In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA	)	
	)	
Plaintiff and Respondent,	)	
	)	Case No.
v.	)	**S232900**
	)	
LAURA REYNOSO VALENZUELA,	)	
	)	
Defendant and Appellant,	)	
	)	

Fourth Appellate District, Division One, Case No. D066907
Imperial County Superior Court Case No. JCF32712
The Honorable M. Christopher J. Plourd, Judge

OPENING **MERITS BRIEF**

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ISSUE PRESENTED

Is a defendant eligible for resentencing on a penalty enhancement for serving a prior prison term on a felony conviction after the superior court reclassifies the underlying felony as a misdemeanor under the provisions of Proposition 47?

STATEMENT OF THE CASE AND FACTS

Appellant was convicted at a jury trial of car-jacking in violation of Penal Code section of 215, subdivision (a);[1] willful disregard for safety while fleeing a pursuing police office in violation of Vehicle Code section 2800.2, subdivision (a), and possession of methamphetamine in violation of Health and Safety Code section 11377, subdivision (a). (12 R.T. 572-574; 1 C.T. 157.) Appellant waived her right to a jury trial on the two prison priors alleged pursuant to section 667.5, subdivision (b). Thereafter, trial court found that only her prior conviction for possession of stolen property in violation of section 496, subdivision (a), in Superior Court case number JCF28616 met the requirements for a prison prior. (13 R.T. 801, 806-807; 1 C.T. 39-40, 207-208.)

On October 24, 2014, the court sentenced appellant to a prison term of six years and eight months as follows: five years for the car-jacking; eight months consecutive for the felony evading and two years concurrent for the possession of

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[1] Hereafter all references shall be to the Penal Code unless otherwise stated.

methamphetamine. The court also imposed a one year consecutive term for the prison prior. (14 R.T. 927-928; 2 C.T. 276.) Appellant filed a notice of appeal on October 27, 2014. (2 C.T. 281.)

On November 4, 2014, California voters approved Proposition 47, (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) text of Proposition 47 § 1, p. 70). Proposition 47 became effective on November 5, 2014. (Cal. Const., art II, § 10, subd. (a)[statutes enacted by initiative or referendum take effect the day after the election unless the measure provides otherwise].) The initiative amended section 496, subdivision (a). Prior to the initiative, a violation of section 496, subdivision (a) was punishable as either a felony or a misdemeanor. With certain exceptions not present in this case, after the approval of Proposition 47, possession of stolen property is now a misdemeanor.

In light of the new law, appellant argued in the opening brief of her appeal that Proposition 47 must be retroactively applied to her case and her prison prior enhancement stricken because it was based upon an offense that must now be deemed a misdemeanor. (AOB at p. 29.) In response, the Attorney General did not dispute that the prior offense qualified for reduction nor that the prison prior must be stricken as a result. Instead, the Attorney General argued that appellant must separately petition for relief. (Respondent's brief at p. 22.)

Unbeknownst to appellate counsel and the Attorney General, on December 4, 2014, pursuant to a petition filed by appellant in the superior court, appellant's prior felony conviction for possession of stolen property in JCF28616 was reduced to a misdemeanor. (Reporter's Augmented Transcript, Vol. 1, p. 4; Supplemental C.T. 7 [minute order for JCF28616].) The court announced: "The defendant had entered a plea to a violation of Penal Code section 496 on April 9, 2012[2]. That charge that she pled to is now a misdemeanor. Defendant is given credit for time served." (Supplemental R.T., Vol.1, p. 4 dated Dec. 4, 2014; Supplemental C.T. p. 7 [minute order contains the notation: "Defendant is given credit for time served and ordered released forthwith on this case pursuant to Penal Code section 1170.18(d)."].)

Appellate counsel learned of these new facts before filing the reply brief, augmented the record on appeal, and addressed these new facts by asking the Court of Appeal to remand the case to the trial court for resentencing in light of the changed circumstances. (Reply brief at pp. 15-16.) In response, the Court of Appeal ordered supplemental briefing on this issue. (*People v. Valencia* (2/3/16, D066907) Slip opn. at p. 21-22.) The People conceded in its supplemental briefing

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[2] The amended information lists the date of conviction in JCF28616 as October 1, 2010. However, the actual date of the conviction appears to be October 1, 2012 with a plea entered in April as noted by the court. (13 R.T. 803; 1 C.T. 209-221.)

that the appropriate remedy would be a limited remand for the trial court to hear a motion to recall the sentence under section 1170.18, subdivision (a). (Supp. Ltr. Brief of Nov. 6, 2015, pp. 4-5.)

The Court of Appeal filed its published opinion on February 3, 2016, affirming appellant's conviction and sentence. The court below found that the issue of whether Proposition 47 provides a right for defendants to have prison priors stricken on facts as presented here was a matter of statutory construction for the court and rejected appellant and the People's requests for a limited remand. (*People v. Valenzuela* (2/3/16 D066907) Slip opn. at pp. 21-22.) The court below found that the ballot materials for Proposition 47 did not indicate an intent that the proposition have retroactive collateral consequences. (*Id.* at p. 22.) Further, the court below found that the enhancement pursuant to section 667.5 "is based on the defendant's status as a recidivist, not on the underlying criminal conduct." (*Id.* at pp. 24-25.)

This court granted appellant's petition for review on March 30, 2016.

ARGUMENT

I

APPELLANT IS ELIGIBLE FOR RESENTENCING ON THE PENALTY ENHANCEMENT FOR SERVING A PRIOR PRISON TERM ON A FELONY CONVICTION AFTER THE SUPERIOR COURT RECLASSIFIED THE UNDERLYING FELONY AS A MISDEMEANOR UNDER THE PROVISIONS OF PROPOSITION 47.

A. Introduction

The issue presented here is whether a defendant is eligible for resentencing on a penalty enhancement for serving a prior prison term on a felony conviction after the superior court reclassifies the underlying felony as a misdemeanor under the provisions of Proposition 47.

The answer is yes for the following reasons: (1) the enhancement is now unauthorized because the elements of section 667.5, subdivision (b), are no longer met and the ameliorative change in the sentencing law occurred while this appeal was pending so the judgment is not final; (2) the stated goals of Proposition 47 and the language of the proposition require that a defendant's sentence not be enhanced by an additional year in prison for conduct that is no longer punishable by a prison term; (3) existing decisions and the ordinary rules of statutory construction support the conclusion that the enhancement should not be applied, and (4) the answer is also supported by an analysis of the right to equal protection guaranteed by the

United States Constitution and the constitution of the State of California.

In addition, even if dismissal of the prison prior enhancement is not required by law, the matter should nevertheless be remanded so that the trial court can consider whether to exercise its discretion to dismiss the enhancement in light of the current classification of the underlying conviction as a misdemeanor.

B. Enhancement Is Unauthorized Because the Elements of Penal Code Section 667.5, subdivision (b), Are No Longer Met

Section 667.5, subdivision (b) adds one year to a defendant's felony sentence for having a prior felony conviction for which he or she was imprisoned. The statute provides, in relevant part: "where the new offense is any felony for which a prison sentence ... is imposed or is not suspended. ... the court shall impose a one-year term for each prior separate prison term ... *for any felony*[.]" (§667.5, subd. (b), italics added.) Thus having a prior felony conviction is an essential ingredient of the prison-prior-enhancement statute.

Proposition 47, in turn, reduced the felony designation for various petty offenses. The initiative amends multiple offense statutes, including particular drug, forgery, and theft provisions, so that most offenders can receive only misdemeanor sentences. (Ballot Pamp., Gen. Elec. (Nov 4, 2014) text of Prop 47, §§ 5-13, pp. 71-73, available at http://vig.cdn.sos.ca.gov/2014/general/pdf/complete-vig.pdf [as of June 3, 2016].) It did so "to maximize alternatives for nonserious, nonviolent

crime, and to invest the savings generated from this act into" ameliorative programs. (*Id.* at §2, p. 70.)

Penal Code section 667.5, subdivision (b) contains four essential elements: (1) defendant was previously convicted of a felony; (2) was imprisoned for that conviction; (3) completed a term imprisonment therefor, and (4) did not remain free for five years of prison custody and the commission of new offense resulting in a felony conviction. (*In re Preston* (2009) 176 Cal.App.4th 1109, 1115.)

Appellant was sentenced to a prison-prior enhancement based on the trial court's finding of a qualifying prior at her sentencing hearing. During the pendency of this appeal, appellant petitioned the trial court to reduce her prison prior offense to a misdemeanor. The court granted appellant's petition. As a consequence, appellant's underlying offense is now a misdemeanor for all purposes[3], therefore, the first element noted above is no longer applicable to appellant's case nor to any other defendant's similarly situated. Penal Code section 667.5, subdivision (b) is not established solely by the fact that a defendant served a term in prison. Penal Code section 667.5, subdivision (b) contains four elements–all of which must be proven before the enhancement may be applied.

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[3] Section 1170.18 subd. (k): "Any felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm ...."

In the opinion below, as well as the recent case of *People v. Acosta*, (2016) 247 Cal.App.4th 1072 (*Acosta*), the courts relied on the fact that a defendant had served a term in prison and had not remained free of a new felony offense for a period of five years to justify their decisions that a section 667.5, subdivision (b) enhancement still applied. Indeed, the court below noted that "having served a prior prison term for a felony conviction is the qualifying criterion for the enhancement." (*People v. Valenzuela, supra*, Slip opn. at p. 25.) Thus the court focused on the prior prison term while completely ignoring the equally important element of the felony conviction.

The purpose of the prior prison term enhancement of section 667.5, subdivision (b) is to "'punish individuals' who have shown that they are 'hardened criminal[s] who [are] undeterred by fear of prison.'" (*In re Preston, supra*, 176 Cal.App.4th at p. 1115; see also *People v. Jones* (1993) 5 Cal.4th 1142, 1148.) However, as a result of Proposition 47, the voters in California have determined that certain behaviors previously classified as felonies may no longer be considered as indicative that a defendant is a "hardened criminal." Thus a person whose conviction has been reduced to a misdemeanor should be considered as someone who never should have been sentenced to prison in the first place given the nature of a conviction for drug offenses or theft offenses which are covered by Proposition 47. As a consequence of Proposition 47, these new misdemeanors

should also be deemed as removed from consideration for the year of punishment because they are misdemeanors for all purposes.

In *Acosta,* the court stated that the phrase "'for all purposes' applies to the simple 'status' of conviction of a felony." (*Acosta, supra*, 247 Cal.App.4th at p. 1078.) The court then held that "[t]he fact that an underlying conviction has been reduced by Proposition 47 does not alter the historical fact of prison term service." (*Ibid.*) The opinion below, as well as *Acosta*'s analysis, fail to consider section 667.5, subdivision (b)'s requirement for proving all four elements of the enhancement, not just three. In fact, *Acosta* relies solely on one element–that of serving a term in prison. However, before the prison term enhancement may be considered, there must first be a felony. Moreover, in enacting Proposition 47, voters evinced a clear intent that covered offenses *never* should have been treated as felonies. It would run contrary to that intent to keep defendants imprisoned longer based on prior offenses that were punished too harshly as felonies in the first place.

C. Proposition 47 Applies Retroactively Because Her Judgment Is Not Yet Final

Proposition 47 applies retroactively because her judgment is not yet final. As a general rule a new statute which lessens punishment will be applied to a non-final judgment. (*In re Estrada* (1965) 63 Cal.2d 740, 748 (*Estrada).*) The

exception to the rule is that a statute will not be given retroactive effect when it contains a savings clause. *(Ibid.*; see *People v. Yearwood* (2013) 213 Cal.App.4th 161, 172 (*Yearwood*) [*Estrada* does not apply where act contains functional equivalent of saving clause].[4] Proposition 47 contains no saving clause or functional equivalent. Indeed, the language of the proposition provides for relief to be granted to defendants whose cases are final. Penal Code section 1170.18, added by Proposition 47, states:

> A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ("this act") had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 496, or 666 of the Penal code, as those sections have been amended or added by this act.

(Pen. Code § 1170.18, subd. (a).)

Proposition 47 provides remedies for those already serving their sentence: a person still serving a sentence can petition for recall of sentence. (Pen. Code, § 1170.18, subd. (a).) In addition, those who have completed their sentences can

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[4] The issue of whether *Estrada* applies to relief under Proposition 36 (Three Strikes Reform Act) was recently decided by this court in *People v. Conley* (6/30/16, S211275)___Cal.4th___. This court in held *Conley* that third strike defendants whose judgments were not yet final did not have an automatic right to resentencing because Proposition 36 provided a means to petition for recall of sentence under section 1170.126.

also apply for relief. (Pen. Code, § 1170.18, subd. (f).) It would make no sense if the provision were to apply to those not yet convicted, those serving time, and those no longer serving time, yet exclude those whose judgments are not yet final. The new law must therefore apply to those whose cases are still on appeal.

Since appellant's case is still on appeal, her judgment is not yet final. (*People v. Vieira* (2005) 35 Cal.4th 264, 306 [judgment not final until time to petition U.S. Supreme court for writ of certiorari has passed]; *Bell v. Maryland* (1964) 378 U.S. 226, 230[84 S.Ct. 1814, 12 L.Ed.2d 822].) Where an amendatory statute mitigates punishment and there is no saving clause, the amendment operates retroactively so the lighter punishment is imposed on the offense. (*People v. Wade* (2012) 204 Cal.App.4th 1142, 1151, citinq *In re Estrada supra* 63 Cal.2d at p. 748; *People v. Babylon* (1985) 39 Cal.3d 719, 722 [defendant entitled to benefit of change in law during pendency of appeal].)

D. Proposition 47's Stated Goals and Voter Intent Require That a Defendant's Sentence Not Be Enhanced by an Additional Year in Prison

Proposition 47, The Safe Neighborhoods and Schools Act, was approved by the voters on November 4, 2014. Penal Code section 1170.18 was included as a new statute by the proposition. The purpose of the proposition and section 1170.18 was to "ensure that prison spending is focused on violent and serious offenses, to maximize alternatives for nonserious, nonviolent crime and to invest the savings

generated from this act into prevention and support in K-12 schools, victim services, and mental health and drug treatment." (Ballot Pamp., Gen. Elec. (Nov. 4, 2014), text of Prop 47, §2, p. 70.)

As Proposition 47 dictates, this court should construe the "for all purposes" language broadly to acheive the law's remedial goals. (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) text of Prop. 47, §§ 15, 18, p. 74.) The official argument in favor of Proposition 47 repeatedly stated that the measure would stop "wasting" money on petty offenses:

> "Proposition 47 will .. [r]educe prison spending and government *waste*." (*Id.*, argument in favor of Prop. 47, p. 38, italics added.
>
> "Stops *wasting* money on warehousing people in prisons for nonviolent crimes ... ." (*Ibid.,* italics added.)
>
> "*For too long,* California's overcrowded prisons have been disproportionately *draining taxpayer dollars* and law enforcement resources, and incarcerating too many people convicted of low-level, nonviolent offenses." (*Ibid.* Italics added.)

This desire to stop wasting money on petty offenses is why section 1170.18 permits defendants to reduce convictions for which they have already been sentenced. It makes no sense, then, that voters would want to continue wasting money on prison time attributable to these same types of petty offenses–in the form of prison-prior enhancements imposed prior to Proposition 47 but yet to be fully served. Nothing in the initiative's text or ballot materials implies such a half-

measured approach.

Moreover, it is not logical that the voters' choice to enact particularly expansive language–"for all purposes"–would be interpreted to *limit* the initiative's reach. (See *People v. Loper* (2015) 60 Cal.4th 115, 1162 ["When interpreting statutes, we give the law its plain, commonsense meaning.']).

E. Existing Decisions and Ordinary Rules of Statutory Construction Support the Conclusion That the Enhancement Should Not Be Applied

Contrary to the court below's decision, there is no language in the proposition which prohibits retroactive application of the collateral consequence that reduction to a misdemeanor entails: striking a prison term enhancement when the underlying felony is reduced to a misdemeanor. The voters expressed their intent that certain drug and theft offenses would no longer be considered appropriate for treatment as felonies–for all purposes. This means that this behavior should not be deemed relevant when considering whether a defendant is a "hardened criminal" and should also not be considered as a felony when determining whether the four elements of section 667.5,subdivision (b) have been met.

Proposition 47 went into effect less than two weeks after appellant was sentenced on this case. As noted above, appellant filed a petition for recall of her sentence pursuant to section 1170.18, subdivision (f) with respect to her prison

prior offense on November 17, 2014.[5] On December 4, 2014, the trial court granted appellant's appellant's petition and ordered her prior conviction to be designated as a misdemeanor. (Supplemental R.T., Vol.1, p. 4 dated Dec. 4, 2014; Supplemental C.T. pp. 1-3, 7.) The trial court clearly understood its authority under the proposition to reduce appellant's prior felony conviction for a violation of section 496, subdivision (a) to a misdemeanor. The court also re-sentenced appellant on the "now" misdemeanor to credit for time served. This establishes that the court believed that it was empowered by the proposition to make an order as though appellant's prison term had never been served. The court further ordered appellant released "forthwith" on JCF28616. (Supp. C.T. p. 7.) Clearly then, by the court's action, the court believed it had the authority to re-sentence appellant; give retroactive effect to her prior, and treat it as a misdemeanor "for all purposes." (§1170.18, subd. (k).)

Even before the passage of Proposition 47, a trial court had the discretion to strike punishment under section 667.5. (*People v. Langston* (2004) 33 Cal.4th 1237, 1241; *People v. Campbell* (1999) 76 Cal.App.4th 305, 311.) The implication

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[5] Section 1170.18 subds. (f) and (g) read as follows: (f) A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors. (g) If the application satisfies the criteria in subdivision (f), the court shall designate the felony offense or offenses as a misdemeanor.

of this discretion is that punishment for recidivism is not only not mandatory, a trial court is invested with the authority to determine that such punishment may not be necessary for the interests of justice in some cases. Since the passage of Proposition 47, and because of the inclusion of the phrase "for all purposes," it is now clear that when a prison prior felony has been reduced to a misdemeanor, imposing the one year term is no longer a matter of discretion, it is unlawful. The voters' interest in reducing prison lengths, saving money, and using the savings for other goals supplants the interest in punishing for recidivist behavior.

As noted above, Proposition 47 provided dual processes to treat pre-initiative eligible felonies as misdemeanors:

(1) For "[a] person currently serving a sentence for [an eligible] conviction," the initiative created a petition process to recall that sentence. (§ 1170.18, subd. (a)).) So long as the crime and petitioner are eligible, then the petitioner shall be "resentenced to a misdemeanor[.]" (*Id.* subd. (b).)

(2) For "[a] person who has completed his or her sentence for [an eligible] conviction." there is an application process to "have the felony conviction or convictions designated as misdemeanors." (*Id.* subd. (f).)

Under either process, the reduced conviction "shall be considered a misdemeanor *for all purposes*" (except it will still ban the defendant from possessing a firearm). (*Id.* subd. (k), italics added.)

In the opinion below, the Court of Appeal noted that there was no procedure for striking a prison prior if the underlying felony was reduced to a misdemeanor. (*Valenzuela, supra*, Slip opn. at p. 23.) But section 1170.18 does not stand alone in California's criminal justice system. Indeed, section 1170.18 specifically provides that "[n]othing in this section is intended to diminish or abrogate any rights or remedies otherwise available to the petitioner or appellant." (§ 1170.18, subd (m).) Thus section 1170.18 can work in tandem with other procedures to afford defendants complete relief. "Both the Legislature and the electorate by the initiative process are deemed to be aware of laws in effect at the time they enact new laws and are conclusively presumed to have enacted the new laws in light of existing laws having direct bearing upon them." (*Williams v. County of San Joaquin* (1990) 225 Cal.App.3d 1326, 1332.

Proposition 47 demonstrates that the electorate did intend that eligible offenders like appellant be shielded from the collateral consequences of prior prison terms stemming from felonies that the law now recognizes as misdemeanors. This is apparent by the sole limitation contained within the Proposition 47 sentencing reform which maintains the continued ban on the ownership of firearms stemming from the prior felony status. Moreover the ballot pamphlet materials state that the goal of Proposition 47 was to "ensure that prison spending is focused on violent and serious offenses, to maximize alternative for

nonserious, nonviolent crime, and to invest the savings generated from this act into prevention and support in K-12 schools, victim services, and mental health and drug treatment." (Ballot Pamp., Gen. Elec. (Nov. 4, 2014), text of Prop 47, §2, p.70.)

In the opinion below, however, the court stated that nothing in the language of the proposition or the ballot materials indicate that defendants should be shielded from the collateral consequences of prior prison terms. (*People v. Valenzuela, supra*, Slip opn. at p. 23.) Yet the court below's position ignores the initiative's statutory context and plain language. Not only does section 1170.18 apply to a "person *currently* serving a sentence for [an eligible] conviction," (§ 1170.18, subd. (a), italics added), but it also applies to an "person who had *completed* his or her sentence for [an eligible] conviction" (§ 1170.18, subd. (f), italics added.) Moreover, once a felony offense is reduced pursuant to either of those subdivisions, it "shall be considered a misdemeanor *for all purposes*[.]" (§ 1170.18, subd. (k), italics added.) Since the phrase "misdemeanor for all purposes" applies to a conviction for which the defendant has already completed the sentence, that phrase must also refer to the conviction's post-sentence effects. (See *People v. Ortega* (2015) 240 Cal.App.4th 956, 966 [" ' "Courts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage." ' "], quoting *Ennabe v. Manosa* (2014) 58 Cal.4th

697, 719.) Moreover, identical language appearing in separate statutory provisions should receive the same interpretation when the statutes cover the same or analogous subject matter. (*People v. Cornett* (2012) 53 Cal.4th 1261, 1269, fn. 6.)

And perhaps the most important post-sentence effect of a felony conviction is its ability to enhance subsequent felony sentences. In *People v. Park* (2013) 56 Cal.4th 782, 798-799 (*Park)*, this court held that a wobbler offense pleaded to as a felony but later reduced to a misdemeanor pursuant to section 17, subdivision (b) could not be used to enhance a subesquent sentence. Once a trial court uses its authority under section 17, subdivision (b), "the statute generally has been construed in accordance with its plain language to mean that the offense is a misdemeanor 'for all purposes.'" (*Id.* at p. 793.) And these purposes "have long" included the offense's ability to serve "as a prior felony conviction in subsequent prosecution":

> [O]ne of the "chief" reasons for reducing a wobbler to a misdemeanor "is that under such circumstances the offense is not considered to be serious enough to entitle the court to resort to it as a prior conviction of a felony for the purpose of increasing the penalty for a subsequent crime."

(*Id.* at p. 794, quoting *In re Rogers* (1937) 20 Cal.App.2d 397, 400-401.)

Recently, in *People v. Abdallah* (2016) 246 Cal.App.4th 736 (Abdallah), the Court of Appeal noted that "the same logic applies" in the Proposition 47 context:

> Once the trial court recalled Abdallah's 2011 felony sentence and resentenced him to a misdemeanor, section 1170.18, subdivision (k) reclassified that conviction as a misdemeanor 'for all purposes.' [Citation.] Therefore, at the time of sentencing in this case, Abdallah was not a person who had committed 'an offense which result[ed] in a felony conviction' ... .

(*Abdallah, supra,* at p. 746, citing *Park, supra*, 56 Cal.4th at p. 799.)

Proposition 47 came into effect between the time *Abdallah* was convicted by a jury and before he was sentenced on that conviction. *Abdallah's* sentence included a one year enhancement pursuant to section 667.5, subdivision (b). *Abdallah* had been released from prison in 2005 and was arrested for a new felony in 2009. He was convicted for the latter felony in 2011. Pursuant to Proposition 47, *Abdallah* petitioned the trial court to reduce the 2011 conviction to a misdemeanor. The court granted *Abdallah's* motion but still sentenced him to the one year enhancement for the previous felony. The Court of Appeal held that the "misdemeanor for all purposes" language of section 1170.18, subdivision (k), meant that *Abdallah* no longer qualified for the one year enhancement. (*People v. Abdallah, supra,* Slip op. at p. 2.) The court in *Abdallah* found that the five year "wash out" period of section 667.5, subdivision (b), was not tolled for *Abdallah's* 2005 prior when the 2009 offense was determined to be a misdemeanor for all purposes. Thus *Abdallah* is similar to the present case in that one of the four elements of section 667.5, subdivision (b) is absent and imposition of the enhancement was deemed not lawful.

The *Abdallah* court distinguished its case from appellant's case where the conviction was reduced after the enhancement was imposed. (*Ibid.*) However, it soundly rejected the reasoning in the opinion below that a reduction of a prior conviction "for all purposes" under Proposition 47 has no effect on that conviction's ability to support a prison-prior enhancement. (*Ibid.*)

Abdallah also rejected the court below's reasoning that the enhancement is based on a defendant's recidivist status, and not on the underlying conduct. A defendant's recidivist status in immaterial since one of the main reasons to reduce a prior conviction it to prevent a court from using it as a basis for a recidivist enhancement. (*Id.* at p. 748.)

As discussed above, Valenzuela was convicted and sentenced before the passage of Proposition 47. Her sentence included a one year enhancement pursuant to section 667.5, subdivision (b). Subsequent to her sentencing and during the pendency of this appeal, she petitioned to have that prior felony reduced to a misdemeanor. Her petition was granted by the trial court. As noted in the opinion below, the Court of Appeal requested supplemental briefing to address the impact of the trial court's decision to reduce the prior felony to a misdemeanor. In its response, the People recommended to the Court of Appeal that it stay the appeal and "order a limited remand for the trial court to hear a petition in this case under section 1170.18, subdivision (a), or an application under section 1170.18,

subdivision (f), to strike the prison prior under the "misdemeanor for all purposes" provision of section 1170.18, subdivision (k)." (AG Letter Brief, Nov. 30, 2016, p. 1.)

In the opinion below, the Court of Appeal stated its disagreement with the People's recommendation for a remand for the trial court to determine whether to strike the one year enhancement. (*People v. Valenzuela, supra,* at p. 21.) The court below held that this issue was a question of statutory construction which the Court of Appeal should decide. The court stated that while section 1170.18 provided a mechanism for reduction of a felony to a misdemeanor, it did not provide a procedure for striking a prison prior if the underlying felony was subsequently reduced to a misdemeanor[6]. (*Id.* at p. 22.) The court stated that nothing in the language of the ballot materials indicates an intent that section 1170.18, subdivision (k), have retroactive collateral consequences. (*Ibid.*) Further, the court expressed its disagreement with appellant's reliance on this court's decision *People v. Park* (2013) 56 Cal.4th 782, as well as *People v. Flores* (1979)

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[6] In the recent case of *People v. Vasquez* (2016) 247 Cal.App.4th 513, the court held that Proposition 47 does not provide a procedure to retroactively vacate or change a sentence that was already completed. *Vasquez* was attempting to vacate his prison sentence in order to influence an immigration proceeding. (*Id.* Slip opn. at pp. 3, fn 2; 6.) The discussion and reasoning in *Vasquez* do not apply here since appellant's sentence is not complete and the remedy she seeks relates specifically to her current prison term.

92 Cal.App.3d 461. (*Id.* at pp. 23-24.)

If prison-prior enhancements are allowed to stand, however, after their underlying convictions are no longer felonies, the taxpayers will continue to pay for prison time attributable to petty offenses–contrary to the voters' clear intent in enacting Proposition 47. Moreover and contrary to the court below's reasoning, both *People v. Park, supra*, 56 Cal.4th 782, and *People v. Flores, supra,* 92 Cal.App.3d 461, do apply to the issues in this case. As discussed above, the applicability of the one year enhancement is dependent on the continued characterization of the prior as a felony, and a downgrade of that status to a misdemeanor bars its use as a sentence aggravator. (See *People v. Flores, supra*, 92 Cal.App.3d at p. 471.) In *Flores*, the defendant served time in prison after suffering a felony conviction in 1966 for the possession of marijuana. (*Id.*, at p. 470.) Despite the fact that marijuana possession had become a misdemeanor in 1975, the trial court nonetheless enhanced Flores' sentence by one year in light of his service of the 1966 prior prison term. (*Ibid.*; Cal. Pen Code § 667.5, subd. (b).)

On appeal, Flores argued that he should not have been subjected to the enhancement because its underlying criminal conduct no longer amounted to a felony. (*People v. Flores, supra*, 92 Cal.App.3d at p. 470.) The Court of Appeal in *Flores* found that the imposition of the enhancement was improper. "The amendatory act imposing the lighter sentence for possession of marijuana," noted

the Court of Appeal, "can obviously be applied constitutionally to prevent the enhancement of a new sentence by reason of a prior conviction of possession." (*People v. Flores, supra*, 92 Cal.App.3d at p. 471.) It further noted that the change in the law specifically prohibited the use of a past record of marijuana possession as means by which to impose a collateral sanction. (*Ibid.*) The Court of Appeal in *Flores* concluded that "[i]n view of the express language of the statute and the obvious legislative purpose, it would be unreasonable to hold that the Legislature intended that one who had already served a felony sentence for possession of marijuana should be subjected to the additional criminal sanction of sentence enhancement." (*Id.* at p. 473.)

In the opinion below, the Court of Appeal distinguished *Flores* stating that the Legislature reduced the crime of marijuana possession to a misdemeanor before the defendant committed the new offense. The court below noted that appellant's conviction was reduced to a misdemeanor after she committed and was sentenced for the current offenses. (*People v. Valenzuela, Slip op. at pp. 23-24.*) Such a matter of timing as to the date of the passage of Proposition 47 and the date of sentencing, however, should not be used as a bar in cases like appellant's. Proposition 47's use of the term "for all purposes" is the equivalent to the specific statutory restriction discussed in *Flores* against use of past marijuana convictions.

Further, this court has recognized that when "when a wobbler is reduced to a

misdemeanor in accordance with the statutory procedures, the offense thereafter is deemed a misdemeanor for all purposes, except when the Legislature has specifically directed otherwise." (*People v. Park supra,* 56 Cal.4th at p. 795, internal quotations omitted.) Indeed, subdivision (k) of section 1170.18 states that "[a]ny felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6."

Here, the voters did not "direct otherwise." Thus phrase "for all purposes" should include the recognition that sentencing enhancements such as section 667.5, subdivision (b) should be stricken where the underlying conviction is no longer a felony. Moreover, this interpretation is consistent with this court's reasoning in *People v. Park, supra*, 56 Cal.4th at p. 799, ["we conclude that when a wobbler has been reduced to a misdemeanor the prior conviction does not constitute a prior felony conviction within the meaning of section 667(a)"].)

Further, this court reasoned in *Park* that: "[w]hen the court properly exercises its discretion to reduce a wobbler to a misdemeanor, it has found that the felony punishment, *and its consequences*, are not appropriate for that particular

defendant." (*Park, supra,* at p. 801, italics added.)

Thus appellant requests that this court find that when the underlying felony used for an enhancement pursuant to section 667.5, subdivision (b), is reduced to a misdemeanor, the one year prison term enhancement should be stricken.

F. The Failure to Apply Proposition 47 to Appellant Would Deny her Equal Protection Under the Fourteenth Amendment.

Appellant submits that a failure to extend the ameliorative provisions of Proposition 47 to her cannot pass constitutional muster. "The equal protection clauses are found in the Fourteenth Amendment to the United States Constitution and section 7, subdivision (a) of article I of the California Constitution. The scope and effect of the two clauses is the same." (*In re Evans* (1996) 49 Cal.App.4th 1263, 1270.) "[N]either clause prohibits legislative bodies from making classifications; they simply require that laws or other governmental regulations be justified by sufficient reasons." (*Id.* at p. 1270.) Unless a law proceeds along suspect lines or infringes on a constitutional right, it will be upheld if it is supported by a rational basis for its enactment. (*Ibid.*) In other words, "[t]he Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes. [citation omitted.] It also imposes a requirement of some rationality in the nature of the class singled out." (*Rinaldi v. Yeager* (1966) 384 U.S. 305, 308-309 [86 S.Ct. 1497, 16 L.Ed.2d 577].)

The equal protection clause has been applied to determine whether ameliorative statutes should be given retroactive application. "Even where the Legislature expressly intends an ameliorative provision to apply prospectively, constitutional consideration may require that it be applied retroactively. In such a case, the finality of the judgment is no impediment to retroactive application of the new law. (*In re Chavez* (2004) 114 Cal.App.4th 989, 1000.)

In the opinion below, the Court of Appeal held that appellant's equal protection rights were not violated by a statute which specifies that it is prospective only. (*Valenzuela, supra* at p. 26.) However, as appellant has argued here, the statute does not specifiy that it is prospective only. Moreover, Proposition 47 does have retroactive application, including the retroactive right to have her prision prior declared a misdemeanor. The court below has held that in spite of that right, there is no right to retroactive application to the collateral effects of such a reduction – the right to strike a prison term where the offense is now deemed a misdemeanor.

In this case, no rational basis can justify appellant's exclusion from the benefits of Proposition 47, since she meets the requirements for relief and only differs from other possession of stolen property offenders by the fact that her criminal judgment, still not final, was issued prior to the passage of the initiative. Put more succinctly, where appellant finds herself in the criminal justice system

should have no role to play in providing him the relief to which the electorate believes that he is entitled. The aforementioned prior prison enhancements should be stricken. It would indeed by an absurd result to read into the statute that "for all purposes" is qualified by an exception not contained within the statute itself. In other words, it would be an absurd result to provide a mechanism for reducing felonies to misdemeanors where the sentence was already served yet not intend the collateral benefits of precluding enhanced penalties under section 665.5, subdivision (b).

G. Alternatively, Remand So The Trial Court Can Exercise Its Discretion

Even if this court finds the reduction to a misdemeanor for a felony where a prison term was served does not require dismissal of the enhancement, the change in status is a matter that the trial court should consider in determining whether the prison prior enhancement is warranted or whether, instead, it should exercise its discretion to dismiss the enhancement. The expression of intent by the voters should be taken into serious consideration by trial judges when presented with such enhancements based on prison terms for offenses now deemed to be misdemeanors for all purposes.

CONCLUSION

The goal of Proposition 47 was to ensure that prison spending was focused on violent and serious offenses. To that end, drug and theft-related offenses were reduced from felonies to misdemeanors. Following the normal rules for statutory construction this court should find that it was the intent of the voters to allow for its retroactive application. Moreover, when choosing between punishing recidivism or giving full impact to the intent of the voters, the weight of the analysis should clearly fall on an interpretation which supports striking sentencing enhancements when the underlying offense is no longer a felony. Further, when appellant's prison prior was reduced to a misdemeanor, one of the essential elements for imposing a prison term for section 667.5, subdivision (b) was eliminated. To give proper effect to Proposition 47's "misdemeanor for all purposes" language, the one year enhancement should be stricken. Thus, based on the foregoing appellant requests that the sentence to one year in prison under Penal Code section 667.5, subdivision (b), be stricken.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I am the attorney for appellant. Based upon the word-count of the Word Perfect program, I hereby certify the length of the text of the foregoing brief, including footnotes, but not including tables, proof of service or this certificate is 6,692 words. (California Rules of Court, rule 8.360.)

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

Date: July 8, 2016

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DECLARATION OF SERVICE BY U.S. MAIL AND ELECTRONIC SERVICE

Case Name: People v. Valenzuela **Case Number: S232900**

I declare: I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action. My business address is P.O. Box 45338, San Diego, CA 92145-0338. On July 8, 2016 I served the foregoing document described as **APPELLANT'S MERITS BRIEF** on all parties to this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Clerk of the Superior Court, Imperial County Courthouse
Attn: Hon. Christopher J. Plourd
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El Centro, CA 92243

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and I further declare: I electronically served a copy of the above document from address: sjcarrollesq@gmail.com on July8, 2016 to:
Appellate Defenders, Inc. at eservice-court@adi-sandiego.com
The Attorney General at ADIEService@doj.ca.gov.
An electronic copy was submitted to the Court of Appeal at https://www.truefiling.com

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that I signed this declaration on July 8, 2016 in San Diego California.

Declarant: Steven J. Carroll Signature: