California Sentencing Reform

All Those Propositions

FDAP
FIRST DISTRICT APPELLATE PROJECT

Proposition 47 – the "Safe Neighborhoods and Schools Act"

- Reduced certain theft & drug possession offenses to misdemeanors
- PC § 490.2: "obtaining any property by theft" where value $950 or less shall be petty theft
- PC § 459.5: shoplifting as entry of any business w/ intent to commit larceny during business hours
- PC § 1170.18 re petitions to recall or redesignate felony to misdemeanor

Romanowski (2017) 2 Cal.5th 903: Theft is Theft

- Theft of access card information (credit or debit card info) – Pen. Code § 484e(d)
- Trial court denied D's Prop 47 petition, Court of Appeal reversed
- Does § 490.2 apply?

Quick Answer: Yes!

- "Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft . . ."

- 490.2's unqualified references to "obtaining any property by theft" and "any … provision of law defining grand theft" encompass theft of access card information.

How to Determine Value of $950 or Less?

- Per PC § 484(a), Value = "reasonable or fair market value"
- The Plastic Card is not the object to be valued – access card info is a form of intangible property
- How much would the info sell for, even on the black market?
- Burden is on Petitioner to show value
- Hearing on value appropriate if can show reasonable likelihood of relief

Entry with Intent to Steal: Burglary under § 459 or Shoplifting under § 459.5?
People v. Gonzales (2017) 2 Cal.5th 858

- Defendant petitioned for recall of burglary conviction based on entering a bank to cash a stolen check. Denied. Court of Appeal affirmed.

- Supreme Court: any act of shoplifting can only be charged as shoplifting.

Theft is Theft, Whatever its Form

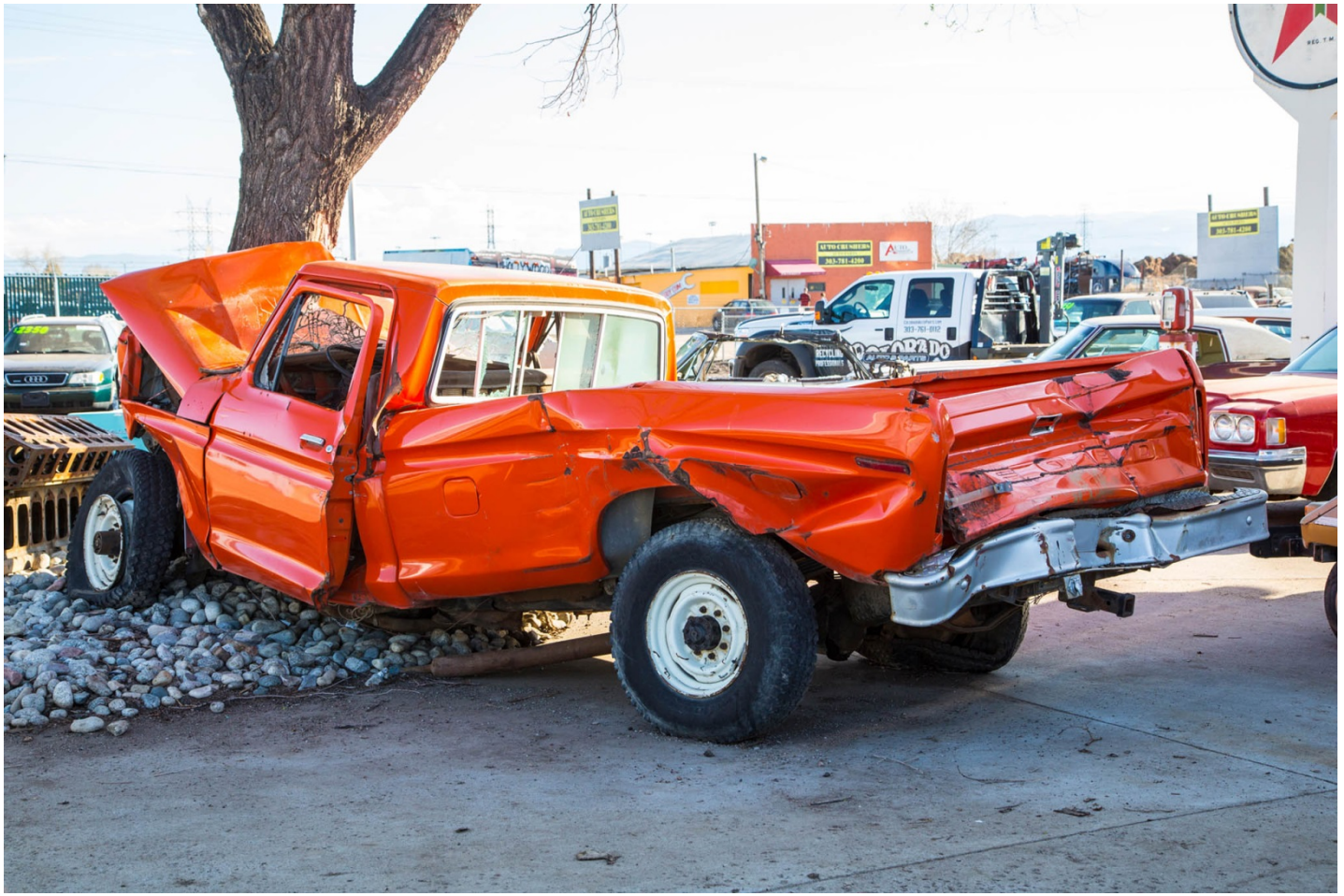
- Theft as defined by §§ 484 & 490a = property stolen by larceny, false pretenses, or embezzlement.
- Court rejects AG's position that shoplifting is limited to colloquial understanding of theft of tangible goods
- § 459.5 now defines shoplifting as entry with intent to steal, not the taking of an item

- § 459.5 requires any act of shoplifting to be charged as such – precludes charge of commercial burglary

- D eligible for Prop 47 resentencing if can show no disqualifying prior super strikes or sex offenses and entry with intent to cash stolen check to obtain less than $950.

- Burglary lies only if proof of entry to commit non-theft felony, or theft of property worth more than $950

Vehicle Code §10851 – Prop 47 Eligible?



People v. Page (2017) 3 Cal.5th 1175

- Grand Theft Auto (PC § 487(d)) eligible for resentencing if vehicle worth $950 or less
- Mere driving or taking without intent to permanently deprive (joyriding) is not theft and thus not eligible for Prop 47 reduction
- **But**, taking with intent to permanently deprive is vehicle theft.

§ 1170.18 – recall if crime would have been a misdemeanor had Prop 47 been in effect at the time of the crime

- After Prop 47, "obtaining any property by theft" is petty theft if worth ≤$950 (§ 490.2)
- List of statutes in § 1170.18 (in accordance with 11350, 495.5, etc.) not intended to limit eligibility
- § 490.2 applies – defendants can seek resentencing in accordance with that section

VC § 10851 – driving or taking?

- Theft of a vehicle is a form of grand theft
- Theft where vehicle worth $\leq$ \$950 = petty theft, punishable as a misdemeanor, **regardless of how charged** (Penal Code vs. Vehicle Code offense)
- D's burden to show not just value, but also conviction was based on theft of the vehicle, rather than on post-theft driving or taking without intent to permanently deprive

- Where evidence shows “substantial break” between the taking and the driving, conviction of VC § 10851can be based on post-theft driving

- Where factual basis shows “substantial break,” D will not be able to establish eligibility under §1170.18

- But, Defendants not categorically ineligible for relief, remanded without prejudice to file new petition alleging facts establishing eligibility

Priors Later Reduced – Timing is Everything -- People v. Call (2017) 9 Cal.App.5th 856

- D found guilty of drug offenses and three §667.5(b) priors found true.
- Prior to sentencing, D's pending Prop 47 petition granted and underlying priors were reduced to misdemeanors.
- D moved to strike the § 667.5(b) priors – denied. Appeal.

§ 1170.18(k): "Shall be considered a misdemeanor for all purposes" shows intent to treat as misdemeanors going forward

- Imposing enhancement after prior had been reduced to a misdemeanor is contrary to voter intent.
- True even if the prior felony had not been reduced prior to the commission of the current offenses.
- Priors no longer felonies at time of sentencing, so §667.5(b) enhancements stricken

But the Shoe Can be on the Other Foot

- § 1170.18, subdivision (i) – no resentencing if D has prior conviction for a "super strike" under § 667(e)(2)(C)(iv) or 290(c) registration sex offense

- People v. Casillas (2017) 13 Cal.App.5th 745
  - D had 2006 prior felony drug conviction
  - 2013 convicted of attempted murder (super strike)
  - "Prior conviction" under 1170.18(i) means any conviction suffered **prior to the ruling on the petition**
  - 2015 – D moves for Prop 47 reduction – Denied. Court of Appeal affirms.

Prop 47 – Still No Word on Retroactive Effect on a § 667.5(b) Prior

- § 667.5(b) prior prison term enhancements imposed, but the offense on which the prior based later reduced to a misdemeanor per Prop 47
- Does the misdemeanor reduction undermine the validity of the previously-imposed enhancement?
- People v. Valenzuela, rev granted March 30, 2016, S232900 – still waiting for the Court's decision
- Most courts have held § 1170.18 does not apply retroactively to invalidate a § 667.5(b) enhancement (Johnson, Jones, Carrea, Williams)

Three Strikes Sentences – Disqualified as "Super Strikes?"

- No Prop 47 relief if have a prior "super strike" or sex registration-eligible offense – § 1170.18(i)
- Super Strikes listed in § 667(e)(2)(C)(iv) – includes various sex offenses, any homicide, possession of weapons of mass destruction, etc.
- § 667(e)(2)(C)(iv)(VIII) – any serious or violent **felony punishable by life imprisonment** or death
- Is a 25-to-life Three Strike term a Super Strike?

NO! People v. Hernandez (2017) 10 Cal.App.5th 192 (Panel Atty Carla Castillo)

- D convicted of robbery, petty theft with a prior, and two strike priors in 1997
- 25-to-life on the robbery under Three Strikes
- 2015, D moved for resentencing on the petty theft
- Trial court denied petition because the prior robbery was punishable by life imprisonment

Hernandez: Robbery is not a Super Strike

- Under Prop 36, 25-to-life Three Strikes terms limited to cases where the current offense is also a serious or violent felony.
- But added §667(e)(2)(C)(iv) list of super strikes making D ineligible for Prop 36 relief
- **Super strikes are only offenses that carry their own punishment of life imprisonment or death**
- Robbery does not convert to a super strike merely because D has two prior strikes
- Remand for court to determine whether D posed unreasonable risk of danger to public safety in order to determine whether Prop 47 relief warranted

What does "unreasonable risk of danger to public safety" mean?

- For both Prop 36 and Prop 47, court must grant for eligible D's unless court finds petitioner would pose unreasonable risk of danger to public safety.

- No definition of that term in Prop 36 when enacted in 2012

- 2014, Prop 47 enacted and included a definition:
  - § 1170.18(c) – "as used throughout this code," **unreasonable risk . . . means** petitioner will commit a new violent felony within meaning of § 667(e)(2)(C)(iv) – **a super strike**!

  - **Prop 47 petitioners get relief unless court finds D likely to commit a future super strike**

People v. Valencia (2017) 3 Cal.5th 347

- H: **Prop 47 did not amend Prop 36**
- § 1170.18(c)'s definition is applicable only to Prop 47 petitions

- Concedes "as used throughout this code" preamble in § 1170.18(C) could support different interpretation, but says its interpretation is better

- Court relies on lack of indication in Prop 47 that definition was meant to also apply to Prop 36, either within the statute or in the ballot materials

- And, no equal protection, due process or 8th Amendment problem either; leaves determination of unreasonable risk of danger to trial court's discretion

LET'S HAVE SOME RETRO – ACTIVITY!

SB 620 – Firearm Enhancements are Subject to Dismissal!

- Jan. 1, 2018, §12022.5(c) & §12022.53(h) effective
- Grants sentencing courts discretion under § 1385 to strike or dismiss a firearm enhancement
- AG concedes! At least mostly . . .
- Courts have uniformly found new law applies to any case not yet final on appeal per *Estrada* and *Francis*

Two Published Cases Finding Retroactive

People v. Robbins, E066284, 4th Dist., Div. 2, Jan. 19, 2018

- Court reversed § 12022.53 25-to-life firearm enhancement, directed resentencing on it
- AG conceded retroactivity of SB 620

People v. Woods, C081813, 3rd Dist., 1-26-18

- Court remands § 12022.53 firearm enhancement for court to exercise discretion whether to strike it
- AG conceded retroactivity

First District Also Finds Retroactive

- People v. Powell, A149038, Div. 5 (Panel Atty Cliff Gardner)
  - D shoots and kills 2 teenage girls
  - LWOP + 65 to life for 1st° & 2nd° Murder, a special circumstance and personal use of firearm causing death or GBI
  - AG agrees SB620 applies to cases not final, BUT argues harmless because no indication judge would have dismissed the firearm enhancements
  - Court says Legislative History shows legislature wants sentencing judges to decide
  - Court finds trial judge should exercise 1385 discretion in the first instance
- People v. Johnson, A140841, Div. 2 (Panel Atty Barry Karl)
  - AG again argues harmless because trial court would impose
  - Court: remand for resentencing because already remanding on other issues anyway

§12022.53(d) Enhancements – Hedge the Remedy?

- §12022.53 Punishable in 3 different ways:
- (b) (personal use) = 10 years
- (c) (personal discharge) = 20 years
- (d) (personal discharge resulting in death or GBI = 25-to-life

- If AG argues imposition harmless, reply fall-back could be trial court must exercise § 1385 discretion because court could choose to strike the §(d) 25-to-life and impose either the §(c) personal discharge or §(b) personal use enhancement instead

Final on Appeal? No SB 620 Relief Unless Resentenced for Some Other Reason

- Statute says relief granted "applies to any resentencing that may occur pursuant to any other law."

- If defendant can get back in front of trial court for resentencing (habeas remand?, Prop 47 petition?), then also entitled to move for dismissal of the firearm enhancement.

HS § 11370.2 Prior Narcotic Conviction Enhancement

- SB 180 amends and abolishes HS § 11370.2 prior narcotic conviction enhancement for all except those who induce a minor to be involved in the current drug crime

- AG not contesting retroactivity – see People v. Burnell, G055198 (unpublished, Feb. 2, 2018)

- Court of Appeal does not remand for resentencing, strikes the 3-year enhancement

More Retroactivity – No Direct File of Minors in Adult Court

- In re Lara, S241231, Feb. 1, 2018
- Prop 57 prohibits charges being direct-filed against minors in adult court, requires W&I 707 juvenile court transfer hearing to move into adult criminal court
- Prop 57 reduces possible punishment for minors
- *Estrada* inference of retroactivity applies

Lara – What's the Remedy Where Minor Already Convicted in Adult Court?

- Direct file in Adult Criminal Court – convicted, now you represent the defendant/minor on appeal
- What is the remedy following *Lara*?
- **Best guess**: appellant entitled to remand for belated post-conviction fitness hearing under § 707
- If found unfit to be tried as an adult, adult conviction & sentence overturned
- Juvenile disposition hearing then held

More on Minors – PC 3051 Expands Youthful Offender Parole Eligibility to LWOP

- Miller v. Alabama prohibits LWOP for minors
- Graham v. Florida instructs states to figure out how to comply
- Legislature enacts PC § 3051 providing for youthful offender parole hearings
- But original version did not apply to LWOP

§ 3051 – First 18, then 23, now 25

- **SB 394** amends § 3051 to apply to offenders under the age of **25** when non-LWOP crime committed
  - (b)(1) – minor 25 or younger with determinate term eligible for parole hearing during 15th year of incarceration
  - (b)(2) – minor 25 or younger with less than 25-to-life term eligible after 20 years
  - (b)(3) – minor 25 or younger with 25-to-life term eligible during 25th year
- Adds (b)(4) – LWOP terms eligible for parole hearing during 25th year
- BUT – only for those 18 or younger at time of the crime

And Finally . . . . Prop 64 &

- Prop 64 legalized some and reduced punishment for certain other marijuana offenses
- HS § 11361.8 provides mechanism for seeking misdemeanor reduction
- Crimes set forth in the statute do not limit eligibility ("in accordance with sections . . . (sub-§§(a)&(e))"
- Court in Div. 3, People v. Magallon, A150194 (Panel Atty Susan Jordan), holds D entitled to petition for misdemeanor reduction
  - Even where underlying crime was maintaining a place for manufacturing, storing or selling marijuana (not just simple possession)
  - Even where conviction was from a plea bargain
  - Court relies on reasoning of *Page* and *Romanowski* to find terms of statute do not limit eligibility