POINTS AND AUTHORITIES

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Week Of	Topic	Guest	General 30
Aug. 20 2018	**Subpoena duces tecum by criminal defendants seeking confidential content from Facebook and other social media;** **New Supreme Court case on Prop 47**	**Carrie Skolnick**	

Facebook, Inc. v. The Superior Court (2018) 4 Cal.5th 1245

- **Two defendants charged with murder and other crimes served pretrial subpoenas duces tecum on Facebook, Instagram and Twitter. These social network operators (petitioners) moved to quash the subpoenas on the grounds that disclosure is barred by the federal Stored Communications Act. The trial court denied petitioners' motions to quash. The Court of Appeal then granted petitioners' writ of mandate, ordering the subpoenas quashed.**

- **The California Supreme Court vacated the Court of Appeal decision and remanded the matter for further proceedings. It said the Court of Appeal was correct to the extent if found the subpoenas unenforceable under the Stored Communications Act with respect to communications that are private or restricted. However, the Court of Appeal's determination was erroneous to the extent it concluded that the Act bars disclosure by providers of communications configured by the registered user to be public and were public at the time the subpoenas were issued.**

I. Proceedings in Trial Court

A. General Factual Background

1. Derrick Hunter and Lee Sullivan were involved in a drive-by shooting, stemming from a rival gang dispute, in which one person was killed and a minor was seriously injured. Hunter's 14-year old brother, Quincy, was identified by witnesses as one of the shooters. He was tried in juvenile court and found guilty of murder and attempted murder. The car used in the shooting belonged

to Renesha Lee, the girlfriend of defendant Sullivan, who was a witness for the prosecution. In presenting the case to the grand jury, the prosecution contended that defendants and Quincy were members of a criminal street gang, and that the victim was killed because he was a member of a rival gang, and because he had threatened Quincy on social media. (*Id*. at pp. 1251-1252.)

2. A gang expert with the San Francisco Police Department testified before the grand jury that "gangsters are now in the 21st century and they have taken on a new aspect of being gangbangers, and they do something called cyber banging. They will actually be gangsters on the internet. They will issue challenges; will show signs of disrespect, whether it's via images or whether it's via the written word, Facebook, Instagram . . . . They will disrespect each other in cyberspace." (*Id*. at p. 1253.) In a subsequent declaration, the inspector stated that he relies "heavily on records from social media providers such as Facebook, Instagram, and Twitter to investigate and prosecute alleged gang members for gang crimes." The inspector also said he relied, in part, on social media records as evidence that the victim and the defendants were members of rival gangs and that the drive-by shooting was gang related. (*Ibid*.)

4. The defendants were indicted and stand charged with the murder and attempted murder, and firearms enhancements. (*Id*. at p. 1253.)

B. The Subpoenas Duces Tecum

1. Counsel for defendant Sullivan served subpoenas duces tecum on Facebook, Instagram, and Twitter, seeking records from the social media accounts of the murder victim and prosecution witness Lee. As to Facebook and Instagram, the subpoena sought "any and all public and private content," including deleted material that had not been "published by" the murder victim or Lee. Defendant Sullivan's subpoena to Twitter sought similar information as to Lee only. Defendant Hunter only subpoenaed Twitter. (*Id.* at pp. 1253-1254.)

2. Facebook, Instagram and Twitter [collectively referred to in the opinion as "the providers"] moved to quash the subpoenas, arguing that the disclosure of the information sought was barred by the Stored Communications Act (SCA). Specifically, they relied on section 2702(a) of that statute, which states that a covered person or entity such as providers "shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service." (*Id.* at p. 1256.) The providers argued that this prohibition applies broadly, and does not depend on whether communications are private/restricted as opposed to public. Moreover, while section 2702(b) of the SCA has certain exceptions that permit disclosure, the providers asserted that none applied to the defendants here. (*Id*. at p. 1256.)

3. Defendants opposed the motion to quash. They did not contest the assertions of the providers regarding SCA, including the providers' claim that disclosure is prohibited even as to public communications. Rather, the defendants contended that their constitutional rights to a fair trial, to present a complete defense, and to cross-examine witnesses supported the

subpoenas and rendered the SCA unconstitutional to the extent it afforded the providers a basis to refuse to comply with their subpoenas. (*Id.* at p. 1256.)

4. In an offer of proof as to witness Lee's social media records, Sullivan alleged that Lee was the only witness who implicated him in the shootings, that the records would demonstrate, among other things, that Lee was motivated by jealous rage over Sullivan's involvement with other women. In his offer of proof as to the murder victim's social media records, Sullivan said review of the records was required to " 'locate exculpatory evidence' " and to confront and cross-examine the inspector gang expert. Sullivan cited the inspector's grand jury testimony and attached examples to his opposition of what he alleged were screen shots of violent video postings by the murder victim, asserting that the subpoenaed records would show that the murder victim was " 'a violent criminal who routinely posted rap videos and other posts threatening [Hunter's brother] and other individuals.' " (*Id*. at p. 1256-1257.)

5. The trial court denied the providers' motions to quash the subpoenas, and ordered them to produce the requested material for an in camera hearing. (*Id*. at p. 1260.)

II. Proceedings in the Court of Appeal

A. The Initial Request for a Stay

1. The providers filed a petition for writ of mandate in the California Court of Appeal and asked for a stay of the order requiring them to produce the materials. The Court of Appeal granted the stay. After requesting and receiving a response from defendants, the Court of Appeal issued an order to show cause why the relief should not be granted. (*Id*. at p. 1260.)

2. The Court of Appeal then granted the petition for writ of mandate and directed the trial court to issue an order quashing the subpoenas.

B. The Court of Appeal's Reasoning Based on Constitutional Arguments

1. The Court of Appeal concluded the SCA barred enforcement of the defendants' pretrial subpoenas and rejected the defendants' arguments that the SCA violated their constitutional rights. It stated, " 'The consistent and clear teaching of both United States Supreme Court and California Supreme Court jurisprudence is that a criminal defendant's right to *pretrial* discovery is limited, and lacks any solid constitutional foundation.' " (*Id*. at p. 1260, italics in original.) The Court of Appeal stressed, however, that its conclusion was confined to " 'this stage of the proceedings' " and limited to the " 'pretrial context in which the trial court's order was made.' " It said that defendants would remain free to seek the production of the materials at trial. (*Id.* at p. 1260.)

III. California Supreme Court Analysis of the SCA

In the Supreme Court, the parties again proceeded on the assumption that this litigation raised only constitutional issues. However, the Supreme Court focused on the language of the statute itself, particularly whether the statute supports the assumption made by the parties and the lower courts that the SCA bars disclosure of both private and public communications.

A. Key Provisions of the Stored Communications Act (SCA)

1. Section 2702 of the SCA addresses disclosure solely by certain covered service providers, and by no other person or entity. Subsection (a)(1) declares that, subject to specified exceptions, "a person or entity providing an electronic communication service to the public *shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service.*" (italics and emphasis added.)

2. Section 2702, subsection (b) describes eight circumstances under which a provider "may divulge the contents of a communication." The Supreme Court identified, as relevant here, three subparts of subsection section 27012, subsection (b) that permit disclosure:

(1) "to an addressee or intended recipient of such communication or an agent of such addressee or intended recipient";

(2) pursuant to section 2703, which permits a "governmental entity" to compel a covered provider to disclose stored communications by search warrant, subpoena or court order {i.e. law enforcement, a prosecutor's office}; and

(3) "*with the lawful consent of the originator or an addressee or intended recipient* of such communication, or the subscriber in the case of [a] remote computing service." (italics added). [As explained below, some of the communications sought under the subpoenas at issue here may fall within the lawful consent exception set forth in section 2702(b)(3).] (*Id.* at p. 1265, italics and emphasis added.)

B. U.S. Legislative History and Case Law

1. The House Judiciary Committee Report concerning the SCA addressed the "lawful consent" exception in the SCA. As the Supreme Court here stated, "The committee explained that, in its view, implied lawful consent by a user—and hence permissible disclosure by service providers—would readily be found with regard to communications configured by the user to be accessible to the public. It stressed that consent as contemplated by section 2702(b)(3) 'need not take the form of a formal written document of consent.' " (*Id.* at p. 1267.)

2. More precisely, the Supreme Court stated: "In other words, the committee indicated its understanding that with regard to electronic communications configured by the user to be accessible to the public, a covered service provider would be free to divulge those

communications under section 2702(b)(3)'s lawful consent exception. Nothing in the subsequent Senate Report took issue with this analysis." (*Id*. at p. 1268.)

3. The Supreme Court then reviewed civil cases which it concluded "reflect an understanding that Congress intended section 2702 to prohibit disclosure by providers of only private or restricted, but not public, social media communications." (*Id*. at p. 1271.)

C. The Supreme Court's Conclusion Re Public Communications

Based on the legislative history and civil cases construing the SCA in light of that legislative history, the Supreme Court stated: "[W] e conclude that communications configured by a social media user to be public fall within section 2702(b)(3)'s lawful consent exception, presumptively permitting disclosure by a provider." (*Id*. at p. 1274.)

IV. Supreme Court's Application of Law to this Case

A. The Limits of the Court's Analysis

1. The Supreme Court notes that after the parties provided supplemental briefing at its request, the providers abandoned their assertion that no exception to the prohibition applies as to any of the sought communications. Instead, all parties now agreed that a social media communication configured by a registered user to be public falls with section 2702(b)(3)'s lawful consent exception.

2. The Court stated that both parties urged it to address not only the scope of the lawful consent exception, but also the constitutional issues that were originally raised. However, the Court, in essence, said this request was premature. The court observed that in the lower court proceedings, the parties did not focus on whether any communication sought by the defendants was configured to be public. Thus, there was no determination by the trial court as to which, if any, communications required disclosure. The Supreme Court remanded the case to the trial court for this purpose. (*Id*. at p. 1276.)

3. The defendants argued further that a user's implied consent to disclosure by providers under section 2702(b)(3) should be triggered not only by communications configured by the user to be public, but also those configured by the user to be *restricted*, but nonetheless accessible to a "'large group'" of friends or followers. (*Id*. at p. 1276.) The Supreme Court rejected this "broad" interpretation: "Providers' FAQs warn that even communications configured as restricted still might be shared by an authorized recipient with anyone else. At the same time, nothing of which we are aware in any of providers' policies or answers to FAQs suggests that users would have any reason to expect that, having configured a communication to be available not to the public but instead to a restricted group of friends or followers, the user nevertheless has made a public communication—and hence has impliedly consented to disclosure by a service

provider, just as if the configuration had been public." (*Id*. at pp. 1280-1281.)

V. General Takeaways from this Opinion

Under the language of the SCA, in response to a subpoena authorized by law, a provider must divulge communications configured by the account holder as public, but not those configured as private or restricted. A provider can still defend against a subpoena by arguing that the information can be obtained by other means or by arguing that the burden on the provider is not justified under the circumstances.

As to whether the provisions of the SCA violate a defendant's constitutional trial rights, the Supreme Court says that is a topic for another day. The cases on the limitation of pretrial discovery subpoenas, such as *People v. Hammon* (1997) 15 Cal.4th 1117, remain applicable.

VI. Specific Takeaways for Prosecutors

As explained in the opinion, the SCA in section 2702 addresses the prohibition on disclosures of stored electronic communications by providers, but also lists certain exceptions to those general prohibitions. One of those exceptions is section 2702(b)(3), which permits a "governmental entity" to compel a covered provider to disclose stored communications by search warrant, subpoena or court order." Thus prosecutors, through these procedures, may be able to obtain the communications from the provider.

In footnote 8 of the opinion (p. 1255), the Supreme Court notes: "Of course, defendants are independently entitled to general criminal discovery, including exculpatory evidence, from the prosecution under Penal Code section 1054.1. Moreover, under authority such as *Brady v. Maryland* (1963) 373 U.S. 83, 83, *People v. Salazar* (2005) 35 Cal.4th 1031, 1042-1043, and *Barnett v. Superior Court* (2010) 50 Cal.4th 890, 900-901, the prosecution is obligated to share with the defense any material exculpatory evidence in its possession—including that which is potentially exculpatory."

The Supreme Court in this footnote also refers to the recently amended Rules of Professional Conduct, Rule 5-110(D), which requires "timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows or reasonably should know tends to negate the guilt of the accused, mitigate the offense, or mitigate the sentence" and notes corresponding discussion, which points out that "the disclosure obligations in paragraph (D) are not limited to evidence or information that is material as defined *by Brady v. Maryland* and its progeny. For example, these obligations include, at a minimum, the duty to disclose impeachment evidence or information that a prosecutor knows or reasonably should know casts significant doubt on the accuracy or admissibility of witness testimony on which the prosecution intends to rely."

However, the defense can still respond that this discovery remains inadequate for their needs,

the argument made by the defense here. Footnote 10 of the opinion (at p. 1256) states that while defendants acknowledged receiving some of the murder victim's social media records through the discovery process that supported the prosecutor's theory of the case, they still lacked " 'access to records necessary to present a complete defense and to ensure the right to effective assistance of counsel.' " The footnotes states that defendants characterized the prosecution as having declined to obtain all the victim's Instagram accounts.

● Another Facebook case is currently pending in the Supreme Court: ***Facebook, Inc. v. Superior Court (Touchstone)***, S245203 (15 Cal.App.5th 729). It addresses, among other issues, whether a victim whose nonpublic Facebook communications are being sought, can be compelled to comply with a subpoena served on him on her seeking disclosure of the documents in camera, or be compelled to consent to disclosure by Facebook subject to in camera review.

The case has generated much interest in the Supreme Court. Amicus curiae status has been granted to several county public defender's offices, the California Public Defender's Association, California Attorneys for Criminal Justice, as well as Apple, Google, Twitter and the California Chamber of Commerce. The San Diego District Attorney's Office has been admitted as an intervenor in the case.

Facts: The defendant is charged with attempted murder. He is seeking from Facebook the *nonpublic* content of the victim's Facebook account, believing it might provide exculpatory evidence helpful for his trial preparation. After the shooting incident, the victim was active on his personal Facebook account, posting updates on his physical recovery. On the public portion of his Facebook page, he posted updates of court hearings and asked friends to attend the preliminary hearing. The Court of Appeal opinion states that in his public posts, "the victim also discussed his personal use of guns and drugs, and described his desire to rob and kill people."

The trial court denied Facebook's motion to quash the subpoena served on them by defendant. Facebook sought a writ of mandate in the Court of Appeal directing the trial court to grant the motion to quash. The Court of Appeal granted the petition for peremptory writ of mandate, directing the trial court to grant the motion to quash the subpoena. The defendant sought review in the Supreme Court, which was granted. The Supreme Court has asked the parties to address the issues stated below (assuming the prosecution lists the victim as a witness who will testify at trial and if the materiality of the sought communications is shown):

1. Does the trial court have authority, pursuant to statutory and/or inherent power to control litigation before it and to insure fair proceedings, to order the victim witness (or any other listed witness), on pain of sanctions, to either (a) comply with a subpoena served on him or her, seeking disclosure of the sought communications subject to in camera review and any appropriate protective or limiting conditions, or (b) consent to disclosure by provider Facebook subject to in camera review and any appropriate protective or limiting conditions?

2) Would such a court order be valid under the Stored Communications Act?

3) Assuming the orders cannot properly be issued and enforced in conjunction with continuing *pretrial* proceedings, does the trial court have authority, on an appropriate showing during *trial*, to issue and enforce such orders?

4) Would such a court order be proper under the Stored Communications Act?

5) As an alternative to the above options, may the trial court, acting pursuant to statutory and/or inherent authority to control the litigation before it and to insure fair proceedings, order the *prosecution* to issue a search warrant under 18 U.S.C. section 2703 regarding the sought communications? In this regard, what is the effect, if any, of California Constitution, article I, sections 15 and 24?

New Cases on Prop 47:

- **Court of Appeal: *People v. Brayton* (2018) __ Cal.App.5th __ 2018 WL 3628229**

Yet another case (published) on the intersection of the identity theft crime (Penal Code section 530.5(a)) and Prop 47

A. Factual and Procedural Background

1. The defendant entered a Kohl's store where she took a watch from the jewelry department and removed the security tag. She also removed an item of clothing from a hanger. She then went to the customer service department to falsely claim that she had previously purchased these items and was seeking a store credit for $107.07.

2. To obtain this credit, the defendant presented a California driver's license which belonged to another woman. The driver's license has been stolen. The defendant was detained and questioned by two of the store's loss prevention employees. During questioning, the defendant was unable to spell the name of the person on the driver's license or provide the year the person was born. (p.*1.)

3. In a felony information the defendant was charged the " 'the crime of identity theft-obtain credit with other's identification, in violation of Penal Code 530.5(a), a Felony" (count 1), and petty theft by taking Kohl's property, a misdemeanor (§ 484, subd. (a)) (count 2). (p.*1.) The defendant pled guilty to both counts.

4. The defendant filed a motion to reduce count 1, the violation under Penal code section 530.5(a), to a misdemeanor pursuant to Proposition 47. The People opposed the motion, claiming that violations of section 530.5(a) are not eligible for reduction under Proposition 47.

The trial court denied defendant's motion. It agreed with the People's position that the defendant's conviction was not an eligible crime for Proposition 47 resentencing. (p.*1.)

B. Court of Appeal's Analysis

1. Proposition 47 added a new misdemeanor shoplifting crime. If a defendant's conduct in committing the prior felony falls within the definition of this new crime, he or she may be entitled to resentencing relief. The new provision, section 459.5, provides that "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)." (p.*2.)

2. The Court of Appeal rested its analysis on three cases. In *People v. Gonzales* (2017) 2 Cal.5th 858,the Supreme Court held that a "defendant's act of entering a bank to cash a stolen check for less than $950, traditionally regarded as a theft by false pretenses . . ., now constitutes shoplifting under [Proposition 47]. Defendant may properly petition for misdemeanor resentencing. . . ." (*Id*. at p. 862.)

3. In *People v. Garrett* (2016) 248 Cal.App.4th 82, 84, the trial court denied a Proposition 47 petition and found the defendant was not eligible for resentencing because he had entered the convenience store with the intent to commit felony identity theft under Penal Code section 530.5. However, the Court of Appeal reversed, holding that "entering a commercial establishment with the intent to use a stolen credit card to purchase property valued at no more than $950 constitutes shoplifting," a misdemeanor (§ 459.5), eligible for Proposition 47 resentencing. (*Id.* at p. 84.) The Court of Appeal in *Garrett* stated that shoplifting under Section 459.5 must be interpreted to mean 'entering a commercial establishment with intent to commit theft,' under section 484." (*Id.* at p. 89.) The definition of theft includes taking property of another " 'by any false or fraudulent representation or pretense.' " (*Ibid*.) The *Garrett* court said, "Using another person's credit card to purchase property without the card owner's consent is 'theft' under this definition." (*Ibid*.)

4. In *People v. Jimenez* (2018) 22 Cal.App.5th 1282, (review granted July 25, 2018, S249397), a defendant entered a commercial establishment to cash stolen checks valued at less than $950. He was convicted of a violation of Penal Code section 530.5, subdivision (a). Like the defendant in *Gonzales*, he entered a commercial establishment during business hours for the purpose of cashing stolen checks valued at less than $950 each. The Court of Appeal concluded he committed theft by false pretenses, which now falls under the shoplifting statute, and thus was eligible for Prop 47 relief.

5. In this *Brayton* opinion, the Court of Appeal states: "Here the facts of [the defendant's] identity theft crime are similar to *Gonzales*, *Garrett* and *Jimenez*. [The defendant] used a stolen driver's license belonging to another person to obtain a $107.07 store credit. She obtained the credit by the false representation that she was the person named in that driver's license. In

Gonzales, entering a bank to cash a stolen check fell within the purview of the resentencing provision. In *Garrett*, using another person's credit card to purchase property constituted misdemeanor shoplifting under Proposition 47. Similarly, here it was [the defendant's] use of another person's driver's license that allowed her to obtain the credit." (*Id*. at p.*2.)

Note: The Supreme Court will be weighing in on this issue. On July 31, the Supreme Court granted review in *People v. Jiminez* (S249397). On its list of pending criminal cases, the Supreme Court states that the case presents the following issue: "May a felony conviction for the unauthorized use of personal identifying information of another (Pen. Code, § 530.5, subd. (a)) be reclassified as a misdemeanor under Proposition 47 on the ground that the offense amounted to Penal Code section 459.5 shoplifting?"

- **California Supreme Court: *People v. Buycks* (2018) __ Cal.5th __ 2018 WL 3615629**

This issue in this case is the effect of Prop 47 on felony-based enhancements. Can a defendant challenge such an enhancement (e.g, Penal Code 12022.1 and 667.5) when the underlying felony has been resentenced or redesignated as a misdemeanor? This P&A addresses two of the three cases that were consolidated in the Supreme Court's opinion.

I. Background

A. *People v. Buycks*

1. In November 2013, the defendant pled guilty to a violation of H&S 11350, and was ordered to enroll in a one-year, live-in program. The court released him on his own recognizance. One month later the defendant was arrested after an incident at Home Depot that resulted in several charges, including robbery. Because the defendant committed the new offenses during the time in which he was OR'd on the earlier possession of narcotics, he was also charged in the second case with a section 12022.1, subdivision (b) enhancement. (p.*2.)

2. The defendant entered a negotiated plea of no contest to petty theft with a prior (a felony) and evading a police officer, also a felony. His sentence included two years for the section 12022.1 enhancement. (p.*2.)

3. After the approval of Prop 47 in 2014, the defendant successfully petitioned for resentencing in the narcotics case. He also successfully petitioned under Prop 47 for resentencing of his petty theft with a prior to a misdemeanor. However, the resentencing court rejected the defendant's argument that his section 12022.1 enhancement no longer applied. The defendant asserted that the narcotics offense for which he had been released on bail when he committed his Home Depot-related crimes was no longer a felony as a result of Prop 47. The

resentencing court, however, reasoned that, at the time defendant committed his Home Depot-related felonies, his earlier offense was still a felony and that Prop 47 did not apply to his section 12022.1 enhancement. In resentencing defendant, the court restructured defendant's sentence to make his conviction for felony evading a police officer as the principal term and imposed a full base term of three years, the maximum possible sentence, plus the enhancements for an aggregate sentence of 7 years. (p.*3.)

B. *People v. Valenzuela*

1. In October 2012, the defendant was convicted of a violation of Penal Code section 496, a felony, and sentenced to a 16-month prison term. In September 2014, the defendant was found guilty of carjacking, and other offenses. At sentencing, the court found true an enhancement based on the 2012 conviction for Penal Code 496, and imposed a one-year consecutive term under section 667.5, subdivision (b). (p.*3.)

2. After the approval of Prop 47, and while her appeal was still pending, the defendant successfully petitioned to have her conviction for receipt of stolen property redesignated as a misdemeanor. (p.*3.)

3. On appeal, the defendant argued, among other things, that Prop 47 required the court to strike her one-year section 667.5, subdivision (b) prior felony prison term enhancement since her receipt of stolen property conviction had been reduced to a misdemeanor. The Court of Appeal refused to do so. It noted that at the time she was sentenced, her prior conviction was still a felony, and that the purpose of section 667.5 is to punish for recidivist conduct. The Court of Appeal also concluded that nothing in Proposition 47 indicated an intent to retroactively ameliorate the collateral consequences of felonies reduced to misdemeanors. (p.*3.)

II. Analysis

A. Application of Prop 47 to Felony-based Enhancements

1. In addition to its reclassification of certain felonies to misdemeanors, Proposition 47 created procedures to ameliorate convictions for those currently serving a sentence for a qualifying felony, as well as those who have completed their sentences for a qualifying felony, regardless of whether those judgments are final. (§1170.18, subds. (a), (f).) These provisions are expressly retroactive in their effect by permitting persons "who would have been guilty of a misdemeanor under" the measure had it "been in effect at the time of the offense" to petition to seek relief. (*Ibid*.) For those who have completed their sentences for a qualifying felony, the resentencing court, upon receiving an application from a person with a qualifying felony conviction, "shall designate the felony offense or offenses as a misdemeanor." (*Id.,* subd. (g).) (p.*6.)

2. Although no provision enacted by Proposition 47 expressly addresses whether it has any

mitigating effect on felony-based enhancements or a felony failure to appear in which the underlying felony is reduced to a misdemeanor, The Supreme Court said that section 1170.18, subdivision (k), which was enacted by Prop 47, is relevant. That subdivision states, in part, that a "felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes . . . ." (§ 1170.18, subd. (k).) Additionally, Proposition 47 informed voters that the act "shall be broadly construed to accomplish its purposes," and that its provisions "shall be liberally construed to effectuate its purposes."

B. Retroactivity Issue

1. Even though the sentencing courts had converted each underlying felony to a misdemeanor under Prop 47, the trial courts declined to give retroactive relief to the underlying felony conviction for purpose of the defendant's new sentence.

2. Proposition 47, through section 1170.18, subdivision (k), mandates that the reduced conviction "*shall be considered a misdemeanor for all purposes*." The Supreme Court stated: "Subdivision (k) therefore, plainly extends the retroactive ameliorative effects of Proposition 47 to mitigate any future collateral consequence of a felony conviction that is reduced under the measure. And yet, subdivision (k) is silent concerning whether it also retroactively mitigates the already-imposed collateral consequence of a felony conviction that is subsequently reduced under the measure." (p.*6.)

3. The Attorney General argued that voters did not intend for Proposition 47 "to retroactively reach back to unravel a felony-based conviction or a felony-based enhancement that had already been imposed before any successful petition for resentencing under section 1170.18, even if that judgment was not final." (*Id.* at p.*7.) The Attorney General contended a resentencing under section 1170.18 has only a *forward* ameliorative effect on any new collateral consequence that is imposed after a successful Proposition 47 resentencing. (*Ibid*.)

4. The Supreme Court disagreed. It said that "although subdivision (k) of section 1170.18, unlike other provisions of Proposition 47, contains no provision concerning retroactivity, it also contains no provision categorically *precluding* its capacity to have any constitutionally permissible retroactive effect." (p.*8.) The Supreme Court noted that Prop 47 as a whole, including subdivision (k), is intended to ameliorate criminal punishment. It said that the phrase "for all purposes" in subdivision (k) "is rooted in an overall scheme that is undeniably intended to have a retroactive effect. This observation is important because Proposition 47 as a whole, including subdivision (k) of section 1170.18, is intended to ameliorate criminal punishment. This invokes a limited rule of retroactivity that applies to newly enacted criminal statutes intended to reduce punishment for a class of offenders." (p.*8.)

5. Describing the "*Estrada* rule," the Supreme Court said that it presumes that newly enacted legislation mitigating criminal punishment "reflects a determination that the 'former penalty was

too severe' and that the ameliorative changes are intended to 'apply to every case to which it constitutionally could apply,' which would include those 'acts committed before its passage[,] provided the judgment convicting the defendant of the act is not final. ' " (*Buycks*, at p.*8, quoting *In re Estrada* (1965) 63 Cal.2d 740, 745.)

6. The Supreme Court concludes that "the reduction of a felony conviction to a misdemeanor conviction under Proposition 47 exists as 'a misdemeanor for all purposes' prospectively, but, under the *Estrada* rule, it can have retroactive collateral effect on judgments that were not final when the initiative took effect on November 5, 2014." (p.*10.)

C. <u>Application to the Facts Here</u>

1. As to the section 667.5(b) enhancement, the Supreme Court concludes that the resentencing of a prior underlying felony conviction to a misdemeanor conviction negates an element required to support a section 667.5 one-year enhancement. "A successful Proposition 47 petition or application can reach back and reduce a defendant's previous felony conviction to a misdemeanor conviction because the defendant 'would have been guilty of a misdemeanor under' [Prop 47] had it 'been in effect at the time of the offense.' (§ 1170.18, subds. (a), (f).)" (p.*14.)

2. Therefore, if the "felony conviction that is recalled and resentenced . . . or designated as a misdemeanor" conviction becomes "a misdemeanor for all purposes," then it can no longer be said that the defendant "was previously convicted of a felony, which is a necessary element for imposing the section 667.5, subdivision (b) enhancement. Instead, "for all purposes," it can only be said that the defendant was previously convicted of a misdemeanor. (p.*14.)

3. Thus, section 1170.18, subdivision (k) can negate a previously imposed section 667.5, subdivision (b), enhancement when the underlying felony attached to that enhancement has been reduced to a misdemeanor under Prop 47. (p.*14.)

4. As to the section 12022.1, subdivision (b) two-year enhancement, "section 12022.1 defines the felony for which the defendant had been released from custody on bail or on own recognizance as the 'primary offense,' and the new felony committed while on release as the 'secondary offense.' (§ 12022.1, subd.(a).)" (p.*15.) "Consequently, section 12022.1 is a unique enhancement that, even if found true, cannot be imposed until the defendant is convicted of both the prior felony and the new felony committed while released on bail." (*Ibid*.)

5. "The effect of these circumstances means that if Proposition 47 can reach back and reduce to a misdemeanor the record of conviction for the primary offense, and that conviction becomes 'a misdemeanor for all purposes,' then the attached section 12022.1 enhancement in a nonfinal judgment remains intact but its two-year term must be struck and permanently stayed. In contrast, if Proposition 47 can reach back and reduce to a misdemeanor the record of conviction for the secondary offense, and that conviction becomes 'a misdemeanor for all purposes,' then

the attached section 12022.1 enhancement in a nonfinal judgment must be dismissed entirely." (p.*15.)

Suggestions for future shows, ideas on how to improve P&A, and other comments or criticisms should be directed to Mary Pat Dooley at (510) 272-6249, or marypat.dooley@acgov.org Technical questions should be addressed to Gilbert Leung at (510) 272-6327. Participatory students: MCLE Evaluation sheets are available on location and certificates of attendance are constructively maintained in your possession in the Ala. Co. Dist.Atty computer banks.