PROPOSITION 64:

"Adult Use of Marijuana Act"

Resentencing Procedures and Other Selected Provisions

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I. INTRODUCTION

Proposition 64, the "Control, Regulate and Tax Adult Use of Marijuana Act," commonly known as the "Adult Use of Marijuana Act." ("the Act") was adopted by the voters on November 8, 2016. The Act has four major divisions:

- It permits adults, 21 years of age or older, to legally possess, transport, purchase, consume, or share up to one ounce (≤ 28.5g) of marijuana, and up to 8 grams of marijuana concentrates. It also permits adults, 21 years of age or older, to grow up to 6 marijuana plants per household out of public view. In addition to its legalization provisions, the Act also reduces the penalty for many marijuana offenses – what previously was a felony in many cases has been changed to a misdemeanor or a wobbler. Several misdemeanor offenses are now infractions. A number of statutes are created to regulate the consumption of marijuana in public.
- The Act has a resentencing provision that permits persons previously convicted of designated marijuana offenses to obtain a reduced conviction or sentence, if they would have received the benefits of the Act had it been in place when the crime was committed. If the crime was for conduct now legal under the Act, there is a provision requiring the court to "dismiss and seal" the record of conviction.
- The Act establishes a comprehensive system to control the cultivation, distribution and sale of nonmedical marijuana and marijuana products.
- The Act creates a marijuana tax to be imposed on purchasers of marijuana and marijuana products.

The last two points are beyond the scope of these materials.

A. Application of the law related to Propositions 36 and 47

It is readily apparent that either by use of the same language or by cross-reference, the Act uses some of the provisions in Propositions 36 and 47 in fashioning its resentencing procedures. For example, the court may deny resentencing if to do so would create an "unreasonable risk of danger to public safety." (Health & Saf. Code, § 11361.8, subd. (b).*) The Act further provides that "[a]s used in this section, 'unreasonable risk of danger to public safety' has the same meaning as provided in subdivision (c) of Section 1170.18 of the Penal Code." (§ 11361.8, subd. (b)(2).) Furthermore, the fundamental structure of the Act is the same as Propositions 36 and 47 – all three initiatives reduce the penalties for designated offenses and provide a re-sentencing

* Unless otherwise indicated, all references are to the Health and Safety Code

mechanism for persons sentenced under the old law. Accordingly, to the extent legal issues are addressed under one of the initiatives, their resolution likely will inform the resolution of the same issue in the context of other initiatives.

II. EFFECTIVE DATE

A. Effective date, generally

Since the Act does not designate a specific effective date, it became effective on November 9, 2016. "An initiative statute or referendum approved by a majority of the votes thereon takes effect the day after the election unless the measure provides otherwise." (Calif. Const., art. 2, § 10, subd. (a).) Clearly the new law will apply to all crimes committed on or after November 9, 2016. The issue is the extent to which it applies to crimes committed prior to the effective date.

B. Application of the *Estrada* rule

Whether the reduced penalty provisions of the Act will operate retroactively to crimes committed prior to November 9, 2016 will depend on the application of the seminal case of *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*).

Estrada teaches that "[w]hen the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final. This intent seems obvious, because to hold otherwise would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology." (*Estrada*, *supra*, 63 Cal.2d at p. 745.)

The issue was addressed by our Supreme Court in *People v. Conley* (2016) 63 Cal.4th 646 (*Conley*), a Proposition 36 case. "In *Estrada,* we considered the retroactive application of a statutory amendment that reduced the punishment prescribed for the offense of escape without force or violence. 'The problem,' we explained, 'is one of trying to ascertain the legislative intent—did the Legislature intend the old or new statute to apply? Had the Legislature expressly stated which statute should apply, its determination, either way, would have been legal and constitutional.' [Citation.] But in the absence of any textual indication of the Legislature's intent, we inferred that the Legislature must have intended for the new penalties, rather than the old, to apply. [Citation.] We reasoned that when the Legislature determines that a lesser punishment suffices for a criminal act, there is ordinarily no reason to continue imposing the more severe penalty, beyond simply ' "satisfy[ing] a desire for vengeance." ' [Citation.] Thus, we concluded, '[i]t is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could

apply,' including 'to acts committed before its passage[,] provided the judgment convicting the defendant of the act is not final.' [Citation.]" (*Conley*, at p. 656.)

In construing the legislative intent of the electorate in enacting Proposition 36, the court rejected any retroactive application of *Estrada* to cases not final as of the effective date. It rejected an automatic right to resentencing for three reasons:

- Proposition 36 directly addressed the question of retroactivity in the resentencing provisions under Penal Code section 1170.126, which extended the benefits of the new law to persons currently serving a sentence, whether or not the case is final.
- The resentencing provisions allow only a limited right to resentencing, excluding persons who would pose an unreasonable risk of danger to the public if resentenced. "Where, as here, the enacting body creates a special mechanism for application of the new lesser punishment to persons who have previously been sentenced, and where the body expressly makes retroactive application of the lesser punishment contingent on a court's evaluation of the defendant's dangerousness, we can no longer say with confidence, as we did in *Estrada,* that the enacting body lacked any discernible reason to limit application of the law with respect to cases pending on direct review. On the contrary, to confer an automatic entitlement to resentencing under these circumstances would undermine the apparent intent of the electorate that approved [Penal Code] section 1170.126: to create broad access to resentencing for prisoners previously sentenced to indeterminate life terms, but subject to judicial evaluation of the impact of resentencing on public safety, based on the prisoner's criminal history, record of incarceration, and other factors. This public safety requirement must be applied realistically, with careful consideration of the Reform Act's purposes of mitigating excessive punishment and reducing prison overcrowding. But given that [Penal Code] section 1170.126, by its terms, applies to all prisoners 'presently serving' indeterminate life terms, we can discern no basis to conclude that the electorate would have intended for courts to bypass the public safety inquiry altogether in the case of defendants serving sentences that are not yet final." (*Conley*, *supra*, 63 Cal.4th at pp. 658-659.)
- "[U]nlike in *Estrada,* the revised sentencing provisions at issue in this case do more than merely reduce previously prescribed criminal penalties. They also establish a new set of disqualifying factors that preclude a third strike defendant from receiving a second strike sentence. (See Pen. Code, § 1170.12, subd. (c)(2)(C).) The sentencing provisions further require that these factors be 'plead[ed] and prove[d]' by the prosecution. (*Ibid.*)" (*Conley*, *supra*, 63 Cal.4th at p. 659.)

In its conclusion, the court observed that "our decision in *Estrada . . .* recognizes that the retroactive application of ameliorative changes to the criminal laws is ultimately governed by the intent of the legislative body. And we have expressly rejected the notion that *Estrada* 'dictate[s] to legislative drafters the forms in which laws must be written to express the legislative intent.' [Citation.] '[W]hat *is* required is that the Legislature demonstrate its intention with sufficient clarity that a reviewing court can discern and effectuate it.' [Citation.] As explained above, the text, structure, and purposes of the Act all lead to the conclusion that the electorate meant what

it said when it approved [Penal Code] section 1170.126: Prisoners presently serving indeterminate life terms imposed under the prior version of the Three Strikes law, including those with nonfinal judgments, may seek resentencing under the Act, but subject to judicial determination of whether resentencing would pose an unreasonable danger to the public." (*Conley*, *supra*, 63 Cal.4th at p. 661; italics in original.)

There seems little doubt that *Conley's* reasoning would be equally applicable to the Act. Each of the three reasons for rejecting a retroactive application of *Estrada* to Proposition 36 cases is fully applicable to cases under the Act. Accordingly, persons "currently serving a sentence for a conviction, whether by trial or by open or negotiated plea, who would not have been guilty of an offense or who would have been guilty of a lesser offense under the [Act] had that Act been in effect at the time of the offense," will be required to petition for resentencing under section 11361.8, even though the conviction is not final as of November 9, 2016.

People v. Lin (2018) 26 Cal.App.5th Supp. 10, addresses the circumstance where a defendant is charged with, but not convicted of, a felony marijuana violation when the initiative passed. The district attorney refiled the charges as misdemeanors under the Act's provisions; the defendant's demurred, contending they cannot be charged with any crime. The trial court sustained the demurrer, and the appellate panel reversed, reasoning: "There is no ambiguity concerning how to address the penalties for those convicted of marijuana-related offenses prior to Election Day in 2016; they are eligible to seek a lesser penalty through the mechanism outlined in Proposition 64. There is also no ambiguity concerning penalties facing those charged with marijuana-related offenses after Election Day 2016; they face the lesser penalties set out in Proposition 64. The proposition is silent concerning those in Respondents' situation: facing but not yet convicted of felony marijuana-related offenses prior to Election Day 2016. The Estrada rule applies to these cases. The conduct alleged in the amended complaints remains criminal under California law, but the lesser penalties in the amended statutes will apply." (*Lin*, at p. 19.)

III. REDUCED PENALTIES FOR SPECIFIED MARIJUANA OFFENSES

A. Provisions applicable to adults

The Act eliminates the criminal consequences for the personal level possession and cultivation of marijuana by persons 21 years of age or older. It also reduces the punishment for many other marijuana offenses. Refer to Appendix I of these materials for a detailed breakdown of the changes made by the Act.

Specifically, section 11362.1, subdivision (a), subject to certain exceptions, allows persons 21 years old or older to:

- Possess, process, transport, purchase, obtain or give away to persons 21 years old or older without compensation, not more than 28.5 grams of marijuana, other than concentrated cannabis.

- Possess, process, transport, purchase, obtain or give away to persons 21 years old or older without compensation, not more than 8 grams of concentrated cannabis, including what is contained in marijuana products.
- Possess, plant, cultivate, harvest, dry, or process not more than 6 living marijuana plants and products produced by the plants, within a person's private residence or grounds, in a locked place, and not open to public view. (See § 11362.2.)
- Smoke or ingest marijuana and marijuana products.
- Possess, transport, purchase, obtain, use, manufacture or give away without compensation to persons 21 years of age or older, any marijuana accessories.

Persons with prior convictions for a "super strike" or registration requirement

Unlike Propositions 36 and 47, the Act does not directly restrict the reduction in punishment for new offenses based on the defendant's current crime or criminal record. Under Proposition 36, a defendant may not receive the benefit of reduced punishment for any new crimes if he or she has committed the new offense under designated circumstances, including a crime requiring registration under Penal Code section 290, subdivision (c), or has suffered a prior conviction for designated serious or violent offenses. (Pen. Code, § 1170.12, subd. (c)(2)(C).) Similarly, the reduced punishment provisions of Proposition 47 are not available to defendants who have a prior conviction for any of the "super strikes" listed in Penal Code section 667, subdivision (e)(2)(C)(iv), or are required to register as a sex offender under Penal Code section 290, subdivision (c). (See Appendix III for a detailed listing of the "super strike" offenses.) No such restrictions apply to the marijuana offenses amended by the Act.

However, if the defendant *does have* a prior "super strike" conviction, or is required to register as a sex offender under Penal Code section 290, subdivision (c), a higher level of punishment *may* be imposed for certain crimes defined in the Act. For example, section 11358, governing cultivation of marijuana, provides that persons over 18 years of age who cultivates more than 6 living plants "shall be punished by imprisonment in a county jail for a period of not more than six months or by a fine of not more than . . . $500, or by both such fine and imprisonment." (§ 11358, subd. (c).) However, if such person has a prior "super strike" or is required to register under Penal Code section 290, subdivision (c), the person "may" be punished by imprisonment pursuant to Penal Code section 1170, subdivision (h). (§ 11358, subd. (d).) The punishment is permissive; it is not mandatory. The Act expressly changes the operative term from "shall" to "may." Accordingly, for those persons who possess more than the legal limit of marijuana, and who have a "super strike" or are required to register as a sex offender under Penal Code section 290, subdivision (c), the court may choose between a jail term of up to 6 months, or a term of 16 months, two, or three years under Penal Code section 1170, subdivision (h).

Similar provisions are applicable to possession for sale under section 11359. Persons over 18 years of age who possess marijuana for sale, "shall" be punished by a jail commitment of up to 180 days, or by a fine of up to $500, or both such imprisonment and fine. (§ 11359, subd. (b).) However, if such person has a "super strike" or is required to register as a sex offender under

Penal Code section 290, subdivision (c), he or she *may* be sentenced to 16 months, two or three years under Penal Code section 1170, subdivision (h). (§ 11359, subd. (c).)

The concurrent conviction of the defendant for possession of marijuana for sale and a super strike does not disqualify the defendant from relief under the Act. In *People v. Smit* (2018) 24 Cal.App.5th 596 (*Smit*), the court held "[t]he fact that defendant was convicted of attempted murder in the same case in which he seeks relief under section 11361.8 does not make him ineligible for resentencing. This is because section 11361.8 makes an individual eligible for resentencing if he or she would not have been convicted of felony possession of marijuana for sale had the Act been in effect when he was charged with possessing marijuana for sale. (§ 11361.8, subd. (a).) In other words, a defendant is eligible for relief *unless* he could have been charged and convicted of a felony violation of section 11359, even if the Act been in effect at the time of the charged incident. [¶] At the time defendant was charged with felony possession of marijuana for sale, he had not suffered any prior conviction of a so-called super strike. Thus, had the Act been in effect in 2009, the year of the alleged violation in this matter, defendant would not have been charged, much less convicted, of a felony for possessing marijuana for sale. Being charged with a super strike in the same case in which the defendant is charged with possession of marijuana for sale does not, under the Act, make the marijuana possession charge a felony. The statute requires a 'prior conviction[ ].' (§ 11359, subd. (c)(1).)" (*Smit*, at p. 602.)

Finally, similar provisions are applicable to sale or transportation for sale of marijuana under section 11360. Persons over 18 years of age who illegally sell marijuana, "shall" be punished by a jail commitment of up to 180 days, or by a fine of up to $500, or both such imprisonment and fine. (§ 11360, subd. (b)(2).) However, if such person has a "super strike" or is required to register as a sex offender under Penal Code section 290, subdivision (c), he or she *may* be sentenced to two, three, or four years under Penal Code section 1170, subdivision (h). (§ 11360, subd. (a)(3).)

Penal Code section 1170, subdivision (h)(3), excludes persons who have a current or prior conviction of any serious or violent felony, or who must register as a sex offender. To give full effect to the new sentencing scheme created by the Act, however, sections 11358, subdivision (d), 11359, subdivision (c), and 11360, subdivision (a)(3), must be read together with Penal Code section 1170, subdivision (h). It is likely the intent of the enactors that persons convicted of these marijuana offenses be sentenced to county jail, not state prison. A very reasonable interpretation of these seemingly conflicting statutes is that the Act has created a series of exceptions to the exclusion provisions under Penal Code section 1170, subdivision (h)(3), such that qualified persons may be sentenced under Penal Code section 1170, subdivision (h), notwithstanding the existence of a prior "super strike" or the requirement to register as a sex offender.

The existence of a prior "super strike" also is relevant in the determination of dangerousness when the defendant has requested resentencing. (See Section IV, *infra*.)

If the district attorney seeks to impose the enhanced punishment due to the existence of a "super strike" or sex registration, it will be necessary to plead and prove the allegation. Although the Act itself does not require such pleading and proof, because the existence of the prior conviction

or sex registration increases the punishment for the offense, the pleading and proof requirement is imposed by *Apprendi v. New Jersey* (2000) 530 U.S. 466, and its progeny.

B. Provisions applicable to juveniles

The Act substantially revises the consequences of marijuana offenses committed by juveniles. Rather than take a penal approach to offenses committed by minors, the Act emphasizes education and community service.

See Appendix I of these materials for a detailed breakdown of the changes made for offenses committed by juveniles. Unlike for personal-level offenses committed by persons over 21 years of age, the Act does not decriminalize any marijuana offenses. Depending on the type of offense and whether there are any prior convictions of the offense, the court may impose drug education of specified lengths ranging between 4 and 10 hours, and community service hours of specified lengths up to 60 hours. For example, a minor who possess more than 28.5 grams of marijuana previously was adjudicated for a misdemeanor, with up to six months in custody. (§ 11357, subd. (a).) Under the Act, the first offense is an infraction, with eight hours of drug education or counseling and up to 40 hours of community service, both to be completed within 60 days. A second or subsequent adjudication is an infraction with 10 hours of drug education or counseling and up to 60 hours of community service, both to be completed within 90 days. (§ 11357, subd. (a)(1).)

Section 11361.1, subdivision (a), provides: "The drug education and counseling requirements under section 11357, 11358, 11359, and 11360 shall be: (1) Mandatory, unless the court finds that such drug education or counseling is unnecessary for the person, or that a drug education or counseling program is unavailable; (2) Free to participants, and shall consist of at least four hours of group discussion or instruction based on science and evidence-based principles and practices specific to the use and abuse of canabis and other controlled substances." For good cause, the court may extend the time limit for completing the drug program or counseling for not more than 30 days. (§ 11361.1, subd. (b).) Although the Act does not specifically authorize the court to extend the time to complete community service, nothing precludes such authority. By placing a limit on the extension of the program and counseling requirement, the Act is making it clear that this component of the disposition should be carried out expeditiously.

The Act does not provide any consequences for failing to complete the drug program or counseling, or the community service. The treatment and community service options are the only sanctions authorized for juvenile offenders. The court is not authorized to impose monetary or custody sanctions on juveniles for violation of the marijuana statutes.

Suspension of driving privileges

Vehicle Code section 13202.5, subdivision (a)(1), provides that if a person is at least 13 years old and under the age of 21, and commits a designated drug or alcohol offense, "the court shall suspend the person's driving privilege for one year. If the person convicted does not yet have

the privilege to drive, the court shall order the department [of motor vehicles] to delay issuing the privilege to drive for one year subsequent to the time the person becomes legally eligible to drive." The designated offenses include all the marijuana statutes amended by the Act. (Veh. Code, § 13202.5, subd. (d)(2).) The suspension or delay of the person's driving privilege "shall be in addition to any penalty imposed upon conviction of a violation specified in subdivision (d)." (Veh. Code, § 13202.5, subd. (e).)

Legislation effective January 1, 2020, repealed Vehicle Code section 13202.5 to the extent it allowed or required suspension of the driving privilege for an offense that did not relate to driving. The change applies only prospectively. Senate Bill 485, section 15, provides:

a) This act is not intended to affect any order issued by the court before January 1, 2020, to suspend, delay, or otherwise restrict the driving privilege of a person. This act is also not intended to affect any action taken by the Department of Motor Vehicles, whether before, on, or after January 1, 2020, pursuant to an order issued by the court before January 1, 2020, to suspend, delay, or otherwise restrict the driving privilege of a person.

(b) This act is intended to remove the authority of the court to suspend, delay, or otherwise restrict the driving privilege, and to remove the authority of the court to order the Department of Motor Vehicles to suspend, delay, or otherwise restrict the driving privilege, of the following persons pursuant to this act:

(1) Persons who are convicted, on or after January 1, 2020, of an offense described in this act that would have been subject to the suspension, delay, or restriction.

(2) Persons who were convicted, before January 1, 2020, of an offense described in this act that would have been subject to the suspension, delay, or restriction, but for whom an order was not issued by the court before January 1, 2020, to suspend, delay, or otherwise restrict their driving privilege.

IV. RESENTENCING PROVISONS – CURRENTLY SERVING SENTENCE

Like Proposition 47, the resentencing provisions of the Act have two basic components: (1) provisions applicable to persons "currently serving a sentence," and (2) provisions applicable to persons who have completed their sentence.

Section 11361.8, subdivision (a), provides that "[a] person currently serving a sentence for a conviction, whether by trial or by open or negotiated plea, who would not have been guilty of an offense or who would have been guilty of a lesser offense under the Control, Regulate and Tax Adult Use of Marijuana Act had that Act been in effect at the time of the offense may petition for a recall or dismissal of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing or dismissal in accordance with Sections 11357, 11358,

11359, 11360, 11362.1, 11362.2, 11362. 3, and 11362. 4 as those sections have been amended or added by that act."

A. Eligible persons

There are three eligibility requirements specified by section 11361.8, subdivision (a), for resentencing of persons currently serving a sentence:

- The resentencing must be for a crime listed in the Act: sections 11357, 11358, 11359, 11360, 11362.1, 11362.2, 11362.3, or 11362.4.
- The person must be currently serving a sentence for one of the designated crimes.
- The person "would not have been guilty of an offense or who would have been guilty of a lesser offense under the [Act] had that act been in effect at the time of the offense." (§ 11361.8, subd. (a).) As to some offenses, to meet this element of eligibility, the defendant must either have been between the ages of 18 and 21, or over 21 when the crime was committed. Furthermore, the ability to obtain a reduced sentence may also depend on the type and quantity of marijuana involved. For example, section 11362.1, subdivision (a)(1), makes it legal for a person over the age of 21 to possess not more than 28.5 grams of marijuana not in the form of concentrated cannabis.

Basic eligibility is established by the petitioner meeting just these three requirements. (§ 11361.8, subd. (b).) Unlike Propositions 36 and 47, the Act does not disqualify a person simply because he or she has any particular prior criminal offense. While the existence of "super strikes" may be relevant in determining dangerousness (discussed, *infra*), the fact that the defendant has committed a "super strike," or any other crime, or is a registered sex offender will not automatically disqualify him from seeking resentencing.

B. Eligible crimes

Section 11361.8, subdivision (a), clearly provides that the ability to seek resentencing is limited to persons convicted of a violation of sections 11357, 11358, 11359, 11360, 11362.1, 11362.2, 11362.3, and 11362. 4.

In *People v. Raybon* (2021) 11 Cal.5th 1056, 1058-1060, the Supreme Court concluded the Act did not eliminate the crime of possession of cannabis in prison in violation of section 4573.6. In accord with *Raybon* are *People v. Perry* (2019) 32 Cal.App.5th 885, 887, *People v. Whalum* (2020) 50 Cal.App.5th 1, 3, and *People v. Herrera* (2020) 52 Cal.App.5th 982. The Supreme Court has granted review of *Whalum* and *Herrera*.

The Act does not apply to felony conspiracy (Pen. Code, § 182) to commit a violation of section 11359 (possession for sale). The court in *People v. Medina* (2018) 24 Cal.App.5th 61 (*Medina*), explained: "Defendant's felony conspiracy conviction was not eligible for reduction under section 11361.8(e). Penal Code section 182, the conspiracy statute, is not a marijuana-related offense specified in section 11361.8(e). As our Supreme Court explained in discussing Proposition 47, 'the

mere fact that [the statute of conviction] is not one of the code sections enumerated in Penal Code section 1170.18(a) [Proposition 47] is not fatal to [defendant's] petition.' [Citation.] Rather, defendant's eligibility for reduction turns on whether he is a person who 'would not have been guilty of an offense or who would have been guilty of a lesser offense under [Proposition 64] had that act been in effect at the time of the offense.' (§ 11361.8(e); [citation].) Here, defendant *would not* have been guilty of a lesser offense by the mere application of Proposition 64; although he *could* have been guilty of a lesser offense had the trial court granted defendant's section 17(b)(3) motion. That is because 'a "wobbler[ ]" is deemed a felony unless charged as a misdemeanor by the People or reduced to a misdemeanor by the sentencing court under [section 17(b)].' [Citations.]" (*Medina,* at p. 66; italics in original.)

A person convicted of being an accessory to one of the crimes specifically listed in Proposition 64 may be eligible for resentencing. In *People v. Boatwright* (2019) 36 Cal.App.5th 848 (*Boatwright*), the defendant was originally charged with possession for sale and cultivation of marijuana; he ultimately pled to being an accessory under section 32. The trial court's denial of his motion for resentencing was reversed on appeal. The court explained: "That Penal Code section 32 is not specifically enumerated in section 11361.8 does not alter our conclusion. Section 11361.8 provides that the trial court must evaluate a resentencing petition '*in accordance with* Sections 11357, 11358, 11359, 11360, 11362.1, 11362.2, 11362.3, and 11362.4 as those sections have been amended or added by that act.' (§ 11361.8, subd. (a), italics added). Under a plain reading of this subdivision, petitions for resentencing or dismissal must be evaluated 'in accordance with' the manner in which the statutory sections enumerated in section 11361.8 were amended or added by Proposition 64. These statutory amendments underpin the trial court's analysis whether a defendant 'would not have been guilty of an offense, or who would have been guilty of a lesser offense' had Proposition 64 been in effect at the time of the offense. The wording of section 11361.8, however, does not limit postconviction relief to just those sections enumerated in the statute." (*Boatwright*, at pp. 855–856.)

People v. Jessup (2020) 50 Cal.App.5th 83 (*Jessup*), holds that attachment of a gang enhancement to a felony possession of marijuana for sale charge does not disqualify the defendant from resentencing. "Section 11359 includes specified exceptions that permit treating possession of marijuana for sale as a felony: if the defendant has certain prior convictions (*id*., subd. (c)(1) & (2)), sells marijuana to a minor (*id*., subd. (c)(3)), or commits their crime with a person under age 21 (*id*., subd. (d)). The absence of a gang enhancement exception in section 11359 implies that voters did not intend to include it. (See Howard Jarvis Taxpayers Assn. v. Padilla (2016) 62 Cal.4th 486, 514 ['the explicit mention of some things in a text may imply other matters not similarly addressed are excluded'].) Section 11361.8 similarly includes no language that excludes felony convictions with attached gang enhancements. '[W]e may not add to [a] statute or rewrite it to conform to some assumed intent not apparent from that language.' [Citation.]" (*Jessup*, at p. 90.)

C. Persons currently serving a sentence

"Persons currently serving a sentence" is not expressly defined by the Act. The following analyses is provided to assist in resolution of this issue.

1. **Persons serving a sentence in state prison or county jail.** County jail terms would include a straight commitment to jail for a misdemeanor, jail imposed as a condition of probation for a felony, or the custody portion of a split sentence imposed under Penal Code section 1170, subdivision (h).

2. **Persons serving a term of mandatory supervision under Penal Code section 1170, subdivision (h).** Clearly the mandatory supervision portion of a split sentence imposed under Penal Code section 1170, subdivision (h), is a sentence. Whether the sentence is a straight term of incarceration or a split sentence containing mandatory supervision, these sentences are considered prison terms for the purposes of enhancement under Penal Code section 667.5, subdivision (b). Since to be sentenced under Penal Code section 1170, subdivision (h), the defendant must first be denied probation, he is being sentenced in the same manner as a person being sentenced to state prison. Furthermore, there is nothing in the Act that limits the application of section 11361.8 to persons serving actual custody.

3. **Persons on parole or Postrelease Community Supervision (PRCS).** It is clear that persons on parole or PRCS will be entitled to seek relief under the Act – the only issue is which portion of section 11361.8 is appropriate to employ to request relief. If being on parole or PRCS is considered "currently serving a sentence," the person must petition for relief under section 11361.8, subdivisions (a) – (d), which will require the court to determine whether the petitioner is unreasonably dangerous to the community before granting the petition. If being on parole or PRCS is *not* a part of the sentence, the sentence will be considered completed and the person must apply for relief under sections 11361.8, subdivisions (e) – (g), which does not include a requirement that the judge consider the person's dangerousness.

   In *People v. Morales* (2015) 238 Cal.App.4th 42, the Court of Appeal held that a person who is on PRCS when relief is requested under Proposition 47, is "currently serving a sentence," and, would be subject to one year of parole after resentencing under Proposition 47: "A person convicted of a felony and given a prison term receives a period of parole or PRCS as a matter of course. Accordingly, [Penal Code] section 3000, which refers to individuals sentenced to state prison—i.e., felons—includes parole or PRCS as a part of the sentence." (*Id*. at p. 47.) Further, the court of appeal held that, to the extent the defendant had "excess" custody credits after resentencing, his excess credits would apply to reduce his parole period. (*Id*. at pp. 49-52.) The Supreme Court granted review. Its opinion (*People v. Morales* (2016) 63 Cal.4th 399) focused on the issue of applying excess credits to the period of parole. The court ruled that the one period of parole upon Proposition 47 resentencing is not reduced. Thus, *Morales*'s underlying rule that a person on PRCS is currently serving a sentence remains substantively sound.

Morales is consistent with *People v. Nuckles* (2013) 56 Cal.4th 601 (*Nuckles*), which addresses this issue in the context of parole. *Nuckles* observes that the prison *term* is the actual time served in prison before release on parole, and the day of release marks the end of that term. (*Nuckles*, at p. 608.) It goes on to say, however, that "[a]lthough parole constitutes a distinct phase from the underlying prison sentence, a period of parole following a prison term has generally been acknowledged as a form of punishment. '[P]arolees are on the "continuum" of state-imposed punishments.' [Citation.] Further, parole is a form of punishment accruing directly from the underlying conviction. As the Attorney General observes, parole is a mandatory component of any prison sentence. 'A sentence resulting in imprisonment in the state prison . . . shall include a period of parole supervision or postrelease community supervision, unless waived . . . .' (§ 3000, subd. (a)(1).) Thus, a prison sentence 'contemplates a period of parole, which in that respect is related to the sentence.' [Citation.]" (*Nuckles*, at p. 609.)

4. **Persons on probation.** Persons on probation are "currently serving" a sentence and are eligible to petition for relief under the Act. The eligibility for resentencing under Proposition 47 of persons on probation was discussed in *People v. Garcia* (2016) 245 Cal.App.4th 555, 558: "The parties agree that in passing Proposition 47 the voters intended to embrace probationers within the reach of the resentencing provisions of [Penal Code] section 1170.18. To interpret the statutory language otherwise would, in their view, lead to absurd consequences. We find merit in this position. As the People acknowledge, there is nothing in either the ballot materials or the statutory language that appears to limit the phrase 'currently serving a sentence for a conviction' to those serving a term of imprisonment. Defendant points out that granting probation is in some contexts a 'sentencing choice' (see, e.g., Cal. Rules of Court, rule 4.405(6) [' "Sentence choice" means the selection of any disposition of the case that does not amount to a dismissal, acquittal, or grant of a new trial']). [Citations.] Both parties observe that the language of another voter initiative, Proposition 36, the Substance Abuse and Crime Prevention Act of 2000, used the language 'sentenced to probation.' [Citations.].)" Generally in accord with *Garcia* is *People v. Davis* (2016) 246 Cal.App.4th 127.

5. **Cases on appeal.** It is unlikely the Act applies to cases pending on appeal. *People v. Yearwood* (2013) 213 Cal.App.4th 161, in the context of Proposition 36, holds that the resentencing process cannot be utilized while a case is on appeal. "The trial court does not have jurisdiction over a cause during the pendency of an appeal. [Citation.] A Penal Code section 1170.126 petition must be filed once the judgment is final and jurisdiction over the cause has been returned to the trial court. Appellant's eligibility for recall of sentence will be determined at that point in time. Penal Code section 1170.126, subdivision (b), contains a 'good cause' exception to the two year filing period. The pendency of appellate proceedings and consequent lack of jurisdiction over the cause in the trial court would

necessarily constitute good cause for a filing delay. Thus, the length of the appellate process will not foreclose prisoners whose judgments were not final on the Act's effective date from obtaining relief to which they may be entitled pursuant to [Penal Code] section 1170.126." (*Yearwood*, at p. 177.)

Several cases have addressed the role of the appellate courts in granting resentencing under Proposition 47. A number of appellants have requested the appellate court to specify qualified felony convictions as misdemeanors. *People v. Shabazz* (2015) 237 Cal.App.4th 303; *People v. Contreras* (2015) 237 Cal.App.4th 868; *People v. DeHoyos* (2015) 238 Cal.App.4th 363; *People v. Lopez* (2015) 238 Cal.App.4th 177; *People v. Diaz* (2015) 238 Cal.App.4th 1323, and *People v. Delapena* (2015) 238 Cal.App.4th 1414, have refused such requests, observing that Penal Code section 1170.18 requires the request for relief to originate with a petition filed in the trial court. *Shabazz* and *DeHoyos* held that Proposition 47 was not retroactive. The cases rejected the application of *In re Estrada* (1965) 63 Cal.2d 740, even though the cases were not final on appeal at the time Proposition 47 was enacted. (*Shabazz*, at pp. 313-314; *DeHoyos*, at pp. 367-368.) *Shabazz* and *DeHoyos* are consistent with *People v. Conley* (2016) 63 Cal.4th 646, in which the California Supreme Court declined to apply *Estrada* in a Proposition 36 case. *DeHoyos*, *Lopez*, and *Delapena* have been granted review.

People v. Awad (2015) 238 Cal.App.4th 215, acknowledged the Hobson's choice facing defense counsel: either abandon a potentially meritorious appeal and proceed with a motion under Penal Code section 1170.18 which could effect an early release of the defendant, or await the results of the appeal, then file the motion if the conviction is affirmed. The latter approach is suggested by *Lopez*, which observed that the appellate status of the case would constitute "good cause" for a delayed filing under Penal Code section 1170.18, subdivision (j). (*Lopez*, at p. 182.) *Awad*, however, holds that appellate courts have the discretion to make a limited remand to the trial court under Penal Code section 1260, expressly for the purpose of considering a motion under Penal Code section 1170.18. (*Awad*, at p. 222.)

Whether the trial court has some form of concurrent jurisdiction with the appellate court for the purpose of hearing a motion under Penal Code section 1170.18 is also addressed in *People v. Scarbrough* (2015) 240 Cal.App.4th 916. In relying on the Proposition 36 case of *People v. Yearwood* (2013) 213 Cal.App.4th 161, the court concluded the trial court does not have jurisdiction to consider a direct application under Penal Code section 1170.18 once the case is on appeal. The court observed, however, that the defendant could apply to the appellate court for a stay of the sentence for the Proposition 47-eligible offense – only a partial solution to the defendant's problems because he would have to serve the misdemeanor sentence once the appeal had been completed. (*Scarbrough*, at p.929, fn. 4.) Additionally the court distinguished *Awad* because the defendant

there did not request a limited remand for the purpose of a Penal Code section 1170.18 motion. (*Scarbrough*, at p. 929, fn.5.)

6. Juveniles. Section 11361.8, subdivision (m), makes all of the provisions of resentencing applicable to juvenile proceedings: "The provisions of this section shall apply equally to juvenile delinquency adjudications and dispositions under Section 602 of the Welfare and Institutions Code if the juvenile would not have been guilty of an offense or would have been guilty of a lesser offense under the Control, Regulate and Tax Adult Use of Marijuana Act."

D. Procedure for resentencing

For persons currently serving a sentence, the resentencing process is defined in section 11361.8, subdivisions (a) - (d). Like the resentencing of third strike offenders under section 1170.126, or the resentencing of specified property and drug crimes under section 1170.18, the Act contemplates a potential four-step process: (1) the filing of a petition requesting resentencing, (2) an initial screening for eligibility, (3) a qualification hearing where the merits of the petition are considered, and, if appropriate, (4) a resentencing of the crime.

Although the procedure contemplated for persons currently serving a term undoubtedly includes the right to a hearing on the merits if requested by either the petitioner or the prosecution, there is no express requirement that the court hold a hearing in the absence of such a request. The court and counsel should be free to design a resentencing process through stipulations presented to the court without a hearing, except as may be required by the parties if there is a particular issue involving qualification or dangerousness, or where it may be required to comply with Marsy's Law.

1. The filing of a petition

The resentencing process is initiated by the petitioner with the filing of a petition. Nothing in the Act suggests the court has any *sua sponte* obligation to act on any case without the request of the petitioner.

Form of petition

No particular form of petition is specified by the initiative. Although section 11361.8, subdivision (l), specifies that "[t]he Judicial Council shall promulgate and make available all necessary forms to enable the filing of the petitions and applications provided in this section," nothing in the Act *requires* the use of Judicial Council forms. Presumably, the petition may be made orally in open court, as in a request for resentencing under Proposition 47. (*People v. Amaya* (2015) 242 Cal.App.4th 972.)

The Judicial Council has approved a series of optional forms for seeking relief under the Act. See Appendix IV for adult convictions and Appendix VIII for juvenile adjudications.

Statute of limitations

Unlike Propositions 36 and 47, the Act has no window period for filing for relief.

Right to counsel

For a full discussion of the right to counsel in the preparation of the petition, see Section VI, *infra*.

2. Initial screening of the petition for eligibility

Under Propositions 36 and 47, the petitioner carries an initial burden to establish eligibility for relief. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 877; *People v. Bradford* (2014) 227 Cal.App.4th 132; *People v. Perkins* (2016) 244 Cal.App.4th 129, 136-137.) The Act, however, specifies that "the court *shall presume the petitioner satisfies the criteria* in subdivision (a) unless the party opposing the petition proves by clear and convincing evidence that the petitioner does not satisfy the criteria." (§ 11361.8, subd. (b); italics added.) Although the presumption shifts the burden to the prosecution, presumably the court retains the ability to deny a petition if it is facially deficient – e.g., the petition fails to allege a qualified crime.

3. Qualification hearing

The third step of the process, if necessary, is the qualification hearing where the court will consider the merits of the petition. Nothing in the Act expressly requires a hearing, but one may be necessary to resolve issues of eligibility or to meet the interests of a victim. The hearing will have two phases: (1) a confirmation of the petitioner's eligibility for relief and, if he is otherwise eligible, (2) a determination of whether resentencing will pose an unreasonable risk of danger to public safety. (§ 11361.8, subd. (b).)

Because section 11361.8 does not specify a time of hearing, it should be set within a "reasonable time." The petitioner, the prosecution, and any victim who requests it, have the right to notice of, and to appear at, any hearing held in connection with the qualification and resentencing procedure. (See Proposition 36 cases: *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1297; *People v. Manning* (2014) 226 Cal.App.4th 1133, 1144.)

Confirmation of eligibility

The initial phase of the qualification hearing will be to confirm the petitioner's eligibility for relief: that he has been convicted of a qualified offense, is currently serving a sentence

for a qualified crime, and would have been convicted of a lesser offense, or no crime at all, had the Act been in effect when the crime was committed. As to the last element of eligibility, it may be necessary to determine the defendant's age at the time the crime was committed, or the nature and quantity of the marijuana involved. To overcome the presumption of eligibility, the prosecution must present clear and convincing evidence that the defendant is not eligible. "Clear and convincing evidence' requires a finding of high probability." (*In re Angelia P.* (1981) 28 Cal.3d 908, 919.)

The statute does not define the scope of evidence admissible to prove or disprove the petitioner's eligibility for resentencing. What is admissible likely will depend on whether courts follow the guidelines of Proposition 36, which limits the determination of eligibility to the record of conviction, or Proposition 47, which allows the consideration of reliable evidence beyond the record of conviction. This distinction was discussed in *People v. Johnson* (2016) 1 Cal.App.5th 953 (*Johnson*):

"[The defendant] suggests that because *Bradford* limits the evidence of eligibility for resentencing to what is found in a record of conviction that preceded the Proposition 36 resentencing proceedings ([*People v. Bradford* (2014) 227 Cal.App.4th 1322,] at pp. 1327, 1338 . . .), the same limitation should apply in Proposition 47 resentencing proceedings. However, under Proposition 36, in order to determine eligibility (whether initially or otherwise), the resentencing court need consider only the petitioning defendant's *existing prior convictions*. Ultimate eligibility for resentencing is set forth at section 1170.126, subdivision (e) and requires showings that: the defendant is serving an indeterminate term of life imprisonment imposed pursuant to section 667, subdivision (e)(2) or section 1170.12, subdivision (c)(2) for a conviction of a felony that is not defined as serious and/or violent by section 667.5, subdivision (c) or section 1192.7, subdivision (c) (§ 1170.126, subd. (e)(1)); the defendant's sentence was not based on offenses in section 667, subdivision (e)(2)(C)(i)-(iii) or section 1170.12, subdivision (c)(2)(C)(i)-(iii) (§ 1170.126, subd. (e)(2)); and the defendant has no prior convictions for any of the offenses in section 667, subdivision (e)(2)(C)(iv) or section 1170.12, subdivision (c)(2)(C)(iv) (§ 1170.126, subd. (e)(3)). The evidentiary limitation in *Bradford* is arguably reasonable, given that the requirements for establishing eligibility (or ineligibility) under Proposition 36 are based on the defendant's convictions *in existence at the time of the resentencing petition* and, thus, may be reliably ascertained by a review of the record(s) of conviction in most situations.

"In contrast, under Proposition 47 the relevant inquiry for purposes of establishing a petitioning defendant's initial eligibility is 'guilt [ ] of a misdemeanor' (§ 1170.18, subd. (a))—which often cannot be established merely from the record of conviction of the felony. This is because, prior to Proposition 47, where a defendant was convicted of certain drug- or theft-related felonies, the facts necessary to establish that the petitioning defendant was guilty either of a misdemeanor added by Proposition 47 or of a felony reduced to a misdemeanor by Proposition 47 likely would have been irrelevant in charging the defendant with the pre-Proposition 47 felony. [Footnote omitted.] Stated differently,

since Proposition 47 created misdemeanors either that did not exist previously (e.g., § 459.5 [shoplifting]) or that were felony offenses with different showings required (e.g., § 496, subd. (a) [receiving stolen property]), there is no reason to believe that the electorate intended to limit the resentencing court's review to the petitioning defendant's record of conviction. (See Couzens & Bigelow, Proposition 47 "The Safe Neighborhoods and Schools Act," *supra*, § VI.B.2., p. 39 < http://www.courts.ca.gov/documents/Prop-47-Information.pdf> [as of July 25, 2016] ['there may be circumstances in which additional facts will be required'].) As applicable in the present case involving receipt of stolen property, '[f]or example, it may not be possible from a review of the record [of conviction] alone to determine the value of property taken.' (*Ibid.*)" (*Johnson*, at pp. 966–967.)

The distinction was also discussed in *People v. Hall* (2016) 247 Cal.App.4th 1255, 1263: " 'The trial court's decision on a section 1170.18 petition is inherently factual, requiring the trial court to determine whether the defendant meets the statutory criteria for relief.... [Whether] the value of the property defendant stole disqualifies him from resentencing under [section 1170.18] ... is a factual finding that must be made by the trial court in the first instance.' [Citation.] Evidence to support such a finding may come from within or outside the record of conviction, or from undisputed facts acknowledged by the parties. In some cases, the record of a petitioner's conviction may suffice to establish a prima facie case for resentencing. But in others it may not, particularly where there was no reason for either party to fix the value of the property stolen when the plea was taken. [Citation.]" In accord is *People v. Salmorin* (2016) 1 Cal.App.5th 738, 744 [*Bradford* not applicable to determination of value of stolen property under Proposition 47; court may consider the police report].

People v. Banda (2018) 26 Cal.App.5th 349 (*Banda*), holds that in determining whether to grant resentencing under the Act, the court may consider evidence beyond the record of conviction, as authorized in the Proposition 47 context by *People v. Romanowski* (2017) 2 Cal.5th 903 (*Romanowski*). In *Romanowski*, the Supreme Court "determined that, in some instances, the record of conviction would contain the facts necessary to demonstrate eligibility. In others, however, an evidentiary hearing would be required if, after considering the record and any matters in the petition, the return, affidavits, or matters subject to judicial notice, the court believed 'the petitioner's entitlement to relief depends on the resolution of an issue of fact.' [Citations.]" (*Banda*, at p. 356.)

The *Banda* court also referenced *People v. Perez* (2018) 4 Cal.5th 1055 (*Perez*), where, in the context of Proposition 36, the Supreme Court "reaffirmed its ruling in *People v. Estrada* (2017) 3 Cal.5th 661, 672, . . . that the court could properly consider facts beyond the record of conviction, and held that the court could, consistent with the Sixth Amendment, consider facts not found by the jury. [Citation.] [¶] Thus, to the extent the court and the parties in this case were uncertain that the court could consider facts beyond the record of conviction, and could do so in an evidentiary hearing, the reasoning of the decisions in *Perez* and *Romanowski* indicate that the same should be true in cases

under Proposition 64. Section 11361.8, subdivision (a) placed the burden of proof on the People; as *Perez* and *Romanowski* made clear, the People were not limited in meeting that burden to facts already in the record." (*Banda*, *supra*, 26 Cal.App.5th at pp. 356–357.)

The *Banda* court further held that trial courts may consider probation reports from the underlying case, but only if they are reliable: "The People correctly assert that the petition in a Proposition 64 case, as in Propositions 36 and 47, bears the hallmarks of a resentencing proceeding. In such cases, trial courts may consider hearsay if that hearsay is reliable. [Citations.] [¶] A probation report is inadmissible hearsay, however, when 'the report excerpt includes the officer's assertions that certain events 'reportedly' occurred [during the prior assault]. Narration of 'reported' events is by definition based on the statements of others. Indeed, unless the probation officer was a percipient witness [to the assault], all of the narration contained in the excerpt must have been drawn from other people's previous statements. [¶] The report fragment does not identify the declarant or declarants from whose statements the probation officer drew his factual summary.' [Citation.]" (*Banda*, at p. 357.)

People v. Hall (2019) 39 Cal.App.5th 831 (*Hall*), also addresses the types of evidence the court may consider. According to *Hall,* the trial court may consider reliable hearsay from probation reports, including the weight of marijuana at issue. (*Id*., at pp. 838–840.) The court explained: "The trial courts' ability to consider reliable hearsay in probation reports is necessary to assure the fair and efficient implementation of Proposition 64. In many cases the probation report will be the only document in the court file setting forth the facts underlying the marijuana offense to which the Proposition 64 petitioner pleaded guilty. If reliable hearsay information in the probation report were inadmissible, the People would have to subpoena the law enforcement personnel who had provided the information to the probation officer. Because of the passage of time, the personnel may not be available or even identifiable, such as the unnamed criminalist who in 1996 analyzed and weighed the marijuana in the present case." (*Hall*, at p. 840.)

Potential issues regarding eligibility

In any given petition under section 11361.8, there are a number of potential issues that will affect the petitioner's eligibility for resentencing. Most of the issues relate to whether the petitioner would have been guilty of a lesser offense, or no crime at all, had the Act been in effect when the crime was committed. Among the issues the court may need to address are:

- Whether the petitioner was convicted of a qualified crime.
- When the crime occurred.

- The age of the applicant at the time the crime was committed. Specifically, whether the petitioner was under 18 years old, between the ages of 18 and 20, or 21 years old or older.
- Whether the offense occurred in public, in private, or in or near the grounds of any elementary or high school.
- The quantity of the substance.
- The nature of the substance; whether it was concentrated cannabis.
- How many living plants the defendant was cultivating.
- What punishment was imposed on the defendant.
- Whether the defendant has a prior "super strike," or is required to register under Penal Code section 290, subdivision (c).
- Whether the crime involved a minor as a participant, target or victim.
- Whether the crime involved interstate transportation or importation.
- Whether the prior conduct is still criminal under the Act.
- The punishment imposed under the Act.

Prior "super strike," or requirement to register as a sex offender

As noted previously, unlike Proposition 47, the Act does not automatically exclude petitioners who have a prior "super strike," or are required to register under Penal Code section 290, subdivision (c). However, the existence of these factors in the defendant's record may increase the punishment the defendant could receive under Act. (See discussion in Section III, *supra*.) Although the Act does not mandate the imposition of an enhanced sentence, the fact that the court "may" impose a sentence under Penal Code section 1170, subdivision (h), under certain circumstances should be taken into account in determining whether the petitioner is eligible for any relief.

The concurrent conviction of the defendant for possession of marijuana for sale and a super strike does not disqualify the defendant from relief under the Act. In *People v. Smit* (2018) 24 Cal.App.5th 596, 602, the court held the "fact that defendant was convicted of attempted murder in the same case in which he seeks relief under section 11361.8 does not make him ineligible for resentencing. This is because section 11361.8 makes an individual eligible for resentencing if he or she would not have been convicted of felony possession of marijuana for sale had the Act been in effect when he was charged with possessing marijuana for sale. (§ 11361.8, subd. (a).) In other words, a defendant is eligible for relief *unless* he could have been charged and convicted of a felony violation of section 11359, even if the Act been in effect at the time of the charged incident. ¶ At the time defendant was charged with felony possession of marijuana for sale, he had not suffered any prior conviction of a so-called super strike. Thus, had the Act been in effect in 2009, the year of the alleged violation in this matter, defendant would not have been charged, much less convicted, of a felony for possessing marijuana for sale. Being charged with a super strike in the same case in which the defendant is charged with possession of

marijuana for sale does not, under the Act, make the marijuana possession charge a felony. The statute requires a 'prior conviction [ ].' (§ 11359, subd. (c)(1).)"

Dangerousness

If the defendant establishes eligibility for relief, the Act directs that "the court shall grant the petition to recall the sentence or dismiss the sentence because it is legally invalid unless the court determines that granting the petition would pose an unreasonable risk of danger to public safety." (§ 11361.8, subd. (b).)

In determining dangerousness, "the court may consider, but shall not be limited to evidence provided for in subdivision (b) of Section 1170.18 of the Penal Code." (§ 11361.8, subd. (b)(1).) Penal Code section 1170.18, subdivision (b), specifies the court may consider "(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."

The Act further provides that "[a]s used in this section, 'unreasonable risk of danger to public safety' has the same meaning as provided in subdivision (c) of Section 1170.18 of the Penal Code." (§ 11361.8, subd. (b)(2).) Penal Code section 1170.18, subdivision (c), states "'[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).

People v. Hall (2019) 39 Cal.App.5th 831 (*Hall*), determined that proof of dangerousness in section 11361.8, subdivision (b), can be made with the use of reliable hearsay. "[S]ection 11361.8(b) and section 1170.18 do not create an exception for the admission of hearsay evidence. Neither section refers to hearsay evidence or the hearsay rule. 'Proposition 64 does not define [what] constitutes 'evidence' for purposes of determining whether a defendant poses an unreasonable risk of danger to public safety (§ 11361.8, subd. (b)(1)) .... Nothing in Proposition 64 suggests the applicable rules of evidence are any different than those which apply to other types of sentencing proceedings. [Citations.]' [Citation.]" (*Hall*, at p. 847.)

Danger of committing a specified violent felony

The determination of dangerousness is predicated on the current risk that the petitioner "will commit a new *violent felony within the meaning of*" Penal Code section 667, subdivision (e)(2)C)(iv)" – the "super strikes." (§ 1170.18, subd. (c), italics added.) The court must determine whether there is an unreasonable risk that the petitioner will

commit one of the "super strikes," not whether there is an unreasonable risk that the petitioner will commit other serious or violent felonies such as a robbery, kidnapping or arson. (For a complete table of the listed violent felonies, see Appendix III.) Specifically, the court must determine whether there is an unreasonable risk that the petitioner will commit any of the following offenses:

(a) A "sexually violent offense" as defined in Welfare and Institutions Code, section 6600, subdivision (b) [Sexually Violent Predator Law]: " '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, 287, 288, 288.5, or 289 of, or former Section 288a 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, 287, 288, or 289 of, or former Section 288a of, the Penal Code."

(b) Oral copulation under Penal Code section 288a, sodomy under Penal Code section 286, or sexual penetration under Penal Code section 289, if these offenses are committed with a person who is under 14 years of age, and who is more than 10 years younger than the defendant.

(c) A lewd or lascivious act involving a child under 14 years of age, in violation of Penal Code section 288.

(d) Any homicide offense, including any attempted homicide offense, defined in Penal Code sections 187 to 191.5, inclusive. Potential conviction for voluntary manslaughter under section 192, subdivision (a), involuntary manslaughter under section 192, subdivision (b), and vehicular manslaughter under section 192, subdivision (c), will not exclude the defendant from the benefits of the new law.

As noted, the determination of dangerousness includes the potential of committing gross vehicular manslaughter while intoxicated, in violation of Penal Code section 191.5, subdivision (a). In that regard, likely the court will be able to consider the person's history of substance abuse and driving as it relates to the person's potential of killing someone while operating a vehicle under the influence of alcohol or drugs.

(e) Solicitation to commit murder as defined in Penal Code section 653f.

(f) Assault with a machine gun on a peace officer or firefighter, as defined in Penal Code section 245, subdivision (d)(3).

(g) Possession of a weapon of mass destruction, as defined in s Penal Code section 11418, subdivision (a)(1).

(h) Any serious or violent offense punishable in California by life imprisonment or death.

The court clearly may deny the petition of an offender who presents an unreasonable risk of committing any crime that has a base term punishment of life in prison, such as first or second degree murder. There is an issue, however, whether a court may consider the likelihood of the petitioner committing a life-term crime because of the application of an alternative sentencing scheme such as the Three Strikes law or because of an enhancement.

The analysis must begin with a careful reading of the applicable statutes. Penal Code section 1170.18, subdivision (d), defines an "unreasonable risk of danger to public safety" to mean that the petitioner will commit "a new *violent felony* within the meaning of" Penal Code section 667, subdivision (e)(2)(C)(iv). (Italics added.) Penal Code section 667, subdivision (e)(2)(C)(iv)(VIII), includes "[a]ny *serious or violent felony* offense punishable in California by life imprisonment or death." (Italics added.) Penal Code section 667, subdivision (e)(1), defines "serious or violent felony" by a cross-reference to Penal Code section 667, subdivision (d). Penal Code section 667, subdivision (d)(1), defines a serious and/or violent felony for the purposes of the Three Strikes law as "[a]ny offense defined in subdivision (c) of [Penal Code] Section 667.5 as a violent felony or any offense defined in subdivision (c) of [Penal Code] Section 1192.7 as a serious felony in this state." The plain language of the statutes suggests the court may consider whether there is an unreasonable risk that the petitioner will commit a violent felony listed in Penal Code section 667.5, subdivision (c), if the crime is punishable by life imprisonment or death. The list of potential offenses appears more than just the "super strikes" specified in Penal Code section 667, subdivision (e)(2)(C)(iv), but does not include all felonies that might receive a life sentence.

The question is whether the court may consider the likelihood of a petitioner committing a new violent felony listed in Penal Code section 667.5, subdivision (c), other than a "super strike," and, because the petitioner has two or more strikes, will commit a "violent offense punishable in California by life imprisonment. . . ." The case of *People v. Williams* (2014) 227 Cal.App.4th 733 (*Williams*), which sets forth a helpful analysis of three California Supreme Court cases, is instructive.

The *Williams* case

Williams concerned the application of the 10-year gang enhancement under Penal Code section 186.22, subdivision (b)(1)(C). That section requires the addition of 10 years to any term imposed for a violent felony committed for the benefit of a street gang under Penal Code section 186.22, subdivision (b)(1). Penal Code Section 186.22, subdivision (b)(1), "states that '[e]xcept as provided in paragraphs 4 and 5,' the trial court shall impose the

gang enhancement. Subdivision (b)(5) provides, in relevant part: '[A]ny person who violates this subdivision in the commission of a felony *punishable by imprisonment in the state prison for life* shall not be paroled until a minimum of 15 calendar years have been served.' (Italics added.) 'This provision establishes a 15–year minimum parole eligibility period, rather than a sentence enhancement for a particular term of years.' [Citation omitted.]" (*Williams*, *supra*, 227 Cal.App.4th at p. 740; italics in original.)

Williams found three Supreme Court cases relevant to the issue. "The first is *People v. Montes* (2003) 31 Cal.4th 350, 352, 2 Cal.Rptr.3d 621, 73 P.3d 489 (*Montes*). In *Montes,* the defendant was convicted of attempted murder with findings that he committed the crime for the benefit of a street gang (§ 186.22, subd. (b)(1)) and that he had personally and intentionally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)). The trial court sentenced him to the 7–year midterm for the attempted murder conviction plus a consecutive 10–year term for the gang enhancement, plus a consecutive term of 25 years to life for the firearm enhancement (§ 12022.53, subd. (d)). (*Id*. at p. 353, 2 Cal.Rptr.3d 621, 73 P.3d 489.) [¶] The issue was whether 186.22, subdivision (b)(5)'s use of the phrase 'a felony punishable by imprisonment ... for life' applied to the defendant because his felony conviction *coupled with his firearm enhancement* resulted in a life sentence. (*Montes, supra,* 31 Cal.4th at p. 352, 2 Cal.Rptr.3d 621, 73 P.3d 489.) Based upon its analysis of legislative and voter intent, *Montes* concluded: '[S]ection 186.22(b)(5) applies only where the felony *by its own terms provides for a life sentence.*' (*Ibid.*; italics added.) *Montes* therefore found that the consecutive 10–year term for the gang enhancement had been correctly imposed because the defendant had not been convicted of 'a felony punishable by imprisonment ... for life.' (§ 186.22, subd. (b)(5).) (*Id*. at p. 353, 2 Cal.Rptr.3d 621, 73 P.3d 489.)" (*Williams*, *supra*, 227 Cal.App.4th at pp. 740-741; italics in original, footnote omitted.)

The second case "is *People v. Lopez* (2005) 34 Cal.4th 1002, 22 Cal.Rptr.3d 869, 103 P.3d 270 (*Lopez*). In *Lopez,* the defendant was convicted of first degree murder (§ 187). The punishment for that crime is a term of 25 years to life. (§ 190, subd. (a).) The jury also found that the defendant had committed the murder for the benefit of a street gang (§ 186.22, subd. (b)). The trial court sentenced the defendant, among other things, to 25 years to life in state prison for murder with a consecutive 10–year term for the gang enhancement. (*Id*. at p. 1005, 22 Cal.Rptr.3d 869, 103 P.3d 270.) [¶] The Supreme Court granted review in *Lopez* to decide whether a defendant convicted of first degree murder with a gang enhancement finding should be subject to a consecutive term of 10 years under [Penal Code] section 186.22, subdivision (b)(1)(C) or, instead, the minimum parole eligibility term of 15 years set forth in [Penal Code] section 186.22, subdivision (b)(5). [¶] The heart of the dispute was whether the phrase 'punishable by imprisonment ... for life' in [Penal Code] section 186.22, subdivision (b)(5) meant 'all life terms (including terms of years to life)' as contended by defendant or, as urged by the Attorney General, meant "merely 'straight' life terms" so that the phrase did not include a sentence for first or second degree murder. (*Lopez, supra,* 34 Cal.4th at p. 1007, 22 Cal.Rptr.3d 869, 103 P.3d 270.) *Lopez* concluded that the statutory language 'is plain and its meaning unmistakable':

'the Legislature intended [Penal Code] section 186.22(b)(5) to encompass both a straight life term as well as a term expressed as years to life ... and therefore intended to exempt those crimes from the 10–year enhancement in subdivision (b)(1)(C). [Citation.]' (*Id*. at pp. 1006–1007, 22 Cal.Rptr.3d 869, 103 P.3d 270.) Consequently, *Lopez* directed deletion of the 10–year sentence for the gang enhancement. (*Id*. at p. 1011, 22 Cal.Rptr.3d 869, 103 P.3d 270.)" (*Williams*, *supra*, 227 Cal.App.4th at pp. 741-742; footnote omitted.)

The third case is "[*People v. Jones* (2009)] 47 Cal.4th 566, 98 Cal.Rptr.3d 546, 213 P.3d 997. In *Jones,* the defendant was convicted of shooting at an inhabited dwelling, a crime punishable by a sentence of three, five or seven years. (§ 246.) The trial court selected the seven-year term but then imposed a life sentence pursuant to Penal Code section 186.22, subdivision (b)(4) because the jury had found the defendant committed the crime to benefit a street gang. (*Id*. at p. 571, 98 Cal.Rptr.3d 546, 213 P.3d 997.) In addition, the trial court imposed a consecutive 20–year sentence because the defendant had personally and intentionally discharged a firearm in committing the offense. (§ 12022.53, subd. (c).) (*Id*. at p. 569, 98 Cal.Rptr.3d 546, 213 P.3d 997.) The sentence for that latter enhancement applies to the felonies listed in Penal Code section 12022.53, subd. (a)(1–16) as well as to '[a]ny felony punishable by ... imprisonment ... for life.' (§ 12022.53, subd. (a)(17).) Shooting at an inhabited dwelling is not one of the listed felonies but the trial court determined that defendant had been convicted of a felony punishable by life imprisonment because of the application of Penal Code section 186.22, subdivision (b)(4). "[Penal Code] Section 186.22, subdivision (b)(4) provides: 'Any person who is convicted of a felony enumerated in this paragraph committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, be sentenced to an indeterminate term of life imprisonment ... [¶] (B) ... a felony violation of [Penal Code] Section 246.' [¶] On appeal, the issue was whether the trial court properly imposed the 20–year sentence enhancement (§ 12022.53) based upon its finding that the defendant had suffered a felony punishable by life. The defense contended that the phrase '[a]ny felony punishable by ... imprisonment ... for life' (§ 12022.53, subd. (a)(17)) should be *narrowly construed* as it was in *Montes* to be limited to a felony which 'by its own terms provides for a life sentence.' (*Montes, supra,* 31 Cal.4th at p. 352, 2 Cal.Rptr.3d 621, 73 P.3d 489.) In particular, the defendant urged that his life term could not trigger application of [Penal Code] section 12022.53, subdivision (c)'s additional 20–year prison term 'because his sentence of life imprisonment did not result from his conviction of a *felony* (shooting at an inhabited dwelling) but from the application of [Penal Code] section 186.22(b)(4), which sets forth not a felony but a penalty.' (*Jones, supra,* 47 Cal.4th at p. 575, 98 Cal.Rptr.3d 546, 213 P.3d 997.)" (*Williams*, *supra*, 227 Cal.App.4th at pp. 742-743; footnotes omitted, italics in original.)

Williams observed that *Jones* distinguished *Montes,* quoting *Jones*: "'Thus, this court in *Montes, supra,* 31 Cal.4th 350 [2 Cal.Rptr.3d 621, 73 P.3d 489], narrowly construed the statutory phrase "a felony punishable by imprisonment ... for life," which appears in subdivision (b)(5) of [Penal Code] section 186.22, as applying only to crimes where the

underlying felony provides for a term of life imprisonment. (*Id.* at p. 352 [2 Cal.Rptr.3d 621, 73 P.3d 489].) Defendant here argues that to be consistent with *Montes,* we should give the statutory phrase "felony punishable by ... imprisonment in the state prison for life," which appears in subdivision (a)(17) of [Penal Code] section 12022.53, the same narrow construction, and that, so construed, it does not include a life sentence imposed under an alternate penalty provision. *We agree with defendant that these statutory phrases should be construed similarly*. But we disagree that, construed narrowly, a felony that under [Penal Code] section 186.22(b)(4) is punishable by life imprisonment is not a "felony punishable by ... imprisonment in the state prison for life" within the meaning of subdivision (a)(17) of [Penal Code] section 12022.53. [¶] 'Unlike the life sentence of the defendant in *Montes, supra,* 31 Cal.4th 350 [2 Cal.Rptr.3d 621, 73 P.3d 489], which was imposed as a *sentence enhancement* (a punishment added to the base term), here defendant's life sentence was imposed under [Penal Code] section 186.22(b)(4), which sets forth the *penalty for the underlying felony* under specified conditions. The difference between the two is subtle but significant. "Unlike an enhancement, which provides for an *additional term* of imprisonment, [a penalty provision] sets forth an alternate penalty *for the underlying felony itself,* when the jury has determined that the defendant has satisfied the conditions specified in the statute." [Citation.] Here, defendant committed the felony of shooting at an inhabited dwelling (§ 246), he personally and intentionally discharged a firearm in the commission of that felony (§ 12022.53(c)), and because the felony was committed to benefit a criminal street gang, it was punishable by life imprisonment (§ 186.22(b)(4)). Thus, imposition of the 20–year sentence enhancement of [Penal Code] section 12022.53(c) was proper.' (*Jones, supra,* 47 Cal.4th at pp. 577–578, 98 Cal.Rptr.3d 546, 213 P.3d 997, some italics added.)" (*Williams*, *supra*, 227 Cal.App.4that p. 743; italics in original; footnote omitted.)

In concluding the trial court erred in imposing the 10-year gang enhancement, the *Williams* courts observed: "In this case, defendant received sentences of 25 years to life. These sentences of 25 years to life constitute life sentences within the meaning of [Penal Code] section 186.22, subdivision (b)(5). (*Lopez*, *supra*, 34 Cal.4th at p. 1007, 22 Cal.Rptr.3d 869, 103 P.3d 270.) These life sentences resulted from the application of the Three Strikes law. The Three Strikes law is a penalty provision, not an enhancement. It is not an enhancement because it does not add an additional term of imprisonment to the base term. Instead, it provides for an alternate sentence (25 years to life) when it is proven that the defendant has suffered at least two prior serious felony convictions. (See, *e.g.*, *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 527, 53 Cal.Rptr.2d 789, 917 P.2d 628 ['The Three Strikes law ... articulates an alternative sentencing scheme for the current offense rather than an enhancement.'].)" (*Williams*, *supra*, 227 Cal.App.4th at p. 744.)

Burden of proof of dangerousness

The burden of proof of dangerousness is by a preponderance of the evidence. (*People v. Saelee* (2018) 28 Cal.App.5th 744, 754 (*Saelee*).) Although a showing of *ineligibility* under the Act must be by clear and convincing evidence, dangerousness is not a part of

eligibility; dangerousness relates to *suitability* for relief. (*Saelee*, at pp. 753-754.) *Saelee* observed that "[o]ther courts have rejected [a claim that the standard is clear and convincing evidence] in the context of Proposition 36 and Proposition 47. (*People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1302-1306, 155 Cal.Rptr.3d 856 (*Kaulick*); *People v. Jefferson* (2016) 1 Cal.App.5th 235, 240-242, 204 Cal.Rptr.3d 583 (*Jefferson*).) The courts in *Kaulick* and *Jefferson* concluded, respectively, that the standard of proof to be applied in the second-step under the Proposition 36 and Proposition 47 recall and resentencing provisions is the default standard of proof by a preponderance of the evidence. (*Kaulick*, at pp. 1305-1306, 155 Cal.Rptr.3d 856 [Prop. 36]; *Jefferson,* at p. 241, 204 Cal.Rptr.3d 583 [Prop. 47].) In doing so, both courts cited Evidence Code section 115, which provides: '[e]xcept as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.' (*Kaulick*, at p. 1305, 155 Cal.Rptr.3d 856; *Jefferson*, at p. 341, 204 Cal.Rptr.3d 583.) [¶] We conclude that the reasoning of *Kaulick* and *Jefferson* applies equally to section 11361.8, subdivision (b), enacted in Proposition 64. (See Couzens, § 27.11, pp. 27-29 to 27-32.) Because neither the plain language of section 11361.8, nor any other statute provides for a higher standard of proof on the dangerousness finding under section 11361.8, subdivision (b), the proper standard of proof for the suitability step is preponderance of the evidence." (*Saelee*, at p. 754.)

Current dangerousness

Although nothing in the Act expressly addresses the issue, likely the court must determine whether the petitioner "currently" presents an unreasonable risk of danger to public safety. *People v Payne* (2014) 232 Cal. App. 4th 579, requires consideration of current dangerousness in the context of the similar exclusion in Proposition 36. "Although we decline to decide how and to what extent parole cases inform the decision whether to resentence a petitioner under the Act or our review of such a decision, we do agree with defendant that the proper focus is on whether the petitioner *currently* poses an unreasonable risk of danger to public safety. [Citations.] We also agree a trial court may properly deny resentencing under the Act based solely on immutable facts such as a petitioner's criminal history '*only* if those facts support the ultimate conclusion that an inmate continues to pose an unreasonable risk to public safety. [Citation.]' [Citation.] ' "[T]he relevant inquiry is whether [a petitioner's prior criminal and/or disciplinary history], when considered in light of other facts in the record, are such that they continue to be predictive of current dangerousness many years [later]. This inquiry is ... an individualized one, and cannot be undertaken simply by examining the circumstances of [the petitioner's criminal history] in isolation, without consideration of the passage of time or the attendant changes in the inmate's psychological or mental attitude. [Citation.]" [Citation.]' [Citation.]" (*Payne*, at pp. 601-602; italics in original.)

"Unreasonable" is not subject to a vagueness challenge

In a Proposition 36 case, *People v. Flores* (2014) 227 Cal.App.4th 1070 (*Flores*), the court rejected a petitioner's challenge that the phrase "unreasonable risk of danger to public

safety," was vague. The court stated: "Surely a superior court judge is capable of exercising discretion, justly applying the public safety exception, and determining whether a lesser sentence would pose an unreasonable risk of harm to the public safety. [Citation.] This is one of those instances where the law is supposed to have what is referred to by Chief Justice Rehnquist as 'play in the joints.' [Citation.] 'This is a descriptive way of saying that the law is flexible enough for the . . . trial court to achieve a just result depending upon the facts, law, and equities of the situation.' [Citation.]" (*Flores*, at p. 1075., footnote omitted.)

Nature of the hearing

In determining dangerousness, section 11361.8, subdivision (b)(1), provides "the court may consider, but shall not be limited to evidence provided in" Penal Code section 1170.18, subdivision (b). That section permits the court to consider (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.

It is clear that since the court has the authority to consider any relevant evidence, the inquiry is not limited to the record of conviction. If the defendant has been convicted of a "super strike," that fact alone will not disqualify the defendant from seeking resentencing, but the court certainly may consider the existence of the conviction in determining the defendant's dangerousness. It is likely the hearing will focus on whether the petitioner has engaged in sufficient violent conduct to allow a court to find that the pattern of conduct creates an unreasonable risk that a super strike will be committed.

The hearing itself likely will be conducted in the same manner as an original sentencing proceeding. There is nothing in the Act that suggests the rules of evidence and procedure would be any different than those employed in traditional sentencing proceedings. Accordingly, there likely may be a limited use of hearsay evidence, such as that found in probation reports. The California Supreme Court has directed that at sentencing, the court is permitted to consider a broad range of information, including responsible unsworn and out-of-court statements concerning the defendant, provided there is a substantial basis for believing the information is reliable. (*People v. Arbuckle* (1978) 22 Cal. 3d 749, 754; *People v. Lamb* (1999) 76 Cal. App. 4th 664, 683.) By statute, when imposing sentence the court may consider the "record in the case, the probation officer's report, other reports, including reports received pursuant to [Penal Code] Section 1203.03, and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing." (Pen. Code, § 1170 subd. (b).)

The scope of evidence that is admissible for the determination of dangerousness appears very broad, given the factors set forth in the statutory definition, listed above. Section 11361.8, subdivision (b)(1), and Penal Code section 1170.18, subdivision (b)(3), specifically authorize consideration of any relevant evidence in the determination of dangerousness – likely including the use of live testimony.

Whether a petitioner is dangerous if resentenced will depend on a careful review of all of the petitioner's circumstances. Some of the factors the court may wish to consider are:

- The actuarial risk rating of the petitioner and classification score by CDCR.
- The extent to which the petitioner has a well-grounded re-entry plan and support services, including the extent of any support services that may be ordered by the court on resentencing.
- The extent of any significant mental health issues, particularly those that will require continuing intervention and medication. It may be useful for the court to appoint a qualified mental health professional under Evidence Code, section 730 to assist in this aspect of the review. While normally a petitioner would have a medical privilege not to have psychological records disclosed, likely the privilege will be deemed waived by the filing of a petition under section 11361.8. Certainly the psychological history of a petitioner can have a direct bearing on the issue of dangerousness.
- Information disclosed by a current review of the petitioner's record of convictions. In other words, whether the petitioner's pattern of criminal conduct is reflective of dangerousness.
- Whether any victims were particularly vulnerable.
- The extent to which there may be non-criminal evidence of the petitioner's character or violent tendencies.

The hearing officer

The petition should be heard by the judge who originally sentenced the petitioner, if available. If for some reason the original judge is unavailable, the presiding judge must designate another judge to rule on the petition. (§ 11361.8, subd. (i).) The petitioner may enter a waiver of the right to have the proceeding heard by the original sentencing judge, provided such a waiver is entered prior to any judicial decision on the petition. (See *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279.) Although *Kaulick* makes no mention of the prosecution's right to have the matter heard by the original judge, presumably both parties must join in the waiver for it to be effective.

The right of the victim to participate

The resentencing hearing is considered a "post-conviction release proceeding" under article I, section 28, subdivision (b)(7) of the California Constitution (Marsy's Law). (§ 11361.8, subdivision (l).) If requested, the victim is entitled to notice of and to participate in the qualification and resentencing proceedings. Article I, section 28, subdivision (b)(7) entitles crime victims to "reasonable notice of all public proceedings, including delinquency proceedings, upon request, at which the 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." Section 28, subdivision (b)(8), additionally entitles victims to "be heard, upon request, at any proceeding, including any delinquency proceeding, involving a post-arrest release decision, plea, sentencing, post-conviction release decision, or any proceeding in which a right of the victim is at issue." Even if the prosecution is stipulating to the resentencing, the court should ensure that proper notice has been given to the victim, if notice has been requested.

Section 28, subdivision (e), of the California Constitution defines "victim" as "a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act. The term 'victim' also includes the person's spouse, parents, children, siblings, or guardian, and includes a lawful representative of a crime victim who is deceased, a minor, or physically or psychologically incapacitated. The term 'victim' does not include a person in custody for an offense, the accused, or a person whom the court finds would not act in the best interests of a minor victim."

Right to counsel

For a discussion of the right to counsel, see Section VI, *infra*.

No right to jury

The petitioner likely has no right to a jury determination of his eligibility for resentencing. Other courts have determined, in the Proposition 36 context, that *Apprendi v. New Jersey* (2000) 530 U.S. 466, has no application due to the retrospective nature of the petition for resentencing. (*People v. Elder* (2014) 227 Cal.App.4th 1308, 1315; *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1331-1336; *People v. Guilford* (2014) 228 Cal.App.4th 651, 662-663; see also *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1303.)

4. The resentencing

If the petitioner is eligible for resentencing and does not pose an unreasonable risk to public safety if resentencing is granted, "the court shall grant the petition to recall the sentence or dismiss the sentence because it is legally invalid. . . ." (§ 11361.8, subd. (b).)

Upon resentencing, the court presumably could impose any custody term authorized by the statute amended by the Act. However, "[u]nder no circumstances may resentencing under this section result in the imposition of a term longer than the original sentence." (§ 11361.8, subd. (d).)

The Judicial Council has approved a series of optional forms for seeking relief under the Act. For a form of order, see Appendix VII for adult convictions and Appendix XI for juvenile adjudications.

Credit for time served

The defendant must be given credit for any time already served. (§ 11361.8, subd. (c).) Accordingly, the petitioner is entitled to the following credits:

- For time served on a traditional commitment to county jail, custody credits will be awarded under Penal Code section 4019: for every two days of actual time served, the petitioner is entitled to two days of actual time credit and two days of conduct credit.
- For time served on a sentence imposed under Penal Code section 1170, subdivision (h), custody credits will be calculated under Penal Code section 4019 to the extent of any actual custody time served as part of the sentence. For time served on mandatory supervision, the petitioner will be entitled only to actual time served. (Pen. Code, § 1170, subd. (h)(5)(B).)
- For time served in state prison, credits will be calculated under Penal Code section 2933: for every six months of actual time, the defendant is entitled to six months of conduct credits, or a similar ratio for time served of less than six months.
- If the petitioner had been sentenced under the Three Strikes law, but is resentenced as a misdemeanant, custody credits should be calculated using the traditional formula under Penal Code section 2933 (50% credit), not the more restrictive formula specified by Penal Code section 1170.12, subdivision (a)(5), (20% credit), because the matter no longer falls under the Three Strikes law.

CDCR cannot calculate the credits for inmates who receive a misdemeanor sentence or for time served in county jail because the custody time is not limited to state prison. However, it can provide the court with all credits earned by the inmate while in prison to assist in the final calculation of custody credits. Guidance for the proper calculation of credits may be found in *People v. Buckhalter* (2001) 26 Cal.4th 20, which concerns resentencing following appeal. Under *Buckhalter*, the trial court is charged with the responsibility to calculate all actual time and conduct credits earned in the county jail. The trial court also is to calculate the actual time earned in state prison; conduct credits in prison, however, are calculated by CDCR. The CDCR calculations will be provided to the court or the county jail upon request.

Supervision

The Act specifies that the defendant will be subject to supervision on completion of the sentence. The mechanism of supervision will depend on whether the defendant has been serving a jail sentence or a term in state prison. Section 11361.8, subdivision (c), provides the defendant "shall be subject to supervision for one year following completion of his or her time in custody or shall be subject to whatever supervision time he or she would have otherwise been subject to after release, whichever is shorter, unless the court, in its discretion, as part of its resentencing order, releases the person from supervision. Such person is subject to parole supervision under Section 3000.08 of the Penal Code or post-release community supervision under subdivision (a) of Section 3451 of the Penal Code by the designated agency and the jurisdiction of the court in the county in which the offender is released or resides, or in which an alleged violation of supervision has occurred, for the purpose of hearing petitions to revoke supervision and impose a term of custody." The two sentences must be read together because "such person" in the second sentence clearly refers back to the person in the first sentence. Accordingly, supervision will occur as follows:

- For persons who are currently serving a jail sentence either as a straight misdemeanor commitment or a felony term imposed as a condition of probation or under Penal Code section 1170, subdivision (h), the supervision will be by probation for a period of one year, or the length of any remaining supervision period under probation or Penal Code section 1170, subdivision (h), whichever is less, unless the court "releases the person from supervision."
- For persons serving a state prison sentence, the supervision will be by probation for persons released to PRCS and by DAPO for persons on parole, for a period of one year, or any remaining period of PRCS or parole, whichever is less, unless the court "releases the person from supervision."

It is important to understand, however, that the forgoing limits on post-release supervision occur only if the defendant is serving a sentence for a qualified offense. If other, non-marijuana charges are being served, the defendant will be subject to the normal term of supervision, depending on his status on probation, PRCS, or parole.

If the defendant successfully petitions for resentencing and his available custody credits exceed the new sentence, undoubtedly the defendant will request that any excess credits be applied to any remaining supervision period. A similar issue has been addressed by the Supreme Court in *People v. Morales* (2016) 63 Cal.4th 399, in the context of Proposition 47. Penal Code section 1170.18, subdivision (d), in language nearly identical to section 11361.8, subdivision (c), provides: "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. The person is subject to parole supervision by the Department of Corrections and Rehabilitation pursuant to [Penal

Code] Section 3000.08 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." *Morales* rejected the application of *In re Sosa* (1980) 102 Cal.App.3d 1002, a case requiring excess credit to be applied to reduce a person's parole period. *Morales* concluded that a defendant will be given credit for his time in custody, but will also be required to complete a one-year period of parole unless the court releases him from that requirement. "[T]he voters have given Proposition 47 some retroactive effect. Some persons originally sentenced as felons can receive the benefit of a favorable resentencing. But the voters imposed a price for that benefit—parole for one year unless the court orders otherwise." (*Morales*, at p. 409.) Given the nearly identical language and context in Proposition 47 and section 11361.8, subdivision (c), *Morales* resolves the same issue under the Act.

Resentencing with mixed qualified and non-qualified offenses

Resentencing becomes more complicated if the marijuana offense is one among multiple offenses not subject to resentencing. In such circumstances, the court must recalculate the sentence, taking into account the resentencing of the marijuana charge.

If the marijuana offense is the principal term in a consecutive sentence, it will be necessary for the court to resentence the case with the offense now being a misdemeanor and determine a new principal term. (Couzens, Bigelow & Prickett, *Sentencing of California Crimes* (The Rutter Group 2016) Multiple Counts, § 13:19, p. 13-56, et seq.) The misdemeanor sentence will be either fully concurrent with or fully consecutive to the other counts. It may be necessary to "elevate" a subordinate term to be the new principal term. In selecting the new principal term, the court must select the sentence with the longest term actually imposed including count-specific conduct enhancements. The court would be free to select any term from the triad for a former subordinate count. The only restriction is that the aggregate sentence must not exceed the original aggregate sentence imposed by the court. (§ 11361.8, subd. (d).) Because the marijuana count is part of a multiple-count sentencing scheme, changing the sentence of one count fairly puts into play the sentence imposed on non-marijuana counts, at least to the extent necessary to preserve the original concurrent/consecutive sentencing structure. The purpose of section 11361.8 is to take the defendant back to the time of the original sentencing and resentence him with the punishment prescribed by the Act.

The resentencing of a subordinate count was discussed in *People v. Sellner* (2015) 240 Cal.App.4th 699). There, the defendant was originally sentenced on a Proposition 47-eligible offense to three years in prison. On a non-Proposition 47-eligibible offense she was sentenced to a consecutive eight months. Following the successful application for resentencing of the Proposition 47-eligible crime as a misdemeanor, the trial court resentenced the non-Proposition 47-eligibile offense to two years. The sentence was affirmed. "When the principal term is no longer in existence, the subordinate term must be recomputed. That is the case here. As long as the recomputed term is less than the

prior aggregate term, the defendant has not been punished more severely for the successful filing of a Proposition 47 petition. [¶] [Penal Code] Section 1170.18, subdivision (e) provides: "Under no circumstances may resentencing under this section result in the imposition of a term longer than the original sentence." It does not trump Penal Code section 1170.1, subdivision (a) or govern aggregate consecutive sentences which are treated as interlocking pieces. [Citation.]" (*Sellner*, at p. 701.)

Upon resentencing of the defendant, the court may impose the same term as originally imposed, so long as the sentence is authorized. (*People v. Roach* (2016) 247 Cal.App.4th 178 (*Roach*). "A successful petition under [Penal Code] section 1170.18 vests the trial court with jurisdiction to resentence the applicant, and in doing so the court is required to follow the generally-applicable sentencing procedures in [Penal Code] section 1170, et seq. [Citation.] In particular, [Penal Code] section 1170.1, subdivision (a) directs a trial court how to determine an aggregate sentence, such as that at issue in the present case." (*Roach*, at p. 184.)

Roach analogized the resentencing process under Penal Code section 1170.18 with the resentencing following an appeal. "We find some guidance from cases where a conviction underlying a principal term has been reversed on appeal and the matter remanded for resentencing. In that situation, the trial court on remand must 'select the next most serious conviction to compute a new principal term' and may also modify the sentences imposed on other counts as appropriate. [Citations.] In doing so, ' "the trial court is entitled to consider the entire sentencing scheme. Not limited to merely striking illegal portions, the trial court may reconsider all sentencing choices. [Citations.] This rule is justified because an aggregate prison term is not a series of separate independent terms, but one term made up of interdependent components." ' [Citations.] Similarly, where a petition under Penal Code section 1170.18 results in reduction of the conviction underlying the principal term from a felony to a misdemeanor, the trial court must select a new principal term and calculate a new aggregate term of imprisonment, and in doing so it may reconsider its sentencing choices." (*Roach*, at p. 185.)

Information needed by CDCR

If a court grants a petition for resentencing for a prison inmate, CDCR will need a certified copy of the minute order from the resentencing proceeding. The order should include all relevant information about the specific court findings and orders related to the new sentence. The order should be sent to the case records manager at the California institution where the individual is housed. If the inmate is housed in an out-of-state facility (COCF) or in a Community Correctional Facility (CCF), the documentation should be sent to the CDCR Contract Bed Unit (CBU). Faxed copies can be used by CDCR until the mailed copy is received.

The order of resentencing should clearly state whether the inmate is to be placed on PRCS or parole upon his release. If the petitioner remains subject to a prison commitment

based on non-Proposition 47-eligibile offenses, the court should do a full resentencing of the petitioner with the eligible crime designated as a misdemeanor.

No refilling of charges

Section 11361.8, subdivision (d), specifies that "[u]nder no circumstances may resentencing under this section result in the imposition of a term longer than the original sentence, or the reinstatement of charges dismissed pursuant to a negotiated plea agreement." With this provision, the Act makes it clear that although prior plea negotiations resulted in a certain disposition, the fact that the defendant receives a reduced disposition under the Act is not grounds for reopening those discussions. Likely there would be the same outcome based on the Supreme Court's decision in *Harris v. Superior Court (People)* (2016) 1 Cal.5th 984, wherein the court held the district attorney was not entitled to reinstate charges dismissed as part of a plea bargain when the defendant successfully petitioned for relief under Proposition 47.

Sealing of record

The Act does not provide persons currently serving a sentence the means to seal the conviction if the recall of the sentence is based on the fact that the conduct of the defendant is no longer criminal. Such a right is given to persons who petition for relief after the sentence has been completed. (See discussion of section 11361.8, subd. (f), *infra*.) However, since nothing prevents the defendant from requesting such relief once the sentence has been completed, it may be expedient for the parties to stipulate to such relief in appropriate circumstances.

Misdemeanor or infraction for all purposes

If the court grants the request to resentence the offense as a misdemeanor or infraction, thereafter the crime will be treated as a misdemeanor or infraction for all purposes. Unlike Proposition 47, the resentencing does not preclude the right to own or possess firearms. (See Pen. Code § 1170.18, subd. (k).)

Presumably because section 11361.8, subdivision (b), specifies the petitioner's felony sentence shall be *recalled*, the petitioner will automatically be restored of all civil rights that had been denied because of the felony conviction.

V. REDESIGNATION PROVISIONS – COMPLETED SENTENCE

Section 11361.8, subdivisions (e) - (g), allow persons who have completed their sentence for qualified marijuana offenses to apply to the court that entered judgment in their case for designation of the offense as a misdemeanor or infraction, or dismissal as if the Act would have been in effect at the time the crime was committed.

Section 11361.8, subdivisions (e) and (f), provide, in relevant part: "(e) A person who has completed his or her sentence for a conviction under Sections 11357, 11358, 11359, and 11360, whether by trial or open or negotiated plea, who would not have been guilty of an offense or who would have been guilty of a lesser offense under the Control, Regulate and Tax Adult Use of Marijuana Act had that 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 conviction dismissed and sealed because the prior conviction is now legally invalid or redesignated as a misdemeanor or infraction in accordance with Sections 11357, 11358, 11359, 11360, 11362.1, 11362.2, 11362.3, and 11362.4 as those sections have been amended or added by that act. (f) … Once the applicant satisfies the criteria in subdivision (e), the court shall redesignate the conviction as a misdemeanor or infraction or dismiss and seal the conviction as legally invalid as now established under the Control, Regulate and Tax Adult Use of Marijuana Act."

The two subsections must be read together. Read alone, subsection (e) would suggest the defendant would be entitled to dismissal and sealing of all convictions covered by the Act, including those that are simply reduced to a misdemeanor or infraction. However, when subdivision (e) is read with subdivision (f), it is clear the enactors intended the petitioner will be entitled to redesignation of a qualified crime as a misdemeanor or infraction, but dismissal and sealing occurs only if the qualified offense is no longer a crime under the Act.

A. Eligible persons

There are three eligibility requirements specified by section 11361.8, subdivision (e), for redesignation or dismissal of qualified offenses:

- The conviction must be for a crime listed in the Act: sections 11357, 11358, 11359, 11360.
- The person must have completed the sentence for one of the designated crimes.
- The person "would not have been guilty of an offense or who would have been guilty of a lesser offense under the [Act] had that act been in effect at the time of the offense." (§ 11361.8, subd. (e).) As to some offenses, to meet this element of eligibility, the defendant must either have been between the ages of 18 and 21, or over 21 when the crime was committed. Furthermore, the ability to obtain a reduced sentence may also depend on the type and quantity of marijuana involved. For example, section 11362.1, subdivision (a)(1), makes it legal for a person over the age of 21 to possess not more than 28.5 grams of marijuana not in the form of concentrated cannabis.

Basic eligibility is established by the petitioner meeting just these three requirements. (§ 11361.8, subd. (f).) Unlike Propositions 36 and 47, the Act does not disqualify a person simply because he or she has any particular prior criminal offense, even "super strikes."

B. Eligible crimes

Section 11361.8, subdivision (a), clearly provides that the ability to seek resentencing is limited to persons convicted of a violation of sections 11357, 11358, 11359, and 11360.

C. Persons who have completed their sentence

The following persons will be eligible to apply for redesignation or dismissal:

1. **Persons who have completed a prison term**
   Persons who have completed a prison term, and any required period of parole or PRCS, will have the ability to apply for redesignation or dismissal of any qualified offense.

2. **Persons who have completed a term imposed under section 1170, subdivision (h)(5)**
   Persons who have completed a county jail term imposed under the provisions of section 1170, subdivision (h)(5), whether a straight or split sentence, will be eligible for relief.

3. **Persons who have completed probation**
   Persons who have completed their terms of probation will be able to apply for relief. A person whose probation is terminated or has fulfilled a probationary sentence has "completed a sentence," in that there is no remaining sentence to serve. In addition, it would be anomalous for the enactors to intend to benefit persons who complete a prison term, but not a defendant who successfully completes the requirements of probation.

4. **Persons who have completed straight jail sentences imposed on misdemeanors.**
   The Act will include all those persons who have completed any jail sentence imposed on misdemeanors without probation having been granted.

5. **Juveniles**
   The Act expressly extends the benefits of redesignation to juveniles. (§ 11361.8, subd. (m).)

The fact that a qualified conviction has been dismissed under Penal Code section 1203.4 does not preclude the granting of relief under Proposition 47. (*People v. Tidwell* (2016) 246 Cal.App.4th 212.) Given the intent of the Act to provide broad relief to persons who have committed designated marijuana offenses, it seems likely *Tidwell* will apply to petitions under section 11361.8, subdivision (e).

D. Procedure for redesignation or dismissal

For persons who have completed their sentence, the process for redesignation or dismissal is defined in section 11361.8, subdivisions (e) - (g). Like the resentencing of specified property and drug crimes under Penal Code section 1170.18, the Act contemplates a potential four-step process: (1) the filing of an application requesting redesignation or dismissal, (2) an initial screening for eligibility, (3) a qualification hearing where the merits of the application are considered, and, if appropriate, (4) a redesignation or dismissal of the crime.

1. The filing of an application

The process is initiated by the filing of an application. Nothing in the Act suggests the court has any *sua sponte* obligation to act on any case without the request of the petitioner.

Form of the application

No particular form of application is specified by the initiative. Although section 11361.8, subdivision (n), specifies that "[t]he Judicial Council shall promulgate and make available all necessary forms to enable the filing of the petitions and applications provided in this section," nothing in the Act *requires* the use of Judicial Council forms. Presumably, the application may be made orally in open court, as in a request for resentencing under Proposition 47. (*People v. Amaya* (2015) 242 Cal.App.4th 972; *People v. Franco* (2016) 245 Cal.App.4th 679.) The Supreme Court affirmed *Franco* in *People v. Franco* (2018) 6 Cal.5th 433, but it did not address this particular issue.

The Judicial Council has approved a series of optional forms for seeking relief under the Act. See Appendix IV for adult convictions and Appendix VIII for juvenile adjudications.

Statute of limitations

Unlike Propositions 36 and 47, the Act has no window period for filing for relief.

Right to counsel

For a full discussion of the right to counsel in the preparation of the application, see Section VI, *infra*.

2. Initial screening of the application for eligibility

Under Propositions 36 and 47, the petitioner carries an initial burden to establish eligibility for relief. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 877; *People v. Bradford* (2014) 227 Cal.App.4th 132; *People v. Perkins* (2016) 244 Cal.App.4th 129, 136-137.) The Act, however, specifies that "the court *shall presume the petitioner satisfies the criteria* in

subdivision (f) unless the party opposing the application proves by clear and convincing evidence that the petitioner does not satisfy the criteria in subdivision (e)." (§ 11361.8, subd. (f); italics added.) Although the presumption shifts the burden to the prosecution, presumably the court retains the ability to deny a petition if it is facially deficient – i.e., the petition fails to allege a qualified crime.

3. Qualification hearing

The third step of the process, if necessary, is the qualification hearing where the court considers the merits of the petition. Subdivision (g) provides that "'[u]nless requested by the applicant, no hearing is necessary to grant or deny an application filed under subdivision (e)." While the court may proceed without a hearing, implicit in the ability of the prosecution to present evidence that the applicant is not eligible, is the right to notice that the petition has been filed. The court should not proceed with an application without the prosecution being served and having an opportunity to object, and, if necessary, to request a hearing.

The hearing will be to confirm the petitioner's eligibility for relief: that he has been convicted of a qualified offense, that he completed a sentence for a qualified crime, and that he would have been convicted of a lesser offense, or no crime at all, had the Act been in effect when the crime was committed. As to the last issue, it may be necessary to determine the defendant's age at the time the crime was committed, or the nature and quantity of the marijuana. To overcome the presumption of eligibility, the prosecution must present clear and convincing evidence that the defendant is not eligible. There is no determination of dangerousness in this process.

The statute does not define the scope of evidence admissible to prove or disprove the petitioner's eligibility for resentencing. *People v. Bradford* (2014) 227 Cal.App.4th 1332, 1337, a Proposition 36 case, concludes that the determination of eligibility is limited to the "record of conviction." The "record of conviction" constitutes "those record documents reliably reflecting the facts of the offense for which the defendant was convicted." (*People v. Reed* (1996) 13 Cal.4th 217, 223.) Depending on the circumstances, the record of conviction can include the abstract of judgment, the Penal Code section 969b prison packet, the charging document and plea form, transcripts of the petitioner's plea, the factual basis given for the plea, preliminary hearing and trial transcripts, and appellate opinions. (For a full discussion of the law related to the record of conviction, see Couzens & Bigelow, "California Three Strikes Sentencing," (The Rutter Group, 2020) § 4:5.) It is unlikely that the court may consider live testimony or other documentation offered by either party if it is outside the "record of conviction." Such evidence is prohibited in the context of proving a strike. (*Reed*, *supra*, at p. 223; *People v. Guerrero* (1988) 44 Cal.3d 343.)

The restriction to the "record of conviction," however, is not absolute. In *People v. Triplett* (2016) 244 Cal.App.4th 824, the parties agreed to certain facts regarding a prior

conviction, which were offered to supplement the facts contained in the record. The court held it was proper to consider these additional facts: "[W]e conclude that in determining eligibility for sentence modification under the Act, a trial court is not limited to the record of conviction, but may also consider any factual stipulations or clear agreements by the parties that add to, but do not contradict, the record of conviction." (*Triplett*, at p. 826.) The Supreme Court granted review of *Triplett* and transferred the matter back to the appellate court, with directions to vacate its decision and reconsider it for reasons unrelated to the analysis above.

People v. Banda (2018) 26 Cal.App.5th 349 (*Banda*), holds that in determining whether to grant resentencing under the Act, the court may consider evidence beyond the record of conviction, as authorized in the Proposition 47 context by *Romanowski, supra*, 2 Cal.5th 903. In *Romanowski*, the Supreme Court "determined that, in some instances, the record of conviction would contain the facts necessary to demonstrate eligibility. In others, however, an evidentiary hearing would be required if, after considering the record and any matters in the petition, the return, affidavits, or matters subject to judicial notice, the court believed 'the petitioner's entitlement to relief depends on the resolution of an issue of fact.' [Citations.]" (*Banda*, at p. 356.)

The *Banda* court also referenced *Perez, supra*, 4 Cal.5th 1055, where, in the context of Proposition 36, the Supreme Court "reaffirmed its ruling in *People v. Estrada* (2017) 3 Cal.5th 661, 672, . . . that the court could properly consider facts beyond the record of conviction, and held that the court could, consistent with the Sixth Amendment, consider facts not found by the jury. [Citation.] [¶] Thus, to the extent the court and the parties in this case were uncertain that the court could consider facts beyond the record of conviction, and could do so in an evidentiary hearing, the reasoning of the decisions in *Perez* and *Romanowski* indicate that the same should be true in cases under Proposition 64. Section 11361.8, subdivision (a) placed the burden of proof on the People; as *Perez* and *Romanowski* made clear, the People were not limited in meeting that burden to facts already in the record." (*Banda*, *supra*, 26 Cal.App.5th at pp. 356–357.)

The *Banda* court further held that trial courts may consider probation reports from the underlying case, but only if they are reliable: "The People correctly assert that the petition in a Proposition 64 case, as in Propositions 36 and 47, bears the hallmarks of a resentencing proceeding. In such cases, trial courts may consider hearsay if that hearsay is reliable. [Citations.] [¶] A probation report is inadmissible hearsay, however, when 'the report excerpt includes the officer's assertions that certain events 'reportedly' occurred [during the prior assault]. Narration of 'reported' events is by definition based on the statements of others. Indeed, unless the probation officer was a percipient witness [to the assault], all of the narration contained in the excerpt must have been drawn from other people's previous statements. [¶] The report fragment does not identify the

declarant or declarants from whose statements the probation officer drew his factual summary.' [Citation.]" (*Banda*, at p. 357.)

The probation report is not a part of the record of conviction. Therefore, it was error by the trial court, in the context of a Proposition 36 case, to use the probation report in establishing the defendant was armed at the time of the crime. (*People v. Burns* (2015) 242 Cal.App.4th 1452, 1459–1460.)

Original sentencing judge

Unless the requirement is waived, the application must be reviewed by the original sentencing judge, or if that judge is unavailable, by a judge designated by the presiding judge of the court. (§ 11361.8, subd. (i).) (See *People v. Superior Court (Kaulick)*(2013) 215 Cal.App.4th 1279, 1300 – 1301 [waiver of original sentencing judge in Proposition 36 case].)

Time of hearing

Because section 11361.8 does not specify a time of hearing, the hearing should be set within a "reasonable time." The petitioner and the prosecutor have the right to notice of, and to appear at, any hearing held in connection with the qualification and redesignation procedure. (See Proposition 36 cases: *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279; *People v. Manning* (2014) 226 Cal.App.4th 1133, 1144.)

No right to jury

The petitioner likely has no right to a jury determination of his eligibility for redesignation. Other courts have determined, in the Proposition 36 context, that *Apprendi v. New Jersey* (2000) 530 U.S. 466, has no application due to the retrospective nature of the petition for resentencing. (*People v. Elder* (2014) 227 Cal.App.4th 1308, 1315; *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1331-1336; *People v. Guilford* (2014) 228 Cal.App.4th 651, 662-663; see also *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1303.)

Right to counsel

For a discussion of the right to counsel, see Section VI, *infra*.

Role of the victim

It is uncertain whether the Act grants the victim the right to participate in the redesignation process. Section 11361.8, subdivision (l), provides that "[a] *resentencing hearing* ordered under this act shall constitute a 'post-conviction release proceeding' under paragraph (7) of subdivision (b) of Section 28 or Article I of the California Constitution (Marsy's Law)." (italics added.) The purpose of Marsy's Law is to ensure that

victims have the right to participate in any decision that could result in the post-sentencing release of an offender. Clearly, no one is being "released" as a result of the redesignation process. Furthermore, section 11361.8, subdivision (g), expressly allows the court to grant the redesignation without any hearing – there is no "resentencing hearing" that would trigger the victim's rights under Marsy's Law.

4. Order granting redesignation or dismissal

If the defendant is eligible for relief, "the court shall redesignate the conviction as a misdemeanor or infraction or dismiss and seal the conviction as legally invalid as now established under the Control, Regulate and Tax Adult Use of Marijuana Act." (§ 11361.8, subd. (f).)

The Judicial Council has approved a series of optional forms for seeking relief under the Act. For a form of order, see Appendix VII for adult convictions and Appendix XI for juvenile adjudications.

If the court grants the request to redesignate the offense as a misdemeanor or infraction, thereafter the crime will be treated as a misdemeanor or infraction for all purposes. Unlike Proposition 47, the redesignation does not preclude the right to own or possess firearms. (See Pen. Code § 1170.18, subd. (k).)

5. Sealing of conviction

Section 11361.8, subdivision (f), provides, in relevant part, that "[o]nce the applicant satisfies the criteria in subdivision (e), the court shall redesignate the conviction as a misdemeanor or infraction or dismiss and *seal the conviction as legally invalid as now established under* [the Act]." (Italics added.) The court's obligation to seal the conviction is not further defined by the Act.

Clearly the court will be required to seal its own records of the conviction. Each court should develop a mechanism for physically sealing the file of a qualified conviction and make any necessary entries in its data system indicating the sealed status of the case. Thereafter, access to the sealed file and record of conviction would only be as authorized by court order.

Without additional express language in section 11361.8, subdivision (f), it is doubtful the court has further duties in the sealing of the record. Penal Code section 851.8, subdivision (a), for example, provides extensive instructions for the sealing and destruction of arrest records when a person is found factually innocent of a criminal offense: "In any case where a person has been arrested and no accusatory pleading has been filed, the person arrested may petition the law enforcement agency having jurisdiction over the offense to destroy its records of the arrest. A copy of the petition shall be served upon the prosecuting attorney of the county or city having jurisdiction over the offense. The law

enforcement agency having jurisdiction over the offense, upon a determination that the person arrested is factually innocent, shall, with the concurrence of the prosecuting attorney, seal its arrest records, and the petition for relief under this section for three years from the date of the arrest and thereafter destroy its arrest records and the petition. The law enforcement agency having jurisdiction over the offense shall notify the Department of Justice, and any law enforcement agency that arrested the petitioner or participated in the arrest of the petitioner for an offense for which the petitioner has been found factually innocent under this subdivision, of the sealing of the arrest records and the reason therefor. The Department of Justice and any law enforcement agency so notified shall forthwith seal their records of the arrest and the notice of sealing for three years from the date of the arrest, and thereafter destroy their records of the arrest and the notice of sealing. The law enforcement agency having jurisdiction over the offense and the Department of Justice shall request the destruction of any records of the arrest which they have given to any local, state, or federal agency or to any other person or entity. Each agency, person, or entity within the State of California receiving the request shall destroy its records of the arrest and the request, unless otherwise provided in this section." Since section 11361.8, subdivision (f), contains none of the directives contained in Penal Code section 851.8, it is unlikely any such duty will be imposed on the court pursuant to the Act.

Juvenile adjudications

Although section 11361.8, subdivision (f), refers to "convictions" and not "adjudications," there is no doubt that its provisions also apply to juvenile adjudications. Section 11361.8, subdivision (m), makes the benefits of the Act fully applicable to juveniles. However, since the Act does not decriminalize any conduct committed by juveniles, the sealing provisions will have no application to their cases.

VI. RIGHT TO COUNSEL

A criminal defendant has a Sixth Amendment right to be represented by counsel at all critical stages of the proceedings in which his substantial rights are at stake. (*People v. Crayton* (2002) 28 Cal.4th 346, 362, citing *Mempa v. Rhay* (1967) 389 U.S. 128, 134.) Sentencing is a stage at which a defendant has a right to counsel. (See *Clemensen v. Municipal Court* (1971) 18 Cal.App.3d 492, 499.) In determining whether there is a right to counsel, it may be necessary to distinguish between resentencing proceedings, where a petitioner's liberty interest is at stake, and redesignation proceedings, where the sentence has been completed. It may be argued that there is no right to appointed counsel in the latter circumstance since it is no longer a "critical stage of the proceedings." If the right to counsel exists for either procedure, however, entitlement may depend of the particular stage of the proceedings.

A. Preparation of the petition or application and initial screening

The procedure under section 11361.8 may be considered comparable to a habeas proceeding where the petitioner's right to counsel does not attach until the court determines the petitioner has made a *prima facie* case for relief and issues an order to show cause. (See *In re Clark* (1993) 5 Cal.4th 750, 779 ["[I]f a petition attacking the validity of a judgment states a *prima facie* case leading to issuance of an order to show cause, the appointment of counsel is demanded by due process concerns."].) Therefore, it does not appear the defendant is entitled to counsel for the initial preparation of the petition or in connection with its initial screening.

B. The qualification hearing

Since section 11361.8 allows a person to seek "resentencing" or "redesignation," it would appear the person has a right to counsel in any court proceeding where the merits of the application are considered. There are several aspects of section 11361.8 that seem to support such a conclusion.

First, the trial judge presented with a petition for resentencing must determine whether the person has satisfied the criteria specified in section 11361.8, subdivision (a), and also must exercise discretion in determining whether other factors outlined in the new law indicate that resentencing the petitioner "would pose an unreasonable risk of danger to public safety." (§ 11361.8 subd. (b).)

Second, section 11361.8, subdivision (l), indicates proceedings under the new law 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)." Such a designation means any victim in the case has a right to request notice of the hearing, be at the hearing, and present argument if a right of the victim is at issue.

Because in a proceeding under section 11361.8, the court (1) exercises its discretion in deciding whether to resentence the petitioner or redesignate the offense, and (2) makes such a decision at a scheduled hearing during which the victim and prosecutor may present argument against the petitioner, it would appear the procedure is one in which the petitioner's substantial rights are at stake and thus there is a right to counsel.

The process for providing appointed counsel should be practical, tailored to the realities of the circumstances. It would be wasteful of court time and resources to schedule court hearings for the purpose of determining whether a petitioner or applicant desires an attorney. Courts may find it most productive to refer all *pro se* petitions to the public defender, which, in turn, would make personal contact with the individual.

C. The resentencing

The petitioner has a right to the assistance of counsel for the actual resentencing stage of the proceedings. (*People v. Rouse* (2016) 245 Cal.App.4th 292.) The right attaches even though the petitioner has waived his appearance for the proceedings. As noted above, sentencing is a stage at which a defendant has a constitutional right to counsel. (See *Clemensen v. Municipal Court* (1971) 18 Cal.App.3d 492, 499.) A petitioner also has the right of self-representation at the resentencing proceeding; the right, however, is waivable. (*People v. Fedalizo* (2016) 246 Cal.App.4th 98.)

VII. Appellate review

Appellate courts were in conflict over the issue of the proper vehicle to review the summary denial of a petition for resentencing under Proposition 36. The primary issue was whether a summary denial is appealable or whether the aggrieved party must proceed by writ. The Supreme Court resolved the conflict in *Teal v. Superior Court* (2014) 60 Cal.4th 595. There, the court held a summary denial of a petition for resentencing under Penal Code section 1170.126 is an appealable order under Penal Code section 1237, subdivision (b). There is nothing in Proposition 47 that suggests any different result for petitions or applications brought under Penal Code section 1170.18. For the same reasons, *Teal* makes the summary denial of a petition under the Act appealable.

An appeal to challenge the grant or denial of a petition or application under Penal Code section 1170.18 must be heard by the Court of Appeal, not the appellate division of the superior court. "[I]f a defendant is charged with at least one felony in an information, an indictment, or in a complaint that has been certified to the superior court under [Penal Code] section 859a, . . . it is a felony case and appellate jurisdiction properly lies with this court." (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089; *People v. Lynall* (2015) 233 Cal.App.4th 1102, 1105.) *Rivera* and *Lynall* appear fully applicable to section 11361.8.

Standard of review

The denial of resentencing based on dangerousness is reviewed under the "abuse of discretion" standard. The argument that the substantial evidence standard should be applied in this situation was rejected in *People v. Payne* (2014) 232 Cal.App.4th 579 (*Payne*): "The plain language of subdivisions (f) and (g) of [Penal Code] section 1170.126 calls for an exercise of the sentencing court's discretion. ' "Discretion is the power to make the decision, one way or the other." [Citation.]' [Citation.] 'Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion "must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]" [Citation.]' [Citations.]" (*Payne*, at p. 591, footnote omitted.) *Payne* was granted review by the Supreme Court, which subsequently dismissed the matter and remanded it to the appellate court.

Relief by appellate court

Several cases have addressed the role of the appellate courts in granting resentencing under Proposition 47. A number of appellants have requested the appellate court to specify qualified felony convictions as misdemeanors. *People v. Shabazz* (2015) 237 Cal.App.4th 303; *People v. Contreras* (2015) 237 Cal.App.4th 868; *People v. DeHoyos* (2015) 238 Cal.App.4th 363; *People v. Lopez* (2015) 238 Cal.App.4th 177; *People v. Diaz* (2015) 238 Cal.App.4th 1323, and *People v. Delapena* (2015) 238 Cal.App.4th 1414, have refused such requests, observing that Penal Code section 1170.18 requires the request for relief to originate with a petition filed in the trial court. *Shabazz* and *DeHoyos* hold that Proposition 47 is not retroactive. The cases reject the application of *In re Estrada* (1965) 63 Cal.2d 740, even though the cases were not final on appeal at the time Proposition 47 was enacted. . (*Shabazz*, at pp. 313–314; *DeHoyos*, at pp. 367–368.) *DeHoyos*, *Lopez*, and *Delapena* were granted review. *DeHoyos* was affirmed in *People v. DeHoyos* (2018) 4 Cal.5th 594. *Lopez* and *Delapena* were dismissed and remanded in light of *DeHoyos*.

People v. Awad (2015) 238 Cal.App.4th 215, acknowledged the Hobson's choice facing defense counsel: either abandon a potentially meritorious appeal and proceed with a motion under Penal Code section 1170.18 which could effect an early release of the defendant, or await the results of the appeal, then file the motion if the conviction is affirmed. The latter approach is suggested by *Lopez*, which observed that the appellate status of the case would constitute "good cause" for a delayed filing under Penal Code section 1170.18, subdivision (j). (*Lopez*, *supra*, 238 Cal.App.4th at p. 182.) *Awad*, however, holds that appellate courts have the discretion to make a limited remand to the trial court under Penal Code section 1260, expressly for the purpose of considering a motion under Penal Code section 1170.18. (*Awad*, at p. 222.)

Whether the trial court has some form of concurrent jurisdiction with the appellate court for the purpose of hearing a motion under Penal Code section 1170.18 is also addressed in *People v. Scarbrough* (2015) 240 Cal.App.4th 916. Relying on the Proposition 36 case of *People v. Yearwood* (2013) 213 Cal.App.4th 161, the court concluded the trial court does not have jurisdiction to consider a direct application under Penal Code section 1170.18 once the case is on appeal. The court observed, however, that the defendant could apply to the appellate court for a stay of the sentence for the Proposition 47-eligible offense – only a partial solution to the defendant's problems because he would have to serve the misdemeanor sentence once the appeal had been completed. (*Scarbrough*, at p. 929, fn. 4.) Additionally the court distinguished *Awad* because the defendant there did not request a limited remand for the purpose of a Penal Code section 1170.189 motion. (*Scarbrough*, at p. 929, fn.5.)

VIII. Additional issues

A. Previously imposed fees and fines

Whether the Act compels an adjustment of fees and fines paid for a marijuana conviction likely will depend on whether the sentence is still being served or has been completed.

Persons who have completed their sentence

With respect to persons who have completed their sentence, it is unlikely there will be any right to reimbursement of overpaid fees and fines. The assessed fees and fines were lawfully imposed at the time of conviction. The remedy afforded under section 11361.8, subdivision (f), is not unlike relief granted under Penal Code section 17, subdivision (b)(3) ("[The crime] is a misdemeanor for all purposes under the following circumstances: . . . (3) When the court grants probation to a defendant and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor.") When such relief is granted, felony fees and fines are not refunded. As observed by the Supreme Court, a reduction to a misdemeanor "for all purposes" under Penal Code section 17, subdivision (b), does not apply retroactively. (*People v. Feyrer* (2010) 48 Cal.4th 426, 438-439; *People v. Banks* (1959) 53 Cal.3d 370, 381-382; see also *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1094-1095.) Furthermore, there is nothing in the express language of Proposition 64 that compels such a refund. Finally, there is no right to adjustment if the particular assessment is within the range authorized for the redesignated offense. A request for refund of fees and fines under these circumstances should be denied. For example, section 1203.4, subdivision (b), provides for a restitution fine for any felony or misdemeanor conviction. If the offense is a felony, the minimum assessment is currently $300; if it is a misdemeanor, the minimum assessment is currently $150, but may be up to $1,000. An assessment of $300 for a misdemeanor, therefore, is well within the court's discretion; it is not an *unauthorized* sentence. Under similar circumstances, the court in *Alejandro N. v. Superior Court (People)*(2015) 238 Cal.App.4th 1209, denied a recovery of fees in a juvenile proceeding because the assessment was already within proper limits for a misdemeanor. *Alejandro N.* was disapproved of on other grounds in *In re C.B.* (2018) 6 Cal.5th 118.)

Persons who are currently serving their sentence

The court will have a different obligation to persons who are currently serving a sentence where fees and fines remain unpaid. There likely is a duty, upon request of the defendant, to recompute the fees and fines based on a misdemeanor disposition. It does not seem appropriate that the court continue to collect fees and fines based on a felony conviction after the conviction has been reduced to a misdemeanor. If recomputation is required, the determination of the correct fee will depend on the nature of the assessment. If the assessment is a "fine," such as the restitution fine under Penal Code section 1203.4, subdivision (b), it should be recomputed at the rate set for the level of the offense at the time the crime was committed. If the assessment is an "administrative cost," such as the court operations assessment under Penal Code section 1465.8, then the current fee would be the current assessment. (See *People v. Schoeb* (2005) 132 Cal.App.4th 861.)

Recomputing the fees and fines

The process of recalculation is not complicated. If the court grants a request for resentencing of a case, it should redetermine the proper fees and fines, given the new level of the resentenced

offense. For example, assume the defendant was previously convicted of a felony violation of section 11359, possession of marijuana with intent to sell, and the court previously imposed the following fees and fines:

Base fine $480 + penalty assessments ($1,920):	$2,400
Restitution fine (Pen. Code, § 1202.4, subd.(b)):	$300
Probation revocation fine (Pen. Code, § 1202.44)(stayed):	$300
Court operations assessment (Pen. Code, § 1465.8):	$40
Court facilities fee (Govt. Code, § 70373, subd. (a)(1)):	$30
Crime lab fee (§ 11372.5) $50 + penalty assessments ($200)	$250
Total original fees and fines:	$3,020

If the court grants resentencing of the felony charge, the fees and fines would be recomputed at the misdemeanor level, as necessary, as follows:

Base fine $480 + penalty assessments ($1,920):	$2,400
Restitution fine (Pen. Code, § 1202.4, subd. (b)):	$150
Probation revocation fine (Pen. Code, § 1202.44)(stayed):	$150
Court operations assessment (Pen. Code, § 1465.8):	$40
Court facilities fee (Govt. Code, § 70373, subd. (a)(1)):	$30
Crime lab fee (§ 11372.5) $50 + penalty assessments ($200)	$250
Total fees and fines after resentencing:	$2,720

Note that the base fine did not *require* adjustment since it is within the amount of fine authorized for the crime under the Act. However, the court would have the *discretion* to lower or eliminate the base fine on resentencing. The court operations assessment, court facilities fee, and crime laboratory fee remain the same since these amounts apply whether the crime is a misdemeanor or felony. The defendant would be entitled to a credit for any of these fees or fines paid up to the point of resentencing.

If the request for resentencing results in a dismissal of a marijuana charge, the fees and fines would be recalculated with that charge no longer a part of the equation. In other words, if there is a single count conviction of a marijuana charge for conduct that is now legal under the Act, all unpaid fees and fines would be "zeroed out."

Application of excess custody credits to fees and fines

The resentencing of a felony count may result in a defendant having excess custody credits when applied to the new sentence. The excess credits may be applied to reduce certain fees and fines at the rate of $125 or more per day. (Pen. Code, § 2900.5, subd. (a).) For crimes committed after July 2013, the credit may apply to all fines except for a restitution fine imposed under Penal Code section 1202.4. (*People v. Morris* (2015) 242 Cal.App.4th 94.)

B. Cases transferred to different county

Probation cases and cases where the defendant is serving a period of mandatory supervision under Penal Code section 1170, subdivision (h), may be transferred to the defendant's county of residence under Penal Code section 1203.9. Appellate decisions were in conflict regarding the proper venue for the filing of a petition for resentencing under Penal Code section 1170.18, subdivision (a), when the case has been transferred to a new county under section 1203.9. The Supreme Court, In *People v. Adelmann* (2018) 4 Cal.5th 1071 (*Adelmann*), determined the proper court for filing of the resentencing petition is in the county of the original sentencing court. "Under the resentencing statute, a person 'who would have been guilty of a misdemeanor under the act that added this section . . . 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' Proposition 47. ([Pen. Code,] § 1170.18, subd. (a), italics added.) The word 'may' is 'usually permissive' [citation], but use of that word here refers to what a person eligible for resentencing may do. A defendant is not required to seek relief, but if he or she chooses to do so, the statute directs that a resentencing petition be filed in the original sentencing court." (*Adelmann*, at p. 1078.) Although *Adelmann* was decided in the context of Proposition 47, nothing in the opinion suggests it would not be equally applicable to petitions for resentencing under section 11361.8. Similar to Penal Code, section 1170.18, subdivision (a), section 11361.8, subdivision (a), provides that a qualified person "may petition for a recall or dismissal of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing or dismissal . . . ."

C. DNA samples

The provisions in the Act that make specified marijuana offenses "infraction[s] for all purposes" do not require the expungement of a person's DNA from the state's database where it was properly obtained prior to the change in the law. (*People v. Laird* (2018) 27 Cal.App.5th 458.)

Laird is consistent with *In re C.B.* (2018) 6 Cal.5th 118 (*C.B.*), in which the Supreme Court held Proposition 47 does not require the expungement of DNA samples and profiles. (*C.B.*, at p. 121.) Similar to the Act, Proposition 47 mandates redesignated offenses be treated as misdemeanors "for all purposes." (Pen. Code, § 1170.18, subd. (k).) The court, however, explained that "[a]fter Proposition 47, redesignation of a category of offenses can terminate the duty to submit samples. But redesignation is largely immaterial to expungement, which does not hinge on whether an offense would give rise to a duty to submit were it committed today. There is no inconsistency between treating a redesignated offense as a misdemeanor for all purposes and declining to expunge a previously submitted DNA sample." (*C.B.*, at p. 129.)

D. Felony warrants; failure to appear

When a defendant fails to appear on a felony prosecution, the court's standard response is to issue a felony warrant for the defendant's arrest. Frequently the district attorney will file a felony

complaint under Penal Code sections 1320, subdivision (b), or 1320.5 for the failure to appear. If the underlying offense is now a misdemeanor under Proposition 64, there is a question about how the court should proceed. It is unlikely the court will be required to recall the felony warrants previously issued – there is no question as to their validity when issued. When the defendant is taken into custody on the warrant, however, he or she may be entitled to a bail setting based on the misdemeanor that is the underlying crime. It is likely also that the prosecution of the case will proceed as a misdemeanor.

Nothing in the Act requires the court or prosecution to independently search for warrants issued in cases where the conduct may or may not now be legal, and to recall them prior to execution.

Courts should be advised to revise their current bail schedules to account for the new penalties. (Pen. Code § 1269b, subd. (c).)

E. Ability to apply for certificate of rehabilitation (Pen. Code § 4852.01)

A person who successfully obtains a resentencing or reclassification of a qualified crime as a misdemeanor likely will not thereafter be able to apply for a certificate of rehabilitation under Penal Code section 4852.01. Penal Code section 4852.01, subdivision (b), provides: "A person *convicted of a felony or a person who is convicted of a misdemeanor violation of any sex offense specified in Section 290* . . . may file a petition for certificate of rehabilitation and pardon pursuant to the provisions of this chapter if the petitioner has not been incarcerated in a prison, jail, detention facility, or other penal institution or agency since the dismissal of the accusatory pleading, is not on probation for the commission of any other felony, and the petitioner presents satisfactory evidence of five years' residence in this state prior to the filing of the petition." (Italics added.) Penal Code section 4852.01 likely is no longer available to the person because section 11361.8, subdivision (h), provides that "[a]ny felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor or infraction under subdivision (f) *shall be considered a misdemeanor or infraction for all purposes*." (Italics added.)

The effect of the phrase "shall be considered a misdemeanor for all purposes," in the context of an application for a certificate of rehabilitation is discussed in *People v. Moreno* (2014) 231 Cal.App.4th 934 (*Moreno*). *Moreno* observed: "Here, in June 2010, Moreno petitioned the superior court under [Penal Code] section 1203.4 to reduce his offenses to misdemeanors and dismiss them. The court granted Moreno's request, and under [Penal Code] section 17, subdivision (b)(3) his convictions are now misdemeanors for all purposes. [Penal Code] Section 17, subdivision (b)(3) provides in relevant part, 'When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail . . . or by fine or imprisonment in the county jail, it is a misdemeanor *for all purposes* . . . [¶] [w]hen the court grants probation to a defendant without imposition of sentence and at the time of granting probation, *or on application of the defendant* or probation officer thereafter, the court declares the offense to be a misdemeanor.' (Italics added.) In other words, the reduction of Moreno's crimes from felony offenses to misdemeanors for all future purposes changed their status, and they were no longer felonies. [Citation.] Once a court designates an offense as a misdemeanor

for all purposes, a defendant is no longer considered a convicted felon. [Citations.] [¶] The plain language of [Penal Code] section 17, subdivision (b) unambiguously states that an offense is a misdemeanor for all purposes when the court grants probation without imposing sentence, and later declares the offense to be a misdemeanor. Here, after successfully completing probation, Moreno applied in 2010 to reduce his felony convictions to misdemeanors. The San Mateo County Superior Court granted Moreno's petition, declared the crimes misdemeanors for all purposes, and dismissed them. The decision to deny Moreno's 2012 petition for rehabilitation and pardon was statutorily correct because once Moreno's felony charges were reduced to misdemeanors, he was no longer within the purview of [Penal Code] section 4852.01." (*Moreno*, at pp. 940–941.) The court also found there was no denial of equal protection of the law. (*Id.* at pp. 941–943.)

Because Penal Code section 17, subdivision (b)(3), and section 11361.8, subdivision (b), share the same phrasing, *Moreno* likely will apply to persons who apply for relief under the Act.

F. The court's reporting responsibilities

There is nothing in the Act that requires the court to report resentencing and redesignation of crimes to other agencies. Furthermore, there is no requirement that an abstract of judgment be prepared for misdemeanor cases. (See Pen. Code § 1213.) Penal Code section 13151, however, requires courts to report all case dispositions in criminal proceedings within 30 days to the Department of Justice, if the person was arrested for the offense. It further provides that "[w]henever a court . . . order[s] any action subsequent to the initial disposition of a case, the court shall similarly report such proceedings to the department." As a result, reporting requirements likely are triggered by the court's resentencing or redesignation order.

An abstract of judgment may be used as both a record of conviction and as a tool for enforcing restitution. Section 11361.8, subdivision (l), provides that resentencing hearings constitute a post-conviction release proceeding under Marsy's Law. At least to the extent that the resentencing modifies any restitution owed by the petitioner, an amended abstract of judgment should be prepared to facilitate collection efforts by the victim.

If a court grants a petition for resentencing for a prison inmate, CDCR will need a certified copy of the minute order from the resentencing proceeding. The order should include all relevant information about the specific court findings and orders related to the new sentence. The order should be sent to the case records manager at the California institution where the individual is housed. If the inmate is housed in an out-of-state facility (COCF) or in a Community Correctional Facility (CCF), the documentation should be sent to the CDCR Contract Bed Unit (CBU). Faxed copies can be used by CDCR until the mailed copy is received.

CDCR has identified a number of issues that create additional work for CDCR and the courts, and delay the proper processing of the inmate's new sentence in orders received from the trial courts after granting the resentencing of a person in state prison: :

- **Lack of proper identification of the inmate.** If possible, either the minute order or letter of transmittal should contain the full name of the inmate, his or her date of birth, and CDCR or CII number.
- **Incorrect code section for the order.** The correct code section to reference for the resentencing is section 11361.8, subdivision (b), not section 11361.8, subdivision (f), the latter of which is used for reclassification of crimes where the sentence has been completed.
- **Requests to CDCR to calculate the misdemeanor custody credits.** CDCR cannot calculate the credits for misdemeanor crimes and time served in county jail because the custody time is not limited to state prison. However, it can provide the court with all credits earned by the inmate while in prison to assist in the final calculation of custody credits. Guidance for the proper calculation of credits may be found in *People v. Buckhalter* (2001) 26 Cal.4th 20, which concerns resentencing following an appeal. Under *Buckhalter*, the trial court is charged with the responsibility to calculate all actual time and conduct credits earned in the county jail. The trial court also is to calculate the actual time earned in state prison; conduct credits in prison, however, are calculated by CDCR. The CDCR calculations will be provided to the court or the county jail upon request.
- **Calculation of an "out date.**" Although the prison normally calculates the out date for an inmate, it will expedite the processing of an inmate who is due to be released if the trial court designates the actual out date for the misdemeanor term. Having the information as part of the order of resentencing will obviate the need for CDCR to verify with the county jail that no further time is due under the new sentence. The determination of the out date, however, is not statutorily required.
- **Failure to designate whether the inmate is to be on parole or PRCS.** The court may not delegate the authority to make a supervision placement order on resentencing by such phrases as: "report to parole or PRCS as directed by CDCR." The order of resentencing should clearly designate the proper category and length of supervision. If an offender is currently on PRCS and the resentencing order fails to address whether the inmate is to be placed on parole or PRCS, CDCR will leave the person on PRCS.
- **Failure to properly resentence on all counts if there are remaining non-eligible offenses.** If the court resentences an inmate to a misdemeanor for an eligible offense, but the inmate will remain in prison on one or more non-eligible felonies, the resentencing should include *all* offenses, with the misdemeanor term run either fully concurrent with or fully consecutive to the sentence for the remaining felonies. If the eligible offense was the principal term, it may be necessary to resentence one of the non-eligible offenses as the new, full-term principal offense. The "one-third the midterm" limitation applies only to crimes sentenced under the Determinate Sentencing Law, not to indeterminate terms or misdemeanors that are in different sentencing systems. (See § 1170.1, subd. (a).) If there are no remaining non-qualified felonies, it is not proper to order any remaining custody time "to be served in any penal institution." If only misdemeanor time remains, it must be served in county jail, not state prison.

G. Registration requirement

Former section 11590 required registration as a narcotics offender by persons convicted under sections 11357, 11358, 11359 and 11360. (Former § 11590, subd. (a).) Assembly Bill No. 1261 repealed section 11590 and added section 11594, which provides: "All registration requirements set forth in this article, as it read on January 1, 2019, are terminated. The statements, photographs, and fingerprints obtained pursuant to this section, as it read on January 1, 2019, are not open to inspection by the public or by any person other than a regularly employed peace or other law enforcement officer."

H. Requests for relief when record destroyed

The Act allows defendants to submit a petition for resentencing or an application for redesignation without any time limits. Unlike Propositions 36 and 47, there is no "window period" during which the defendant must request relief. There is no limit on the age of the marijuana conviction – conceivably the request for relief can relate to an offense occurring years ago. It is quite possible that because of the age of the conviction, the court will no longer have any of the file. Either because of the requirements of section 11361.5, discussed below, or because of other programs to purge the court of old records, there may be a request for relief involving a case where there is no physical or electronic record available. The status of the court's records of a case, however, will not justify a refusal to grant relief. The Act does not condition the granting of resentencing or redesignation on the fact the court has retained its file on the case. Indeed, as noted previously, the request for relief is presumed to be proper, it being the burden of the opponent to prove ineligibility by clear and convincing evidence. (§ 11361.8, subd. (b) and (f).) Where a court record no longer exists, it will be the obligation of the court to create some form of a working file for the purpose of considering the defendant's request. It may be possible to reconstruct portions of the file from information obtained from the prosecution and defense.

I. Plea agreements

In *People v. Mora-Duran* (2020) 45 Cal.App.5th 589 (*Mora-Duran*), defendant waived preliminary hearing and pled to a violation of section 11358, cultivation of marijuana. After plea but before sentencing, the voters enacted Proposition 64 which narrowed the scope of the cultivation charge. The defendant requested his cultivation offense be redesignated a misdemeanor in accordance with the Act. The trial court refused the request, but rejected the plea agreement. Thereafter the prosecution filed new cultivation charges under section 11358, subdivision (d)(3)(C) – a post-Proposition 64 charge requiring the proof of additional elements for the crime. The defendant pled to the charge and later appealed.

The appellate court found the trial court acted within its discretion in rejecting the plea bargain and its decision was not arbitrary or capricious. (*Mora-Duran*, *supra*, 45 Cal.App.5th at pp. 596–597.) The court also rejected the application of *People v. Harris*

(2016) 1 Cal.5th 984: "Relying on *Harris*, . . . defendant argues the trial court's reason for rejecting the plea was 'legally incorrect' because his plea bargain should be read to include the opportunity to petition for relief as brought about by Proposition 64. Defendant interprets *Harris* far too broadly. The general rule that a plea agreement is deemed to incorporate the enactment of new laws does not apply where, as here, the new law does not apply to the parties of the plea bargain. Indeed, the instant case provides two examples of how a new law may not apply. First, the statutory language does not cover defendant. Second, the defendant's conduct was exempted from the change allowing reduction to a misdemeanor." (*Mora-Duran*, at p. 597.) The court found *Harris* inapplicable because the defendant here was not currently serving a sentence as required by section 11361.8, subdivision (a), and "defendant's conduct was statutorily exempted from the change in the law allowing reduction to a misdemeanor." (*Mora-Duran*, at p. 598.)

Nevertheless, the court reversed the conviction because the new charge was improperly added after the waiver of the preliminary hearing under section 1009: " 'Section 1009 prohibits amending an information to charge an offense not shown by evidence taken at the preliminary hearing.' [Citation.] Where a preliminary hearing is waived, the prosecution may not amend the information to add new charges—even if the defendant had notice of the underlying facts or would not be prejudiced by it. [Citation.]" (*Mora-Duran*, at p. 599.)

IX. ADDITIONAL PROVISIONS OF THE ACT

A. Destruction of records (§ 11361.5)

Section 11361.5, subdivision (a), directs the destruction of specified arrest and conviction records for persons concerning violations under section 11357, subdivisions (b), (c), (d), or (e), and 11360, subdivision (b). The Act expands the list of records to be destroyed after two years from the date of conviction or from the date of arrest if there is no conviction, to include all offenses under section 11357, and any records "pertaining to the arrest or conviction of any person under the age of 18 for a violation of any provisions of this article except Section 11357.5." Section 11361.5, subdivision (a), however, provides that records of arrest and conviction for violation of section 11357, subdivision (d), "or any other violation by a person under the age of 18 occurring upon the grounds of, or within, any school providing instruction in kindergarten or any of grades 1 to 12, inclusive, during house the school is open for classes or school-related programs," are to be retained until the offender is 18 years old, after which the records are to be destroyed as provided in this section.

Section 11361.5, subdivision (a), is further amended to provide that any court or agency having custody of the arrest and conviction records, including statewide criminal databases, shall provide for the timely destruction of the subject records, including being purged from the statewide criminal databases. "As used in this subdivision, 'records

pertaining to the arrest or conviction' shall include records of arrests resulting in the criminal proceeding and records relating to other offenses charged in the accusatory pleading, whether the defendant was acquitted or charges were dismissed. The two-year period beyond which records shall not be kept pursuant to this subdivision does not apply to any person who is, at the time at which this subdivision would otherwise require record destruction, incarcerated for an offense subject to this subdivision. For such persons, the two-year period shall commence from the date the person is released from custody."

B. Lawful activity not probable cause for search or arrest

Section 11362.1, subdivision (a), subject to certain exceptions, allows persons 21 years old or older to:

- Possess, process, transport, purchase, obtain or give away to person 21 years old or older without compensation, not more than 28.5 grams of marijuana, other than concentrated cannabis.
- Possess, process, transport, purchase, obtain or give away to person 21 years old or older without compensation, not more than 8 grams of concentrated cannabis, including what is contained in marijuana products.
- Possess, plant, cultivate, harvest, dry, or process not more than six living marijuana plants and products produced by the plants, within a person's private residence or grounds, in a locked place, and not open to public view. (See § 11362.2.)
- Smoke or ingest marijuana and marijuana products.
- Possess, transport, purchase, obtain, use, manufacture or give away without compensation to persons 21 years old or older, any marijuana accessories.

Subdivision (c) provides: "Marijuana and marijuana products involved in any way with conduct deemed lawful by this section are not contraband nor subject to seizure, and no conduct deemed lawful by this section shall constitute the basis for detention, search, or arrest."

X. Expedited review of petitions for relief under Section 11361.8

Effective January 1, 2019, the Legislature enacted section 11361.9 which requires a proactive review of all cases eligible for relief under section 11361.8. Section 11361.9 provides, in relevant part:

(a) On or before July 1, 2019, the Department of Justice shall review the records in the state summary criminal history information database and shall identify past convictions that are potentially eligible for recall or dismissal of sentence, dismissal and sealing, or redesignation pursuant to Section 11361.8. The department shall notify the prosecution of all cases in their jurisdiction that are eligible for recall or dismissal of sentence, dismissal and sealing, or redesignation.

(b) The prosecution shall have until July 1, 2020, to review all cases and determine whether to challenge the recall or dismissal of sentence, dismissal and sealing, or redesignation.
(c)(1) The prosecution may challenge the resentencing of a person pursuant to this section when the person does not meet the criteria established in Section 11361.8 or presents an unreasonable risk to public safety.
(2) The prosecution may challenge the dismissal and sealing or redesignation of a person pursuant to this section who has completed his or her sentence for a conviction when the person does not meet the criteria established in Section 11361.8.
(3) On or before July 1, 2020, the prosecution shall inform the court and the public defender's office in their county when they are challenging a particular recall or dismissal of sentence, dismissal and sealing, or redesignation. The prosecution shall inform the court when they are not challenging a particular recall or dismissal of sentence, dismissal and sealing, or redesignation.
(4) The public defender's office, upon receiving notice from the prosecution pursuant to paragraph (3), shall make a reasonable effort to notify the person whose resentencing or dismissal is being challenged.
(d) If the prosecution does not challenge the recall or dismissal of sentence, dismissal and sealing, or redesignation by July 1, 2020, the court shall reduce or dismiss the conviction pursuant to Section 11361.8.
(e) The court shall notify the department of the recall or dismissal of sentence, dismissal and sealing, or redesignation and the department shall modify the state summary criminal history information database accordingly.
(f) The department shall post general information on its Internet Web site about the recall or dismissal of sentences, dismissal and sealing, or redesignation authorized in this section.
(g) It is the intent of the Legislature that persons who are currently serving a sentence or who proactively petition for a recall or dismissal of sentence, dismissal and sealing, or redesignation pursuant to Section 11361.8 be prioritized for review.

APPENDIX I: Changes to Criminal Penalties Under Proposition 64

CRIMINAL OFFENSE[1]	PENALTY UNDER FORMER LAW[2]	PENALTY UNDER PROP. 64[2,3]
POSSESSION OF MARIJUANA - H&S Code § 11357		
Possession of ≤ 28.5 g marijuana (adults)	Infraction with $100 fine	21 + = Legal
		18 to 20 = Infraction with not more than $100 fine
Possession of ≤ 28.5 g marijuana (under 18)	Infraction with $100 fine	1st offense: infraction with 4 hours drug education + up to 10 hours community service
		2nd (or more) offense: infraction with 6 hours drug education + up to 20 hours community service
Possession of > 28.5 g marijuana (adults)	Misdemeanor (max 6 months jail and/or $500 fine)	18 + = Misdemeanor (max 6 months jail and/or $500 fine)
Possession of > 28.5 g marijuana (under 18)	Misdemeanor (max 6 months jail)	1st offense: infraction with 8 hours drug education + up to 40 hours community service
		2nd (or more) offense: infraction with 10 hours drug education + up to 60 hours community service
POSSESSION OF CONCENTRATED MARIJUANA - H&S Code § 11357		
Possession of ≤ 8 g concentrated cannabis (adults)	Any amount = Misdemeanor (max 1 year jail and/or $500); wobbler if registered sex offender under 290(c) or prior super strike	21 + = Legal
		18 to 20 = Infraction with not more than $100 fine
Possession of ≤ 8 g concentrated cannabis (under 18)	Any amount = Misdemeanor (max 1 year jail and/or $500); wobbler if registered sex offender under 290(c) or prior super strike	1st offense: 4 hours drug education + up to 10 hours community service
		2nd (or more) offense: 6 hours drug education + up to 20 hours community service
Possession of > 8 g concentrated cannabis (adults)	Any amount = Misdemeanor (max 1 year jail and/or $500); wobbler if registered sex offender under 290(c) or prior super strike	18 + = Misdemeanor (max 6 months jail and/or $500 fine)
Possession of > 8 g concentrated cannabis (under 18)	Any amount = Misdemeanor (max 1 year jail and/or $500); wobbler if registered sex offender under 290(c) or prior super strike	1st offense: infraction with 8 hours drug education + up to 40 hours community service
		2nd (or more) offense: infraction with 10 hours drug education + up to 60 hours community service
POSSESSION ON SCHOOL GROUNDS - H&S Code § 11357		
Possession of ≤ 28.5 g marijuana and/or ≤ 8 g concentrates on school grounds (18 and older)	Misdemeanor (max 10 days jail and/or $500 fine)	1st offense: Misdemeanor (max. $250 fine)
		2nd (or more) offense: Misdemeanor (max 10 days jail and/or $500 fine)

Possession of ≤ 28.5 g marijuana and/or ≤ 8 g concentrates on school grounds (under 18)	1st offense: Misd. (max $250 fine)	1st offense: infraction with 8 hours drug education + up to 40 hours community service
	2nd (or more) offense: Misd. with $500 fine and/or 10 days juvenile hall/camp/group home	2nd (or more) offense: infraction with 10 hours drug education + up to 60 hours community service

CRIMINAL OFFENSE[1]	PENALTY UNDER FORMER LAW[2]	PENALTY UNDER PROP. 64[2,3]
POSSESSION WITH INTENT TO SELL MARIJUANA - H&S Code § 11359		
Possession with intent to sell (adults)	Felony (16 mos / 2 yrs / 3 yrs)	Misdemeanor (max 6 months jail and/or $500 fine).
		Wobbler if (1) prior super strike, (2) if a registered sex offender under 290(c), (3) two prior convictions under this subsection, (4) offense occurred in connection with knowing sale or attempted sale of marijuana to a person under 18, or (5) adult 21 + if knowingly hire, employ, or use a persons under 21 in unlawfully cultivating, selling, etc. any marijuana
Possession with intent to sell (by someone under 18)	Felony (16 mos / 2 yrs / 3 yrs)	1st offense: infraction with 8 hours drug education + up to 40 hours community service
		2nd or more: infraction with 10 hours drug education + up to 60 hours community service
SALES OF MARIJUANA - H&S Code § 11360		
Sales/giving away of marijuana to adults (by adults 18 and over)	Felony (2/3/4 years) If amount is < 28.5 g and it is given away (i.e. no sale) = Misdemeanor with max fine of $100	Misdemeanor (max 6 months jail and/or $500 fine).
		It becomes a wobbler (2/3/4 yrs) IF (1) prior super strike (2) a registered sex offender, (3) two prior convictions under this subsection, (4) involved sale to person under 18; OR (5) involved import into this state or transport out of this state of more than 28.5 grams.
		**The section providing that if amount is < 28.5 g and it is given away (i.e. not sold) is an infraction with max fine of $100. This will likely apply to adults aged 18 to 20 who share marijuana.
Sales/giving away of	Felony (2/3/4 years)	1st offense: infraction with 8 hours drug education + up to 40 hours community service

marijuana to adults (by someone under 18)	If amount is < 28.5 g and it is given away (i.e. no sale) = Misdemeanor with max fine of $100	2nd or more: infraction with 10 hours drug education + up to 60 hours community service
Sales to a minor (adults 18 and over) § 11361	Felony (3/5/7 years) for sales to a minor under 14 if the adult is over 18. Felony (3/4/5 years) for sales to a minor over 14 if the adult is over 18.	No change to current law.

CRIMINAL OFFENSE[1]	PENALTY UNDER FORMER LAW[2]	PENALTY UNDER PROP. 64[2,3]
CULTIVATION OF MARIJUANA - H&S Code §11358		
Cultivation (adults)	Felony (16 mos/2 yrs/3 yrs)	<u>6 plants or less</u> 21+ = Legal 18 to 20 = Infraction with $100 fine
		<u>More than 6 plants</u> (18 +) Misdemeanor (max 6 months jail and/or $500 fine). BUT it is a wobbler if (1) prior super strike or if a registered sex offender, (2) two prior convictions under this subsection, OR (3) offense resulted in intentional division of public waters, introduction of harmful chemical into waters or otherwise caused substantial environmental harm to public lands.
Cultivation (under 18)	Felony (16 mos/2 yrs/3 yrs)	1st offense: infraction with 8 hours drug education + up to 40 hours community service
		2nd or more: infraction with 10 hours drug education + up to 60 hours community service
Cultivation restrictions on growing at home	All non-medical cultivation is illegal and charged as a felony.	If adult cultivates no more than 6 plants for personal use but (1) plants are visible to public or (2) not kept in a locked space = infraction with $250 fine
NUISANCE PENALTIES		
Opening or maintaining place for unlawfully selling, giving away or using drugs (§ 11366)	For marijuana = wobbler	No change to current law.
Renting, leasing, or making building/room/ space available for unlawful manufacturing or storing of drugs (§ 11366.5)	For marijuana = wobbler Second offense is a felony punishable by 2, 3, or 4 years.	No change to current law.

MANUFACTURING: H&S Code § 11379.6		
Manufacturing concentrates by chemical synthesis	Felony (3/5/7 years)	No change to current law.

CRIMINAL OFFENSE[1]	PENALTY UNDER FORMER LAW[2]	PENALTY UNDER PROP. 64[2,3]
PUBLIC USE INFRACTIONS CREATED BY PROP. 64: H&S Code §§ 11362.3, 11362.4		
Smoking or ingesting in public	No specific penalty for marijuana. Charged with possession or same as tobacco.	Infraction with max fine of $100
		Under 18 = 4 hours of drug education and up to 10 hours of community service
Smoking where tobacco prohibited	No specific penalty for marijuana. Charged with possession or same as tobacco.	Infraction with max fine of $250
		Under 18 = 4 hours of drug education and up to 20 hours of community service
Smoking within 1,000 feet of a school, day care or youth center while children are present	No specific penalty for marijuana. Charged with possession or same as tobacco.	Infraction with max fine of $250
		Under 18 = 4 hours of drug education and up to 20 hours of community service
Possess open container or package of marijuana while driving, operating, or riding in vehicle	No specific penalty. Charged with possession.	Infraction with max fine of $250
		Under 18 = 4 hours of drug education and up to 20 hours of community service

Notes:

1. Shaded cells represent penalties for juveniles under age 18.
2. Prop. 215 protections remain in effect.
3. Licensed activity in accordance with state law will not be subject to these penalties.
4. The charts were originally prepared by the Drug Policy Alliance, and have been reprinted with their permission. Alterations to the original charts have been made to reflect subsequent changes to the law

APPENDIX II: PROPOSITION 64: Text of Resentencing Provisions: Health & Safety Code, § 11361.8

11361.8

(a) A person currently serving a sentence for a conviction, whether by trial or by open or negotiated plea, who would not have been guilty of an offense, or who would have been guilty of a lesser offense under the Control, Regulate and Tax Adult Use of Marijuana Act had that act been in effect at the time of the offense may petition for a recall or dismissal of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing or dismissal in accordance with Sections 11357, 11358, 11359, 11360, 11362.1, 11362.2, 11362.3, and 11362.4 as those sections have been amended or added by that act.

(b) Upon receiving a petition under subdivision (a), the court shall presume the petitioner satisfies the criteria in subdivision (a) unless the party opposing the petition proves by clear and convincing evidence that the petitioner does not satisfy the criteria. If the petitioner satisfies the criteria in subdivision (a), the court shall grant the petition to recall the sentence or dismiss the sentence because it is legally invalid unless the court determines that granting the petition would pose an unreasonable risk of danger to public safety.

(1) In exercising its discretion, the court may consider, but shall not be limited to evidence provided for in subdivision (b) of Section 1170.18 of the Penal Code.

(2) As used in this section, "unreasonable risk of danger to public safety" has the same meaning as provided in subdivision (c) of Section 1170.18 of the Penal Code.

(c) A person who is serving a sentence and is resentenced pursuant to subdivision (b) shall be given credit for any time already served and shall be subject to supervision for one year following completion of his or her time in custody or shall be subject to whatever supervision time he or she would have otherwise been subject to after release, whichever is shorter, unless the court, in its discretion, as part of its resentencing order, releases the person from supervision. Such person is subject to parole supervision under Section 3000.08 of the Penal Code or post-release community supervision under subdivision (a) of Section 3451 of the Penal Code by the designated agency and the jurisdiction of the court in the county in which the offender is released or resides, or in which an alleged violation of supervision has occurred, for the purpose of hearing petitions to revoke supervision and impose a term of custody.

(d) Under no circumstances may resentencing under this section result in the imposition of a term longer than the original sentence, or the reinstatement of charges dismissed pursuant to a negotiated plea agreement.

(e) A person who has completed his or her sentence for a conviction under Sections 11357, 11358, 11359, and 11360, whether by trial or open or negotiated plea, who would not have been guilty of an offense or who would have been guilty of a lesser offense under the Control, Regulate and Tax Adult Use of Marijuana Act had that 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 conviction dismissed and sealed because the prior conviction is now legally invalid or redesignated as a misdemeanor or infraction in accordance with Sections 11357, 11358, 11359, 11360, 11362.1, 11362.2, 11362.3, and 11362.4 as those sections have been amended or added by that act.

(f) The court shall presume the petitioner satisfies the criteria in subdivision (e) unless the party opposing the application proves by clear and convincing evidence that the petitioner does not satisfy the criteria in subdivision (e). Once the applicant satisfies the criteria in subdivision (e), the court shall redesignate the conviction as a misdemeanor or infraction or dismiss and seal the conviction as legally invalid as now established under the Control, Regulate and Tax Adult Use of Marijuana Act.

(g) Unless requested by the applicant, no hearing is necessary to grant or deny an application filed under subdivision (e).

(h) Any felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor or infraction under subdivision (f) shall be considered a misdemeanor or infraction for all purposes. Any misdemeanor conviction that is recalled and resentenced under subdivision (b) or designated as an infraction under subdivision (f) shall be considered an infraction for all purposes.

(i) 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.

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

(k) 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 the Control, Regulate and Tax Adult Use of Marijuana Act.

(l) A resentencing hearing ordered under the Control, Regulate and Tax Adult Use of Marijuana 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).

(m) The provisions of this section shall apply equally to juvenile delinquency adjudications and dispositions under Section 602 of the Welfare and Institutions Code

if the juvenile would not have been guilty of an offense or would have been guilty of a lesser offense under the Control, Regulate and Tax Adult Use of Marijuana Act.

(n) The Judicial Council shall promulgate and make available all necessary forms to enable the filing of the petitions and applications provided in this section.

APPENDIX III: OFFENSES LISTED IN PENAL CODE § 667(e)(2)(C)(iv)

The following table was prepared by Hon. John "Jack" Ryan, Orange County Superior Court (Ret.)

Table of Crimes Listed in Penal Code, § 667(e)(2)(C)(iv) – "Super Strikes"

Prior Conviction	*Description*	*Penal Code Sections*
Any Serious or Violent Felony	Punishable in California by life imprisonment or death.	667(e)(2)C)(iv)(VIII)
187	Murder or attempt. (Any homicide or attempt from 187 to 191.5)	667(e)(2)C)(iv)(IV)
191.5	Vehicular manslaughter while intoxicated or attempt.	667(e)(2)C)(iv)(IV)
207	Kidnap to ... §261, 262, 264.1, 286, 288, 288a, or 289. (Kidnap, as defined in Pen C §207 does not include attempts to commit a defined sex offense.)	667(e)(2)C)(iv)(I)
209	Kidnap to violate §261, 262, 264.1, 286, 288, 288a, or 289.	667(e)(2)C)(iv)(I)
220	Assault to violate 261, 262, 264.1, 286, 288, 288a, or 289. (Pen C § 220 specifies *rape* as a designated offense. It does not use a section number, 261 (rape) or 262 (spousal rape).	667(e)(2)C)(iv)(I)
245(d)(3)	Assault with a machine gun on a peace officer or firefighter	667(e)(2)C)(iv)(VI)
261(a)(2)	Rape by force.	667(e)(2)C)(iv)(I)
261(a)(6)	Rape by threat to retaliate.	667(e)(2)C)(iv)(I)
262(a)(2)	Spousal rape by force.	667(e)(2)C)(iv)(I)
262(a)(4)	Spousal rape by threat to retaliate.	667(e)(2)C)(iv)(I)
264.1	Rape in concert by force or violence	667(e)(2)C)(iv)(I)
269	Aggravated sexual assault of a child.	667(e)(2)C)(iv)(I)
286(c)(1)	Sodomy with child <14 + 10 years age differential.	667(e)(2)C)(iv)(II)
286(c)(2)(A)	Sodomy by force.	667(e)(2)C)(iv)(I)
286(c)(2)(B)	Sodomy by force upon child <14	667(e)(2)C)(iv)(I)
286(c)(2)(C)	Sodomy by force upon child >14	667(e)(2)C)(iv)(I)
286(c)(3)	Sodomy with threat to retaliate	667(e)(2)C)(iv)(I)
286(d)(1)	Sodomy in concert by force…., threat to retaliate.	667(e)(2)C)(iv)(I)
286(d)(2)	Sodomy in concert by force upon child <14	667(e)(2)C)(iv)(I)
286(d)(3)	Sodomy in concert by force upon child >14	667(e)(2)C)(iv)(I)
288(a)	Lewd act upon a child under the age of 14	667(e)(2)C)(iv)(III)
288(b)(1)	Lewd act upon a child by force…	667(e)(2)C)(iv)(I)
288(b)(2)	Lewd act by caretaker by force…	667(e)(2)C)(iv)(I)
288a(c)(1)	Oral copulation upon a child <14 + 10 years…	667(e)(2)C)(iv)(III)
288a(c)(2)(A)	Oral copulation by force	667(e)(2)C)(iv)(I)
288a(c)(2)(B)	Oral copulation by force… force upon child <14.	667(e)(2)C)(iv)(I)
288a(c)(2)(C)	Oral copulation by force… force upon child >14.	667(e)(2)C)(iv)(I)
288a(d)	Oral copulation in concert by force.	667(e)(2)C)(iv)(I)
288.5(a)	Continuous sexual abuse of a child with force…	667(e)(2)C)(iv)(I)
289(a)(1)(A)	Sexual penetration by force, etc.	667(e)(2)C)(iv)(I)
289(a)(1)(B)	Sexual penetration upon a child <14 by force…	667(e)(2)C)(iv)(I)
289(a)(1)(C)	Sexual penetration upon a child >14 by force…	667(e)(2)C)(iv)(I)
289(a)(2)(C)	Sexual penetration by threat to retaliate.	667(e)(2)C)(iv)(I)
289(j)	Sexual penetration upon a child <14 + 10 years…	667(e)(2)C)(iv)(II)

Prior Conviction	*Description*	*Penal Code Sections*
653f	Solicitation to commit murder.	667(e)(2)C)(iv)(V)
664/191.5	Attempt vehicular manslaughter while intoxicated	667(e)(2)C)(iv)(IV)
664/187	Attempt murder	667(e)(2)C)(iv)(IV)
11418(a)(1)	Possession of a weapon of mass destruction	667(e)(2)C)(iv)(VII)

APPENDIX IV: PETITION/APPLICATION – ADULT CASE

CR-400

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.:	FOR COURT USE ONLY
NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (name):	
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	
PETITION/APPLICATION (Health and Safety Code, § 11361.8) ADULT CRIME(S) ☐ **RESENTENCING OR DISMISSAL (Health & Saf. Code, § 11361.8(b))** | ☐ **REDESIGNATION OR DISMISSAL/SEALING (Health & Saf. Code, § 11361.8(f))**	CASE NUMBER: *FOR COURT USE ONLY* Date: Time: Department.:

1. **CONVICTION INFORMATION (Check all that apply)**
   - ☐ 11357 - Possession of Marijuana
   - ☐ 11358 - Cultivation of Marijuana
   - ☐ 11359 - Possession of Marijuana for Sale
   - ☐ 11360 - Transportation, Distribution, or Importation of Marijuana
   - ☐ 11362.1 - Personal Use of Marijuana

2. **REQUEST (check all that apply)**
   - ☐ PETITION: Petitioner is currently serving a sentence in the above-captioned case and now requests the court recall/resentence/dismiss the conviction.
   - ☐ APPLICATION: Applicant has completed his/her sentence in the above captioned case and now requests the court dismiss & seal/redesignate the conviction.

3. **WAIVER OF HEARING BY ORIGINAL SENTENCING JUDGE**
   - ☐ Petitioner/applicant waives the right to have this matter heard by the original sentencing judge. The presiding judge of the court may designate any judge to rule on this matter.

4. **WAIVER OF APPEARANCE**
   - ☐ Petitioner/applicant understands there is a right to personally attend any hearing held in this matter. Petitioner/applicant gives up that right; the matter may be heard without his/her appearance.

Dated: ▶ _____
SIGNATURE OF PETITIONER/APPLICANT

Form CR-401 (Proof of Service for Petition/application adult crimes) may be used to provide proof of service of this petition/ application.

APPENDIX V: PROOF OF SERVICE – ADULT CASE

CR - 401

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (name):	*FOR COURT USE ONLY*
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	
PROOF OF SERVICE **FOR PETITION/APPLICATION (Health and Safety Code, § 11361.8)** **ADULT CRIME(S)** **Method of Service (only one):** ☐ **Personal Service** ☐ **Mail**	CASE NUMBER: *FOR COURT USE ONLY* Date: Time: Department:

1. Person serving: I am over the age of 18 and not a party to this action.
   a. Name:
   b. Residence or Business Address:
   c. Telephone:
2. I served a copy of the Petition/Application for Resentencing or Reduction on the person or persons listed below as follows:
   a. Name of person served:
   b. Address where served:
   c. Date Served:
   c. Time Served: ☐ AM ☐ PM
3. The documents were served by the following means *(specify)*:
   a. ☐ **by personal service.** I personally delivered the documents to the persons at the addresses listed in item 2. Delivery was made (a) to the attorney personally; or (b) by leaving the documents at the attorney's office, in an envelope or package clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office; or (c) if there was no person in the office with whom the notice or papers could be left, by leaving them in a conspicuous place in the office between the hours of nine in the morning and five in the evening.
   b. ☐ **by United States mail.** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses in item 2 and *(specify one)*:
      (1) ☐ deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.
      (2) ☐ placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

      I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at *(city and state)*:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

▶ _____
SIGNATURE OF DECLARANT

_____
(PRINTED NAME OF DECLARANT)

Form Approved for Optional Use
Judicial Council of California
CR-401 [New July 1, 2017]

PROOF OF SERVICE
FOR PETITION/APPLICATION (Health and Safety Code, § 11361.8)
ADULT CRIME(S)

Health and Safety Code, § 11361.8
www.courts.ca.gov

APPENDIX VI: RESPONSE – ADULT CASE

CR - 402

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (name):	*FOR COURT USE ONLY*
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	
PROSECUTING AGENCY RESPONSE TO PETITION/APPLICATION (Health and Safety Code, § 11361.8) ADULT CRIME(S)	CASE NUMBER: *FOR COURT USE ONLY* Date: Time: Department:

PROSECUTING AGENCY RESPONSE

☐ The prosecuting agency has no objection to this petition/application. Petitioner/applicant is entitled to the requested relief without a hearing.

☐ The prosecuting agency requests a hearing and objects to the granting of the petition/application because:

☐ Petitioner/applicant was not convicted of an eligible offense.

☐ Other:

☐ Petitioner is eligible for relief, but relief should be denied because petitioner presents an unreasonable risk of danger to public safety if he/she is resentenced.

☐ The prosecuting agency does not object to the petitioner's/applicant's eligibility for relief, but requests a hearing on the issue of resentencing.

Dated:

▶ _____
SIGNATURE OF PROSECUTING ATTORNEY

Form Approved for Optional Use
Judicial Council of California
CR-402 [New July 1, 2017]

PROSECUTING AGENCY RESPONSE TO PETITION/APPLICATION (Health and Safety Code, § 11361.8) ADULT CRIME(S)

Health and Safety Code, § 11361.8
www.courts.ca.gov

PEOPLE OF THE STATE OF CALIFORNIA v DEFENDANT:	CASE NUMBER:

PROOF OF SERVICE
FOR PROSECUTING AGENCY RESPONSE
Method of Service (only one):

☐ **Personal Service** ☐ **Mail**

1. Person serving: I am over the age of 18 and not a party to this action.
   a. Name:
   b. Residence or Business Address:
   c. Telephone:

2. I served a copy of the Petition/Application for Resentencing or Reduction on the person or persons listed below as follows:
   a. Name of person served:
   b. Address where served:
   c. Date Served:
   c. Time Served: ☐ AM ☐ PM

3. The documents were served by the following means *(specify)*:
   a. ☐ **by personal service.** I personally delivered the documents to the persons at the addresses listed in item 2. Delivery was made (a) to the attorney personally; or (b) by leaving the documents at the attorney's office, in an envelope or package clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office; or (c) if there was no person in the office with whom the notice or papers could be left, by leaving them in a conspicuous place in the office between the hours of nine in the morning and five in the evening.

   b. ☐ **by United States mail.** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses in item 2 and *(specify one)*:

      (1) ☐ deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.

      (2) ☐ placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

      I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at *(city and state)*:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct

Date:

▶ _____
SIGNATURE OF DECLARANT

_____
(PRINTED NAME OF DECLARANT)

Form Approved for Optional Use
Judicial Council of California
CR-402 [New July 1, 2017]

Health and Safety Code, § 11361.8
www.courts.ca.gov

APPENDIX VII: ORDER – ADULT CASE

CR-403

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.:	FOR COURT USE ONLY
NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (name):	
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	
ORDER AFTER PETITION/APPLICATION (Health and Safety Code, § 11361.8) **ADULT CRIME(S)** ☐ **RESENTENCING OR DISMISSAL (Health & Saf. Code, § 11361.8(b))** ☐ **REDESIGNATION OR DISMISSAL/SEALING (Health & Saf. Code, § 11361.8(f))**	CASE NUMBER: *FOR COURT USE ONLY* Date: Time: Department:

From the petition/application filed in this matter, the records of the court, and any other evidence presented in this matter, the court finds as follows:

1. **RESENTENCING GRANTED**

☐ The petitioner is eligible for the requested relief. The petition is **GRANTED**. The court hereby recalls the sentence imposed on the designated crime(s) and enters the following additional orders:

☐ The following crime(s) is/are resentenced as ☐ misdemeanor(s) ☐ infraction(s):
(specify crime(s)):

☐ The following sentence is imposed for the commission of the crime(s):

☐ The petitioner is given credit for time served of (days):

☐ Petitioner is required to complete a period of supervision of months/days on
☐ parole ☐ postrelease community supervision ☐ mandatory supervision (Pen. Code, section 1170(h))
☐ formal probation ☐ informal probation

☐ The court releases the petitioner from any form of postconviction supervision.

☐ The court **DISMISSES** the following crime(s) for the reason that the conviction is legally invalid:

☐ Other:

2. **REDESIGNATION GRANTED**

☐ The applicant is eligible for the requested relief. The application is **GRANTED**. The court hereby recalls the sentence imposed on the designated crime(s) and enters the following additional orders:

☐ The following crime(s) is/are redesignated as ☐ misdemeanor(s) ☐ infraction(s):
(specify crime(s)):

☐ The court **DISMISSES** the following crime(s) for the reason that the conviction is legally invalid:
(specify):

☐ Other:

PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	CASE NUMBER:

3. **RESENTENCING/REDESIGNATION DENIED**

☐ The petitioner/applicant is ineligible for the requested relief. The request for resentencing/redesignation/dismissal/sealing is **DENIED** as to crime(s): for the following reasons:

- ☐ The petitioner/applicant was convicted of an offense that is not eligible for the requested relief.
- ☐ The petitioner's/applicant's age at the time the crime(s) was/were committed makes petitioner/applicant ineligible for the requested relief.
- ☐ The nature of the marijuana substance constituting the basis of the crime(s) makes petitioner/applicant ineligible for the requested relief.
- ☐ The quantity of the marijuana substance constituting the basis of the crime(s) makes petitioner/applicant ineligible for the requested relief.
- ☐ Although petitioner is eligible for relief, for reasons set forth on the record, the court finds that resentencing of petitioner would pose an unreasonable risk of danger to public safety.
- ☐ Other:

4. **MISDEMEANOR/INFRACTION FOR ALL PURPOSES**

Any misdemeanor resentenced as an infraction as a result of this order shall thereafter be an infraction for all purposes. Any felony conviction resentenced as a result of this order as a misdemeanor or infraction shall be a misdemeanor or infraction for all purposes.

5. **REGISTRATION**

☐ The petitioner/applicant is relieved from the requirement to register as a narcotics offender under Health and Safety Code section 11590.

6. **SEALING OF CONVICTION**

☐ The court's record of conviction is ordered sealed. No access to the information shall be permitted without court order.

IT IS SO ORDERED.

Dated:

JUDICIAL OFFICER

Form Approved for Optional Use
Judicial Council of California
CR-403 [Revised July 1, 2017]

**ORDER AFTER PETITION/APPLICATION
ADULT CRIMES**

APPENDIX VIII: PETITION/APPLICATION – JUVENILE CASE

JV-744

PARTY WITHOUT AN ATTORNEY OR ATTORNEY: STATE BAR NO. (If applicable):	FOR COURT USE ONLY
NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (name):	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CASE NAME:	
REQUEST TO REDUCE JUVENILE MARIJUANA OFFENSE	CASE NUMBER: Date: Time: Department:

INSTRUCTIONS

- Use this form if you went to court and were found to have committed a marijuana offense when you were under the age of 18 and you want to reduce the charge on your record. You need to use a different form if you were 18 or older at the time of the offense.
- If you have more than one juvenile marijuana offense:
  - A. Use a separate JV-744 form for each marijuana offense that has a different case number or if you are requesting a different remedy in item 3 or 4.
  - B. Use form JV-744A to list marijuana offenses that have the same case number even if the court decided you violated a marijuana law on a different day. You need to list the date the court made its decision.
- If this form asks for information that you do not have, you can contact your attorney. If you don't have an attorney, the public defender's office or the court in the county where you went to court can probably help you get the information.
- The court will serve this form for you unless you have an attorney. If you have an attorney, he/she must serve the form.
- How to fill out the form without an attorney:
  - A. Put your name and contact information in the box at the top of the form and in number 1 below.
  - B. Put the address of the court from your court papers in the box below your address. This form must be filed in the same county where you went to court for this offense.
  - C. Fill out number 2 about the marijuana offense.
  - D. If you are on probation now for the marijuana offense, also check number 3 to ask the judge to make new dispositional orders (a new sentence) based on the new law. The new orders cannot be worse than your original sentence.
  - E. If you have completed probation for the marijuana offense, check number 4 to ask the judge to change your offense to an infraction. So, if it was a misdemeanor or a felony, it will now be treated like a traffic ticket.
  - F. Your case may be heard by the judge who originally sentenced you or the court will have a different judge hear your request.
  - G. You will not have a hearing (talk to a judge) unless you ask for one. You can check one of the boxes in number 5 if you want the court to set a hearing. If you will need an interpreter, ask for one in number 6.
  - H. You can check number 5(c) if you do not want to come to court if there is a hearing.

For more information about Proposition 64 and filling out this form, go to www.courts.ca.gov/prop64.htm.

For information about record sealing, go to www.courts.ca.gov/28120.htm.

1. MY INFORMATION

My name is:

I was born on *(date)*:

Form Approved for Optional Use
Judicial Council of California
JV-744 [Rev. July 1, 2017]

REQUEST TO REDUCE JUVENILE MARIJUANA OFFENSE
(Health and Safety Code, § 11361.8(m))

Health and Safety Code, § 11361.8
www.courts.ca.gov

CASE NAME:	CASE NUMBER:

1. OFFENSE INFORMATION

On (*date*): _____ I was found to come within the jurisdiction of the court under Welfare and Institutions Code section 602 for a violation of Health and Safety Code section *(check all that apply)*:

- ☐ 11357—Possession of Marijuana 11358—
- ☐ Cultivation of Marijuana 11359—Possession of
- ☐ Marijuana for Sale
- ☐ 11360—Transportation, Distribution, or Importation of Marijuana

Proposition 64 has reclassified this offense as an infraction when committed by a person under the age of 18. At the time of the offense, I was under the age of 18.

☐ I have attached form JV-744A because I have more than one marijuana offense with this case number.

2. REQUEST FOR A NEW DISPOSITIONAL ORDER (RESENTENCING)

☐ I am currently subject to a dispositional order (on probation) for the marijuana offense in number 2. I request that the dispositional order be recalled and relief be granted in accordance with Health and Safety Code section 11361.8(b) so that I will be resentenced.

3. REQUEST FOR REDESIGNATION

☐ I am no longer a ward of the court (completed probation) for the marijuana-related offense in number 2. I request the court's dispositional order be recalled and in accordance with Health and Safety Code section 11361.8(f). The offense will be redesignated as an infraction (treated like a traffic ticket).

4. REQUEST FOR HEARING/WAIVER OF APPEARANCE

a. ☐ I request a hearing if the prosecuting agency opposes my request. I understand that if I check this box, the court will hold a hearing only if the prosecution agency disagrees with my request.

b. ☐ I request that the court hold a hearing even if my request is not opposed by the prosecution agency.

c. ☐ I understand that I have a right to attend any hearing about my request and argue on my behalf. I give up that right. The case may be heard without my presence.

5. REQUEST FOR INTERPRETER

☐ If there is a hearing, I will need a *(language)* _____ interpreter.

6. WAIVER OF HEARING BY ORIGINAL SENTENCING JUDGE

☐ I waive the right to have the judge who originally sentenced me hear my request. I understand that if I don't waive this right, I will not have the hearing in front of the original judge if he/she is unavailable.

Date: _____

▶ _____
SIGNATURE OF PETITIONER

INSTRUCTIONS - AFTER YOU COMPLETE THIS FORM

File this form with the court. The court will send a copy to the probation department and to the prosecuting agency.

APPENDIX IX: SUPPLIMENTAL PAGE – JUVENILE CASE

JV-744A

SHORT TITLE	CASE NUMBER:

ATTACHMENT TO REQUEST TO REDUCE JUVENILE MARIJUANA OFFENSE

_____ On (*date*): _____, the court found that I violated Welf. and Inst. Code section *(check all that apply)*:

- ☐ 11357—Possession of Marijuana 11358—
- ☐ Cultivation of Marijuana 11359—Possession of
- ☐ Marijuana for Sale
- ☐ 11360—Transportation, Distribution, or Importation of Marijuana

Proposition 64 has reclassified this offense as an infraction when committed by a person under the age of 18. At the time of the offense, I was under the age of 18.

_____ On (*date*): _____, the court found that I violated Welf. and Inst. Code section *(check all that apply)*:

- ☐ 11357—Possession of Marijuana 11358—
- ☐ Cultivation of Marijuana 11359—Possession of
- ☐ Marijuana for Sale
- ☐ 11360—Transportation, Distribution, or Importation of Marijuana

Proposition 64 has reclassified this offense as an infraction when committed by a person under the age of 18. At the time of the offense, I was under the age of 18.

_____ On (*date*): _____, the court found that I violated Welf. and Inst. Code section *(check all that apply)*:

- ☐ 11357—Possession of Marijuana 11358—
- ☐ Cultivation of Marijuana 11359—Possession of
- ☐ Marijuana for Sale
- ☐ 11360—Transportation, Distribution, or Importation of Marijuana

Proposition 64 has reclassified this offense as an infraction when committed by a person under the age of 18. At the time of the offense, I was under the age of 18.

_____ On (*date*): _____, the court found that I violated Welf. and Inst. Code section *(check all that apply)*:

- ☐ 11357—Possession of Marijuana 11358—
- ☐ Cultivation of Marijuana 11359—Possession of
- ☐ Marijuana for Sale
- ☐ 11360—Transportation, Distribution, or Importation of Marijuana

Proposition 64 has reclassified this offense as an infraction when committed by a person under the age of 18. At the time of the offense, I was under the age of 18.

_____ On (*date*): _____, the court found that I violated Welf. and Inst. Code section *(check all that apply)*:

- ☐ 11357—Possession of Marijuana 11358—
- ☐ Cultivation of Marijuana 11359—Possession of
- ☐ Marijuana for Sale
- ☐ 11360—Transportation, Distribution, or Importation of Marijuana

Proposition 64 has reclassified this offense as an infraction when committed by a person under the age of 18. At the time of the offense, I was under the age of 18.

_____ On (*date*): _____, the court found that I violated Welf. and Inst. Code section *(check all that apply)*:

- ☐ 11357—Possession of Marijuana 11358—
- ☐ Cultivation of Marijuana 11359—Possession of
- ☐ Marijuana for Sale
- ☐ 11360—Transportation, Distribution, or Importation of Marijuana

Proposition 64 has reclassified this offense as an infraction when committed by a person under the age of 18. At the time of the offense, I was under the age of 18.

Form Approved for Optional Use
Judicial Council of California
JV-744A [New July 1, 2017]

Attachment to Request to Reduce Juvenile Marijuana Offense
(Health and Safety Code, § 11361.8(m))

Health and Safety Code, § 11361.8
www.courts.ca.gov

APPENDIX X: RESPONSE – JUVENILE CASE

JV-745

PARTY WITHOUT AN ATTORNEY OR ATTORNEY: STATE BAR NO. (if applicable): NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (name):	FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CASE NAME:	
PROSECUTING AGENCY RESPONSE TO REQUEST TO REDUCE JUVENILE MARIJUANA OFFENSE	CASE NUMBER: Date: Time: Department:

TO BE FILLED OUT BY THE PROSECUTING AGENCY

PROSECUTING AGENCY RESPONSE

- ☐ The prosecuting agency has no objection to this petition. Applicant is entitled to the requested relief without a hearing.
- ☐ The prosecuting agency does not object to the applicant's eligibility for relief, but requests a hearing on the issue of a new dispositional order.
- ☐ The prosecuting agency requests a hearing and objects to the granting of the petition because:
  - ☐ The prosecuting agency does not agree that the petition should be granted because the offense for which applicant was found to be within the jurisdiction of the court under Welfare and Institutions Code section 602 is not eligible for the requested relief under Health and Safety Code section 11361.8.
  - ☐ Applicant is eligible for relief, but relief should be denied because applicant presents an unreasonable risk of danger to public safety if he/she is resentenced.
  - ☐ Other:_

Date: _____

_____
SIGNATURE OF PROSECUTING AGENCY

Form Approved for Optional Use
Judicial Council of California
JV-745 [New July 1, 2017]

PROSECUTING AGENCY RESPONSE TO REQUEST TO REDUCE JUVENILE MARIJUANA OFFENSE
(Health and Safety Code, § 11361.8(m))

Health and Safety Code, § 11361.8
www.courts.ca.gov

CASE NAME:	CASE NUMBER:

1. Person serving: I am over the age of 18 and not a party to this action.
   a. Name:
   b. Residence or Business Address:
   c. Telephone:
2. I served a copy of the *Prosecuting Agency Response to Request to Reduce Juvenile Marijuana Offense* on the person or persons listed below as follows:
   a. Name of person served:
   b. Address where served:
   c. Date Served:
   c. Time Served: ☐ AM ☐ PM
3. The documents were served by the following means *(specify)*:
   a. ☐ **by personal service.** I personally delivered the documents to the persons at the addresses listed in item 2. Delivery was made (a) to the attorney personally; or (b) by leaving the documents at the attorney's office, in an envelope or package clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office; or (c) if there was no person in the office with whom the notice or papers could be left, by leaving them in a conspicuous place in the office between the hours of nine in the morning and five in the evening.
   b. ☐ **by United States mail.** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses in item 2 and *(specify one)*:
      (1) ☐ deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.
      (2) ☐ placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

      I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at *(city and state)*:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct

Date:

▶ _____
SIGNATURE OF DECLARANT

_____
(PRINTED NAME OF DECLARANT)

APPENDIX XI: ORDER – JUVENILE CASE

JV-746

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.:	FOR COURT USE ONLY
NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (name):	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CASE NAME:	
ORDER AFTER REQUEST TO REDUCE JUVENILE MARIJUANA OFFENSE	CASE NUMBER: Date: Time: Department:

From the petition/application filed in this matter, the records of the court, and any other evidence presented in this matter, the court finds as follows:

1. **NEW DISPOSITION GRANTED**

☐ The applicant is eligible for the requested relief. The petition is **GRANTED**. The court recalls its disposition for the designated offense and makes the following additional orders:

☐ The following offense is redesignated as an infraction *(indicate offense(s) and date of petition)*:

☐ Applicant is required to complete:

☐ hours of drug education and counseling and/or

☐ hours of community service, within days from the date of this order.

☐ Wardship and delinquency jurisdiction for this offense is terminated.

☐ Delinquency jurisdiction remains in effect. All prior orders remain in full force and effect. The court vacates condition number(s) of the terms and conditions of probation.

2. **REDESIGNATION GRANTED**

☐ The applicant is eligible for the requested relief. The request is **GRANTED**. The court hereby redesignates the following offense(s) as an infraction *(indicate offense(s))*:

3. **NEW DISPOSITION/REDESIGNATION DENIED**

☐ The applicant is ineligible for the requested relief. The request for a new dispositional order or redesignating is **DENIED** for the following reasons:

☐ The offense for which the applicant was found to be within the jurisdiction of the court under Welfare and Institutions Code section 602 is not eligible for the requested relief under Health and Safety Code section 11361.8.

☐ Although applicant is eligible for relief, for reasons set forth on the record, the court finds that modifying the applicant's disposition would pose an unreasonable risk of danger to public safety.

☐ Other:

Form Approved for Optional Use
Judicial Council of California
JV-746 [New July 1, 2017]

ORDER AFTER REQUEST TO REDUCE JUVENILE MARIJUANA OFFENSE (Health and Safety Code, § 11361.8(m))

Health and Safety Code, § 11361.8
www.courts.ca.gov

CASE NAME:	CASE NUMBER:

4. **INFRACTION FOR ALL PURPOSES**

   Any offense redesignated as an infraction as a result of this order shall thereafter be an infraction for all purposes.

5. **PREVIOUSLY SEALED RECORD**

   ☐ The record was previously sealed pursuant to Welfare and Institutions Code section 781 or 786 and it is ordered resealed.

IT IS SO ORDERED.

Dated: _____ _____

JUDICIAL OFFICER