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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RENE VELASQUEZ, Defendant and Appellant.	B264142 (Los Angeles County Super. Ct. No. BA405723)

APPEAL from an order of the Superior Court of Los Angeles County, Charlaine F. Olmedo, Judge. Affirmed.

Rich Pfeiffer, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Mary Sanchez and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Rene Velasquez appeals the trial court's order partially denying his request to recall his sentence and resentence him pursuant to Proposition 47, the Safe Neighborhoods and Schools Act. Velasquez is currently serving a prison sentence that includes five 1-year prior prison term enhancements imposed pursuant to Penal Code section 667.5, subdivision (b).[1] After passage of Proposition 47, and after sentence was imposed in the current case, Velasquez successfully petitioned to have one of the five prior convictions redesignated as a misdemeanor. He also sought resentencing in his current case, claiming that one of the section 667.5, subdivision (b) enhancements was invalid because it was predicated upon the conviction that had been redesignated a misdemeanor. We conclude the enhancement was unaffected by Proposition 47 and affirm the trial court's order.

FACTUAL AND PROCEDURAL BACKGROUND

On May 3, 2013, the trial court found Velasquez guilty of the second degree robbery of a victim who was 65 years of age or older (the "current offense").[2] (§§ 211, 667.9, subd. (a).) It also found Velazquez had served five prior prison terms within the meaning of section 667.5, subdivision (b). On May 17, 2013, the trial court sentenced Velasquez to a total of nine years in state prison, comprised of three years for the robbery, one year for the section 667.9 age enhancement, and five 1-year terms for the section 667.5, subdivision (b) prior prison term enhancements. We affirmed the judgment in an unpublished opinion. (*People v. Velasquez* (Dec. 12, 2013, B248857).[3]

On November 4, 2014, while Velasquez was still serving his sentence on the current offense, the voters enacted Proposition 47, which went into effect the following day. (*People v. Morales* (2016) 63 Cal.4th 399, 404; *People v. Lynall* (2015)

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[1] All further undesignated statutory references are to the Penal Code.

[2] A bench trial was held after Velasquez waived his right to a jury trial.

[3] We take judicial notice of our unpublished opinion. (Evid. Code, §§ 459, subd. (a), 452, subd. (d).)

233 Cal.App.4th 1102, 1108.) Proposition 47 amended and enacted various provisions of the Penal and Health and Safety Codes that reduced certain drug and theft offenses to misdemeanors, unless committed by ineligible offenders. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091; *People v. Diaz* (2015) 238 Cal.App.4th 1323, 1327-1328.) These offenses had previously been either felonies or wobblers. (*People v. Rivera, supra,* at p. 1091; *People v. Lynall, supra,* at p. 1108.) Proposition 47 also enacted section 1170.18, which created a procedure whereby an eligible defendant who has suffered a felony conviction of one of the enumerated crimes can petition to have it designated as a misdemeanor.

On February 26, 2015, Velasquez, represented by counsel, filed a petition for recall of his sentence and resentencing pursuant to section 1170.18. He sought to have a 1997 conviction for possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)) designated a misdemeanor pursuant to Proposition 47. He also sought to have the section 667.5 enhancement that was predicated on the 1997 conviction stricken, because after redesignation the 1997 offense was no longer a felony.[4]

At a May 6, 2015 hearing the trial court granted the petition insofar as Velasquez sought to have the 1997 conviction reduced to a misdemeanor, but denied it insofar as Velasquez sought to have the section 667.5, subdivision (b) enhancement imposed in the current case stricken. It explained: "The court is inclined to grant the 47 reduction to a misdemeanor on the [Health and Safety Code section] 11350 because he qualifies for that. But the court is refusing to or denying the request to strike it as a qualifier under [section] 667.5(b) as a prior prison sentencing enhancement at the time defendant was sentenced in this case. That is a collateral consequence of certain prison time. And the court feels that that status of the law has not changed by virtue of Prop 47."

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[4] Although the petition was cursory and unclear, the parties' arguments at the subsequent hearing clarified the relief Velasquez sought. Velasquez did not request redesignation of the other offenses upon which the remaining four section 667.5, subdivision (b) enhancements were based.

Velasquez appeals the trial court's denial of his request to strike the section 667.5, subdivision (b) enhancement. (See *Teal v. Superior Court* (2014) 60 Cal.4th 595 (*Teal*).)

DISCUSSION

1. *Sections 1170.18 and 667.5, subdivision (b)*

Proposition 47 created two separate procedures for redesignating an offense as a misdemeanor. A defendant who is currently serving a felony sentence for an offense now classified as a misdemeanor by Proposition 47 may petition to recall the sentence and request resentencing. (§ 1170.18, subd. (a); *People v. Rivera, supra,* 233 Cal.App.4th at pp. 1092, 1099.) If the petitioner meets the statutory eligibility criteria, he or she is entitled to resentencing unless the trial court determines, in its discretion, that resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.18, subd. (b).) Eligible persons who have already completed their sentences for such offenses may file an application to have their felony convictions designated as misdemeanors. (§ 1170.18, subds. (f), (g); *People v. Abdallah* (2016) 246 Cal.App.4th 736, 743-744; *People v. Rivera, supra,* at pp. 1093, 1099.)[5] Section 1170.18,

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[5] Section 1170.18, subdivisions (a), (b), (f), and (g) provide, in pertinent part: "(a) 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 ('this act') had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act.

"(b) Upon receiving a petition under subdivision (a), the court shall determine whether the petitioner satisfies the criteria in subdivision (a). If the petitioner satisfies the criteria in subdivision (a), the petitioner's felony sentence shall be recalled and the petitioner resentenced to a misdemeanor pursuant to Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, [as] those sections have been amended or added by this act, unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.

"[¶] . . . [¶]

subdivision (k) provides: "Any 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," except in regard to restrictions on the ownership or possession of firearms. Subdivision (n) states: "Nothing in this and related sections is intended to diminish or abrogate the finality of judgments in any case not falling within the purview of this act."

Section 667.5, subdivision (b), requires imposition of a one-year enhancement for each of a defendant's prior felony convictions that resulted in a separate term of imprisonment, when the defendant commits another felony within five years of release from custody.[6] (See *People v. Langston* (2004) 33 Cal.4th 1237, 1241; *People v. Abdallah, supra,* 246 Cal.App.4th at p. 740.) "Imposition of a sentence enhancement under Penal Code section 667.5 requires proof that the defendant: (1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction; (3) completed

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"(f) A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors.

"(g) If the application satisfies the criteria in subdivision (f), the court shall designate the felony offense or offenses as a misdemeanor."

[6] Section 667.5, subdivision (b) provides, in pertinent part and subject to exceptions not relevant here, that "where the new offense is any felony for which a prison sentence or a sentence of imprisonment in a county jail under subdivision (h) of Section 1170 is imposed or is not suspended, in addition and consecutive to any other sentence therefor, the court shall impose a one-year term for each prior separate prison term or county jail term imposed under subdivision (h) of Section 1170 or when sentence is not suspended for any felony; provided that no additional term shall be imposed under this subdivision for any prison term or county jail term imposed under subdivision (h) of Section 1170 or when sentence is not suspended prior to a period of five years in which the defendant remained free of both the commission of an offense which results in a felony conviction, and prison custody or the imposition of a term of jail custody imposed under subdivision (h) of Section 1170 or any felony sentence that is not suspended."

that term of imprisonment; and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction." (*People v. Tenner* (1993) 6 Cal.4th 559, 563; *In re Preston* (2009) 176 Cal.App.4th 1109, 1115.)

2. *The trial court's order is appealable*

Preliminarily, we address the People's argument that Velasquez's appeal should be dismissed for lack of subject matter jurisdiction. They reason as follows. A defendant may appeal from a postjudgment order only if it affects his or her substantial rights. (§ 1237, subd. (b).) A postjudgment order implicates a defendant's substantial rights only if the court has jurisdiction over the subject matter of the order. (See *People v. Turrin* (2009) 176 Cal.App.4th 1200, 1208; *People v. Chlad* (1992) 6 Cal.App.4th 1719, 1726; *People v. Roe* (1983) 148 Cal.App.3d 112, 118.) Generally, a court lacks jurisdiction to resentence a defendant once execution of sentence has begun. (*People v. Howard* (1997) 16 Cal.4th 1081, 1089.) Although Proposition 47 provides for resentencing on eligible crimes, it does not authorize a petitioner to seek resentencing in regard to enhancements. Instead, the People argue, "the only defendants authorized by Proposition 47 to petition a trial court for resentencing are those who are currently serving a sentence for one of the offenses that the Act reduced to a misdemeanor. Because appellant is currently serving a sentence for second degree robbery, which was not affected by the passage of Proposition 47," his petition was unauthorized insofar as it pertained to the enhancement, and the trial court lacked jurisdiction to consider it. Thus the trial court's order is not appealable.

As discussed *post*, we agree that Proposition 47 does not provide for striking Velasquez's section 667.5, subdivision (b) enhancement. However, this does not mean the trial court lacked jurisdiction to consider the issue. A similar contention was rejected by our Supreme Court in *Teal, supra,* 60 Cal.4th 595. There, the petitioner had been convicted of making a criminal threat (§ 422) and sentenced to 25 years to life in prison pursuant to the "Three Strikes" law. (*Teal, supra,* at p. 597.) After passage of

Proposition 36, the Three Strikes Reform Act of 2012 (Proposition 36 or the Reform Act), he sought resentencing pursuant to Proposition 36's resentencing provision, section 1170.126. The trial court denied the petition because making criminal threats was a serious felony, and the petitioner therefore failed to meet section 1170.126's threshold eligibility requirements. (*Teal,* at p. 597.) The appellate court held the order was not appealable because inmates had no right to have the trial court consider whether they should be resentenced unless they met the statutory eligibility requirements. (*Ibid.*)

Our Supreme Court disagreed with the appellate court. A judgment or order is not appealable unless expressly made so by statute, and Proposition 36 was silent on the appealability question. (*Teal, supra,* 60 Cal.4th at p. 598.) Section 1170.126 stated that it was intended to apply exclusively to persons who would not have been sentenced to a third strike term under Proposition 36. The statute further stated that persons serving a third strike sentence for a felony or felonies not defined as serious or violent "may file a petition for a recall of sentence. . . .' " (*Teal, supra,* at pp. 598-599, italics omitted.) Based on this statutory language, the Attorney General argued: "the above provisions establish a threshold eligibility requirement that determines an inmate's standing to file a petition *as well as the trial court's jurisdiction*. [The Attorney General] reasons that because petitioner's current offense is presently defined as ' "serious" ' under subdivision (c) of section 1192.7, he had no statutory right or standing to file a petition for recall of sentence. Therefore, the trial court's denial order did not affect his substantial rights and is not appealable under section 1237. [The Attorney General] further argues that *because a trial court has no statutory authority to initiate recall proceedings or consider a defendant's eligibility for relief on its own motion, it lacks jurisdiction to decide issues beyond the threshold eligibility determination when a petitioner fails to meet those eligibility requirements*." (*Teal, supra,* at p. 599, italics added.)

The Supreme Court disagreed with the Attorney General's contentions. The petitioner had standing to file the petition and to have the trial court consider his eligibility claim on the merits. (*Teal, supra,* 60 Cal.4th at p. 599.) His timely petition

alleged a justiciable controversy affecting concrete interests, in that he claimed he was eligible for resentencing. (*Ibid.*) The "trial court's authority or discretion to determine the merits of petitioner's claim was not predicated on his eligibility to file a petition in the first instance." (*Id.* at pp. 599-600.) Section 1170.126, subdivision (f) required that upon receipt of a petition for resentencing, the trial court was required to determine the petitioner's eligibility. (*Teal,* at p. 600.) The trial court's ineligibility finding "provided a basis to deny the petition," but "did not affect petitioner's standing to file the petition in the first instance." (*Ibid.*)

Teal explained that the Attorney General's contrary argument "confuse[d] the issues on the merits with the procedural question of appealability." (*Teal, supra,* 60 Cal.4th at p. 601.) The argument was "premised on the correctness of the trial court's ineligibility finding. . . . However, a postjudgment order 'affecting the substantial rights of the party' (§ 1237, subd. (b)) does not turn on whether that party's claim is meritorious, but instead on the nature of the claim and the court's ruling thereto. [Citations.] Section 1170.126 creates a substantial right to be resentenced and provides a remedy by way of a statutory postjudgment motion. A denial of a section 1170.126 petition, foreclosing a reduced sentence, would certainly '*affect*[] the substantial rights of the party.' (§ 1237, subd. (b), italics added.)" (*Id.* at pp. 600-601, fns. omitted.) "The test of appealability under section 1237, subdivision (b), does not depend on the resolution of 'an issue to be determined on the merits.' [Citation.]" (*Id.* at p. 601.)

The same is true here. Velasquez's petition alleged a justiciable controversy affecting concrete interests, in that he claimed he was eligible for resentencing. Section 1170.18, subdivision (b), like section 1170.126, subdivision (f), requires that upon receiving a Proposition 47 petition for resentencing the trial court "shall determine whether the petitioner satisfies" the statutory criteria. Section 1170.18, like section 1170.126, creates a substantial right to resentencing, and provides a remedy by way of a statutory postjudgment motion. (See *Teal, supra,* 60 Cal.4th at pp. 600-601.) Denial of a reduced sentence certainly affects Velasquez's substantial rights. (*Id.* at p. 601.)

Velasquez is not eligible for the resentencing he seeks. But just as in *Teal*, the fact that the petition lacks merit does not defeat jurisdiction. The People's contrary argument inappropriately confuses the issues on the merits with the procedural questions of appealability and jurisdiction. (See *Teal, supra,* at p. 601.)

We turn, then, to the merits of Velasquez's appeal.

3. *Standard of review and principles of statutory interpretation*

Application of Proposition 47 on the facts presented here is a pure question of law that we review de novo. (*People v. Prunty* (2015) 62 Cal.4th 59, 71; *People v. Camp* (2015) 233 Cal.App.4th 461, 467.) When interpreting a voter initiative, our task is to ascertain and effectuate the voters' intent. (*People v. Park* (2013) 56 Cal.4th 782, 796; *People v. Briceno* (2004) 34 Cal.4th 451, 459.) We apply the same principles that govern interpretation of a statute enacted by the Legislature. Thus, we look first to the language of the statute, giving the words their ordinary meaning. (*People v. Park, supra,* at p. 796; *People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 571.) If not ambiguous, the plain meaning of the statutory language controls, unless it would lead to absurd results the electorate could not have intended. (*People v. Birkett* (1999) 21 Cal.4th 226, 231; *People v. Bush* (2016) 245 Cal.App.4th 992, 1003.) The statutory language must be construed in the context of the statute as a whole and the overall statutory scheme. (*People v. Brown* (2014) 230 Cal.App.4th 1502, 1509; *People v. Bush, supra,* at p. 1003.) When the statutory language is ambiguous, we refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet. (*People v. Superior Court (Pearson), supra,* at p. 571; *People v. Shabazz* (2015) 237 Cal.App.4th 303, 313.)

4. *Redesignation of an offense as a misdemeanor under Proposition 47 does not retroactively alter the designation of that crime for purposes of imposition of an enhancement imposed before the redesignation*

Velasquez argues that a section 667.5, subdivision (b) enhancement may not be imposed unless the defendant has suffered a prior felony. Because his prior felony was

redesignated a misdemeanor, the enhancement is no longer based on a "presently valid felony conviction." He insists the enhancement is therefore unauthorized and must be stricken. We disagree.

Our California Supreme Court is currently considering whether a defendant is eligible for resentencing on a section 667.5, subdivision (b) enhancement after the underlying felony is reclassified as a misdemeanor pursuant to Proposition 47. (*People v. Valenzuela* (2016) 244 Cal.App.4th 692, review granted Mar. 30, 2016, S232900; see also, e.g., *People v. Williams* (2016) 245 Cal.App.4th 458, review granted May 11, 2016, S233539; *People v. Ruff* (2016) 244 Cal.App.4th 935, review granted May 11, 2016, S233201; *People v. Carrea* (2016) 244 Cal.App.4th 966, review granted Apr. 27, 2016, S233011.)[7]

The trial court did not err. By its plain terms, Proposition 47 does not provide a mechanism for striking enhancements retroactively. (*People v. Jones* (2016) 1 Cal.App.5th 221, 224-225, review granted Sept. 14, 2016, S235901.) Section 1170.18, subdivision (a) provides that a person currently serving a sentence for a conviction of a felony or felonies, who "would have been guilty of a misdemeanor under the act that added this section . . . had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act." Velasquez is not currently serving a sentence for any of the offenses that were reduced to misdemeanors

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[7] The parties cite these and other cases in which review was granted after their respective briefs were filed. (*People v. Buycks* (2015) 241 Cal.App.4th 519, review granted Jan. 20, 2016, S231765; *People v. Florez* (2016) 245 Cal.App.4th 1176, review granted June 8, 2016, S234168.) Because review was granted in these cases prior to the effective date of California Rules of Court, rule 8.1105(e)(1)(B), they may no longer be cited and we do not discuss them.

by Proposition 47. His current crime is robbery, which is not among the enumerated offenses eligible for resentencing under Proposition 47.

Section 1170.18 also provides that a person who has completed his sentence for a felony or felonies who would have been guilty of a misdemeanor under Proposition 47, had it been in effect at the time of the offense, may apply to "have the felony conviction or convictions designated as misdemeanors." (§ 1170.18, subd. (f).) Velasquez has already received the relief to which he is entitled under subdivision (f), in that his 1997 conviction was redesignated as a misdemeanor. Neither subdivisions (a) nor (f) of section 1170.18 provide for resentencing, striking, or dismissing sentence enhancements. Section 1170.18 refers only to resentencing and redesignation of *convictions*, not enhancements. (*People v. Jones, supra,* 1 Cal.App.5th at p. 228.) An enhancement is not a felony or a misdemeanor; it is an additional term of imprisonment, imposed due to the defendant's criminal history or circumstances involved in commission of the crime. (See *People v. Jefferson* (1999) 21 Cal.4th 86, 101; Cal. Rules of Court, rule 4.405.) Neither the Proposition 47 ballot materials nor section 1170.18 mention recidivist enhancements, and Proposition 47 did not amend section 667.5. Proposition 47 did not provide a procedure for resentencing on an ineligible felony simply because an offense underlying an enhancement was affected. "It follows that nothing in the language of section 1170.18 allows or even contemplates the retroactive redesignation, dismissal, or striking of sentence enhancements imposed in a final judgment entered before Proposition 47 passed, even where the offender succeeds in having the underlying conviction itself deemed a misdemeanor." (*People v. Jones,* at p. 229.) To the contrary, the statement in section 1170.18, subdivision (n), that "Nothing in this and related sections is intended to diminish or abrogate the finality of judgments in any case not falling within the purview of this act," suggests the resentencing and redesignation mechanisms in section 1170.18, subdivisions (a) and (f) are the only avenues of relief available.

Velasquez argues that the unambiguous language of section 1170.18, subdivision (k), which states that any felony conviction that is recalled and resentenced or designated

as a misdemeanor "shall be considered a misdemeanor for all purposes," supports his position. He urges one such "purpose" is the use of a redesignated offense as the basis for imposition of a sentence enhancement. In his view, therefore, the plain language of the statute requires that once a prior conviction is designated a misdemeanor, enhancements based upon the prior's felony status are no longer valid.

But Proposition 47's "misdemeanor for all purposes" language tracks that used in section 17, subdivision (b), pertaining to the effect of a judicial declaration that a wobbler is to be considered a misdemeanor. (§ 17, subd. (b)(3);[8] *People v. Abdallah, supra,* 246 Cal.App.4th at p. 745; *People v. Rivera, supra,* 233 Cal.App.4th at pp. 1094, 1100.) In construing the "misdemeanor for all purposes" language in section 17, subdivision (b), our Supreme Court has "stated that the reduction of the offense to a misdemeanor does not apply retroactively." (*People v. Rivera, supra,* at p. 1100.) "If ultimately a misdemeanor sentence is imposed, the offense is a misdemeanor from that point on, but not retroactively . . . ." (*People v. Feyrer* (2010) 48 Cal.4th 426, 439; see *People v. Moomey* (2011) 194 Cal.App.4th 850, 857.)

People v. Park illustrates this principle. There, the defendant was convicted of a felony in 2003. The trial court suspended imposition of sentence and placed him on probation. In 2006 the court reduced the conviction to a misdemeanor pursuant to section 17, subdivision (b)(3). (*People v. Park, supra,* 56 Cal.4th at p. 787.) When the defendant was convicted in 2007 of a new felony, the court imposed a five-year serious felony enhancement pursuant to section 667, subdivision (a), predicated on the 2003 felony conviction. (*People v. Park, supra,* at pp. 787-788.) Construing section 17's

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[8] Section 17 provides in pertinent part: "(b) When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances: [¶] . . . [¶] (3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor."

"misdemeanor for all purposes" language, *Park* concluded that "when a wobbler is reduced to a misdemeanor in accordance with the statutory procedures, the offense *thereafter* is deemed a 'misdemeanor for all purposes,' except when the Legislature has specifically directed otherwise." (*Park, supra,* at p. 795, italics added.) Accordingly, "when a wobbler has been reduced to a misdemeanor the prior conviction does not constitute a prior felony conviction within the meaning of section 667(a)." (*Id.* at p. 799.) Significant to our analysis here, *Park* recognized that "until the court actually exercises its discretion to reduce a wobbler to a misdemeanor under section 17(b), the offense is deemed a felony for all purposes." (*Id.* at p. 800.) The court explained: "There is no dispute that . . . defendant would be subject to the section 667(a) enhancement had he committed and been convicted of the present crimes *before* the court reduced the earlier offense to a misdemeanor." (*Id.* at p. 802, italics added.)

Proposition 47 and section 17, subdivision (b) both pertain to the effect of redesignation of an offense as a misdemeanor. (*People v. Abdallah, supra,* 246 Cal.App.4th at p. 745.) Because identical language appearing in separate statutory provisions should be interpreted the same way when the provisions cover analogous subject matter (*People v. Rivera, supra,* 233 Cal.App.4th at p. 1100; *People v. Abdallah, supra,* at p. 745), we presume the voters intended the same construction in section 1170.18, subdivision (k). Velasquez's prior offense was not designated a misdemeanor until *after* sentence had been imposed on his current crime, and therefore the language in subdivision (k) does not preclude imposition of the enhancement.[9]

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[9] *People v. Abdallah* held that in light of section 1170.18, subdivision (k), "where . . . a prior conviction is no longer a felony *at the time the court imposes a sentence enhancement under section 667.5,* Proposition 47 precludes the court from using that conviction as a felony merely because it was a felony at the time the defendant committed the offense." (*People v. Abdallah, supra,* 246 Cal.App.4th at p. 747, italics added.) As noted, here the offense upon which the section 667.5 enhancement was predicated was not redesignated until after sentence was imposed on the current crime, and *Abdallah* is not inconsistent with our analysis. We express no opinion on whether section 1170.18, subdivision (k) precludes a sentencing court from imposing a section

Velasquez also argues that the rule of *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*) applies to require retroactive application of Proposition 47. Again, we disagree. Penal statutes are not given retroactive effect unless a contrary legislative intent is apparent. (§ 3; *People v. Brown* (2012) 54 Cal.4th 314, 319.) Section 3 "erects a strong presumption of prospective operation" and codifies " 'the time-honored principle . . . that in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature . . . must have intended a retroactive application.' " (*People v. Brown, supra,* at pp. 319, 324.) A statute that is ambiguous with respect to retroactive application is construed to be unambiguously prospective. (*Id.* at p. 324.)

Estrada established an exception to this general rule. (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1195, disapproved on another point in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.) *Estrada* held: "When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final." (*Estrada, supra,* 63 Cal.2d at p. 745.) *Estrada* is " 'properly understood, not as weakening or modifying the default rule of prospective operation codified in section 3, but rather as informing the rule's application in a specific context by articulating the reasonable presumption that a legislative act mitigating the punishment for a particular criminal offense is intended to apply to all nonfinal judgments. [Citation.]' [Citation.]" (*People v. Hajek and Vo, supra,* at p. 1196.)

667.5, subdivision (b) enhancement when the underlying felony is designated a misdemeanor before commission of and sentencing on the current crimes.

But *Estrada* is of no help to Velasquez here for at least two reasons. First, *Estrada* is inapplicable because Velasquez's convictions in the current and prior cases are final. (See *People v. Diaz, supra,* 238 Cal.App.4th at pp. 1335-1336.) Second, our Supreme Court's recent decision in *People v. Conley* (2016) 63 Cal.4th 646 suggests the *Estrada* presumption simply does not apply to Proposition 47 resentencing. In *Conley,* the defendant was sentenced under the Three Strikes law. While his appeal was pending the electorate enacted the Reform Act, which, as noted *ante,* included a resentencing provision (§ 1170.126) similar to that created by Proposition 47. The defendant argued that because his judgment was not final when the Reform Act was enacted, he was entitled to automatic resentencing. (*Conley, supra,* at pp. 655-656.) Our Supreme Court disagreed. It reasoned: "The *Estrada* rule rests on an inference that, in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not. [Citation.] In enacting the recall provision, the voters adopted a different approach. They took the extraordinary step of extending the retroactive benefits of the [Reform Act] beyond the bounds contemplated by *Estrada*—including even prisoners serving *final* sentences within the Act's ameliorative reach—but subject to a special procedural mechanism for the recall of sentences already imposed. In prescribing the scope and manner of the Act's retroactive application, the voters did not distinguish between final and nonfinal sentences, as *Estrada* would presume, but instead drew the relevant line between prisoners 'presently serving' indeterminate life terms—whether final or not—and defendants yet to be sentenced." (*Id.* at pp.657-658.) The nature of the recall mechanism "call[ed] into question the central premise underlying the *Estrada* presumption . . . ." (*Id.* at p. 658.) "Where, as here, the enacting body creates a special mechanism for application of the new lesser punishment to persons who have previously been sentenced, and where the body expressly makes retroactive application of the lesser punishment contingent on a court's evaluation of the defendant's dangerousness, we can no longer say with

confidence, as we did in *Estrada*, that the enacting body lacked any discernible reason to limit application of the law with respect to cases pending on direct review." (*Id.* at pp. 658-659.) *Conley*'s reasoning suggests that the *Estrada* principle has no application here.

Velasquez next urges that Proposition 47 was designed to ensure prison spending is focused on violent and serious offenders, with the cost savings generated thereby invested into prevention and support programs. He reasons that interpreting section 1170.18 to prohibit section 667.5, subdivision (b) sentence enhancements based on crimes made misdemeanors by Proposition 47 would promote the statute's purpose and intent. But where the statutory language is plain and unambiguous, as is the case with section 1170.18, "there is no need for construction and the judiciary should not indulge in it." (*People v. Massicot* (2002) 97 Cal.App.4th 920, 925; *People v. Jones, supra,* 1 Cal.App.5th at p. 227; *People v. Vasquez* (2016) 247 Cal.App.4th 513, 519.) In any event, giving redesignations retroactive effect in regard to section 667.5, subdivision (b) enhancements would require a court to resentence on *any* offense – including violent crimes – if an enhancement is predicated on a redesignated offense. This would undercut the electorate's intent that persons convicted of crimes such as murder, rape, and child molestation not benefit from Proposition 47. (See Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 3, subd. (1), p. 70.)

Velasquez cursorily argues that Proposition 47 "specifically stated the one and only purpose that would not be applied . . . possessing a firearm. [Citation.] If any other purposes were intended not to apply, they too would have been listed." (Italics omitted.) Presumably, Velasquez intends to invoke the canon of statutory construction *expressio unius est exclusio alterius*. But the fact that the electorate excepted firearm ownership from the "misdemeanor for all purposes" language does not clearly imply it intended to allow the retroactive collateral consequences Velasquez advocates. A limitation on how the statute applies is not an indicator the electorate intended section 1170.18 to be free of temporal limitations.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

EDMON, P. J.

LAVIN, J.