



Voters Pass Proposition 47

The On November 4, 2014, California voters passed Proposition 47, which enacts the Safe Neighborhoods and Schools Act. It reduces a number of low-level theft and drug offenses to straight misdemeanors unless the defendant has specified prior convictions. See below for a brief summary of the relevant changes.

Statutes Amended and Added by Proposition 47

Adds Penal Code section 459.5

Defines shoplifting (value of property must not exceed \$950) and states that the offense shall be punished as a misdemeanor unless the defendant has one or more prior convictions for an offense specified in Penal Code section 667, subdivision (e)(2)(C)(iv) or an offense requiring registration under Penal Code section 290. The statute also provides that "[n]o person who is charged with shoplifting may also be charged with burglary or theft of the same property."

Amends Penal Code section 473 (punishment for forgery)

Any forgery relating to a check, bond, bank bill, note, cashier's check, traveler's check, or money order where the amount is under \$950 shall be punished as a misdemeanor unless the defendant has one or more prior convictions for an offense specified in Penal Code section 667, subdivision (e)(2)(C)(iv) or an offense requiring registration under Penal Code section 290. The lesser punishment is not required if the person is convicted of both forgery and identity theft (Pen. Code, § 530.5).

Amends Penal Code section 476a (making or delivering check with insufficient funds)

If the total amount of all checks, drafts, or orders that the defendant is charged with and convicted of making, drawing, or uttering does not exceed \$950 (previously the amount was \$450), the offense is punishable only as a misdemeanor unless the defendant has one or more prior convictions for an offense specified in Penal Code section 667, subdivision (e)(2)(C)(iv) or an offense requiring registration under Penal Code section 290. The lesser penalty also does not apply if the defendant has previously been convicted of three or more violations of specified crimes (Pen. Code, §§ 470, 475, 476, 476a). Previously, just one prior conviction was required.

Adds Penal Code section 490.2

Notwithstanding Penal Code 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 \$950 shall be considered petty theft and shall be punished as a

misdemeanor, unless the defendant has one or more prior convictions for an offense specified in Penal Code section 667, subdivision (e)(2)(C)(iv) or an offense requiring registration under Penal Code section 290.

Amends Penal Code section 496 (receiving stolen property)

If the value of the property does not exceed \$950, the offense will be punished as a misdemeanor unless the defendant has one or more prior convictions for an offense specified in Penal Code section 667, subdivision (e)(2)(C)(iv) or an offense requiring registration under Penal Code section 290. Previously, the prosecution had discretion as to whether to file the offense as a misdemeanor. The amendment removes this discretion.

Amends Health and Safety Code sections 11350 (unlawful possession of controlled substance), 11357 (possession cannabis), 11377 (possession of controlled substance previously classified as restricted or dangerous drugs)

Offense shall be punished as misdemeanor unless the defendant has one or more prior convictions for an offense specified in Penal Code section 667, subdivision (e)(2)(C)(iv) or an offense requiring registration under Penal Code section 290.

Amends Penal Code section 666 (petty theft with a prior)

A petty theft conviction may be punished as a felony pursuant to section 666 if the following two conditions are met.

First, the person was previously convicted of, and served a prison term for or was imprisoned as a condition of probation for, any of the following offenses:

- petty theft
- grand theft
- a violation of Penal Code section 368, subdivision (d) or (e) (involving theft crimes against elders)
- auto theft (Veh. Code, § 10851)
- burglary
- carjacking
- robbery, or
- a felony violation of Penal Code section 496.

Second, the person

- is required to register pursuant to the Sex Offender Registration Act (SORA), or
- has a prior violent or serious felony conviction, as specified in Penal Code section 667, subdivision (e)(2)(C)(iv), or
- has a conviction for violating Penal Code section 368, subdivision (d) or (e).

Notes on amended section 666: Prior to Proposition 47's amendment to section 666, subdivision (a) allowed a petty theft conviction to be punished as felony only if the defendant had been convicted *three or more* times of specified crimes and had served a term for the

offense in any penal institution or had been imprisoned therein as a condition of probation. Former section 666, subdivision (b) allowed a petty theft conviction to be punished as a felony when the person had been convicted of only one of the enumerated offenses (with the same imprisonment requirement) if the person was required to register under SORA or had previously been convicted of ANY serious or violent felony (see Pen. Code, §§ 667.5, subd. (c), 1192.7, subd. (c)). The newly amended version of section 666 allows a petty theft conviction to be punished as a felony if the defendant (1) has been convicted of *one* of the specified crimes and incarcerated for the offense and (2) is required to register under SORA, has a prior violent or serious felony conviction under section 667, subdivision (e)(2)(C)(iv), or has a section 368, subdivision (d) or (e) conviction.

The eligibility requirements for misdemeanor punishment in amended section 666 differ from the other statutes affected by Proposition 47. The other statutes provide that the offense at issue will be punished as a misdemeanor unless the defendant has one or more prior convictions for an offense specified in Penal Code section 667, subdivision (e)(2)(C)(iv) or an offense requiring registration under Penal Code section 290. In contrast to this, amended section 666 states that petty theft with a prior may only be punished as a felony if the above requirements are met. The nature of prior convictions permitting felony treatment is both narrower (prior conviction of only a certain class of serious or violent felonies elevate petty theft to felony level) and broader (any person required to register under SORA and any prior conviction of section 368, subdivision (d) or (e) (which is not a serious or violent felony) elevates petty theft to a felony). Rather than only excluding defendants who have one or more prior convictions for an offense requiring registration under section 290, amended section 666 excludes defendants who are required to register pursuant to SORA (Pen. Code, §§ 290-290.024). There may be cases where a defendant is required to register under SORA based on an offense that is not listed in Penal Code section 290.

Proposition 47 does not specify whether the prior enumerated theft conviction for which the person served time must be a prior conviction separate from the prior violent or serious felony conviction or the section 368, subdivision (d) or (e) conviction required by amended subdivision (b).

Note also that section 666 provides for imprisonment in state prison (rather than county jail under section 1170, subdivision (h)) and explicitly states that section 666 does not preclude prosecution or punishment pursuant to Penal Code section 667, subdivisions (b) through (i), or section 1170.12.

Effective Date

Proposition 47's effective date is November 5, 2014. (See Cal. Const., art. II, § 10(a).)

Retroactivity

In addition to lessening the punishment for the offenses listed above, Proposition 47 establishes resentencing procedures for defendants who were previously convicted of a felony offense that would be a misdemeanor under the new law. The resentencing procedures

provided in Proposition 47 (summarized below) are very similar to the resentencing procedures in the Three Strikes Reform Act of 2012 (Prop. 36). As a result, some of the same issues in Proposition 36 cases are likely to be present in Proposition 47 cases.

Defendants Currently Serving Prison Sentences

Proposition 47 adds Penal Code section 1170.18, which provides that "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 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 11377 of the Health and 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." (Pen. Code, § 1170.18, subd. (a).)

If the petitioner is eligible for resentencing, the felony sentence shall be recalled and the petitioner shall be resentenced to a misdemeanor unless the court determines that resentencing the petitioner would pose an "unreasonable risk of danger to public safety." (Pen. Code, § 1170.18, subd. (b).) The court may consider the petitioner's criminal conviction history, disciplinary record and record of rehabilitation while incarcerated, and any other evidence the court determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety. (Pen. Code, § 1170.18, subd. (b)(1)-(3).)

Unlike the Three Strikes Reform Act, Proposition 47 defines "unreasonable risk of public safety" as follows: "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." (Pen. Code, § 1170.18, subd. (c).) Parole requirements for resentenced petitioners are also outlined. (Pen. Code, § 1170.18, subd. (d).) Petitions for resentencing must be filed within three years of the effective date of Proposition 47; petitions filed at a later date must make a showing of good cause. (Pen. Code, § 1170.18, subd. (j).)

Cases Pending on Direct Appeal

It is unsettled how Proposition 47 will apply to cases that are currently pending on direct appeal. If appointed appellate counsel believes that Proposition 47 applies in a case where the defendant was sentenced within the last 120 days, counsel should explore whether the trial court would recall the defendant's sentence under Penal Code section 1170, subdivision (d)(1). Appellate counsel may wish to discuss this issue with trial counsel.

In pending appeals, counsel should consider presenting the argument that Proposition 47 applies retroactively to an eligible defendant who was sentenced before Proposition 47's effective date, but whose judgment was not final until after that date. (See *In re Estrada* (1965) 63 Cal.2d 740.) This issue has been raised in cases involving the Three Strikes Reform Act and is currently pending in the California Supreme Court in *People v. Conley*, S211275 (the case is fully briefed but no oral argument date has been set). The Courts of Appeal have reached conflicting decisions on this issue. (Compare *People v. Contreras* (2013) 221 Cal.App.4th 558, review granted Jan. 29, 2014, S215516/G047603 with *People v.*

Lester (2013) 220 Cal.App.4th 291, review granted Aug. 14, 2013, S211494/E055009.) Because of the similarities between the resentencing provisions in Proposition 47 and the Three Strikes Reform Act, the court's reasoning in *Conley* will likely be relevant to Proposition 47 cases on the issue of retroactivity. The opening brief in *Conley* argues that *Estrada* applies in the context of the Three Strikes Reform Act, and is available on CCAP's website [here](#).

For more information on *Estrada*, see CCAP Assistant Director Gary McCurdy's articles on the development of *Estrada* in the California Supreme Court and the Courts of Appeal:

[When Punishment No Longer Fits The Crime \(PDF\)](#)

[Estrada, The Rest of the Story \(PDF\)](#)

Individuals Who Have Completed Their Sentences

Penal Code section 1170.18 also provides that "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 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." (Pen. Code, § 1170.18, subd. (f).) If the petitioner is eligible, "the court shall designate the felony offense or offenses as a misdemeanor." (Pen. Code, § 1170.18, subd. (g).)

Appealability

If a trial court concludes that a petitioner is ineligible to file a recall petition or application under Proposition 47, the court's order will likely be appealable. (See *Teal v. Superior Court (Los Angeles County)* (2014) __ Cal.4th __ (S211708, decided 11/6/2014) .)

Resentenced Petitioners May Not Own or Possess Firearms

A felony conviction that is resentenced or designated as a misdemeanor under Proposition 47 shall be considered a misdemeanor for all purposes with one exception. Such a resentencing shall not permit the "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." (Pen. Code, § 1170.18, subd. (k).)

Eligibility for Proposition 47 Relief Versus Eligibility for Proposition 36 Relief

While Proposition 36 and Proposition 47 have similarities, there is a difference in the eligibility requirements that should be noted. Defendants are not eligible for relief under the Three Strikes Reform Act (Prop. 36) if (1) the three strikes sentence was or would be imposed for a serious or violent felony (Pen. Code, §§ 667.5, subd. (c), 1192.7, subd. (c)); (2) the current sentence was or would be imposed for an offense listed in Penal Code section 667, subdivision (e)(2)(C)(i)-(iii) or Penal Code section 1170.12, subdivision (c)(2)(C)(i)-(iii); or (3) the defendant has prior convictions for any of the offenses listed in Penal Code

section 667, subdivision (e)(2)(C)(iv) or Penal Code section 1170.12, subdivision (c)(2)(C)(iv). (See Pen. Code, §§ 667, subd. (e)(2)(c), 1170.12, subd. (c)(2)(C), 1170.126, subdivision (e).) In contrast, the exclusionary provision in Proposition 47 is narrower. In most circumstances, a defendant will only be ineligible for relief under Proposition 47 if he or she has one or more prior convictions for an offense specified in Penal Code section 667, subdivision (e)(2)(C)(iv) or an offense requiring registration under Penal Code section 290. As a result, there may be cases where a defendant is ineligible for relief under the Three Strikes Reform Act, but qualifies for a misdemeanor sentence under Proposition 47.

Helpful Links

The full text of Proposition 47 is available [here \(PDF\)](#).

For more information about the prior convictions that render a defendant ineligible for Proposition 47 consideration, see the relevant excerpts from Penal Code sections 667, subdivision (e)(2)(C)(iv), 290, subdivision (c), and Welfare and Institutions Code section 660, subdivision (b) available [here \(PDF\)](#).