mandatory, and may not be earlier terminated except by court order. Any proceeding to revoke or modify mandatory supervision under this subparagraph shall be conducted pursuant to either subdivisions (a) and (b) of Section 1203.2 or Section 1203.3. During the period when the defendant is under such supervision, unless in actual custody related to the sentence imposed by the court, the defendant shall be entitled to only actual time credit against the term of imprisonment imposed by the court. Any time period which is suspended because a person has absconded shall not be credited toward the period of supervision.

(6) The sentencing changes made by the act that added this subdivision shall be applied prospectively to any person sentenced on or after October 1, 2011.

(7) The sentencing changes made to paragraph (5) by the act that added this paragraph shall become effective and operative on January 1, 2015, and shall be applied prospectively to any person sentenced on or after January 1, 2015.

Welfare and Institutions Code section 6600(b)
(sexually violent offenses)

"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 that are committed on, before, or after the effective date of this article and result in a conviction or a finding of not guilty by reason of insanity, as defined in subdivision (a): a felony violation of Section 261, 262, 264.1, 269, 286, 288, 288a, 288.5, or 289 of the Penal Code, or any felony violation of Section 207, 209, or 220 of the Penal Code, committed with the intent to commit a violation of Section 261, 262, 264.1, 286, 288, 288a, or 289 of the Penal Code.