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Crimes & Immigration Newsletter

February, 2016

This Newsletter contains selected recent developments in criminal immigration law occurring during February, 2016. The full version , which includes *all* monthly updates, is available here.

The coded references following each case summary refer to the title and section number in our practice manuals in which the subject of the recent development is discussed more fully. For example, CD 4.19 refers to N. TOOBY & J. ROLLIN, CRIMINAL DEFENSE OF IMMIGRANTS § 4.19 (2007), with monthly updates online at NortonTooby.com.

Andrew J. Phillips, Esq.
Editor

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RECENT DEVELOPMENTS

Articles

CONVICTION – VACATED CONVICTION – *PICKERING* IN THE FIFTH CIRCUIT

In *Matter of Pickering*, 23 I. & N. Dec. 621 (BIA 2003), vacated by *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006), the BIA held that a conviction is no longer valid for immigration purposes if it was vacated due to a substantive or procedural effect in the underlying proceedings. Previously, however, the Fifth Circuit held in *Renteria-Gonzalez v. INS*, 322 F.3d 804 (5th Cir. 2002), that the vacatur of a conviction has no effect for immigration purposes, regardless of the reason for the vacatur. The Fifth Circuit has more recently recognized that *Renteria* was wrongly decided. *Discipio v. Ashcroft*, 369 F.3d 472 (5th Cir. 2004). OIL has told the court that it would no longer defend *Renteria* in cases arising in the Fifth Circuit. *Gaona-Romero v. Gonzales*, 497 F.3d 694 (5th Cir. 2007). There are also more than 10 unpublished BIA decisions applying *Matter of Pickering* in cases arising in the Fifth Circuit. Victor Manuel Martinez, A029 084 542, 2014 Immig. Rptr. LEXIS 5870 (BIA July 30, 2014); Son Hoang Nguyen, A097 683 305,

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Consultations

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2013 Immig. Rptr. LEXIS 1732 (BIA May 16, 2013); Bottom of FormTop of FormBottom of FormFrancisco Flores Alcala, A200 762 691, 2013 Immig. Rptr. LEXIS 1536 (BIA May 9, 2013); Sergio Gustavo Rangel-Juarez, A038 829 107, 2012 Immig. Rptr. LEXIS 5591 (BIA July 16, 2012); Manojkumar Vinobhai Patel, A090 385 839, 2012 Immig. Rptr. LEXIS 84 (BIA Jan. 17, 2012); Daniel Sierra, A074 026 895, 2011 Immig. Rptr. LEXIS 6983 (BIA June 1, 2011); Hugo Angel Robles, A087 021 860, 2011 Immig. Rptr. LEXIS 367 (BIA Jan. 9, 2011); Genaro Moya, A041 934 890, 2010 Immig. Rptr. LEXIS 3461 (BIA March 24, 2010); Arnulfo Martinez-Honorato, A041 633 828, 2008 Immig. Rptr. LEXIS 10921 (BIA May 30, 2008).

In *Matter of Adamiak*, 23 I. & N. Dec. 878 (BIA Feb. 9, 2006), the court made it clear that it followed the contrary rule in the Fifth Circuit only under compulsion:

To the extent that the DHS relies on *Renteria-Gonzalez v. INS*, 322 F.3d 804, 812-13 (5th Cir. 2002), our decisions in *Matter of Pickering*, *supra*, and *Matter of Rodriguez-Ruiz*, *supra*, make clear that we do not share the view of the United States Court of Appeals for the Fifth Circuit on this matter. The Sixth Circuit, in whose jurisdiction this proceeding arises, has not adopted the Fifth Circuit's approach in *Renteria-Gonzalez*.

Moreover, the Government recently stated its view in a case arising within the Fifth Circuit that "the Board's opinion in [Matter of] Pickering constitutes a permissible construction of the statute because it comprehensively addresses the effect of a vacated conviction." *Discipio v. Ashcroft*, 417 F.3d 448, 450 (5th Cir. 2005). Consequently, the court in *Discipio* granted the Government's request to remand the case to the Board for termination of removal proceedings based on the vacation of the respondent's conviction because of procedural defects in the underlying criminal proceedings. (*Id*. at 880.)

In general, DHS uses this issue as a tool. If they do not like the client, or you have a jerk for a TA, they will insist that the person is still removable. You then have to go to the BIA which agrees. Then they remove the person (if detained), and you have to take it to the Fifth Circuit. They then force you to file your opening brief, after which OIL will usually ask for a remand to terminate. If anyone gets it to the Fifth Circuit, please notify Lisa Brodyaga. Thanks to Lisa Brodyaga and Ben Winograd.

What follows is an except from a brief filed by Jessie Miles, submitted several years ago:

In *Renteria-Gonzalez v. INS*, 322 F.3d 804 (5th Cir. 2002), the Fifth Circuit Court of Appeals held that a conviction, even if vacated, remains valid for the purposes of immigration law. *Id*. at 811. The Court noted that its decision was uninformed by the Board of Immigration Appeals because, "[t]he BIA has not addressed the precise question whether a vacated federal conviction remains valid under [the Act.]" *Id*. at 813. Just a year later, however, the BIA addressed the issue head-on in *In Re Pickering*, 23 I&N Dec. 621 (BIA 2003), holding that a conviction vacated for reasons unrelated to immigration or rehabilitative

purposes is not considered a conviction under the INA. *Id*. at 624.

Noting their departure from the Fifth Circuit's holding in *Renteria-Gonzalez* , the Board stated in *Pickering*, "we decline at this time to adopt [*Renteria*-Gonzalez] outside the jurisdiction of the 5th Circuit." *Id.* However, after an en banc panel expressed concerns over the application of *Renteria-Gonzales* the Fifth Circuit, in *Discipio v. Ashcroft*, 417 F.3d 448 (5th Cir. 2005), remanded the case to the Board of Immigration Appeals to allow for dismissal in accordance with *Pickering*. After *Disipio* was decided:

[T]he government undertook a policy review to determine how removal cases arising in the Fifth Circuit that involve vacated convictions should be treated. The government concluded that it would not seek that removal decisions be upheld pursuant to *Renteria*, but rather would request remand to the BIA so that the government could take action in accord with *Pickering*.

Gaona-Romero v. Gonzales, 497 F.3d 694, 649 (5th Cir. 2007). The Fifth Circuit responded to the Government's policy shift in *Gaona-Romero v. Gonzales*, 497 F.3d 694, by again ordering remand to allow for the application of *Pickering*.

Since *Gaona*, the BIA has not issued a published opinion on the issue, but has consistently applied *Pickering* to cases arising in the Fifth Circuit, holding that a vacated conviction may not be used as conviction under the INA so long as the *vacatur* is unrelated to immigration or rehabilitative reasons. Footnote 1. *See In Re Alexis Ruiz Alvarez*, A205 653 283 - CLE, 2013 WL 3200544 (BIA June 4, 2013) ("the United States Government, through the Department of Justice's Office of Immigration Litigation, has advised the Fifth Circuit that it would not seek to uphold removal orders premised upon an application of *Renteria-Gonzalez*… As such, this Board evaluates the effect of a *vacatur* under the rubric set forth in *Matter of Pickering*."). *E.g. In Re Son Hoang Nguyen*, A097 683 305 - DAL, 2013 WL 2608424 (BIA May 16, 2013); *In Re Francisco Flores Alcala A.K.A. Francisco Flores A.K.A. Francisco Alcala Flores*, : A200 762 691 - DAL, 2013 WL 2610047 (BIA May 9, 2013); *In Re Sergio Gustavo Rangel-Juarez*, A038 829 107 - EL, 2012 WL 3276562 (BIA July 16, 2012); *In Re Daniel Sierra*, : A074 026 895 - LOS, 2011 WL 2470936 (BIA June 1, 2011) ("we conclude that the respondent's motion should be adjudicated in accordance with this Board's decisions in *Matter of Pickering*."); *In Re Hugo Angel Robles A.K.A. Hugo Gonzalez Robles,* A087 021 860 - HOU, 2011 WL 400460 (BIA Jan. 19, 2011).

Footnote 1. Regarding its consistent application of *Pickering* over *Renteria-Gonzalez* in the Fifth Circuit the BIA has explained, "We observe that, in certain circumstances, a federal court may defer to an agency's interpretation of a statute which is within the agency's jurisdiction to administer even if the agency's interpretation is inconsistent with the jurisprudence of that court." *In Re: Francisco Flores Alcala A.K.A. Francisco Flores A.K.A.*

Francisco Alcala Flores, A200 762 691 - DAL, 2013 WL 2610047 (BIA May 9, 2013) (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005)).

CD4:11.3;PCN:4.3;AF:6.3;CMT3:10.3

Practice Advisories

PRACTICE ADVISORY – HOW AN IMMIGRATION HOLD CAN CAUSE A CRIMINAL DISASTER

In *Mederos v. Commonwealth*, No. 15-13623-FDS, 2016 U.S. Dist. LEXIS 10854 (D. Mass. Jan. 28, 2016), a noncitizen was convicted in Massachusetts in 2000 of indecent Assault & Battery on a child and sentenced to a three-year term of imprisonment. While serving his sentence, an immigration judge ordered his removal and an ICE detainer lodged against him. The ICE detainer indicated that upon his release from state custody, he was to be taken into immigration custody and deported. Shortly before the date of his release from his criminal sentence, the Commonwealth moved to civilly commit him as a sexually dangerous person. In January of 2003, he was committed to the Treatment Center at Bridgewater for the term of one day to his natural life. He has remained at Bridgewater for the last 13 years. He contends that the ICE detainer prevents him from participating in the final phase of treatment which involves release to a Community Transition House. However, without access to the transition house, he cannot be released from state custody. As the court notes, he alleges that "he is in a perpetual state of limbo because he is civilly committed until he completes the sexual-offender treatment, but he cannot complete that treatment due to the ICE detainer. At the same time, he cannot be taken into ICE custody and removed from the United States, because he is civilly committed until he completes that treatment."In an attempt to either lift the ICE detainer or effectuate his removal, Mr. Mederos has filed multiple petitions in state and federal court -- to no avail. His current claim was a request for declaratory relief, though the court construed it as a petition for a writ of habeas corpus. The request was dismissed on procedural grounds.

This case is an extreme example of the negative impact ICE detainers can have on criminal defendants and provides strong incentive for defense attorneys to challenge detainers. Thanks to Wendy Wayne, and the Massachusetts Committee for Public Counsel Services. See https://www.publiccounsel.net.

CD4:6.11

BIA

SENTENCE – SENTENCE IMPOSED – SUBSTANCE ABUSE TREATMENT FACILITY

Matter of Calvillo Garcia, 26 I&N Dec. 697 (BIA 2015) (court-ordered indeterminate term of confinement and treatment of not more than one (1) year or less than 180 days in a substance abuse treatment facility operated by the Texas Department of Criminal Justice, where defendant was not permitted to leave, constituted a period of

"confinement" and therefore a "term of imprisonment" for immigration purposes).

Note: The BIA left open, in a footnote, the question of whether house arrest might also constitute a "term of imprisonment." CD4:10.63;AF:3.62;SH:7.25;PCN:7.3

CRIMES OF MORAL TURPITUDE – FALSE STATEMENT TO FEDERAL OFFICIAL – 18 U.S.C. § 1001

Matter of Pinzon, 26 I&N Dec. 189 (BIA 2013) (federal conviction of making a false statement to a government official or body, in violation of 18 U.S.C. § 1001(a), constitutes a crime of moral turpitude; but see *Hirsch v. INS*, 308 F.3d 562, 567 (9th Cir. Sept. 10, 1962) (holding 18 U.S.C. § 1001 not to be a crime of moral turpitude, since it penalized merely false, not only fraudulent, statements: ("We have stated, however, that "[t]he word 'wilful' means no more than that the forbidden act is done deliberately and with knowledge.").); overruling *Matter of Marchena*, 12 I. & N. Dec. 355 (BIA 1967) and *Matter of Espinosa*, 10 I. & N. Dec. 98 (BIA 1962).

Note: This statute was amended since *Hirsch* to add a materiality requirement, but (1) that requirement was implicitly present in the offense before the amendment, and (2) the materiality requirement does not actually require that the outcome would have been potentially changed. See *Rivera v. Lynch,* ___ F.3d ___, ___, 2016 WL 909362 (9th Cir. Mar. 10, 2016). *Hirsch* may still be good law, and certainly has not been overruled explicitly. See *Notash v. Gonzales* 427 F.3d 693, 698 (9th Cir. 2005) ("Thus, in *Hirsch*, we held that a conviction for willfully and knowingly making false and fraudulent statements on a shipper's export declaration did not constitute a crime involving moral turpitude.")

CD4:20.6;CMT3:8.6;SH:7.111

First Circuit

POST CON RELIEF – GROUNDS – STATE ADVISAL STATUTE – MASSACHUSETTS

Commonwealth v. Nsubuga, 88 Mass. App. Ct. 788 (Dec. 2015) (effective date of amendment to the immigration warnings required under Mass.G.L. c. 278, § 29D now includes a specific warning that an admission to sufficient facts [as well as a finding of guilty] might carry immigration consequences was Oct. 27, 2004).

PCN:6.57

Second Circuit

AGGRAVATED FELONY – CRIME OF VIOLENCE – ATTEMPTED SECOND-DEGREE ASSAULT

United States v. Moreno, ___ F.3d ___, ___, n.5, 2016 WL 691128 (2d Cir. Feb. 22, 2016) (Connecticut conviction for attempted second-degree assault, under Conn. Gen.Stat. § 53a–60, was not categorically a conviction for an aggravated felony crime of violence, since § 53a–60(a)(3), includes reckless conduct)

CD4:19.41;AF:5.23, A.14, B.9;SH:7.49, 8.10

CONVICTION -- CATEGORICAL ANALYSIS – RECORD OF CONVICTION – PROSECUTOR'S STATEMENT OF FACTUAL BASIS DURING PLEA COLLOQUY

United States v. Moreno, ___ F.3d ___, ___, n.5, 2016 WL 691128 (2d Cir. Feb. 22, 2016) (while Connecticut Conn. Gen.Stat. § 53a–60, was a divisible statute, and it was appropriate to apply the modified categorical analysis, the prosecutor's factual statement during the plea colloquy is not part of the record of conviction absent evidence that the defendant stipulated to, or assented to, or agreed that that statement was true).

The court stated:

Shepard makes clear that factual admissions and judicial findings in the context of a guilty plea must be adopted or confirmed by the defendant to be considered in determining the nature of the defendant's crime by the modified categorical approach. *See id.* at 16 (allowing courts to examine "any explicit factual finding by the trial judge *to which the defendant assented* ") (emphasis added); *id.* at 20 (explaining that "adequate judicial record evidence" may include "the statement of factual basis for the charge ... shown by a transcript of plea colloquy or by written plea agreement presented to the court, or by a record of comparable findings of fact *adopted by the defendant upon entering the plea* ") (emphasis added); *see also United States v. Rosa,* 507 F.3d 142, 158 (2d Cir.2007). Accordingly, courts have considered statements made during a plea colloquy by someone other than the defendant in applying the modified categorical approach only when the defendant adopted the statements in some overt fashion. *See, e .g., Savage,* 542 F.3d at 966 (government may not rely on prosecutor's factual assertions during a plea colloquy where defendant did not endorse them); *Rosa,* 507 F.3d at 158–59 (defendant's silence did not "assent" to judge's characterization of offense); *United States v. Taylor,* 659 F.3d 339, 348 (4th Cir.2011) (facts set forth by the prosecutor could be used in applying the modified categorical approach where, after the prosecutor's recitation, defense counsel stated that defendant had no "additions or corrections"); *United States v. Jimenez–Banegas,* 209 F. App'x 384, 390 (5th Cir.2006) (finding that defendant assented to the prosecutor's version of events by explicitly confirming portions thereof and not objecting to the rest).

Here, the district court determined that Moreno's offense was a crime of violence by looking to the prosecutor's account of the facts during the plea proceeding. However, Moreno was never asked to confirm the factual basis for his plea. Nor can the guilty plea itself be taken to have adopted the prosecutor's statements, since Moreno pled guilty to violating § 53a–60 (without specifying any particular subsection) *before* the prosecutor's recitation of the offense conduct. At no point did Moreno allocute to any facts about the offense. After the prosecutor's account, Moreno was not asked to, and did not, assent to the prosecutor's assertions; he merely remained silent.

CD4:16.33;AF:4.32;CMT3:7.12

Fourth Circuit

JUDICIAL REVIEW – AGGRAVATED FELONY BAR – CONVENTION AGAINST TORTURE

RELIEF – CONVENTION AGAINST TORTURE

AGGRAVATED FELONY – IMMIGRATION CONSEQUENCES – CONVENTION AGAINST TORTURE – AGGRAVATED FELONY BAR

*Oxygene v. Lynch***,** 813 F.3d 541, 545 (4th Cir. Feb. 22, 2016) ("when an applicant for CAT relief has committed an aggravated felony, [8 U.S.C.] § 1252(a)(2)(C) eliminates appellate review for sufficiency of evidence. *See Saintha,* 516 F.3d at 249–50. Consequently, we lack jurisdiction to consider his alternative argument.").

CD4:15.37;AF:2.18;CMT3:3.18

Fifth Circuit

RELIEF – ADJUSTMENT OF STATUS – BURDEN OF PROOF

Le v. Lynch, 819 F.3d 98 (5th Cir. Feb. 23, 2016) (noncitizen failed to demonstrate that he was admissible to the United States as a lawful permanent resident: "Notwithstanding the inconclusive evidence in the instant case, we conclude that the burden remains on Le to prove eligibility for relief from removal.").

NOTE: The question in this case was whether the noncitizen had been convicted or not of a controlled substances offense in Canada, rather than the *nature* of the offense. The Government had submitted a Canadian rap-sheet showing a conviction, but neither party was able to produce any court documents. Since the issue was the *existence* rather than *nature* of the conviction, the Court found the Ninth Circuit's decision in *Almanza Arenas* to be inapposite.

The court's reasoning was as follows:

> As a general rule, the Government may remove an alien and deny his application for adjustment of status if grounds for mandatory denial of the application *may* exist. *See* 8 C.F.R. § 1240.8(d) (emphasis added). However, an alien may apply for relief or protection from this removal. *See* 8 U.S.C § 1229a(c)(4)(A). While the Government bears the burden of proving that an alien is removable, § 1229a(c)(3)(A), the alien has the burden of proof to establish that he satisfies the applicable eligibility requirements in order to prove that any grounds for denial do not apply. § 1229a(c)(4)(A); *see also* 8 C.F.R. § 1240.8(d) (noting that the alien in a removal proceeding bears "the burden of establishing that he or she is eligible for any requested benefit or privilege and that it should be granted in the exercise of discretion"); *Ramon–Torres v. Holder*, 637 F.3d 544, 548 (5th Cir.2011); *Vasquez–Martinez*, 564 F.3d at 715–16; *Matter of Blas*, 15 I & N Dec. 626, 629 (BIA 1974). When an alien's prior conviction is at issue, the offense of conviction itself "is a factual determination, not a legal one." *Vasquez-Martinez v. Holder*, 564 F.3d 712, 716 (5th Cir. 2009). However, determining whether

> that conviction is a particular type of generic offense is a legal question. *See*, *e.g.*, *Esparza–Rodriguez v. Holder*, 699 F.3d 821, 823–24 (5th Cir.2012); *Vasquez–Martinez*, 564 F.3d at 716–17.

(*Id*. at ___.) The court concluded: "Notwithstanding the inconclusive evidence in the instant case, we conclude that the burden remains on Le to prove eligibility for relief from removal." (*Id*. at ___.)
CD4:15.26

POST CON RELIEF – PARDON – FOREIGN PARDON
Le v. Lynch, ___ F.3d ___, ___, 2016 WL 723298 (5th Cir. Feb. 23, 2016) (foreign pardons are generally not recognized under United States immigration laws). Danso v. Gonzales, 489 F.3d 709, 717 (5th Cir. 2007)(same); *Mullen–Cofee v. INS*, 976 F.3d 1375, 1379 (11th Cir.1992)(drug offense pardons are not recognized under the INA)).
CD4:11.24;PCN:8.43;AF:6.18;CMT3:10.23
POST CONVICTION RELIEF – SENTENCE – GROUNDS – INEFFECTIVE ASSISTANCE OF COUNSEL – FAILURE TO PRESENT EVIDENCE OF IMPACT OF IMMIGRANT EXPERIENCE

Chanthakoummane v. Stephens, ___ F.3d ___, 2016 WL 760912 (5th Cir. Feb. 25, 2016) (affirming death penalty, and rejecting claim of ineffective assistance of counsel at sentence since counsel's decision not to present information regarding the impact of the Laotian immigrant experience on petitioner's upbringing was reasonable trial strategy).

PCN:6.17

AGGRAVATED FELONY – CRIME OF VIOLENCE – 18 USC 16(b) – STATUTE FOUND UNCONSTITUTIONALLY VAGUE

United States v. Gonzalez-Longoria, 813 F.3d 225 (5th Cir. Feb. 10, 2016), rehearing en banc ordered, 815 F.3d 189 (5th Cir. Feb. 26, 2016) (holding 18 U.S.C. § 16(b) to be unconstitutionally vague); following *Johnson v. United States*, ––– U.S. ––––, 135 S.Ct. 2551 (2015).

CD4:19.41;SH:7.51;AF:5.23

Seventh Circuit

POST CON RELIEF – GROUNDS – WISCONSIN – STATE ADVISAL STATUTE

State v. Valadez, ___ Wis. ___, 2016 WL 325524 (Jan. 28, 2016) (noncitizen defendant is permitted to withdraw a guilty plea if she is able to show that the judge failed to notify her of "likely" adverse immigration consequences of conviction, as required by state statute); Wis. Stat. § 971.08(2) permits a defendant to withdraw a guilty plea and enter another plea if a court fails to advise her of the immigration consequences of the guilty plea as required by Wisconsin Statute § 971.08(1)(c)).

PCN:6.57

Eighth Circuit

POST CON RELIEF – CONVICTION – EFFECTIVE ORDER

Andrade-Zamora v. Lynch, 814 F.3d 945, 948 (8th Cir. Feb. 26, 2016) ("If a court vacates an alien's criminal conviction for a reason unrelated to the merits of the case—such as to avoid immigration consequences or for rehabilitative reasons—rather than to correct a procedural or substantive defect, the conviction will still stand for immigration purposes despite its vacatur."), following *In re Pickering,* 23 I. & N. Dec. 621, 624 (BIA 2003), *rev'd on other grounds, Pickering v. Gonzales,* 465 F.3d 263, 271 (6th Cir.2006); *see also Vivieros v. Holder,* 692 F.3d 1, 3 (1st Cir.2012) (noting circuit courts have "uniformly" followed this rule).").

PCN:11.18;AF:6.12;PCN:8.3;CMT3:10.11

POST CON RELIEF – CONVICTION – EFFECTIVE ORDER VACATING CONVICTION – BURDEN

Andrade-Zamora v. Lynch, 814 F.3d 945, 948 (8th Cir. Feb. 26, 2016) (respondent bears the burden of proving he does not have a conviction that disqualifies him from eligibility for LPR cancellation of removal, under INA § 240A(a), 8 U.S.C. § 1229b(a), or that the state court order vacating the conviction was not issued to eliminate its immigration consequences).

Note: The court distinguished deportation cases, because the burden is there on the government to establish every fact necessary to result in deportation. See *Cardoso–Tlaseca v. Gonzales,* 460 F.3d 1102, 1107 (9th Cir. 2006).

PCN:11.18;AF:6.12;PCN:8.3;CMT3:10.11

Ninth Circuit

CALIFORNIA POST CONVICTION RELIEF – PROPOSITION 47 – PENAL CODE § 1170.18 -- PRACTICE ADVISORY: CURRENT CASELAW AND ISSUES ON REVIEW.

SUMMARY

Proposition 47 (Prop. 47), also known as "*The Safe Neighborhood and Schools Act*" was

enacted by California voters November 4, 2014 and became effective on November 5, 2014. Prop. 47 was designed to focus prison spending on serious and violent felonies with the savings gained from its implementation directed in support of school programs, mental health, drug treatment, and victim services. Specifically, Prop. 47 reduces drug possession and certain property theft under $950.00 to straight misdemeanors. It also creates a process for those currently serving a felony sentence to petition the court for resentencing as a misdemeanor. Penal Code § 1170.18(f). Prop. 47 also provides a reclassification process for those who have completed their sentences to reduce a felony

conviction to a misdemeanor. Prop 47. is codified at Penal Code, section 1170.18.

In the first year of implementing Prop. 47, California courts have settled many legal issues with additional issues currently pending Supreme Court review. Although

there are still many unanswered questions and split opinions on some issues, Prop. 47 has benefited eligible individuals. For many the reduction of a felony conviction to a misdemeanor offers new opportunities for employment, release from custody and/or probation, reestablishment of voting rights, and/or immigration privileges.

CURRENT CASELAW AND SETTLED ISSUES

Prop. 47 Applies to Juvenile Cases. Reclassification provisions set forth in Penal Code 1170.18 applY to juvenile wardship proceedings. See *Alejandro v. Superior Court* (2015) 238 Cal.App.4th 1209. See also *T.W v. Superior Court* (2015) 236 Cal.App.646 (Prop. 47, reducing some convictions for theft and drug offenses, applies to juvenile delinquency cases).

After Prop. 47 Reclassification, Petitioner may be Eligible for DNA Expungement.

In *Alejandro v. Superior Court*, *supra*, minor's request for felony DNA expungement was denied by the trial court on the basis that Prop. 47 did not provide for felony DNA expungement after reclassification. The appellate court remanded on this issue noting that Penal Code §§ 296 and 296.1 do not authorize collection of a DNA sample based solely on the commission of a misdemeanor. The court further noted, "voters did not intend that a reclassified misdemeanor offense be deemed a felony for purposes of retention of DNA samples". On remand, the trial court was instructed to determine if there existed any other statutory basis for DNA retention after misdemeanor reclassification under Prop. 47.

Penal Code § 12022.1 (Felony out on Bail) Enhancement Disappears on Prop. 47 Reduction to Misdemeanor. Felony bail enhancement is not applicable where defendant is resentenced to a misdemeanor. See *People v. Buycks* (2015) 241 Cal.App.4th 519, , and Penal Code § 1170.18(k).

Prop. 47 Petitioner has the Burden of Proof. A petitioner for resentencing under Prop. 47 must establish his or her eligibility for such resentencing. See *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, following the holding in *People v. Sheron* (2015) 239 Cal.App.4th 875 (defendant has the burden to establish facts upon which his eligibility is based, i.e., the property he took from the store was valued less than $950.00). (See also *People v. Gomez* (12/24/2015) ___ Cal.App.4th ___.

Post Release Community Supervision (PRCS) Constitutes "serving a sentence" for

Purposes of Imposing One Year Parole Requirement after Prop. 47 Resentencing.

Prop 47 petitioners who are released from custody on Post Release Community Supervision (PRCS) are still "serving a sentence" and are therefore subject to the one year parole requirement upon re-sentencing. (See Penal Code 1170.18(d)). This

parole requirement is not imposed if the petitioner has completed his or her sentence, i.e.,

completed any in-custody time or PRCS.

Penal Code § 496d(a) (receiving stolen property, a vehicle) and Vehicle

Code § 10851 (unlawful taking/driving vehicle) do not qualify for Prop. 47 Treatment. Penal Code § 496d (receiving stolen property, i.e., a vehicle), and Vehicle

Code § 10851 (auto theft), do not qualify for Prop. 47 treatment, regardless of the value of the property involved. In *People v. Garness* (2015) 241 Cal.App.4th 1370, the court noted that Prop. 47 amended Penal Code § 496, making it a straight misdemeanor if the property value was under $950.00 but left intact the language in Penal Code § 496d which the court reasons evidences a legislative intent that Penal Code § 496d remains a wobbler or alternative felony-misdemeanor. (In this case, although there was a stipulation in the plea agreement that the value of the car here was $540, the court still found Prop. 47 inapplicable.) Similarly in *People v. Page* (2015) 241 Cal.App.4th 714, the court held that Vehicle Code § 10851 does not proscribe theft but instead prohibits the taking or driving of a vehicle without the intent to steal and since Prop. 47 did not amend Vehicle Code § 10851, it continues to be a wobbler. But see *People v. Gomez*, ___ Cal.App.4th ___ (2015), disagreeing with *People v. Page and People v. Harness*, *supra.* On the substantive issue of whether Prop. 47 applies to violation of Vehicle Code §10851, the appellate court in *Gomez* court noted: "Vehicle Code, section 10851 can be violated by the taking of a vehicle with the intent to permanently deprive the owner of the vehicle. Assuming that the defendant takes a vehicle valued under $950, such violation should constitute a violation of Penal Code, 490.2. The trial court here erred by finding that all

violations of Vehicle Code, section 10851 are not entitled to resentencing under Penal Code section 1170.18". (*Id*. at ___.)

Split of Authority as to Whether Prop. 47 Applies to Access Card Information Theft under Penal Code § 484e(d). Cases are split on this issue. In *People v. Romannowski* (2015) 242 Cal.App.4th 151, the court held Prop. 47 applies to Penal Code § 484e(d) if the value of the property involvfed is under $950.00. (The court did not address the question of what is the intrinsic value of an access card.) But see *People v. Cuen* (2015) 241 Cal.App.4th, and *People v. Grayson* (2015) 241 Cal.App.4th 454, both cases holding that Prop. 47 does not apply to theft of an access card information under Penal Code § 484e(d).

CALIFORNIA SUPREME COURT PENDING REVIEWS

Unreasonable Risk of Public Safety Standard.

Petitioners who have completed their sentences are entitled to have their qualifying felony convictions reclassified as misdemeanors, irrespective of whether they are a "risk to public safety". The issue of "risk to public safety" arises where petitioners are still serving sentences and petition the trial court to be resentenced under Prop. 47. The California Supreme Court has granted review in *People v. Chaney* (2014) 231 Cal.App.4th 1391(Prop. 47 retroactive application under

Three Strikes Reform Act (Prop. 36)). The California Supreme Court has also granted review in *People v. Valencia* (2014) 232 Cal.App.4th 514 (Prop.47 application under Three Strikes Reform Act (Prop. 36)). The court may further define the "risk to public safety" in these cases.

Using Excess Custody Credits to Reduce One-Year Parole Requirement under Prop. 47 Resentencing. Currently there is split of authority on the issue of whether a defendant can use excess custody credits to reduce or eliminate the one-year parole period required upon Prop. 47 resentencing. Some courts have held that excess custody credits cannot be used to reduce the one-year parole requirement. (See *People v. McCoy* (2015) 239 Cal.App.4th 431; *People v. Hickman* (2015) 237 Cal.App.4th 984)). In contrast, the appellate court in *People v. Armogeda* (2015) 240 Cal.App.4th 1039, following *People v. Morales* (2015) 238 Cal.App.4th (review granted 8/26/2015 (S228030)), held that excess custody credits can be applied to reduce the one-year parole requirement for Prop. 47 resentencing. The California Supreme Court should decide this issue in *People v. Morales* (2015) 238 Cal.App.4th 42.

Cashing Stolen Checks in a Bank is not Shoplifting for Purposes of Prop. 47.

In *People v. Gonzales* (2015) 242 Cal.App.4th 35, petitioner was convicted felony commercial burglary (Penal Code § 459) after he cashed forged checks in a bank, in the amount of $250.00. Trial court denied a petition to reduce this conviction to a conviction for shoplifting under Penal Code § 459.5, finding there was no larceny. The court of appeal affirmed, stating "larceny requires taking of the owner's property without the

owner's consent," reasoning the bank relied on a false representation to transfer the cash to petitioner, so there was no larceny. Larceny according to this appellate court is "entering a commercial establishment with an intent to commit larceny while that establishment is open for regular business hours, and the property taken is less than $950". The ruling in *People v. Gonzalez*, *supra*, seems illogical since a bank is a commercial establishment and stealing checks is larceny. The court also left unanswered the question of what theft behaviors in which commercial establishments fall outside Penal Code § 459.2, misdemeanor shoplifting under $950.00.

The Prosecution Cannot Aggregate Value in Separate Counts to Meet the $950.00 Requirement. See *People v. Hoffman* (2015) 241 Cal.App.4th 1304, where the trial court attempted to aggregate seven separate felony counts each under $950.00. Perhaps seeing the folly in this reasoning, the prosecution argued that petitioner's *Harvey* waiver allowed the court to rely on the dismissed counts that would not be eligible for misdemeanors to find petitioner "outside the spirit of Prop. 47". The court of appeals held that trial court cannot aggregate the value on separate counts to meet the over $950 requirement to deny defendant's resentencing petition.

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Eleventh Circuit

SENTENCE – SENTENCE IMPOSED – IMPRISONMENT DEFINED -- HOUSE ARREST

Herrera v. U.S. Attorney General, 811 F.3d 1298 (11th Cir. Feb. 2, 2016) (court order that defendant serve a period of house arrest is considered a term of imprisonment for immigration purposes).

CD4:10.63;AF:3.62;SH:7.25;PCN:7.3