California Voters Proposition You: Changing Landscape After Propositions 36, 47, 57, 64 and 66

Relevant Documents Collated

By: Paul Couenhoven

Table of Contents

RECENT LEGAL DEVELOPMENTS AFFECTING PROPOSITIONS

PROP 36: WHAT'S LEFT?

1. *People v. Chaney* (S223676) and *People v. Valencia* (S223825): Does the definition of "unreasonable risk of danger to public safety" under Proposition 47 apply retroactively to resentencing under the Three Strikes Reform Act of 2012, Proposition 36? Oral argument on this question was presented April 4, 2017. Michael Satris, a member of our panel, presented the argument for Chaney. Stephanie Gunther presented the argument for Valencia.

2. *People v. Estrada* (S232114) Did the trial court improperly rely on the facts of counts dismissed under a plea agreement to find defendant ineligible for resentencing under the provisions of Proposition 36? Court below held petitioner properly found ineligible on basis of evidence at preliminary hearing that he was armed, even though all firearm enhancements were dismissed when defendant pled to grand theft. Scheduled for oral argument on May 4, 2017, in San Francisco. Richard Lennon, CAP-LA staff attorney is presenting oral argument.

3. *People v. Frierson* (S236728). What is the standard of proof for a finding of ineligibility for resentencing under Proposition 36? (See *People v. Arevalo* (2016) 244 Cal.App.4th 836 [198 Cal. Rptr. 3d 343]; cf. *People v. Osuna* (2014) 225 Cal.App.4th 1020 [171 Cal. Rptr. 3d 55].) Court below found the standard of proof was preponderance of the evidence. Reply brief was just filed March 29, 2017. Richard Lennon, CAP-LA staff attorney, represents appellant.

PROP 47:

A comprehensive list of published cases addressing Prop. 47 issues is regularly updated by Doug Feinberg of the Fresno County Public Defender's Office. His Caselaw Outline as updated March 22, 2017, is attached.

PROP 47 DECISIONS AFTER MARCH 22, 2107

People v. Romanowski (March 27, 2017, S231405). Theft of access card account information (PC 484e, subd. (d)) is eligible for Prop. 47 relief. Section 484e(d) states that theft of access card account information is grand theft. However, section 490.2 states that, "Notwithstanding Section 487 or *any other provision of law defining grand theft*" obtained "any property by theft" is petty theft if the value of the property is under $950. The language of section 490.2 encompasses theft of access card information, and it therefore is eligible for Prop. 47 consideration. Entering a commercial establishment during regular business hours with the intent to commit "larceny" encompasses all forms of theft, as made clear by section 490a. "Shoplifting," as used in section 459.5, is a term of art which must be understood as it is

defined in the statute, not in its colloquial sense.

People v. Gonzalez (March 23, 2017, S231171). Supreme Court holds entering a bank to cash a stolen check for less than $950 qualifies for resentencing under Prop. 47. Stealing property, whether by larceny, false pretenses, or embezzlement, is theft.

People v. Hernandez (March 28, 2017, H043551((6th). A Prop. 47 petition is disqualified from resentencing if she or he has a "super strike" prior conviction. The list of "super strikes" includes a prior conviction for "[a]ny serious and/or violent felony offense punishable in California by life imprisonment or death." The court of appeal held this language is limited to felony offenses which by themselves are punishable by life, and does not include any serious or violent felony which results in a life sentence under the Three Strikes Law.

People v. Van Orden (March 23, 2017, E066432) (4/2). Some Vehicle Code section 10851 convictions, depending on the circumstances, are eligible for Prop. 47 relief if the value of the car is less than $950. If the crime involves "pure theft," the conviction is eligible for resentencing. If the crime involves joyriding, it is not eligible. If the crime involves "driving theft," that is, "theft accomplished by driving the vehicle away," the conviction is eligible for resentencing. If the conviction is based on "posttheft driving, that is, "driving the vehicle after there has been a 'substantial break' from the theft," it is not eligible for resentencing. In *Van Orden*, defendant stole a $700 car, drove it into a reservoir, and left it there. The crime was "driving theft," and was eligible for resentencing consideration.

People v. Vandiver (March 30, 2017 E065899) (4/2). Trial court properly granted Prop. 47 relief for receiving stolen property (blank checks). Blank checks have a de minimus value, and cannot be valued based on the amount of money in the checking account. The claim blank checks should be valued based on the amount a person could get on the black market for blank checks was forfeited, since the prosecutor never pursued that theory in the trial court.

People v. Sloat (April 10, 2017 B170080) (2/5). The trial court, without stating a reason, denied a Prop. 47 petition to reduce a petty theft with priors conviction to misdemeanor petty theft. The prosecutor had argued the petty theft was ineligible for reduction since the theft was not from an "open commercial business." On appeal, the Attorney General conceded this was irrelevant, as appellant was seeking the reduction of a petty theft with priors conviction, not a commercial burglary conviction.

PROP 57

People v. Superior Court (Lara) (2017) 9 Cal.App.5th 753. Juvenile who is already in adult court on a direct-file case is entitled to fitness hearing under newly enacted Proposition 57. Since trial had not begun, applying Prop 57 to the case did not involve retroactive application.

People v. Mendoza (March 30, 2017 H039705) (6th). If a juvenile has already been convicted in adult court and the case is on appeal, Prop 57 does not apply retroactively. The general rule is that new laws are prospective only. There is no *Estrada* issue because Prop 57 does not reduce punishment. Also, there is no equal protection violation. There is a rational basis for disparate treatment of cases which have already been tried: "the legitimate purpose of not overwhelming the juvenile courts with requests for fitness hearings by those who had already been convicted in adult court for crimes committed as juveniles."

NOTE: other cases are still pending which raise the retroactivity issue. *Mendoza* may not be the last word.

People v. Cervantes (March 9, 2017, A140464) (1/4). Proposition 57 applies prospectively. A juvenile tried, convicted, and sentenced in adult court is not entitled to a fitness hearing if her or his convictions are affirmed on appeal. However, he is entitled to a fitness hearing on any counts which are reversed and remanded for a retrial and resentencing. In *Cervantes*, some counts were reversed on appeal and remanded for possible retrial. Since resentencing was required even if the prosecutor decided not to retry the reversed counts, the juvenile was entitled to a fitness hearing.

PROP 64

People v. Rason (April 3, 2017, B269000) (2/1). Case on appeal from conviction for possession of marijuana for sale when Prop. 64 was enacted is not entitled to retroactive application of the law to automatically reduce his conviction to a misdemeanor. A defendant must file a resentencing petition as provided by the statute.

PROPOSITION 47 CASELAW OUTLINE

I. COLOR CODING

1. No highlighting means that a remittitur has issued.
2. Yellow highlighting means that review has been granted, but briefing has been deferred as a result of the Supreme Court hearing the same or a similar issue in another case.
3. Purple highlighting means that review has been granted and this is the lead case.
4. Blue highlighting means that review has been requested but not yet granted or denied.
5. Green highlighting means that the case is not yet final and review has either not been sought or has been denied.
6. Gray highlighting means that one is not permitted to cite the opinion to a court. E.g., unpublished opinion, vacated opinion, depublished case, *et cetera*.

II. EFFECTIVE & ELIGIBILITY DATES

A. Prospective Application

1. Proposition 47 went into effect on November 5, 2014, the day after its passage.
2. Proposition 47 applies to sentences imposed on or after November 5, 2014, even if the offense occurred before that date. *People v. Shabazz* (2015) 237 CA4th 303, 309.

B. Retroactive Application

1. Proposition 47 is not retroactive for people sentenced prior to Proposition 47 even if their cases were not yet final. People who had already been sentenced must go through the petitioning process. *People v. Shabazz* (2015) 237 CA4th 303; *People v. Noyan* (2014) 232 CA4th 657, 672; *People v. DeHoyos* (2015) 238 CA4th 363, rev. granted, lead case 9-30-15, S228230; *People v. Delapena* (2015) 238 CA4th 1414, rev. granted, briefing def'd 10-28-15, S229010; *People v. Bradshaw* (5th Dist. 2016) 246 CA4th 1251; *People v. Curry* (CA1/2, 7-28-16, A123695) 1 CA5th 1073, rev. granted, briefing def'd 11-9-16, S237037; *People v. Lopez* (2015) 238 CA4th 177, rev. granted, briefing def'd 8-7-15, S228372; *People v. Contreras* (2015) 237 CA4th 868, 892; *People v. Smith* (2015) 234 CA4th 1460; *People v. Davis* (2016) 246 CA4th 127, rev. granted, briefing def'd 7-13-16, S234324. Cf. *People v. Conley* (2016) 63 C4th 646, 652 [Proposition 36].

C. Eligibility for Post-Sentence Reduction; Partial Retroactivity

1. The offense must have been committed prior to Proposition 47's passage in order for the defendant to be able to have the offense reduced by means of an application or petition. The petitioning process is limited to those with felony convictions "who would have been guilty of a misdemeanor" if Proposition 47 had "been in effect at the time of the offense." §1170.18(a).
2. People sentenced after Proposition 47 passed are eligible for relief so long as the offense

occurred before Proposition 47 passed. *People v. Mutter* (2016) 1 CA5th 429. That will only be necessary when the original sentencing was botched.

D. Deadline to File Application or Petition

1. Originally, people had file their application by November 4, 2017, unless they showed good cause for not filing earlier.
2. The deadline has been extended to November 4, 2022. §1170.18(j), as amended by AB-2765 (2015-2016).

III. ELIGIBLE & INELIGIBLE OFFENSES

A. Summary of eligible offenses

1. Automatically Eligible Offenses
   a) Pen C §666.[1]
   b) Simple possession (Health & Saf C §§11350, 11357, 11377).
2. Eligible Depending on Facts
   a) Legally, post-sentencing reduction requires that you file a declaration for these offenses stating the facts proving eligibility for the offenses that are not automatically eligible or the court may summarily deny the petition or application.
   (1) Many counties and judges do not require a declaration stating facts of the offense establishing eligibility.
   (2) The court has discretion to set a hearing on a petition that contains insufficient allegations of eligibility. People v. Huerta (2016) 3 CA5th 539.
   b) §459 (if commercial establishment during regular business hours, property ≤ $950 & intent to commit larceny);
   c) §§470-476 (if forgery related to specified items and value ≤ $950);
   d) §476a (if total of all convictions of such ≤ $950);
   e) any theft crime where value ≤ $950;
   f) §496 (if value ≤ $950);
   g) §§503, 504, 504a, 504b, 505, 506, 506a (if value ≤ $950)

B. Attempts

1. No case directly addresses whether attempts are eligible.
2. But an attempt is generally punishable by ½ the penalty for the completed crime. §664.

C. Offenses Prosecuted in Juvenile Court

1. Juvenile offenders are eligible for Proposition 47. See *Alejandro N. v. Superior Court* (2015) 238 CA4th 1209 [resentencing].

D. Conspiracy to Commit an Eligible Offense

1. A felony conviction of a conspiracy to commit petty theft, a misdemeanor, was ineligible for reduction because conspiracy is not mentioned in Proposition 47. *People v. Segura* (2015) 239 CA4th 1282. Note that conspiracy to commit a misdemeanor is a wobbler. §182.
2. Where a person may be charged both with conspiracy and a shoplifting (§490.2), the prosecution is not permitted to charge the conspiracy. *People v. Huerta* (2016) 3 CA5th 539.

E. Offenses With Enhancements

1. The existence of an enhancement that applies to a particular count does not preclude Proposition 47 relief. Cf. *People v. Sweeney* (2016) 4 CA5th 295 [gang enhancement].

F. Strikes

1. The fact that an offense is a Strike does not disqualify a person from Proposition 47. *People v. Sweeney* (2016) 4 CA5th 295.

G. §459.5 Shoplifting (Eligible Burglaries)

---

[1] All undesignated section references are to the Penal Code.

1. Elements.
   a) Entry into commercial establishment
   b) with intent to commit larceny
   c) while the business is open during regular business hours
   d) where value of the property taken or sought to be taken does not exceed $950
2. Exclusive Penalty
   a) If an act is punishable as shoplifting, it must be so punished rather by some other charge. "Any act of shoplifting as defined in subdivision (a) shall be charged as shoplifting." §459.5(b). E.g., *People v. Huerta* (2016) 3 CA5th 539 [prosecutor required to charge shoplifting rather than conspiracy].
3. Value of the property taken or sought to be taken does not exceed $950
   a) If the defendant is unsuccessful in obtaining the property, one uses the value of the property sought to be taken. *People v. Pak* (2016) 3 CA5th 1111.
   b) If the defendant is successful, ones uses the value of the property taken. *People v. Pak* (2016) 3 CA5th 1111. See also *People v. Colbert* (CA6, 11-9-16, H042499) 5 CA5th 385, rev. granted (on a different issue), lead case 2-15-17 [where defendant took items, intent to take whatever they could was insufficient evidence without evidence that property worth more than $950 was customarily present].
   c) For a person who enters a commercial establishment with the intent to sell it stolen property, one does not use the value of the stolen property. *People v. Pak* (2016) 3 CA5th 1111.
4. Any Theft Meeting Statutory Definition Qualifies
   a) Theft from employee's wallet met statutory definition of shoplifting and was therefor eligible. *People v. Franske* (CA3, 12-19-16, C081591) 6 CA5th 1057, rev. granted, briefing def'd 2-15-17, S239732.
   b) Theft committed by entering a laundromat and trying to break into coin-operated soap dispenser was eligible. *People v. Bunyard* (CA5, 3-22-17, F071846) 2017 WL 1075091.
   c) Shoplifting is not limited to "entry with intent to steal retail merchandise." (*People v. Gonzales* (3-23-17, S231171) http://www.courts.ca.gov/opinions/documents/S231171.PDF.
5. Intent Issues
   a) Perjury
      (1) A second degree burglary committed with intent to commit perjury did not qualify. People v. Chen (2016) 245 CA4th 322.
   b) If an act is punishable as shoplifting, it must be so punished. "Any act of shoplifting as defined in subdivision (a) shall be charged as shoplifting." §459.5(b).
      (1) This language precludes prosecution where there was also another intent upon entry, such as an intent to commit identity theft. People v. Gonzales (3-23-17, S231171) http://www.courts.ca.gov/opinions/documents/S231171.PDF.
   c) Intent to Commit Larceny
      (1) "Wherever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall hereafter be read and interpreted as if the word 'theft' were substituted therefor." §490a.
      (2) The word "larceny" as used in §459 includes all thefts, including thefts by false pretenses. People v. Parson (2008) 44 C4th 332, 354.
         (a) When the legislature or voters use language that has previously been construed on a similar subject, the usual presumption is that they intended a similar construction. *People v. Rivera* (2015) 233 CA4th 1085, 1100.
   d) Intent to Cash a Forged Check
      (1) Entering with intent to cash a forged check is entry made with the intent to commit larceny within the meaning of § 459.5. People v. Gonzales (3-23-17, S231171) http://www.courts.ca.gov/opinions/documents/S231171.PDF.
      (2) .
   e) Intent To Use A Stolen Credit Card.
      (1) "[E]ntering a commercial establishment with the intent to use a stolen credit card to purchase property valued at no more than $950 constitutes shoplifting, a misdemeanor under subdivision (a) of Penal Code section 459.5." People v. Garrett (2016) 248 CA4th 82, rev. granted, briefing def'd 8-24-16, S236012 [the fact that defendant also had intent to commit identity theft and not just theft was immaterial since the statute

requires the offense to be prosecuted as shoplifting; "larceny" interpreted in accord with §490a]; People v. Grayson (2015) 241 CA4th 454, rev. granted, briefing def'd 1-20-16, S231757.

f) Entry With Intent To Pass Counterfeit Bills

(1) Entry with intent to pass counterfeit bills is eligible. People v. Smith (2016) 1 CA5th 266 [counterfeit bills], rev. granted, briefing def'd 9-14-16, S236112; People v. Valencia (2016) 245 CA4th 730, rev. granted, lead case 5-25-16, S233402.

g) Entry With Intent To Sell A Stolen Item.

(1) Defendant's entry with intent to steal a stolen surfboard was intent to commit false pretenses and fell within Proposition 47. The word "larceny" in §459.5 is interpreted broadly as theft in accord with §490a and includes theft by false pretenses. People v. Fusting (2016) 1 CA5th 404.

h) Intent to Obtain Drugs Using A Forged Prescription

(1) Entry with intent to obtain drugs using a forged prescription did not qualify for Proposition 47 where defendant did not have health insurance and no one was defrauded. People v. Brown (CA1/1, 1-27-17, A147671) 7 CA5th 1214, pet. rev. filed 3-3-17, S240390.

i). Perjury

(1) A second degree burglary committed with intent to commit perjury did not qualify. People v. Chen (2016) 245 CA4th 322.

6. Commercial Establishment

a) Theft from a school locker is not theft from a commercial establishment and is thus ineligible for Proposition 47 relief. The court looked to the ordinary use of the term shoplifting in defining commercial establishment. *In re J.L.* (2015) 242 CA4th 1108.

b) A check cashing store is a commercial establishment. *People v. Smith* (2016) 1 CA5th 266, rev. granted, briefing def'd 9-14-16, S236112.

c) A bank is a commercial establishment. A commercial establishment is "a place of business established for the purpose of exchanging goods or services." *People v. Abarca* (2016) 2 CA5th 475, rev. granted, briefing def'd 10-19-16, S237106; *People v. Hudson* (CA4/1, 8-16-16, D068439) 2 CA4th 575, rev. granted, briefing def'd 10-26-16, S237340. See also *People v. Root* (2016) 245 CA4th 353, 356, rev. granted, briefing def'd 5-11-16 [Attorney General conceded a bank is a commercial establishment].

d) A commercial establishment need not sell to the general public. *People v. Holm* (2016) 3 CA5th 141 [country club].

e) The CTA found that a theft committed inside a laundromat is eligible, impliedly finding the a laudromat is a commercial establishment. *People v. Bunyard* (CA5, 3-22-17, F071846) 2017 WL 1075091.

7. Unit Within a Unit

a) A person who enters a building that is open for business during normal business hours but then enters a closed storage unit is ineligible for Proposition 47. *People v. Stylz* (2016) 2 CA5th 530. The CTA relied upon *People v. Garcia* (2016) 62 C4th 1116, 1120, which held that person may be convicted of burglary for entering a room within a structure "if the subsequently entered room provides a separate and objectively reasonable expectation of protection from intrusion relative to the larger structure."

b) "In this appeal we consider whether the entry during business hours into a commercial establishment's employee rest room to commit larceny qualifies as 'shoplifting' under Penal Code section 459.5 as enacted by the voters in Proposition 47. We conclude that it does." *People v. Hallam* (2016) 3 CA5th 905. Contra *People v. Colbert* (CA6, 11-9-16, H042499) 5 CA5th 385, rev. granted, lead case 2-15-17 [entry into unlocked areas not accessible to the general public disqualified defendant from Proposition 47; *Colbert* does not cite *Hallam*].

8. Attempted & Vehicular Burglary

a) Proposition 47 neither includes attempted vehicular burglary nor vehicular burglary. *People v. Acosta* (2015) 242 CA4th 521, 526.

H. Forgery

1. "[F]orgery relating to a check, bond, bank bill, note, cashier's check, traveler's check, or money order, where the value of the check, bond, bank bill, note, cashier's check, traveler's check, or money order does not exceed nine hundred fifty dollars ($950)" is eligible for Proposition 47. §473(b).

2. Applies to §§470-476 if the item is listed in §473(b) and the value does not exceed $950.
3. Specific Types of Forgery.
   a) Forgery of a California driver's license is not one of the items listed in §473(b) and is therefore ineligible for Proposition 47.
   b) Forgery of counterfeit bills falls within Proposition 47. *People v. Valencia* (2016) 245 CA4th 730, 734, rev. granted, lead case 5-25-26, S233402; *People v. Maynarich* (2016) 248 CA4th 77; *People v. Mutter* (2016) 1 CA5th 429.
   c) Forgery on a credit card receipt is not eligible for Proposition 47. *People v. Martinez* (2016) 5 CA5th 234.
4. People convicted of both §530.5 and forgery are ineligible to have the forgery reduced. §473(b). The convictions must be transactionally related for the exclusion to operate. *People v. Gonzales* (CA3, 12-19-16, C078960) 6 CA5th 1067, rev. granted, lead case, 2-15-17, S240044. Contra *People v. Guerrero* (CA6, 10-11-16, H041900) 2016 WL 5906164, unpublished, rev. ganted, briefing def'd 2-15-17, S237762 [exclusion requires both convictions occur in the same proceeding, but the convictions do not have to be transactionally related].

I.§476a Checks with insufficient funds

1. If the *total* amount of bad checks that resulted in conviction did not exceed $950, then the offense is eligible. §476a(b).
   a) The other Proposition 47 offenses do not have provisions that aggregate the values of items taken in different counts.

J. Grand theft

1. All thefts (other than theft of a firearm) are misdemeanors if the value does not exceed $950.
   a) "Notwithstanding Section 487 or any other provision of law defining grand theft theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor . . ." §490.2(a).
      (1) There are only two kinds of theft: grand theft and petty theft. §486.
      (2) Petty theft was already punishable as a misdemeanor. §490.
      (3) Proposition 63, effective November 9, 2016, provides that §490.2 does not apply to the theft of a firearm. §490.2(c).
2. §368--one very disturbing case
   a) Proposition 47 does not include theft from an elder in violation of §368(e). *People v. Bush* (2016) 245 CA4th 992.
   b) Oddly, the CTA found this statutory language ambiguous: "Notwithstanding Section 487 or any other provision of law defining grand theft . . ."
   c) The CTA concluded section 368 does not qualify because (1) it is a more serious offense than the crimes enumerated in section 1170.18; (2) only theft offenses where the penalty provision was changed or referenced in Proposition 47 are eligible; and (3) §368 expressly allows a felony punishment. *Bush, supra*, at pp. 1004-1005.
      (1) This interpretation would effectively render §490.2 purely unnecessary. See Arnett v. Dal Cielo (1996) 14 C4th 4, 22 ["Courts should . . . avoid a construction making any word surplusage"].
      (2) It also violates the plain language regarding notwithstanding any other law.
      (3) Although section 490.2 refers to grand theft and section 368 never specifically says it involves grand theft, section 486 makes all non-petty thefts grand thefts.
      (4) Accepting the logic of Bush would mean no thefts other than violations of section 666 would qualify for Proposition 47. ☹
   d) Unfortunately, *People v. Bush* is final.
3. §484e(d) Possession of credit card account information
   a) Subject to Proposition 47. *People v. Thompson* (2015) 243 CA4th 413, rev. granted, briefing def'd 3-9-16, S232212; *People v. Romanowski* (2015) 242 CA4th 151, rev. granted, lead case 1-20-16, S231405.
   b) Not subject to Proposition 47. *People v. King* (2015) 242 CA4th 1312, rev. granted, briefing def'd 2-24-16, S231888; *People v. Cuen* (2015) 241 CA4th 1227, rev. granted, briefing def'd 1-20-16, S231107; *People v. Grayson* (2015) 241 CA4th 454, rev. granted, briefing def'd 1-20-16, S231757.

4. Veh C §10851
   a) Eligible if defendant proves value does not exceed $950. *People v. Ortiz* (2016) 243 CA4th 854, rev. granted, briefing def'd 3-16-16, S232344; *People v. Gomez* (2016) 243 CA4th 319, rev. granted, briefing def'd 5-25-16, S233849. Numerous California statutes refer to "vehicle theft" or "theft" in a way that appears to include Veh C §10851. E.g., Civ C §1936(b)(2); Veh C §38125; Ins C §1871.3.
   b) Ineligible. *People v. Page* (2015) 241 CA4th 714, rev. granted, lead case 1-27-16, S230793; *People v. Haywood* (2015) 243 CA4th 515, rev. granted, briefing def'd 3-9-16, S232250; *People v. Solis* (2016) 245 CA4th 1099, rev. granted, briefing def'd 6-8-16, S234150; *People v. Orozco* (2016) 244 CA4th 65, 68, rev. granted, briefing def'd 8-10-16, S235603; *People v. Johnston* (2016) 247 CA4th 252, rev. granted, briefing def'd 7-13-16, S235041.
   c) Maybe. A violation of Veh C §10851 may be based upon theft or receiving stolen property. Unless the defendant proves that the conviction was based upon theft that did not include driving after completion of the theft, the offense is ineligible. The CTA took "no position" on whether a violation based solely upon theft and no additional driving is eligible if the defendant if the defendant proves the value does not exceed $950. *People v. Sauceda* (CA5, 9-23-16, F071531) 3 CA5th 635, rev. granted, briefing def'd 11-30-16, S237975.
   d) In unpublished cases, the CTA has occasionally held that a violation of Veh C §10851 with a prior conviction has to be a felony because §666.5 creates a straight felony. E.g., *People v. Pifer* (9-23-16, E064119) 2016 WL 5338117, unpublished. However, §666.5 uses language that suggest violations of it are "stealth wobblers." *People v. Mauch* (2008) 163 CA4th 669, 675.
5. Embezzlement (§§503, 504, 504a, 504b, 505, 506, 506a)
   a) The penalty for embezzlement is the same as for theft of the same. §514.
   b) Embezzlement is a form of theft. *People v. Vidana* (2016) 1 C5th 632.
6. False Pretenses
   a) Theft by false pretenses is punishable by the same penalty as for larceny. §532.
7. Other theft offenses
   a) Any offense defined as theft may be eligible.
   b) Any offense which is has the same penalty for larceny or theft of similarly valued property may be eligible.
   c) Although many theft offenses now require that the amount exceed $950, those amounts used to be lower. As a result, just because an offense now requires that the amount exceed $950, you shouldn't automatically weed out old offenses when considering whether to file an application or petition.
   d) These are theft or theft-related offenses not previously mentioned which might be eligible for Proposition 47:
      (1) Food & A C §21852;
      (2) Lab C §405;
      (3) Pen C §§67.5, 332, 334, 350, 463(b) 484, 484g, 484h, 484.1, 485, 487a, 487b, 487d, 487e, 487h, 487i, 487j, 489, 496c, 497, 502.5, 502.7, 514, 530, 530.5 [defined as theft ("identity theft") by §473(b), as amended by Proposition 47], 532, 532f, 538, 642, 778a.

K. Receiving stolen property

1. Proposition 47 amended §496(a) so that receiving stolen property qualifies if the value does not exceed $950. §496(a).
2. Receiving a stolen vehicle in violation of §496d is NOT eligible for Proposition 47 relief. *People v. Garness* (2015) 241 CA4th 1370, rev. granted, briefing def'd 1-27-16, S231031; *People v. Peacock* (2015) 242 CA4th 708, rev. granted, briefing def'd 2-17-16, S230948; *People v. Nichols* (2016) 244 CA4th 681, rev. granted, briefing def'd 4-20-16, S233055; *People v. Orozco* (2016) 244 CA4th 65, 68, rev. granted, briefing def'd 8-10-16, S235603; *People v. Varner* (CA4/2, 9-15-16, E063389) 3 CA5th 360, rev. granted, briefing def'd 11-22-16, S237679.

L. Theft with a prior

1. Theft with a prior is eligible for Proposition 47. §666(a).

M. Simple drug possession offenses

1. Health & S C §§11350(a), 11357(a) & 11377(a) are eligible.

2. Other drug offenses.
   a) Health & S C §11358 (cultivation of marijuana) is ineligible. This does not violate equal protection. *People v. Descano* (2016) 245 CA4th 175.
   b) Transportation of drugs for personal use is ineligible. *People v. Eagle* (2016) 246 CA4th 275; *People v. Martinez* (CA4/2, 12-15-15, E063107) 2015 WL 8836684, **unpublished**, rev. granted, lead case 1-15-16, S231826.
      (1) If a judgment is not yet final and was obtained when transportation did not have to be for purposes of sale, then the defendant is entitled to withdraw his plea. Eagle, supra.

N. Street Terrorism (§186.22(a))

1. Active participation in a street crime (§186.22(a)) where the target offense was a felony that has since the conviction been reduced to a misdemeanor as a result of Proposition 47 is not eligible for Proposition 47 relief. *People v. Valenzuela* (CA2/6, 11-14-16, B269027) 5 CA5th 449, rev. granted, lead case 3-1-17, S239122. The opinion has language suggesting the result might be different if the conviction is for a violation of §186.22(b).

O. Another Source of Eligible Offenses

1. Retired Superior Court Jack Ryan prepared a list of offenses that he believes are eligible for Proposition 47. Couzens & Bigelow, Prop. 47, Appen. III, p. 118.

IV. VALUATION ISSUES.

A. Fair Market Value

1. The value used is "the reasonable and fair market value." §484(a).
2. "'The value to be placed upon stolen articles for the purpose of establishing a felony charge is the fair market value of the property and not the value of the property to any particular individual.' (*People v. Lizarraga* (1954) 122 Cal.App.2d 436, 438, 264 P.2d 953, italics added.)" *People v. Vandiver* (CA4/2, 2-28-17, E065899) 2017 WL 767005 [Proposition 47 case]. Cf. *People v. Simpson* (1938) 26 CA2d 223 [fact-finder erred in considering the cost to install the stolen items].
3. "[Fair market value is the highest price the property would reasonably have been sold for in the open market at the time of, and in the general location of, the theft.]" CALCRIM 1801.

B. Guilty Plea

1. A guilty plea to an offense that, at the time of the plea, requires that the value exceed $950, likely precludes a defendant from relief. "A guilty plea admits every element of the crime charged." *People v. Wallace* (2004) 33 C4th 738, 749, citations and internal quotation marks omitted.

C. Access Cards

1. Access cards generally do not exceed $950. *People v. Bush* (2016) 245 CA4th 992. See also *Berry v. American Exp. Publishing, Inc.* (2007) 147 CA4th 224, 229 ["[A] plastic credit card is tangible. But the card has no intrinsic value and exists only as indicia of the credit extended to the card holder."] But see *Caretto v. Superior Court* (CA2/8, 5-19-16, B265256) 2016 WL 3031222, unpublished, rev. granted, lead case, 6-24-16, S235419 [debit card worth amount held in account].

D. Forged Checks

1. After A Theft or Receiving Stolen Property Conviction
   a) "[A] forged check does not have a value equal to the amount for which it is written. [Citation.] The check's value is 'a nullity'; it is merely 'an order to pay [citation] and is of no value unless accepted.' (Citation.)" *People v. Cuellar* (2008) 165 CA4th 833, 838. However, a forged check still has "minimal intrinsic value." Id. at 839. Contra *People v. Hudson* (CA4/1, 8-16-16, D068439) 2 CA4th 575, rev. granted, briefing def'd 10-26-16, S237340 [Δ did not meet burden of proving value less than $950].
   b) Blank checks "come within the amibit of section 473(b)." *People v. Gonzales* (CA3, 12-19-16, C078960) 6 CA5th 1067, rev. granted, lead case, 2-15-17, S240044.

2. After A Forgery Conviction:
   a) Is the value the amount stated on the forged document?
      (1) Yes
         (a) Value is based upon the amount stated on the forged document. *People v. Franco* (2016) 245 CA4th 679, rev. granted, lead case 6-15-16, S233973; *People v. Salmorin* (2016) 1 CA5th 738.
      (2) No
         (a) "Value" refers to "the actual monetary worth of the check—that is, the amount the defendant could obtain for the check, not the amount for which it was written." *People v. Lowery* (CA6, 2-10-17, H042551) 8 CA5th 533, pet. rev. filed 3-14-17, S240615.

E. Blank Checks

1. Blank checks do not exceed $950 in value. *People v. Gonzales* (CA3, 12-19-16, C078960) 6 CA5th 1067, rev. granted, lead case, 2-15-17, S240044.
2. "[B]lank, unendorsed checks have a non-zero, de minimis value." *People v. Vandiver* (CA4/2, 2-28-17, E065899) 2017 WL 767005.
3. The court does not use the amount of money contained in the account. Nor does the court use the black market value. *People v. Vandiver* (CA4/2, 2-28-17, E065899) 2017 WL 767005.

F. Aggregation of Values

1. Generally
   a) Generally, the court is not permitted to aggregate values in different counts to disqualify a defendant based upon the amount exceeding $950. See *People v. Bush* (2016) 245 Cal.App.4th 992, 1007 [value of stolen property in other counts irrelevant].
2. §476a
   a) For insufficient funds cases, if the total amount of bad checks that resulted in conviction exceeded $950, then the offense is ineligible. §476a(b). *People v. Hoffman* (2015) 241 CA4th 1304, 1310.
3. Forged checks
   a) For forged checks cases, the court does not aggregate the values of the forged checks. Nor is the court permitted to rely on *Harvey* waiver to find a value over $950. The rule is different for cases involving insufficient funds; in those cases, values may be aggregated. *People v. Hoffman* (2015) 241 CA4th 1304. See also *People v. Gonzales* (CA3, 12-19-16, C078960) 6 CA5th 1067, rev. granted, lead case, 2-15-17, S240044 [court shall not aggregate amounts from different counts in forgery cases].
   b) For forged checks, the court shall NOT aggregate the value of forged checks even if "the checks [were] the subject of a single charged offense." *People v. Salmorin* (2016) 1 CA5th 738.

G. Forged Currency

1. For forged currency, use the value of any forged currency and not any counterfeit bills that do not yet have a face value. *People v. Rendon* (2016) 4 CA5th 974.

H. Financial Information.

1. The value of financial information within the meaning of §484e(d) will always be close to nothing. *People v. Thompson* (2015) 243 CA4th 413, rev. granted, briefing def'd 3-19-16, S232212.

I. Less than $951.

1. "Proposition 47 . . . reduced the penalty for theft of property worth less than $951 from a wobbler to a misdemeanor." *People v. Solis* (2016) 245 CA4th 1099, rev. granted, briefing def'd 6-8-16, S234150.

J. §459.5 (*People v. Pak* (2016) 3 CA5th 1111)

1. If the defendant is unsuccessful in obtaining the property, one uses the value of the property sought to be taken.
2. If the defendant is successful, ones uses the value of the property taken. See also *People v. Colbert* (CA6, 11-9-16, H042499) 5 CA5th 385, rev. granted (on a different issue), lead case 2-15-17 [intent to take whatever they could was insufficient evidence without evidence that property worth more than $950 was customarily present].

3. For a person who enters a commercial establishment with the intent to sell it stolen property, one does not use the value of the stolen property.

V. PEOPLE EXCLUDED FROM PROPOSITION 47

A. Super Strikes & §290(c) Registrants.

1. People Convicted of Super Strikes & Offenses Requiring §290(c) Registration Are Ineligible (see Couzens & Bigelow, Proposition 47 "The Safe Neighborhoods and Schools Act" (Barrister Press, May 2016) http://www.courts.ca.gov/documents/Prop-47-Information.pdf (Couzens & Bigelow, Prop. 47), Appen. II, p. 114 [listing all disqualifying offenses, both super strikes and offenses requiring §290(c) registration].
   a) "Super Strikes"
      (1) A "super strike" refers *to offenses described by §667(e)(2)(C)(iv). People v. Hoffman (2015) 241 CA4th 1304, 1310.*
      (2) People with super strikes are ineligible. §§459.5(a), 473(b), 476a(a), 490.2(a), 496(a), 666(b), 1170.18(i); Health & S C §§11350(a), 11357(a), 11377(a).
   b) Most people convicted of sex offenses are ineligible.
      (1) People with a conviction for an offense that requires registration pursuant to §290(c) are excluded from Proposition 47. §§459.5(a), 473(b), 476a(a), 490.2(a), 496(a), 1170.18(i); Health & S C §§11350(a), 11357(a), 11377(a).
         (a) People required to register as sex offender based upon the court's discretion (§290.006) are not required to register as sex offenders under §290(c) and are eligible for Proposition 47, unless the conviction for the current offense is for petty theft with a prior. See §666 [excluding from Proposition 47 those required to register under the Sex Offender Registration Act].
   c) Juvenile Adjudications as Disqualifying Convictions
      (1) Juvenile adjudications "shall not be deemed a conviction of a crime for any purpose." Welf & I C §203 People v. Lopes (2015) 238 CA4th 983 [juvenile DUI]. See also People v. Dunn (2016) 2 CA5th 153.
      (2) A juvenile adjudication of a super strike offense for conduct occurring after the minor turned 16 counts as a disqualifying prior conviction if the offense meets the statutory requirements to count as a Strike. People v. Sledge (CA4/3, 1-25-17, G052780) 7 CA5th 1089, pet. rev. filed 2-27-17, S240290. There is a dicta that if the offense counts as a Strike and also requires sex offender registration, the defendant would also be disqualified. See Sledge, supra, fn. 6.
      (3) But in ***Proposition 36*** *cases, a juvenile adjudication of a super strike for an offense committed after a minor turned 16 will usually count as a disqualifying prior conviction. People v. Arias (5th Dist. 2015) 240 CA4th 161, 168; People v. Thurston (2016) 244 CA4th 644, 664.*
         (a) *Arias* & *Thurston* may not apply to Proposition 47 cases. *Arias* dealt with an amendment of the Three Strikes law. Thus, it made sense to apply the Three Strikes definition of conviction. Proposition 47 does not primarily involve the Three Strikes law. Thus, Welf & I C §203's generally applicable prohibition on treating a juvenile adjudication as a conviction may not apply.
         (b) However, the super strike exclusion refers to offenses contained within §667(e)(2)(C)(iv). §667(d)(3) states the Three Strikes definition of a "conviction" which often includes juvenile offenses where the minor was 16 years of age or older when he committed the offense. See *People v. Garcia* (1999) 21 C4th 1, 10 [when juvenile adjudications count as Strikes].
         (c) Presumably, *Arias* & *Thurston* should not apply to exclusions based upon adjudications for offenses requiring registration under §290(c) because §290.008, not §290(c), requires registration for acts prosecuted in juvenile court.
   d) Prior Conviction
      (1) Prior means prior to committing the current offense when applying Proposition 47 prospectively. Couzens & Bigelow, Prop. 47, III, p. 10.
         (a) The reduced penalty provisions of Proposition 47 only apply to people with no "prior convictions" of super strikes or offenses required §290(c) registration. §§459.5(a), 473(b), 476a(b), 490.2(a), 496(a); Health & S C §§11350(a), 11357(a), 11377(a).
         (b) A prior conviction must precede commission of the current offense. *People v. McGee* (1934) 1 C2d 611, 614; *People v. Balderas* (1985) 41 C3d 144, 203; *People v. Rojas* (1988) 206 CA3d 795; 3 Witkin &

Epstein, Cal. Crim. Law (4th 2012) Punishment, §397.

(2) The rule regarding prior convictions is different when dealing with petitions and applications.

(a) When a person seeks to reduce an offense to a misdemeanor pursuant to Proposition 47, prior conviction means prior to filing the request for reduction or prior to the court ruling on the request, not prior to commission of the current offense. (E.g., *People v. Zamarripa* (2016) 247 CA4th 1179; *People v. Montgomery* (2016) 247 CA4th 1385; *People v. Walker* (2016) 5 CA5th 872. See also Couzens & Bigelow, Prop. 47, III, p. 10. But see *People v. Spiller* (CA5, 2016) 2 CA5th 101 ["prior conviction" to exclude a person from Proposition 36 resentencing requires conviction occur before conviction of current offense].

2. Exclusions Specific to §666

a) §666 differs from other provisions of Proposition 47 in that it also excludes people "required to register pursuant to the Sex Offender Registration Act" and people with a conviction for §368(d) or (e).

b) Sex Offenders

(1) The Sex Offender Registration Act consists of §§290-290.024. §290(a).

(2) People who are required to register as sex offenders due to discretionary sex offender registration (§290.006) are thus ineligible to have §666 charges reduced.

(3) There is no requirement of a prior conviction of a sex offense to exclude a person from receiving Proposition 47 relief regarding a §666.

(a) People required to register as sex offenders as a result of a juvenile adjudication are ineligible to have §666 charges reduced to misdemeanors as a result of Proposition 47. This exclusion is due to the specific language of §666 and does not extend to other crimes affected by Proposition 47. *People v. Dunn* (2016) 2 CA5th 153.

c) §666 uses the term "conviction" of violating §368(d) or (e) without preceding it with the term "prior. Does this mean the conviction need not precede commission of current offense?

3. Exclusions specific to §476a

a) Convictions for §476a are ineligible for Proposition 47 relief if the defendant has three or more prior convictions for forgery. §476a(b).

B. Dangerousness

1. People who "would pose an unreasonable risk of danger to public safety" are excluded from resentencing. §1170.18(b).
2. The limitation based upon public safety applies neither to prospective application of Proposition 47 nor to people who have completed their sentences, i.e., who are no longer on probation, parole, MSR, or PRCS. See §1170.18(b).
3. "'[U]nreasonable risk of danger to public safety' means an unreasonable risk that the petitioner will commit a" super strike. §1170.18(c).
4. The CTA affirmed dangerousness exclusions based upon defendants' likelihood of committing super strikes, even though they had not committed any yet. *People v. Hall* (2016) 247 CA4th 1255; *People v. Jefferson* (2016) 1 CA5th 235 [dangerousness]. (Defendants with super strikes will already be excluded from Proposition 47.)
5. The prosecution has the burden of proving dangerousness by a preponderance of the evidence. *People v. Jefferson* (2016) 1 CA5th 235. See also *People v. Osuna* (2015) 225 CA4th 1020 [same holding, Proposition 36]. *But see People v. Arevalo* (2015) 244 CA4th 836 [reasonable doubt is appropriate burden in Proposition 36 cases].
6. A trial court's determination of dangerousness is reviewed for abuse of discretion. *Jefferson, supra.*

VI. PROSPECTIVE APPLICATION

A. No express pleading & proof requirements

1. Proposition 47 contains no express requirement that the prosecutor plead and prove disqualifying facts (typically, the fact of a prior conviction).
2. The California Supreme Court requires pleading prior convictions that increase the statutory maximum. *People v. Dawson* (1930) 210 C 366, 372; *People v. Ford* (1964) 60 C2d 772, 794.

See also *People v. Lara* (2012) 54 C4th 896, 905 ["the core concern underlying the rule of *Ford*" is "the need to ensure that the jury's verdict authorizes the sentence"].

B. Jury Trial as to Prior Conviction

1. The constitutional requirement described in *Apprendi v. New Jersey* (2000) 530 US 466, 490, that a jury determine any fact increasing the maximum possible term, does not apply to "the fact of a prior conviction." See also *People v. McGee* (2006) 38 C4th 682 [trial court determines that nature of offense based upon the record of conviction].
2. *Apprendi* does not bar used of a juvenile adjudication in Three Strikes cases. (*People v. Nguyen* (2009) 46 C4th 1007, 1019. To the extent that a juvenile adjudication counts as "conviction" under Proposition 47, using the adjudication as a conviction likely does not violate *Apprendi*.

C. Dismissal of Disqualifying Convictions—May the Court Do So?

1. The court can probably dismiss prior convictions to make someone eligible for Proposition 47.
2. A court may dismiss allegations that increase the punishment for an offense in the interests of justice pursuant to §1385. E.g., *People v. Superior Court (Romero)* (1996) 13 C4th 497.
   a) But the Supreme Court held in *In re Varnell* (2003) 30 C4th 1132 that a judge lacks authority to dismiss a strike offense to make a person eligible for drug treatment pursuant to §1210.1 (old Proposition 36).
   b) In *Varnell*, the Supreme Court distinguished sentencing factors from matters which must be pled and proven. "[S[ection 1385 may be used to dismiss sentencing allegations-but not sentencing factors." *Varnell, supra*, at 1138.
   c) Assuming, as is likely, that the prosecution is required to plead and prove ineligibility, a court conducting an original sentencing hearing may dismiss disqualifying prior convictions.

D. Prison Priors §667.5(b)

1. Prison prior washout
   a) *People v. Abdallah* (2016) 246 CA4th 736 held that a felony conviction that prevented a prison prior from washing out no longer did so after the felony was reduced.
2. Whether reduction of the prison prior itself under Proposition 47 before sentencing on a new case gets rid of the prison prior.
   a) A conviction cannot be used as a prison prior if it has been reduced prior to the adjudication of the prior on the new case. *People v. Kindall* (2016) 6 CA5th 119.
   b) A conviction cannot be used as a prison prior if it has been reduced prior to sentencing on the new caseeven if the offenses were still felonies when the prior convictions were found true. *People v. Call* (CA5, 3-14-17, F071500) http://www.courts.ca.gov/opinions/documents/F071500.PDF.
   c) "Proposition 47 applies to Section 667.5(b) enhancements in judgments that have not yet become final." *People v. Evans* (CA4/2, 12-15-16, E064243) 6 CA5th 894, rev. granted, briefing def-d 2-22-17, S239635. This means that if a defendant is sentenced in a new case but a prior used to enhance a sentenced before the new case becomes final, the defendant may have the prior stricken. A decision is "final," for purposes of retroactivity, when the matter is no longer pending before higher courts and the time for petitioning for a writ of certiorari to the United States Supreme Court has passed. *People v. Nasalga* (1996) 12 C4th 784, 790, n. 5. The time for filing for review in the U.S. Supreme Court is usually 90 days after the entry of judgment. See US SCT R 13.1. In *Evans*, the Attorney General conceded that when a prison prior is reduced pursuant to Proposition 47 prior to sentencing on the new case, the prison prior cannot be used to enhance the sentence.
   d) A law changing a felony to a misdemeanor resulted in the offense no longer being able to be used as a prison prior. *People v. Flores* (1979) 92 CA3d 461.
   e) There is a case that refused to remove reduced prison priors when a defendant was *resentenced after* some charges were reduced pursuant to Proposition 47. *People v. Acosta* (2016) 247 CA4th 1072, rev. granted 8-17-16, S235773.
   f) When a wobbler is reduced pursuant to §17(b), the offense no longer counts as a felony prior unless there is a contrary legislative intent that it remain a felony for a particular purpose. *People v. Park* (2013) 56 C4th 782, 795 [reduced offense did not count as five-year prior although it did qualify as a strike due to

legislative intent].

E. Failure to Appear

1. If a person failed to appear on a felony that was later reduced to a misdemeanor pursuant to Proposition 47 and dismissed, the failure to appear remains a valid felony charge. The court has discretion to reduce failure to appear to a misdemeanor pursuant to §17(b). *People v. Eandi* (2015) 239 CA4th 801, rev. granted, briefing def'd 11-18-15, S229305.

F. Motions to reduce Proposition 47 eligible offenses

1. Occasionally, a case will appear where the defendant has not yet been sentenced but appears eligible for Proposition 47 as to the current offense.
2. The defense attorney can try asking the DA to reduce the offense.
3. If the DA doesn't do so, the defense attorney has a few options:
   a) The attorney can demur. The success of this strategy may depend on whether the courts read into Proposition 47 a pleading requirement.
   b) The attorney can file a motion to reduce the charge. I see this frequently. Strictly speaking, I'm unaware of any reason why a magistrate needs to entertain such a motion. One can't normally litigate the adequacy of facts supporting a charge by argument before a preliminary hearing. The attorney is still free to challenge the felony determination at a preliminary hearing, by §995 motion, by §1118.1 motion, to the jury, and on appeal.

G. §1368

1. Generally speaking, one the court has declared a doubt as to the competence of the defendant, the court has no jurisdiction to proceed. *People v. Hale* (1988) 44 C3d 531, 541.
2. Nonetheless the court likely has jurisdiction to reduce an offense pursuant to Proposition 47 while proceedings are suspended, at least if there is not a dispute as to eligibility. See *People v. Stankewitz* (1990) 51 C3d 72, 87-88 [trial court properly granted defendant's request to appoint new counsel for him pursuant to *People v. Marsden* (1970) 2 C3d 118]; §1370(c)(1) [maximum period of confinement shall not exceed maximum term for most serious charge].

H. Did Proposition 47 eliminate the defense of transporting for a person with a prescription?

1. Possibly not.
2. Westlaw currently shows two current versions of Health & Saf C §11350 and two versions of Health & Saf C §11377.
3. On 9-25-14, the Governor signed AB 2603 (2013-2014), which amended Heath & Saf C §§11350 and 11377, effective 1-1-15.
4. AB 2603 would provide a defense to possession of a controlled substance for those transporting it to a person with a lawful prescription.
5. On 11-4-14, the voters also amended Health & Saf C §§11350 and 11357 by passing Proposition 47.
6. The initiative did not include language providing a defense of possession for the purpose of transporting the controlled substance to a person who has a prescription.
7. When the legislature amends a code section, and the voters enact an initiative that amends the same code section before the legislative amendment becomes effective, the courts try to harmonize the code sections. *People v. Bustamante* (1997) 57 CA4th 693, 696. But see Gov C §9605 [different rule when legislative body passes two amendments and the latter amendment excludes the language of the former; failure to include earlier amendment deemed intentional]; *People v. Cooper* (2002) 27 Cal.4th 38, 44, n. 4 [applying Gov C §9605 to initiatives].

VII. POST-SENTENCE REDUCTIONS

A. Petition v. Application (or Resentencing v. Reclassifying)

1. Application
   a) A person who is not serving a sentence "may file an application" to reduce the charge. §1170.18(f)

(1) A court lacks jurisdiction to modify a sentence in response to an application. The court is only permitted to reclassify the offense as a misdemeanor. The defendant had sought to change the sentence in the hopes of obtaining a better result in immigration court. People v. Vasquez (2016) 247 CA4th 513.

2. Petition
   a) A person currently serving a sentence "may petition" to reduce the charge. §1170.18(a). If successful, this would require resentencing.
      (1) In addition to people who are physically confined jail or prison, those subject to the court restraints described below also use the petitioning process:
         (a) Probationers. *People v. Garcia* (2016) 245 CA4th 555; *People v. Bastidas* (CA1/5, 1-13-17, A146431) 7 CA5th 591, pet. rev. filed 2-22-17, S240208; *People v. Davis* (2016) 246 CA4th 127, rev. granted, briefing def'd 7-13-16, S234324; *People v. Curry* (CA1/2, 7-28-16, A123695) 1 CA5th 1073, rev. granted, briefing def'd 11-9-16, S237037.
         (b) PRCS. *People v. Morales* (2016) 63 C4th 399, 409; *People v. Lewis* (2016) 4 CA5th 1085.
         (c) Parole & MSR. *People v. Garcia* (2016) 245 CA4th 555, 559 ["all those with felony dispositions"].
   b) Oral Petitions
      (1) An oral petition is sufficient. People v. Amaya (2015) 242 CA4th 972 [motion made after defendant's VOP]; People v. Franco (2016) 245 CA4th 679, rev. granted, lead case 6-15-16, S233973; People v. Curry (CA1/2, 7-28-16, A123695) 1 CA5th 1073, n. 5, rev. granted, briefing def'd 11-9-16, S237037. See also People v. Bradshaw (CA5, 2016) 246 CA4th 1251 [when remanding case on a ground unrelated to Proposition 47, Fifth District ordered trial court to act as if defendant had filed a Proposition 47 reduction request].
3. CTAs don't always use the terms "petition" and "application" consistently with Proposition 47
   a) Courts sometimes use the term "petition" to refer to an application filed pursuant to §1170.18(f).
4. In practice, most counties provide one sample form that can be used for either an application or petition.

B. Jurisdiction of Trial Court to Hear Case While Appeal Pending

1. While an appeal is pending, the trial court has no jurisdiction to reduce a sentence pursuant to Proposition 47. *People v. Scarbrough* (2015) 240 CA4th 916.
2. The CTA may specifically direct the trial court to hear a Proposition 47 petition while the appeal is pending. *People v. Awad* (2015) 238 CA4th 21.
3. A case being on appeal is good cause for not filing a petition within the three year time period. *People v. Lopez* (2015) 238 CA4th 177, rev. granted, briefing def'd 8-7-15, S228372.

C. Venue

1. The trial court correctly denied applications filed in the wrong county. The court that heard the matter is required to make the decision. *People v. Marks* (2015) 243 CA4th 331.
2. Jurisdictional transfers:
   a) Probation & MSR
      (1) Supervision of probation and MSR involves transferring the court's jurisdiction to another county. §1203.9. People v. Curry (CA1/2, 7-28-16, A123695) 1 CA5th 1073, rev. granted, briefing def'd 11-9-16, S237037, held that the transfer of jurisdiction pursuant to §1203.9 while the defendant was on probation did not permit the receiving court to hear the resentencing petition. Rather, the defendant had to go through the petitioning process in the original sentencing court. In People v. Adelmann (CA4/2, 8-31-16, E064099) 2 CA5th 1188, rev. granted, lead case, 11-19-16, S237602, the CTA agreed that the transferring court has jurisdiction to hear a request to reduce the offense. However, the Adelmann court, held that "a defendant seeking Proposition 47 relief may also waive his right to be sentenced by a particular judge in a particular county," and have his matter heard in the receiving county even if the D.A. objects. In In re I.S. (CA1/1, 12-8-16, A147004) 6 CA5th 517, the CTA held that the reasoning of Adelmann applies to transfers of juvenile court jurisdiction.
   b) PRCS
      (1) §1203.9, which provides that the court's jurisdiction may be transferred to another county in probation and MSR cases, does not apply to PRCS. According to Couzens & Bigelow, Prop. 47, XI, B, p. 86, the original sentencing court is likely the only court with jurisdiction. However, the broad language in Adelmann about waiving one's right to the original sentencing judge conceivably could apply to PRCS.

D. Original Sentencing Judge

1. The original sentencing judge, if available, hears petitions and applications. §1170.18(a), (f) & (l).
2. The defendant may expressly waive the right to have the original sentencing judge hear the matter, even over the prosecutor's objection. *People v. Adelmann* (CA4/2, 8-31-16, E064099) 2 CA5th 1188, rev. granted, lead case, 11-19-16, S237602; *People v. Superior Court (Kaulick)*) (2013) 215 CA4th 1279, 1301 [Proposition 36].

E. Dismissed Charges & Plea Bargains

1. In determining eligibility for reduction, the trial court does not look at charges that were dismissed. *People v. Brown* (2016) 244 CA4th 1170, rev. granted, briefing def'd 4-27-16, S233274.
2. The existence of a plea bargain does not disqualify a defendant from a Proposition 47 reduction. *T.W. v. Superior Court* (2015) 236 CA4th 646; *People v. Dunn* (2016) 248 CA4th 518, rev. granted, briefing def'd 9-14-16, S236282; *In re Guiomar* (CA6, 11-7-16, H043114) 5 CA5th 265, rev. granted, briefing def'd 1-24-17, S238888.
3. Is the DA Permitted To Withdraw From The Plea Bargain And Reinstate The Original Charges?
   a) No, a prosecutor is not permitted to withdraw from a plea bargain when the defendant has petitioned for a reduction of the offense pursuant to Proposition 47. *Harris v. Superior Court* (11-10-16, S231489) 383 P3d 648, 2016 WL 6647777.

F. Jury Trial

1. There is no right to have a jury determine disputed facts when a defendant petitions for a reduction to a misdemeanor. *People v. Rivas-Colon* (2015) 241 CA4th 444.

G. Burden of Proof as to Eligibility of Offense

1. Defendants bear the burden of proof of showing their offenses are eligible when seeking to reduce a previously imposed sentence. *People v. Rivas-Colon* (2015) 241 CA4th 444; *People v. Sherow* (2015) 239 CA4th 875; *People v. Johnson* (2016) 1 CA5th 953; *People v. Perkins* (2016) 244 CA4th 129, 136-137; *People v. Bush* (2016) 245 CA4th 992, 1007; *People v. Hudson* (CA4/1, 8-16-16, D068439) 2 CA4th 575, rev. granted, briefing def'd 10-26-16, S237340 [entered during normal business hours and value did not exceed $950]; *People v. Sweeney* (2016) 4 CA5th 295. The prosecution has the burden of showing ineligibility based upon dangerousness or prior convictions. Couzens & Bigelow, Prop. 47, III, p. 10; *People v. Jefferson* (2016) 1 CA5th 235 [dangerousness]; *People v. Sledge* (CA4/3, 1-25-17, G052780) 7 CA5th 1089, pet. rev. filed 2-27-17, S240290 [disqualifying conviction]. But cf. *People v. Buford* (CA5, 10-27-16, F069936) 4 CA5th 886, rev. granted, briefing def'd 1-11-17, S238790 [Prop. 36 case; prosecution bears burden of proving facts supporting dangerousness by a preponderance of the evidence; the court itself makes a discretionary determination of dangerousness for which there is no burden of proof].
   a) There is some room to argue that the general rule that uncertainties in plea agreements are interpreted in favor of the defendant may partially relieve the defendant of the burden of proof. "[P]lea agreements are interpreted according to the general rule 'that ambiguities are construed in favor of the defendant. Focusing on the defendant's reasonable understanding also reflects the proper constitutional focus on what induced the defendant to plead guilty.' (*U.S. v. De la Fuente* [9th Cir. 1993] 8 F.3d [1333,] 1337, fn. 7.)" *People v. Toscano* (2004) 124 CA4th 340, 345.
   b) The CTA appears to have placed the burden of proving that a room is locked and thus separate from the open commercial part of the building on the **prosecution** in *People v. Hallam* (2016) 3 CA5th 905. See also See also *People v. Colbert* (CA6, 11-9-16, H042499) 5 CA5th 385, rev. granted (on a different issue), lead case 2-15-17 [no evidence that property in that location was usually worth more than $ 950].
2. Showing Required In Moving Papers
   a) A defendant must state any facts justifying relief in the petition. *People v. Sherow* (2015) 239 CA4th 875. In *People v. Perkins* (2016) 244 CA4th 129, the CTA held that simply alleging that the stolen property

received did not exceed $950 in value was NOT sufficiently specific to require a hearing. "In any new petition, defendant should describe the stolen property and attach some evidence, whether a declaration, court documents, record citations, or other probative evidence showing he is eligible." *Perkins, supra*, 140. But see *People v. Abarca* (2016) 2 CA5th 475, rev. granted, briefing def'd 10-19-16, S237106 [defendant's statement under penalty of perjury that value did not exceed $950 was sufficient proof, at least in the absence of an objection from the prosecutor]; Couzens & Bigelow, Prop. 47, VII, B, 2, p. 69 [court should not deny petition based upon defendant not stating a value]; *People v. Bradford* (2014) 227 CA4th 1322, 1341 [if court intends to deny a Proposition 36 resentencing petition without a hearing based upon a fact not adjudicated at the time of conviction, it should first invite further briefing].

b) Note that there is no need for a defendant to establish that a simple possession (Health & Saf C §§11350, 11357, 11377) or theft with a prior (§666) is eligible. Those offenses are always eligible. If there are grounds to deny such a petition or application, those grounds are based upon facts related to the defendant or the defendant's criminal history, not the facts of the current offense.

c) In practice, many jurisdictions don't or only occasionally enforce the requirement that defendants establish that the offense is eligible before granting defendants a hearing. Often, in actual practice, one of the parties states facts from the probation report or police report, the other side does not object to those facts, and the court relies upon them. The application/petition on most court web sites does not ask for sufficient information to prove eligibility for offenses where eligibility depends upon the facts of the offenses. "[T]rial courts have substantial flexibility to devise practical procedures to implement Proposition 47, so long as those procedures are consistent with" law. *People v. Fedalizo* (2016) 246 CA4th 98, 108.

d) A court is permitted to grant a hearing on a petition that contains insufficient evidence of value. *People v. Huerta* (2016) 3 CA5th 539.

e) A petitioner who failed to meet burden of proof in a petition could file another petition. *People v. Sherow* (2015) 239 CA4th 875; *People v. Perkins* (2016) 244 CA4th 129; *People v. Johnson* (2016) 1 CA5th 953 956; *People v. Ortiz* (2016) 243 CA4th 854, rev. granted, briefing def'd 3-16-16, S232344; *People v. Pak* (2016) 3 CA5th 1111; *People v. Sweeney* (2016) 4 CA5th 295. But see *People v. Huerta* (2016) 3 CA5th 539 [if the trial court determined petition was factually inadequate, it should have granted petitioner leave to amend].

(1) A prosecutor might argue that the cases permitting a second petition should no longer control because the law is now well-established that the defendant bears the burden of proving eligibility in the petition, thus the defendants have notice.

(a) It would be unreasonable to presume defendants or even their attorneys have that knowledge when county court web sites continue to provide sample forms that almost uniformly inadequate in permitting a defendant to state facts justifying relief for cases where the offense is not automatically eligible for relief. See http://www.safeandjust.org/county-map [hyperlinks to Proposition 47 forms for different courts].

f). An "'evidentiary hearing is required if . . . there is a reasonable likelihood that the petitioner may be entitled to relief and the petitioner's entitlement to relief depends on the resolution of an issue of fact.' (California Rules of Court, rule 4.551(f).)" *People v. Sledge* (CA4/3, 1-25-17, G052780) 7 CA5th 1089, pet. rev. filed 2-27-17, S240290.

3. Moving Papers Not Always Required

a) An oral petition is sufficient. *People v. Amaya* (2015) 242 CA4th 972 [motion made after defendant's VOP]; *People v. Franco* (2016) 245 CA4th 679, rev. granted, lead case 6-15-16, S233973; *People v. Curry* (CA1/2, 7-28-16, A123695) 1 CA5th 1073, n. 5, rev. granted, briefing def'd 11-9-16, S237037. See also *People v. Bradshaw* (CA5, 2016) 246 CA4th 1251 [when remanding case on a ground unrelated to Proposition 47, Fifth District ordered trial court to act as if defendant had filed a Proposition 47 reduction request].

H. Evidence That The Court May Rely Upon at The Reduction Hearing

1. Probation Report

a) Admissible

(1) The court may rely on probation reports and other reliable hearsay to determine if the current offense is eligible and whether any conviction disqualifies the defendant from Proposition 47. People v. Sledge (CA4/3,

1-25-17, G052780) 7 CA5th 1089, pet. rev. filed 2-27-17, S240290. See also People v. Bush (2016) 245 CA4th 992 [CTA relied upon the probation report, although it didn't explicitly say it was allowed to do so].

b) Inadmissible

(1) "'[A] probation report ... is not evidence' (People v. Overton (1961) 190 Cal.App.2d 369, 372)." People v. Johnson (2016) 1 CA5th 953, n. 16. The Johnson court may have limited somewhat its statement about a probation report not being evidence: "We express no opinion as to what specific evidence Johnson might rely on" to prove eligibility. Johnson, supra, at n. 18.

2. Preliminary Hearing Transcript.

(1) The CTA relied upon the preliminary hearing transcript. People v. Garrett (2016) 248 CA4th 82, rev. granted, briefing def'd 8-24-16, S236012.

3. Probation Report and Preliminary Hearing Transcript.

a) The CTA relied upon both the preliminary hearing transcript and the probation report. *People v. Hall* (2016) 247 CA4th 1255, n. 2.

4. Police Report

a) The CTA relied upon the police report in *People v. Jones* (2016) 1 CA5th 221, rev. granted, briefing def'd 9-14-16, S235901.

b) The trial court was permitted to rely upon the police report. *People v. Salmorin* (2016) 1 CA5th 738 [both counsel had relied upon it in trial court and defense only objected to it on appeal].

c) The police report is inadmissible. *People v. Johnson* (2016) 1 CA5th 953, n. 16.

5. Declaration in support of arrest warrant

a) The CTA and trial court relied upon the affidavit in support of an arrest warrant for the facts of what happened. *People v. Abarca* (2016) 2 CA5th 475, rev. granted, briefing def'd 10-19-16, S237106.

b) The CTA treated the arrest warrant as being part of the record of conviction. *Abarca, supra*, at n. 3.

6. Facts that neither side disputes

a) Evidence to support the court's finding "may come from . . . undisputed facts acknowledged by the parties." *People v. Hall* (2016) 247 CA4th 1255; *People v. Mutter* (2016) 1 CA5th 429 [prosecutor's statement that value did not exceed $700 conceded the point and made up for petitioner's lack of evidence]; *People v. Triplett* (2016) 244 CA4th 824, rev. granted, briefing def'd 4-27-16, S233172; *People v. Abarca* (2016) 2 CA5th 475, rev. granted, briefing def'd 10-19-16, S237106 [prosecutor did not deny defendant's declaration that the value was less than $950]; *People v. Oehmigen* (2014) 232 CA4th 1, 10 [Proposition 36 case; prosecutor's uncontested factual statement made at change of plea hearing were adoptive admissions by the defendant and sufficient for a court to later deny eligibility]; *People v. Smith* (CA4/2, 7-8-16, E062858) 1 CA5th 266, n. 5, rev. granted, briefing def'd 9-16-16, S236112 ["prosecution did not contest Smith's assertion in their responsive pleading"]; *People v. Huerta* (2016) 3 CA5th *539* ["prosecutor's silence during defense counsel's representations of these facts effectively forfeited the People's objection that defendant did not carry his burden"]; *People v. Gonzales* (CA3, 12-19-16, C078960) 6 CA5th 1067, rev. granted, lead case, 2-15-17, S240044. [CTA relied upon the prosecutor's assertions of fact made in written opposition to petition in order to overrule trial court and rule in the defendant's favor].

7. Evidence Outside The Record of Conviction.

a) A petitioner may rely on facts outside of the record of conviction. *People v. Sherow* (2015) 239 CA4th 875; *People v. Smith* (CA4/2, 7-8-16, E062858) 1 CA5th 266, n. 5, rev. granted, briefing def'd 9-16-16, S236112; *People v. Perkins* (2016) 244 CA4th 129, 140, n. 5; *People v. Hall* (2016) 247 CA4th 1255 ["within or outside the record of conviction"]; *People v. Johnson (2016) 1 CA5th 953*; *People v. Salmorin* (2016) 1 CA5th 738 (quoting *Perkins* with approval); *People v. Huerta* (2016) 3 CA5th 539.

b) Cannot Contradict Record of Conviction

(1) "The trial court may consider, in addition to the record of conviction, any facts the parties clearly agree to, as long as such facts only augment, and do not contradict or otherwise detract from, the record of conviction." People v. Triplett (2016) 244 CA4th 824, rev. granted, briefing def'd 4-27-16, S233172. See also People v. Abarca (2016) 2 CA5th 475, rev. granted, briefing def'd 10-19-16, S237106 [CTA would accept trial court's implicit finding that conviction predicated upon theft or forgery rather than identity theft, although defendant could have been prosecuted based upon entry to commit identity theft].

8. Hearsay

a) Judges routinely consider hearsay evidence at sentencing hearings. *People v. Otto* (2001) 26 C4th 200, 212.
b) "We note that [Proposition 36] risk assessment hearings are plainly part of potential resentencing hearings, and courts have long been permitted to consider hearsay evidence at sentencing hearings. (*People v. Peterson* (1973) 9 Cal.3d 717, 725–726.)" *People v. Garcia* (2016) 244 CA4th 224, n. 6, rev. granted, briefing def'd 2-26-16, S232679.
c) The CTA strongly suggested hearsay evidence is not allowed at resentencing hearings. *People v. Johnson* (2016) 1 CA5th 953, n. 16. But see n. 18.

I. Court Limited to Statutory Criteria

1. The court is limited to the statutory criteria in determining eligibility.
2. The trial court making a Proposition 47 determination is not permitted to consider defendant's agreement that the original sentencing judge could consider facts in dismissed counts at sentencing (*Harvey* waiver). *People v. Hoffman* (2015) 241 CA4th 1304.
3. "The trial court may not refuse to reduce a defendant's sentence based on the court's notion of the statute's 'spirit.'" *Hoffman, supra.*

J. Expunged Offenses.

1. Expunged offenses are eligible. "[A] dismissal pursuant to section 1203.4 does not preclude relief under Proposition 47." *People v. Tidwell* (2016) 246 CA4th 212.

K. Firearms Prohibition

1. 17(b)
   a) Reduction of a felony to a misdemeanor under §17(b) even after conviction permits a person to permit a firearm, unless there is another prohibition on possessing a firearm other than that former felony. *People v. Gilbreth* (2007) 156 CA4th 53; *People v. Lewis* (2008) 164 CA4th 533, 536; *People v. Culbert* (2013) 218 CA4th 184, 194. See also 18 USC §921(a)(20)(B).
2. Proposition 47
   a) Reduction without resentencing
      (1) When the court redesignates an offenses as a misdemeanor ***without resentencing*** *the defendant pursuant to §1170.18(g), the offense no longer counts as a felony for the purpose of prohibiting the person from possessing a firearm. §1170.18(k).*
      (a) Federal law might be different
         (i) The 9th Cir held in *U.S. v. Pruner* (1979) 606 F2d 871, 872-873, that offenses reduced to misdemeanors pursuant to §17(b) even at sentencing still count as felonies for purposes of the federal prohibition on possessing firearms.
         (ii) *Pruner* was arguable superseded by an amendment to 18 USC §921(a)(20).
         (iii) When the Cal. DOJ runs a background check before permitting a person to buy a firearm, DOJ does not exclude a person simply because the person has a felony that was later reduced to a misdemeanor.
   b) Different rule for the resentenced
      (1) When the court recalls a sentence and resentences the defendant to a misdemeanor pursuant to §1170.18(b), the defendant is still prohibited from owning or possessing a firearm or ammunition. §1170.18(k). See also People v. Bastidas (CA1/5, 1-13-17, A146431) 7 CA5th 591, pet. rev. filed 2-22-17, S240208 [distinguishing between reduction under subd. (k) and resentencing under subd. (b) before deciding that appellant was still subject to state prohibition on possessing items related to firearms].

L. DNA

1. Former law: Reduction to a misdemeanor pursuant to Proposition 47 prevented DOJ from continuing to maintain DNA samples. *Alejandro N. v. Superior Court* (2015) 238 CA4th 1209.
2. Current law: Legislative changes to §299 permit DOJ to continue to hold DNA samples from people whose cases have been reduced. The legislation did not impermissibly amend Proposition 47. *In re J.C.* (2016) 246 CA4th 1462; *In re C.B.* (CA1/3, 8-30-16, A146277) 2 CA5th 1112, rev. granted, lead case, 11-9-16, S237801; *In re C.H.* (CA1/3, 8-30-16, A146120) 2 CA5th 1139, rev. granted, lead case, 11-16-16, S237762.

VIII. RESENTENCING

A. Resentencing occurs as a result of a petition (as opposed to an application) being granted.

B. Limitations on Resentencing

1. "Under no circumstances may resentencing under this section result in the imposition of a term longer than the original sentence." PC §1170.18(e); *People v. Mendoza* (CA2/6, 11-15-16, B272222) 5 CA5th 535. This refers to the total sentence, not the sentence on particular counts.
   a) The trial court resentences a defendant on all counts after reducing one of the offenses. The court may increase the term on some counts if the new aggregate term does not exceed the old. *People v. Roach* (2016) 247 CA4th 178; *People v. Sellner* (2015) 240 CA4th 699; *People v. McDowell* (2016) 2 CA5th 978; *People v. Cortez* (2016) 3 CA5th 308 [misdemeanor counts]; *In re Guiomar* (CA6, 11-7-16, H043114) 5 CA5th 265, rev. granted, briefing def'd 1-24-17, S238888 [able to reconfigure sentence even if Proposition 47 reduction did not affect principal sentence]; *People v. Mendoza* (CA2/6, 11-15-16, B272222) 5 CA5th 535 [able to reconfigure sentence even if Proposition 47 reduction did not affect principal sentence]. See also *People v. Acosta* (2016) 247 CA4th 1072, 1079, rev. granted 8-17-16, S235773 [where trial court said at original sentencing that it was dismissing the prison priors as to one case only, it had not actually dismissed the prison priors and they could be reinstated as to the other case after resentencing]. But see *In re Guiomar* (CA6, 11-7-16, H043114) 5 CA5th 265, rev. granted, briefing def'd 1-24-17, S238888 [where court had dismissed prior Strike prior and did not reinstate it at resentencing, the trial court unlawfully doubled a term].
   b) The "parole term may not exceed the remaining time that defendant will be on PRCS." *People v. Pinon* (2016) 6 CA5th 956. The holding likely applies where a defendant has remaining time on MSR, parole, or probation.
   c) When there is a consecutive sentence, the court has suspended execution of sentence, and the period of probation has run on one principle term, the court is without authority to recompute the term upon a violation of probation. *People v. Martinez* (CA5, 2015) 240 CA4th 1006.
2. Time Credits at Resentencing
   a) Upon resentencing the defendant, the trial court is required to calculate the actual days that the defendant has spent in prison.
   b) The trial court does not calculate any sort of good behavior credits for time between the prison commitment and the resentencing. That's the prison's job. See *In re Martinez* (2003) 30 C4th 29.

C. Right to Counsel

1. A person serving a felony sentence has a right to counsel at his resentencing hearing. *People v. Rouse* (2016) 245 CA4th 292.
2. A defendant has a right to represent himself at a Proposition 47 resentencing hearing and to be present *People v. Fedalizo* (2016) 246 CA4th 98; *In re Guiomar* (CA6, 11-7-16, H043114) 5 CA5th 265, rev. granted, briefing def'd 1-24-17, S238888. *Fedalizo* implies we must communicate with the defendant before waiving either of those rights on the defendant's behalf. However, under *Fedalizo*, on appeal, the CTA will presume defense counsel was authorized to do so barring a contrary indication. *In re Guiomar* holds that even if there is error, the defendant must still show IAC to obtain a reversal.

D. Parole Period

1. A person who has been resentenced is subject to one year of parole, unless the court exercises its discretion to not place the person on parole. §1170.18(d).
   a) Couzens & Bigelow believe that parole is not intended for someone who does not have remaining felony offenses. Couzens & Bigelow, Prop. 47, VI, B, 4, at p 63.
2. A trial court is prohibited from imposing a parole term that would last longer than any time remaining on PRCS, MSR, or probation.
   a) "Under no circumstances may resentencing under this section result in the imposition of a term longer than the original sentence." §1170.18(e).
   b) "Under no circumstances" is an unusually strong indication of legislative intent. See *Matthews v. Superior Court* (1995) 36 CA4th 592, 597.

c) The word "term" in §1170.18(e) means the whole sentence, including periods while on parole or PRCS. *People v. Morales* (2016) 63 C4th 399, 409.

d) The "parole term may not exceed the remaining time that defendant will be on PRCS." *People v. Pinon* (2016) 6 CA5th 956.

3. There is no provision in Proposition 47 for probation, MSR, or PRCS. See *People v. Morales* (2016) 63 C4th 399, 407 ["the most natural meaning of the words 'subject to parole' is that the person is subject to parole rather than some other form of supervision such as postrelease community supervision"]. But see Couzens & Bigelow, Prop. 47, VI, B, 4, at p. 62 [court may impose formal or informal probation on offenses resentenced as misdemeanors].

a) Since there is no statutory provision for probation, PRCS, or MSR, a defendant should be immune from punishment after resentencing for a violation that preceded resentencing.

4. Are a defendant's excess custody credit deducted from the Proposition 47 parole period? No. "[C]redit for time served does not reduce the parole period." *People v. Morales* (2016) 63 C4th 399.

5. On a parole violation for a reduced misdemeanor, the time that a defendant may spend in custody is determined "without reference to the time in custody the parolee had previously served." *People v. Hronchak* (2016) 2 CA5th 884

E. Credit for Fines & Fees

1. Misdemeanor fines and fees are often less than for felonies.
2. At a resentencing, defense counsel should request any extra days of time credits be credited towards the defendant's fines and fees.

a) "In all felony and misdemeanor convictions, ... all days of custody of the defendant ... shall be credited upon his or her term of imprisonment, or credited to any fine, including, but not limited to, base fines, on a proportional basis, ... at the rate of not less than thirty dollars ($30) per day, or more...." §2900.5; *People v. Morris* (2015) 242 CA4th 94 [§2900.5 applies to resentencing pursuant to Proposition 47]; *People v. Pinon* (2016) 6 CA5th 956.

b) A defendant who does not object to the fines at resentencing forfeits the issue if the resulting fines were within the statutory range. *People v. Pinon* (2016) 6 CA5th 956.

c) The change in law such that excess custody credits don't count towards restitution fine is not retroactive to crimes committed before that change in the law. *People v. Morris* (2015) 242 CA4th 94. The change in the law took effect on January 1, 2014.

3. Refunds

a) A defendant who has already paid his or her fines and fees before being resentenced might be entitled to a refund. At a resentencing, the original sentence is vacated. The defendant is restored to the same place as if he had not been sentenced. See §1170.18(b) ["felony sentence shall be recalled and the petitioner resentenced to a misdemeanor"]; *Van Selzer v. Superior Court* (1984) 152 CA3d 742, 744.

b) "[W]here a criminal conviction is set aside with the effect of finally disposing of the action, the defendant is entitled to a return of any fine imposed and there is a duty upon the public entity to which the fine was paid to return the fine on the basis that the retention of such monies will result in unjust enrichment." *Gonzales v. State of California* (1977) 68 CA3d 621, 631. See also §1262 [after successful appeal, a criminal defendant is entitled to a refund].

(1) With petitions, although the convictions are not set aside, the entire sentence and the original fines and fees are. Thus, the same unjust enrichment principles apply as in Gonzales. It would be improper to allow a fee or fine to be retained based upon an order that has since been vacated.

(2) The CTA has applied similar reasoning to compel the return of fines and fees paid after a civil contempt finding was invalidated. "[T]o do otherwise would be manifestly unjust." Elysium v. Superior Court (1968) 266 CA2d 763.

c) A defendant whose offense is reduced to a misdemeanor as a result of an application is probably ineligible for any refunds, since §1170.18(f)-(g) does not authorize resentencing of such offenders. The court is without authority to change the fine.

F. Drug Offender Registration

1. Where a controlled substance offense does not require registration when the offense is a misdemeanor, the post-conviction reduction pursuant to Proposition 47 relieves the defendant of the obligation to register as a drug offender. *People v. Pinon* (2016) 6 CA5th 956.

G. Prison Priors

1. When a defendant is convicted of an offense and, at the time of sentencing, the defendant's prison prior had not been reduced, subsequent reduction of the offense giving rise to prison prior does not permit a defendant to be resentenced in the case with the prison prior. *People v. Valenzuela* (2016) 244 CA4th 692, rev. granted, lead case 3-30-16, S232900; *People v. Ruff* (CA5, 2016) 244 CA4th 935, rev. granted, briefing def'd 5-11-16, S233201; *People v. Carrea* (2016) 244 CA4th 966, rev. granted, briefing def'd 4-27-16, S233011; *People v. Williams* (2016) 245 CA4th 458, rev. granted, briefing def'd 5-11-16, S233539; *People v. Jones* (2016) 1 CA5th 221, rev. granted, briefing def'd 9-14-16, S235901; *People v. Johnson* (CA5, 2-2-17, F071140) 8 CA5th 111, pet. rev. filed 3-8-17, S240509.
2. Prior Conviction Reduced Before Judgment in New Case Becomes Final
   a) "Proposition 47 applies to Section 667.5(b) enhancements in judgments that have not yet become final." *People v. Evans* (CA4/2, 12-15-16, E064243) E064243) 6 CA5th 894, rev. granted, briefing def'd 2-22-17, S239635. A decision is "final," for purposes of retroactivity, when the matter is no longer pending before higher courts and the time for petitioning for a writ of certiorari to the United States Supreme Court has passed. (*People v. Nasalga* (1996) 12 Cal.4th 784, 790, fn. 5.) A CTA majority disageed with *Evans'* holding that if the prison prior is reduced before the judgment in the new case becomes final, the defendant is permitted to be have the prison prior stricken. *People v. Diaz* (CA2/4, 2-15-17, B269048) 8 CA5th 512 [reversing grant of habeas corpus].
3. Without deciding whether a prison prior would be able to be reduced, the CTA held that the underlying offense must first be reduced. Only afterwards would the defendant possibly be entitled to relief. The defendant should file a habeas at that point. *People v. Diaz* (2015) 238 CA4th 1323.

H. Felony Failure to Appear

1. If a person was convicted of failing to appear on a felony, the subsequent reduction of the underlying offense to a misdemeanor will not permit a defendant to obtain a reduction of the failure to appear. *People v. Perez* (2015) 239 CA4th 24, rev. granted, briefing def'd 11-18-15, S229046; *In re Guiomar* (CA6, 11-7-16, H043114) 5 CA5th 265, pet. rev. filed 12-12-16, S238888.
2. A conviction of failure to appear while out on bail for a felony does not require a conviction of the underlying felony. *People v. Walker* (2002) 29 C4th 577, 587.

I.Out on Bail Enhancement

1. A reduction of the primary offense to a misdemeanor entitles the defendant to resentencing on the secondary offense. *People v. Buycks* (CA2/8, 10-20-15, B262023) 241 CA4th 519, rev. granted, lead case 1-20-16, S231765. But see *People v. Franske* (CA3, 12-19-16, C081591) 6 CA5th 1057, rev. granted, briefing def'd 2-15-17, S239732 [reduction of the secondary offense to a misdemeanor did not permit resentencing as to out-on-bail enhancement, which had been imposed on the secondary case]. *Franske's* decision is curious because it upheld the resentencing of a person to a misdemeanor while imposing an out-on-bail enhancement that requires a felony conviction.

J. Proposition 47 Petitions and Violations of Parole, Probation, MSR, and PRCS

1. A court is not required to hear a Proposition 47 petition before ruling on an alleged PRCS violation. *People v. Elizalde* (CA2/6, 12-19-16, B267479) 6 CA5th 1052.
2. The CTA in *Elizalde* never expressly holds that the trial court is required to hear a Proposition 47 petition before sentencing a person on a PRCS violation.
3. Granting a Proposition 47 petition automatically terminates PRCS and any terms imposed for violating PRCS. The trial court erred in keeping the defendant incarcerated on the PRCS

violation after the court granted her petition. (*Elizalde, supra.*)

K. Firearms

1. A person whose felony offense is resentenced pursuant to §1170.18(b) remains subject to the prohibition on possessing a firearm. §1170.18(k); *People v. Bastidas (CA1/5, 1-13-17, A146431) 7 CA5th 591, pet. rev. filed 2-22-17, S240208.*

L. Time Credits

1. When a court reduces a felony to a misdemeanor pursuant to Proposition 47 but runs the term on the misdemeanor consecutively to a violent felony, the 15% time credits limitation applies to the entire sentence. *In re Mallard* (CA4/1, 1-27-17, D071345) 7 CA5th 1220.

IX. OTHER PROPOSITION 47 ISSUES

A. Certificates of Rehabilitation

1. A reduction to a misdemeanor might prevent a person from obtaining a certificate of rehabilitation. Cf. *People v. Moreno* (2014) 231 CA4th 934 [reduction to a misdemeanor pursuant to §17(b) made defendant ineligible]. But see §1170.18(m) ["Nothing in this section is intended to diminish or abrogate any rights or remedies otherwise available to the petitioner or applicant."]

B. Expungement

1. Generally speaking, a person is ineligible for an expungement after serving time in prison. E.g., *People v. Johnson* (2012) 211 CA4th 252.
2. A person who was sentenced to prison but whose felony was later reduced pursuant to Proposition 47 is eligible for an expungement pursuant to Penal Code section 1203.4a. *People v. Khamvongsa* (CA2/1, 2-24-17, B269998) 8 CA5th 1239.

C. Appeal

1. Jurisdiction of the Court of Appeal
   a) For determining whether the CTA has appellate jurisdiction, one uses the designation as a felony at the original sentencing hearing, even though Proposition 47 later reduced the offense to a misdemeanor. *People v. Rivera* (2015) 233 CA4th 1085. See also *People v. Lynall* (2015) 233 CA4th 1102, 1111 [CTA jurisdiction proper where offense reduced after complaint was treated as an information].
2. Prosecution forfeited argument that entry of bank to cash a forged check was identity theft by not raising argument in trial court, although the CTA would have ruled against prosecution even absent the waiver. *People v. Abarca* (2016) 2 CA5th 475, rev. granted, briefing def'd 10-19-16, S237106.
3. On appeal from a trial court ruling in favor of the defendant, the CTA would assume that entry into store to cash a forged check was with intent to commit theft or forgery rather than intent to commit identity theft. *People v. Abarca* (2016) 2 CA5th 475, rev. granted, briefing def'd 10-19-16, S237106.
4. The CTA refused to entertain a Proposition 47 request while hearing a Proposition 36 appeal. The defendant would need to file a petition in the superior court. *People v. Aparicio* (2015) 232 CA4th 1065, rev. granted, briefing def'd 3-25-15, S224317.
5. A case being on appeal is good cause for not filing a petition within the three year time period. *People v. Lopez* (2015) 238 CA4th 177, rev. granted, briefing def'd 8-7-15, S228372.

D. Proposition 36

1. Dangerous to Public Safety: Did The Definition Change?
2. "As used throughout this Code, 'unreasonable risk of danger to public safety' means an unreasonable risk that the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667." §1170.18(c).
   a) Proposition 47 did NOT change the definition of "unreasonable risk of danger to public safety" as used in Proposition 36 to govern whether the strike should be stricken in old cases. *People v. Esparza* (2015) 242 CA4th 726; *People v. Lynall* (2015) 233 CA4th 1102; *People v. Chaney* (2014) 231 CA4th 1391, rev.

granted, lead case 2-18-15, S223676; *People v. Valencia* (5th Dist. 2014) 232 CA4th 514, rev. granted, lead case 2-18-15, S223825; *People v. Florez* (2016) 245 CA4th 1176, rev. granted, briefing def'd 6-8-16, S234168; *People v. Guzman* (2015) 235 CA4th 847, rev. granted, briefing def'd 6-17-15, S226410; *People v. Myers* (2016) 245 CA4th 794, rev. granted, briefing def'd 5-25-16, S233937; *People v. Davis* (2015) 234 CA4th 1001, rev. granted, briefing def'd 6-10-15, S225603; *People v. Lopez* (2015) 236 CA4th 518, rev. granted, briefing def'd 7-15-15, S227028; *People v. Sledge* (2015) 235 CA4th 1191, 1212, rev. granted, briefing def'd 7-8-15, S226449; *People v. Buford* (CA5, 10-27-16, F069936) 4 CA5th 886, rev. granted, briefing def'd 1-11-17, S238790.

b) Proposition 47 changed the definition of "unreasonable risk of danger to public safety" as used in Proposition 36 determinations. The change is retroactive. *People v. Cordova* (2016) 248 CA4th 543, rev. granted, briefing def'd 8-31-16, S236179.

E. Federal Court Order

1. Proposition 47 did not change the definition of "unreasonable risk of danger to public safety" as used in the federal court order requiring early release of certain offenders with strike priors. *In re Ilasa* (CA4/1, 9-19-16, D069629) 3 CA5th 489.

F. MDOs

1. A person may be recommitted in a Mentally Disordered Offender proceeding even though the underlying felony has been reduced to a misdemeanor pursuant to Proposition 47. *People v. Goodrich* (CA4/1, 1-17-17, D069515) 7 CA5th 699, pet. rev. filed 2-24-17, S240242.

X. ADDITIONAL RESOURCES

1. Couzens & Bigelow, Proposition 47 "The Safe Neighborhoods and Schools Act" (Barrister Press, May 2016) www.courts.ca.gov/documents/Prop-47-Information.pdf. This is the best secondary source on Proposition 47.
2. CCAP Proposition 47 Case Summaries www.capcentral.org/criminal/sentencing/prop47/prop47_cases.asp.
3. 3 Witkin & Epstein, Cal. Criminal Law (4th) Punishment, §308, *et seq.*
4. Official Voter Information Guide, 11-4-14 Election www.vig.cdn.sos.ca.gov/2014/general/en/pdf/complete-vigr1.pdf.
5. Official Voter Information Guide, 11-4-14 Election, Proposition 47 Related Materials Only www.co.fresno.ca.us/WorkArea/DownloadAsset.aspx?id=70168.
6. Appellate Court Case Information www.appellatecases.courtinfo.ca.gov.
7. Published Slip Opinions www.courts.ca.gov/opinions-slip.htm.
8. Official Reporters www.lexisnexis.com/clients/CACourts.
9. www.safeandjust.org/county-map [hyperlinks to Proposition 47 forms for different courts].
10. MyProp47 www.myprop47.org

XI. PENDING ISSUES BEFORE CALIFORNIA SUPREME COURT[2]

1. *People v. Buycks* (2015) 241 CA4th 519, rev. granted, lead case 1-20-16, S231765: "Was defendant eligible for resentencing on the penalty enhancement for committing a new felony while released on bail on a drug offense even though the superior court had reclassified the conviction for the drug offense as a misdemeanor under the provisions of Proposition 47?"
2. *People v. Chaney* (2014) 231 CA4th 1391, rev. granted, lead case 2-18-15, S22367: "Does the definition of 'unreasonable risk of danger to public safety' (Pen. Code, § 1170.18, subd. (c))

[2] The cases listed below will actually be heard by the California Supreme Court. The majority of grants of review in Proposition 47 cases involve deferring further action until the Supreme Court decides the issue.

under Proposition 47 ('the Safe Neighborhoods and Schools Act') apply retroactively to resentencing under the Three Strikes Reform Act of 2012 (Pen. Code, § 1170.126)? (See also *People v. Valencia*, S223825.)"

3. *People v. DeHoyos* (2015) 238 CA4th 363, rev. granted, lead case 9-30-15, S228230: "Does the Safe Neighborhood and Schools Act [Proposition 47] (Gen. Elec. (Nov. 4, 2014)), which made specified crimes misdemeanors rather than felonies, apply retroactively to a defendant who was sentenced before the Act's effective date but whose judgment was not final until after that date?"
4. *People v. Martinez* (CA4/2, 12-15-15, E063107) 2015 WL 8836684, unpublished, rev. granted, lead case 1-15-16, S231826: "Could defendant use a petition for recall of sentence under Penal Code section 1170.18 to request the trial court to reduce his prior felony conviction for transportation of a controlled substance to a misdemeanor in light of the amendment to Health and Safety Code section 11379 effected by Proposition 47?"
5. *People v. Page* (2015) 241 CA4th 714, rev. granted, lead case, 1-27-16, S230793: "Does Proposition 47 ('the Safe Neighborhoods and Schools Act') apply to the offense of unlawful taking or driving a vehicle (Veh. Code, § 10851), because it is a lesser included offense of Penal Code section 487, subdivision (d), and that offense is eligible for resentencing to a misdemeanor under Penal Code sections 490.2 and 1170.18?"
6. *People v. Romanowski* (2015) 242 CA4th 151, rev. granted, lead case, 1-20-16, S231405: "Does Proposition 47 ('the Safe Neighborhoods and Schools Act'), which reclassifies as a misdemeanor any grand theft involving property valued at $950 or less (Pen. Code, § 490.2), apply to theft of access card information in violation of Penal Code section 484e, subdivision (d)?"
7. *People v. Valencia* (2016) 245 CA4th 730, rev. granted, lead case 5-25-16, S233402: "Does the definition of 'unreasonable risk of danger to public safety' (Pen. Code, § 1170.18, subd. (c)) under Proposition 47 ('the Safe Neighborhoods and Schools Act') apply to resentencing under the Three Strikes Reform Act of 2012 (Pen. Code, § 1170.126)? (See also *People v. Chaney*, S223676.)
8. *People v. Franco* (2016) 245 CA4th 679, rev. granted, lead case 6-15-16, S233973: "For the purpose of the distinction between felony and misdemeanor forgery, is the value of an uncashed forged check the face value (or stated value) of the check or only the intrinsic value of the paper it is printed on?"
9. *People v. Valenzuela* (2016) 244 CA4th 692, rev. granted, lead case 3-30-16, S232900: "Is defendant eligible for resentencing on the penalty enhancement for serving a prior prison term on a felony conviction after the superior court had reclassified the underlying felony as a misdemeanor under the provisions of Proposition 47?"
10. *People v. Adelmann* (2016) 2 CA5th 1188, rev. granted, lead case, 11-19-16, S237602: "If a case is transferred from one county to another for purposes of probation (Pen. Code, § 1203.9), must a Proposition 47 petition to recall sentence be filed in the court that entered the judgment of conviction or in the superior court of the receiving county?"
11. *In re C.B.* (CA1/3, 8-30-16, A146277) 2 CA5th 1112, rev. granted, lead case, 11-9-16, S237801: "Did the trial court err by refusing to order the expungement of a juvenile's DNA record after his qualifying felony conviction was reduced to a misdemeanor under Proposition 47 (Pen. Code § 1170.18)?"
12. *In re C.H.* (CA1/3, 8-30-16, A146120) 2 CA5th 1139, rev. granted, lead case, 11-16-16, S237762: "Did the trial court err by refusing to order the expungement of juvenile's DNA record after his qualifying felony conviction was reduced to a misdemeanor under Proposition 47 (Pen. Code § 1170.18)? Does the retention of juvenile's DNA sample violate equal protection because a person who committed the same offense after Proposition 47 was enacted would be under no obligation to provide a DNA sample?"

13. *Caretto v. Superior Court* (CA2/8, 5-19-16, B265256) 2016 WL 3031222, unpublished, rev. granted, lead case, 6-24-16, S235419: "What is the value of an unused stolen debit card for the purpose of distinguishing between misdemeanor and felony receiving stolen property in violation of Penal Code section 496, subdivision (a)?"
14. *People v. Gonzales* (CA3, 12-19-16, C078960) 6 CA5th 1067, rev. granted, lead case, 2-15-17, S240044: "What relationship, if any, must exist between convictions for forgery and identity theft in order to exclude a forgery conviction from sentencing as a misdemeanor under Penal Code section 473, subdivision (b)?"
15. *People v. Colbert* (CA6, 11-9-16, H042499) 5 CA5th 385, rev. granted, lead case 2-15-17 ["Did defendant's entry into separate office areas of a commercial establishment that were off-limits to the general public constitute an 'exit' from the 'commercial' part of the establishment that precluded reducing his conviction for second degree burglary to misdemeanor shoplifting under Penal Code section 459.5?"]
16. *People v. Valenzuela* (CA2/6, 11-14-16, B269027) 5 CA5th 449, rev. granted, lead case 3-1-17, S239122 ["Does a conviction for active gang participation in violation of Penal Code section 186.22, subdivision (a), which requires that the defendant willfully promote, further, or assist in any felonious criminal conduct of the gang, remain valid when the underlying conduct in question was reduced from a felony to a misdemeanor pursuant to Proposition 47?"].

XII. General Rules for Understanding The Cases

1. All decisions by the CTA referred to herein were published, unless otherwise noted.
2. Where a case is cited but does not contain any docket number, the time for seeking a rehearing or review has past.
3. An appellate decision is binding on all lower courts. *Auto Equity Sales, Inc. v. Superior Court (1962) 57 C2d 450, 455.*
4. When there are conflicting published appellate decisions on a subject, a trial court is permitted to follow either one. *McCallum v. McCallum* (1987) 190 CA3d 308, 315, n. 4.
5. A case may be cited as soon as it is ordered published. CRC 8.1115(d).
6. Decisions of the CTA become final to that court 30 days after filing. CRC 8.264(b).
7. Rehearing
   a) A case may not be cited if the CTA has granted a rehearing. CRC 8.1105(e)(1)(A).
   b) Any order granting a rehearing must be made before the decision is final in the CTA. CRC 8.268(a)(2).
8. Petition for Review
   a) A case remains binding even though a petition for review has been filed, so long as the petition for review has not been granted.
   b) Petitions for review must be filed within 10 days of an appellate decision becoming final. CRC 8.500(e)(1).
9. Grant of Review (CRC 8.1115(e))
   a) Cases where review has been granted may be cited.
      (1) It is unsettled whether this applies to cases where the Supreme Court granted review prior to July 1, 2016.
      (a) One case held that the recent change of Rule 8.1115 only applies to the cases where the Supreme Court granted review after July 1, 2016. *People v. Varner* (CA4/2, 9-15-16, E063389) 3 CA5th 360, at n. 2, rev. granted, briefing def'd 11-22-16, S237679. However, since the change to Rule 8.1115, the CTA has cited cases where the Supreme Court granted review prior to the change in the Rule. E.g., *People v. Hudson* (CA4/1, 8-16-16, D068439) 2 CA5th 575, rev. granted, briefing def'd 10-26-16, S237340; *In re Ana C.* (CA1/4, 8-10-16, A145411) 2 CA5th 333, rev. granted, briefing def-d, 10-19-16, S237208; *People v. Garner* (CA2/4, 8-19-16, B266881) 2 CA5th 768 [traveler's check], rev. granted, briefing def'd 10-26-16, S237279; *People v. Smith* (CA4/2, 7-8-16, E062858) 1 CA5th 266, n. 5, rev. granted, briefing def'd 9-16-16, S236112; *The Kind and Compassionate v. City of Long Beach* (2016) 2 CA5th 116 [containing this citation: "(*See Pack v. Superior Court* (2011) 199 Cal.App.4th 1070, 132 Cal.Rptr.3d 633, review granted Jan. 18, 2012, S197169, review dismissed Aug. 22, 2012.))"].
      (2) The party citing the review granted case must prominently note that review has been granted.
      (3) The Supreme Court may order that the review granted appellate opinion not be cited.

(4) Cases where review has been granted are not binding authority unless the Supreme Court has otherwise ordered.

(a) The Comment to rule 8.1115 provides that published cases where review has not been granted remain binding even if in conflict with contrary cases where review has been granted.

(5) Once the Supreme Court has decided a case, the underlying appellate case may be cited and is binding unless the Supreme Court has ordered otherwise or the appellate decision contradicts the Supreme Court.

(6) The Supreme Court has not ordered otherwise in any Proposition 47 cases cited in this outline, unless noted otherwise.

b) Sample citation from a review granted case

(1) "(People v. Davis (2016) 246 Cal.App.4th 127, review granted July 13, 2016, S234324 (Davis).)" People v. Been (CA7, 8-22-16, H042297) 2016 WL 4435654, ***unpublished****.*

10. Any person may request an opinion be published. See CRC 8.1120.

11. Depublication (CRC 8.1125.)

a) Any person may request that a case be depublished.

b) Depublication requests must be made within 30 days of the decision becoming final in the CTA.

THE PUBLIC SAFETY AND REHABILITATION ACT OF 2016

SECTION 1. Title.

This measure shall be known and may be cited as "The Public Safety and Rehabilitation Act of 2016."

SEC. 2. Purpose and Intent.

In enacting this Act, it is the purpose and intent of the people of the State of California to:

1. Protect and enhance public safety.
2. Save money by reducing wasteful spending on prisons.
3. Prevent federal courts from indiscriminately releasing prisoners.
4. Stop the revolving door of crime by emphasizing rehabilitation, especially for juveniles.
5. Require a judge, not a prosecutor, to decide whether juveniles should be tried in adult court.

SEC. 3. Section 32 is added to Article I of the California Constitution, to read:

SEC. 32. (a) The following provisions are hereby enacted to enhance public safety, improve rehabilitation, and avoid the release of prisoners by federal court order, notwithstanding anything in this article or any other provision of law:

(1) Parole consideration: Any person convicted of a non-violent felony offense and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense.

(A) For purposes of this section only, the full term for the primary offense means the longest term of imprisonment imposed by the court for any offense, excluding the imposition of an enhancement, consecutive sentence, or alternative sentence.

(2) Credit Earning: The Department of Corrections and Rehabilitation shall have authority to award credits earned for good behavior and approved rehabilitative or educational achievements.

(b) The Department of Corrections and Rehabilitation shall adopt regulations in furtherance of these provisions, and the Secretary of the Department of Corrections and Rehabilitation shall certify that these regulations protect and enhance public safety.

SEC. 4. Judicial Transfer Process.

Sections 602 and 707 of the Welfare and Institutions Code are hereby amended.

Section 602 of the Welfare and Institutions Code is amended to read:

602. ~~(a)~~ Except as provided in ~~subdivision (b)~~ Section 707, any person who is under 18 years of age when he or she violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime other than an ordinance establishing a curfew based

solely on age, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court.

~~(b) Any person who is alleged, when he or she was 14 years of age or older, to have committed one of the following offenses shall be prosecuted under the general law in a court of criminal jurisdiction:~~

~~(1) Murder, as described in Section 187 of the Penal Code, if one of the circumstances enumerated in subdivision (a) of Section 190.2 of the Penal Code is alleged by the prosecutor, and the prosecutor alleges that the minor personally killed the victim.~~

~~(2) The following sex offenses, if the prosecutor alleges that the minor personally committed the offense, and if the prosecutor alleges one of the circumstances enumerated in the One Strike law, subdivision (d) or (e) of Section 667.61 of the Penal Code, applies:~~

~~(A) Rape, as described in paragraph (2) of subdivision (a) of Section 261 of the Penal Code.~~

~~(B) Spousal rape, as described in paragraph (1) of subdivision (a) of Section 262 of the Penal Code.~~

~~(C) Forcible sex offenses in concert with another, as described in Section 264.1 of the Penal Code.~~

~~(D) Forcible lewd and lascivious acts on a child under 14 years of age, as described in subdivision (b) of Section 288 of the Penal Code.~~

~~(E) Forcible sexual penetration, as described in subdivision (a) of Section 289 of the Penal Code.~~

~~(F) Sodomy or oral copulation in violation of Section 286 or 288a of the Penal Code, by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.~~

~~(G) Lewd and lascivious acts on a child under 14 years of age, as defined in subdivision (a) of Section 288, unless the defendant qualifies for probation under subdivision (d) of Section 1203.066 of the Penal Code.~~

Section 707 of the Welfare and Institutions Code is amended to read:

707. (a)(1) In any case in which a minor is alleged to be a person described in ~~subdivision (a) of~~ Section 602 by reason of the violation, when he or she was 16 years of age or older, of any felony criminal statute, ~~or ordinance except those listed in subdivision (b)~~, or of an offense listed in subdivision (b) when he or she was 14 or 15 years of age, the District Attorney or other appropriate prosecuting officer may make a motion to transfer the minor from juvenile court to a court of criminal jurisdiction. ~~upon~~ The motion ~~of the petitioner~~ must be made prior to the attachment of jeopardy. Upon such motion, the juvenile court shall ~~cause~~ order the probation officer to ~~investigate and~~ submit a report on the behavioral patterns and social history of the minor. ~~being considered for a determination of unfitness.~~ The report shall include any written or oral statement offered by the victim pursuant to Section 656.2.

(2) Following submission and consideration of the report, and of any other relevant evidence that the petitioner or the minor may wish to submit, the juvenile court shall decide whether the minor should be transferred to a court of criminal jurisdiction. In making its decision, the court shall consider the criteria specified in subparagraphs (A) to (E) below. If the court orders a transfer of jurisdiction, the court shall recite the basis for its decision in an order entered upon the minutes. In any case in which a hearing has been noticed pursuant to this section, the court shall postpone the taking of a plea to the petition until the conclusion of the transfer hearing, and no plea that may have been entered already shall constitute evidence at the hearing. ~~may find that the minor is not a fit and proper subject to be dealt with under the juvenile court law if it concludes that the minor would not be amenable to the care, treatment, and training program available through the facilities of the juvenile court, based upon an evaluation of the criteria specified in clause (i) of subparagraphs (A) to (E), inclusive:~~

(A)(i) The degree of criminal sophistication exhibited by the minor.

(ii) When evaluating the criterion specified in clause (i), the juvenile court may give weight to any relevant factor, including, but not limited to, the minor's age, maturity, intellectual capacity, and physical, mental, and emotional health at the time of the alleged offense, the minor's impetuosity or failure to appreciate risks and consequences of criminal behavior, the effect of familial, adult, or peer pressure on the minor's actions, and the effect of the minor's family and community environment and childhood trauma on the minor's criminal sophistication.

(B)(i) Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction.

(ii) When evaluating the criterion specified in clause (i), the juvenile court may give weight to any relevant factor, including, but not limited to, the minor's potential to grow and mature.

(C)(i) The minor's previous delinquent history.

(ii) When evaluating the criterion specified in clause (i), the juvenile court may give weight to any relevant factor, including, but not limited to, the seriousness of the minor's previous delinquent history and the effect of the minor's family and community environment and childhood trauma on the minor's previous delinquent behavior.

(D)(i) Success of previous attempts by the juvenile court to rehabilitate the minor.

(ii) When evaluating the criterion specified in clause (i), the juvenile court may give weight to any relevant factor, including, but not limited to, the adequacy of the services previously provided to address the minor's needs.

(E)(i) The circumstances and gravity of the offense alleged in the petition to have been committed by the minor.

(ii) When evaluating the criterion specified in clause (i), the juvenile court may give weight to any relevant factor, including but not limited to, the actual behavior of the person, the mental state of the person, the person's degree of involvement in the crime, the level of harm actually caused by the person, and the person's mental and emotional development.

~~A determination that the minor is not a fit and proper subject to be dealt with under the juvenile court law may be based on any one or a combination of the factors set forth above in clause (i) of subparagraphs (A) to (E), inclusive, which shall be recited in the order of unfitness. In any case in which a hearing has been noticed pursuant to this section, the court shall postpone the taking of a plea to the petition until the conclusion of the fitness hearing, and no plea that may have been entered already shall constitute evidence at the hearing.~~

~~(2)(A) This paragraph shall apply to a minor alleged to be a person described in Section 602 by reason of the violation, when he or she has attained 16 years of age, of any felony offense when the minor has been declared to be a ward of the court pursuant to Section 602 on one or more prior occasions if both of the following apply:~~

~~(i) The minor has previously been found to have committed two or more felony offenses.~~

~~(ii) The offenses upon which the prior petition or petitions were based were committed when the minor had attained 14 years of age.~~

~~(B) Upon motion of the petitioner made prior to the attachment of jeopardy the court shall cause the probation officer to investigate and submit a report on the behavioral patterns and social history of the minor being considered for a determination of unfitness. Following submission and consideration of the report, and of any other relevant evidence that the petitioner or the minor may wish to submit, the minor shall be presumed to be not a fit and proper subject to be dealt with under the juvenile court law unless the juvenile court concludes, based upon evidence, which evidence may be of extenuating or mitigating circumstances, that the minor would be amenable to the care, treatment, and training program available through the facilities of the juvenile court based upon an evaluation of the criteria specified in subclause (I) of clauses (i) to (v), inclusive:~~

~~(i)(I) The degree of criminal sophistication exhibited by the minor.~~

~~(II) When evaluating the criterion specified in subclause (I), the juvenile court may give weight to any relevant factor, including, but not limited to, the minor's age, maturity, intellectual capacity, and physical, mental, and emotional health at the time of the alleged offense, the minor's impetuosity or failure to appreciate risks and consequences of criminal behavior, the effect of familial, adult, or peer pressure on the minor's actions, and the effect of the minor's family and community environment and childhood trauma on the minor's criminal sophistication.~~

~~(ii)(I) Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction.~~

~~(II) When evaluating the criterion specified in subclause (I), the juvenile court may give weight to any relevant factor, including, but not limited to, the minor's potential to grow and mature.~~

~~(iii)(I) The minor's previous delinquent history.~~

~~(II) When evaluating the criterion specified in subclause (I), the juvenile court may give weight to any relevant factor, including, but not limited to, the seriousness of the minor's previous~~

~~delinquent history and the effect of the minor's family and community environment and childhood trauma on the minor's previous delinquent behavior.~~

~~(iv)(I) Success of previous attempts by the juvenile court to rehabilitate the minor.~~

~~(II) When evaluating the criterion specified in subclause (I), the juvenile court may give weight to any relevant factor, including, but not limited to, the adequacy of the services previously provided to address the minor's needs.~~

~~(v)(I) The circumstances and gravity of the offense alleged in the petition to have been committed by the minor.~~

~~(II) When evaluating the criterion specified in subclause (I), the juvenile court may give weight to any relevant factor, including, but not limited to, the actual behavior of the person, the mental state of the person, the person's degree of involvement in the crime, the level of harm actually caused by the person, and the person's mental and emotional development.~~

~~A determination that the minor is a fit and proper subject to be dealt with under the juvenile court law shall be based on a finding of amenability after consideration of the criteria set forth in subclause (I) of clauses (i) to (v), inclusive, and findings therefore recited in the order as to each of the those criteria that the minor is fit and proper under each and every one of those criteria. In making a finding of fitness, the court may consider extenuating and mitigating circumstances in evaluating each of those criteria. In any case in which the hearing has been noticed pursuant to this section, the court shall postpone the taking of a plea to the petition until the conclusion of the fitness hearing and no plea that may have been entered already shall constitute evidence at the hearing. If the minor is found to be a fit and proper subject to be dealt with under the juvenile court law pursuant to this subdivision, the minor shall be committed to placement in a juvenile hall, ranch camp, forestry camp, boot camp, or secure juvenile home pursuant to Section 730, or in any institution operated by the Department of Corrections and Rehabilitation, Division of Juvenile Facilities.~~

~~(3) If, pursuant to this subdivision, the minor is found to be not a fit and proper subject for juvenile court treatment and is tried in a court of criminal jurisdiction and found guilty by the trier of fact, the judge may commit the minor to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities, in lieu of sentencing the minor to the state prison, unless the limitations specified in Section 1732.6 apply.~~

(b) Subdivision ~~(c)~~ (a) shall be applicable in any case in which a minor is alleged to be a person described in Section 602 by reason of the violation of one of the following offenses when he or she was 14 or 15 years of age:

(1) Murder.

(2) Arson, as provided in subdivision (a) or (b) of Section 451 of the Penal Code.

(3) Robbery.

(4) Rape with force, violence, or threat of great bodily harm.

(5) Sodomy by force, violence, duress, menace, or threat of great bodily harm.

(6) A lewd or lascivious act as provided in subdivision (b) of Section 288 of the Penal Code.

(7) Oral copulation by force, violence, duress, menace, or threat of great bodily harm.

(8) An offense specified in subdivision (a) of Section 289 of the Penal Code.

(9) Kidnapping for ransom.

(10) Kidnapping for purposes of robbery.

(11) Kidnapping with bodily harm.

(12) Attempted murder.

(13) Assault with a firearm or destructive device.

(14) Assault by any means of force likely to produce great bodily injury.

(15) Discharge of a firearm into an inhabited or occupied building.

(16) An offense described in Section 1203.09 of the Penal Code.

(17) An offense described in Section 12022.5 or 12022.53 of the Penal Code.

(18) A felony offense in which the minor personally used a weapon described in any provision listed in Section 16590 of the Penal Code.

(19) A felony offense described in Section 136.1 or 137 of the Penal Code.

(20) Manufacturing, compounding, or selling one-half ounce or more of a salt or solution of a controlled substance specified in subdivision (e) of Section 11055 of the Health and Safety Code.

(21) A violent felony, as defined in subdivision (c) of Section 667.5 of the Penal Code, which also would constitute a felony violation of subdivision (b) of Section 186.22 of the Penal Code.

(22) Escape, by the use of force or violence, from a county juvenile hall, home, ranch, camp, or forestry camp in violation of subdivision (b) of Section 871 if great bodily injury is intentionally inflicted upon an employee of the juvenile facility during the commission of the escape.

(23) Torture as described in Sections 206 and 206.1 of the Penal Code.

(24) Aggravated mayhem, as described in Section 205 of the Penal Code.

(25) Carjacking, as described in Section 215 of the Penal Code, while armed with a dangerous or deadly weapon.

(26) Kidnapping for purposes of sexual assault, as punishable in subdivision (b) of Section 209 of the Penal Code.

(27) Kidnapping as punishable in Section 209.5 of the Penal Code.

(28) The offense described in subdivision (c) of Section 26100 of the Penal Code.

(29) The offense described in Section 18745 of the Penal Code.

(30) Voluntary manslaughter, as described in subdivision (a) of Section 192 of the Penal Code.

~~(c) With regard to a minor alleged to be a person described in Section 602 by reason of the violation, when he or she was 14 years of age or older, of any of the offenses listed in subdivision (b), upon motion of the petitioner made prior to the attachment of jeopardy the court shall cause the probation officer to investigate and submit a report on the behavioral patterns and social history of the minor being considered for a determination of unfitness. Following submission and consideration of the report, and of any other relevant evidence that the petitioner or the minor may wish to submit, the minor shall be presumed to be not a fit and proper subject to be dealt with under the juvenile court law unless the juvenile court concludes, based upon evidence, which evidence may be of extenuating or mitigating circumstances, that the minor would be amenable to the care, treatment, and training program available through the facilities of the juvenile court based upon an evaluation of each of the following criteria specified in subparagraph (A) of paragraphs (1) to (5), inclusive:~~

~~(1)(A) The degree of criminal sophistication exhibited by the minor.~~

~~(B) When evaluating the criterion specified in subparagraph (A), the juvenile court may give weight to any relevant factor, including, but not limited to, the minor's age, maturity, intellectual capacity, and physical, mental, and emotional health at the time of the alleged offense, the minor's impetuosity or failure to appreciate risks and consequences of criminal behavior, the effect of familial, adult, or peer pressure on the minor's actions, and the effect of the minor's family and community environment and childhood trauma on the minor's criminal sophistication.~~

~~(2)(A) Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction.~~

~~(B) When evaluating the criterion specified in subparagraph (A), the juvenile court may give weight to any relevant factor, including, but not limited to, the minor's potential to grow and mature.~~

~~(3)(A) The minor's previous delinquent history.~~

~~(B) When evaluating the criterion specified in subparagraph (A), the juvenile court may give weight to any relevant factor, including, but not limited to, the seriousness of the minor's previous delinquent history and the effect of the minor's family and community environment and childhood trauma on the minor's previous delinquent behavior.~~

~~(4)(A) Success of previous attempts by the juvenile court to rehabilitate the minor.~~

~~(B) When evaluating the criterion specified in subparagraph (A), the juvenile court may give weight to any relevant factor, including, but not limited to, the adequacy of the services previously provided to address the minor's needs.~~

~~(5)(A) The circumstances and gravity of the offenses alleged in the petition to have been committed by the minor.~~

~~(B) When evaluating the criterion specified in subparagraph (A), the juvenile court may give weight to any relevant factor, including, but not limited to, the actual behavior of the person, the mental state of the person, the person's degree of involvement in the crime, the level of harm actually caused by the person, and the person's mental and emotional development.~~

~~A determination that the minor is a fit and proper subject to be dealt with under the juvenile court law shall be based on a finding of amenability after consideration of the criteria set forth in subparagraph (A) of paragraphs (1) to (5), inclusive, and findings therefore recited in the order as to each of those criteria that the minor is fit and proper under each and every one of those criteria. In making a finding of fitness, the court may consider extenuating or mitigating circumstances in evaluating each of those criteria. In any case in which a hearing has been noticed pursuant to this section, the court shall postpone the taking of a plea to the petition until the conclusion of the fitness hearing and no plea which may have been entered already shall constitute evidence at the hearing. If, pursuant to this subdivision, the minor is found to be not a fit and proper subject for juvenile court treatment and is tried in a court of criminal jurisdiction and found guilty by the trier of fact, the judge may commit the minor to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities, in lieu of sentencing the minor to the state prison, unless the limitations specified in Section 1732.6 apply.~~

~~(d) (1) Except as provided in subdivision (b) of Section 602, the district attorney or other appropriate prosecuting officer may file an accusatory pleading in a court of criminal jurisdiction against any minor 16 years of age or older who is accused of committing an offense enumerated in subdivision (b).~~

~~(2) Except as provided in subdivision (b) of Section 602, the district attorney or other appropriate prosecuting officer may file an accusatory pleading against a minor 14 years of age or older in a court of criminal jurisdiction in any case in which any one or more of the following circumstances apply:~~

~~(A) The minor is alleged to have committed an offense that if committed by an adult would be punishable by death or imprisonment in the state prison for life.~~

~~(B) The minor is alleged to have personally used a firearm during the commission or attempted commission of a felony, as described in Section 12022.5 or 12022.53 of the Penal Code.~~

~~(C) The minor is alleged to have committed an offense listed in subdivision (b) in which any one or more of the following circumstances apply:~~

~~(i) The minor has previously been found to be a person described in Section 602 by reason of the commission of an offense listed in subdivision (b).~~

~~(ii) The offense was committed for the benefit of, at the direction of, or in association with any criminal street gang, as defined in subdivision (f) of Section 186.22 of the Penal Code, with the specific intent to promote, further, or assist in criminal conduct by gang members.~~

~~(iii) The offense was committed for the purpose of intimidating or interfering with any other person's free exercise or enjoyment of a right secured to him or her by the Constitution or laws of this state or by the Constitution or laws of the United States and because of the other person's race, color, religion, ancestry, national origin, disability, gender, or sexual orientation, or because the minor perceives that the other person has one or more of those characteristics, as described in Title 11.6 (commencing with Section 422.55) of Part 1 of the Penal Code.~~

~~(iv) The victim of the offense was 65 years of age or older, or blind, deaf, quadriplegic, paraplegic, developmentally disabled, or confined to a wheelchair, and that disability was known or reasonably should have been known to the minor at the time of the commission of the offense.~~

~~(3) Except as provided in subdivision (b) of Section 602, the district attorney or other appropriate prosecuting officer may file an accusatory pleading in a court of criminal jurisdiction against any minor 16 years of age or older who is accused of committing one or more of the following offenses, if the minor has previously been found to be a person described in Section 602 by reason of the violation of a felony offense, when he or she was 14 years of age or older:~~

~~(A) A felony offense in which it is alleged that the victim of the offense was 65 years of age or older, or blind, deaf, quadriplegic, paraplegic, developmentally disabled, or confined to a wheelchair, and that disability was known or reasonably should have been known to the minor at the time of the commission of the offense.~~

~~(B) A felony offense committed for the purposes of intimidating or interfering with any other person's free exercise or enjoyment of a right secured to him or her by the Constitution or laws of this state or by the Constitution or laws of the United States and because of the other person's race, color, religion, ancestry, national origin, disability, gender, or sexual orientation, or because the minor perceived that the other person had one or more of those characteristics, as described in Title 11.6 (commencing with Section 422.55) of Part 1 of the Penal Code.~~

~~(C) The offense was committed for the benefit of, at the direction of, or in association with any criminal street gang as prohibited by Section 186.22 of the Penal Code.~~

~~(4) In any case in which the district attorney or other appropriate prosecuting officer has filed an accusatory pleading against a minor in a court of criminal jurisdiction pursuant to this subdivision, the case shall then proceed according to the laws applicable to a criminal case. In conjunction with the preliminary hearing as provided in Section 738 of the Penal Code, the magistrate shall make a finding that reasonable cause exists to believe that the minor comes within this subdivision. If reasonable cause is not established, the criminal court shall transfer the case to the juvenile court having jurisdiction over the matter.~~

~~(5) For an offense for which the prosecutor may file the accusatory pleading in a court of criminal jurisdiction pursuant to this subdivision, but elects instead to file a petition in the juvenile court, if the minor is subsequently found to be a person described in subdivision (a) of Section 602, the minor shall be committed to placement in a juvenile hall, ranch camp, forestry camp, boot camp, or secure juvenile home pursuant to Section 730, or in any institution operated by the Department of Corrections and Rehabilitation, Division of Juvenile Facilities.~~

~~(6) If, pursuant to this subdivision, the minor is found to be not a fit and proper subject for juvenile court treatment and is tried in a court of criminal jurisdiction and found guilty by the trier of fact, the judge may commit the minor to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities, in lieu of sentencing the minor to the state prison, unless the limitations specified in Section 1732.6 apply.~~

~~(e) A report submitted by a probation officer pursuant to this section regarding the behavioral patterns and social history of the minor being considered for a determination of unfitness shall include any written or oral statement offered by the victim, the victim's parent or guardian if the victim is a minor, or if the victim has died, the victim's next of kin, as authorized by subdivision (b) of Section 656.2. Victims' statements shall be considered by the court to the extent they are relevant to the court's determination of unfitness.~~

SEC. 5. Amendment.

This Act shall be broadly construed to accomplish its purposes. The provisions of Section 4 of this measure may be amended so long as such amendments are consistent with and further the intent of this Act by a statute that is passed by a majority vote of the members of each house of the Legislature and signed by the Governor.

SEC. 6. Severability.

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

SEC. 7. Conflicting Initiatives.

(a) In the event that this measure and another measure addressing credits and parole eligibility for state prisoners or adult court prosecution for juvenile defendants shall appear on the same statewide ballot, the provisions of the other measure or measures shall be deemed to be in conflict with this measure. In the event that this measure receives a greater number of affirmative votes than a measure deemed to be in conflict with it, the provisions of this measure shall prevail in their entirety, and the other measure or measures shall be null and void.

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

SEC. 8. Proponent Standing.

Notwithstanding any other provision of law, if the State, government agency, or any of its officials fail to defend the constitutionality of this act, following its approval by the voters, any other government employer, the proponent, or in their absence, any citizen of this State shall have the authority to intervene in any court action challenging the constitutionality of this act for the purpose of defending its constitutionality, whether such action is in any trial court, on appeal, or on discretionary review by the Supreme Court of California and/or the Supreme Court of the United States. The reasonable fees and costs of defending the action shall be a charge on funds appropriated to the Department of Justice, which shall be satisfied promptly.

SEC. 9. Liberal Construction.

This Act shall be liberally construed to effectuate its purposes.

PROPOSITION 57's PROVISIONS CONCERNING JUVENILE COURT JURISDICTION

Proposition 57 repealed the provisions providing for the direct filing of juvenile matters in adult court. The question is whether a defendant is entitled to relief if his or her case was on appeal when Proposition 57 was enacted. This is important because a juvenile adjudication is not a criminal conviction. (*In re W.B.* (2012) 55 Cal.4th 30, 43; see also *In re Joseph B.* (1983) 34 Cal.3d 952, 955.) But for a few notable exceptions, juvenile adjudications cannot be used as a prior conviction. The dispositional hearing often, but not always, leads to less severe punishment than an adult sentence, and it is easier to have a juvenile record expunged and sealed than an adult record, unless the minor has committed an offense listed in Welfare and Institutions Code section 707, subdivision (b).

Historically, a minor who was at least 16 years old and charged with a felony could be transferred to adult court if he was found to be unfit for the juvenile court. The minor was presumed unfit for juvenile court if the felony was a section 707(b) offense, and presumed fit if the felony was not listed in section 707(b). In 2000, Proposition 21 expanded the role of adult court so that one as young as 14 years old with a section 707(b) offense could be sent directly to adult court, and the prosecution had the unchecked discretion to send minors who were at least 16 years old to adult court under certain circumstances. (Former Welf. & Inst. Code, §§ 602, subd. (b), 707, subds. (a)-(d); see *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 548-550.) Penal Code sections 1170.17 and 1170.19 provided a "reverse remand" process if the minor was eventually acquitted of the crime that permitted direct filing in adult court. Under this process, the adult court could could either itself conduct the fitness hearing or transfer the matter to the juvenile court for the hearing.

Proposition 57 undid Proposition 21 by eliminating direct filings. Now a minor who is 16 years old and charged with any felony can be transferred to adult court only if the juvenile court finds the minor to be unfit. (Welf. & Inst. Code, § 707, subd. (a)(1).) A minor who is at least 14 years old can be transferred to adult court if he or she is charged with a section 707(b) offense and the court finds the minor to be unfit. (*Ibid.*) In both instances, it is presumed the minor is fit for juvenile court treatment. (*Ibid.*)

Proposition 57 did not change the reverse remand provisions of Penal Code sections 1170.17 and 1170.19 to determine if a juvenile convicted in adult court is fit for a juvenile court disposition. It is the position of the Santa Clara District Attorney's Office that if a juvenile is in adult court because of direct filing and has not yet been convicted, the DA's Office will move to strike the allegation in the charging document that permits direct filing, and it will request the matter to be "certified" for juvenile court. This is only if the defendant is willing to waive time, however, so that it would be possible to hold a fitness hearing in the

juvenile court. If the juvenile is not willing to waive time or has been convicted but is awaiting sentencing, then the district attorney will request that the judge who presided over the conviction conduct a fitness hearing under Penal Code sections 1170.17 and 1170.19. Reportedly, similar procedures are being adopted in Ventura and Sacramento Counties.

An adult court has fundamental jurisdiction to convict and sentence a juvenile, even if it is in contravention of the Welfare and Institutions Code provisions concerning what matters belong in the juvenile court. (*In re Harris* (1993) 5 Cal.4th 813, 836-838.) In cases where the defendant lies about his or her age but reveals the true age before trial, the defendant is entitled to have the matter transferred to the juvenile court. When the error is discovered after trial but before sentencing, the conviction is still valid, but the juvenile is entitled to have the matter transferred to the juvenile court for a dispositional hearing. (*In re Jermaine B.* (1999) 69 Cal.App.4th 634, 641-642; *Jose D. v. Superior Court* (1993) 19 Cal.App.4th 1098, 1100-1101.) If the defendant reveals his or her age after judgment is entered, it is deemed that he or she completely waived the right to be treated as a juvenile. (*People v. Level* (2002) 97 Cal.App.4th 1208, 1212; *In re Application of Gutierrez* (1934) 1 Cal.App.2d 281, 286-287, disapproved on other grounds in *In re McInturff* (1951) 37 Cal.2d 876, 881-882.)

There is a persuasive argument that a juvenile convicted in adult court because of direct filing is entitled to the retroactive benefit of Proposition 57 if the case was on appeal when the initiative was enacted. The California Supreme Court in *Tapia v. Superior Court* (1991) 53 Cal.3d 282 observed that there are three categories of laws in determining whether a new provision applies to conduct occurring before the law was enacted.

First, laws defining criminal conduct, increasing punishment, or eliminating a defense are said to be retroactive if they apply to conduct occurring before the law was enacted, and this is prohibited by the ex post facto clause if the change is to the defendant's detriment. (*Id.* at p. 288.) Thus, provisions in Proposition 115 increasing penalties could not be applied to crimes occurring before the initiative was enacted. (*Id.* at pp. 297-298.)

Second, procedural laws are treated differently. "Even though applied to the prosecution of a crime committed before the law's effective date, a law addressing the conduct of trials still addresses conduct in the future. This is a principle that courts in this state have consistently recognized. Such a statute 'is not made retroactive merely because it draws upon facts existing prior to its enactment . . . . [Instead,] [t]he effect of such statutes is actually prospective in nature since they relate to the procedure to be followed in the future.' [Citations.] For this reason, we have said that 'it is a misnomer to designate [such statutes] as having retrospective effect.' [Citation.]" (*Id.* at p. 288.) Thus, changes in judicial procedure, such as reciprocal discovery and limitations on voir dire, applied to crimes

committed before hand because they were not substantive changes. (*Id.* at pp. 299-300.)

Third, some statutory changes in Proposition 115 purportedly limited criminal liability, and they were applied retroactively under *In re Estrada* (1965) 63 Cal.2d 740. (*Tapia, supra,* 53 Cal.3d at pp. 300-301.)

Under *Tapia's* third category, Proposition 57 should be retroactively applied. The new law changed the legal consequences of the minor's behavior by potentially limiting the government's power to seek a criminal conviction. Because the change in the law acts to the benefit of the minor in reducing criminal punishment, it should be applied retroactively to cases not final.

In the alternative, it might be argued that Proposition 57 is retroactive under *Tapia's* second category. The revised law is arguably procedural in nature in that it still allows the prosecutor to seek adult punishment, albeit via the more onerous vehicle of a fitness hearing. Viewed from this perspective, this change in procedure should be applied to pending cases that are not yet final.

Assuming the defendant is entitled to retroactive relief, there is the question of remedy. In *Harris, supra,* 5 Cal.4th 813, the minor objected in the trial court that he was too young to be prosecuted as an adult. Eventually, the Supreme Court agreed. Insofar as Mr. Harris had a fair trial, the Supreme Court held that the proper remedy was to remand the case to the juvenile court for a dispositional hearing. (*Id* at p. 851.) In the present context, the remedy would appear to be a remand so that the trial court may exercise its discretion under Penal Code sections 1170.17 and 1170.19 to either conduct a fitness hearing or transfer the cause to the juvenile court for that purpose. In seeking this remedy, counsel should carefully explain why there is a basis in the record for believing that the client would prevail at a fitness hearing. (See *People v. Villa* (2009) 178 Cal.App.4th 443, 452-453 [failure to hold a "reverse remand" hearing pursuant to section 1170.17 was harmless error because the defendant failed to establish prejudice as required under Article VI, section 13 of the California Constitution].)

Notes on Proposition 57 and Parole Eligibility
By Bill Robinson, Assistant Director, SDAP, 11/10/2016

Introduction

Proposition 57, the "Public Safety and Rehabilitation Act of 2016," was enacted by the Electorate on November 8, 2016, and is now the law. One portion of this initiative – the only part which this short essay addresses – promises to have a profound effect on persons serving long prison sentences for nonviolent felony crimes, including many second and third strikers serving sentences under the Three Strikes law who have not benefitted significantly from Prop. 36 or Prop. 47.

This discussion focuses only on the parole eligibility provisions, not the credits provisions or the changes in law for charging of juvenile offenses. I am putting this together as a way of fostering discussion and early thinking about this measure so that we will have some idea, as advocates for our clients, what kind of arguments to raise on their behalf now that Prop. 57 has passed.

General Thesis of Argument. In my view, the measure will be transformative because it will provide parole eligibility to anyone with a long sentence for a crime or crimes which include no "violent felony" convictions under section 667.5, subdivision (c), once he has served out the longest possible determinate sentence which could have been imposed for his most serious offense.[1]

To reach this conclusion, a pair of significant ambiguities in the statute have to be addressed and resolved in our favor. I now turn to these problems of analysis and construction.

1. **The Language of the Initiative.** Prop. 57's parole eligibility provision consists of a single paragraph with, for our purposes, two pertinent sentences:

> "(1) Parole Consideration: Any person convicted of a *nonviolent felony* offense and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense.

[1] I use the male pronoun throughout for convenience and because I assume that the overwhelming percentage of persons likely to benefit from Prop. 57 are men.

(A) For purposes of this section only, the full term for the primary offense means the longest term of imprisonment imposed by the court for any offense, excluding the imposition of an enhancement, consecutive sentence, or *alternative sentence.*"

(Proposition 57, § 3, now "Art. I, § 32 of Cal. Const.)

2. **The Two Interpretation Questions.** This provision leaves two key questions open to ambiguity: the intended meaning of the phrase "nonviolent felony;" and the question whether *alternative sentence* includes sentences imposed under the Three Strikes law, including second-strike doubled terms and 25-to-life third strike terms. I am moderately optimistic that our interpretation of these two parts of the initiative will prevail.

There are also a couple of other possible ambiguities, discussed below, about which I have mixed confidence.

a. **The Meaning of "Nonviolent Felony."** The measure does not define "nonviolent felony." Our argument is that "nonviolent felony" means "a crime that is not defined as a 'violent felony' under Penal Code section 667.5, subdivision (c)." Other possible interpretations would be "a felony conviction which does not involve actual violence" or "a felony conviction that does not involve actual violence or the risk/threat of violence."

In the latter interpretation, there would still be a lot of inmates who would benefit from this provision. However, it would be a far narrower group. For example, any assaultive felony (e.g., aggravated assault in any form under section 245), and any residential burglary could be found to involve use of violence or the threat of violence.

The lack of clear guidance here is unfortunate. By contrast, recent initiative measures, such as Prop. 36, have clear references to the statutory provisions for "serious and/or violent felonies" as those terms are used, i.e., to section 1192.7(c) and 667.5(c).

It is settled that where the language of an initiative measure appears ambiguous, courts must "analyze the intent of the law utilizing "customary rules of statutory construction or legislative history for guidance." (*Quarterman v. Kefauver* (1997) 55 Cal. App. 4th 1366, 1371), and that "this may include reference to ballot materials in the case of initiatives in order to discern what the average voter would understand to be the intent of the law upon which he or she

was voting. (*Legislature v. Eu* (1991) 54 Cal. 3d 492, 505; accord, *McLaughlin v. State Bd. of Education* (1999) 75 Cal.App.4th 196, 215-216.) An important component of such analysis can also be the Legislative Counsel's analysis of the measure. (See, e.g., *Vernon v. State Bd. of Equalization* (1992) 4 Cal.App.4th 110, 122; see also *Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 444–445 ["if the language is ambiguous, we consider extrinsic evidence in determining voter intent, including the Legislative Analyst's analysis and ballot arguments for and against the initiative"].)

Here, the Legislative Analyst's comments are very helpful, as they assume that "violent felony" means what we want it to mean: a crime not defined as a violent felony under California law.

> Although the measure and current law do not specify which felony crimes are defined as nonviolent, this analysis assumes a nonviolent felony offense would include any felony offense that is not specifically defined in statute as violent.

(Official Ballot Guide, 2016, p. 57.)[2]

Looking next to the ballot arguments, the proponents' primary argument is not particularly helpful to our position, but one point in rebuttal is very helpful, while the opponents' arguments are very helpful because they assume that "nonviolent felony" means any crime not defined as a violent felony. (See Official Ballot Guide, 2016, pp. 58-59.)

The proponents' primary argument suggests that the test is going to be the "dangerousness" of the offender, not the formal classification of the offense. "The proposition would still keep dangerous offenders in prison." (Summary of Official Argument in Favor) The only other guidance is somewhat circular and unhelpful, where the proponents quote the Supreme Court decision which put the matter on the ballot, which states that the proposition "would only apply *to prisoners convicted of non-violent felonies.* '" (Ballot Argument at 58; *Brown v. Superior Court* (2016) 63 Cal.4th 335, 352.)

This brings up another point, namely, that there already is a judicial construction of Prop. 57 from *Brown*, and there is something positive we can take away from that. As suggested above, the majority opinion in *Brown* referenced in

---

[2]http://voterguide.sos.ca.gov/pdf/complete-vig.pdf,

the proponents' argument does not provide any help, as it simply repeats the phrase "non-violent felony" from the initiative measure, without anywhere discussing its meaning. (*Ibid.*) However, Justice Chin, in his dissent, points out the ambiguity of this term, and the potential interpretation problems concerning it, in a way which we can harness to our advantage in this question of interpretation.

> [T]he constitutional provision never defines the term "non-violent felony offense." Because the United States Supreme Court recently declared unconstitutional as impermissibly vague the term "violent felony" in a federal statute (*Johnson v. United States* (2015) 576 U.S. ___ [192 L.Ed.2d 569, 135 S. Ct. 2551]), the absence of a definition is troublesome, to say the least. The Penal Code contains various lists of crimes satisfying various definitions, including a list of "violent" felonies. (Pen. Code, § 667.5, subd. (c).) Does that statute apply to mean that any crime not listed in it would be a nonviolent felony, even though many such crimes are arguably violent? Can a statute define a constitutional term? What if the Legislature amends the list? What happens if the term "non-violent felony offense" is also found to be void for vagueness? Would that mean all inmates would be eligible for parole? The amended measure could greatly benefit from a definition of the term. Adding such a definition would be possible if the proposal were submitted for public review, but it is impossible under the majority's holding.

(*Brown v. Superior Court* (2016) 63 Cal.4th 335, 360, diss. opin. of Chin, J.)

The one favorable point which can be made based on Justice Chin's sage observation above is that the interpretation we favor – that "nonviolent felony" means any crime not defined as a violent felony under section 667.5(c) – receives support from the principle of statutory construction which requires courts to interpret laws in a way which avoids constitutional challenges.

> [I]n assessing the merits of alternative interpretations of a statutory provision, it is appropriate to consider the potential constitutional problems that would be posed by each alternative construction of the statute, and to favor an interpretation that avoids such problems. (See, e.g., *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 509 ["'If a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language

> used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable.' "].)

(*In re Marriage Cases* (2008) 43 Cal.4th 757, 800, fn. 21.) Since, as Justice Chin's dissent in *Brown* makes clear, an interpretation of "nonviolent felony" as meaning "any crime not involving violence" is subject to the same constitutional vagueness problems recognized by the U.S. Supreme Court in *Johnson*, and our proposed construction, as referring to crimes not defined as violent under section 667.5(c), has no such constitutional problem, this principle of interpretation is favorable to our position.

So too is the "rule of lenity," which requires courts to uphold the interpretation of a criminal statute that favors a criminal defendant if there is an ambiguity in the language of the measure, where competing interpretations are in "relative equipoise." (See, e.g., *People v. Soria* (2010) 48 Cal.4th 58, 65, citing *People v. Oates* (2004) 32 Cal.4th 1048, 1068.) We can certainly make the case that the ambiguity about the meaning of "nonviolent felony" in Prop. 57 fits within this rubric.

Turning back to the ballot arguments, though there is little help from the proponents' arguments, the *opponents' argument* are very helpful. They clearly presume that "nonviolent felony" means exactly what we advocate – any crime not defined as a violent felony under § 667.5(c). The opponents make much out of the fact that a whole host of offenders who they believe to be violent and dangerous would receive the benefit of early parole consideration, and the list of offenders which they cite is plainly based on the unarticulated assumption that the dividing line is whether the offense is classified as a violent felony under section 667.5(c). The general comment is that "the proposition was poorly drafted and would allow criminals convicted of crimes like rape, lewd acts against a child, and human trafficking to be released early from prison . . .", with the opponents later specifying that they are referring to crimes such as "rape by intoxication," arson, and assault with a deadly weapon, all of which, many folks would agree, involve violence, but none of which are defined as violent felonies under section 667.5(c).

Notably, the proponents, in their rebuttal to the argument of the opponents, expressly invoke the definitions of "violent felonies" in section 667.5(c) as the litmus test for "nonviolent felony" under the measure.

"Prop 57:

• Does NOT automatically release anyone from prison.

> • Does NOT authorize parole for violent offenders. The California Supreme Court clearly stated that parole eligibility under Prop. 57 applies, "only to prisoners convicted of non-violent felonies." (Brown v. Superior Court, June 6, 2016). *Violent criminals as defined in Penal Code 667.5(c) are excluded from parole.*

(Ballot Arguments on Prop. 57, p. 59, emphasis added.) This language appears to be our trump card – please forgive the expression – as it quite expressly states that the controlling provisions are the definitions of "violent felony" under section 667.5(c).

We can thus argue that the situation here is akin to the one presented in *Legislature v. Eu, supra*, 54 Cal. 3d at p. 505, where the court focused on the opponents' ballot argument as to the potential harm of the measure – terms limits creating a lifetime ban from holding office – led the Supreme Court to state, "[w]e think it likely the average voter, reading the proposed constitutional language as supplemented by the foregoing analysis and arguments, would conclude the measure contemplated a lifetime ban against candidacy for the office once the prescribed maximum number of terms had been served." (*Ibid.*)

The same argument can be made here. The opponents, who set the terms for the debate and the voters' understanding of the meaning of this provision of Prop. 57, make the assumption that "nonviolent felony" means any felony not defined as violent under 667.5(c), and the proponents' competing arguments either says nothing as to this or expressly supports it, as in the rebuttal statement quoted above. Moreover, as explained above, the Legislative Analyst's comments are to the same effect.

Thus, now that the initiative measure has passed, it is fair to assume that "the average voter, reading the proposed constitutional language as supplemented by the foregoing analysis and arguments, would conclude the measure contemplated . . ." parole consideration for anyone whose principal crime of conviction was not a violent felony under 667.5(c). (*Ibid.*)

I am therefore fairly optimistic that our proposed interpretation will prevail.

b. **Does "alternative sentence" include a doubled determinate term or a 25-to life term under Three-Strikes law, such that the lengths of these terms are excluded from determination of the date or parole eligibility?** This is a critical point, and the language of the initiative is somewhat confusing, and maybe even

internally contradictory. However, in my view, we are on equally solid ground for arguing that it applies to second and third strikers, and that the length of sentences imposed under the Three Strikes law does not determine the date of parole eligibility.

As explained below, our assumption has to be that doubled determinate terms and 25 to life terms under the Three Strikes law, as well as other recidivist punishment provisions, are "alternative sentences," which means that the doubled determinate term or life term imposed under these provisions has to be, like enhancement provisions, excluded from the required calculus for parole eligibility under Prop. 47. What this would mean, for example, would be that a garden-variety third striker, convicted for a nonviolent residential burglary as a third strike, would be eligible for parole once he has served out the "longest term of imprisonment" for which residential burglary is punishable, which would be 6 years. (§ 461, subd. (a).)

The biggest obstacle to this construction comes in the language of the measure which refers to the punishment *actually imposed* by the court, but not the statutory maximum. It states that "the full term for the primary offense means the longest term of imprisonment *imposed by the court* for any offense. . . ." This suggests that the controlling "full term" on which parole eligibility is based references the sentence *actually* imposed – i.e., for a second-striker, the doubled determinate term, and for a third-striker, a 25 year minimum. This would be a very unhelpful interpretation, although our clients could still receive some benefit.

However, the next phrase in that same sentence seems to strongly disavow such a construction, in that it provides that the "full term for the primary offense" must necessarily "exclude[s] the imposition of an enhancement, consecutive sentence, or *alternative sentence.*" (Emphasis added.)

Our best argument here is that there really is no ambiguity, and that the range of punishments actually imposed under the Three Strikes law is excluded from calculation of the parole date. This must be so by virtue of a long line of cases which expressly characterize the Three Strikes law, like the older "Habitual Offender Law" (§ 667.7) construed in *People v. Jenkins* (1995) 10 Cal. 4th 234, as articulating an *alternative sentencing scheme* for the current offense, rather than an enhancement. (See, e.g., *Romero*, *supra*, 13 Cal.4th at p. 527.)

As an earlier case put it, "the three strikes provisions . . . articulate an *alternative sentencing scheme* [which] supplants the general penalty provisions and applies to repeat offenders who meet the statutory requirements." (*People v.*

Cressy (1996) 47 Cal.App.4th 981, 991, emphasis added.) This is made even clearer by the court in *Anthony v. Superior Court* (2010) 188 Cal.App.4th 700, 708, which states that "[t]he indeterminate life term to which the offender may be subject, under the Three Strikes law, is . . . an alternative punishment that is imposed based upon the fact of the defendant's recidivism, and it is imposed upon conviction of 'a felony' without regard to the seriousness of the current felony offense, if the defendant has two or more 'serious' or violent felony convictions . . .", and that such a sentence "is not . . .'the maximum punishment prescribed by statute for the offense.'" (*Ibid.*, citing and quoting *People v. Turner* (2005) 134 Cal.App.4th 1591, 1597–1598.)

Our argument again receives support from the ballot arguments, especially those of the opponents, which expressly assume that parole eligibility will not be limited by a Three Strikes sentence.

> "57 effectively overturns key provisions of Marsy's Law, '3-Strikes and You're Out,' Victims' Bill of Rights, Californians Against Sexual Exploitation Act — *measures enacted by voters that have protected victims and made communities safer," Susan Fisher, Former Chairwoman State Parole Board."*

(Opponent's Ballot Argument, p. 59.)

Proponents, as with the prior issue, largely just slide around any ambiguity, using phrases like this one, in the ballot argument, to the effect that the measures "allows parole consideration for people with non-violent convictions who complete the full prison term for their primary offense . . .", with no reference to the meaning of "alternative sentence" provisions. (Proponents' Ballot Argument, p. 58.)

On balance, I think we are in good shape to argue that parole eligibility occurs after the inmate has served out the maximum determinate term for his principal crime, irrespective additional punishment imposed for recidivism, whether through enhancements under, for example, sections 667(a) or 667.5(b), or alternative sentencing laws, such as the Three Strikes law.

3. **Remaining Ambiguities.** The sparsely worded provision includes some other potential ambiguities. I will only trace out a couple here.

a. **Does it Apply to Combined Sentences Which Include Violent and Nonviolent Felonies? Probably not.** It will be recalled that there was a controversy concerning Prop. 36, which excluded from its benefits any person

with a current offense conviction for any serious or violent felonies, as to whether it applied to persons with multiple life sentences for, say, one serious felony and one nonserious felony. We won that argument in *People v. Johnson* (2015) 60 Cal.4th 674, with the California Supreme Court ruling that it was to be applied on a "count-by-count" basis.

Does this same principle apply to Prop. 57? For example, does it apply to someone with a mixed set of crimes which includes one violent felony? I think that we will lose this one. Unlike Prop. 36, I see no way to modify the sentence so that there is parole eligibility as to certain crimes, but not as to others. Under *Johnson*, an inmate can still have a 25-to-life term for his current offense serious felony while his other, consecutively imposed sentences for nonserious felony crimes are reduced to doubled determinate terms. By contrast, the goal under Prop. 57 is a parole eligibility hearing. If a person is not eligible for such a hearing by virtue of one crime which is a violent felony, it is hard to conceive how he would be eligible for another crime which is nonviolent.

Thus, I am afraid we are stuck with a blanket exclusion from the benefits of Prop. 57 of anyone with at least one violent felony as part of his sentence. Such persons will likely receive no early parole consideration under its provisions.

b. **What is a "Primary Offense"?** Another area of potential confusion concerns the use of the term "primary offense" in the measure. Does this mean the same thing as the "principal term" under section 1170.1 and the DSL? It probably does, as Justice Chin explains in his dissent in *Brown* (*Brown, supra,* 63 Cal.4th at p. 360 (Chin., J. diss.).) Thus, where, as with a second striker, or an inmate with a non-Strikes determinate sentence for multiple offenses, an inmate serving a lengthy sentence for a set of not-violent felonies would be parole eligible when he had served out the maximum sentence for the "principal term" as indicated in the abstract of judgment, and irrespective of consecutive terms, as the measure clearly provides.

But what does this mean when there is more than one conviction, with life sentences imposed for each, under the Three Strikes law? In such a case, there is no "principal term" and no simple way to determine what "primary offense" means.

Take, for example, one of my poor former clients, Mr. G, who could properly be characterized as the Prop. 57 poster man. Mr. G currently has a 190 to life sentence based on four consecutive life terms imposed for residential burglary

and a couple of other charges, as well as a bunch of redundant 667(a) enhancements imposed for each count. Would Mr. G be eligible for parole after serving out the maximum term for *one* first degree burglary, or does he have to also serve out the term for others as well, since they are separately punished and there is no principal term?

I suspect we will prevail on this because of the provision in Prop. 57 which expressly excludes "consecutive sentences" from the determination of parole eligibility. The most reasonable interpretation is that the inmate is parole eligible when he serves out the maximum sentence for the crime which he could have been given if he had been sentenced determinately, i.e., the crime which would carry the longest upper term punishment under the DSL. Thus, if there are consecutive life terms imposed for, say, residential burglary and criminal threats under section 422, parole eligibility would be after 6 years, the maximum term for first degree burglary, and not 3 years, the maximum term for criminal threats.

Disclaimer and Recommendations. What I am leaving out of this analysis is the critical subject of how the parole provisions of Prop. 57 are going to be carried out, and what role trial and appellate counsel are going to have in this process or the interpretation of the new law. Unlike Propositions 36 and 47, there is no "self-actuating" provision by which an inmate can petition for a parole hearing. The measure just makes the inmate potentially "eligible for parole consideration." It also provides that the Department of Corrections and Rehabilitation (CDCR) shall "adopt regulations in furtherance of these provisions . . ." which shall be certified by the CDCR Secretary. (Prop. 57, § 3(b).)

I know that folks from Stanford Three Strikes Clinic and others will be trying to get together with CDCR on this to obtain a list of persons whom CDCR believe are eligible. But this process is only beginning.

When the parole hearings start happening under Prop. 57, they will be administrative procedures, presumably with a right to counsel, but where counsel are appointed by CDCR parole authorities, as in lifer and other parole hearings. Thus, unlike Prop. 36 and 47, public defender's offices, and appellate counsel, will not be directly involved in the actual parole hearing process.

However, I assume there will be legal issues about interpretation which will arise. If, for example, an inmate is told that he is ineligible because his crime – say, assault with a deadly weapon – is not a "non-violent felony," he should challenge this ruling based on the definition of "non-violent felony" advanced

above. Such challenges would be first by means of CDCR administrative appeals and then by habeas corpus petitions filed in the counties where they are incarcerated. Hopefully, both public defender offices and appellate counsel can get involved in these proceedings.

I do have one suggestion for both appellate and trial counsel as to how you can get involved right away. Search your records and institutional memories for likely candidates who would benefit from Prop. 57. As suggested above, some of the "losers" in Prop. 36 and 47 cases will first come to mind – e.g., my client who was disqualified from Prop. 36 because his convictions for drug sales with gang enhancements were serious felonies (even though they weren't when he committed them in 1999]. You may want to get in touch with such persons to advise them about Prop. 57.

In addition to this, it is likely that you, like me, will start to get flooded with mail and phone calls from current and former clients asking about Prop. 57 and how they can benefit from it. At this point, I am explaining to them how this works, and urging them to be patient until CDCR has time to sort things out and until our side gets some kind of list of potentially eligible inmates.

Conclusion: This short summary is meant only to get the discussion and analysis going about this important new initiative measure, and to help us to, in effect "hit the ground running now that Prop. 57 has passed.

I welcome and encourage dialogue and response from anyone reviewing this analysis. Additionally, I would appreciate hearing from you as to any important matters about Prop. 57 which I may have left out.

Will Wonders Never Cease?
AN OVERVIEW OF PROPOSITIONS 57 AND 64

Both propositions were passed on November 8, 2016 and became effective the next day. What they have in common is significant benefits for our past, present and future clients. Although it's too early to tell how they will play out, the following is a selective overview.

PROPOSITION 57 ("The public safety and rehabilitation act of 2016")

Proposition 57 has three provisions: two short and simple ones regarding early parole eligibility for nonviolent felons and additional credits for *all* prisoners, and a more lengthy one which transfers from prosecutors to judges the power to decide which crimes committed by minors aged 14 through 17 will be prosecuted in criminal rather than juvenile court, with a strong presumption favoring juvenile court.

Early parole eligibility for "nonviolent" felons

This and the credits provision are constitutional amendments, meaning it will be harder for the legislature to chip away at them. Any change will require a 2/3 vote, followed by voter passage of a ballot initiative. Although constitutional amendments can also be changed by direct initiative, they are still less mutable than mere statutes, and for these amendments, that's a nice thing.

Although the amendment is effective immediately, no changes will be seen for awhile. This is because neither the parole nor the credits provision are self-executing. It will be up to the Department of Corrections and Rehabilitation to adopt regulations, which will take months, at least. Once the regulations are put into effect, challenges to them will occur via administrative appeals followed by habeas petitions, and we can expect to see some appointments of counsel for those filed in the Court of Appeal. Until then, all there is for us to do is advise our clients and answer their questions.

Here's the provision in full:

> "Any person convicted of a non-violent felony offense and sentenced

> to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense.
>
> "For purposes of this section only, the full term for the primary offense means the longest term of imprisonment imposed by the court for any offense, excluding the imposition of an enhancement, consecutive sentence or alternative sentence.
>
> [credits provision follows]
>
> "The Department of Corrections and Rehabilitation shall adopt regulations in furtherance of these provisions, and the Secretary of the Department of Corrections and Rehabilitation shall certify that these regulations protect and enhance public safety."

In other words, to calculate the length of incarceration before parole eligibility, subtract all consecutive terms and all enhancements and (probably) substitute the primary offense's upper term for any alternative sentence imposed under the three-strikes law.[1] Then apply credits.

The most obvious question is what constitutes "a non-violent felony offense." No one knows yet, but there is good reason to hope and think that non-violent offenses will be interpreted to mean *all* crimes not occurring in Penal Code section 667.5(c)'s list of violent felonies (as opposed to, say, crimes in which no violence occurred in fact). SDAP's "Notes on Proposition 57 and Parole Eligibility," in the accompanying CD, explains why. Briefly, (1) both the Legislative Analyst and the opponents of the Proposition assumed so, and courts look to both to interpret ambiguous provisions; (2) broadening the definition to exclude some crimes which could be seen as violent but aren't listed in section 667.5(c) might be subject to challenge as unconstitutionally vague per *Johnson v. United States* (2015) 576 U.S. ___ [192 L.Ed.2d 569], and a principle of statutory construction requires courts to interpret laws in a way that avoids constitutional

---

[1] The three-strikes law comes to mind as the most obvious source of an "alternative sentence" for purposes of the amendment. Although the sex crimes and gang statutes also create alternative sentences, they mostly if not exclusively apply to violent crimes, which the amendment excludes from early parole consideration.

challenges; (3) the rule of lenity requires that the defendant be given the benefit of the doubt when a statute can be interpreted in conflicting but equally plausible ways.

The other obvious question is the interpretation of "alternative sentence." It seems clear that a defendant convicted of only non-violent felonies and sentenced to a base term, a couple of consecutive terms and an enhancement, say 5 years under Penal Code section 667(a) on account of both his primary offense and a prior being "serious," would be eligible for parole consideration after serving only the base term on the primary offense. But what if the base term is an alternative sentence, e.g., a doubled term or 25-years-to-life for a non-violent crime by a defendant with one or two strikes? On the one hand, the amendment defines the term that must be served before parole consideration as "the longest term of imprisonment *imposed by the court* for any offense . . .," and in this example the longest such term imposed is the doubled or indeterminate sentence. On the other hand, the amendment goes on to exclude any "alternative sentence" from the term that must be served before parole consideration, which would seem to preclude using the doubled or indeterminate sentence. The solution that seems to best give force to the language of the amendment is to treat the "longest term of imprisonment imposed by the court for any offense" as the longest term available for the primary offense without application of any alternative sentencing scheme. In the example above, if the primary term were for a residential burglary, the minimum parole period would then come out to 6 years, the upper term for first-degree burglary excluding enhancements, consecutive terms and alternative sentencing schemes.

As the SDAP memo points out, opponents' arguments help to clarify statutory ambiguities, and in this case The Association of Deputy District Attorneys' "Facts About Proposition 57 'The Public Safety and Rehabilitation Act'" is helpful, as it assumes the amendment operates to exclude three-strikes sentences from the minimum term that must be served before parole eligibility. It poses a situation where the defendant "is convicted of rape by intoxicating substance PC 261(a)(3) and has a prior PC 261(a)(2) rape by force strike conviction and a prior residential burglary strike conviction," in other words, a nonviolent primary offense whose upper term is 8 years, though the defendant's actual term was 25-to-life on account of two strikes, an alternative sentence. The ADDA's "Facts" show:

Maximum sentence today:

261(a)(3) 3-6-8	25-Life Prior
261(a)(2) rape by force	Alt. S.S.
Prior 459 strike	Alt. S.S.
TOTAL SENTENCE:	25-Life

Eligible for parole after 25 years. [0% credit on life sentence.]

Under PSRA:

261(a)(3) 3-6-**8**	~~25-Life~~
~~Prior 261(a)(2) rape by force~~	~~Alt. S.S.~~
~~Prior 459 strike~~	~~Alt. S.S.~~
TOTAL SENTENCE:	25-Life

Eligible for parole after 8 years.

(See the SDAP memo for a fuller argument.)

It should be emphasized to clients that as revolutionary as this provision is, it doesn't guarantee parole, just an opportunity to be paroled much earlier than had been possible. It could also be pointed out that keeping up a good record in prison might now have a substantial payoff.

Opportunities for all prison inmates to earn additional credits

Those missing out on early parole consideration can still get their prison time reduced, to an as yet undetermined extent, by the amendment's credits provision, which states in full:

> "The Department of Corrections shall have authority to award credits earned for good behavior and approved rehabilitative or educational achievements."

Although this language grants authority rather than imposes an obligation, an obligation to increase opportunities to earn credits is reasonably inferrable from other language of the amendment. The early parole and credits clauses are

followed by a directive to "adopt regulations in furtherance of these provisions," the entire act is to "be liberally construed to effectuate its purposes," and those purposes include "sav[ing] money by reducing wasteful spending on prisons," "prevent[ing] federal courts from indiscriminately releasing prisoners" and "emphasizing rehabilitation . . .," which imply reducing the prison population by granting earlier release to those inmates who've shown themselves to be rehabilitated. We'll have to await the regulations to see how far CDCR is willing to go, but for now we can advise all our clients, including those who have been subject to 15% or 20% limitations on earned credits on account of violent felonies or strikes, that it appears all limitations will be eased for those the institution deems worthy by virtue of their good behavior and participation in offered programs.

The end of direct filing coupled with a new presumption that minors belong in juvenile court

In 2000, Proposition 21 ushered in an era of prosecutorial control over whether older minors would be tried in juvenile court, in which case they could not be incarcerated past the age of 25, or adult court where the sky's the limit. Up to now, for children 16 years old and older, prosecutors could directly file cases in adult court for any violent felony and some nonviolent ones; and for children 14 and older, prosecutors could direct file for any gang or gun crime and some others, and enumerated particularly violent crimes were automatically assigned to adult court without the prosecutor even having a choice. There was a presumption that minors charged with the more serious crimes belonged in adult court. Proposition 57 changes all this. There is now a juvenile court presumption for *all* cases where a crime was committed by child between the ages of 14 and 18, no matter how serious or violent. Prosecutors can move to transfer to adult court cases charging 14 or 15 year olds with any of thirty enumerated felonies,[2] and those charging 16

---

[2] These are listed in Welfare & Institutions Code section 707(b): murder; arson per PC451(a) or (b); robbery; rape with force, violence or threat of great bodily harm; sodomy by force, violence, duress, menace or threat of great bodily harm; lewd or lascivious act per PC 288(b); oral copulation by force, violence, duress, menace, or threat of great bodily harm; PC289(a); kidnapping for ransom; kidnapping for robbery; kidnapping with bodily harm; attempted murder; assault with a firearm or destructive device; assault by means of force likely to produce great bodily injury; discharge of a firearm into an inhabited or occupied building; PC1203.09; PC12022.5 or 12022.53; felony offenses in which the minor personally used a

through 17 year olds with any felony, but there is a presumption against granting the motion. If the motion is made, the court must order a full social report, consider a long list of factors that focus on the minor's level of maturity, consider any relevant evidence the minor wants to submit and, if the motion is granted, record justifying reasons in a minute order. All these changes are in amendments to Welfare and Institutions Code sections 602 and 707.

As for cases currently in the appellate pipeline where a minor was prosecuted in adult court, the question is to what extent can the amendments to Welfare & Institutions Code sections 602 and 707 be applied to them. In other words, are the statutory changes retroactive or prospective, and if prospective, what does that mean? There are two arguments that can be made, one fairly solid and the other a bigger stretch.

The more solid argument applies to the worst-case scenario, which assumes application of the standard presumption that statutes operate prospectively only (Pen. Code § 3; *Tapia v. Superior Court* (1991) 53 Cal.3d 282). Prospective application doesn't mean that the crime must be committed after the statute took effect in order for the statute to apply. Rather, the event in question must occur after the statute took effect in order for it to apply. The event here would be the time at which transfer from adult court to juvenile court is no longer available. The attachment of jeopardy would be too late,[3] but any time earlier should be okay. Thus, in a case where the crime was committed and the prosecutor direct-filed in adult court before November 8, 2016 but jury trial didn't

---

weapon described in any provision listed in PC16590; PC136.1or 137; manufacturing, compounding, or selling one-half ounce or more of a salt or solution of a controlled substance specified in subdivision (e) of Health & Saf. Code § 11055; a violent felony defined in PC667.5(c) which also would constitute a felony violation of PC186.22(b); escape by force or violence per PC871(b) if great bodily injury is intentionally inflicted upon an employee of the juvenile facility during its commission; torture; aggravated mayhem; carjacking while armed with a dangerous or deadly weapon; kidnapping for sexual assault per PC209(b); kidnapping per PC209.5; PC26100; PC 18745; and voluntary manslaughter.

[3] Newly amended Welfare & Inst. Code § 707(a)(1), just like its predecessor, requires motions to transfer the case between adult and juvenile court to be made before attachment of jeopardy, the only difference being that previously the motion had to be made by the minor for transfer to juvenile court and now it has to be made by the prosecutor for transfer to adult court.

start (or the minor didn't plead guilty) until after November 8, it can probably be argued that the case should have been transferred to juvenile court or that in order to keep it in adult court the prosecutor was required to move to do so and the court was required to find factors that justified overcoming the presumption favoring juvenile court. An even better argument could be made if, in such a case, the minor asked to be transferred to juvenile court but the judge refused in the belief that it was too late.

A second, weaker but fair, argument is available (for the present at least) in cases where jury trial began or the minor pled guilty in adult court *before* November 8, 2016. Prospective application of the changes to the statutes can't provide any relief in this situation, since there was no opportunity for transfer to juvenile court until after the statute became effective. The argument would have to be that the amendments effected not a mere procedural change, but one that alters the punishment for crimes by lessening them (on grounds that juvenile incarceration ends at age 25 per WIC§1771 unless an order for further detention is made). Under the rule of *In re Estrada* (1965) 63 Cal.2d 740 as modified by *People v. Brown* (2012) 54 Cal.4th 314, statutory amendments which lessen punishment apply retroactively to all nonfinal judgments if an intent of retroactive application is clear from either the language of the statute or extrinsic sources. Here, statutory language indicating an intent to apply the changes as liberally as possible to further the goal of rehabilitating juveniles might suffice to show that intent and thereby show the changes to be retroactive. If so, for all cases not yet final where a minor was tried in adult court under direct filing, the argument is that the judgment should be reversed and the case remanded to juvenile court. The CD contains this argument, made in a supplemental brief on grant of rehearing after the opinion was filed.

One Court of Appeal opinion on the retroactivity question has already appeared: *People v. Superior Court,* E067296, 1/19/17 [Fourth Appellate Dist., Div. 2]. It says that *Estrada* does not apply, but that retroactivity wasn't argued by the defendant and the opinion therefore doesn't consider whether Prop 57 amounts to a legislative reduction in the punishment for a crime. Regardless, the court holds that per *Tapia*, the amendments to Welfare & Institutions Code sections 602 and 707 apply to trials occurring after the law's effective date regardless of when the crime was committed, so that applied to this case, where the prosecution direct-filed in adult court, the Proposition then passed, the minor moved for a

fitness hearing in juvenile court, the trial court granted the motion and the prosecutor then filed a petition for writ of mandate, the mandate petition would be denied.

Materials on the CD related to Proposition 57

- Text of the proposition
- Prison Law Office letter explaining the proposition (for clients)
- FDAP Qs and As (hits highlights)
- SDAP interpretation of ambiguities in the early parole provision
- *Estrada* argument for retroactive application of the juvenile provision
- *People v. Superior Court* opinion on prospectivity of the juvenile provision
- Retroactivity chart with parts highlighted showing where the *Tapia* and *Estrada* analyses fit into general retroactivity principles

PROPOSITION 64 ("The Control, Regulate and Tax Adult Use of Marijuana Act")

General provisions

Like Prop 57, Proposition 64 is a sea change. This time the subject is marijuana and the changes purely statutory. As the title suggests, the bulk of the enactment deals with control, regulation and tax, amending old statutes and creating new ones in the Business & Professions, Labor, Water, Revenue & Taxation and Food & Agricultural codes, all servicing California state law's new legalization of marijuana use by adults. The portion that concerns us is the amendments and additions to the Health & Safety Code which reduce or decriminalize most (but not all) former marijuana crimes and, like Prop 47 did for felonies which it reduced to misdemeanors, provide for people either currently serving a sentence or having completed a sentence for conviction of a crime that

has now been reduced or decriminalized to petition for reduction of the crime and sentence or for dismissal of the conviction and sealing all records related to it.

For those petitioning for reduction or dismissal, the provisions of Prop 64 are better than the similar provisions of Prop 47 in a couple of ways: there is no deadline for filing a petition, and the petitioner is *presumed* to qualify for relief with the prosecution bearing the burden of proving otherwise by clear and convincing evidence. As in Prop 47, a qualifying petitioner can be denied on grounds of dangerousness, but also as in Prop 47, dangerousness is narrowly defined as a current risk that the petition will commit one of the violent felonies ("super strikes") listed in Penal Code section 667(e)(2)(C)(iv); they are listed in Appendix III of the Couzens/Bigelow memo included on the accompanying CD. For those facing prosecution for marijuana crimes now reduced to lesser ones, a history containing a "super strike" or sex offense registration requirement doesn't disqualify them from receiving the benefits of the statutory ameliorations, though for some crimes it gives the court the option of imposing a lesser reduction.

The crimes that have been reduced or decriminalized range from various forms of possession, possession for sale, sale and cultivation. There are 20 or so permutations within these categories, based on quantity of marijuana, type, location of activity (school grounds is still a no), age of the person involved, age of any victim (i.e., an underaged buyer or furnishee) and for some crimes done by minors, whether there have been any prior offenses. Across the board, the penalties are less for minors than adults, and for some crimes a middle ground is carved out for younger adults (aged 18 through 20). Both the Couzens/Bigelow memo[4] and SDAP analysis included on the accompanying CD contain a chart of all affected crimes. The highlights can be summarized as follows:

> It is now legal for adults age 21 or older to possess, process, transport, buy, obtain and give away (to other adults age 21 or older) not more than 28.5 grams of marijuana, 8 grams of concentrated

---

[4] The memo is extensive, with a wealth of useful information not readily available from any other single source, but should be taken with a grain of salt. As explained below, it may misconstrue, *inter alia*, the present status of adults who give away not more than 28.5 grams of marijuana to another adult (formerly felony sale, now legal though not consistently portrayed as such in the memo) and the law regarding what evidence a court can properly rely on to decide disputed questions of fact.

cannabis and any marijuana accessories; and to cultivate and process not more than six living plants and their products though with place and manner restrictions (within a private residence or in a locked place on its grounds, not in public view).

It is still illegal to sell or possess for sale any quantity of marijuana,[5] and to possess more than 28.5 grams, though the penalties are generally reduced from former felonies to misdemeanors or from misdemeanors to infractions (in some cases, wobblers if the defendant has a super strike or sex registration requirement).

There is no change in the law penalizing adult sales to minors; maintaining a place for unlawfully selling, giving away or using; renting or making a space available for unlawful manufacture or storage; and manufacturing concentrates by chemical synthesis.

As for minors, no marijuana offense is completely decriminalized, but the offenses are greatly reduced, to no more than infractions, with penalties limited to education and community service.

Younger adults, aged 18 through 20 are treated as other adults except in three circumstances: possession of not more than 28.5 grams of marijuana or 8 grams of concentrated cannabis, and cultivation of six plants or less are all infractions with a $100 fine, as opposed to being legal for older adults and lesser infractions (no fine, but education and community service) for minors.

There are a couple of ambiguities in the statutes. The first concerns whether it's legal for adults 21 years or over to share (i.e., give away not more than 28.5 grams without compensation). New Health & Safety Code section 11360 appears to say no: "(a) Except as otherwise provided by this section or as authorized by law, every person who transports [meaning transports for sale], . . . sells, *furnishes*, administers, or *gives away*, [or offers or attempts same] any marijuana shall be

---

[5] The Prison Law Office letter on the accompanying CD, designed to answer defendants' questions, wrongly states that selling has been legalized. This should be corrected in any copies distributed to clients.

punished as follows: . . ." While new section 11362.1(a) says yes: "Subject to [some time, place and manner restrictions], but notwithstanding any other provision of law, it shall be lawful under state and local law, and shall not be a violation of state and local law, for persons 21 years of age or older to: (1) Possess, process, transport, purchase, obtain *or give away* to persons 21 years of age or older without any compensation whatsoever, not more than 29.5 grams of marijuana . . ." The Couzens/Bigelow memo is similarly inconsistent, showing illegality in the chart but claiming decriminalization in the text. It may be that the furnishing and giving away language in section 11360 is an inadvertent leftover from a former statute, seemingly nullified in any event by the "notwithstanding any other provision of law" language in 11362.1(a).

The second ambiguity concerns whether driving in possession of not more than 28.5 grams is legal or decriminalized. Vehicle Code section 23222(b), which like all Vehicle code statutes, was unchanged by Proposition 64, states that having marijuana in a vehicle is an infraction. The language of Health & Safety Code section 11362.1 quoted above is contra, inasmuch as it legalizes "transportation" as long as the transportation is not for purpose of sale.[6] Per the grapevine, the legislature may be working on a fix.

Some unsettled questions

The Couzens/Bigelow memo notes that Proposition 64 is similar in numerous ways to Propositions 36 and 47 and will therefore likely be interpreted similarly. This is only partially true. What follows is a brief and noninclusive list of issues that occur in at least two of the three propositions, some of which seem to call for the same solutions and others that seem to call for different ones.

The Guerrero issue regarding what facts a court can consider to determine questions of eligibility. The question is does *People v. Guerrero* (1988) 44 Cal.3d 343 apply [court is limited to the record of conviction] to Prop 64, as it does in the Prop 36 context? And if so, what constitutes the "record of conviction"? For Prop 36, this issue is pending in *People v. Estrada* (2015) 243

---

[6] Per other provisions of the Health & Safety Code, the marijuana must be inaccessible to the vehicle's occupants, much like it's illegal to drive with an open container of alcohol in the passenger compartment.

Cal.App.4th 336, review granted 4/13/2016 (S232114/B260573). As for Prop 47, where the defendant has the initial burden of showing he'd have been guilty of a misdemeanor had the proposition been in effect at the time of his crime, e.g. by showing the value of the property received or taken didn't exceed $950, *People v. Johnson* (2016) 1 Cal.App.5th 953, *People v. Sherow* (2015) 239 Cal.App.4th 875 and *People v. Perkins* (2016) 244 Cal.App.4th 129 reason that since those facts weren't necessarily relevant to prove the crime, the defendant must be able to go outside the record of conviction to meet his burden and therefore *Guerrero* doesn't apply. Although the Couzens/Bigelow memo assumes *Guerrero* applies in the Prop 64 context for factual questions re eligibility (e.g., number of plants cultivated, whether marijuana was sold or given away without compensation, etc.), Prop 64 is different from both Prop 36 and Prop 47. Eligibility is *presumed* in Prop 64, and it's the prosecution that has the burden of showing otherwise. So, ideally we'd probably prefer that *Guerrero* applied. But since, as in Prop 47, the facts determinative of eligibility weren't necessarily relevant to prove the crime (since, e.g., *any* quantity of plants was sufficient for a cultivation conviction and *any* transfer was sufficient for a sales conviction even if no consideration was received), it seems likely the courts will find that the *Johnson/Perkins* analysis is a better fit. If so, the scope of admissible evidence is unclear. In the Prop 47 context, review has been granted with briefing deferred in cases where the Court of Appeal relied on evidence in a police report (*People v. Jones* (2016) 1 Cal.App.5th 221, rev. granted 9/14/16, S23590) a preliminary hearing transcript (*People v. Garrett* (2016) 248 Cal.App.4th 82, rev. granted 8/24/15, S236012), and an affidavit in support of search warrant (*People v. Abarca* (2016) 2 Cal.App.5th 475, rev. granted 10/19/16, S237106). The resolution of these cases may or may not be pertinent to Prop 64, and depending on what kinds of evidence the Prop 64 petitioner comes up with at his hearing and what kinds the prosecutor seeks to introduce to rebut it, the position that best serves the interest of one client may be opposite to that which best serves the interest of another.

Does Prop 64 apply retroactively to a defendant who was sentenced before the Act's effective date but whose judgment was not final until after that date? (If it does, then he could not be found unsuitable due to a finding of dangerousness.) This issue, as to Prop 36, was decided adversely to us in *People v. Conley* (2016) 63 Cal.4th 646; as to Prop 47, it's still pending in *People v. Dehoyos* (2015) 238 Cal.App.4th 363, review granted 9/30/2015

(S228230/D065961), but the writing's on the wall. It may be difficult to construct an argument why the *Conley* analysis would not apply to Propositions 36 and 64.

What is the standard of proof for a finding of ineligibility? (Re factual questions such as the number of plants cultivated, age of associates or purchasers, whether the marijuana was given away or sold, etc.) The Courts of Appeal are split on this issue in the Proposition 36 context, with *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1040 applying a preponderance standard vs. *People v. Arevalo* (2016) 244 Cal.App.4th 836 applying a beyond a reasonable doubt standard. Review has been granted in *People v. Frierson* (2016) 1 Cal.App.5th 788, which agreed with *Osuna* (review granted 10/19/2016 (S236728/B260774)). But it doesn't appear to be an issue at all as to Prop 64; the statute explicitly provides that the prosecution has the burden of proving ineligibility by clear and convincing evidence.

Is a defendant eligible for resentencing on an on-bail enhancement for committing a new felony while released on bail on a marijuana offense which was subsequently reduced to a misdemeanor or infraction or dismissed under Prop 64? This issue, as to Prop 47, is pending in *People v. Buycks* (2015) 241 Cal.App.4th 519, review granted 1/20/2016 (S231765/B262023). Counsel's opening brief in the Court of Appeal is included in the accompanying CD. The same principles would seem to apply in both contexts.

Is a defendant eligible for resentencing on the penalty enhancement for serving a prior prison term on a felony conviction under Penal Code section 667.5(b) after the superior court had reclassified the underlying felony as a misdemeanor or infraction or dismissed it under the provisions of Proposition 64? This issue, as to Prop 47, is pending in *People v. Valenzuela* (2015) 244 Cal.App.4th 692, review granted 3/30/2016 (S232900/D066907). Again the same principles would seem to apply in the Prop 64 context. There's sample briefing on the CD.

What should appellate counsel be doing?

There are things that can be done both for clients currently on appeal and those whose cases are final. For a client appealing a conviction of a crime that's been reduced or decriminalized by Prop 46, relief on appeal is probably unavailable as such, just as held in the Prop 47 context. And, as in that context, the Superior Court will probably not hear a petition while the Court of Appeal has jurisdiction. But, particularly for a defendant in danger of serving more time than he should under the revamped marijuana laws if he were to wait for the conclusion of the appeal before filing a petition, there should be a remedy that doesn't require abandoning the appeal. One that was successful in the Prop 47 context is asking the Court of Appeal to stay the appeal for purposes of filing a petition in Superior Court. (*People v. Awad* (2015) 238 Cal.App.4th 215.) Similar requests have been granted in the Second Appellate District in at least two cases. The requests (one a formal motion and the other not so much) in those two cases are included in the accompanying CD.

If time is critical, a motion for bail on appeal might also be considered, on the grounds that your client has already overstayed all the time he should be serving under the ameliorative provisions of Prop 64, or is about to.

For former clients who may be eligible for a reduction or dismissal, the Couzens/Bigelow memo has form petitions and orders for adults and juveniles in an appendix. These have been adopted verbatim by the Judicial Counsel and also available on their website (via links in the Judicial Council informational article included in the CD). It's still unknown whether the Public Defender and Alternate Public Defender will identify, and file petitions for, their former clients who are eligible. Meanwhile, you can see if you can identify suitable former clients, particularly those not represented by the PD or Alternate PD, and send them copies of the petitions. Note, though, that the instructions on the petitions are not right, possibly having been left over from previous drafts, and should be corrected before sending any petitions out. For people currently serving a sentence, where the petitions say to fill out sections 1 and 2, that should be changed to 1 and 2a. For people whose sentences are completed, the instructions to fill out sections 1 and 3 should state 1 and 2b. In all the petitions, the instruction to complete sections 4 and 5 as necessary should refer instead to sections 3 and 4 (there being no section 5). Consider including the Prison Law Office letter.

Proposition 57: Parole Eligibility and Conduct Credits[1]

(As of April 14, 2017)

What is Prop. 57?	It is a voter initiative that amended the Cal. Constitution: (1) it provides early "parole consideration" for some people sentenced to state prison, and (2) it authorizes the California Department of Corrections & Rehabilitation (CDCR) to modify the award of conduct credits for persons serving state prison sentences.
When does this law take effect?	The law became effective November 9, 2016.
How does it work?	If you are sentenced to a "determinate" or fixed term in state prison, you *may* now be eligible for early parole release.
What does the law say exactly?	You will receive "parole consideration" if you were: (1) convicted of a non-violent felony offense; (2) sentenced to state prison; and (3) completed the full term for the primary offense.
Who is a "non-violent" offender?	The Cal. Constitution, as amended by the initiative, does not define the term. We agree with CDCR that a person serving a term for a violent felony as defined by PC 667.5(c)(1-23) is excluded from parole consideration. For example, the following offenses found in PC 667.5(c) will be excluded from early parole consideration: murder, mayhem, robbery, most sex offenses, offenses that involve the use of a firearm or cause great bodily injury, and many gang related offenses. Additionally, if you have completed a term for a violent felony under PC 667.5(c), and are only serving a term for a non-violent felony, you are eligible for early parole consideration.
If my charges qualify, when do I get my "parole consideration"?	You receive it after you complete the *full term for your primary offense* excluding any *enhancement, consecutive sentence, or alternative sentence.* (Note: If you have any rules violations or refusal to accept housing or assignments, it will delay your parole suitability date.)
I was sentenced to state prison on a PC 422 (threats) for 2 years + 5 years for a prop 8 prior = 7 years total. When do I get my "parole consideration"?	You are eligible for parole consideration after 2 years. It is calculated based on the full term for your primary offense (2 years) and excludes the prop 8 prior (an "enhancement").
Do my ***credits*** count toward my parole consideration date?	No. CDCR will not include conduct credits when calculating an inmate's parole consideration date.
I had my term in prison doubled because I was sentenced as a ***second-striker***. Will I be eligible for parole consideration?	Yes. We believe a second-strike sentence is an "alternative sentence" and you will benefit from the law. CDCR appears to agree with this interpretation.
I am a three-striker, serving a life term for a non-violent felony offense, will I be eligible for early parole consideration?	No. CDCR maintains that 3rd strikers do not qualify for Prop. 57 parole consideration. We take the opposite position. We believe a three-strike sentence is also an "alternative sentence" and you should benefit from the law.
I am three-striker serving a 25-L sentence for a PC 273.5 (spousal abuse), when would I be eligible for early parole consideration?	We believe it will be 4 years. A violation of PC273.5 is a 2-3-4 offense. 4 years would be the" longest term of imprisonment imposed by the court" for the offense excluding the imposition of the "alternative sentence." Again, CDCR takes the opposite position—3rd strikers do not qualify for Prop. 57 parole consideration.
I am a 290 registrant, am I eligible for parole consideration?	No. CDCR maintains that 290 registrants are not eligible for Prop. 57 parole consideration. We disagree. So long as your current offense is not a violent felony listed in PC 667.5(c), then we believe you should be eligible.

[1] **The new law will be implemented by the California Department of Corrections & Rehabilitation (CDCR). CDCR issued "emergency" rules on March 24, 2017. CDCR will start applying the new credit rules on May 1 (good conduct credit) and August 1 (various new programming credits), and will start the new early parole consideration process on July 1. Note: the CDCR rules are not yet final.**

What factors will CDCR take into account at my parole consideration hearing?	You will not receive a "full-blown" parole hearing. You are not entitled to an appointed attorney and will not be present at the hearing. This will be a "paper process" in which an administrative judge will evaluate your pre- and post-incarceration conduct. You are entitled to submit a written letter for consideration by the Board of Parole. We encourage you to take advantage of this process and highlight the following: (1) consider making an expression remorse for the charged offense; (2) show insight into why you committed the offense; and (3) highlight your reentry plan. In addition, the Board of Parole wants your statement to focus on why you will not be a risk to the community if released, and encourages you to submit statements from family, friends, potential employers or others with helpful information. If denied parole, you may appeal the decision. You will be considered again in one year.
I am serving a term in county jail for felony offenses sentenced under PC 1170(h), will I get early parole consideration?	Most likely not. The law says it applies only to those persons serving time in "state prison." However, it is possible a court in the future could say the law violates equal protection principles unless it applies equally to persons serving 1170(h) terms in county jail.
Do I need to return to court?	First, if you qualify for early parole consideration, that process will take place in state prison. However, to the extent there is disagreement about the interpretation and implementation of the new law as applied to your case (see comments above), we recommend you seek guidance from counsel. CDCR will begin the initial eligibility determination for parole consideration on June 1, 2017.
What ***conduct credits*** will I earn while in state prison?	Effective May 1, 2017, CDCR will be increasing its award of conduct credits as follows: • Non-violent felony + strike priors: Persons sentenced under the PC 1170.12 ("3 Strikes law) for a non-violent offense will now receive conduct credits at a 33% rate (up from 20%); • Violent Felony: Persons serving a sentence for a violent felony (PC 667.5(c)) will now receive credits at a 20% rate (up from 15%); • Life Sentences: Persons serving life sentences (including murder) will now receive conduct credit toward their eventual parole hearing date. The rate will be 20% for violent and 33% for non-violent felonies. This category includes inmates who are eligible for Youthful Offender Parole Hearings (YOPH); • Fire Camp participants: CDCR will give all persons assigned to fire camp two days credit for each day served (66.7%), except persons serving a determinate term for a violent felony (PC 667.5(c) assigned to fire camp will receive one day credit for every day served (50%); • Non-violent felony sentenced under PC 1170.1: Persons serving a standard sentence for a non-violent felony will continue to receive day-for-day credits (50%); • LWOP and death sentences: Persons serving LWOP or death sentences will continue to receive no conduct credits.
Will I receive ***additional conduct credits*** for completing educational, vocational, and rehabilitation programs?	Yes. Effective August 1, 2017, CDCR will give additional credits for completion of the following programs: • Milestone Credit Program: The Department offers 200 vocational and educational programs. CDCR will grant twelve [12] weeks of additional conduct credit for participation in these programs. • Educational Milestone Programs: The Department offers course toward an A.A. degree, a G.E.D. and a certificate in Substance Abuse treatment. Inmates that earn an A.A. degree or Substance Abuse certification will receive an additional six [6] months of conduct credit. Those who earn a G.E.D. will receive an additional three [3] months. • Rehabilitative Achievement Programs: The Department offers 400 different self-help programs including NA, AA and anger management. Inmates who successfully complete 208 hours of self-help will be awarded an additional four [4] weeks of conduct credit per year.

CERTIFICATION OF OPERATIONAL NECESSITY
[Per Penal Code Section 5058.3]

This emergency rulemaking action implements Proposition 57, The Public Safety and Rehabilitation Act of 2016 (the "Act"), which was approved overwhelmingly by California voters on November 8, 2016. The Act amends the California Constitution by adding a new section 32 to Article I that substantially reformed the juvenile and adult criminal justice system in California. The Act gives the California Department of Corrections and Rehabilitation (CDCR or the "Department") broad powers to promulgate regulations that (1) define the terms under which non-violent offenders who have served the full term for their primary criminal offense in state prison may be considered for parole by the Board of Parole Hearings (the "Board"), and (2) award credits earned for good conduct and approved rehabilitative or educational achievements. The Act also amended the law to require judges, rather than prosecutors, to determine whether juveniles charged with certain crimes should be tried in juvenile or adult court.

Proposition 57 provides that the "Department of Corrections and Rehabilitation shall adopt regulations in furtherance of [the Act], and the Secretary of the Department of Corrections and Rehabilitation shall certify that these regulations protect and enhance public safety." (Cal. Const., art. 1, § 32(b).) As explained in the Notice of Proposed Emergency Regulations below, the immediate adoption of these regulations is necessary to implement the will of the people of California to establish a parole consideration process for non-violent offenders and an effective system of credits for inmates to take responsibility for their own rehabilitation. Adoption of these regulations will further the Act's primary goals to "[s]top the revolving door of crime by emphasizing rehabilitation..." and to "[p]revent federal courts from indiscriminately releasing prisoners" (The Public Safety and Rehabilitation Act of 2016, Section 2-Purpose and Intent).

With the immediate implementation of new and revised rules for inmate credit earning and parole consideration, the Department seeks to make our prisons and communities safer by encouraging and motivating inmates to participate in rehabilitative programs and service opportunities that create skills, employability, and hope. This in turn will lead to improved inmate behavior and a safer prison environment for inmates and staff alike. Almost every inmate will eventually return to society when they complete their sentence. Public safety is enhanced when inmates choose to pursue and accomplish tangible academic, vocational and personal/behavioral achievements to position themselves for earlier consideration before the Board or for successful transition to society. And if granted parole, these inmates enter our communities better equipped to find employment and be productive members of that community. Successful implementation also gives the Department a better chance to end federal court oversight of our prisons and prevent indiscriminate court-ordered releases of prisoners.

I, Scott Kernan, Secretary, CDCR, certify that these regulations protect and enhance public safety and that the constitutional changes made by Proposition 57, as well as the operational needs of the Department, require the immediate revision of California Code of Regulations (CCR) Title 15, Division 3, Sections 3042, 3043, 3043.1, 3043.2, 3043.3, 3043.4, 3043.5, 3043.6 and 3043.8, as well as the adoption of new Sections 3043, 3043.1, 3043.3, 3043.4, 3043.5, 3043.6, concerning inmate credit earning opportunities. In addition, the Department proposes to revise section 3044 inmate work groups. Finally, CDCR and the Board propose to adopt new Sections 3490, 3491, 3492 and 3493 of the CCR; and Sections 2449.1, 2449.2, 2449.3, 2449.4 2449.5 Division 2, Title 15, concerning parole consideration on an emergency basis.

_____ _____

SCOTT KERNAN Date
Secretary
Department of Corrections and Rehabilitation

NOTICE OF PROPOSED EMERGENCY REGULATIONS
(Government Code § 11346.1(b)(2))

INFORMATIVE DIGEST (Gov. Code § 11346.5 (a)(3))

This action provides the following:

Credit Earning and Parole Consideration

I. Introduction

Passage of The Public Safety and Rehabilitation Act of 2016 (the "Act") by the people of the State of California on November 8, 2016 authorizes the California Department of Corrections and Rehabilitation (CDCR or the "Department") to develop regulations that (1) create a process for non-violent offenders who have served the full term for their primary criminal offense in state prison to become eligible for parole consideration by the Board of Parole Hearings (the "Board") and, (2) award credits earned for good conduct and approved educational or rehabilitative achievements. The Act also amends the law to require judges, rather than prosecutors, to determine whether juveniles charged with certain crimes should be tried in juvenile or adult court.

The Act's primary purposes are to "Stop the revolving door of crime by emphasizing rehabilitation" and "Prevent federal courts from indiscriminately releasing prisoners." To achieve these goals, the Department proposes to establish a parole consideration process for non-violent offenders and to increase the credit earning opportunities for inmates who successfully complete approved rehabilitative programs. In this way, the Department seeks to create incentives for inmates to take responsibility for their own rehabilitation while incarcerated, enhance public safety by encouraging inmates to pursue educational, vocational, and self-improvement programs, and reduce recidivism by increasing the likelihood that inmates will better prepare themselves for their eventual return to society.

II. Credit Earning

The Act amends the California Constitution to authorize the Department to award credits earned in state prison for good behavior and approved rehabilitative or educational achievements. Using this authority, the Department proposes to revise the complex system of credits that currently exists in the Penal Code and regulation (see A Short History of Credit Earning '101' Programs in California below). These proposed regulations revise and simplify several existing forms of credit and adopt new ways inmates may earn credit based on their participation in and completion of specific rehabilitative or educational programs. Such credits may advance an inmate's release date if sentenced to a determinate term or advance an inmate's initial parole consideration hearing if sentenced to an indeterminate term. Condemned inmates and those serving a sentence of life without the possibility of parole will remain ineligible to earn any credit. Inmates who violate the rules and regulations of the Department shall have their credits forfeited. Some forfeited credits may be restored if the inmate remains free of disciplinary violations for a specified timeframe; other forfeited credits cannot be restored.

Activation of the revised and new credit earning categories will be phased-in during the initial implementation of these regulations because of the significant training, case records and information technology infrastructure changes and programming needed to support each credit earning change. Good Conduct Credit shall take

effect on May 1, 2017, and the remaining credit provisions described below shall take effect on August 1, 2017. With the exception of Educational Merit Credit, all new or revised credit provisions will be applied prospectively from the date of implementation.

Inmates shall not be awarded credit or have credit restored which advances the date of his or her transition to parole to a date less than 60 calendar days from the date the credit is applied. This will ensure that the Department has adequate time to conduct pre-parole assessments and planning to provide inmates with the best possible opportunity to succeed upon their transition to the community, as well as provide, where applicable, advance notification to crime victims, prosecutors, and law enforcement (as required by Penal Code sections 3058.6 and 3058.9) of the inmate's pending transition to parole supervision.

There are five categories of credit earning programs that are the subject of this rulemaking action.

A. Good Conduct Credit

Good Conduct Credit is an existing type of credit awarded to eligible inmates who comply with the regulations and rules of the Department and perform the duties assigned to him or her. These proposed regulations will simplify the credit-earning categories for various offenders, incentivize more inmates to comply with prison regulations, and create a durable solution to prison overcrowding by incorporating mandatory federal court-ordered credit increases. Since Good Conduct Credit is awarded conditionally based on an expectation that each inmate will comply with prison rules and perform the duties as assigned, Good Conduct Credit is subject to forfeiture for disciplinary reasons.

B. Milestone Completion Credit

Milestone Completion Credit is an existing type of credit awarded to eligible inmates for successful completion of approved rehabilitative or educational programs. The awarding of Milestone Completion Credit requires the mastery of certain performance measures that demonstrate an understanding of course curriculum (either academic or vocational) through completion of assignments, instructor evaluations, and standardized testing. Each milestone credit is weighted based on the number of hours of classroom time and assignments. In keeping with the intent of the Act, the maximum amount of Milestone Completion Credit an inmate may be awarded in a 12-month period will increase from six (6) to twelve (12) weeks, and all inmates eligible for Good Conduct Credit shall be eligible to earn Milestone Completion Credit. These proposed regulations will incentivize more inmates to seek out educational or vocational training opportunities available to them and to strive to complete the longer and more complex programs. The revised Milestone Completion Credit Schedule (Rev 3/17) is incorporated by reference. Milestone Completion Credit is subject to forfeiture for disciplinary reasons.

C. Rehabilitative Achievement Credit

Rehabilitative Achievement Credit is a new type of credit for eligible inmates who participate in approved group or individual programs designed to further the educational, behavioral, or rehabilitative development of an inmate, such as alcohol and substance abuse support groups and counseling, anger management, life skills, victim awareness, restorative justice, and parenting classes. Inmate group programs must be organized to achieve educational or rehabilitative goals, must be sponsored by Department staff or volunteers, and must be approved by the institutional warden. All inmates eligible for Good Conduct Credit shall be eligible to earn Rehabilitative Achievement Credit. Inmates may earn up to a maximum of four weeks of credit per year. Rehabilitative Achievement Credit is subject to forfeiture for disciplinary reasons.

D. Educational Merit Credit

Educational Merit Credit is a new type of credit for eligible inmates who successfully complete, while incarcerated, a high school diploma or equivalent, an associate of arts or science degree, a bachelor's degree or graduate level college degree, or an alcohol and drug counselor certification. This is a one-time credit awarded for each level of educational achievement and must be earned during the inmate's current term of incarceration. All inmates eligible for Good Conduct Credit shall be eligible to earn Educational Merit Credit. Educational Merit Credit will not be subject to forfeiture for disciplinary reasons.

E. Extraordinary Conduct Credit

Extraordinary Conduct Credit is an existing type of credit awarded pursuant to Penal Code section 2935, under which the Secretary of the Department may grant up to twelve (12) months of credit to a prisoner who has performed a heroic act in a life-threatening situation or who has provided exceptional assistance in maintaining the safety and security of a prison. Extraordinary Conduct Credit is not subject to forfeiture.

III. Non Violent Parole Consideration

In 2014, a federal Three Judge Court ordered the Department to implement a parole consideration process for non-violent second-strike offenders who have served 50 percent of their sentence. This court-ordered process requires prison officials to carefully review and screen out inmates based on public safety criteria. Inmates who satisfy these rigorous public-safety screens are then referred to the Board. Within five days of any referral, the Board notifies the prosecutor from the county of commitment and any registered victims. Interested parties are afforded 30 days to provide written comment and input concerning the inmate's potential parole.

A hearing officer with the Board reviews all relevant information, including the inmate's criminal history, behavior in prison, rehabilitative efforts, and written statements from interested parties, and approves or denies the inmate's parole. The Board's decision to grant or deny parole follows established legal standards and is based on whether the inmate poses an unreasonable risk of violence to the community. If parole is approved, the Department notifies registered victims, local law-enforcement agencies and probation officers, and the Division of Adult Parole Operations completes its normal pre-parole review process.

Under section 32(a)(1) of Article I of the California Constitution, adopted under Proposition 57, the Department is directed to establish a process by which any person convicted of a nonviolent felony offense and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense. The full term for the primary offense means the longest term of imprisonment imposed by the court for any offense, excluding the imposition of an enhancement, consecutive sentence, or alternative sentence.

These regulations establish a non-violent parole process that mirrors the existing court-ordered non-violent second strike parole process. Key terms such as "nonviolent," "full term," and "primary offense" are defined, and rules established when and how a nonviolent offender may become eligible for parole consideration. To further the goal of protecting public safety, the Department will maintain the same public safety screening

criteria and notification procedures for registered victims and prosecuting agencies, and the Board will review all relevant evidence and apply the same legal standard for reviewing an inmate's suitability for parole—whether the inmate poses an unreasonable risk of violence to the community. For nonviolent offenders granted parole, the Department proposes to clarify the timing of release and the application of other laws to this parole process, such as laws governing holds, writs, detainers, notification laws, and serving additional sentences for in-prison offenses.

AUTHORITY AND REFERENCE CITATIONS (Gov. Code § 11346.5 (a)(2))

In California, adopting, amending, or repealing a regulation requires an express grant of authority in law. As stated in subdivision (b) of section 11349 of the Government Code, "'Authority' means the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation."

Ordinarily, the authority to adopt, amend, or repeal regulations in Division 3 of Title 15 ("Adult Institutions, Programs and Parole") is found in subdivision (a) of section 5058 of the Penal Code: "The [Secretary] may prescribe and amend rules and regulations for the administration of the prisons . . . ." Authority to do the same in Division 2 of Title 15 ("Board of Parole Hearings") is found in section 3052 of the Penal Code, which states, "The Board of Parole Hearings shall have the power to establish and enforce rules and regulations under which inmates committed to state prisons may be allowed to go upon parole outside the prison buildings and enclosures when eligible for parole." Furthermore, pursuant to section 5058.3 of the Penal Code, the Department is authorized to promulgate emergency regulations, as it proposes to do here, "to expedite the exercise of its power to implement regulations as its unique organizational circumstances require."

With the passage of The Public Safety and Rehabilitation Act 2016 (the "Act"), the California Constitution was amended to specifically require the Department to promulgate regulations in furtherance of the Act's parole and credit provisions. Specifically, Proposition 57 states that, "notwithstanding anything in this article or any other provision of law," CDCR "shall adopt regulations in furtherance of [the Act], and the Secretary of the Department of Corrections and Rehabilitation shall certify that these regulations protect and enhance public safety." (Cal. Const., art. 1, § 32, subds. (a)-(b).) Accordingly, the Secretary has been granted broad rulemaking authority under the California Constitution to adopt, amend, or repeal regulations in furtherance of the Act, notwithstanding other provisions of law, and hereby invokes that constitutional grant of authority in support of this rulemaking action.

Other relevant authority: Penal Code section 5000 provides that commencing July 1, 2005, any reference to the Department of Corrections in this or any code, refers to the CDCR, Division of Adult Operations. Penal Code section 5050 provides that commencing July 1, 2005, any reference to the Director of Corrections, in this or any other code, refers to the Secretary of the CDCR. As of that date, the office of the Director of Corrections is abolished. Penal Code section 5054 provides that commencing July 1, 2005, the supervision, management, and control of the state prisons, and the responsibility for the care, custody, treatment, training, discipline, and employment of persons confined therein are vested in the Secretary of the CDCR. Penal Code section 5058 authorizes the Director to prescribe and amend regulations for the administration of prisons.

SPECIFIC BENEFITS ANTICIPATED BY THE PROPOSED REGULATIONS (Gov. Code § 11346.5(a)(3)(C))

The proposed regulations regarding credit earning will benefit our criminal justice system and our communities by creating incentives and opportunities for inmates to take responsibility for their own conduct and rehabilitation while incarcerated. These regulations enhance public safety by encouraging inmates to pursue educational and vocational achievement, engage in self-improvement programs and make personal preparation for the transition to state parole supervision or Post Release Community Supervision. Providing incentives to inmates to engage in rehabilitative programming also reduces inmate disciplinary misconduct and violence in the prisons, yielding safer conditions for inmates and a safer workplace for staff.

Successful implementation of these regulations will help reduce overcrowding in state prisons and aid the Department in keeping its inmate prison population below the 137.5 percent of design capacity threshold ordered by the federal Three Judge Court. Furthermore, by maintaining the inmate population below the federal court cap, the Department and the State avoid the possibility of indiscriminate court-ordered early releases of prisoners. Establishing a durable remedy to prison overcrowding can eventually lead to the end of federal court intervention and substantial savings from reduced litigation costs.

The establishment of the nonviolent offender parole consideration process will also make our prisons and communities safer by encouraging and motivating inmates to participate in rehabilitative programs and service opportunities that create skills, employability and hope. The proposed regulations establish rigorous screening criteria and notification procedures for registered victims and prosecuting agencies. Establishing screening criteria benefits public safety because it excludes inmates who are more likely to pose a risk to the public and provides nonviolent offenders with substantial motivation to avoid prison misconduct and focus on their rehabilitation. Establishing notification processes benefits public safety by ensuring that registered victims and prosecuting agencies, as well as other interested parties, have the opportunity to submit additional information regarding the nonviolent offender for the Board's consideration. Under the proposed regulations, the Board will review all relevant evidence, including an inmate's full criminal history, institutional behavior, rehabilitative efforts, and written statements from interested parties and determine whether the inmate poses an unreasonable risk of violence to the community. This process will enhance public safety by motivating eligible inmates to take responsibility for their own rehabilitation and work to prepare themselves to be productive members of the community upon their release.

EVALUATION OF CONSISTENCY AND COMPATIBILITY WITH EXISTING STATE REGULATIONS (Gov. Code § 11346.5(a)(3)(D))

The Department must evaluate whether the proposed regulations are inconsistent or incompatible with existing State regulations. Pursuant to this evaluation, and because the Act allows the Department to adopt regulations "notwithstanding anything in this article or any other provision of law" (Cal. Const., art. 1, § 32, subd. (a)), it has determined these proposed regulations are not inconsistent or incompatible with and existing regulations within CCR, Title 15, Division 3 and Division 2.

STATUTORY REQUIREMENTS, IF ANY, SPECIFIC TO AGENCY (Gov. Code § 11346.5(a)(4))

N/A

LOCAL MANDATE DETERMINATION (Gov. Code § 11346.5(a)(5))

This action imposes no mandates on local agencies or school districts, or a mandate which requires reimbursement of costs or savings pursuant to Government Code Sections 17500 - 17630.

FISCAL IMPACT STATEMENTS OF COST OR SAVINGS FOR THE FOLLOWING (Gov. Code § 11346.5(a)(6)):

- Cost to any local agency or school district requiring reimbursement: *None*
- Cost or savings to any state agency: **Cost:** Fiscal Year 2016-17 $0;

  Fiscal Year 2017-18 $5.7 Million and Fiscal Year 2018-19 $5.9 Million.
- Cost or savings in federal funding to the state: *None*
- Other nondiscretionary cost or savings imposed on local agencies: *None*

TECHNICAL, THEORETICAL, OR EMPIRICAL STUDIES, REPORTS, OR DOCUMENTS RELIED UPON (Gov. Code. § 11346.1(b)(2)):

1. Official Voter Information Guide, Proposition 57, November 8, 2016 Election.
http://voterguide.sos.ca.gov/en/propositions/57/arguments-rebuttals.htm

2. Governor's Budget Summary for Fiscal Year 2017-2018 – Public Safety.
http://www.ebudget.ca.gov/2017-18/pdf/BudgetSummary/PublicSafety.pdf

3. Report Filed with Three Judge Panel Regarding Non-Violent Second Striker Process.
http://www.cdcr.ca.gov/News/docs/3JP-Dec-2014/State%27s-report-on-new-parole-process-for-non-violent-second-strike-inmates.pdf

4. 2015 Outcome Evaluation Report-CDCR Office of Research.
http://www.cdcr.ca.gov/Adult_Research_Branch/Research_Documents/2015_Outcome_Evaluation_Report_8-25-2016.pdf

5. Three-Judge Court Order Granting in Part and Denying in Part the State's Request for an Extension of the Population Reduction Deadline.
http://www.cdcr.ca.gov/News/docs/3jp-Feb-2014/Three-Judge-Court-order-2-20-2014.pdf

6. Short History of Credit Earning '101' Programs in California (see below).

LETTER CDCR HAS POSTED IN PRISONS

A letter to CDCR Inmates

I want to provide the inmate population an update on significant changes that will affect them in the coming months. Many of the changes stem from Proposition 57, which was overwhelmingly passed by voters in November. We are also changing the inmate classification system.

Our system has seen many changes in recent years, but this one is different. Realignment, Propositions 36 and 47, Senate Bills 260 and 261, and the Federal Court population-reduction measures all involved increased credits or access to parole suitability hearings. Governor Brown's Proposition 57 places the responsibility on the individual to participate in their rehabilitation. His belief that a human being can change, if personally motivated and given the opportunity, is really the spirit of Proposition 57.

The changes in privileges for lifers and LWOP's, and the classification changes discussed below that have an impact on almost all inmates, are intended to recognize the individual and his/her sustained positive programming and disciplinary-free behavior. I have met many inmates involved in positive programming and have no doubt that these changes will provide an opportunity for people to "earn" their way to their families faster. For those inmates who would continue to game the system, and themselves, Proposition 57 will do little for your life. The Governor is giving you a chance of a lifetime and it's up to you to take advantage of it.

All of the changes listed below will be adopted through regulations and implemented in various phases. Given the size of this reform, please understand that all of this will not happen overnight.

Proposition 57

Some of Proposition 57 concerned juvenile justice, but the bulk of it concerns the adult population. The following is a list of the main features.

- Non-Violent Parole Process

Codifies and expands the existing court-ordered Non-Violent Second-Striker parole process. Third-Strikers and inmates with violent enhancements are excluded from this process. Qualifying inmates that complete the full term of their primary sentence, exclusive of enhancements or alternative sentences, and meet the behavior requirements (disciplinary free, SHU terms, etc.) will qualify for parole suitability consideration with the Board of Parole Hearings. It's anticipated that this revised process will be effective July 1, 2017.

- Credit earning

Several credit-earning categories have been simplified and modestly increased. It is anticipated that these credit changes will be effective May 1, 2017.

Due to the large volume of date changes required, Release Date Change Notices (RDCN) will be processed by Case Records in release date order, closest release date first. Release dates already within

60 days of May 1, 2017 will not change. Do not submit Form 22's, GA 22's, or appeals to Case Records as they will not expedite the process.

	Description of Offender Type	Current Credit Rate	Proposed Credit Rate
Zero	Life without parole (LWOP) and condemned	0%	0%
20%	Indeterminate offenders (lifers)	0%	20%
	Violent offenders (determinately sentenced)	15%	20%
	Violent third strike offenders	0%	20%
	Violent offenders earning zero credit	0%	20%
33.30%	Non-violent second strikers (with PC 290)	20%	33.3%
	Non-violent second strikers	33.3%	33.3%
	Non-violent 3rd strikers	0%	33.3%
	1/3 lifers (admissions for certain crimes before 1994)	33.3%	33.3%
50%	Day-for-day offenders	50%	50%
	Violent offenders in fire camps	15%	50%
	Day-for-day lifers	50%	50%
66.7%	Day-for-day minimum custody offenders	66.7%	66.7%
	Day-for-day offenders in Fire camps	66.7%	66.7%
	Non-violent second strikers in fire camps	33.3%	66.7%

- Milestones

Currently, only inmates convicted of a non-violent offense can earn milestone credits and can earn a maximum of six weeks in a 12-month consecutive period. Milestone programs are being expanded to almost all inmates, including lifers, and the maximum credits are being increased to up to 12 weeks in a 12-month consecutive period. These credit changes will be effective August 1, 2017 and are prospective.

- Educational Milestone

Completion of High School, earning college degrees (AA, BA, Masters), or Offender Mentor Certification Program will result in a one-time reduction of between three and six months. This credit will be retroactively applied if earned during an inmate's current incarceration. These credit changes will be effective August 1, 2017. A process will be defined to earn these retrospectively.

- Rehabilitative Achievement Credit

Inmates who participate in approved positive self-help programs can earn an additional four weeks per year. For every 52 hours of program participation, one week can be earned with a maximum of 208

hours in a continuous 12-month period. These credit changes will be effective August 1, 2017 and are prospective.

Milestone and Rehabilitative Achievement Credits lost as a result of disciplinary behavior are non-restorable.

Family Visiting for Lifers/LWOP

A policy memorandum authorizing Lifer/LWOP inmates to participate in the Family Visiting program was effective February 2017. The existing FV criteria will remain in effect for this expanded population. CDCR is developing new FV regulations that emphasize the importance of family unification during a person's incarceration and restricts an inmate's access to the program for disciplinary infractions.

Classification Changes

CDCR has implemented a number of changes to the classification process to recognize sustained positive behavior by individuals. Thousands of inmates have received classification overrides to lower-level prisons as a result of their positive behavior. CDCR will continue this process and has developed additional regulations, effective February 2017, to expand this theme to inmates previously excluded from lower-level placement because of their commitment offense. More discretion is being placed on the Warden and staff of our prisons to make the decision when an inmate has proven he/she is motivated to change.

- LWOP's have been excluded from placement in Level II institutions due to mandatory minimum scores keeping them in Level III and IV prisons. These regulations will allow LWOP's, with sustained positive behavior, to be placed in Level II prisons with lethal electrified perimeters.
- Life inmates, who meet specific criteria, will be authorized to be housed in Secure Level I facilities. These facilities will give them enhanced access to programs and better prepare them for subsequent BPH hearings.
- Close Custody regulations have been modified. The former Close A and B custody designations have been consolidated into one Close Custody designation. The time that an inmate must remain on close custody, based upon his/her individual behavior, has been reduced to a requirement of at least five years. This will expand an inmate's ability to access rehabilitative programs and evening programming.
- CDCR excludes inmates from minimum custody by affixing a Violent "VIO" determinant and mandatory minimum placement score of 19. Regulations have been completed that permit the prison staff to evaluate an inmate's sustained positive behavior and remove the VIO determinant up to seven years before an inmate's Earliest Possible Release Date. This will allow access to lower-level placement and more access to programming.
- Inmates who receive disciplinary action for a positive urinalysis test are assessed sanctions and points are added to their classification score. This results in inmates being placed in higher-level prisons. Regulations have been developed to discontinue applying classification points for positive tests and instead require referral to a Substance Abuse Disorder Treatment program

that will be available at all prisons by July 2017. All other sanctions from the disciplinary process will remain in place.

- Current regulations motivate inmates to refuse urinalysis testing rather than be tested positive and being referred to programs that have proven results in helping inmates stop using drugs. Regulations incentivize inmates to provide urine samples for testing as they will not be assessed points for a positive test but instead referred to programming.

Upcoming in fall of 2017:

- Currently an inmate can earn up to eight points to be deducted from his classification score by positively programming and remaining disciplinary free. Regulations have been developed to increase the point reduction for positive behavior to 12 points. This will allow an inmate to accelerate the lowering of their score and gain access to lower placement and more programming.

All of these changes are intended to allow the individual the greatest opportunity to participate in his/her rehabilitation and move up their return to society. I hope that you will prove Governor Brown right that the human spirit can change. These reforms will lead to safer prisons for staff and inmates, fewer crime victims, and increased public safety for all Californians.

Scott Kernan

Secretary
California Department of Corrections and Rehabilitation (CDCR)

California Department of Corrections and Rehabilitation

Fact Sheet

FOR INFORMATIONAL PURPOSES
MARCH 24, 2017

CONTACT: (916) 445-4950

Proposition 57 – Public Safety and Rehabilitation Act of 2016

Summary

Proposition 57 is a ballot measure that was overwhelmingly approved by voters last November (64% to 35%) to enhance public safety, to stop the revolving door of crime by emphasizing rehabilitation, and to prevent federal courts from indiscriminately releasing prisoners. It will require judges, rather than prosecutors, to determine whether juveniles charged with certain crimes should be tried in juvenile or adult court. It establishes a parole consideration process for non-violent offenders who have served the full term for their primary criminal offense and who demonstrate that they should no longer be considered a current threat to public safety. It also gives inmates the opportunity to earn additional credits for good behavior and participation in rehabilitative, educational, and career training programs, so they are better prepared to succeed and less likely to commit new crimes when they reenter our communities.

CDCR is currently under a Federal court-ordered prison population cap of 137.5 percent of design capacity. In order to stay below the cap, CDCR has used a variety of measures, including adding new bed and programming space and building the new California Health Care Facility in Stockton. As of mid-March, CDCR was about 1,500 inmates below the cap. Proposition 57 will help CDCR avoid unearned, court-ordered inmate releases and instead will require behavior and program participation, as well as achievement and accountability.

Juvenile Justice

Proposition 57 amended the law to require judges, rather than prosecutors, to determine whether juveniles charged with certain crimes should be tried in juvenile or adult court.

Non-Violent Offender Parole Consideration

Proposition 57 creates a process for non-violent offenders, as defined by California Penal Code, who have served the full term for their primary offense to be considered for parole by the Board of Parole Hearings (BPH). This does not mean that inmates are automatically granted parole. The inmate's behavior will be reviewed and considered by BPH. The commissioners may find that inmate suitable for parole if they believe he or she does not pose a current threat to public safety.

Credit Earning and Revocation

By giving inmates – a vast majority of whom will eventually return to our communities – incentives to improve their lives through education, career training and rehabilitation, we are giving them tools they need to succeed once they reenter society, and that will improve public safety.

Under the Proposition 57 regulations, inmates will be able to earn credits if they complete approved rehabilitative programs and activities. Credits will be applied prospectively with the exception of Educational Merit Credit, which will apply retrospectively if earned during the inmate's current term of incarceration. Condemned inmates and inmates sentenced to life without the possibility of parole will continue to be excluded from any credit-earning.

CDCR can revoke credits, with the exception of Educational Merit Credits, if an inmate violates prison rules. Inmates have the right to appeal any revocation of credit and the credits will be restored if the disciplinary action is reversed as a result of a successful administrative appeal or court action.

Good Conduct Credits

- Inmates currently earn Good Conduct Credits if they comply with prison rules and perform duties as assigned.
- Proposition 57 increases the amount of Good Conduct Credits inmates can earn.

Milestone Completion Credits

- Inmates can earn Milestone Completion Credits when they complete a specific education or career training program that has attendance and performance requirements.
- Proposition 57 increases the amount of time inmates can earn for Milestone Completion Credits from 6 weeks per year to 12 weeks.

Rehabilitative Achievement Credits (RAC)

- Inmates can earn Rehabilitative Achievement Credits when they participate in approved self-help groups or other activities which promote the rehabilitation or positive change in behavior of inmates.
- Inmates can earn up to 4 weeks of credit per year.

Educational Merit Credits (EMC)

- Inmates can earn Educational Merit Credits for successful completion while incarcerated, of a GED, high school diploma, college degree or alcohol and drug counselor certification
- A one-time credit is awarded for each level of educational achievement earned during the inmate's current term.

California Department of
Corrections and Rehabilitation

Proposition 57: The Public Safety and Rehabilitation Act of 2016 Frequently Asked Questions March 2017

What is Proposition 57?
Proposition 57 – The Public Safety and Rehabilitation Act of 2016 – is a ballot measure that was overwhelmingly approved by voters last November (64% to 35%) to enhance public safety, to stop the revolving door of crime by emphasizing rehabilitation, and to prevent federal courts from indiscriminately releasing prisoners. It also will require judges, rather than prosecutors, to determine whether juveniles charged with certain crimes should be tried in juvenile or adult court. It establishes a parole consideration process for non-violent offenders who have served the full term for their primary criminal offense and who demonstrate that they should no longer be considered a current threat to public safety. It also gives inmates the opportunity to earn additional credits for good behavior and participation in rehabilitative, educational, and career training programs so they are better prepared to succeed and less likely to commit new crimes when they re-enter our communities. Condemned inmates and inmates sentenced to life without the possibility of parole will continue to be excluded from any credit-earning.

When will Proposition 57 go into effect?
The juvenile justice provisions have already gone into effect. CDCR has written regulations – now with the Office of Administrative Law (OAL) – to enact changes to the way credits are awarded to inmates, as well as expand parole consideration for non-violent offenders. The new parole consideration process for non-violent offenders is expected to go into effect on July 1, 2017. Good Conduct Credits are expected to go into effect on May 1, 2017, and Milestone Completion, Rehabilitative Achievement, and Educational Merit credits are expected to go into effect on August 1, 2017.

Why is Proposition 57 important?
By giving inmates – a vast majority of whom will eventually return to our communities – incentives to improve their lives through education, career training and rehabilitation, we are giving them tools to succeed on the outside, and that's good for public safety. Additionally, the initiative creates a durable solution to help the department implement common-sense prison population reduction measures and avoid court-ordered inmate releases. Currently, CDCR is under federal court orders to not exceed a prison population of more than 137.5% of design capacity. Without a durable solution, a federal court could release any inmates they choose if the population cap is exceeded.

What will Proposition 57 do?
Proposition 57 includes three major components designed to improve the juvenile and adult criminal justice system in California.

- It will require judges, rather than prosecutors, to determine whether juveniles charged with certain crimes should be tried in juvenile or adult court.
- It establishes a parole consideration process for non-violent offenders, as defined by California Penal Code, who have served the full term for their primary criminal offense and who demonstrate that they should no longer be considered a current threat to public safety.
- It will give inmates the opportunity to earn additional credits for good behavior and participation in rehabilitative, educational, and career training programs so they are better prepared to succeed and less likely to commit new crimes on the outside.

What are the credits inmates can earn under Proposition 57?
The current credit-earning system is based on the crime committed. This new system will be based on conduct and participation in programs. CDCR is increasing credits for Good Conduct and Milestone Completion Programs, and introducing credits for Rehabilitative Achievement and Educational Merit. Click here for more information on the Proposition 57 credits.

Credits shall be awarded to inmates who participate in qualifying programs and activities successfully, and have sustained good behavior. The credits will serve to advance an inmate's release date if sentenced to a determinate term, or advance an inmate's initial parole hearing date if sentenced to an indeterminate term with the possibility of parole. Most credits can be revoked if the inmate violates prison rules.

Who will be eligible to receive credits under Proposition 57?
All inmates, except condemned inmates and inmates sentenced to life without the possibility of parole.

Can an inmate lose credits?
CDCR can revoke Good Conduct Credits, Milestone Completion Credits, and Rehabilitative Achievement Credits as a result of disciplinary infractions and rules violations. Educational Merit Credits are not subject to revocation for disciplinary reasons.

What is the non-violent parole process?
All inmates currently serving a conviction for a non-violent offense as defined by California Penal Code will be able to participate in this parole process. This does not mean that inmates are automatically granted parole. The inmate's behavior will be reviewed and considered by the Board of Parole Hearings (BPH). The commissioners

may find that inmate suitable for parole if they believe he or she does not pose a current threat to public safety, and the inmate has served the full term of the sentence for their primary offense.

Will CDCR be granting "early release" for inmates under Proposition 57?
Proposition 57 does not grant early release, but does give eligible inmates the opportunity to earn additional credits or time off their sentences. Credits can also be earned to advance an inmate's initial parole hearing date if he or she is sentenced to an indeterminate term with the possibility of parole. Credits can also be taken away for breaking prison rules.

How will Proposition 57 affect inmates who are serving time out of state?
Inmates serving criminal sentences under California law but housed in another jurisdiction (such as Western or Interstate Corrections Compact and a correctional facility administered by the Federal Bureau of Prisons), or housed in facilities leased by CDCR, are eligible to earn in Good Conduct Credit, Educational Merit Credit, and Extraordinary Conduct Credit.

California Department of
Corrections and Rehabilitation

Proposition 57: Credit Earning for Inmates Frequently Asked Questions March 2017

In November, California voters overwhelmingly passed Proposition 57 (64% to 35%), which gives California Department of Corrections and Rehabilitation (CDCR) inmates the ability to earn additional credits for sustained good behavior and for approved rehabilitative or educational achievements. The current credit-earning system is based on the crime committed. This new system will be based on conduct and participation in programs. Under Proposition 57, the department will incentivize inmates to take responsibility for their own rehabilitation; promote public safety by encouraging inmates to pursue educational, vocational, and self-improvement activities; and reduce recidivism by increasing the likelihood that inmates will successfully transition back into our communities.

What are the credits inmates can earn under Proposition 57?
Inmates are expected to work or participate in rehabilitative programs and activities to prepare for their eventual return to society. Under Proposition 57, inmates who comply with the rules, avoid violence, and perform duties assigned to them, will be eligible to earn Good Conduct Credits. Inmates who participate in approved rehabilitative programs and activities shall be eligible to earn Milestone Completion Credits, Rehabilitative Achievement Credits, or Educational Merit Credits.

Credits earned for good conduct and rehabilitative and educational achievements can advance an inmate's release date if sentenced to a determinate term, or advance an inmate's initial parole hearing date if sentenced to an indeterminate term with the possibility of parole. *(Note: A determinate term is a sentence of specified length. An indeterminate term is a sentence of unspecified length which ends only when the inmate is granted parole by the Board of Parole Hearings.)* Inmates who violate prison rules will have credits revoked.

Who is eligible?
All inmates other than condemned inmates and those serving sentences of life without the possibility of parole can be eligible to earn Good Conduct Credit, Milestone Completion Credit, Rehabilitative Achievement Credit, and Educational Merit Credit.

What are Good Conduct Credits under Proposition 57?
Most inmates currently receive some form of Good Conduct Credits. These credits are awarded to eligible inmates who comply with all the rules within a prison and perform

the duties as assigned on a regular basis. Effective May 1, 2017, Good Conduct Credits will be awarded according to the following table:

Good Conduct Credits Table (GCC):

Inmates Eligible	Current GCC Credits	Proposed GCC Credit Changes
• Violent offenders serving determinate sentences or indeterminate life sentences	Zero to 15%	20%
• Non-violent second- and third-strikers	Zero to 33.3%	33.3%
• Day-for-day offenders	50%	50%
• Offenders with violent offenses serving in fire camps	15%	50%
• Day-for-day minimum-custody offenders • Non-violent offenders serving in fire camps	33.3% to 66.6%	66.6%

What are Milestone Completion Credits?
Milestone Completion Credits will be awarded for achievement of a distinct objective in approved rehabilitative programs, including academic, vocational, and significant self-help program. Milestone Credits are currently capped at a maximum of six weeks in a 12-month consecutive period. The proposed regulations will expand the Milestone Credits to 12 weeks in a 12-month consecutive period, starting on August 1, 2017.

What are Rehabilitative Achievement Credits?
Hundreds of self-help and volunteer public service activities offered in California prisons are intended to provide meaningful rehabilitative programming to our inmate population. Currently, there is no credit-earning attached to self-help activities. Proposition 57 changes that, and subtracts up to one month per year from an inmate's sentence for participating in up to 208 hours of eligible self-help programs. The department is currently evaluating the various self-help activities to determine which will qualify for the credits.

What are Education Merit Credits?
Education Merit Credits will recognize the achievements of inmates who earn a high school diploma or GED, higher education degrees, such as an AA or a BA, and the offender mentor certification program that's available at several of our prisons. Offenders must earn at least 50 percent or more of the degree or diploma during their current term in order to receive Education Merit Credits. Because it can take years to earn a college degree, inmates who achieve that goal will be given three-to-six month

one-time reductions. These credits will take effect in August 2017, but will be applied retroactively.

Can an inmate lose credits?
CDCR can revoke Good Conduct Credits, Milestone Completion Credits, and Rehabilitative Achievement Credits as a result of disciplinary infractions and rules violations. Educational Merit Credits are not subject to forfeiture for disciplinary reasons.

Why are the credits being implemented incrementally?
The changes proposed in the Proposition 57 regulations require CDCR to properly provide training to staff, as well as update information technology systems, and revise credit calculations systems.

INFORMATION SHEET

Office of Correctional Education

CDCR Division of Rehabilitative Programs

UPDATED: August 2016 **CONTACT:** (916) 445-8035

General Education Development (GED)

The General Education Development (GED) program is provided to inmates/students who possess neither a high school diploma nor a high school equivalency (HSE) certificate. Inmates/students receive instruction in English/Language Arts, Mathematical Reasoning, Science, and Social Studies in preparation to take a HSE exam.

In keeping with the California Penal Code, 2053.1 (a2) inmates/students reading at a 9th grade level or higher are assigned or have the opportunity to enroll in a general education development /high school equivalency class. Inmates/students are placed into the GED program after completing prerequisites (Adult Basic Education (ABE) III or the required TABE score) so long as they do not already possess a high school diploma or a high school equivalency certificate. Inmates/students who are assigned/enrolled into the GED program are provided subject matter preparation to pass high school equivalency exam(s).

In order to qualify to take a HSE Exam, inmates/students must demonstrate readiness based upon the Test of Adult Basic Education (TABE) of 9 or higher, or a Comprehensive Adult Student Assessment System (CASAS) Test of 145 or higher and computer literacy skills. Students/inmates may take a computer-based GED or a paper and pencil HSE exam on a case-by-case determination. The GED test is taken on a computer which delivers test data directly to the scoring site, the test is scored, and results are returned immediately. To achieve the GED certificate, inmates/students must achieve a minimum score of 145 in each section and a total score of 580 on the entire test battery (all four parts). A passing score on HSE exams signify inmates/students have the skills and knowledge necessary for college entrance and/or entry into the workforce.

Location(s): All Institutions

Length of Program: Assignments and enrollments into this program are considered open entry/open exit. Inmates/students progress at their own pace, reflecting their effort and desire to learn.

Enrollment: Inmates may be assigned by a Classification Committee, to a GED program or voluntarily enroll in a Voluntary Education Program (VEP) to obtain a high school equivalency.

Eligibility Requirements: Reading Test of Adult Basic Education (TABE) of 9.0 or higher.

CDCR's Division of Rehabilitative Programs (DRP) manages adult inmate and parolee rehabilitative programs. Its top priority is to provide rehabilitative programming and life skills to offenders in an effort to reduce their likelihood of reoffending after their release from prison. DRP is comprised of the Office of Offender Services (OS), the Office of Correctional Education (OCE), and the Office of Program Accountability and Support (OPAS).

#####

INFORMATION SHEET

Office of Correctional Education

CDCR Division of Rehabilitative Programs

UPDATED: August 2016 **CONTACT:** (916) 445-8035

Adult Basic Education (ABE) I, II, and III

The Office of Correctional Education (OCE) provides Educational Programs for incarcerated inmates/students. Inmates/students with reading skills below the ninth grade level attend Adult Basic Education. Adult Basic Education (ABE) is divided into class levels I, II, and III. These ABE programs are targeted to serve the academic needs of the inmate/student population. ABE provides opportunities for acquiring academic skills through an emphasis on English Language Arts and Mathematics. The Test of Adult Basic Education (TABE) assessment is used to determine the initial placement of each inmate/student into an appropriate ABE level. ABE Classes are designed specifically for incarcerated adult students and are taught by teachers with current and valid credentials from the California Commission on Teacher Credentialing. Teachers provide inmates/students with interactive, engaging, relevant, and high interest instruction in the College and Career Readiness Standards.

The ABE I class are designed for inmates/students who have scored between 0.0 and 3.9 on the reading portion of the TABE assessment. ABE II is for inmates/students with a reading score between 4.0 and 6.9. ABE III is intended for inmates/students with reading scores between 7.0 and 8.9. To advance or promote from one level to the next, inmates/students must show competence of the College and Career Readiness Standards and/or achievement of an applicable TABE score. As inmates/students matriculate through the ABE program levels, classes become more rigorous and an increase in the depths of knowledge are expanded.

The ABE classes are designed to prepare the inmates/students for entry into a (High School Equivalency) program or a High School Diploma Program as pre-requisites are met. ABE programs are available to all populations through class assignments during the Classification Committee process and as a Voluntary Education Program that includes individualized instruction through tutorial support. In complying with penal code 2053.1 (2): "The department shall offer academic programming throughout an inmate's incarceration that shall focus on increasing the reading ability of an inmate to at least a 9th grade level.

Location(s): All institutions

Length of Program: Assignments and enrollments into this program are considered open entry/open exit. Inmates/students progress at their own pace, reflecting their effort and desire to learn.

Enrollment: Inmates are placed in the appropriate ABE class level according to their TABE reading score.

Eligibility Requirements: The Tests of Adult Basic Education (TABE) and Correctional Management Profiling for Alternative Sanctions (COMPAS) assessments are required for placement into educational programs. Priority is given to inmates determined to have a criminogenic need.

CDCR's Division of Rehabilitative Programs (DRP) manages adult inmate and parolee rehabilitative programs. Its top priority is to provide rehabilitative programming and life skills to offenders in an effort to reduce their likelihood of reoffending after their release from prison. DRP is comprised of the Office of Offender Services (OS), the Office of Correctional Education (OCE), and the Office of Program Accountability and Support (OPAS).

#####

INFORMATION SHEET

Office of Correctional Education

CDCR Division of Rehabilitative Programs

UPDATED: August 2016 **CONTACT:** (916) 445-8035

Career Technical Education (CTE) Programs

CTE training is provided in six different career sectors that include the building trade and construction sector, the energy and utilities sector, the finance and business sector, the public service sector, manufacturing and product development sector, and the transportation sector.

Each of the 19 CTE programs is aligned with a positive employment outlook within the State of California, providing industry recognized certification an employment pathway to a livable wage.

Many programs listed include green employment skills relevant to solar, geothermal and smart energy management practices. The CTE programs include: Construction Technology, Carpentry, Dry Wall, Masonry, Plumbing, Industrial Painting, Electrical Construction, Heating/Ventilation/Air-Conditioning/Refrigeration, Sheet Metal, Welding, Electronics/Network Cabling, Roofing, Auto Mechanics/Engine Service and Repair, Automotive Body Repair and Refinishing, and Small Engine Repair, Sustainable Landscape design, Office Services and Related Technologies, Computer Literacy, Cosmetology, and Machine Shop.

Location(s): Each institution has its own specific set of CTE programs based on size, mission, and available space appropriate for each particular program.

Length of Program: CTE programs utilize a stackable curriculum allowing each inmate/student to gain employment skills and enter a career pathway for the industry. This stackable approach to CTE training provides each inmate/student the ability to acquire very basic employment skills in a career pathway in as little as 3-6 months, or moderate-to-advanced skills in 6-24 months.

Enrollment: Any inmate may request participation in CTE programs.

Eligibility Requirements: There are no eligibility requirements.

CDCR's Division of Rehabilitative Programs (DRP) manages adult inmate and parolee rehabilitative programs. Its top priority is to provide rehabilitative programming and life skills to offenders in an effort to reduce their likelihood of reoffending after their release from prison. DRP is comprised of the Office of Offender Services (OS), the Office of Correctional Education (OCE), and the Office of Program Accountability and Support (OPAS).

#####

TEXT OF PROPOSITION 66

SECTION 1. Short Title.

This Act shall be known and may be cited as the Death Penalty Reform and Savings Act of 2016.

SEC. 2. Findings and Declarations.

1. California's death penalty system is ineffective because of waste, delays, and inefficiencies. Fixing it will save California taxpayers millions of dollars every year. These wasted taxpayer dollars would be better used for crime prevention, education, and services for the elderly and disabled.

2. Murder victims and their families are entitled to justice and due process. Death row killers have murdered over 1,000 victims, including 229 children and 43 police officers; 235 victims were raped and 90 victims were tortured.

3. Families of murder victims should not have to wait decades for justice. These delays further victimize the families who are waiting for justice. For example, serial killer Robert Rhoades, who kidnapped, raped, tortured, and murdered 8-year-old Michael Lyons and also raped and murdered Bay Area high school student Julie Connell, has been sitting on death row for over 16 years. Hundreds of killers have sat on death row for over 20 years.

4. In 2012, the Legislative Analyst's Office found that eliminating special housing for death row killers will save tens of millions of dollars every year. These savings could be invested in our schools, law enforcement, and communities to keep us safer.

5. Death row killers should be required to work in prison and pay restitution to their victims' families consistent with the Victims' Bill of Rights (Marsy's Law). Refusal to work and pay restitution should result in loss of special privileges.

6. Reforming the existing inefficient appeals process for death penalty cases will ensure fairness for both defendants and victims. Right now, capital defendants wait five years or more for appointment of their appellate lawyer. By providing prompt appointment of attorneys, the defendants' claims will be heard sooner.

7. A defendant's claim of actual innocence should not be limited, but frivolous and unnecessary claims should be restricted. These tactics have wasted taxpayer dollars and delayed justice for decades.

8. The state agency that is supposed to expedite secondary review of death penalty cases is operating without any effective oversight, causing long-term delays and wasting

taxpayer dollars. California Supreme Court oversight of this state agency will ensure accountability.

9. Bureaucratic regulations have needlessly delayed enforcement of death penalty verdicts. Eliminating wasteful spending on repetitive challenges to these regulations will result in the fair and effective implementation of justice.

10. The California Constitution gives crime victims the right to timely justice. A capital case can be fully and fairly reviewed by both the state and federal courts within ten years. By adopting state rules and procedures, victims will receive timely justice and taxpayers will save hundreds of millions of dollars.

11. California's Death Row includes serial killers, cop killers, child killers, mass murderers, and hate crime killers. The death penalty system is broken, but it can and should be fixed. This initiative will ensure justice for both victims and defendants, and will save hundreds of millions of taxpayer dollars.

SEC. 19. Effective Date.

Except as more specifically provided in this act, all sections of this act take effect immediately upon enactment and apply to all proceedings conducted on or after the effective date.

SEC. 20. Amendments.

The statutory provisions of this act shall not be amended by the Legislature, except by a statute passed in each house by rollcall vote entered in the journal, three-fourths of the membership of each house concurring, or by a statute that becomes effective only when approved by the voters.

SEC. 21. Severability/Conflicting Measures/Standing.

If any provision of this act, or any part of any provision, or its application to any person or circumstance is for any reason held to be invalid or unconstitutional, the remaining provisions and applications which can be given effect without the invalid or unconstitutional provision or application shall not be affected, but shall remain in full force and effect, and to this end the provisions of this act are severable.

This measure is intended to be comprehensive. It is the intent of the people that in the event this measure or measures relating to the subject of capital punishment shall appear on the same statewide election ballot, the provisions of the other measure or measures shall be deemed to be in conflict with this measure. In the event that this measure receives a greater number of affirmative votes, the provisions of this measure shall

prevail in their entirety, and all provisions of the other measure or measures shall be null and void.

The people of the State of California declare that the proponent of this act has a direct and personal stake in defending this act and grant formal authority to the proponent to defend this act in any legal proceeding, either by intervening in such legal proceeding, or by defending the act on behalf of the people and the state in the event that the state declines to defend the act or declines to appeal an adverse judgment against the act. In the event that the proponent is defending this act in a legal proceeding because the state has declined to defend it or to appeal an adverse judgment against it, the proponent shall: act as an agent of the people and the state; be subject to all ethical, legal, and fiduciary duties applicable to such parties in such legal proceedings; take and be subject to the oath of office prescribed by *Section 3 of Article XX of the California Constitution* for the limited purpose of acting on behalf of the people and the state in such legal proceeding; and be entitled to recover reasonable legal fees and related costs from the state.

PENAL CODE SECTION AFFECTED BY PROPOSITION 66

PRIOR PENAL CODE SECTION 190.6

§ 190.6. Appeals in capital cases to be handled expeditiously

(a) The Legislature finds that the sentence in all capital cases should be imposed expeditiously.

(b) Therefore, in all cases in which a sentence of death has been imposed on or after January 1, 1997, the opening appellate brief in the appeal to the State Supreme Court shall be filed no later than seven months after the certification of the record for completeness under subdivision (d) of Section 190.8 or receipt by the appellant's counsel of the completed record, whichever is later, except for good cause. However, in those cases where the trial transcript exceeds 10,000 pages, the briefing shall be completed within the time limits and pursuant to the procedures set by the rules of court adopted by the Judicial Council.

(c) In all cases in which a sentence of death has been imposed on or after January 1, 1997, it is the Legislature's goal that the appeal be decided and an opinion reaching the merits be filed within 210 days of the completion of the briefing. However, where the appeal and a petition for writ of habeas corpus is heard at the same time, the petition should be decided and an opinion reaching the merits should be filed within 210 days of the completion of the briefing for the petition.

(d) The failure of the parties or the Supreme Court to meet or comply with the time limit provided by this section shall not be a ground for granting relief from a judgment of conviction or sentence of death.

SECTION 190.6 AFTER PROP 66

§ 190.6. Appeals in capital cases to be handled expeditiously

(a) The Legislature finds that the sentence in all capital cases should be imposed expeditiously.

(b) Therefore, in all cases in which a sentence of death has been imposed on or after January 1, 1997, the opening appellate brief in the appeal to the State Supreme Court shall be filed no later than seven months after the certification of the record for completeness under subdivision (d) of Section 190.8 or receipt by the appellant's counsel of the completed record, whichever is later, except for good cause. However, in those cases where the trial transcript exceeds 10,000 pages, the briefing shall be completed within the time limits and pursuant to the procedures set by the rules of court adopted by the Judicial Council.

(c) In all cases in which a sentence of death has been imposed on or after January 1, 1997, it is the Legislature's goal that the appeal be decided and an opinion reaching the merits be filed within 210 days of the completion of the briefing. However, where the appeal and a petition for writ of habeas corpus is heard at the same time, the petition should be decided and an opinion reaching the merits should be filed within 210 days of the completion of the briefing for the petition.

(d) The right of victims of crime to a prompt and final conclusion, as provided in paragraph (9) of subdivision (b) of *Section 28 of Article I of the California Constitution*, includes the right to have judgments of death carried out within a reasonable time. Within 18 months of the effective date of this initiative, the Judicial Council shall adopt initial rules and standards of administration designed to expedite the processing of capital appeals and state habeas corpus review. Within five years of the adoption of the initial rules or the entry of judgment, whichever is later, the state courts shall complete the state appeal and the initial state habeas corpus review in capital cases. The Judicial Council shall continuously monitor the timeliness of review of capital cases and shall amend the rules and standards as necessary to complete the state appeal and initial state habeas corpus proceedings within the five-year period provided in this subdivision.

(e) The failure of the parties or of a court to comply with the time limit in subdivision (b) shall not affect the validity of the judgment or require dismissal of an appeal or habeas corpus petition. **If a court fails to comply without extraordinary and compelling reasons justifying the delay, either party or any victim of the offense may seek relief by petition for writ of mandate. The court in which the petition is filed shall act on it within 60 days of filing. Paragraph (1) of subdivision (c) of *Section 28 of Article I of the California Constitution*, regarding standing to enforce victims' rights, applies to this subdivision and subdivision (d).**

Cal Pen Code § 1239.1 **NEW**

§ 1239.1. Duty of Supreme Court to expedite review of capital cases; Acceptance by qualified attorneys of appointment in capital cases when substantial backlog

(a) It is the duty of the Supreme Court in a capital case to expedite the review of the case. The court shall appoint counsel for an indigent appellant as soon as possible. The court shall only grant extensions of time for briefing for compelling or extraordinary reasons.

(b) When necessary to remove a substantial backlog in appointment of counsel for capital cases, the Supreme Court shall require attorneys who are qualified for appointment to the most serious non-capital appeals and who meet the qualifications for capital appeals to accept appointment in capital cases as a condition for remaining on the court's appointment list. A "substantial backlog" exists for this purpose when the time from entry of judgment in the trial court to appointment of counsel for appeal exceeds 6 months over a period of 12 consecutive months.

NEW PENAL CODE SECTIONS ON HABEAS CORPUS IN CAPITAL CASES

§ 1509. Writ filed by person in custody pursuant to judgment of death NEW

(a) This section applies to any petition for writ of habeas corpus filed by a person in custody pursuant to a judgment of death. A writ of habeas corpus pursuant to this section is the exclusive procedure for collateral attack on a judgment of death. A petition filed in any court other than the court which imposed the sentence should

be promptly transferred to that court unless good cause is shown for the petition to be heard by another court. A petition filed in or transferred to the court which imposed the sentence shall be assigned to the original trial judge unless that judge is unavailable or there is other good cause to assign the case to a different judge.

(b) After the entry of a judgment of death in the trial court, that court shall offer counsel to the prisoner as provided in *Section 68662 of the Government Code*.

(c) Except as provided in subdivisions (d) and (g), the initial petition must be filed within one year of the order entered under *Section 68662 of the Government Code*.

(d) An initial petition which is untimely under subdivision (c) or a successive petition whenever filed shall be dismissed unless the court finds, by the preponderance of all available evidence, whether or not admissible at trial, that the defendant is actually innocent of the crime of which he or she was convicted or is ineligible for the sentence. A stay of execution shall not be granted for the purpose of considering a successive or untimely petition unless the court finds that the petitioner has a substantial claim of actual innocence or ineligibility. "Ineligible for the sentence of death" means that circumstances exist placing that sentence outside the range of the sentencer's discretion. Claims of ineligibility include a claim that none of the special circumstances in subdivision (a) of Section 190.2 is true, a claim that the defendant was under the age of 18 at the time of the crime, or a claim that the defendant has an intellectual disability, as defined in Section 1376. A claim relating to the sentencing decision under Section 190.3 is not a claim of actual innocence or ineligibility for the purpose of this section.

(e) A petitioner claiming innocence or ineligibility under subdivision (d) shall disclose all material information relating to guilt or eligibility in the possession of the petitioner or present or former counsel for petitioner. If the petitioner willfully fails to make the disclosure required by this subdivision and authorize disclosure by counsel, the petition may be dismissed.

(f) Proceedings under this section shall be conducted as expeditiously as possible, consistent with a fair adjudication. The superior court shall resolve the initial petition within one year of filing unless the court finds that a delay is necessary to resolve a substantial claim of actual innocence, but in no instance shall the court take longer than two years to resolve the petition. On decision of an initial petition, the court shall issue a statement of decision explaining the factual and legal basis for its decision.

(g) If a habeas corpus petition is pending on the effective date of this section, the court may transfer the petition to the court which imposed the sentence. In a case where a judgment of death was imposed prior to the effective date of this section,

but no habeas corpus petition has been filed prior to the effective date of this section, a petition that would otherwise be barred by subdivision (c) may be filed within one year of the effective date of this section or within the time allowed under prior law, whichever is earlier.

§ 1509.1. Appeal of decision on writ filed by person in custody for judgment of death

(a) Either party may appeal the decision of a superior court on an initial petition under Section 1509 to the court of appeal. An appeal shall be taken by filing a notice of appeal in the superior court within 30 days of the court's decision granting or denying the habeas petition. A successive petition shall not be used as a means of reviewing a denial of habeas relief.

(b) The issues considered on an appeal under subdivision (a) shall be limited to the claims raised in the superior court, except that the court of appeal may also consider a claim of ineffective assistance of trial counsel if the failure of habeas counsel to present that claim to the superior court constituted ineffective assistance. The court of appeal may, if additional findings of fact are required, make a limited remand to the superior court to consider the claim.

(c)

(d) The people may appeal the decision of the superior court granting relief on a successive petition. The petitioner may appeal the decision of the superior court denying relief on a successive petition only if the superior court or the court of appeal grants a certificate of appealability. A certificate of appealability may issue under this subdivision only if the petitioner has shown both a substantial claim for relief, which shall be indicated in the certificate, and a substantial claim that the requirements of subdivision (d) of Section 1509 have been met. An appeal under this subdivision shall be taken by filing a notice of appeal in the superior court within 30 days of the court's decision. The superior court shall grant or deny a certificate of appealability concurrently with a decision denying relief on the petition. The court of appeal shall grant or deny a request for a certificate of appealability within 10 days of an application for a certificate. The jurisdiction of the court of appeal is limited to the claims identified in the certificate and any additional claims added by the court of appeal within 60 days of the notice of appeal. An appeal under this subdivision shall have priority over all other matters and be decided as expeditiously as possible.

§ 2700.1. Labor and compensation requirements for inmates sentenced to death

(e)

Section 2700 applies to inmates sentenced to death, except as otherwise provided in this section.

Every person found guilty of murder, sentenced to death, and held by the Department of Corrections and Rehabilitation pursuant to Sections 3600 to 3602 shall be required to work as many hours of faithful labor each day he or she is so held as shall be prescribed the rules and regulations of the department.

Physical education and physical fitness programs shall not qualify as work for purposes of this section. The Department of Corrections and Rehabilitation may revoke the privileges of any condemned inmate who refuses to work as required by this section.

In any case where the condemned inmate owes a restitution fine or restitution order, the Secretary of the Department of Corrections and Rehabilitation shall deduct 70 percent or the balance owing, whichever is less, from the condemned inmate's wages and trust account deposits, regardless of the source of the income, and shall transfer those funds to the California Victim Compensation and Government Claims Board according to the rules and regulations of the Department of Corrections and Rehabilitation, pursuant to Sections 2085.5 and 2717.8.