Quick overview of what is Prop 47 Eligible:

Drugs: simple possession

11350

11377

11357 (possession not cultivation under 11358)

Property Crimes:

459 per 459.5 a petty theft

Elements: commercial establishment, during business hours, intent to steal, property under $950

Not: a school, church, tool shed, uncoupled dwelling, apartment common area – not a commercial establishment

Not: casino, cash checking business, bank – did not enter for the purpose of theft – entered for the purpose of larceny – not the same thing (see People V. Jorgenson) This happens when someone enters for the purpose of completing a check forgery, fraudulent check cashed, ID theft, etc... Can happen at an open business per the elements of 459.5. This is a ruling from out court only and has not yet need address by an appeals court.

473a(b) (all forgery sections)

Does not apply if convicted of both forgery and ID theft.

Value under $950

476a(b)

NSF checks <u>total</u> $950 or less

666

No longer exists, a petty theft is now always a misd even if over $950

Charge or plea to a 487a alleged as over $950.

487 – all sections

Caution: if you have a 211 and want to reduce it for some reason, a 487c will get you a misd

Caution: if you have a 487d – to keep it as a felony you have to prove over $950

If you have a theft of a gun – it is a misd unless you can prove over $950

496(a) – eligible if $950 or less – only the property they were in possession of counts

If lots of property was taken from a residence and the D only ends up with a small value, it is a misd – consider the 459 instead

A Trial Court may ask you to prove the amount as a special finding or as an element of the offense – ask

Caution: 496d is not eligible regardless of amount (even though it is the same thing as a 487d)

503 – embezzlement under $950 is a misd

Not Eligible: Super-strikes and 290(c) registration

Homicide: 187, 191.5 and 664 – not 192, solicitation for murder 653f

Sex: 182, 207 to commit sex crimes, 220 to commit sex act, 243.4 sexual battery, 326.1 human trafficking, 261 et.al. rape, 266 et.al. pimping and pandering, all 288 type crimes on children, 289 crimes, 311 crimes, 314 crimes

Possession of weapons of mass destruction 111418(a)(1)

Burden of Proof (Peo V. Jorgenson and Peo V. Sherow)

Petitioner/Defendant has burden of proving facts

They are limited to the record

People must prove Disqualifiers (super-strike and 290)

Application vs. Petition

Our Court Procedure – forms

Marsy's law

[redacted]

29800

Prop 47 specifically states: 1170.18(k) Any felony conviction that is recalled and **resentenced** under subdivision (b) (ie: petition) or **designated** as a misdemeanor under subdivision (g) (ie: application) 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.**

[redacted]

Resentencing: probation v. parole

[redacted]

Appendix III: Proposition 47 crimes

The following table was prepared by Hon. John "Jack" Ryan, Orange County Superior Court (Ret.)

SENTENCING UNDER PROPOSITION 47, *Effective 11-5-14.*
Document changes, 11-13-14

The offenses in Table 1, except for Penal Code §666(a), are misdemeanors, unless the defendant has suffered one or more designated prior convictions. (See Table 2 [Appendix II].) *Except for H&S C §11350*, if there is a designated prior, the defendant *may* be sentenced to 16 months, 2 or 3 years, pursuant to Penal Code § 1170(h). *H&S C §11350(a), requires a 16-2-3 (h) sentence when there is a designated prior conviction.*

Table 1

Offense Penal Code §	*Description*	*Maximum Punishment Without Designated Prior*	*Punishment with Designated Prior*
459** (to shoplift), is now the crime of *shoplifting*, §459.5(a)[m]	Shoplifting, entering a commercial establishment during regular business hours where the property taken or intended to be taken, is $950 or less. Can't charge with burglary (459**) or theft (484-490.5) of the same property, *Pen C. §459.5(b.)*	6 months, and/or fine up to $1,000. (See, Pen C §19.)	16-2-3[w] (h)
473(b)	Forgery relating to a check, bond, bank bill, note, cashier's check, traveler's check, or money order, where the value is $950 or less. This subdivision does not apply if the defendant is convicted of both forgery and identity theft (Pen C §530.5).	1 year.*	16-2-3[w] (h)
476a(b)	If total of all NSF checks is $950 or less. 476a(b)[m] does not apply if the defendant has suffered 3 or more prior convictions for Section 470, 475, 476, 476a, or petty theft which was also a violation of 470, 475, 476, or 476a. Foreign priors with all the elements qualify.	1 year.*	16-2-3[w] (h)
484 with prior	See, 666, below		
484(a)	Theft	6 months when loss does not exceed $950. See Pen C §490.2	16-2-3[w] (h)
484b	Diversion of construction funds		
484c	Obtaining construction funds by false voucher		
484e(a); (b); (d)	Theft of access cards		
487(b)(1); (b)(2)	Theft of fowl, fruits, nuts... Theft of shell fish...		
487(c)	Theft from the person		
487(d)(1); (d)(2)	Theft of an automobile or designated animal; Theft of a firearm		
487a	Stealing a carcass		
487b	Converting real estate into personal property by severance. The maximum punishment for misdemeanor conversion remains at 1 year. Pen C §487c,		
487d	Theft from a mining claim		

Offense Penal Code §	Description	Maximum Punishment Without Designated Prior	Punishment with Designated Prior
487g	Stealing an animal for medical research...		
487i	Public housing fraud		
490.2(a)[m]	*Any* theft $950 or less is petty theft, punished as a *misdemeanor.* (Pen C §19, sets the maximum punishment at 6 months unless a different punishment is prescribed.)		
Pen C §490.2(a): "Notwithstanding Section 487 *or any other provision of law* defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor,..." Pen C §503, et.al, is in this list. No effort was made to include every conceivable offense which may be classified as theft.			
496(a)	Possession of stolen property with a value of $950 or less is a misdemeanor.	1 year.*	16-2-3[w] (h)
503; 504; 504a; 504b; 505; 506; 506a	Embezzlement is punishable as a theft. (See, Pen C §§490a, 514	See 490.2	16-2-3[w] (h)
664/496	Attempt to receive stolen property, in excess of $950.	1 year [8]	16-2-3[w] (h)
666(a)[w]	Petty theft by: ▶ a sex registrant (*not limited to 290(c)*), ▶ or one who has a prior designated in Table 2, ▶ or who has served time for a prior conviction for: robbery (*Pen C §211)*; carjacking, (*Pen C § 215*); 368(d), (*theft from an elder by a non-caretaker)*, 368((e) (*theft from an elder by a caretaker)*; burglary (Pen C §459); petty theft (*Pen C §484*); grand theft (*Pen C § 487 (probably as defined by Prop 47)*; ▶or a felony violation of Pen C §496 ▶or auto theft under Veh C §10851. This section does not preclude prosecution under 667((b-i) or 1170.12. (Pen C §666(c).)	Up to 1 year * as a misdemeanor, or 16-2-3 ~~(h)~~.[sp]	16-2-3[w sp]
Health & Safety Code			
11350(a)	Possession of a narcotic. H&S §11054(e), [*mecloqualone, methaqualone & GHB*], has been added to H&S §11350(a)	1 year * It is either a misdemeanor or a felony.	16-2-3[l] (h)
11350(b)	Former 11350(b), a wobbler, is now included in 11350(a), above.		
11357	Possession of concentrated cannabis.	1 year *, $500.	16-2-3[w] (h)
11377	Possession of a controlled substance.	1 year *.	16-2-3[w] (h)

* 1 year is 364 days, *effective 1-1-15.* (Pen C §18.5

Appendix II: Table of disqualifying prior convictions

The following table was prepared by Hon. John "Jack" Ryan, Orange County Superior Court (Ret.)

TABLE OF DISQUALIFYING PRIOR CONVICTIONS

Table 2

Prior Conviction	*Description*	*Authority Pen C Sections*
Any Serious or Violent Felony punishable in California by life imprisonment or death.		667(e)(2)C)(iv)(VIII)
182(a)	Conspiracy to commit any mandatory sex registration offense	Pen C §290(c)
187	Murder or attempt. (Any homicide or attempt from 187 to 191.5	667(e)(2)C)(iv)(IV)
187	Murder in perpetration or attempt: 261, 286, 288, 288(a), 289.	Pen C §290(c)
191.5	Vehicular manslaughter while intoxicated or attempt.	667(e)(2)C)(iv)(IV)
207	Kidnap to ... §261, 262, 264.1, 286, 288, 288a, or 289. (Kidnap, as defined in Pen C §207 does not include attempts to commit a defined sex offense.)	667(e)(2)C)(iv)(I)
207	Kidnap to 261, 286, 288, 288(a), 289, 220 sex	Pen C §290(c)
207(b)	Kidnap to child molest (*eff. 1-1-95 to 1-1-98*)	Pen C §290(c)
208(d)	Kidnap to rape/oral cop./sodomy/foreign object (*eff. 1-1-96 to 1-1-98*)	Pen C §290(c)
209	Kidnap to violate §261, 262, 264.1, 286, 288, 288a, or 289.	667(e)(2)C)(iv)(I)
209	Aggravated Kidnap to 261, 286, 288, 288(a), 289, 220 sex	Pen C §290(c)
220	Assault to violate 261, 262, 264.1, 286, 288, 288a, or 289. (Pen C § 220 specifies *rape* as a designated offense. It does not use a section number, 261 (rape) or 262 (spousal rape).	667(e)(2)C)(iv)(I)
220	Assault to commit sex crime.	Pen C §290(c)
236.1(b)	Human trafficking with intent to effect a designated crime	Pen C §290(c)
236.1(c)	Human trafficking Inducing a minor to engage in ...	Pen C §290(c)
243.4	Sexual Battery[5]	Pen C §290(c)
245(d)(3)	Assault with a machine gun on a peace officer or firefighter	667(e)(2)C)(iv)(VI)
261	Rape	Pen C §290(c)
261(a)(2)	Rape by force.	667(e)(2)C)(iv)(I)
261(a)(6)	Rape by threat to retaliate.	667(e)(2)C)(iv)(I)
262(a)(1)	Spousal rape w/force and a prison sentence	Pen C §290(c)
262(a)(2)	Spousal rape by force.	667(e)(2)C)(iv)(I)
262(a)(4)	Spousal rape by threat to retaliate.	667(e)(2)C)(iv)(I)
264.1	Rape in concert by force or violence	667(e)(2)C)(iv)(I)
264.1	Rape or 289(a) in concert	Pen C §290(c)
266	Enticing an unmarried child for purpose of prostitution	Pen C §290(c)
266c	Inducing consent by fraud	Pen C §290(c)
266h(b)	Pimping, prostitute < 16	Pen C §290(c)
266i(b)	Pandering, prostitute < 16	Pen C §290(c)
266j	Procurement of child	Pen C §290(c)
267	Abducting a child for prostitution	Pen C §290(c)
269	Aggravated sexual assault of a child.	667(e)(2)C)(iv)(I)
269	Aggravated sexual assault of a child < 14	Pen C §290(c)
272	Contributing...involving a lewd act	Pen C §290(c)
285	Incest	Pen C §290(c)

Prior Conviction	Description	Authority Pen C Sections
286	Sodomy	Pen C §290(c)
286(c)(1)	Sodomy with child <14 + 10 years age differential.	667(e)(2)C)(iv)(II)
286(c)(2)(A)	Sodomy by force.	667(e)(2)C)(iv)(I)
286(c)(2)(B)	Sodomy by force upon child <14	667(e)(2)C)(iv)(I)
286(c)(2)(C)	Sodomy by force upon child >14	667(e)(2)C)(iv)(I)
286(c)(3)	Sodomy with threat to retaliate	667(e)(2)C)(iv)(I)
286(d)(1)	Sodomy in concert by force...., threat to retaliate.	667(e)(2)C)(iv)(I)
286(d)(2)	Sodomy in concert by force upon child <14	667(e)(2)C)(iv)(I)
286(d)(3)	Sodomy in concert by force upon child >14	667(e)(2)C)(iv)(I)
288	Lewd act upon a child	Pen C §290(c)
288(a)	Lewd act upon a child under the age of 14	667(e)(2)C)(iv)(III)
288(b)(1)	Lewd act upon a child by force...	667(e)(2)C)(iv)(I)
288(b)(2)	Lewd act by caretaker by force...	667(e)(2)C)(iv)(I)
288a	Oral Copulation	Pen C §290(c)
288a(b)(1)	Oral copulation with a person under the age of 18	Pen C §290(c)
288a(b)(2)	Oral copulation with a person under the age of 16	Pen C §290(c)
288a(c)(1)	Oral copulation upon a child <14 + 10 years...	667(e)(2)C)(iv)(III)
288a(c)(2)(A)	Oral copulation by force	667(e)(2)C)(iv)(I)
288a(c)(2)(B)	Oral copulation by force... force upon child <14.	667(e)(2)C)(iv)(I)
288a(c)(2)(C)	Oral copulation by force... force upon child >14.	667(e)(2)C)(iv)(I)
288a(d)	Oral copulation in concert by force.	667(e)(2)C)(iv)(I)
288.2(a)	Felony distribution of harmful matter/minor(*eff. 1-1-90*)	Pen C §290(c)
288.2(b)	Felony distribution of harmful matter/minor by e-mail, etc	Pen C §290(c)
288.3	Arranging meeting with a minor for a lewd act. etc.	Pen C §290(c)
288.5	Continuous sexual abuse	Pen C §290(c)
288.5(a)	Continuous sexual abuse of a child with force...	667(e)(2)C)(iv)(I)
288.7(a)	Intercourse or sodomy with a child less aged 10 or younger.	Pen C §290(c)
288.7(b)	Oral copulation, or sexual penetration /child 10 or younger	Pen C §290(c)
289	Sexual Penetration.	Pen C §290(c)
289(a)(1)(A)	Sexual penetration by force, etc.	667(e)(2)C)(iv)(I)
289(a)(1)(B)	Sexual penetration upon a child <14 by force...	667(e)(2)C)(iv)(I)
289(a)(1)(C)	Sexual penetration upon a child >14 by force...	667(e)(2)C)(iv)(I)
289(a)(2)(C)	Sexual penetration by threat to retaliate.	667(e)(2)C)(iv)(I)
289(d)	Sexual penetration with an unconscious person.	Pen C §290(c)
289(h)	Sexual penetration with a child under the age of 18	Pen C §290(c)
289(j)	Sexual penetration upon a child <14 + 10 years...	667(e)(2)C)(iv)(II)
311.1	Material depicting a child in sexual conduct	Pen C §290(c)
311.2(b)	Distribution, etc., of obscene matter for commercial purposes	Pen C §290(c)
311.2(c)	Distribution, etc., of obscene matter to someone 18 or older	Pen C §290(c)
311.2(d)	Distribution, etc., of obscene matter to a minor	Pen C §290(c)
311.3	Sexual exploitation/child	Pen C §290(c)
311.4	Use of minor in distribution of obscene matter	Pen C §290(c)
311.10	Advertising obscene matter depicting minors	Pen C §290(c)
311.11	Possession of child pornography	Pen C §290(c)
314.1	Indecent exposure	Pen C §290(c)
314.2	Indecent exposure	Pen C §290(c)
647(a), *former*	Loitering at toilet to solicit a lewd act	Pen C §290(c)
647.6	Child annoyance	Pen C §290(c)
653f	Solicitation to commit murder.	667(e)(2)C)(iv)(V)

Prior Conviction	Description	Authority Pen C Sections
653f(c)	Solicit another to commit forcible rape /288(a)(c) /264.1 /288 /289	Pen C §290(c)
664/191.5	Attempt vehicular manslaughter while intoxicated	667(e)(2)C)(iv)(IV)
664/187	Attempt murder	667(e)(2)C)(iv)(IV)
664/any 290(c)	Any attempt on a mandatory sex registerable offense	Pen C §290(c)
11418(a)(1)	Possession of a weapon of mass destruction	667(e)(2)C)(iv)(VII)

▶ There are many strike felonies which are not included Pen C §667(e)(2)(C)(iv). Gang crimes, robberies, residential burglaries, etc. i.e., an 11350 with three 211 priors is a misdemeanor!

PROP 47 Petitions and Applications

Defendant Name: _____

DA Case #: _____ Court#: _____

DA Position: ( ) Eligible ( ) Partial Reduction ( ) Not Eligible

FILE REVIEW

___ CII REVIEWED

___ P47 Charge _____

___ Other Counts _____

___ Strikes _____

___ PPs _____

___ Grand Theft over $950 on Complaint

___ Burglary Type: _____

___ Forgery: ( ) Value Forged over $950); ( ) NSF over $950; ( ) Three or more Priors

___ Value over $950: _____ Value under $950 _____

___ Marsy's Law; V: _____ DOV: ____/____/____

_____

___ Marsy's Law Notification Sent to address: _____

___ Super-strike or 290 Registration: _____

___ Effect on Sentencing: _____

___ OSC Demanded _____

CONTINUE AND WHY:

_____

_____

DISPO ( ) Granted ( ) Partial Reduction ( ) Denied-Affirm; ( ) Withdrawn

Hrg Date: _____ Dept 74 (___) Judge: Whitehead (_____)

Atty: PD Feinberg (_____) Ciummo Asami (_____) ADO Luna (_____) Pvt Atty: _____

DDA: S Phillips (_____)

Custody status: Present I/C ____O/C ____Not Present ___ CDC___

Argument by People/Notes _____

If Petition granted; complete the following: ( ) Petition ( ) Application (no resentence)

Felony Reduced to M: Ct: ( ) _____ ( ) _____ ( ) _____ ( ) _____ ( ) _____

Sentence: Days Custody _____ Credit for: _____ 29800 Notice ____

( )Probation Denied; ( ) Misd Formal Prob Granted; ( ) Misd Prop 36 Prob Granted; Prob to expire: _____

( ) 1 year Parole; Other: _____

Date: _____ ***PROP 47 Application Ex Parte Review***

Defendant Name: _____

DA Case #: _____ Court#: _____

DA Position: **( ) Eligible ( ) Partial Reduction ( ) Not Eligible**

Attorney of Record: _____

FILE REVIEW

___ CII REVIEWED

___ P47 Charge _____

___ Other Counts _____

___ Strikes _____

___ PPs _____

___ Grand Theft over $950 on Complaint

___ Burglary Type: _____

___ Forgery: ( ) Value Forged over $950); ( ) NSF over $950; ( ) Three or more Priors

___ Value over $950: _____ Value under $950 _____

___ Super-strike or 290 Registration: _____

___ Check on Supervision Status: none ___ probation ___ PRCS ___ MSR ___

DISPO WITHOUT HEARING: ( ) Granted ( ) Partial Reduction ( ) Denied-Affirm

Felony Reduced to M: Ct: ( ) _____ ( ) _____ ( ) _____ ( ) _____ ( ) _____

Recommendation sent to court: _____

Recommendation sent to attorney: _____

Dispo entered into STAR: _____

☐ **HEARING REQUESTED: Recommendation sent to Court: ___ Attorney: ___**

HEARING: ( ) Granted ( ) Partial Reduction ( ) Denied-Affirm

Hrg Date: _____ Dept 74 (__) Judge: Whitehead (_____)

Atty: PD Feinberg (_____) Ciummo Asami (_____) ADO Luna (_____) Pvt Atty:_____

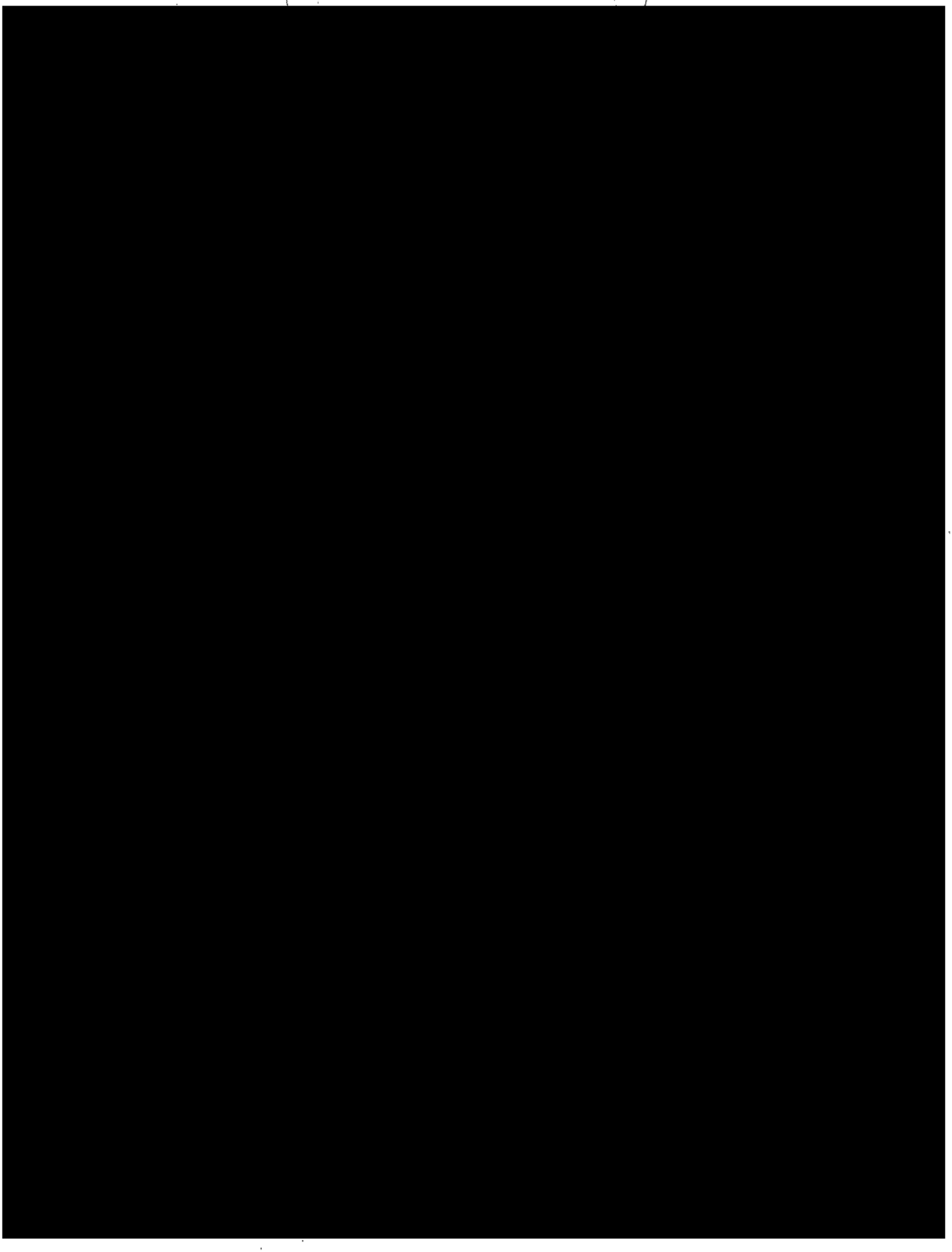
DDA: S Phillips (_____)

Custody status: Present I/C ____O/C ____Not Present ___ CDC___

Argument by People/Notes _____

If Application granted:

Felony Reduced to M: Ct: ( ) _____ ( ) _____ ( ) _____ ( ) _____ ( ) _____



Burden of Proof

Filed 8/11/15; pub. order 8/20/15 (see end of opn.)

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. TIMOTHY WAYNE SHEROW, Defendant and Appellant.	D067605 (Super. Ct. No. RIF138991)

APPEAL from an order of the Superior Court of Riverside, Becky Lynn Dugan, Judge. Affirmed.

William D. Farber, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Amanda E. Casillas, Deputy Attorneys General, for Plaintiff and Respondent.

Timothy Wayne Sherow was originally convicted of nine counts of second degree burglary (Pen. Code,[1] § 459) arising from offenses committed in 2007. (Case No. D056988.)[2] He admitted eight prison priors (§ 667.5, subd. (b)) and one strike prior (§ 667, subds. (b)-(i)). Sherow was sentenced to a determinate term of 19 years four months. On appeal this court reversed counts 7 through 10 for instructional error. However, since the counts had been sentenced concurrently the reversal did not impact the sentence. (*People v. Sherow, supra,* 196 Cal.App.4th at pp. 1311-1312.)

In November 2014, Sherow filed a petition for resentencing of all five remaining counts of second degree burglary pursuant to Proposition 47. The prosecutor opposed the resentencing contending the loss exceeded $950. The court found Sherow did not qualify for relief because the loss exceeded $100,000.

Sherow appeals challenging only the decision as to counts 1 and 2. He contends the record does not show the loss as to each count exceeded $950 and thus the two counts should be resentenced as misdemeanors. Sherow's petition sought resentencing as to all five counts without any separate discussion of the counts, no reference to facts or evidence and no argument. The People contend that Sherow had the burden under section 1170.18 to show the losses as to counts 1 and 2 did not exceed $950. We agree with the People that Sherow had the burden to show the property loss in each of those counts did not exceed $950 and thus fell within the new statutory definition of

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1 All further statutory references are to the Penal Code unless otherwise specified.

2 This court has taken judicial notice of the record in D056988. (*People v. Sherow* (2011) 196 Cal.App.4th 1296.)

shoplifting. We are satisfied that Sherow's blanket request for resentencing on all counts without any effort to deal with those which might have involved less than $950 or to discuss any facts surrounding the offenses, was fatally defective. Thus the trial court properly denied the petition.

STATEMENT OF FACTS

We set forth the facts, taken from the previous appeal, only to provide context for our discussion. Accordingly, we will adopt the respondent's summary for convenience.

On July 31, 2007, Officer Cisneros with the Riverside County Police Department's burglary and auto theft unit conducted undercover surveillance on appellant because he was suspected of large scale DVD thefts. Officer Cisneros observed appellant enter a Ross department store, go the men's apparel section, select several pieces of clothing off the rack, "roll it up in a really tight roll," place it in his waistband, and leave the store without paying. Officer Cisneros then watched appellant go to his vehicle, place the stolen goods in the back seat, and drive off.

Thereafter, Officer Cisneros followed appellant to an AJ Wright store. Officer Cisneros witnessed appellant steal more men's clothing in the same manner as he did at Ross. After appellant left AJ Wright without paying for the merchandise he tucked into his waistband, Officer Cisneros followed him to Walmart. While appellant was inside Walmart, Officer Cisneros looked inside appellant's car and saw the items appellant had taken from Ross and AJ Wright in plain view on the back seat. During appellant's theft excursion, he was with a female that was conducting counter surveillance for him.

DISCUSSION

Sherow contends his blanket request to reduce his convictions to misdemeanors, without any discussion or elaboration placed the burden on the prosecution to first, discern he was only potentially eligible for Proposition 47 relief on counts 1 and 2. He further contends the prosecution had the burden to prove Sherow was not eligible for resentencing. The People, on the other hand contend the initial burden was on Sherow to prove his eligibility for resentencing in this case by showing the value of the stolen property in each of counts 1 and 2 was under $950.

Much like the three strikes resentencing law (Prop. 36) Proposition 47 does not explicitly allocate a burden of proof. However, as we will discuss, applying established principles of statutory construction we believe a petitioner for resentencing under Proposition 47 must establish his or her eligibility for such resentencing. In such cases, it is important to keep in mind a person, like Sherow, was validly convicted under the law applicable at the time of the trial of the felony offenses. It is a rational allocation of burdens if the petitioner in such cases bear the burden of showing that he or she is eligible for resentencing of what was an otherwise valid sentence. As we will discuss, the petition is devoid of any information about the offenses for which Sherow seeks resentencing.

A. Legal Principles

No facts were presented in the trial court. Thus our review of this appeal is based solely on our interpretation of the statute, which we review de novo.

Proposition 47, which is codified in section 1170.18, reduced the penalties for a number of offenses. Among those crimes reduced are certain second degree burglaries where the defendant enters a commercial establishment with the intent to steal. Such offense is now characterized as shoplifting as defined in new section 459.5. Shoplifting is now a misdemeanor unless the prosecution proves the value of the items stolen exceeds $950. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091; *People v. Contreras* (2015) 237 Cal.App.4th 868, 889-891.)

Section 1170.18 creates a process where persons previously convicted of crimes as felonies, which would be misdemeanors under the new definitions in Proposition 47, may petition for resentencing. Section 1170.18, subdivision (b) provides in part: "Upon receiving a petition under subdivision (a), the court shall determine whether the petitioner satisfies the criteria for subdivision (a)." Under subdivision (b) a person who satisfies the criteria in subdivision (a) of section 1170.18, shall have his or her sentence recalled and be sentenced to a misdemeanor (subject to certain exclusions not relevant here). If Sherow establishes the thefts in each of counts 1 and 2 were of a value of less than $950, he would be entitled to resentencing, absent any statutory exclusions. The question is who has the burden of proof.

In their published work on Proposition 47, Judge J. Richard Couzens and Presiding Justice Tricia A. Bigelow concluded the petitioner for resentencing under Proposition 47 bears the burden of proof as to eligibility. "The petitioner will have the initial burden of establishing eligibility for resentencing under section 1170.18(a): i.e., whether the petitioner is currently serving a felony sentence for a crime that would have

been a misdemeanor had Proposition 47 been in effect at the time the crime was committed. If the crime under consideration is a theft offense under sections 459.5, 473, 476a, 490.2 or 496, the petitioner will have the burden of proving the value of the property did not exceed $950." (Couzens & Bigelow, Proposition 47 "The Safe Neighborhoods and Schools Act" (Feb. 2015), <www.courts.ca.gov/documents/Prop-47-Information.pdf> [as of August 10, 2015] p. 40.)

As an ordinary proposition: "A party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense he is asserting." (*Vance v. Bizek* (2014) 228 Cal.App.4th 1155, 1163, fn. 3; Evid. Code, § 500.)

Sherow contends it would violate due process to place the initial burden of proof on him to show eligibility for resentencing. His arguments, however, are directed to principles regarding proof of guilt of an alleged crime. The cases he cites dealing with such matters as the burden of proof to prove the crime of grand theft, address the question of whether in the initial prosecution for certain alleged crimes, the People must prove the amount of the theft meets the criteria for the offense. (*People v. Love* (2008) 166 Cal.App.4th 1292, 1301.)

The difficulty with a due process argument based on the prosecutor's burden of proof in the initial prosecution for an offense is that the resentencing provisions of Proposition 47 deal with persons who have already been proved guilty of their offenses beyond a reasonable doubt. Under this remedial statute, a petitioner is claiming the crime

for which the person has been convicted, would be a misdemeanor if tried after the enactment of the proposition.

B. Analysis

As we have discussed, the petition here gave virtually no information regarding Sherow's eligibility for resentencing. Indeed, it lumped all five counts together without discussion or analysis. We think it is entirely appropriate to allocate the initial burden of proof to the petitioner to establish the facts, upon which his or her eligibility is based.

Applying the burden to Sherow would not be unfair or unreasonable. He knows what kind of items he took from the stores in counts 1 and 2. At the time of trial it was not necessary for the prosecution to prove the value of the loss to prove second degree burglary. Thus there is apparently no record of value in the trial record.

A proper petition could certainly contain at least Sherow's testimony about the nature of the items taken. If he made the initial showing the court can take such action as appropriate to grant the petition or permit further factual determination. (*People v. Bradford* (2014) 227 Cal.App.4th 1332, 1341.)

The petition at issue in this case gave the trial court no information about eligibility or even the actual counts about which there may have been a question of eligibility for resentencing. On a proper petition Sherow may be able to show eligibility on counts 1 or 2 or both, but he has not done so on this record.

DISPOSITION

The order denying Sherow's petition for resentencing is affirmed without prejudice to subsequent consideration of a properly filed petition.

HUFFMAN, Acting P. J.

WE CONCUR:

AARON, J.

IRION, J.

Filed 8/20/15

COURT OF APPEAL - STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,
Plaintiff and Respondent,
v.
TIMOTHY WAYNE SHEROW,
Defendant and Appellant.
D067605
Riverside County No. RIF138991

THE COURT:

The opinion in this case filed August 11, 2015 was not certified for publication. It appearing the opinion meets the standards for publication specified in California Rules of Court, rule 8.1105(c), respondent's request pursuant to California Rules of Court, rule 8.1120(a), for publication is GRANTED.

IT IS HEREBY CERTIFIED that the opinion meets the standards for publication specified in California Rules of Court, rule 8.1105(c); and

ORDERED that the words "Not to Be Published in the Official Reports" appearing on page one of said opinion be deleted and the opinion herein be published in the Official Reports.

Huffman, Acting Presiding Justice

cc: All Parties

FILED
APR 27 2015
FRESNO COUNTY SUPERIOR COURT
By _____ DEPUTY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO

CENTRAL DIVISION

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. [redacted] Defendant.	No. [redacted] Dept. 74 ORDER DENYING PETITION FOR REDUCTION AND RESENTENCING (PEN. CODE, SECTION 1170.1i, subd. (a))

BACKGROUND

On March 30, 2009, a criminal complaint was filed in Case No. [redacted] charging Petitioner [redacted] [hereafter Jorgenson] with 47 counts varying from identity theft, forgery, receiving stolen property, grand theft of an automobile, to second degree burglary. One prior strike and two one-year prison prior enhancements were also alleged. After the preliminary hearing Jorgenson pleaded guilty to the following felony counts: Count 1, Penal Code section 530.5(a), Unauthorized Use of Personal Identifying Information to Obtain Credit, Goods or Services; Count 35, Penal Code section 459/460(b), Second Degree Commercial Burglary; and

Count 36, Penal Code section 470(b), Forgery. He was sentenced concurrently to charges in case number [redacted] for a total term of nine years, eight months in state prison.

On January 6, 2015, Jorgenson filed a petition seeking reduction and resentencing in Case Number [redacted] pursuant to Proposition 47, "the Safe Neighborhoods and Schools Act" [hereafter Proposition 47]. Although Jorgenson did not petition for relief in case number [redacted] the court calendared this case as Jorgenson was sentenced concurrently on these two cases. In Case Number F09901895 Jorgenson seeks reduction of his felony conviction of a violation of Penal Code section 459/460(b) to a misdemeanor violation of Penal Code section 459.5.

ISSUES PRESENTED

This case presents several issues left unanswered by Proposition 47: (1) Should Penal Code section 459.5 be read so that the word "theft" replaces the word "larceny"; (2) who has the burden of establishing that a felony conviction of a commercial burglary qualifies for reduction to a misdemeanor violation of Penal Code section 459.5; (3) what evidence, if any, may the court consider in determining whether the offense qualifies to be reduced to a misdemeanor violation; (4) does a violation of Penal Code section 530.5 constitute a theft within the meaning of Penal Code section 459.5; and (5) is Jorgenson entitled to a reduction of his conviction of a felony violation of Penal Code section 459/460 subdivision (b) where his conduct in entering the store constitutes both a theft by false pretenses and a violation of Penal Code section 530.5.

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CONSTRUCTION OF PENAL CODE SECTION 459.5

Proposition 47 added Penal Code section 1170.18. Subdivision (a) of Penal Code 1170.18 permits 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 . . . had this act been in effect at the time of the offense" to petition the court for reduction to a misdemeanor charge and resentencing.

Jorgenson petitions for reduction of his felony conviction of a violation of Penal Code section 459/460(b), Commercial Burglary to a misdemeanor violation of Penal Code section 459.5, misdemeanor Shoplifting. Penal Code section 459.5, added by Proposition 47, provides in relevant part:

> "Notwithstanding Section 459, shoplifting is defined as entering a commercial establishment with intent to commit *larceny* while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950)." (Italics added.)

Relying on Penal Code section 490a, Jorgenson argues Penal Code section 459.5 must be read to replace the word theft for the word larceny. The point is well taken. Section 490a provides:

> "[w]henever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall be read and interpreted as if the word 'theft' were substituted."

Penal Code section 490a was enacted in 1927 and obviously in effect at the time Proposition 47 was enacted.

> "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. (*Viking Pools, Inc. v. Maloney* (1989) 48 Cal.3d 602, 609; *People v. Weidert* (1985) 39 Cal.3d 836, 844; *People v. Silverbrand* (1990) 220 Cal.App.3d 1621, 1628); (*Williams v. County of San Joaquin* (1990) 225 Cal.App.3d 1326, 1332.)" (*McLaughlin v. State Bd. of Educ.* (1999) 75 Cal.App.4th 196, 212.)

Cases construing section Penal Code section 490a hold the statute means exactly what it says. In *People v. Dingle* (1985) 174 Cal.3d 21 the defendant entered the victim's residence to make a long distance phone call and have it billed to the victim's account. Neither the entry nor the use of the phone was consented to by the victim. The defendant was convicted of residential burglary and appealed. He argued the only form of theft contemplated by the burglary statute was larceny. The section at that time provided: "Every person who enters any house . . . with the intent to commit . . . larceny . . . is guilty of burglary." He argued the burglary conviction could not stand because he did not enter the residence to commit larceny.

Citing Penal Code section 490a, the appellate court rejected the argument. The court stated:

> "Section 490a not only changed section 484 so that the word 'larceny' formerly used therein became superseded by the word 'theft', but plainly means that the word 'larceny' in section 459 shall now be read and interpreted as if the word 'theft' were substituted." (*Id.* at p. 30.)

Accordingly, the court in *Dingle* held the defendant could be convicted of burglary even if he did not intend to commit larceny as long as he intended to commit a theft. (*Ibid.*)

Similarly here section Penal Code section 459.5 must be read replacing the word larceny with the word theft. Jorgenson is

entitled to relief if he establishes, among other things, that he entered the commercial establishment with the intent to commit theft.

BURDEN TO ESTABLISH THE FACTS UNDERLYING THE PRIOR CONVICTION QUALIFY FOR REDUCTION UNDER PROPOSITION 47

Proposition 47 provides little, if any guidance on the procedure to be employed in implementing the Act. Appellate cases interpreting Proposition 36 are useful as guidance in that the basic structure of Proposition 47 is very similar to that of Proposition 36.

> "Both initiatives contain a reduction in penalty for certain crimes and a resentencing process for people who would be entitled to lesser punishment had the crime been committed after the enactment of the new law. The resentencing provision of Proposition 47 are codified in Penal Code section 1170.18. Some of the statutory language is taken directly from section 1170.126, the resentencing provisions of Proposition 36." (*Couzens and Bigelow: Proposition 47 "The Safe Neighborhoods and Schools Act"* rev. Jan. 2015 at p. 6. Hereafter *Couzens*)

Relying on appellate opinions discussing implementation of Proposition 36, *Couzens* concludes the petition process has four potential stages: (1) filing a petition requesting relief under Proposition 47; (2) an initial screening by the court to determine if the offense qualifies for reduction and/or if any of the statutory exclusions apply; (3) a qualification hearing to consider the merits of the petition; and (4) resentencing if eligible for relief. (*Id.* at pp. 35-36.)

At the qualification stage the Petitioner has the burden of establishing eligibility for resentencing under Penal Code section 1170.18. (*Id.* at p. 40.) In the present case, Jorgenson was convicted of a Commercial Burglary in violation of Penal Code

459/460 subdivision (b). That code section provides a defendant is guilty of Commercial Burglary when he or she enters a building "with intent to commit grand or petit larceny or any other felony." Where, as here, the Petitioner seeks reduction from a felony commercial burglary, he or she has the burden of establishing: (1) he entered a commercial establishment during regular business hours; (2) he entered with the intent to commit theft and (3) the value of the property taken or intended to be taken did not exceed $950. (Penal Code section 459.5.)

EVIDENCE COURT MAY CONSIDER

Proposition 47 does not address the issue of what evidence is admissible for a petitioner to meet his or her burden of proving that he/she is currently serving a felony sentence for a crime that would have been a misdemeanor had Proposition 47 been in effect at the time the crime was committed. However, appellate courts have held that in determining the facts underlying the conviction the court may consider the "record of conviction" as these documents reliably reflect the facts of the offense for which defendant was convicted. (*People v. Reed* (1966) 13 Cal.4th 217, 223.) The "record of conviction" may, depending on the circumstances include "the abstract of judgment, the section 969b prison packet, the charging document and plea form, transcripts of the petitioner's plea, the factual basis given for the plea, preliminary hearing and trial transcripts, and appellate opinions." (*Couzens* at p. 41.)

The reporter's transcripts from the preliminary hearing in Case No. F09901895 reflect the following evidence of the commercial burglary conviction. On June 9, 2008, Jorgenson

entered the Home Depot in Fresno County and attempted to purchase $468 worth of property with a Home Depot credit card under the name of James Trapp. (RT. Pp. 177-179.) The record of conviction in this case establishes that Jorgenson entered a commercial establishment during regular business hours. The record further reflects the amount of property Jorgenson intended to take was below the $950 limit.

Jorgenson asserts he is entitled to relief because he entered with the intent to commit theft by false pretenses. The People argue he is not eligible because he did not enter with the intent to commit a theft - he entered with the intent to commit the crime of unauthorized use of personal identifying information in violation of Penal Code section 530.5 subdivision (a). Jorgenson counters that a violation of Penal Code section 530.5 subdivision (a) is identity theft and falls within the definition of theft within the meaning of Penal Code section 459.5. Therefore, according to Jorgenson, he is entitled to relief.

UNLAWFUL USE OF PESONAL IDENTIFYING INFORMATION IN VIOLATION OF PENAL CODE SECTION 530.5 IS NOT A THEFT WITHIN THE MEANING OF PENAL CODE SECTION 459.5

Penal Code section 530.5 subdivision (a) provides:

> "Every person who willfully obtains personal identifying information, as defined in subdivision (b) of section 530.55, of another person, and uses that information for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, real property, or medical information without the consent of that person, is guilty of a public offense, and upon conviction therefor, shall be punished by a fine, by imprisonment in a county jail not to exceed one year, or by both a fine and imprisonment, or by imprisonment pursuant to subdivision (h) of section 1170."

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The issue presented is whether unlawful use of personal identifying information in violation of Penal Code section 530.5 constitutes a theft within the meaning of Penal Code section 459.5.

"In interpreting a voter initiative like [Proposition 47], we apply the same principles that govern statutory construction. [Citation.]" (*People v. Rizo* (2000) 22 Cal.4th 681, 685, 94 Cal.Rptr.2d 375, 996 P.2d 27.) " 'The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. [Citations.]' " (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276, 87 Cal.Rptr.2d 222, 980 P.2d 927.) "In interpreting an initiative adopted by the voters, "'their intent governs. [Citations.]'" (People v. Jones (1993)5 Cal.4th 1142, 1146.)

> "In determining intent, we look first to the words themselves. [Citations.] When the language is clear and unambiguous, there is no need for construction. [Citations.] When the language is susceptible of more than one reasonable interpretation, however, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. [Citations.]" (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1007-1008.)

We also " 'refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet.' [Citation.]" (*People v. Rizo, supra*, 22 Cal.4th at p. 685, 94 Cal.Rptr.2d 375, 996 P.2d 27.)

> "Using these extrinsic aids, we 'select the construction that comports most closely with the

apparent intent of the [electorate], with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.' [Citation.]" (*People v. Sinohui* (2002) 28 Cal.4th 205, 212, 120 Cal.Rptr.2d 783, 47 P.3d 629.)

A review of extrinsic aids in determining the voters' intent in allowing certain commercial burglaries to be reduced to a misdemeanor violation of Penal Code section 459.5 demonstrates the voters did not intend to allow such relief to someone who entered a commercial establishment to commit a violation of Penal Code section 530.5.

First, there are significant differences between the crime of theft and a violation of Penal Code section 530.5. Although Penal Code section 530.5 frequently is referred to as identity theft, it is not statutorily defined as theft. Rather violation of Penal Code section 530.5 involves the unauthorized use of personal information of another person for any unlawful purpose. A violation of subdivision (a) of Penal Code section 530.5 is statutorily defined not as theft, but as a "public offense."

Unlike theft offenses, violation of Penal Code section 530.5 does not require that anyone actually be defrauded or actually suffer a financial or property loss. The definition of unlawful purpose contained in subdivision (a) of Penal Code section 530.5 is not limited to acquiring information for financial reasons. It also includes using the information for any unlawful purpose. For example, using such information to facilitate a violation of a restraining order constitutes a violation of Penal Code section 530.5 subdivision (a). (*People v. Tillotson* (2007) 157 Cal.App.4th 517, 533.)

Finally, as is set forth below, because Penal Code section 530.5 is not reducible to a misdemeanor under Proposition 47, a second degree burglary is not reducible to a misdemeanor violation of Penal Code section 459.5 where the perpetrator enters the commercial establishment to commit a violation of Penal Code section 530.5.

Nothing in the ballot measures suggest the voters intended crimes that have been recognized as serious by lawmakers and the courts would be reduced to misdemeanors on passage of Proposition 47. The uncodified provisions of Proposition 47 informed voters that the purpose of the initiative was in part to "require misdemeanors instead of felonies for *nonserious*, [sic] nonviolent crimes like *petty theft* and drug possession, unless the defendant has prior convictions for specified violent or serious crimes." (Official Voter Information Guide, Gen. Election Nov. 4, (2014. Italics added.)

Both lawmakers and the courts have recognized the significant difference between a traditional theft and unauthorized use of personal identifying information. As stated in *People* v. *Valenzuela* (2012) 205 Cal.App.4th 800, 808, Penal Code section 530.5 "' and complementary statutory provisions were created because the harm suffered [by victims' of this crime] went well beyond the actual property obtained through the misuse of the person's identity. Identity theft victims' lives are often severely disrupted. For example, where a thief used the victim's identity to buy a coat on credit, the victim might not be liable for the actual cost of the coat. However, if the victim was initially unaware of the illicit transaction, the damage to the

person's credit may be very difficult to repair. The perpetrator could commit other crimes by using the victim's identity, causing great harm to the victim. Thus, identity theft in the electronic age is an essentially unique crime, not simply a form of grand theft. In contrast, grand theft is relatively well defined . . . . Grand theft is typically a discrete event, not a crime that creates ripples of harm to the victim that flow from the initial misappropriation.'" (*Valenzuela, supra,* at p. 808 quoting Sen. Com. *On Public Safety, Analysis of Assem. Bill No. 2886* (2005-2006 Reg. Sess.) as amended May 26, 2006.)

The information provided to voters on Proposition 47 was that the proposition would result only in reduction in cases such as petty theft and drug possession. This clearly demonstrates the voters did not intend for a serious crime such as a violation of Penal Code section 530.5 be treated as a misdemeanor.

In addition, passage of Proposition 47 resulted in adding subdivision (b) to Penal Code section 473. With certain exceptions this amendment provides that "any person who is guilty of forgery relating to a check . . . . where the value does not exceed nine hundred fifty dollars ($950.00)" is guilty of a misdemeanor. The section further provides: "This subdivision shall not be applicable to any person who is convicted of both forgery and identity theft as defined in section 530.5."

That an otherwise eligible offense is not reducible if accompanied with a violation of Penal Code section 530.5 is further evidence that the voters did not intend to include a violation of Penal Code section 530.5 in the crimes deemed misdemeanors under Proposition 47.

Accepting Jorgenson's argument that a violation of Penal Code section 530.5 constitutes a theft within the meaning of Penal Code section 459.5 would lead to absurd results. For example, a violation of Penal Code section 459/460 would be reducible to a misdemeanor violation of Penal Code section 459.5 if the perpetrator entered the store to commit a violation of Penal Code section 530.5 if the amount of the loss was under $950.00. Conversely, a violation of Penal Code section 530.5 occurring outside a commercial establishment would not be reducible to a misdemeanor regardless of the amount of the loss.

JORGENSON IS NOT ENTITLED TO RELIEF WHERE HIS CONDUCT ON ENTERING THE STORE CONISITUTES BOTH A THEFT BY FALSE PRETENCES AND A VIOLATION OF PENAL CODE 530.5

Jorgenson asserts that even if a violation of Penal Code section 530.5 is not a theft within the meaning of Penal Code section 459.5 he is nonetheless entitled to relief because his conduct in entering the store also constitutes a theft by false pretenses.

The elements of theft by false pretenses are "'(1) the defendant made a false pretense or representation to the owner; (2) with the intent to defraud the owner of that property; and (3) the owner transferred the property to the defendant in reliance on the representation.' [Citation.]" (*People* v. *Williams* (2013) 57 Cal4th 776, 787.)

Even assuming the conduct constitutes theft by false pretenses, Jorgenson is not entitled to relief. Adoption of his argument would be contrary to the voters' intent that only low level theft offenses be reduced to misdemeanors. As is set forth

above, there is no evidence the voters' intended that a violation of Penal Code 530.5 be reduced to a misdemeanor. It therefore follows that the voters also did not intend to reduce to shoplifting those burglaries where the entry was made to violate Penal Code section 530.5

CONCLUSION

For the reasons set forth herein, the Petition for Reduction and Resentencing pursuant to Proposition 47 is denied.

DENISE L. WHITEHEAD
JUDGE OF THE SUPERIOR COURT

SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO

CENTRAL DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. CHOUA YANG, Defendant.	Nos. F12905793 Dept. 11 F16906567 ORDER DENYING PETITION FOR REDUCTION AND RESENTENCING (PEN. CODE, SECTION 1170.18, subd. (a))

BACKGROUND

On March 5, 2014, Choua Yang was sentenced on ten (10) different felony counts in five separate felony cases to a total term of five years in state prison. The sentence was pursuant to a stipulated plea agreement. The Felony Abstract of Judgment is attached hereto and incorporated by reference. On February 9, 2015, Choua Yang [Petitioner] filed a petition seeking reduction and resentencing in Case Nos. F13906567 and F12905793 pursuant to Proposition 47, "The Safe Neighborhoods and Schools Act" [hereafter Proposition 47]. In Case No. F12905793 he seeks reduction of the felony commercial burglary in violation of Penal

Code section 459/460 subdivision (b). In Case No. F13906567, he seeks reduction of the felony conviction for receiving stolen property in violation of Penal Code section 496 subdivision (a).

ISSUES PRESENTED

This case presents several issues left unanswered by Proposition 47: (1) Should Penal Code section 459.5 be read so that the word "theft" replaces the word "larceny"; (2) who has the burden of establishing that a felony conviction of a commercial burglary qualifies for reduction to a misdemeanor violation of Penal Code section 459.5; (3) what evidence, if any, may the court consider in determining whether the offense qualifies to be reduced to a misdemeanor violation; (4) does a violation of Penal Code section 530.5 constitute a theft within the meaning of Penal Code section 459.5; and (5) is Petitioner entitled to a reduction of his conviction of Penal Code section 459/460 subdivision (b) where he entered with a dual intent - one of which was not to commit a theft.

CONSTRUCTION OF PENAL CODE SECTION 459.5

Proposition 47 added Penal Code section 1170.18. Subdivision (a) of Penal Code 1170.18 permits 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 . . . had this act been in effect at the time of the offense" to petition the court for reduction to a misdemeanor charge and resentencing

In Fresno Superior Court Case No. F12905793, Petitioner seeks reduction of his felony conviction of a violation of Penal Code section 459/460(b), Commercial Burglary to a misdemeanor violation

of Penal Code section 459.5, misdemeanor Shoplifting. Penal Code section 459.5, added by Proposition 47, provides in relevant part:

> "Notwithstanding Section 459, shoplifting is defined as entering a commercial establishment with intent to commit *larceny* while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950.00)." (Italics added.)

Pursuant to Penal Code section 490a, Penal Code section 459.5 must be read to replace the word theft for the word larceny. Penal Code Section 490a provides:

> "[w]henever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall be read and interpreted as if the word 'theft' were substituted."

Penal Code section 490a was enacted in 1927 and obviously in effect at the time Proposition 47 was enacted.

> "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. (*Viking Pools, Inc. v. Maloney* (1989) 48 Cal.3d 602, 609; *People v. Weidert* (1985) 39 Cal.3d 836, 844; *People v. Silverbrand* (1990) 220 Cal.App.3d 1621, 1628); (*Williams v. County of San Joaquin* (1990) 225 Cal.App.3d 1326, 1332.)" (*McLaughlin v. State Bd. of Educ.* (1999) 75 Cal.App.4th 196, 212.)

Cases construing section 490a hold the statute means exactly what it says. In *People v. Dingle* (1985) 174 Cal.3d 21 the defendant entered the victim's residence to make a long distance phone call and have it billed to the victim's account. Neither the entry nor the use of the phone was consented to by the victim. The defendant was convicted of residential burglary and appealed. He argued the only form of theft contemplated by the burglary statute was larceny. The section at that time provided: "Every

person who enters any house . . . with the intent to commit . . . larceny . . . is guilty of burglary." He argued the burglary conviction could not stand because he did not enter the residence to commit larceny.

Citing Penal Code section 490a the appellate court rejected the argument. The court stated:

> "Section 490a not only changed section 484 so that the word 'larceny' formerly used therein became superseded by the word 'theft', but plainly means that the word 'larceny' in section 459 shall now be read and interpreted as if the word 'theft' were substituted." (*Id.* at p. 30.)

Accordingly, the court in *Dingle* held the defendant could be convicted of burglary even if he did not intend to commit larceny as long as he intended to commit a theft. (*Ibid.*)

Similarly here section 459.5 must be read replacing the word larceny with the word theft. Petitioner is entitled to relief if he establishes, among other things, that he entered the commercial establishment with the intent to commit theft.

BURDEN TO ESTABLISH THE FACTS UNDERLYING THE PRIOR CONVICTION QUALIFY FOR REDUCTION UNDER PROPOSITION 47

Petitioner argues the People have the burden of proving the offense is not eligible for reduction. In essence, Petitioner argues that all felony convictions for a violations of Penal Code section 459/460 subdivision (b) must be reduced to a misdemeanor violation of Penal Code section 459.5 under Proposition 47 unless the record affirmatively reflects the charge is not eligible for reduction. He further argues that any crime involving theft of property and or receiving stolen property is a misdemeanor unless

the record expressly reflects that the value of the property taken is over $950.00.

His reliance on *People v. Osuna* (2014) 225 Cal.App.4th 1020 is misplaced. Unlike *Osuna*, the present cases does not present the issue of proving a disqualifying factor. Rather, the issue presented in the present case is whether the facts underlying the offenses qualify for reduction from a felony to a misdemeanor under Proposition 47.

In his brief in Case No. F13906567 at page 4, Petitioner asserts that the article prepared by Judge Couzens and Justice Bigelow titled Proposition 47: The Safe Neighborhoods and Schools Act stands for the proposition that the Prosecutor has the burden to establish that the crime does not qualify for reductions under Proposition 47. Once again, his reliance is misplaced. The portion he cites deals with the Prosecution's burden to prove a disqualification. He completely ignores those portions of the article that expressly state that the Petitioner has the burden to prove the offense he committed "would constitute a misdemeanor had [Proposition 47] been in effect at the time of [his] offense." (Penal Code section 1170.18, subdivision (a).)

A review of the most recent article authored by Judge Couzens and Justice Bigelow reflects that the article in question stands for the complete opposite proposition than that cited by Petitioner.

> "Both initiatives contain a reduction in penalty for certain crimes and a resentencing process for people who would be entitled to lesser punishment had the crime been committed after the enactment of the new law. The resentencing provision of Proposition 47 are codified in Penal Code section 1170.18. Some of the statutory language is taken directly from section

1170.126, the resentencing provisions of Proposition 36." (*Couzens and Bigelow: Proposition 47 "The Safe Neighborhoods and Schools Act"* rev. March 2015 at p. 6. Hereafter *Couzens*)

Relying on appellate opinions discussing implementation of Proposition 36, *Couzens* concludes the petition process has four potential stages: (1) filing a petition requesting relief under Proposition 47; (2) an initial screening by the court to determine if the offense qualifies for reduction and/or if any of the statutory exclusion apply; (3) a qualification hearing to consider the merits of the petition; and (4) resentencing if eligible for relief. (*Id.* at p. 36.)

At the qualification stage the Petitioner has the burden of establishing eligibility for resentencing under Penal Code section 1170.18. (*Id.* at pp. 40-41.) If the Petitioner meets his/her burden of establishing the offense qualifies for reduction, the People would then have the burden of proving that the Petitioner is disqualified because of a "super strike", and/or is required to register as a sex offender under Penal Code section 290. If the Petitioner is not otherwise disqualified, the People would have the burden of establishing that resentencing would pose an unreasonable risk of danger to public safety. (*Id.* at pp. 40-42.)

In Fresno Superior Court Case No. F12905793, Petitioner was convicted of a Commercial Burglary in violation of Penal Code 459/460 subdivision (b). That code section provides a defendant is guilty of commercial burglary when he or she enters a building "with intent to commit grand or petit larceny or any other felony." Where, as here, the Petitioner seeks reduction from a felony commercial burglary, he or she has the burden of

establishing: (1) he entered a commercial establishment during regular business hours; (2) he entered with the intent to commit theft and (3) the value of the property taken or intended to be taken did not exceed $950.00. (Penal Code section 459.5)

In Fresno Superior Court Case No. F13906567, Yang was convicted of felony receiving stolen property in violation of Penal Code section 496 subdivision (a). To be eligible for a reduction to a misdemeanor, Petitioner has the burden of establishing that the value of the property in question did not exceed $950.00.

EVIDENCE COURT MAY CONSIDER

Proposition 47 does not address the issue of what evidence is admissible for a Petitioner to meet his or her burden of proving that he/she is currently serving a felony sentence for a crime that would have been a misdemeanor had Proposition 47 been in effect at the time the crime was committed. However, appellate courts have held that in determining the facts underlying the conviction the court may consider the "record of conviction" as these documents reliably reflect the facts of the offense for which defendant was convicted. (*People v. Reed* (1966) 13 Cal.4th 217, 223.) The "record of conviction" may, depending on the circumstances include "the abstract of judgment, the section 969b prison packet, the charging document and plea form, transcripts of the Petitioner's plea, the factual basis given for the plea, preliminary hearing and trial transcripts, and appellate opinions." (*Couzens* at p. 42.)

Petitioner points to no evidence in the record that supports a reduction of his conviction of felony commercial burglary to a

misdemeanor shoplifting falling within Penal Code section 459.5. Neither does he point to any evidence in the record to show that the amount of property he received on the charge of receiving stolen property was less than $950.00. Rather, assuming he is correct in asserting that the People have the burden of proving the facts do not qualify, he argues the court may not go outside the record of conviction to determine eligibility. Were this court to adopt his argument that the court may not go outside the record of conviction, Petitioner would not prevail on his request for relief. Adoption of his argument would also defeat the purpose of Proposition 47 by denying numerous potentially eligible individuals of relief if the record of conviction does not set forth the relevant facts underlying the conviction.

An approach more consistent with the voters' intent in enacting Proposition 47 is to afford Petitioner an evidentiary hearing to establish his offense or offenses qualify for reduction. "The initial screening of the petition for reclassification [under Proposition 47] is similar to the initial screening of a petition for habeas corpus. California Rules of Court, Rule 4.551(f) provides that an evidentiary hearing is required if there is a reasonable likelihood that the Petitioner might be entitled to relief and the Petitioner's entitlement to relief depends on the resolution of an issue of fact." (*Couzens, supra*, at p. 65.)

An evidentiary hearing should be held when it is not "possible from a review of the record alone to determine the value of the property taken. So long as the record review of the petition states a prima facie basis for relief, the court should

grant a full qualification hearing where any additional evidence could be received on the issue of eligibility. If the district attorney indicates no opposition to the relief, however, no hearing is required." (*Ibid.*)

RESOLUTION OF REMAINING ISSUES

The remaining issues raised by Petitioner were considered and rejected by the court in *People v. Jorgenson*, Case No. F09901895. A copy of that order is made a part of the record in this case and is incorporated herein by reference.

CONCLUSION

In the present case, Petitioner has not met his burden of proving that his convictions are eligible for reduction to misdemeanors under Proposition 47. Accordingly, the petitions are denied without prejudice to requesting an evidentiary hearing within thirty (30) calendar days of today's date. If no such request is made within this time period, the petitions shall be deemed denied with prejudice.

IT IS HEREBY SO ORDERED.

DATED this 8th day of June, 2015.

DENISE L. WHITEHEAD
JUDGE OF THE SUPERIOR COURT