

**RESOLUTION 03-08-2018**

**DIGEST**

Resentencing: Waiver of Appearance Under Propositions 47 and 64

Amends Penal Code section 1170.18 and Health and Safety Code section 11361.8 to allow waiver of personal appearance for resentencing under Propositions 47 and 64.

**STATEMENT OF REASONS**

The Problem: Criminal defendants have a statutory right to be present for sentencing and resentencing. Many incarcerated defendants, however, do not want to be transported from prison to court to be present when their case is resentenced, particularly if the resentencing does not mean the person will be released from custody. Inmates will lose housing location and work assignments. If the inmate is involved in programming, that programming will be lost. When the voters passed Proposition 36 (Three Strikes Reform) they included a provision allowing a waiver of personal presence. The waiver provision was not included in Propositions 47 and 64, both of which contain resentencing provisions.

The Solution: The solution is to allow defendants to waive, in writing, their presence in court for a Proposition 47 or 64 resentencing. No defendant will be required to waive his or her presence. It is entirely up to the inmate.

**TEXT OF RESOLUTION**

**RESOLVED** that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 1170.18 and Health and Safety Code section 11361.8 to read as follows:

1 § 1170.18

2 (a) A person who, on November 5, 2014, was serving a sentence for a conviction,  
3 whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor  
4 under the act that added this section (“this act”) had this act been in effect at the time of the  
5 offense may petition for a recall of sentence before the trial court that entered the judgment of  
6 conviction in his or her case to request resentencing in accordance with Sections 11350, 11357,  
7 or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the  
8 Penal Code, as those sections have been amended or added by this act.

9 (b) Upon receiving a petition under subdivision (a), the court shall determine whether the  
10 petitioner satisfies the criteria in subdivision (a). If the petitioner satisfies the criteria in  
11 subdivision (a), the petitioner’s felony sentence shall be recalled and the petitioner resentenced to  
12 a misdemeanor pursuant to Sections 11350, 11357, or 11377 of the Health and Safety Code, or  
13 Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been  
14 amended or added by this act, unless the court, in its discretion, determines that resentencing the  
15 petitioner would pose an unreasonable risk of danger to public safety. In exercising its discretion,  
16 the court may consider all of the following:

17 (1) The petitioner’s criminal conviction history, including the type of crimes committed,  
18 the extent of injury to victims, the length of prior prison commitments, and the remoteness of the  
19 crimes.

20 (2) The petitioner’s disciplinary record and record of rehabilitation while incarcerated.

21 (3) Any other evidence the court, within its discretion, determines to be relevant in  
22 deciding whether a new sentence would result in an unreasonable risk of danger to public safety.

23 (c) As used throughout this Code, “unreasonable risk of danger to public safety” means  
24 an unreasonable risk that the petitioner will commit a new violent felony within the meaning of  
25 clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667.

26 (d) A person who is resentenced pursuant to subdivision (b) shall be given credit for time  
27 served and shall be subject to parole for one year following completion of his or her sentence,  
28 unless the court, in its discretion, as part of its resentencing order, releases the person from  
29 parole. Such person is subject to Section 3000.08 parole supervision by the Department of  
30 Corrections and Rehabilitation and the jurisdiction of the court in the county in which the parolee  
31 is released or resides, or in which an alleged violation of supervision has occurred, for the  
32 purpose of hearing petitions to revoke parole and impose a term of custody.

33 (e) Under no circumstances may resentencing under this section result in the imposition  
34 of a term longer than the original sentence.

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

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

42 (h) Unless requested by the applicant, no hearing is necessary to grant or deny an  
43 application filed under subdivision (f).

44 (i) The provisions of this section shall not apply to persons who have one or more prior  
45 convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of  
46 subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c)  
47 of Section 290.

48 (j) Any petition or application under this section shall be filed on or before November 4,  
49 2022, or at a later date upon showing of good cause.

50 (k) Any felony conviction that is recalled and resentenced under subdivision (b) or  
51 designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all  
52 purposes, except that such resentencing shall not permit that person to own, possess, or have in  
53 his or her custody or control any firearm or prevent his or her conviction under Chapter 2  
54 (commencing with Section 29800) of Division 9 of Title 4 of Part 6.

55 (l) If the court that originally sentenced the petitioner is not available, the presiding judge  
56 shall designate another judge to rule on the petition or application.

57 (m) Nothing in this section is intended to diminish or abrogate any rights or remedies  
58 otherwise available to the petitioner or applicant.

59 (n) Nothing in this and related sections are not intended to diminish or abrogate the  
60 finality of judgments in any case not falling within the purview of this act.

61 (o) A resentencing hearing ordered under this act shall constitute a “post-conviction  
62 release proceeding” under paragraph (7) of subdivision (b) of Section 28 of Article I of the  
63 California Constitution (Marsy’s Law).

64 (p) Notwithstanding subdivision (b) of Section 977, a person petitioning for resentencing  
65 may waive his or her appearance in court for the resentencing. The waiver shall be in writing and

66 signed by the petitioner.

67

68 § 11361.8

69 (a) A person currently serving a sentence for a conviction, whether by trial or by open or  
70 negotiated plea, who would not have been guilty of an offense or who would have been guilty of  
71 a lesser offense under the Control, Regulate and Tax Adult Use of Marijuana Act had that Act  
72 been in effect at the time of the offense may petition for a recall or dismissal of sentence before  
73 the trial court that entered the judgment of conviction in his or her case to request resentencing or  
74 dismissal in accordance with Sections 11357, 11358, 11359, 11360, 11362.1, 11362.2, 11362.3,  
75 and 11362.4 as those sections have been amended or added by this Act.

76 (b) Upon receiving a petition under subdivision (a), the court shall presume the petitioner  
77 satisfies the criteria in subdivision (a) unless the party opposing the petition proves by clear and  
78 convincing evidence that the petitioner does not satisfy the criteria. If the petitioner satisfies the  
79 criteria in subdivision (a), the court shall grant the petition to recall the sentence or dismiss the  
80 sentence because it is legally invalid unless the court determines that granting the petition would  
81 pose an unreasonable risk of danger to public safety.

82 (1) In exercising its discretion, the court may consider, but shall not be limited to  
83 evidence provided for in subdivision (b) of Section 1170.18 of the Penal Code.

84 (2) As used in this section, “unreasonable risk of danger to public safety” has the same  
85 meaning as provided in subdivision (c) of Section 1170.18 of the Penal Code.

86 (c) A person who is serving a sentence and resentenced pursuant to subdivision (b) shall  
87 be given credit for any time already served and shall be subject to supervision for one year  
88 following completion of his or her time in custody or shall be subject to whatever supervision  
89 time he or she would have otherwise been subject to after release, whichever is shorter, unless  
90 the court, in its discretion, as part of its resentencing order, releases the person from supervision.  
91 Such person is subject to parole supervision under Section 3000.08 of the Penal Code or post-  
92 release community supervision under subdivision (a) of Section 3451 of the Penal Code by the  
93 designated agency and the jurisdiction of the court in the county in which the offender is released  
94 or resides, or in which an alleged violation of supervision has occurred, for the purpose of  
95 hearing petitions to revoke supervision and impose a term of custody.

96 (d) Under no circumstances may resentencing under this section result in the imposition  
97 of a term longer than the original sentence, or the reinstatement of charges dismissed pursuant to  
98 a negotiated plea agreement.

99 (e) A person who has completed his or her sentence for a conviction under Sections  
100 11357, 11358, 11359, and 11360, whether by trial or open or negotiated plea, who would not  
101 have been guilty of an offense or who would have been guilty of a lesser offense under the  
102 Control, Regulate and Tax Adult Use of Marijuana Act had that Act been in effect at the time of  
103 the offense, may file an application before the trial court that entered the judgment of conviction  
104 in his or her case to have the conviction dismissed and sealed because the prior conviction is now  
105 legally invalid or redesignated as a misdemeanor or infraction in accordance with Sections  
106 11357, 11358, 11359, 11360, 11362.1, 11362.2, 11362.3, and 11362.4 as those sections have  
107 been amended or added by this act.

108 (f) The court shall presume the petitioner satisfies the criteria in subdivision (e) unless  
109 the party opposing the application proves by clear and convincing evidence that the petitioner  
110 does not satisfy the criteria in subdivision (e). Once the applicant satisfies the criteria in  
111 subdivision (e), the court shall redesignate the conviction as a misdemeanor or infraction or

112 dismiss and seal the conviction as legally invalid as now established under the Control, Regulate  
113 and Tax Adult Use of Marijuana Act.

114 (g) Unless requested by the applicant, no hearing is necessary to grant or deny an  
115 application filed under subdivision (e).

116 (h) Any felony conviction that is recalled and resentenced under subdivision (b) or  
117 designated as a misdemeanor or infraction under subdivision (f) shall be considered a  
118 misdemeanor or infraction for all purposes. Any misdemeanor conviction that is recalled and  
119 resentenced under subdivision (b) or designated as an infraction under subdivision (f) shall be  
120 considered an infraction for all purposes.

121 (i) If the court that originally sentenced the petitioner is not available, the presiding judge  
122 shall designate another judge to rule on the petition or application.

123 (j) Nothing in this section is intended to diminish or abrogate any rights or remedies  
124 otherwise available to the petitioner or applicant.

125 (k) Nothing in this and related sections is intended to diminish or abrogate the finality of  
126 judgments in any case not falling within the purview of the Control, Regulate and Tax Adult Use  
127 of Marijuana Act.

128 (l) A resentencing hearing ordered under the Control, Regulate and Tax Adult Use of  
129 Marijuana Act shall constitute a “post-conviction release proceeding” under paragraph (7) of  
130 subdivision (b) of Section 28 of Article I of the California Constitution (Marsy’s Law).

131 (m) The provisions of this section shall apply equally to juvenile delinquency  
132 adjudications and dispositions under Section 602 of the Welfare and Institutions Code if the  
133 juvenile would not have been guilty of an offense or would have been guilty of a lesser offense  
134 under the Control, Regulate and Tax Adult Use of Marijuana Act.

135 (n) The Judicial Council shall promulgate and make available all necessary forms to  
136 enable the filing of the petitions and applications provided in this section.

137 (o) Notwithstanding subdivision (b) of Section 977, a person petitioning for resentencing  
138 or dismissal may waive his or her appearance in court for the resentencing or dismissal. The  
139 waiver shall be in writing and signed by the petitioner.

(Proposed new language underlined; language to be deleted stricken)

**PROPONENT:** Los Angeles County Bar Association

**IMPACT STATEMENT**

This resolution does not affect any other law, statute or rule other than those expressly identified.

**CURRENT OR PRIOR RELATED LEGISLATION**

None known.

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**RESPONSIBLE FLOOR DELEGATE:** Mark Harvis

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**RESOLUTIONS COMMITTEE RECOMMENDATION**  
**APPROVE IN PRINCIPLE**

History:

No similar resolutions found.

Reasons:

This resolution amends Penal Code section 1170.18 and Health and Safety Code section 11361.8 to allow waiver of personal appearance for resentencing under Propositions 47 and 64. This resolution should be approved in principle because it would allow inmates to receive the benefits of these resentencing statutes without losing housing placements, work assignments, or access to programming.

Proposition 47 allows petitions for resentencing for petty theft, check kiting, and certain drug possession crimes. Proposition 64 does the same for certain marijuana-related crimes. However, Penal Code section 977, subdivision (b)(1), requires that an inmate charged with a felony be present in court for all hearings, including resentencing hearings. Inmates transported to court for such hearings can potentially lose their housing placements while they are away from their facility, and do not have access to any programming or job placement. Penal Code section 977 does allow for an inmate to waive personal appearances, but the waiver applies to all appearances.

The resolution permits a specific waiver to allow an inmate to waive his or her appearance for resentencing, without requiring an inmate to waive his or her appearance at all hearings. Further, the resolution does not require that an inmate waive his or her appearance at the resentencing. So, if an inmate wants to appear at the hearing, he or she will not lose the right to do so. The resolution would also promote judicial economy in both time and money because there will not be delays in waiting for the inmate to appear in court and the system will not incur transportation costs to bring inmates to court.