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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

TOBIAS CODEE WOOD,

Defendant and Appellant.

A145006

(Solano County
Super. Ct. No. FCR303935)

Defendant and appellant Tobias Codee Wood (Wood) was charged with robbery and petty theft for stealing a beanie and a pair of shoes from a discount store. As part of a plea agreement, he pled no contest to an amended felony count of grand theft under Penal Code section 487, subdivision (c),¹ and the other charges against him were dismissed. The court sentenced him to 90 days in the county jail and three years' probation.

In 2014, California voters enacted Proposition 47, which among other things, reclassifies certain offenses, including some theft offenses, from felonies to misdemeanors. For persons previously convicted of offenses that would be misdemeanors if committed after Proposition 47 was enacted, the measure permits defendants to seek resentencing or, if they have already completed their sentences, redesignation of those offenses as misdemeanors for all purposes. (§ 1170.18.)

¹ Statutory references in this opinion are to the Penal Code.

In 2015, Wood sought resentencing of his grand theft charge to a misdemeanor under Proposition 47. The People cried foul, arguing that reducing the charge to a misdemeanor would violate the plea bargain they struck with Wood in 2013. The trial court agreed and denied resentencing. Wood appealed.

We conclude that the trial court erred in denying resentencing under Proposition 47, which by its terms applies to convictions resulting from plea agreements, and reverse. In *Doe v. Harris* (2013) 57 Cal.4th 64 (*Harris*), our Supreme Court held that a plea agreement is deemed to incorporate and contemplate the state's reserve power to change the law. Since the plea agreement here incorporated and contemplated the change in law accomplished by Proposition 47, Wood's petition for resentencing did not deny the People the benefit of the plea bargain and the trial court erred in denying resentencing on that ground.

BACKGROUND

Wood was arrested on November 18, 2013, in connection with a theft incident at Burlington Coat Factory.² Vacaville police were summoned by the retailer, whose, whose loss prevention officer (LPO) informed the police of the following. The LPO had observed Wood conceal a beanie in the front of his shorts. Wood and a woman were then observed in the shoe department, where the woman put on a pair of shoes and handed her old shoes to Wood, who put them inside his shorts pockets. After the two purchased some items and attempted to leave the store, the LPO approached them and identified himself as the store's LPO. Wood attempted to run, but the LPO grabbed him by his left arm. Wood then faced the LPO and swung with his right arm, attempting to hit the LPO.³ The LPO tackled him to the ground.

² Because this case involves a conviction by plea agreement and not a trial, the facts concerning the offense are taken from the probation department's pre-sentence supplemental report.

³ Wood denied that the LPO identified himself and denied having swung at the LPO.

After talking with the LPO, the Vacaville police officer who reported to the scene “Mirandized” Wood, placed him under arrest, and questioned him. Wood told the officer he and his girlfriend had come to the store so she could purchase shoes. He became excited when he saw items in the store that he wanted to get for her. He could not afford to buy them and convinced her to put on the shoes and walk out without paying for them. Wood denied that the LPO identified himself as such and denied swinging at him. Wood’s girlfriend’s statement to the officer was similar to his. The girlfriend was cited and released at the scene, while Wood was transported to the hospital for medical clearance (he had hit his head when tackled by the LPO) and then booked into the Solano County Jail.

Wood was charged with second degree robbery (§ 211), and he and his girlfriend were also charged with misdemeanor petty theft (§ 484, subd. (a)). It was alleged that Wood was not eligible to be sentenced to imprisonment in the county jail because of a prior conviction, which the record reflects was a 2012 felony conviction for carrying a loaded firearm in public (§ 25850, subd. (c)(6)). Wood was on probation for that prior offense when he was arrested on the robbery and theft charges.

In December 2013, against the advice of his counsel, Wood entered into a plea agreement, pleading no contest to an amended charge of felony grand theft from a person (former § 487, subd. (c)) with a maximum sentence of three years and eight months in county jail. The district attorney agreed to dismissal of the other charges, and the court accepted the plea. In March 2014, the court sentenced Wood to 90 days in county jail, which sentence was suspended pending a progress report, and placed him on three years’ formal probation. The court also sentenced him to 30 days, also suspended, for the violation of his probation in the prior case.

In July 2014, there was a hearing on the progress report and a request by the district attorney to revoke probation based on Wood’s having tested positive for both marijuana and cocaine. This was a violation of a term of his probation requiring him to

abstain from using alcohol and illegal drugs and to submit to drug testing. The court subsequently revoked probation, but released Wood for crisis treatment of his mental health issues and scheduled a further hearing. In September 2014, the court, finding Wood had continued to test positive for use of marijuana, imposed the 90-day suspended county jail sentence and remanded him, modifying his probation accordingly.⁴

In January 2015, Wood filed a “Motion to Recognize Proposition 47 Eligible Probation Cases as an Automatic Misdemeanor,” in which he sought resentencing of his grand theft conviction to a misdemeanor. The People opposed the motion on two grounds: first, that Wood did not comply with the requirements of section 1170.18, subdivision (a) to file a petition seeking resentencing, which was required notwithstanding that Wood was on probation rather than serving a jail or prison sentence; and second, that resentencing under Proposition 47 should be denied because it would violate the plea agreement. The court held an initial hearing in March 2015 at which, after argument, it continued the matter and encouraged the public defender’s office to submit additional briefing.

Defense counsel filed a supplemental brief, in which she argued: although Wood pled to grand theft, under section 490.2 theft shall be considered petty theft if it involves property valued at \$950 or less, the theft Wood committed was of items “the total value of which was \$8.97,” Wood had no priors of the kind that would exclude him from resentencing, and Wood therefore qualified for resentencing under Proposition 47. Wood cited *Harris, supra*, 57 Cal.4th 64 for the proposition that plea agreements are deemed to incorporate the reserve power of the state to amend the law or enact additional laws for the public good and therefore do not insulate the parties from changes in the law. The People filed no response.

⁴ The court also imposed the previously suspended 30-day sentence for the probation violation in the earlier case but recognized that Wood had accumulated credits sufficient to complete that sentence.

At the conclusion of a second hearing in April 2015, the court denied Wood’s resentencing motion, commenting that “this was not just a shoplifting . . . [i]t was a shoplifting with force” and, in the court’s view, “[t]he People have never offered him a misdemeanor. He would never have gotten a misdemeanor, and he got a really sweet deal by not getting a strike.” [¶] . . . [¶] “So the voters didn’t expect, and my reading of the law, the voters expected Courts to be able to make a distinction between cases that were appropriate for reduction and cases that are not appropriate for reduction. Otherwise, they wouldn’t even have this petition process. We wouldn’t be having this hearing, and we wouldn’t be looking at analyzing them on a case-by-case basis.” The court also stated that Wood had “definitely received the benefit of the bargain” because the People did not “saddle him with a strike offense,”⁵ and expressed concern that “the People . . . receive their benefit of the bargain.” Because “so much time has passed,” the court stated that “it doesn’t make a lot of sense to have Mr. Wood withdraw his plea and go back to square one.”

DISCUSSION

I.

The Superior Court Erred in Holding That the Plea Agreement Barred Resentencing Under Proposition 47.

The trial court denied Wood’s motion because it believed the People would not have offered Wood a plea agreement to a misdemeanor offense, and that Proposition 47 gave the trial court discretion to deny reduction of a felony offense to a misdemeanor when it concluded that reduction would deprive the People of the benefit of the plea bargain that had been struck, namely that defendant would suffer the consequences of a felony conviction. As the trial court characterized it, the plea bargain was a “really sweet deal” for defendant because he avoided a strike. Whether a trial court may deny

⁵ We assume the court was referring to the dismissed count of robbery, which is included in the definition of “violent felony” under the Three Strikes statute. (§ 667.5, subd. (c)(9).)

resentencing under Proposition 47 because it views the resulting sentence as contrary to the parties' plea agreement presents issues of law, both statutory and decisional, which we review de novo. (*People v. Prunty* (2015) 62 Cal.4th 59, 71.)

The People defend the trial court's ruling, relying primarily on *People v. Collins* (1978) 21 Cal.3d 208 (*Collins*), which they describe as holding "that when a change in law retroactively lessens the punishment imposed on a defendant through a plea bargain, the prosecution has been deprived of the benefit of that bargain and has the option of rescinding the plea and reinstating any charges that were dismissed pursuant to the plea." The People also argue that Wood may not obtain resentencing unless the People are afforded the opportunity, in effect, to rescind the plea agreement and reinstate the dismissed charges.

In *Collins*, the defendant was charged with fifteen felony counts, including one count of attempted burglary, six of burglary, two of forcible rape, three of assault with intent to commit rape and three of forcible oral copulation. (*Collins, supra*, 21 Cal.3d at p. 211.) He pled guilty to one count of oral copulation, in return for which allegations of force and of a prior conviction were stricken and the other 14 counts were dismissed. (*Ibid.*) Before sentencing, however, the court found defendant to be a mentally disordered sex offender and committed him to a state hospital. (*Ibid.*) While he was hospitalized, the Legislature repealed the oral copulation statute, decriminalizing oral copulation between consenting, nonprisoner adults. (*Ibid.*) Once criminal proceedings were reinstated, Collins objected to the court's jurisdiction to sentence him because of the repeal of the Penal Code section to which he had pled guilty. (*Ibid.*)

The Supreme Court reversed the conviction, applying the rule that "the repeal of a criminal statute without a saving clause terminates all criminal prosecutions not reduced to final judgment." (*Collins, supra*, 21 Cal.3d at p. 212.) However, the court held the defendant's avoidance of any punishment would deprive the People of the benefit of their plea bargain, stating: "Critical to plea bargaining is the concept of reciprocal benefits.

When either the prosecution or the defendant is deprived of benefits for which it has bargained, corresponding relief will lie from concessions made. . . . [¶] . . . [¶] The state, in entering a plea bargain, generally contemplates a certain ultimate result; integral to its bargain is the defendant’s vulnerability to a term of punishment. . . . When a defendant gains total relief from his [or her] vulnerability to sentence, the state is substantially deprived of the benefits for which it agreed to enter the bargain. Whether the defendant formally seeks to withdraw his [or her] guilty plea or not is immaterial; it is his [or her] escape from vulnerability to sentence that fundamentally alters the character of the bargain.” (*Id.* at pp. 214–215.) The court therefore held that the appropriate disposition of the case was to “fashion a remedy that restores to the state the benefits for which it bargained without depriving defendant of the bargain to which he remains entitled.” (*Id.* at p. 216.) This could be accomplished by allowing the People “to revive one or more of the dismissed counts but limiting defendant’s potential sentence to not more than three years in state prison” (*ibid.*)—which apparently was the maximum sentence that could have been imposed on him for the offense to which he pled guilty prior to the repeal of the statute. (See *id.* at p. 217 [“The defendant should not be penalized . . . by being rendered vulnerable to punishment more severe than under his plea bargain”].)

Wood relies on the language of section 1170.18, subdivision (a) providing that a “person currently serving a sentence for a conviction, *whether by trial or by plea*, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section” may petition the court to have the offense reduced to a misdemeanor. (Italics added.) Wood also relies on *T.W. v. Superior Court* (2015) 236 Cal.App.4th 646 (*T.W.*).

In *T.W.*, a juvenile charged with multiple felony counts of robbery and receiving stolen property after taking a purse and its contents, pled guilty to one count of receiving stolen property in exchange for dismissal of the remaining counts. (*T.W.*, *supra*, 236 Cal.App.4th at p. 649.) In the wake of Proposition 47, which reduced the offense of

receiving stolen property from a felony to a misdemeanor when the value of the property does not exceed \$950, T.W. petitioned for recall of his sentence under section 1170.18. (*T.W.*, at p. 651.) The juvenile court denied the petition on the ground that a charge sustained under a “negotiated plea bargain” is not eligible for a reduction under Proposition 47. (*T.W.*, at pp. 650–651.) This court granted defendant’s petition for writ of mandate, concluding that the language of section 1170.18 expressly permitting resentencing of offenses resulting from a plea bargain was unambiguous:

“Here, section 1170.18 clearly and unambiguously states, ‘A person currently serving a sentence for a conviction, *whether by trial or plea*’ of eligible felonies may petition for resentencing to a misdemeanor. (*Id.*, subd. (a), italics added.) The only persons categorically ineligible are those with prior convictions for an enumerated handful of serious crimes, such as murder, rape, or child molestation. (See §§ 490.2, subd. (a), 667, subd. (e)(2)(C)(iv) [listing the disqualifying prior violent convictions].) After a petitioner is found to be eligible, the trial court must grant the petition for reduction of sentence unless the court finds in its discretion that the petitioner poses an unreasonable risk of committing a very serious crime. (See § 1170.18, subds. (b), (c).) The statute does not otherwise automatically disqualify a petitioner and nothing in section 1170.18 reflects an intent to disqualify a petitioner because the conviction was obtained by plea agreement.” (*T.W.*, *supra*, 236 Cal.App.4th at p. 652.)

The *T.W.* court found further support for its interpretation in the legislative history of Proposition 47 reflecting its purposes: “ ‘to reduce penalties for “certain nonserious and nonviolent property and drug offenses” from wobblers or felonies to misdemeanors’ ” and to “ ‘ “[s]top[] wasting prison space on petty crimes and focus[] law enforcement resources on violent and serious crime by changing low-level nonviolent crimes such as simple drug possession and petty theft from felonies to misdemeanors.” ’ ” (*T.W.*, *supra*, 236 Cal.App.4th at p. 652.) The court remanded the case to the superior court with directions “to vacate its order denying T.W.’s modification

petition” and “hold a hearing . . . to determine whether T.W.’s maximum term shall be reduced” applying the criteria of section 1170.18, subdivision (b). (*T.W.*, at p. 653.)

The *T.W.* court did not specifically address whether the People could, either before or after the defendant was resentenced, rescind the plea agreement on the ground that the bargain it had struck with T.W. required him to serve time for a felony. It does not appear that the issue was raised by the People. However, the court noted that its decision is “consistent with the general rule announced by our Supreme Court in *Doe v. Harris* (2013) 57 Cal.4th 64: ‘[T]he general rule in California is that the plea agreement will be “ ‘deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy. . . .’ ” [Citation.] That the parties enter into a plea agreement thus does not have the effect of insulating them from changes in the law that the Legislature has intended to apply to them.’ (*Id.* at p. 66.)” (*T.W.*, *supra*, 236 Cal.App.4th at p. 653, fn. 4.) This aspect of the court’s reasoning indicates that if the People had sought to rescind the plea agreement as a consequence of resentencing under section 1170.18, the court would not have permitted it, since if the plea agreement is deemed to incorporate and contemplate the reserve power of the state to amend the law or enact additional laws, neither the adoption nor the application of Proposition 47’s resentencing provisions would justify rescission of the plea agreement.

Harris also merits discussion. Not only did the *T.W.* court cite the case, but Wood argues that *Harris* impliedly overruled *Collins* “because it broadly held that the terms of a plea agreement do ‘not insulat[e] [the parties] from changes in the law that the Legislature has intended to apply to them . . .’ and did not cite or reference *People v. Collins*.”

In *Harris*, our Supreme Court held that a defendant, who pursuant to a plea agreement pled guilty to lewd and lascivious acts upon a child in 1991, was required to comply with a statute enacted in 2004, known as “Megan’s Law,” which allowed the

public to obtain names, addresses and photographs of registered sex offenders. (*Harris, supra*, 57 Cal.4th at pp. 65, 66.) This was so even though the law at the time the defendant entered the plea agreement kept confidential photographs and fingerprints collected from registered sex offenders. (*Id.* at pp. 66–67.) The federal district court that had first considered the question (later certified to the California Supreme Court by the Ninth Circuit (*id.* at p. 65)), had concluded that publicly disclosing any of the defendant’s previously confidential sex offender registration information would violate the terms of the plea agreement. (*Id.* at p. 67.) Megan’s Law by its terms was retroactive, applying to sex offenders regardless of the date of their conviction. (*Harris*, at pp. 66–67.) Citing an earlier Court of Appeal decision,⁶ the California Supreme Court in *Harris* adopted the rule that “the parties to a plea agreement—an agreement unquestionably infused with a substantial public interest and subject to the plenary control of the state—are deemed to know and understand that the state, again subject to the limitations imposed by the federal and state Constitutions, may enact laws that will affect the consequences attending the conviction entered upon the plea.” (*Id.* at p. 70.)

The *Harris* court made no mention of *Collins*. It is possible that the *Harris* court intended to overrule *Collins* impliedly, but we need not decide that question to resolve this case. *Collins* and *Harris* are distinguishable in key respects. *Collins* involved a statutory amendment that eliminated any penalty for the defendant’s conduct; it decriminalized the conduct (consensual oral copulation between adults) altogether. (*Collins, supra*, 21 Cal.3d at p. 211.) *Harris*, by contrast, involved an amendment that changed the consequences of a conviction for the relevant offense. (See *Harris, supra*, 57 Cal.4th at p. 66.) Further, *Collins* did not involve the retroactive application of the new law the defendant’s conviction had not been reduced to final judgment at the time

⁶ *Harris, supra*, 57 Cal.4th at p. 70, citing *People v. Gipson* (2004) 117 Cal.App.4th 1065.

the law was amended. (*Collins*, at p. 211.) In *Harris*, on the other hand, the conviction was final, the change in law occurred more than a decade after the defendant was sentenced, and the Legislature expressly made the change in law retroactive to convictions pre-dating its enactment. (*Harris*, at pp. 66–67.) Thus, *Collins* is limited to a holding that the People may rescind a plea agreement based on a change in law enacted prior to the final judgment where the change would deprive the People of all of the benefits of the bargain they struck. So understood, *Collins* is not inconsistent with *Harris*, which denied a defendant the right to rescind a plea agreement based on a change in the law affecting the consequences of his conviction after the judgment against him was final, at least where it was clear that the new law was intended to be retroactive.⁷

We view this case as governed by *Harris* and distinguishable from *Collins*. Here, as in *Harris*, the change in law did not wholly decriminalize Wood’s conduct but instead changed the consequences of conviction. Specifically, Proposition 47, by reclassifying theft offenses involving property valued at \$950 or less as misdemeanors, lessened the penalty and other collateral consequences attending conviction of such offenses. (See § 1170.18, subs. (b)–(g), (k).) Unlike *Collins*, the change did not decriminalize the offense altogether such that the defendant would escape punishment with the result that the People would receive *no* benefit from the plea bargain. Also like *Harris*, Wood’s judgment was final, but the change in law effected by Proposition 47 was expressly made retroactive, albeit to a limited extent. Proposition 47 permits those whose convictions are

⁷ Another difference is that *Collins* involved a change in law that benefited the defendant (decriminalization of the offense) whereas *Harris* involved a change in law that was detrimental to the defendant (a harsher consequence to being convicted of a sex offense). This difference does not provide a basis for reconciling the two decisions. A rule that would subject criminal defendants to post-plea bargain changes in law that treat them more harshly but not allow them the benefit of post-plea bargain changes that treat them more leniently would be difficult to justify, giving the People a “heads I win, tails you lose” advantage. Nor could it be squared with the contract law principles applied in *Collins* and *Harris*.

already final to petition for resentencing, if they are still serving their sentence, or for redesignation, if they have already served their full terms. (§ 1170.18, subds. (a)–(g).)

The People cite a number of appellate opinions applying *Collins* more broadly, such as *In re Blessing* (1982) 129 Cal.App.3d 1026 and *People v. Enlow* (1998) 64 Cal.App.4th 850, but those cases were decided before—and have limited precedential value in light of—*Harris* and are distinguishable for various reasons as well. We find the discussion of these cases in *People v. Dunn* (2016) 248 Cal.App.4th 518, 530–531, review granted Sept. 14, 2016, S236282, persuasive.⁸ Moreover, our Supreme Court recently reaffirmed the rule stated in *Harris* in *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 888, fn.10.

In re Ricardo C. (2013) 220 Cal.App.4th 688, also cited by the People, does not aid their position. In that case, the issue was whether the juvenile court could selectively reject but otherwise enforce the terms of a negotiated plea agreement, and the appellate court held that the trial court was required to reject the agreement in its entirety, not to accept it in part and reject it in part. (*Id.* at pp. 693–694, 699.) The case focused on the distinct roles of judge and prosecutor in the plea bargaining process. *In re Ricardo C.* simply applies the principles governing those roles. “[O]nly the prosecutor is authorized to negotiate a plea agreement on behalf of the state. “[T]he court has no authority to substitute itself as the representative of the People in the negotiation process and under the guise of “plea bargaining” to “agree” to a disposition of the case over prosecutorial objection. Such judicial activity would contravene express statutory provisions requiring the prosecutor’s consent to the proposed disposition, would detract from the judge’s ability to remain detached and neutral in evaluating the voluntariness of the plea and the fairness of the bargain to society as well as to the defendant, and would present a

⁸ The Second District’s opinion in *People v. Dunn*, *supra*, 248 Cal.App.4th 518, was not depublished and pursuant to new California Rules of Court, rule 8.1115(e) is citable for its persuasive authority.

substantial danger of unintentional coercion of defendants who may be intimidated by the judge's participation in the matter.' ” (*People v. Segura* (2008) 44 Cal.4th 921, 930, cited in *In re Ricardo C.*, at pp. 698, 699.) No such principles are implicated here, where the change in consequences of the conviction is the product not of judicial intervention but of legislative change that has been expressly made (partially) retroactive. For the same reason, the People's reliance on *In re Travis J.* (2013) 222 Cal.App.4th 187, 198–199 is unpersuasive.⁹

In our view, *Harris* and *T.W.* compel the conclusion that if the Legislature or the voters adopt a change in sentencing or in other consequences of final conviction and the change is expressly made retroactive, a defendant may seek the benefit of that change notwithstanding that his or her conviction was the product of a plea bargain, and the People may not rescind the plea agreement if the defendant does so. This is especially so where the voters enacted a law such as Proposition 47 that has the stated intention that it applies to a “conviction, whether by trial or plea.” A defendant may seek resentencing or redesignation under section 1170.18, and his or her doing so does not deprive the People of the benefit of their bargain both because the plea agreement “ ‘incorporate[d] and contemplate[d] . . . the reserve power of the state to amend the law or enact additional laws for the public good” ’ ” (*Harris, supra*, 57 Cal.4th at p. 66) and because the

⁹ The People also cite the decision in *Harris v. Superior Court* (2015) 242 Cal.App.4th 244, 247, which is on point and does support their position. However, after briefing in this case was complete, the California Supreme Court granted review in that case to decide the issue that is before us now and depublished *Harris v. Superior Court*, Feb. 24, 2016, S231489, 365 P.2d 789. There was a strong dissent by Justice Mosk in the Court of Appeal in *Harris v. Superior Court*, followed by opinions from this District and the Second, Fourth and Sixth Districts agreeing with Justice Mosk's dissent. The Supreme Court has granted review and depublished the decisions from all the districts that issued published decisions addressing the issue, except for this court's decision in *T.W.*

defendant will not escape punishment altogether but will only receive a shorter sentence and/or be relieved of other collateral consequences of the felony conviction.

In so holding, we reject the trial court's interpretation of Proposition 47 as providing trial courts discretion to deny resentencing or redesignation of an offense on a case-by-case basis depending on their assessments of whether such relief would deprive the People of the benefit of the bargain. Section 1170.18 expressly limits a court's discretion to deny resentencing if the defendant satisfies the statutory criteria. Specifically, if a defendant's offense would have been a misdemeanor had Proposition 47 been in effect when the defendant committed it, the statute requires the court to grant resentencing to the defendant currently serving his or her sentence unless it determines that resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.18, subd. (b) ["If the petitioner satisfies the criteria in subdivision (a), the petitioner's felony sentence shall be recalled and the petitioner resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety"].) The statute further confines trial courts' discretion by defining "unreasonable risk of danger to public safety" narrowly to mean "an unreasonable risk that the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667." (*Id.*, subd. (c).) Moreover, once a person has completed his or her sentence, the statute does not provide courts with discretion to deny redesignation on any ground so long as the statutory criteria are met. (*Id.*, subd. (g) ["If the application satisfies the criteria in subdivision (f), the court shall designate the felony offense or offenses as a misdemeanor"].) The voters' inclusion of a single and limited criterion upon which trial courts may deny resentencing and their exclusion of any discretionary basis for denying redesignation after a sentence has been completed belie any notion that they intended to afford trial courts discretion to deny relief on grounds not mentioned in

the statute.¹⁰ The discretion the trial court purported to exercise here is even more obviously precluded given the statutory language making relief available to those convicted *by plea*. (§ 1170.18, subs. (a), (f).) Had the voters intended to afford discretion to deny relief to defendants convicted by plea based on some evaluation of the plea agreement, they could and would have said so.

II.

The Appropriate Remedy Is a Remand for Further Proceedings.

The People contend that because defendant initially sought “automatic” relief in the trial court on the ground that as a probationer he was not “serving a sentence” and could not file a petition pursuant to Penal Code section 1170.18, he is attempting to seek relief under the petition process “for the first instance on appeal.” The People further contend that because section 1170.18 requires that a resentencing petition be filed in the first instance in the superior court of conviction, and because the decision on such a petition is “inherently factual,” “an appellate court is not in a position to make the necessarily eligibility determinations required by [section 1170.18] in the first instance.” The People contend we should deny relief “to the extent that appellant is asking this court to determine his eligibility for relief under Penal Code section 1170.18.”

Wood asks this court to reverse the trial court’s denial of his motion and “to issue an order directing the trial court to grant [it.]” He contends he did not seek relief under Proposition 47 for the first time on appeal, and that the trial court “had ample opportunity” to address his request. In response to the People’s argument that his “motion” was not a “petition” for resentencing under section 1170.18, he cites *People v. Amaya* (2015) 242 Cal.App.4th 972, in which the People urged the court to affirm denial of a resentencing motion on the ground that the appellant “made an oral motion,” “did not

¹⁰ The Latin phrase for this principle of statutory construction is “*expressio unius est exclusio alterius*,” meaning “the expression of one thing in a statute ordinarily implies the exclusion of other things.” (*In re J.W.* (2002) 29 Cal.4th 200, 209.)

file a written petition” and was vague as to what he was requesting. (*Id.* at p. 975.) The court declined to affirm on these grounds, observing that “there is no statutory requirement for the filing of a written petition” and the People failed to cite any legal authority to support their argument that “the word ‘petition’ necessarily always means ‘written petition.’ ” (*Ibid.*) It reversed the denial of relief and remanded “with directions to consider appellant’s oral petition.” (*Ibid.*)

It is true that Wood’s initial filing was not titled a petition under section 1170.18, apparently because he believed the procedures governing “[a] person currently serving a sentence for a conviction” set forth in section 1170.18, subdivisions (a) through (e) did not extend to persons like himself whose sentences were suspended and who were on probation. He titled the petition “Motion to Recognize Proposition 47 Eligible Probation Cases as an Automatic Misdemeanor.” In opposition to that “motion,” the People conceded that Wood could seek resentencing because “a defendant has been sentenced” within the meaning of the section “when probation is granted and terms are imposed.” However, they argued his motion was not a “petition” because it requested “automatic” reduction (and should be denied in any event because reduction of the offense to a misdemeanor would violate the terms of the plea agreement). They did not contend he was otherwise ineligible for a reduction under section 1170.18.

At the initial hearing on the motion, the court continued the matter due to Wood’s inability to be present because he was hospitalized, and noted the public defender’s failure to address in its papers what the court referred to as “the *Collins* issue of the benefit of the bargain.” As we have discussed, Wood filed a supplemental brief in which he argued that the criteria for resentencing under section 1170.18¹¹ were met in that he

¹¹ “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 that added this section . . . had [it] been in effect at the time of the offense” may seek resentencing “in accordance with” the sections that redefine as misdemeanors certain

had no disqualifying prior offenses¹² and his felony offense consisted of a theft of property “the total value of which was [less than \$950].”¹³ The record generally supports these assertions,¹⁴ although there does not appear to have been definitive evidence of the precise value of the goods on which the guilty plea was based.¹⁵ The People did not file a brief in response to Wood’s supplemental brief.

At the hearings, particularly the second hearing, the court treated Wood’s motion as a petition for resentencing under Proposition 47. However, the only issue discussed by the parties or the court at those hearings was whether Wood’s sentence could be reduced

crimes that were formerly defined as felonies. (§ 1170.18, subd. (a).) This includes section 490.2. (§ 1170.18, subd. (a).)

¹² Section 490.2, which—“[n]otwithstanding Section 487 or any other provision of law defining grand theft”—made thefts of property with a value of \$950 or less punishable as misdemeanors, expressly excepts persons previously convicted of certain violent offenses and offenses requiring registration. (§ 490.2, subd. (a).)

¹³ Actually, Wood argued that the property had a value of \$8.97, but cited nothing in the record to support that assertion. He makes the same assertion on appeal, but cites only his brief in the trial court and not the record.

¹⁴ Regarding the absence of disqualifying offenses, the pre-sentence supplemental report states that the grand theft conviction was his second felony conviction as an adult, and the prior conviction was a “felony weapons related conviction.” The attached criminal history indicates Wood had certain sustained offenses as a juvenile, none of which are among those section 490.2 identifies as disqualifying. There is no evidence that Wood was convicted of any such disqualifying offense. Nor did the People, who have the burden of proof to establish a prior disqualifying conviction (Couzens et al., Sentencing Cal. Crimes (2016) § 25:3, p. 25-7), argue that Wood had any such prior offense.

¹⁵ Regarding the value of the items Wood and his girlfriend were charged with stealing, the pre-sentence supplemental report describes the items as a “beanie” and “a pair of black shoes.” Further, the count that was dismissed as part of the plea bargain was petty theft, and this was the only count against his girlfriend, who attempted to leave the store wearing the shoes. Before Proposition 47, petty theft encompassed thefts that, with exceptions for certain types of property not relevant here, were of property valued at less than \$950. (See Penal Code, §§ 487, 488.) At no point during either hearing did the People contend that the value of the property taken exceeded \$950.

in light of the plea bargain. There was no discussion of the exclusion or eligibility issues. Nor was there any discussion of the primary subject of a trial court's discretion in regard to resentencing: whether it would "pose an unreasonable risk of danger to public safety." (See § 1170.18, subd. (b).)

Wood contends there is no evidence that he posed an unreasonable risk of committing one of the violent felonies that would render him an "unreasonable risk of danger to public safety" within the meaning of section 1170.18, subdivision (b).¹⁶ He is correct that there was no such evidence, but it appears that the People took the view that because he filed a "motion" for "automatic" reduction of sentence rather than a petition for resentencing, the People were not required to or were for some reason prevented from addressing factual questions regarding Wood's eligibility for resentencing.¹⁷

We conclude that Wood's motion constituted a petition for resentencing under section 1170.18. That said, both the parties and the trial court focused on the argument that the plea agreement precluded resentencing, and the court denied the motion on that

¹⁶ Section 1170.18, subdivision (c) defines "unreasonable risk of danger to public safety" to mean "an unreasonable risk that the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of section 667." Section 667, subdivision (e)(2)(C)(iv) lists seven categories of offenses that may qualify as a "serious and/or violent felony" for purposes of that section, including sexually violent offenses, certain sex offenses involving children under 14, homicide offenses, solicitation to commit murder, assault with a machine gun on a peace officer or firefighter, possession of a weapon of mass destruction and serious or violent offenses punishable by life imprisonment or death.

¹⁷ The People asked, rhetorically, how the court was to know whether the eligibility requirements were met or make the dangerousness determination "[i]f there was no presentence report from probation, or no preliminary hearing transcript." It argued that "[w]hen a petition (or application) is filed, requesting the application of Proposition 47, it gives the People the opportunity to review the file and provide necessary information to the court, i.e., whether or not the People have grounds to make an objection to said application." It is unclear from this argument why the People were not afforded that opportunity by Wood's motion, as opposed to having chosen not to address the issue based on their contention that his motion could not serve as a petition.

ground. There is no indication that the trial court considered or made any findings regarding any disqualifying prior convictions, Wood's eligibility for reduction of sentence or whether resentencing would pose an unreasonable risk of danger to public safety.

We will therefore reverse the trial court's denial of Wood's motion/petition and remand with directions to consider his eligibility for reduction of sentence under Proposition 47, whether he had any disqualifying prior convictions and whether resentencing would pose an unreasonable risk of danger to public safety.

DISPOSITION

The order of April 23, 2015, denying Wood's Proposition 47 petition is reversed. The matter is remanded to the trial court with directions to consider Wood's eligibility for resentencing under section 1170.18, subdivisions (a) through (c). If Wood is eligible for resentencing under the statute and the court does not find resentencing would pose an unreasonable risk of danger to public safety, it shall grant resentencing without consideration of the effect on the parties' plea agreement. If Wood has completed his sentence by the time the trial court considers his petition, it shall treat the petition as a petition for redesignation under section 1170.18 in accordance with subdivisions (f) through (h), and if it determines Wood is eligible under those provisions shall grant the petition.

STEWART, J.

We concur.

KLINE, P.J.

MILLER, J.

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