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

REPLY BRIEF ON MERITS

STEVEN J CARROLL
Attorney at Law
P.O. Box 45338
San Diego, CA 92145-0338
(858) 368-9181
sjcarrollesq@gmail.com
CA State Bar # 60761
Attorney for Appellant
By Appointment of
The Supreme Court

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Authority **Page**

U.S. Supreme Court Cases

Califoria Supreme Court Cases

California Appellate Court Cases

Statutes, Rules, Constitutions, Other Authority

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?

INTRODUCTION

The jury reached its verdict with regard to the offenses charged against appellant on September 23, 2014. (1 C.T. 157.) She waived her right to a jury trial as to the two alleged prison prior offenses and the court found one of those priors to be valid. (1 C.T. 207-208.) Appellant was then sentenced on October 24, 2014. (2 C.T. 276.) As noted in her opening brief, appellant was sentenced to a one year enhancement pursuant to California Penal Code section 667.5, subdivision (b),[1] for the prior conviction. Appellant filed a notice of appeal on October 27, 2014. (2 C.T. 281.) Proposition 47 was passed by the voters on November 4, 2014. Appellant filed a petition pursuant to section 1170.18, subdivision (f) on November 7, 2014. On December 4, 2014, the trial court granted appellant's petition and ordered her prior conviction to be designated as a misdemeanor. (Supp. C.T. Vol. 1, p.4; 2d Supp. C.T. pp. 1-3, 7.)

The issue presented here appears to turn on whether Proposition 47, and in

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[1] Hereafter all references will be to the Penal Code unless otherwise noted.

particular, section 1170.18, was intended to effect the collateral consequences for felony offenses which are reduced to misdemeanors under the authority of the Proposition if the reduction to a misdemeanor did not occur until after the sentence was imposed.

The term "appears to turn" is used because during the processing of appellant's appeal, the case of *People v. Abdallah* (2016) 246 Cal.App.4th 736 (*Abdallah*) was decided. In *Abdallah's* case, Proposition 47 came into effect between the time *Abdallah* was convicted and before he was sentenced. *Abdallah,* however, moved to have his prison prior reduced to a misdemeanor before he was sentenced. (*Abdallah, supra*, at p. 746.) There, the Court of Appeal held that the Proposition 47 authorization to reduce a felony conviction to a misdemeanor "for all purposes" meant that the defendant "was not a person who had committed 'an offense which result[ed] in a felony conviction"... ." (*Ibid.*)

Here, respondent does not take issue with the decision in *Abdallah.* In fact, respondent relies on the holding in *Abdallah* to oppose appellant's claim for relief. (ABM 9.) Respondent accepts that for defendants in *Abdallah's* circumstance, there is no retroactivity issue and *Abdallah's* status of having served a prison term does not bar striking a prison term enhancement. Thus the issue appears to turn on whether the timing of the reduction of appellant's prior precludes her from relief or

whether this timing issue is irrelevant to the implementation of the benefits of Proposition 47.

Moreover, respondent concedes that section 1170.18, subdivisions (a), (b), (g) and (f) are "provisions made expressly retroactive through establishment of a petition procedure." (ABM 15-16) Respondent asserts, however, that section 1170.18, subdivision (k) only states that "a felony reduced to a misdemeanor under Proposition 47 is a 'misdemeanor for all purposes'" but this particular subsection "does not mitigate the punishment" therefore it is not retroactive. (ABM 15-16.) Appellant notes, however, that section 1170.18, subdivision (k), expressly incorporates subdivisions (b) and (g) in its language.[2] Thus the retroactivity conceded as to subsections (a), (b), (f), and (g) is carried over and subsumed into subsection (k). Nevertheless, "retroactivity" in so far as that term applies to the collateral consequences of negating enhancements under section 665.7, subdivision (b) appears to be conceded by the People, but only if the prior is stricken before the trial court imposes a sentence.

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[2] Sec. 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. . . ."

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. Summary of Appellant's Argument

In her opening brief on the merits, appellant argued that 1) the prison prior enhancement was not authorized because a reduction of her prior to a misdemeanor eliminates the section 667.5, subdivision (b), element that a defendant was previously convicted of a felony; 2) that Proposition 47 applies to appellant because her conviction is not yet final therefore the benefits of a new statute lessening punishment should be applied to her case; 3) that Proposition 47's goals and the voters' intent are served by holding that prison prior enhancements should no longer apply when a felony prior is reduced to a misdemeanor; 4) that existing decisions and ordinary rules of statutory construction support a conclusion that the enhancement should not be imposed on appellant, and 5) that a failure to apply Proposition 47's benefits to appellant would deny her equal protection under the Fourteenth Amendment.

B. Summary of Respondent's Argument

Respondent's principal argument is that because Valenzuela was sentenced by the trial judge to a one year prison term before that same judge reduced her prison prior to a misdemeanor, Valenzuela is not entitled to the relief she seeks, that is, striking the enhancement. (ABM 4-5.) Respondent's justification for its position is that this would give retroactive application to Proposition 47 and the voters did not intend to provide such retroactivity. (ABM 7-8, 12-13.) As a corollary to this argument, respondent argues that because Valenzuela's prison prior was still valid at the time the trial judge sentenced her, it is too late for any court to strike her prison term enhancement. (ABM 8-9.)

Respondent's also asserts that the timing of the events in Valenzuela's case are critical to this issue and thus distinguish the holdings in *People v. Abdallah* (2016) 246 Cal.App.4th 736, *People v. Park* (2013) 56 Cal.4th 782 and *People v. Flores* (1979) 92 Cal.App.3d 461. (ABM 9-11.) Respondent also argues that this court's reasoning in *In re Estrada* (1965) 63 Cal.2d 740 [when the Legislature or electorate amends a statute to reduce the punishment for a particular criminal offense, it is assumed that the voters intent was to apply the amendment to all cases which are not yet final] does not apply to Proposition 47 and Valenzuela's request for relief. (ABM 12-20.)

Respondent additionally argues that providing appellant with her requested relief is not supported by Proposition 47's stated goals of not wasting money and to focus prison spending on violent and serious offenses. (ABM 20-22.) Finally, respondent asserts that the term "misdemeanor for all purposes" as that term is used in Penal Code section 17, is applied prospectively only. Thus it should be applied prospectively only as to this statute as well. (ABM 23-25.)

Respondent further argues that a claim that prospective only application of Proposition 47 violates equal protection is either forfeited because it was not raised in appellant's petition for review, or it lacks merit. (ABM 25-28) Respondent also argues that there is nothing in Proposition 47 which requires that this case be remanded so that the trial court may exercise its discretion to strike the enhancement. (ABM 28.)

C. Resolution of This Issue

1) Retroactivity in General

Section 1170.18, subdivision (a) provides a process, a set of rules, and consequences, including the possibility of a one year period of parole, for petitions presented when the particular defendant is still serving his or her felony sentence. Section 1170.18, subdivision (f) provides a similar process for petitioning the court for a reduction to a misdemeanor when the defendant has already completed his or

her sentence with no authorization for any period of parole following the reduction.

It is relatively easy to discern the value to a defendant who is still serving a felony sentence because when his or her felony is reduced to a misdemeanor the statute provides that he or she should be re-sentenced to misdemeanor penalties.

What, however, is the value to a defendant who has already completed his or her sentence and therefore does not need to have his or her sentence reduced to misdemeanor penalties, unless the reduction to a misdemeanor also carries the benefit that any collateral consequences for those felony priors can no longer be imposed? In other words, why would the voters have set up the benefit of a reduction of prior felony convictions "for all purposes"[3] where his or her sentence has been completed unless the voters intended that the consequences of such prior felonies would not continue to follow those defendants into the future?

Respondent notes that "statutes are presumed to be prospective, not retroactive, and nothing in the language or history of Proposition 47 indicates that voters intended subdivision (k) to operate retroactively in this manner." (ABM 2.) Despite that language from respondent, as noted above, respondent concedes that section 1170.18, subdivisions (a),(b), (f) and (g) are retroactive. (ABM 16.)

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[3] Section 1170.18, subdivision (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...."

Respondent attempts, however, to argue that this issue is governed by subdivision (k) and since subdivision (k) "does not mitigate punishment," appellant's claim must fail. Notwithstanding respondent's assertion, the essential thrust of section 1170.18 is to "retroactively" reach back to prior felony convictions and turn them into misdemeanors. It is a fallacy to say that nothing in the language of Proposition 47 indicates a voter intent to operate retroactively, particularly when retroactivity is conceded as to four of the subsections of the operative statute.

Admittedly, there are portions of the proposition which are specifically prospective. Those portions are reflected in the changes to the penal code sections which reduce certain felonies to misdemeanors such as section 459.5, commercial burglary; section 473, forgery where the amount does not exceed $950, section 496, receiving stolen property where the value does not exceed $950, and certain drug possession offenses.

As it concerns section 1170.18, however, even the title of the section indicates a retroactive application: "**Petition for recall of sentence; resentencing procedures; reduction of felonies to misdemeanors.**" Words like "recall", "resentencing" and "reduction of felonies to misdemeanors" all support the conclusion that this proposition was to have a retroactive effect. Moreover, as noted above, unless the collateral consequences for former felony convictions are

eliminated, there is little value to a defendant in reducing those prior felonies to misdemeanors in cases where the sentence is already completed. By extending the benefit of reductions to misdemeanor for felony convictions where a sentence is completed, the voters clearly demonstrated their intent that such former felony convictions would not be treated in the future as felonies–for any purpose, which would include prison prior enhancements.

2) Is Timing Everything?

The Court of Appeal in the opinion below found that a section 667.5, subdivision (b), enhancement is based on a defendant's "status" as a recidivist and not on the continuing felony characterization of the criminal conduct. (*People v. Valenzuela* (2/13/16 D066907) Slip opn. at p. 24.) Thus it would appear that regardless of the timing of a reduction of a prison prior to a misdemeanor, the court below would always authorize the use of a section 667.5, subdivision (b) enhancement because the defendant's "status" as having served a prison term justifies its imposition. Adhering to the court below's reasoning, since a defendant's prison term was based on a felony conviction, his or her "status" would always justify application of a prison term enhancement.

Such reasoning, however, is in conflict with the holding in *People v. Abdallah* (2016) 246 Cal.App.397. As noted above, in *Abdallah*, the court found

that the section 667.5 enhancement should be stricken because *Abdallah* had his prison prior conviction reduced to a misdemeanor before he was sentenced on a new conviction. (*Id.* at p. 748.) As noted, Valenzuela had her prison prior conviction reduced to a misdemeanor after she was already sentenced for her new felony.

For *Abdallah*, the court found that at the time of his sentence, he had not suffered a prior felony conviction because the prior was reduced to a misdemeanor. (*Ibid.*) The only way to reach that conclusion is to find that the "for all purposes" language relates back to the original felony conviction and find that its reduced-to-misdemeanor status negates an element of section 667.5, subdivision (b). *Abdallah's* "status" as a recidivist was no longer relevant.

For Valenzuela, however, the court below found that such punishment was valid because her "status" of having served a term in prison demonstrated that she failed to learn from her prison term how to comport her conduct with the law. Thus the court below held that it was appropriate to punish her with an additional year in prison. Taking the Court of Appeal's reasoning to its logical reach, a defendant who has served a term in prison, regardless of a later reduction to a misdemeanor, would always be subject to the enhancement because that "status" of having served a term in prison will always exist.

Such a result creates an obvious and absurd conflict between the two courts of appeal. If the rationale for imposing a one year penalty is to punish a defendant for his or her recidivism–that is, his or her failure to learn how to comport with the law from a prison term–how is it logical to say that *Abdallah* should not be so punished but it is still appropriate punishment for Valenzuela and other defendants similarly situated? The issue of the timing of the reduction does not truly address this absurd result. In a similar manner, respondent's concession that four subsections of section 1170.18 are retroactive, but a fifth subsection which specifically refers to and incorporates two of the conceded subsections , is not also a part of the retroactive nature of the statute is likewise untenable.

Appellant asserts that the *Abdallah* holding is correct not because of the timing of his petition for reduction but rather because the electorate believed that the conduct underlying the conviction should not have been considered felonious, thus a prison term was not appropriate for such conduct. Convictions for these offenses will not constitute a felony in the future, and previous convictions for that conduct should not be considered as felony behavior for purposes of sentencing enhancements. This logic is also supported by section 1170.18, subdivision (a)'s requirement that a defendant still serving a prison term should be released from prison and sentenced to misdemeanor penalties.

3) Lack of Finality is Important

Valenzuela's case is not final, therefore, there is still time to provide to her the benefits of Proposition 47 intended by the voters. To hold otherwise would penalize a whole class of defendants whose cases were in progress or only recently completed when the proposition passed. Clearly it was the intent of the voters that the proposition benefit all persons with qualifying prior felony convictions. Section 1170.18, subdivision (j) provides that petitions pursuant to the section must be filed within three years of the effective date of the act. This establishes that the act applies to persons like appellant, who had new cases in progress at the time the act was approved and persons with no pending cases, as well to persons like *Abdallah* who were convicted of new offenses after the effective date of the act. As such, cases like appellant's raise issues unresolved by the proposition itself: what is the effect of prior convictions for defendant's who were sentenced prior to the act and who petitioned to have the prior reduced to a misdemeanor while an appeal was pending?

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]. Proposition 47 contains no saving clause or functional equivalent.

Respondent agrees that *Estrada* stands for the proposition "that where the Legislature (or electorate) amend a statute to reduce the punishment for a particular criminal offense, it is assumed, absent a savings clause or contrary evidence of legislative (or voter) intent, that the Legislature (or electorate) intended the amended statute apply to all defendant's whose judgments are not yet final on the statute's operative date." (ABM 12-13, citing *Estrada, supra,* at pp. 742-748.) Respondent also noted that the statute at issue in *Estrada* was silent as to retroactivity. (ABM 13.) Respondent further cited *Estrada* for this court's reasoning that retroactivity must have been intended by the Legislature because, "there is ordinarily no reason to continue imposing the more severe penalty, beyond simply 'satisfy[ing] a desire for vengeance.'" (ABM 13 quoting from *Estrada, supra*, 63 Cal.2d at p. 745.)

Respondent, however, argues that *Estrada* should not apply to Proposition 47 because *Estrada's* role is limited with regard to "prospective versus retrospective operation" and interpreting *Estrada* too broadly would "endanger the default rule of prospective operation." (ABM 13, quoting *People v. Brown* (2012)

54 Cal.4th 314, 324.)

That "danger" however is not presented here. As appellant has demonstrated and as respondent has conceded in part, the essential nature of section 1170.18 is retrospective. That is, when a petition is presented pursuant to section 1170.18, courts are required to look back at a defendant's prior record and reduce prior felonies to misdemeanors if they fit within the statute. Morever, that retroactive reduction shall occur whether the defendant is still serving a felony sentence or has completed his or her sentence. This clearly demonstrates that Proposition 47 is intended to have retroactive effect. Thus this court's holding in *Estrada* is applicable here, and since appellant's case in not final, she should be afforded the benefits that the statute confers on persons in her circumstance.

4) Propositions 47's goals and the voter's intent are served by granting appellant relief.

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.) In other words, the goal and intent of Proposition 47 was to reclassify certain criminal offenses as misdemeanor conduct so that the State's

resources for incarceration could focus on more serious criminal behavior.

In that regard, the electorate determined that former felonies like receiving stolen property with a value less than $950 should not be treated or considered as felonious behavior. Likewise, convictions for those former felonies would be reduced to misdemeanors for all purposes in order to reflect that voter intent.

Appellant urges that this court construe the "for all purposes" language broadly in order to achieve the law's remedial goals. (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) text of Prop. 47, §§ 15, 18, p. 74.) Treating these former felony convictions as misdemeanors for all purposes would take precedence over the reasoning of the opinion below that appellant's recidivist status continues to validate an enhancement under section 667.5, subdivision (b). If the voters intend that such behavior not be considered felonious, then enhanced punishment under a recidivist statute would not promote the goals of this proposition.

5) Ordinary rules of statutory construction and appellate court decisions support granting appellant's claim.

In the opinion below, 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.) Respondent, likewise, argues the same point. (ABM 12.) Such reasoning, however, 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.)

Respondent attempts to argue that the phrase "for all purposes" does not reach the issue presented here: enhancements as a result of having served a prior term in prison when the prior is reduced to a misdemeanor. Respondent's argument on this point, however, is contrary to its own acceptance of the Court of Appeal's decision in *People v. Abdallah.*. (ABM 9-10.)

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.)

Respondent notes that the use of the phrase "for all purposes" in the context of section 17, subdivision (b) is prospective only, therefore the use of that phrase in section 1170.18 should also be prospective only. (ABM 24.) There is a distinction between these two statutes, however. In the circumstances where a court declares a "wobbler" to be a misdemeanor, that context is naturally prospective: the court declares that a charged felony, which may also be treated as a misdemeanor, is a misdemeanor.

In the context of section 1170.18, however, the statute declares that if a defendant petitions the court to have a conviction for a felony be reduced to a misdemeanor, whether the sentence for that felony is still being served or not, and be resentenced as though the offense had always been a misdemeanor, the statute by its construction is retrospective and "retroactive." The very nature of the statute requires the court to reach back in time and correct the record as though the offense was always a misdemeanor.

In addition, action by the court under section 17, subdivision (b) is discretionary. Section 1170.18, subdivision (g), however, states: If the application satisfies the criteria in subdivision (f), the court **shall** designate the felony offense or offenses as a misdemeanor. (§1170.18, subd. (g), emphasis added.) The

mandatory language of section 1170.18, subdivision (g), demonstrates a voter intent that the court not be permitted to use discretion concerning reducing a qualified conviction to a misdemeanor.

In the briefing below and appellant's opening brief on the merits, appellant relied on the reasoning of this court in *People v. Park* (2013) 56 Cal.4th 782 (*Park*). The court below and respondent have both pointed out the distinctions between the timing of issues in appellant's case and the timing of the issues in *Park*. In *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 subsequent sentence. (*Id.* at pp. 798-799.) Appellant noted in the briefing below that 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.) This court addressed in *Park* whether the former felony could be used as a prior felony conviction in a subsequent prosecution. This court stated:

> [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.)

Likewise, in *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.)

Respondent distinguishes *Park* and argues that the reasoning is *Park* is not applicable here because *Park's* prior felony conviction was reduced to a misdemeanor pursuant to section 17, subdivision (b) prior to his commission of a new felony which was the subject of the appeal. Respondent also distinguishes *People v. Flores* (1979) 92 Cal.App.3d 461 (*Flores*), relied on by appellant, because of timing differences. In *Flores* the Legislature reduced the offense of marijuana possession, which served as the basis of the prison term enhancement, to a misdemeanor before the defendant committed a new felony. (ABM 10-11.)

Appellant maintains, however, that the underlying reasoning forming the bases of the decisions in *Park* and *Flores* do apply to the issues in this case despite the timing distinctions. The applicability of the one year enhancement under section 667.5, subdivision (b) is dependent on the characterization of the prior as a felony. Reducing the conviction to a misdemeanor bars its use as a sentence enhancement. (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.)

The same logic applies here: it is unreasonable to hold that the electorate intended that a defendant, who served a prison term for a felony conviction which the electorate determined to be considered as misdemeanor conduct for all purposes, should still be subject to a one year enhancement when the statutory authority for the enhancement requires a felony conviction. The proposition provides the mechanism for a defendant to reach back in time and have previously considered felony behavior to now be treated a misdemeanor conduct instead–for all purposes, and appellant's most recent conviction is not yet final.

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.) Here, the electorate has not directed otherwise. 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." Thus, the gun possession issue is the only voter limitation reflected in the statute.

Since the voters did not direct otherwise, the 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. This interpretation is consistent with this court's reasoning in *Park*: "[W]e 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)." (*Park, supra* at p. 799.)

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, emphasis added.)

6) Denial of Equal Protection

Respondent is correct that appellant did not address the issue of equal protection in her petition for review. Consequently, respondent asserts that this issue has been forfeited. (ABM 25.) Nevertheless, appellant did raise the issue in the briefing below, and the Court of Appeal addressed this issue in the opinion below. (*Valenzuela, supra,* Slip opn at pp. 24-25.) Moreover, whether equal

protection principles apply to appellant's claim is a natural part of the issue presented.

Appellant asserts that the protections of the equal protection clause do apply to her case most particularly because the Court of Appeal in *Abdallah* found that the enhancement pursuant to section 667.5 should be stricken when the prior has been reduced prior to the trial court's imposition of sentence. As a result of the opinion in this case, however, the same benefit is not available to appellant even though the judgment in her case is not final.

In *Abdallah,* the defendant was able to have his prior stricken prior to imposition of his sentence. Because of the dates of appellant's conviction and sentence and of the passage of Proposition 47, this remedy was not available to appellant. Nevertheless, as discussed above, the new law does apply to Valenzuela and others who were convicted prior to the passage of Proposition 47. That the new law applies is evidenced by the trial court's action in reducing her prison prior to a misdemeanor. The People's argument, however, is that the collateral benefits of such a reduction are not available based solely on the timing of her petition. This denial is one way that she had been denied the protections of the equal protection clause. Through no fault on Valenzuela's part, the remedy available to *Abdallah* was not available to her.

"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].) Here, there is no rationale basis for the distinction between defendant's in Valenzuela's circumstance and those in *Abdallah's*.

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 specify that it is prospective only. Moreover, Proposition 47 has been applied retroactively as demonstrated by the decision in *Abdallah.* Because appellant's conviction is not final, it is a denial of equal protection to deny her the same benefits.

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 she 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 667.5, subdivision (b).

7) Alternatively, remand so the trial court can exercise its discretion.

In her opening brief appellant requested that if this court finds that the reduction to a misdemeanor for a felony where a prison term was served does not require dismissal of the enhancement, then the change in the law is a matter the trial court should be given a chance to act upon. The trial court should be permitted to decide as a matter of discretion whether to strike the prison term enhancement. It is well established that an enhancement pursuant to 667.5, subdivision (b) is discretionary with the court. (*People v. Langston* (2004) 33 Cal.4th 1237, 1241; *People v. Campbell* (1999) 76 Cal.App.4th 305, 311.)

Respondent argues that nothing in Proposition 47 requires a remand for the trial court to exercise its discretion and because the trial court did not originally use its discretion to strike the prior, the case should not now be remanded to permit the court to consider doing so. Appellant agrees that her request in this regard is not required by the proposition.

Obviously, Valenzuela's preferred treatment of this matter is for this court to grant her the relief which is the subject of this appeal. If the court does not so rule, however, she requests that the court consider a limited remand of her case for the

trial court to consider whether to strike the enhancement as a matter in his discretion. At the time of her sentencing Proposition 47 had not yet passed, therefore the court was not aware of the voters' desire that her prior conduct not be looked on as felonious. Further, in its supplemental letter brief to the court of appeal, respondent suggested this remedy. There respondent acknowledged that the trial court lost jurisdiction to take any action when the notice of appeal was filed. Respondent noted that the Court of Appeal could stay the appeal and order a limited remand for the trial court to hear a motion to recall the sentence under 1170.18, citing *People v. Awad* (2015) 238 Cal.App.4th 215, 219-225. (Respondent's Letter Brief of Nov. 30, 2015, pp. 4-5.) The court below rejected respondent's suggestion. (*Valenzuela, supra,* Slip opn. at p.21.)

It is appellant's argument at this point that if striking the prison prior enhancement is not mandated by Proposition 47, nevertheless, 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

Based on the matters presented above it is clear that respondent's acceptance of the Court of Appeal's decision in *People v Abdallah* demonstrates that the issue

presented here is not retroactivity of Proposition of 47, rather it is an issue of timing. Further, since appellant's case is not yet final, timing is not an impediment and she should be afforded the same remedy as was ordered for *Abdallah.*

Appellant has also argued above that the felony prison prior enhancement should be stricken because the issue is not one of "status" as a person who served a prison term, but whether the underlying felony offense which is now a misdemeanor can still serve to justify the additional year in prison. Further, striking the enhancement would serve to implement the goals and intent of the electorate that prison funding be focused on violent and serious offenses. Moreover, appellant's claim is supported by existing judicial interpretations of similar laws. Consequently, 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,

Steven J. Carroll
Attorney at Law, State Bar #60761
P.O. Box 45338; San Diego, 92145-0338
(858) 368-9181
sjcarrollesq@gmail.com
State Bar # 60761

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 6,306 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: October 14, 2016

Steven J. Carroll
Attorney at Law
P.O. Box 45338
San Diego, CA 92145-0338
sjcarrollesq@gmail.com
CA State Bar # 60761

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 October 14, 2016 I served the foregoing document described as **APPELLANT'S REPLY BRIEF ON MERITS** 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
939 West Main Street
El Centro, CA 92243

Office of the District Attorney
Attn: Aaron Lent, Dep. Dist Atty
940 West Main Street
El Centro, CA 92243

Department of the Public Defender
Attn: Ben Warren, Dep. Pub. Defender
895 Broadway
El Centro, CA 92243

Laura Reynoso Valenzuela WF0770
California Institute for Women (CIW)
16756 Chino-Corona Road
Corona, CA 92880

and I further declare: I electronically served a copy of the above document from address: sjcarrollesq@gmail.com on October 14, 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 October 14, 2016 in San Diego California.

Declarant: Steven J. Carroll Signature: