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PENAL CODE
Part 1. Of Crimes and Punishments
Title 16. General Provisions

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Cal Pen Code § 666 (2008)

§ 666. Punishment for subsequent conviction of petit theft after prior theft crime conviction

Every person who, having been convicted of petty theft, grand theft, auto theft under *Section 10851 of the Vehicle Code*, burglary, carjacking, robbery, or a felony violation of Section 496 and having served a term therefor in any penal institution or having been imprisoned therein as a condition of probation for that offense, is subsequently convicted of petty theft, then the person convicted of that subsequent offense is punishable by imprisonment in the county jail not exceeding one year, or in the state prison.

HISTORY:

Enacted Stats 1872. Amended Stats 1903 ch 95 § 1; Stats 1905 ch 506 § 1; Stats 1909 ch 234 § 1; Stats 1931 ch 481 § 2; Stats 1939 ch 390 § 1; Stats 1957 ch 1284 § 1; Stats 1976 ch 1139 § 266, operative July 1, 1977; Stats 1977 ch 296 § 1, effective July 8, 1977, operative July 1, 1977; Stats 1986 ch 402 § 1; Stats 1988 ch 831 § 1; Stats 1993 ch 610 § 9.5 (AB 6), effective September 30, 1993, ch 611 § 10 (SB 60), effective September 30, 1993; Stats 2000 ch 135 § 134 (AB 2539).

NOTES:

Amendments:

1903 Amendment:

(1) Substituted the introductory clause for the former introductory clause which read: "Every person who, having been convicted of any offense punishable by imprisonment in the State Prison, commits any crime after such conviction, is punishable therefor, as follows:"; **(2)** substituted "ten years" for "five years" in subd 1; and **(3)** deleted "or any attempt to commit an offense which, if committed, would be punishable by imprisonment in the state prison not exceeding five years" after "petit larceny" in subd 3.

1905 Amendment:

Substituted "five years" for "ten years" in subd 1.

1909 Amendment:

Substituted "petit larceny and having served a term therefor in any penal institution" for "any offense punishable by imprisonment in the State Prison" in the introductory clause.

1931 Amendment:

(1) Added "or petit theft" after "petit larceny" in the introductory clause; and **(2)** substituted "petty theft" for "petit larceny" in subd 3.

1939 Amendment:

Added "in the county jail not exceeding one year, or" after "imprisonment" in subd 3.

1957 Amendment:

Added "or having been imprisoned therein as a condition of probation for such offense" in the introductory clause.

1976 Amendment:

(1) Substituted "is subsequently convicted of petit theft, then the person convicted of such subsequent offense is punishable by imprisonment in the county jail not exceeding one year, or in the state prison" for "commits any crime after such conviction is punishable therefor as follows:"; and **(2)** deleted former subds 1-3 which read: "(1) If the offense of which such person is subsequently convicted is such that, upon a first conviction, an offender could be punished by imprisonment in the state prison for any term exceeding five years, such person may be punished by imprisonment in the state prison for the maximum period for which he might have been sentenced if such offense had been his first offense, but in no case less than five years.

"(2) If the subsequent offense is such that upon a first conviction, the offender would be punishable by imprisonment in the state prison for five years, or any less term, then the person convicted of such subsequent offense is punishable by imprisonment in the state prison not exceeding 10 years.

"(3) If the subsequent conviction is for petit theft, then the person convicted of such subsequent offense is punishable by imprisonment in the county jail not exceeding one year, or in the state prison not exceeding five years."

1977 Amendment:

Substituted "petit theft, grand theft, burglary, or robbery" for "petit larceny or petit theft".

1986 Amendment:

Added "auto theft under *Section 10851 of the Vehicle Code*,".

1988 Amendment:

Substituted **(1)** "robbery, or a felony violation of Section 496" for "or robbery"; and **(2)** "that" for "such" wherever it appears.

1993 Amendment:

Added "carjacking," after "Code, burglary,". (As amended Stats 1993 ch 611, compared to the section as it read prior to 1993. This section was also amended by an earlier chapter, ch 610. See *Gov C § 9605*.)

2000 Amendment:

Substituted "petty" for "petit" after "convicted of" the first two times it appears.

Historical Derivation:

(a) Former Pen C § 667 as added Stats 1909 ch 236 § 1, amended Stats 1931 ch 481 § 1, Stats 1935 ch 754 § 1, Stats 1941 ch 106 § 11, Stats 1963 ch 1905 § 7.

(b) Field's Draft NY Pen C § 748.

(c) NY Pen C § 688.

Cross References:

Offense punishable by imprisonment in state prison as felony: *Pen C § 17*.

Carjacking: *Pen C § 215*.

Degrees of theft and punishment therefor: *Pen C §§ 486* et seq.

Charging previous conviction: *Pen C § 969*.

Amendment of accusation to charge prior conviction: *Pen C § 969a*.

Prima facie establishment of prior conviction and service of term in penal institution: *Pen C § 969b*.

Amendment to charge prior conviction after plea of guilty: Pen C § 9691/2.

Career Criminal Prosecution Program: *Pen C §§ 999b* et seq.

Plea to charge of previous conviction: *Pen C § 1025*.

Charge of previous conviction, jury to find on: *Pen C § 1158*.

Trial court sentencing: *Pen C §§ 1170* et seq.

Limitations on enhancements: *Cal. Rules of Court, Rule 4.447*.

Collateral References:

Witkin & Epstein, Criminal Law (3d ed), Crimes Against Property § 7.

Witkin & Epstein, Criminal Law (3d ed), Criminal Trial § 515.

Witkin & Epstein, Criminal Law (3d ed), Defenses § 143.

Witkin & Epstein, Criminal Law (3d ed), Introduction To Crimes §§ 14, 15, 68.

Witkin & Epstein, Criminal Law (3d ed), Pretrial Proceedings §§ 254, 276, 277, 278.

Witkin & Epstein, Criminal Law (3d ed), Punishment §§ 334, 374, 375, 376, 377, 379.

10 Witkin Summary (10th ed) Parent and Child § 946.

Cal Jur 3d (Rev) Criminal Law §§ 526, 1206, 3167.

1 Witkin Cal. Evidence (4th ed) Circumstantial Evidence § 16.

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 1850, Petty Theft With Prior Conviction

Forms:

Suggested forms are set out below, following Notes of Decisions.

Law Review Articles:

Conditions of probation. 29 St BJ 44.

Prior convictions. 32 St BJ 616.

Habitual criminal statutes. *6 UCLA LR 153.*

One Strike and You're Out: "Double-Counting" and Dual Use Undermines the Purpose of California's Three Strikes Law. *34 USF LR 99.*

A Proposal for a Wholesale Reform of California's Sentencing Practice and Policy. 38 Loyola U of LA LR 903.

Annotations:

What constitutes former "conviction" within statute enhancing penalty for second or subsequent offense. 5 ALR2d 1080.

Evidence of identity for purposes of statute as to enhanced punishment in case of prior conviction. 11 ALR2d 870.

Determination of character of former crime as a felony, so as to warrant punishment of an accused as a second offender. 19 ALR2d 227.

Pardon as affecting consideration of earlier conviction in applying habitual criminal statute. 31 ALR2d 1186.

Form and sufficiency of allegations as to time, place, or court of prior offenses or convictions, under habitual criminal act or statute enhancing punishment for repeated offenses. 80 ALR2d 1196.

Power of court to make or permit amendment of indictment with respect to allegations as to prior convictions. 17 ALR3d 1265.

Consideration of accused's juvenile court record in sentencing for offense committed as adult. 64 ALR3d 1291.

Admissibility of evidence of subsequent criminal offenses as affected by proximity as to time and place. 92 ALR3d 545.

Chronological or procedural sequence of former convictions as affecting enhancement of penalty for subsequent offense under habitual criminal statutes. 7 ALR5th 263.

Imposition of enhanced sentence under recidivist statute as cruel and unusual punishment. 27 ALR Fed 110.

Hierarchy Notes:

Pt. 1, Tit. 16 Note

NOTES OF DECISIONS A. GENERALLY 1. In General 1.5. Construction with Other Law 2. Purpose, Construction, and Application 2.5. Relation to Other Laws 3. Constitutionality B. CONDITIONS AND BASES FOR INCREASED PUNISHMENT 4. In General 5. Prior Convictions 6. Service of Sentence Under Prior Conviction C. PROSECUTION 7. In General 8. Indictment, Information, or Complaint 9. Arraignment and Plea 10. Admissibility of Evidence 11. Weight and Sufficiency of Evidence 12. Trial 13. Findings or Verdict 14. Judgment and Sentence 15. Appeal and Error

A. GENERALLY

1. In General

Under the Penal Code there is no distinction between the first conviction of petit larceny, had anterior to January 1, 1873, and a conviction for the same offense had after that date. *Ex parte Gutierrez (1873) 45 Cal 429, 1873 Cal LEXIS 62.*

The objective of charging a previous conviction is not for the purpose of evidence as to the commission of the offense upon which the defendant is to be tried, but for the information of the court in determining the punishment to be imposed in case of conviction. *People v. Jeffries (1941, Cal App) 47 Cal App 2d 801, 119 P2d 190, 1941 Cal App LEXIS 1243.*

The California Rehabilitation Center is a "penal institution" within the meaning of *Pen C § 666*, which provides increased punishment for persons convicted of petty theft who have previously been convicted of grand theft, petty theft, burglary or robbery and have served a term therefor in any penal institution or have been imprisoned therein as a condition of probation for such offense. *W & I C § 3000*, which provides that treatment of persons addicted to narcotics or in danger of addiction shall be nonpunitive, also provides that treatment is for the protection of the public and that committed persons who become uncooperative with treatment efforts are to be kept in the program for purposes of control. *W & I C § 3001*, places responsibility for treatment on the Department of Corrections and the department has the responsibility of controlling and confining persons committed. *W & I C § 3002*, treats escape from a rehabilitation facility as a crime and, under § 3305, committed persons are to be treated in the same manner as state prisoners for all purposes described in Pen. Code, pt. 3, which establishes the prisons, provides for their administration, regulates treatment of inmates, establishes the length of terms and allows certain time credits, defines offenses committed by inmates, and establishes the system of parole. *People v. Valenzuela (1981, Cal App 5th Dist) 116 Cal App 3d 798, 172 Cal Rptr 284, 1981 Cal App LEXIS 1545.*

In the operation of *Pen C § 666*, which provides that a person convicted of petit theft, grand theft, burglary, or robbery, who has served a prison term therefor, and who is subsequently convicted of petit theft, is punishable by imprisonment, a prior conviction for one of the specified offenses does not work as an enhancement, i.e., cause an additional term of imprisonment to be added to the base term for petit theft. Rather, it is a necessary element of an entirely different statutory offense. It transforms what otherwise would be a misdemeanor into a hybrid felony misdemeanor, with a greatly increased maximum penalty. *In re Anthony R. (1984, Cal App 5th Dist) 154 Cal App 3d 772, 201 Cal Rptr 299, 1984 Cal App LEXIS 1924.*

Prosecution's appeal from an order dismissing a charge of conspiracy to manufacture methamphetamine in violation of *Pen C § 182(a)(1)* did not become moot when defendant pleaded guilty to possession of pseudoephedrine with intent to manufacture methamphetamine in violation of *Cal. Health & Safety Code § 11383(c)(1)* and to petty theft with a prior conviction in violation of *Pen C §§ 484*, *666*; because these crimes were not lesser included offenses of conspiracy under the elements test, *Pen C § 1023* did not bar a subsequent prosecution for conspiracy. *People v. Herrera (2006, Cal App 4th Dist) 136 Cal App 4th 1191, 39 Cal Rptr 3d 578, 2006 Cal App LEXIS 216,* review denied (2006, Cal) *2006 Cal LEXIS 7187.*

1.5. Construction with Other Law

Unlike Pen C *§ 666, Pen C* § 136.1(c), is not contained in the sentencing and punishment part of the California Penal Code, and it is structured to require proof of an element additional to those specified in § 136.1(a) and (b), namely, that the defendant act "knowingly and maliciously" under § 136.1(c). Because the People must prove the additional element of knowing and malicious conduct in committing a violation of § 136.1(a) or (b), it cannot be said that a charge under § 136.1(c)(3) is merely a notice provision as *Pen C § 666* has been found to be. *People v. Upsher (2007, 4th Dist) 155 Cal App 4th 1311, 66 Cal Rptr 3d 481, 2007 Cal App LEXIS 1662.*

2. Purpose, Construction, and Application

The provisions of § 1158 do not apply exclusively to §§ 666, 667. *People v. Dueber (1917, Cal App) 34 Cal App*

686, 168 P 578, 1917 Cal App LEXIS 211.

The indeterminate sentence law does not repeal, by necessary implication, all the provisions of the Penal Code in relation to prior convictions as a basis for increased penalty. *People v. Howard (1918, Cal App) 39 Cal App 216, 178 P 865, 1918 Cal App LEXIS 72.*

The fact of the former conviction which is charged against the defendant under this section does not change the definition or character of the second offense. *People v. Wallach (1926, Cal App) 79 Cal App 605, 250 P 578, 1926 Cal App LEXIS 96.*

This section must be included with the other laws and statutes of this state in which the term "theft" is substituted for "larceny," without special mention. *People v. Hillard (1930, Cal App) 103 Cal App 698, 284 P 1070, 1930 Cal App LEXIS 929.*

There is nothing in § 668, providing for increased punishment of offender previously convicted of felony in foreign state or country, that directs or indicates that section is to be read into this section. *People v. Perry (1962, Cal App 3d Dist) 204 Cal App 2d 201, 22 Cal Rptr 54, 1962 Cal App LEXIS 2232.*

Pen C § 1158, requiring finding as to whether defendant suffered prior conviction with which he is charged applies to prosecution for petty theft under *Pen C § 666*, fixing penalty of offender previously convicted of petty larceny or petty theft. *People v. Cooks (1965, Cal App 2d Dist) 235 Cal App 2d 6, 44 Cal Rptr 819, 1965 Cal App LEXIS 897.*

Apparent purpose and effect of 1957 amendment of *Pen C § 666*, was to make its provisions for punishment in state prison applicable to persons who have been imprisoned as condition of probation, as well as to those who have served term for petty theft or petty larceny under straight sentence of imprisonment, and though one day of defendant's 60-day term for petty theft had been suspended, on his conviction of two more petty thefts, he was subject to felony punishment prescribed in § 666. *People v. Cowins (1966, Cal App 2d Dist) 241 Cal App 2d 63, 50 Cal Rptr 197, 1966 Cal App LEXIS 1213.*

Statutes which provide for increased punishment for those who have previously offended do not create specific crimes; prior convictions are not elements of the offense alleged in the accusation, or are they separate, substantive offenses; rather, the charged prior conviction is a fact to be determined solely as one side issue in the trial of a present offense. *People v. Franco (1970, Cal App 2d Dist) 4 Cal App 3d 535, 84 Cal Rptr 513, 1970 Cal App LEXIS 1556.*

A juvenile who had been committed to the California Youth Authority based on juvenile court findings that he had committed two burglaries, vehicle theft, and had driven without a license, and who was subsequently found by the juvenile court to have committed petit theft, could not be found to have violated *Pen C § 666*, which provides that a person who has been convicted of burglary, who has served a prison term therefor, and who is subsequently convicted of petit theft, is punishable by imprisonment. *Cal. Const., art. I, § 28*, subd. (f) (a part of the Victims' Bill of Rights(Proposition 8)), which provides that any prior felony conviction shall subsequently be used without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding, does not affect the rule of *W & I C § 203*, that adjudications of juvenile wrongdoings are not criminal convictions. *In re Anthony R. (1984, Cal App 5th Dist) 154 Cal App 3d 772, 201 Cal Rptr 299, 1984 Cal App LEXIS 1924.*

Petty theft with a prior conviction (*Pen Code, § 666*) is a crime whose elements are not capable of attempt. *People v. Bean (1989, Cal App 3d Dist) 213 Cal App 3d 639, 261 Cal Rptr 784, 1989 Cal App LEXIS 885.*

In a prosecution for petty theft with a prior theft-related conviction (*Pen C § 666*), the trial court erred in denying defendant's request to stipulate to a prior robbery conviction to preclude the jury from learning of that conviction, and in allowing the prosecutor to present to the jury evidence of the prior conviction. The prior conviction aspect of § 666 is a sentencing factor and is not an element of the offense to be determined by jury. Section 666 merely puts a defendant on notice that if he is convicted of the substantive offense and if the prior conviction allegation is admitted or found true,

he faces enhanced punishment at the time of sentencing. Thus, *Cal. Const., art. I, § 28*, subd. (f), providing when a prior felony conviction is an element of a felony offense, it shall be proven to the trier of fact in open court, did not apply to the § 666 prosecution. *People v. Bouzas (1991) 53 Cal 3d 467, 279 Cal Rptr 847, 807 P2d 1076, 1991 Cal LEXIS 1333.*

Pen C § 666, petty theft with a prior theft-related offense, is a crime for which the prior is an enhancement, as opposed to an element of the offense. A defendant is entitled to stipulate to the prior and thereby keep it from the jury. A jury need not know that the defendant has been incarcerated for a prior theft-related offense in order to decide the question before it, namely, whether the defendant has committed the essential elements of the substantive crime of petty theft. *People v. Weathington (1991, Cal App 6th Dist) 231 Cal App 3d 69, 282 Cal Rptr 170, 1991 Cal App LEXIS 616,* review denied (1991, Cal) *1991 Cal LEXIS 4258.*

In a prosecution in which defendant was charged with grand theft and in which it was found that defendant had suffered previous theft-related offenses for which he served prison sentences, it was not improper to convict defendant of petty theft, ordinarily a misdemeanor, and to impose a felony sentence for petty theft with a prior theft-related conviction and incarceration (*Pen C § 666*). When the court found that defendant had committed a petty theft, it convicted him of a lesser included offense of that charged in the information. The prior theft-related conviction and incarceration requirement is not an element of § 666; rather, it is directed primarily to sentencing and punishment matters, and petty theft is indisputedly a lesser included offense of grand theft. Also, defendant had notice that he was subject to § 666, even though it was not alleged in the information. The grand theft charge put defendant on notice that he could be convicted of petty theft, and the information alleged the prior convictions and incarcerations, thus alleging all the factual requirements of § 666. *People v. Shoaff (1993, Cal App 2d Dist) 16 Cal App 4th 1112, 20 Cal Rptr 2d 464, 1993 Cal App LEXIS 662,* review denied (1993, Cal) *1993 Cal LEXIS 4995.*

The trial court did not err in sentencing defendant, who was convicted of petty theft with a prior theft-related conviction (*Pen C § 666*), and who had suffered a prior conviction for assault with a deadly weapon, under the three strikes law (*Pen C § 1170.12*). Although the three strikes law applies only to felonies, and although petty theft is not normally a felony, in this case defendant was not convicted of a misdemeanor. The distinction between a misdemeanor and a felony is based upon the punishment prescribed (*Pen C § 17*). *Pen C § 666*, does not describe a substantive offense but is, instead, a sentencing statute. Petty theft is ordinarily a misdemeanor because of the manner in which it is usually punished: by probation or time in the county jail. However, when a defendant has suffered any of the enumerated theft-related prior convictions, a subsequent petty theft can be a felony (*Pen C § 666*). If a felony punishment is selected by the court, the subsequent petty theft is not merely punished as a felony; it is a felony. *People v. Stevens (1996, Cal App 1st Dist) 48 Cal App 4th 982, 56 Cal Rptr 2d 13, 1996 Cal App LEXIS 789.*

Pen C § 666, making petty theft with a prior theft conviction punishable as a felony, is not a "special statute" that controls over the punishment provisions of the three strikes law (*Pen C § 667*, subds. (b)-(i)), a "general statute." The special over the general rule does not apply unless each element of the "general" statute corresponds to an element on the face of the "special" statute. Thus, the three strikes law is applicable to defendants who have suffered any prior serious or violent felony convictions. It does not limit its application to theft-related crimes. In contrast, *Pen C § 666*, is applicable even to defendants who have no prior felony convictions, let alone serious or violent felony convictions, but its scope is limited to defendants who have suffered prior theft-related convictions. A violation of *Pen C § 666*, also will not necessarily or commonly result in a violation of the three strikes law. A recidivist petty thief, the target of *Pen C § 666*, will never violate the three strikes law, because petty theft is not a serious or violent felony even when it is a felony. *People v. Nguyen (1997, Cal App 6th Dist) 54 Cal App 4th 705, 63 Cal Rptr 2d 173, 1997 Cal App LEXIS 324,* review denied (1997, Cal) *1997 Cal LEXIS 5298.*

2.5. Relation to Other Laws

Where the Board of Immigration Appeals vacated a removal order and terminated removal proceedings after the appellate court held that petty theft, *Pen C § 666*, did not qualify as aggravated felony, res judicata barred the Secretary of Homeland Security from initiating a second deportation case on the basis of a charge that could have been brought in

the first case. *Bravo-Pedroza v. Gonzales (2007, 9th Cir) 475 F3d 1358, 2007 US App LEXIS 2542.*

Trial court erred in refusing to strike defendant's *Pen C § 666* conviction for petty theft with a prior theft-related conviction; because the prior conviction was a sentencing factor and not an element, defendant's petty theft of merchandise from a store was a lesser included offense of his *Pen C § 211* robbery of a store employee, and the petty theft conviction had to be stricken pursuant to *Pen C § 654*. *People v. Villa (2007, 2d Dist) 2007 Cal App LEXIS 2043.*

3. Constitutionality

The provision that one who has been convicted of petit larceny who again commits petit larceny is deemed guilty of a felony is not ex post facto within the meaning of the Federal Constitution, even when applied to one who committed the first offense prior to the taking effect of the code. *Ex parte Gutierrez (1873) 45 Cal 429, 1873 Cal LEXIS 62.*

Where a person is subjected to increased punishment for a second offense he is not twice put in jeopardy for the same offense, within the meaning of the constitution. *People v. Stanley (1873) 47 Cal 113, 1873 Cal LEXIS 270.*

This section does not violate any provision of the state or .*Federal ConstitutionPeople v. Coleman (1904) 145 Cal 609, 79 P 283, 1904 Cal LEXIS 640.*

Section 667 is not unconstitutional on the theory that it provides for cruel, unusual or excessive punishment. *People v. Quiel (1945, Cal App) 68 Cal App 2d 674, 157 P2d 446, 1945 Cal App LEXIS 818.*

Section 667 is not unconstitutional. *People v. Collins (1959, Cal App 2d Dist) 172 Cal App 2d 295, 342 P2d 370, 1959 Cal App LEXIS 1952.*

Section 667 does not result in punishing one twice for same offense, is not unconstitutional on theory that it provides for cruel, unusual or excessive punishment, and does not violate *US Const, 14th Amendment*, by subjecting offenders to involuntary servitude on account of their status, and not as punishment for crime. *People v. Brown (1961, Cal App 2d Dist) 198 Cal App 2d 232, 17 Cal Rptr 789, 1961 Cal App LEXIS 2532.*

§ 667, and similar statutes, providing for an increased penalty based on a prior felony conviction, are not unconstitutional. *People v. Tijerina (1969) 1 Cal 3d 41, 81 Cal Rptr 264, 459 P2d 680, 1969 Cal LEXIS 190.*

The fact that § 667 subjects only ex-felons to felony punishment for a petty theft violation does not render the statute unconstitutional as creating an unlawful classification. *People v. Spearman (1969, Cal App 2d Dist) 1 Cal App 3d 898, 82 Cal Rptr 277, 1969 Cal App LEXIS 1338.*

The procedural scheme of *Pen Code, §§ 667*, *979* and *1025*, governing, respectively, the punishment of an ex-felon for petty theft, the charging of all previous convictions, and the trial of denials of previous convictions and, if admitted, prohibition of allusions thereto, is not unconstitutional as violating an ex-felon's privilege against self-incrimination. *People v. Spearman (1969, Cal App 2d Dist) 1 Cal App 3d 898, 82 Cal Rptr 277, 1969 Cal App LEXIS 1338.*

The application of an amendment to *Pen C § 666*, reinstating as a felony the crime of petty theft with a prior burglary conviction, to defendant to preserve a finding of guilt and a probation order in his prosecution under *Pen C § 667*, making it a felony for a previously convicted felon to commit petty theft, did not violate the prohibition against ex post facto legislation. The record indicated that *Pen C § 667*, was repealed effective after defendant was found guilty and admitted to probation, but that the repeal of that statute went into effect eight days prior to the amendment of *Pen C § 666*. *People v. Beaty (1978, Cal App 1st Dist) 84 Cal App 3d 239, 148 Cal Rptr 319, 1978 Cal App LEXIS 1859.*

It is not a denial of equal protection for *Pen C § 666*, to authorize heavier punishment for a thief who has been imprisoned on a prior conviction for theft, burglary or robbery than for other thieves. *People v. Beaty (1978, Cal App 1st Dist) 84 Cal App 3d 239, 148 Cal Rptr 319, 1978 Cal App LEXIS 1859.*

For equal protection purposes, a compelling state interest necessitates the classification whereby a petty thief who has two prior serious felony convictions, including or in addition to a prior theft-related conviction that resulted in confinement, is subject to punishment under the three strikes law (*Pen C § 667*, subds. (b)-(i)), and may receive a term of twenty-five years to life, whereas a petty thief who has two prior serious felony convictions but no prior theft-related convictions is subject only to misdemeanor punishment. The commission of a new theft offense by an individual with a history which connects theft-related crimes with serious or violent criminal conduct is a much more serious event and poses a much greater threat to society than the commission of a petty theft offense by an individual whose criminal history does not disclose such a connection. In the absence of this connection, an individual's commission of petty theft does not reflect a continuation of his or her pattern of serious misconduct. The state has a strong and compelling interest in protecting its citizens from the harm associated with serious or violent criminal conduct. An individual who has previously been convicted of and incarcerated for committing a serious theft-related offense and has not been deterred from committing a new theft crime can only be deterred from this course of serious misconduct by harsh punishment. Thus, the classification does not violate equal protection. *People v. Nguyen (1997, Cal App 6th Dist) 54 Cal App 4th 705, 63 Cal Rptr 2d 173, 1997 Cal App LEXIS 324,* review denied (1997, Cal) *1997 Cal LEXIS 5298.*

Defendant, who was convicted of petty theft with a prior theft conviction (*Pen C § 666*) and was sentenced under the three strikes law (*Pen C § 667*, subds. (b)-(i)) on the basis of two prior serious or violent felonies, and who challenged his three strikes conviction on equal protection grounds, met his burden of making a "prerequisite" showing that a petty thief such as himself, who has two prior serious felony convictions, including or in addition to a prior theft-related conviction that resulted in confinement, and who is subject to enhanced punishment under the three strikes law, is similarly situated to a petty thief who has two prior serious felony convictions but no prior theft-related convictions and is subject only to misdemeanor punishment. Each member of these groups has two prior serious felony convictions and a current petty theft conviction. While the classification of the current offense as a felony or misdemeanor differed based on distinctions in the criminal backgrounds of the two individuals, it was this distinction that defendant challenged as not justified by the purpose of the three strikes law. Thus, the two groups were sufficiently similar to merit application of some level of scrutiny to the unequal treatment. Moreover, strict scrutiny was the appropriate level of scrutiny to be applied. The challenged classification affected a fundamental interest, since the personal liberty interest of the individual offender facing an extended period of incarceration was significantly affected by this classification. *People v. Nguyen (1997, Cal App 6th Dist) 54 Cal App 4th 705, 63 Cal Rptr 2d 173, 1997 Cal App LEXIS 324,* review denied (1997, Cal) *1997 Cal LEXIS 5298.*

Respondent inmate's sentence under *Pen Code § 667(e)(2)(A)*, a "third strike" statute, to two consecutive prison terms of 25 years to life, after being found guilty of two counts of petty theft with a prior conviction under *Pen Code § 666*, for stealing video tapes valued under $200, where his prior convictions included three prior convictions that qualified as serious or violent felonies, was not contrary to, or an unreasonable application of, clearly established federal law under *28 USCS § 2254*(d)(1); it was not objectively unreasonable for the state court to conclude that the contours of the proportionality principle as to cruel and unusual punishment under the Eighth Amendment permitted an affirmance of the sentence. *Lockyer v. Andrade (2003) 538 US 63, 155 L Ed 2d 144, 123 S Ct 1166, 2003 US LEXIS 1950.*

B. CONDITIONS AND BASES FOR INCREASED PUNISHMENT

4. In General

This section makes the penalty depend upon prior conviction, and upon the term for which the offender might have been sentenced on his original conviction, and the gravity of the original offense. *In re Finley (1905, Cal App) 1 Cal App 198, 81 P 1041, 1905 Cal App LEXIS 73.*

This section requires not only conviction of a prior offense, but the serving of a term of imprisonment following the conviction. *In re Application of Miller (1933, Cal App) 133 Cal App 228, 23 P2d 1034, 1933 Cal App LEXIS 522.*

In prosecution for petty theft with prior conviction of petty theft, fact of former conviction is not element of crime.

People v. Gallinger (1963, Cal App 2d Dist) 212 Cal App 2d 851, 28 Cal Rptr 472, 1963 Cal App LEXIS 2919

Defense counsel was not ineffective for failing to object to the prosecution's amendment of an information because the amendment did not violate *Pen C § 1009*; *Pen C § 666* does not establish an enhancement, but rather establishes an alternate and elevated penalty for a petty theft conviction when a recidivist defendant has served a prior term in a penal institution for a listed offense. *People v. Robinson (2004, Cal App 4th Dist) 122 Cal App 4th 275, 18 Cal Rptr 3d 744, 2004 Cal App LEXIS 1562,* review denied (2004, Cal) *2004 Cal LEXIS 12007.*

5. Prior Convictions

Petit larceny, or petit theft, is not of itself a felony, and becomes such only when it is superadded to some other offense of which the party has suffered conviction, and this is done not to enlarge the scope of the crime, but to add to the punishment of the person who commits it, for his prior violations of law. *In re Application of Boatwright (1932) 216 Cal 677, 15 P2d 755, 1932 Cal LEXIS 629,* superseded by statute as stated in (1995, Cal App 2d Dist) *37 Cal App 4th 871, 44 Cal Rptr 2d 205, 1995 Cal App LEXIS 789.*

A conviction may be deemed a prior conviction notwithstanding the defendant has been pardoned for such offense, at least where he does not establish, by satisfactory proof, that his pardon was granted after an investigation and determination of his innocence of the offense. *People v. Biggs (1937) 9 Cal 2d 508, 71 P2d 214, 1937 Cal LEXIS 417,* 116 ALR 205.

Within meaning of provisions of Penal Code prescribing increased punishment for criminals previously convicted of crime, conviction of felony in sister state may be deemed prior conviction notwithstanding defendant has been pardoned for such offense, at least where he does not establish, by satisfactory proof, that his pardon was granted after investigation and determination of his innocence of said offense. *People v. Biggs (1937) 9 Cal 2d 508, 71 P2d 214, 1937 Cal LEXIS 417,* 116 ALR 205.

Whether a crime is a misdemeanor or a felony is to be determined by the punishment, and where a crime is punishable either by incarceration in the state prison or the county jail, the sentence actually given determines the nature of the offense. *People v. Brown (1942, Cal App) 52 Cal App 2d 428, 126 P2d 406, 1942 Cal App LEXIS 298.*

Section does not require prior offense to have been committed in California; foreign offenses are within scope of section. *People v. Perry (1962, Cal App 3d Dist) 204 Cal App 2d 201, 22 Cal Rptr 54, 1962 Cal App LEXIS 2232.*

Person convicted in any foreign state, who reverts to crimes in this state, has demonstrated that he is equally as dangerous to society as one similarly situated who has been convicted previously in this state; both must receive equally severe punishment to deter them. *People v. Perry (1962, Cal App 3d Dist) 204 Cal App 2d 201, 22 Cal Rptr 54, 1962 Cal App LEXIS 2232.*

Defendant, convicted of petty theft with a prior conviction of petty theft (*Pen C §§ 488*, *666*), could not validly predicate error in his sentencing on the basis that the sentencing judge specified a three-year prison term when suspending sentence, since only execution of the sentence was suspended; imposition of the sentence was not. *People v. Mitchell (1981, Cal App 4th Dist) 125 Cal App 3d 715, 178 Cal Rptr 188, 1981 Cal App LEXIS 2353.*

In sentencing defendant, who pleaded guilty to petty theft with a prior conviction for robbery (*Pen C § 666*) and admitted that he served a prison term for the prior offense, the trial court did not err in using the same prior conviction to impose a prior prison term enhancement pursuant to *Pen C § 667.5*, subd. (b), of the three strikes law (*Pen C § 667*, subds. (b)-(i)), to elevate the current offense to a felony under *Pen C § 666*, and to invoke double punishment under *Pen C § 667*, subd. (e)(1). Imposition of the prior prison term enhancement was not prohibited by the Supreme Court rule that double enhancement under both *Pen C §§ 667*, subd. (a), and 667.5, subd. (b), could not be imposed based upon the same prior conviction absent a clear legislative directive that both should apply. Defendant's sentence did not include multiple enhancements. An enhancement is an additional term of imprisonment added to the base term. The only

enhancement in this case was the prior prison term enhancement under *Pen C § 667.5*, subd. (b), since *Pen C §§ 666* and *667*, subd. (e), are not enhancements. Further, applying the sentencing provisions of the three strikes law to the term of imprisonment provided by *Pen C § 666*, was not only consistent with the stated legislative and initiative goals of ensuring longer prison sentences and greater punishment for repeat offenders, it was provided for by the express terms of the statute. *People v. White Eagle (1996, Cal App 5th Dist) 48 Cal App 4th 1511, 56 Cal Rptr 2d 749, 1996 Cal App LEXIS 816,* rehearing denied (1996, Cal App 5th Dist) *1996 Cal App LEXIS 895,* review denied (1996, Cal) *1996 Cal LEXIS 7009.*

Defendant, who was convicted of petty theft with a prior theft conviction (*Pen C § 666*), was subject to punishment under the three strikes law (*Pen C § 667*, subds. (b)-(i)), since defendant had two prior serious or violent felony convictions and his current conviction was for a felony rather than a misdemeanor. A felony is a crime that is punishable with death or by imprisonment in the state prison (*Pen C § 17*, subd. (a)). When a crime is punishable, in the court's discretion, by imprisonment in state prison or by imprisonment in the county jail, it is a misdemeanor for all purposes only when a punishment other than state prison is imposed or the offense is designated or charged as a misdemeanor or determined or declared to be a misdemeanor (*Pen C § 17*, subd. (b)). Thus, it is the potential punishment for an offense that determines whether the offense is a felony or a misdemeanor. Under *Pen C § 666*, defendant's offense was "punishable...by imprisonment in the state prison" and none of the circumstances set forth in *Pen C § 17*, subd. (b), that would have made the offense a misdemeanor were applicable. *People v. Nguyen (1997, Cal App 6th Dist) 54 Cal App 4th 705, 63 Cal Rptr 2d 173, 1997 Cal App LEXIS 324,* review denied (1997, Cal) *1997 Cal LEXIS 5298.*

A sentence entered following appellant's guilty plea to theft was remanded; appellant's prior conviction for burglary did not qualify for purposes of sentencing under *Cal. Penal Code § 666 Div. Eight Div. Eight People v. Moscarelli (2002, Cal App 2d Dist) 2002 Cal App LEXIS 4196.*

References in *Pen C § 666* to "petty theft" and "grand theft"--as qualifying prior convictions for the § 666 offense of petty theft with a prior-do not include a welfare fraud conviction under the special statute of *W & I C § 11483*. Thus, a welfare fraud conviction under *W & I C § 11483* cannot be used as the prior (theft-related) conviction for a *Pen C § 666*, criminal charge of petty theft with a prior. Bradwell v. Superior Court (2007, 3d Dist) *67 Cal Rptr 3d 163, 156 Cal App 4th 265, 2007 Cal App LEXIS 1731.*

Because defendant's prior conviction under the special statute of *W & I C § 11483* could not be used as a "petty theft" or a "grand theft" prior conviction for purposes of prosecuting her under *Pen C § 666*, a trial court had to dismiss an information that charged her with petty theft with a prior under § 666. Bradwell v. Superior Court (2007, 3d Dist) *67 Cal Rptr 3d 163, 156 Cal App 4th 265, 2007 Cal App LEXIS 1731.*

6. Service of Sentence Under Prior Conviction

Detention in the county jail as a condition of probation is not the serving of the term of imprisonment required by this section. *People v. Wallach (1935, Cal App) 8 Cal App 2d 129, 47 P2d 1071, 1935 Cal App LEXIS 624.*

A conviction may be deemed a prior conviction notwithstanding the defendant has been pardoned for such offense, at least where he does not establish, by satisfactory proof, that his pardon was granted after an investigation and determination of his innocence. *People v. Biggs (1937) 9 Cal 2d 508, 71 P2d 214, 1937 Cal LEXIS 417,* 116 ALR 205.

The law does not require allegation or proof of imprisonment for the full term, service of part time being sufficient to bring the case within the purview of this section. *People v. Murray (1940, Cal App) 42 Cal App 2d 209, 108 P2d 748, 1940 Cal App LEXIS 34.*

"Penal institution," referred to in this section, must include a county jail, since one who is convicted of petit theft and who has suffered no previous conviction can be imprisoned only in a county jail. *In re Wolfson (1947) 30 Cal 2d*

20, 180 P2d 326, 1947 Cal LEXIS 146.

County jail is penal institution within meaning of section 667. *People v. James (1957, Cal App 2d Dist) 155 Cal App 2d 604, 318 P2d 175, 1957 Cal App LEXIS 1329.*

It is unnecessary for People to allege and prove that accused was imprisoned for full term of his felony sentence; service of portion of term is sufficient. *People v. James (1957, Cal App 2d Dist) 155 Cal App 2d 604, 318 P2d 175, 1957 Cal App LEXIS 1329.*

In a prosecution for petty theft under former Pen C § 448 (see now *Pen C § 666*) with two prior convictions, the trial court properly found that defendant had served time in a penal institution following his two prior petty theft convictions within the meaning of *Pen C § 666*, which provided that such a previously convicted person convicted of a subsequent offense was punishable by "imprisonment in the county jail not exceeding one year, or in the state prison." In both prior instances, defendant had been ordered to serve time in the county jail, though he had been given credit for all of such time for time previously spent in custody. A county jail is a penal institution and each jail commitment was a condition of defendant's probation. It was inconsequential whether the time in custody was served before or after sentencing. *People v. Valenzuela (1981, Cal App 5th Dist) 116 Cal App 3d 798, 172 Cal Rptr 284, 1981 Cal App LEXIS 1545.*

The same prior conviction charged as an element of the felony of petit theft with a prior conviction and imprisonment in any penal institution (*Pen C § 666*) may also serve as the basis for an enhancement of the sentence for that crime under *Pen C § 667.5*, subd. (b). The phrase "any penal institution" as used in § 666 includes not only those institutions in which service of a "prior separate prison term" qualifies as a sentence enhancement under *Pen C § 667.5*, but also county jails. Since § 666 can be violated without service of a prior "prison term" within the meaning of § 667.5, the elements of the two provisions relating to prior incarcerations are not congruent. *People v. Bruno (1987, Cal App 3d Dist) 191 Cal App 3d 1102, 237 Cal Rptr 31, 1987 Cal App LEXIS 1706.*

The trial court erred in refusing to credit defendant with time in custody attributable to his conviction for petit theft with a prior conviction (*Pen C § 666*) against the consecutive subordinate term of eight months imposed in that case, where, after being sentenced to state prison on that conviction, he remained in custody until a combined sentence was pronounced in both the petit theft prosecution and a burglary prosecution. Since he was subject to a prison commitment in the petit theft case until the combined sentence was pronounced, the in-custody time was attributable solely to the petit theft prosecution and defendant was entitled to have the in-custody time credited against the consecutive eight-month sentence imposed for that case. He was also further entitled to the credits authorized by *Pen C § 4019* (deductions from period of confinement), for the in-custody time. *People v. Lacebal (1991, Cal App 5th Dist) 233 Cal App 3d 1061, 285 Cal Rptr 6, 1991 Cal App LEXIS 976.*

Defendant was improperly convicted of petty theft with a prior petty theft for which she served a term in a penal institution (*Pen C § 666*), where defendant had been granted probation on the prior petty theft conviction and performed 20 days on a work project pursuant to *Pen C § 4024.2*, in lieu of 30 days in county jail. The work project provisions unambiguously describe a work program for persons who are committed to but not confined in jail. Because defendant did not serve a term in a penal institution within the meaning of *Pen C § 666*, as a result of her prior petty theft conviction, the proof of that essential element of the charge failed as a matter of law. *People v. Cortez (1994, Cal App 3d Dist) 24 Cal App 4th 510, 29 Cal Rptr 2d 445, 1994 Cal App LEXIS 401.*

C. PROSECUTION

7. In General

Dismissal of charge of petit larceny in justice court on motion of district attorney, for purpose of charging felony for same offense against same defendant, based on prior conviction of burglary, did not operate as former acquittal.

People v. Smith (1904) 143 Cal 597, 77 P 449, 1904 Cal LEXIS 865.

The defendant having been previously convicted of burglary, his subsequent perpetration of the crime of petit larceny was an act constituting a felony, over which a justice acting as an examining magistrate had no jurisdiction. *People v. Swain (1907, Cal App) 5 Cal App 421, 90 P 720, 1907 Cal App LEXIS 305.*

The superior court is given jurisdiction of petit offenses where the same party has suffered a conviction of petit larceny and sentence has been pronounced against him and subsequently to such conviction he again commits a like offense and is proceeded against as for the commission of a felony. *People v. Rose (1923, Cal App) 63 Cal App 762, 219 P 1043, 1923 Cal App LEXIS 315.*

To establish the prior conviction of a defendant of a felony, the statutory requirements must be fulfilled, that is, the necessary facts must be both pleaded and proved. *People v. Dawson (1930) 210 Cal 366, 292 P 267, 1930 Cal LEXIS 396.*

The statute of limitations has no application to the alleged fact of a prior conviction. *People v. Williams (1932, Cal App) 125 Cal App 387, 13 P2d 841, 1932 Cal App LEXIS 710.*

When the defendant did not admit the previous conviction until the beginning of the trial proceedings, and the verdict indicates that the issue of previous conviction was not passed upon by it, and the judgment entered is self sustaining in all its essentials, such irregularity of procedure does not affect the question of jurisdiction. *In re Application of Westreicher (1934, Cal App) 3 Cal App 2d 377, 39 P2d 474, 1934 Cal App LEXIS 1189.*

In a prosecution for petty theft with a prior conviction of a felony, the fact of the former conviction is not an element of the crime, but merely a penalty-increasing device and the procedures under *Pen C §§ 1025*, *1093*, *1158*, relating to arraignment, plea, trial and findings on a charge of a previous conviction, are intended to apply to a prosecution under § 667, for petty theft with a prior conviction of a felony. *People v. Pierson (1969, Cal App 2d Dist) 273 Cal App 2d 130, 77 Cal Rptr 888, 1969 Cal App LEXIS 2149.*

The defendant was properly convicted of petty theft with a prior. (*Pen C § 666.*) The defendant went into a department store, took clothes from a rack, hid them in a bag, and took them to a cashier. Falsely claiming ownership of the clothes, the defendant asked to exchange them for a cash refund. Store personnel had seen the defendant hide the clothes and knew he had stolen them from the rack. Nonetheless, the cashier completed the exchange as part of the store's plan to catch the defendant. Security agents arrested the defendant after he left the store with the money. The defendant completed theft by larceny when he dropped the clothes in his bag intending to defraud the store of their value. *People v. Shannon (1998, Cal App 2d Dist) 66 Cal App 4th 649, 78 Cal Rptr 2d 177, 1998 Cal App LEXIS 763,* review denied (1998, Cal) *1998 Cal LEXIS 8239.*

8. Indictment, Information, or Complaint

The object in charging a previous conviction is not for the purpose of evidence as to the commission of the offense upon which the defendant is to be tried, but for the information of the court in determining punishment to be imposed in case of conviction. *People v. Thomas (1895) 110 Cal 41, 42 P 456, 1895 Cal LEXIS 1015.*

The inclusion in the indictment of an allegation that the defendant was convicted of burglary in a sister state does not change the definition or character of the second offense, but is for the purpose of bringing the case within section 667 and § 668. *People v. Wallach (1926, Cal App) 79 Cal App 605, 250 P 578, 1926 Cal App LEXIS 96.*

When the jury fixes imprisonment in the county jail as the punishment for statutory rape, a defendant is not thereby convicted of a felony, and such conviction cannot be pleaded against him in an information charging the commission of a subsequent offense. *People v. Currie (1928, Cal App) 93 Cal App 544, 269 P 770, 1928 Cal App LEXIS 835.*

It was not error to set up in the information a charge of "petit larceny with prior conviction," the right and duty of the court to determine such an issue being established by this section and § 667. *People v. Willison (1932, Cal App) 122 Cal App 760, 10 P2d 766, 1932 Cal App LEXIS 1213.*

Under section 667 a defendant can be charged with having suffered only one prior conviction. *People v. Corbin (1933, Cal App) 132 Cal App 324, 22 P2d 747, 1933 Cal App LEXIS 390.*

The information must charge that the person convicted has served a term therefor, and if it fails to do so, it fails to charge the facts necessary to support a judgment carrying a heavier sentence. *People v. Arnest (1933, Cal App) 133 Cal App 114, 23 P2d 812, 1933 Cal App LEXIS 545.*

The law does not require allegation or proof of imprisonment of the full term, service of part time being sufficient to bring the case within the purview of section 667. *People v. Murray (1940, Cal App) 42 Cal App 2d 209, 108 P2d 748, 1940 Cal App LEXIS 34.*

An information alleging a prior conviction, substantially following the language of this section, is sufficient. *People v. Brown (1942, Cal App) 52 Cal App 2d 428, 126 P2d 406, 1942 Cal App LEXIS 298.*

Object of charging prior offenses is to give court information for determining punishment to be imposed in case of conviction. *People v. Cole (1957, Cal App 3d Dist) 148 Cal App 2d 25, 306 P2d 49, 1957 Cal App LEXIS 2330.*

Superior court has no jurisdiction to try charge made under § 488, relating to petty theft, but where defendant was charged with violation of § 488 and prior felony conviction, only purpose of charging prior conviction being to convert misdemeanor into felony, information alleged every fact required for charge of violation of this section, which is all that is required to give superior court jurisdiction. *In re Mitchell (1961) 56 Cal 2d 667, 16 Cal Rptr 281, 365 P2d 177, 1961 Cal LEXIS 330,* cert den *(1962) 368 US 997, 7 L Ed 2d 535, 82 S Ct 622, 1962 US LEXIS 1895.*

By amending information charging violation of section 667 to charge violation of § 488 (defining petty theft), defendant was not deprived of notice of fact that he was being charged with felony where reading of information, as amended, demonstrated that it charged petty theft with prior felony conviction, the elements necessary to constitute violation of the section, a felony. *In re Mitchell (1961) 56 Cal 2d 667, 16 Cal Rptr 281, 365 P2d 177, 1961 Cal LEXIS 330,* cert den *(1962) 368 US 997, 7 L Ed 2d 535, 82 S Ct 622, 1962 US LEXIS 1895.*

Where precise elements of offense are set forth with clarity in information, failure to specifically allege violation of section 667 constitutes only procedural irregularity in judgment of conviction of felony, not prejudicial error. *People v. Moranda (1963, Cal App 1st Dist) 222 Cal App 2d 424, 35 Cal Rptr 231, 1963 Cal App LEXIS 1683.*

Where defendant had advice of counsel prior to and at time of his plea of guilty to petty theft and admission of prior felony conviction, plea and admission fully supported judgment of conviction, and failure to specifically allege § 667, making petty theft felony when accused has been previously convicted of felony and served term therefor, constitutes only procedural irregularity in judgment, not prejudicial error. *People v. Shanklin (1966, Cal App 5th Dist) 243 Cal App 2d 94, 52 Cal Rptr 28, 1966 Cal App LEXIS 1650*

In a prosecution for petty theft alleging a prior conviction, in which the original information was amended to change the date and place of the prior conviction, defendant's request for a continuance was properly denied, and the amendment, being minor in nature, did not prejudice the "substantial rights of defendant" (*Pen C § 1009*), where prejudice to defendant was neither alleged nor apparent from the record, nor was defendant actually misled or surprised. *People v. McQuiston (1968, Cal App 2d Dist) 264 Cal App 2d 410, 70 Cal Rptr 531, 1968 Cal App LEXIS 2099.*

In a prosecution for petty theft, tried to the court without a jury, it was not improper to charge a prior conviction without first establishing the elements of the current offense; due process of law does not preclude all reference to prior offenses prior to a determination of guilt, and *Pen Code, §§ 969*, *1025*, require that the prior offense be alleged and that

the defendant state whether or not he has suffered the previous conviction. *People v. Prince (1968, Cal App 1st Dist) 268 Cal App 2d 398, 74 Cal Rptr 197, 1968 Cal App LEXIS 1321.*

In a petty theft prosecution, defendant, who admitted a prior conviction, could not have been misled by the fact that the information did not specifically mention *Pen C § 666*, relating to felony punishment for a second conviction, where the precise elements which made the offense punishable as a felony were charged in the information, and where the only purpose of alleging the prior conviction was to convert the misdemeanor into a felony. *People v. Franco (1970, Cal App 2d Dist) 4 Cal App 3d 535, 84 Cal Rptr 513, 1970 Cal App LEXIS 1556.*

Pen C § 666 by its terms does not require the statute to be specifically pleaded in the information or indictment; nor do constitutional principles of due process require that the statute be specifically alleged as long as the pleading apprises the defendant of the potential for the enhanced penalty and alleges every fact and circumstance necessary to establish its applicability. Thus, an accusatory pleading charging the greater offense of robbery and alleging several prior prison terms for theft offenses was sufficient because it necessarily put defendant on notice of the lesser included offense of petty theft and prior theft convictions and prison terms to support a felony sentence. *People v. Tardy (2003, Cal App 2d Dist) 112 Cal App 4th 783, 6 Cal Rptr 3d 24, 2003 Cal App LEXIS 1552,* review denied (2004, Cal) *2004 Cal LEXIS 225.*

Defense counsel was not ineffective for failing to object to the prosecution's amendment of an information because the amendment did not violate *Pen C § 1009*; *Pen C § 666* does not establish an enhancement, but rather establishes an alternate and elevated penalty for a petty theft conviction when a recidivist defendant has served a prior term in a penal institution for a listed offense. *People v. Robinson (2004, Cal App 4th Dist) 122 Cal App 4th 275, 18 Cal Rptr 3d 744, 2004 Cal App LEXIS 1562,* review denied (2004, Cal) *2004 Cal LEXIS 12007.*

9. Arraignment and Plea

If the defendant pleads "guilty of the offense as charged in the indictment," and the indictment charges the offense of petit larceny committed after a previous conviction for petit larceny, the plea confesses the offense charged, which includes the previous conviction, and the defendant must be sentenced for a felony. *People v. Delany (1874) 49 Cal 394, 1874 Cal LEXIS 347.*

If the defendant pleads not guilty to the charge of a previous conviction, the issue must be tried by a jury, but if he pleads guilty, no such trial is required. *People v. Carlton (1881) 57 Cal 559, 1881 Cal LEXIS 110.*

A defendant charged with a particular offense and previous convictions may plead simply not guilty and put in issue every material allegation of the information, or he may plead not guilty of the principal offense charged and confess the previous convictions. *People v. Wheatley (1891) 88 Cal 114, 26 P 95, 1891 Cal LEXIS 658.*

The defendant had the right at any time to withdraw his plea of not guilty to the charge of prior conviction, and to confess the same; and having done so the jury had nothing to find in regard to it, and the court was authorized to fix the penalty. *People v. Johnson (1891) 88 Cal 171, 25 P 1116, 1891 Cal LEXIS 667.*

The defendant has it in his power to avoid bringing the fact of previous conviction before the jury by confessing the same by his plea at the time of arraignment. *People v. Coleman (1904) 145 Cal 609, 79 P 283, 1904 Cal LEXIS 640.*

Although *Pen C § 1009*, requires rearraignment and a new plea on an amended information, it is not mandatory where the amendment relates only to minor changes; thus in a prosecution for petty theft charging a prior conviction, in which the original information was amended to change the date and place of the prior conviction, the trial judge did not err in permitting the amendment nor in failing to rearraign defendant on, and take her plea to, the amended information, where it was apparent from the record that the error in date and court was the result of a simple clerical or typographical mistake the timely correction of which did not change the nature of the prior offense charged, only the date and place of conviction, and where, in any event, after the amendment, defense counsel reaffirmed that his client denied the prior

conviction. *People v. McQuiston (1968, Cal App 2d Dist) 264 Cal App 2d 410, 70 Cal Rptr 531, 1968 Cal App LEXIS 2099.*

In a petty theft prosecution, defendant's admission of a prior conviction included an admission that he had served a term therefor even though he was not asked, separately, whether he had served such term, where the serving of a prison term was alleged in the information, and where such allegation was read to defendant by the court before he was asked to admit or deny the prior. *People v. Franco (1970, Cal App 2d Dist) 4 Cal App 3d 535, 84 Cal Rptr 513, 1970 Cal App LEXIS 1556.*

Where an information charges the accused with a former conviction, and with having served a term of imprisonment therefor, and upon arraignment and a reading of the information to him he admits, without reservation, that he has suffered such conviction, it must be assumed that he knowingly admitted that he served his sentence as alleged in the information. *People v. Franco (1970, Cal App 2d Dist) 4 Cal App 3d 535, 84 Cal Rptr 513, 1970 Cal App LEXIS 1556.*

In a petty theft prosecution, defendant's admission of a charged prior conviction was not constitutionally defective because of lack of advice that he was waiving his right to a jury trial, to confront his accusers, and against self-incrimination, where the only offense charged in the information, and for which defendant was tried, was petty theft, and where proof of the prior conviction of petty theft simply increased the penalty. *People v. Franco (1970, Cal App 2d Dist) 4 Cal App 3d 535, 84 Cal Rptr 513, 1970 Cal App LEXIS 1556.*

In a prosecution for two counts of petty theft with a prior conviction (*Pen C § 666*), in which the trial court erred in failing to adequately admonish defendant concerning the consequences of his admission of a prior conviction that was used both for purposes of *Pen C § 666*, and for purposes of sentence enhancement under *Pen C § 667*, subds. (c), (d), and (e) (three strikes law), and *Pen C § 667.5*, subd. (b) (prior prison term enhancement), the proper disposition was to reverse defendant's sentence, which had been enhanced by 24 months, but not his conviction under *Pen C § 666*, since the conviction was proper despite the lack of admonitions. The admonition and waiver procedure that applies to an admission of a prior conviction for purposes of *Pen C § 667*, subds. (c), (d), and (e), does not apply to *Pen C § 666*. This is so because a defendant charged under *Pen C § 666*, may stipulate to the prior conviction and incarceration factors of that statute and thereby prevent the jury from learning of them, and a defendant need not be admonished about his or her constitutional rights when entering into such a self-serving stipulation. Defendant received the benefit of his bargain, in that the prosecution was not allowed to prove his prior felony convictions and incarcerations before the jury. *People v. Witcher (1995, Cal App 1st Dist) 41 Cal App 4th 223, 48 Cal Rptr 2d 421, 1995 Cal App LEXIS 1241.*

10. Admissibility of Evidence

Where a defendant charged with a particular offense and previous convictions confesses to previous convictions, the clerk in reading the information to the jury must omit all that relates to such previous convictions, and no testimony in regard to them can be offered or reference to them be made during the trial. *People v. Wheatley (1891) 88 Cal 114, 26 P 95, 1891 Cal LEXIS 658.*

The statutes to the effect that no evidence relating to a previous conviction shall be received on the trial when such previous conviction is admitted by the defendant on his arraignment have reference exclusively to cases under this section and §§ 667 and 668, and have no application where the fact of the prior conviction is an essential element of the offense charged. *People v. Oppenheimer (1909) 156 Cal 733, 106 P 74, 1909 Cal LEXIS 384.*

The statutes safeguarding a defendant charged with a prior conviction who, upon his arraignment, admits such conviction against the detrimental consequences which are apt to follow reference thereto in the presence of the jury is not fundamental, and if the defendant opens up the question of his good reputation, he waives his right to the protection of such provision. *People v. Stennett (1921, Cal App) 51 Cal App 370, 197 P 372, 1921 Cal App LEXIS 738.*

In a prosecution for petit theft and prior conviction of a felony, there was no error in admitting proof of the defendant's previous conviction of a felony for violating the National Motor Vehicle Theft Act in taking a stolen automobile from this state into a foreign jurisdiction. *People v. Fitzwater (1935, Cal App) 5 Cal App 2d 187, 42 P2d 1044, 1935 Cal App LEXIS 1036.*

The rules against the admission of evidence of a previous conviction when such evidence is not relevant or admissible to impeach was not designed to exclude relevant evidence nor to prevent the impeachment of a witness by proof of conviction of a felony. *People v. Peete (1946) 28 Cal 2d 306, 169 P2d 924, 1946 Cal LEXIS 212,* cert den *(1946) 329 US 790, 67 S Ct 356, 91 L Ed 677, 1946 US LEXIS 1680,* cert den *(1947) 331 US 783, 67 S Ct 1185, 91 L Ed 1815, 1947 US LEXIS 2437.*

When a defendant takes the stand in his own behalf, he waives the protection of the statute precluding reference to alleged prior convictions, since he thereby places his credibility in issue and he may be impeached. *In re Dorsey (1947, Cal App) 81 Cal App 2d 584, 184 P2d 702, 1947 Cal App LEXIS 1100.*

11. Weight and Sufficiency of Evidence

It is necessary not only to charge the facts of the previous conviction and the subsequent offense, but also to prove them. *People v. King (1883) 64 Cal 338, 30 P 1028, 1883 Cal LEXIS 638.*

The admission of a defendant in a criminal case, while a witness, that he has been convicted of a felony only goes to his credibility and is incompetent to prove the prior conviction, and the jury should be so instructed. *People v. Carrow (1929) 207 Cal 366, 278 P 857, 1929 Cal LEXIS 502.*

The provisions of section 667 should not be applied unless proper proof is made by the state. *People v. Carrow (1929) 207 Cal 366, 278 P 857, 1929 Cal LEXIS 502.*

In order to bring accused within provisions of section 667 it is essential to establish fact in trial court, either by evidence introduced to that effect or by admission of accused, that as a result of prior convictions of felony he has served terms in penal institution. *In re Application of Boatwright (1931, Cal App) 119 Cal App 420, 6 P2d 972, 1931 Cal App LEXIS 168.*

In prosecution for petty theft with prior conviction of felony, where there was admitted in evidence, certified by keeper of records of state prison in another state, judgment of conviction of obtaining money by false pretenses, with affidavit that attached fingerprints and photograph of convicted person were made at that time, and there was evidence that defendant's fingerprints were same as those introduced with said record of conviction, documents so received in evidence were properly authenticated by certification, and evidence supported charge of prior conviction. *People v. McKinley (1934) 2 Cal 2d 133, 39 P2d 411, 1934 Cal LEXIS 476.*

In a theft case, defendant's prior conviction of petit theft and imprisonment therefor are established where a certified copy of such conviction and judgment of imprisonment was introduced in preliminary examination, and where the record of such examination is, by stipulation, before the trial judge in the superior court. *People v. Roth (1953, Cal App) 120 Cal App 2d 29, 260 P2d 225, 1953 Cal App LEXIS 1890.*

Conviction of petty theft with prior conviction of felony was supported by evidence where it was stipulated by all counsel that certain records of Department of Corrections relating to prison term served by person with same name as defendant would be received in evidence and that such documents were records of defendant, and where it appeared that defendant carried two boxes of meat from market without paying for them. *People v. Brown (1963, Cal App 2d Dist) 214 Cal App 2d 128, 29 Cal Rptr 267, 1963 Cal App LEXIS 2580.*

Evidence was sufficient to sustain conviction of petty theft with prior felony conviction where it appeared that defendant had two prior felony convictions and served terms in state prison for each, and that defendant and two other

men ate meals in restaurant and left without paying. *People v. Fiene (1964, Cal App 2d Dist) 226 Cal App 2d 305, 37 Cal Rptr 925, 1964 Cal App LEXIS 1283.*

12. Trial

If the defendant denies the prior conviction alleged in the indictment or information, that issue, as well as the issue raised by his plea of not guilty of the principal charge, must be submitted to the jury, but if he admits the previous conviction, all information touching the prior conviction must be withheld from the jury. *People v. Thomas (1895) 110 Cal 41, 42 P 456, 1895 Cal LEXIS 1015.*

The previous conviction is a question of fact material to the aggravated offense for which the defendant is tried, which must be pleaded, and where issue is joined thereon, it must be proven as any other material fact, and it is the jury's province to pass thereupon. *People v. Coleman (1904) 145 Cal 609, 79 P 283, 1904 Cal LEXIS 640.*

Prosecuting attorney in his argument did not err in submitting to jury evidence offered at trial that defendant had previously been convicted of, and served term of imprisonment for, petit theft where he was charged with petit theft with prior theft conviction, felony, and it was necessary for People to prove, as part of their case, prior offense and that defendant had served term therefor. *People v. Blackwell (1962, Cal App 2d Dist) 211 Cal App 2d 353, 27 Cal Rptr 221, 1962 Cal App LEXIS 1516.*

The trial court did not err in accepting defendant's admission to a prior conviction, used to elevate defendant's conviction of petty theft from a misdemeanor to a felony under § 667, without first inquiring as to its constitutional validity, since the burden of initiating inquiry into the constitutional basis of a prior conviction lies with the person challenging its validity rather than with the trial court. *People v. Fairchild (1967, Cal App 1st Dist) 254 Cal App 2d 831, 62 Cal Rptr 535, 1967 Cal App LEXIS 1461,* cert den *(1968) 391 US 955, 88 S Ct 1861, 20 L Ed 2d 870, 1968 US LEXIS 1611.*

In a criminal prosecution involving also a charged prior felony conviction, defendant was not improperly denied a jury trial on the prior felony conviction where, when the case was called for trial, defendant was arraigned on the prior felony conviction alleged in the information, where he denied the truth of the allegation and properly waived his right to jury trial on both the main cause and the prior, where, after the trial commenced, and just after the first prosecution witness was sworn, it became apparent that a typographical error had been made in the statutory reference to the prior which was corrected by interlineation but no new offense was substituted nor substantial change made, where defendant knew the violation originally intended to be charged and thought he was waiving his right to a jury trial on that prior, and thus was not prejudiced by the change, and where defendant subsequently failed to object to the amendment, mention jury waiver thereon, or request a jury trial on the amended information. *People v. Gary (1968, Cal App 2d Dist) 263 Cal App 2d 192, 69 Cal Rptr 777, 1968 Cal App LEXIS 2198.*

In a prosecution for grand theft with a prior felony conviction, the trial court was justified in instructing the jury that, as a matter of law, a conviction evidenced by a certified copy of a minute order of another superior court was a felony conviction, where the minute order recited that defendant entered a plea of guilty to petty theft and that defendant admitted having suffered a prior conviction charged, where the information in the same case contained the allegation that defendant had been previously convicted of petty theft and had served a term in the county jail pursuant to said conviction, where, although the minute order did not expressly indicate that defendant had served a sentence for the previous petty theft conviction, the statement in the order referring to the prior conviction obviously had reference to the charge of previous conviction and the term of imprisonment therefor alleged in the information, and where the record indicated that the offense described in the minute order was not reduced to a misdemeanor by the trial judge but remained a felony. *People v. Bradley (1970, Cal App 1st Dist) 3 Cal App 3d 273, 83 Cal Rptr 234, 1970 Cal App LEXIS 1125.*

Although *Cal. Const., art. I, § 28*, subd. (f) provides, "When a prior conviction is an element of any felony offense,

it shall be proven to the trier of fact in open court," a defendant under prosecution for either *Pen C § 666* (petty theft with a prior) or *Pen C § 314* (indecent exposure) may stipulate to a prior conviction to prevent the jury from learning of it. This is because both of these criminal statutes are enhancement statutes so that their prior conviction and incarceration requirements are sentencing factors for the trial court and not an element of the offense that must be determined by a jury. *People v. Merkley (1996, Cal App 1st Dist) 51 Cal App 4th 472, 58 Cal Rptr 2d 21, 1996 Cal App LEXIS 1233.*

13. Findings or Verdict

Where the defendant pleads the general issue of not guilty to the charge which includes a charge of prior conviction of petit larceny, and the jury fails to find specifically upon the issue of prior conviction, and returns a verdict finding the defendant guilty as charged, the verdict is erroneous in not finding upon the issue of prior conviction, but should be treated as a finding against the defendant upon the crime charged. *People v. Eppinger (1895) 109 Cal 294, 41 P 1037, 1895 Cal LEXIS 951.*

Section 1158, governing verdict on charge of previous conviction, was not intended to apply exclusively to this section. *People v. Dueber (1917, Cal App) 34 Cal App 686, 168 P 578, 1917 Cal App LEXIS 211.*

In prosecution for petty theft with prior conviction of petty theft, though trial court's finding that defendant was guilty as charged was irregular as finding of his prior conviction of petty theft, it could not be construed as acquittal where prior conviction and imprisonment were clearly shown by unchallenged documentary proof and clerk's interpretation of court's finding was reflected in recital of judgment that defendant was found guilty of petty theft with prior conviction of petty theft, as charged. *People v. Cooks (1965, Cal App 2d Dist) 235 Cal App 2d 6, 44 Cal Rptr 819, 1965 Cal App LEXIS 897.*

In a prosecution for petty theft, in which defendant admitted a prior felony conviction, use of the term "petty theft" in the jury verdict was not improper and misleading as connoting a minor crime, for which a jury might be more prone to convict, where the form of the verdict referred to the crime as a felony, and where the charging information, read to the jury and referred to in the verdict, advised that defendant was charged with the "crime of felony, to wit: petty theft in violation of *Section 667 Penal Code*, California;" nor, though it would have been better practice for the trial court to have submitted a form of verdict under which the jury would merely have found whether defendant was guilty of petty theft, was it error in the jury having been advised that if defendant was guilty of petty theft he was guilty of a felony, this being the essence of the crime specified in *Pen Code, § 667*, and it being to remote a possibility that the jury would infer that defendant suffered a prior conviction (*Pen Code, § 1025*) merely because the verdict form designated the petty theft as a felony. *People v. Fairchild (1967, Cal App 1st Dist) 254 Cal App 2d 831, 62 Cal Rptr 535, 1967 Cal App LEXIS 1461,* cert den *(1968) 391 US 955, 88 S Ct 1861, 20 L Ed 2d 870, 1968 US LEXIS 1611.*

14. Judgment and Sentence

Under subd 2 a defendant was punishable with imprisonment for ten years or any term less than ten years. *People v. Brooks (1884) 65 Cal 300, 4 P 11, 1884 Cal LEXIS 529.*

Under an information which charges the defendant with petit larceny and also with prior convictions for like offenses, when the defendant confesses the prior convictions, and the jury returns a verdict finding him guilty of petit larceny, the court has jurisdiction to impose a sentence as upon a conviction of petit larceny, second offense. *Ex parte Young Ah Gow (1887) 73 Cal 438, 15 P 76, 1887 Cal LEXIS 694.*

Under the provisions of subd 2, if the subsequent offense of which a person is convicted is such that upon a first conviction he could be punishable by imprisonment in the state prison for any term less than five years, then on such subsequent conviction he can be punished by imprisonment in the state prison not exceeding ten years. *People v. Douglass (1890) 87 Cal 281, 25 P 417, 1890 Cal LEXIS 1132.*

The court in pronouncing judgment has the right to consider a previous conviction under this section, where the judgment recites that the defendant, subsequent to arraignment, on a specified day, confessed the prior conviction, there being no provision as to how the confession shall be made to appear. *People v. McNeill (1897) 118 Cal 388, 50 P 538, 1897 Cal LEXIS 786.*

A judgment imposed under this section which, owing to the clerical mistake of the clerk in entering it, does not recite such prior conviction, is erroneous but not void, and where the record otherwise shows such prior conviction, the court has a right to consider it in imposing the sentence. *People v. Kelly (1898) 120 Cal 271, 52 P 587, 1898 Cal LEXIS 749.*

Under subd 1, the court might sentence the defendant to any term of imprisonment between the minimum of ten years and life. *People v. Burns (1902) 138 Cal 159, 69 P 16, 70 P 1087, 1902 Cal LEXIS 469.*

Where a prior conviction has been charged and sustained, and the subsequent offense charged is likewise established, the court is authorized to impose a penalty in excess of the maximum penalty prescribed for either the prior or the subsequent offense. *People v. Rudolph (1915, Cal App) 28 Cal App 683, 153 P 721, 1915 Cal App LEXIS 385.*

The legislature intended, by the enactment of section 667, that on a conviction of petit larceny no greater penalty be imposed than imprisonment for five years, notwithstanding that the defendant has suffered other convictions and served time thereunder on more serious charges. *In re Application of Boatwright (1932) 216 Cal 677, 15 P2d 755, 1932 Cal LEXIS 629,* superseded by statute as stated in (1995, Cal App 2d Dist) *37 Cal App 4th 871, 44 Cal Rptr 2d 205, 1995 Cal App LEXIS 789.*

A person convicted of the crime of petit larceny becomes punishable as though petit larceny were a felony when in the indictment or information the fact has been pleaded and thereafter proved that such person theretofor has been similarly convicted and served a term. *People v. Williams (1932, Cal App) 125 Cal App 387, 13 P2d 841, 1932 Cal App LEXIS 710.*

Where information in each of two counts of petty theft alleged prior conviction and that defendant had served term in penal institution therefor, and verdict as to each count found him guilty of particular offense after prior conviction of felony as charged in information, and judgment as to each count recited that he had been found guilty of petty theft after prior conviction of felony, there was no necessity for further statement in judgment that he had served time for prior felony, in order to subject him to term prescribed by section 667. *People v. McKinley (1934) 2 Cal 2d 133, 39 P2d 411, 1934 Cal LEXIS 476.*

For the crime of petit theft after a prior conviction of felony, the defendant was properly sentenced to state prison, instead of to the county jail, under section 667 as it existed prior to and at the time of the judgment. *People v. Mortensen (1935, Cal App) 10 Cal App 2d 124, 51 P2d 450, 1935 Cal App LEXIS 1363.*

In a prosecution in which defendant was convicted on a count of second degree burglary and a count of petty theft after a prior burglary conviction, a judgment imposing sentence on both counts was erroneous where both crimes were part of a single transaction with a single victim. *People v. Brashear (1969, Cal App 4th Dist) 271 Cal App 2d 306, 76 Cal Rptr 485, 1969 Cal App LEXIS 2382.*

Following conviction and sentencing of defendant to a suspended three-year aggravated term for petty theft with a prior conviction of petty theft (*Pen C §§ 488*, *666*), the sentencing court properly revoked defendant's probation because of his use of alcohol in violation of a probation condition. Such a condition had been reasonably imposed, since defendant had assured the court that his alcoholism caused him to steal. *People v. Mitchell (1981, Cal App 4th Dist) 125 Cal App 3d 715, 178 Cal Rptr 188, 1981 Cal App LEXIS 2353.*

Pen C § 666 (petty theft with prior theft-related conviction and incarceration), authorizes a court, in its discretion, to treat the offense as either a misdemeanor or a felony. *People v. Shoaff (1993, Cal App 2d Dist) 16 Cal App 4th 1112,*

20 Cal Rptr 2d 464, 1993 Cal App LEXIS 662, review denied (1993, Cal) *1993 Cal LEXIS 4995.*

In sentencing defendant, who had been convicted of petty theft with a prior theft conviction (*Pen C § 666*) and who had suffered multiple prior serious felony convictions, the trial court did not err in applying the three strikes law (*Pen C §§ 667*, subds. (c) and (e), 1170.12, subd. (c)). Under *Pen C § 666*, a court has the discretion to treat petty theft with a prior as either a misdemeanor or a felony. However, because defendant had been previously convicted of robbery, he was subject to the current theft being treated as a felony. Also, the court specifically denied a motion to reduce the crime to a misdemeanor, because of defendant's long and continuous history of recidivism. Further, none of the factors delineated in *Pen C § 17*, subd. (b), which defines a crime as a misdemeanor, applied. Therefore, defendant's crime was a felony, rather than a misdemeanor that carried the potential for a longer sentence. Because the three strikes law is applicable when a defendant is convicted of a felony and has one or more prior convictions for a serious or violent felony, defendant was properly sentenced according to the three strikes law. *People v. Bury (1996, Cal App 4th Dist) 50 Cal App 4th 1873, 58 Cal Rptr 2d 682, 1996 Cal App LEXIS 1122,* review denied (1997, Cal) *1997 Cal LEXIS 1374.*

The trial court did not abuse its discretion under three strikes law in refusing to strike defendant's prior convictions and sentencing him to 26 years to life for failure to register as a sex offender, where defendant had been reminded of the requirement to register and where he appeared to be a revolving-door career criminal; defendant's lengthy adult criminal record included numerous convictions for offenses such as petty theft, in addition to his three strike offenses and his two prior convictions for failure to register. *People v. Carmony (2004) 33 Cal 4th 367, 14 Cal Rptr 3d 880, 92 P3d 369, 2004 Cal LEXIS 6235.*

United States Court of Appeals for the Ninth Circuit holds that a felony conviction for petty theft with a qualifying prior offense under *Pen C §§ 484*, *488*, and *666* is not a crime for which a sentence of one year or longer may be imposed under *8 USCS § 1227*(a)(2)(A)(i)(II). *Rusz v. Ashcroft (2004, 9th Cir) 376 F3d 1182, 2004 US App LEXIS 15837.*

15. Appeal and Error

A judgment for a term of years less than is provided by this section, if erroneous upon appeal by the state, is not void for want of jurisdiction, and the defendant, not being aggrieved, cannot directly complain of the error upon habeas corpus. *In re Reed (1904) 143 Cal 634, 77 P 660, 1904 Cal LEXIS 873.*

The trial court has a discretion, under section 667, to sentence a defendant to imprisonment in either the county jail or the state prison, and on appeal the court will not interfere with that discretion. *People v. Quiel (1945, Cal App) 68 Cal App 2d 674, 157 P2d 446, 1945 Cal App LEXIS 818.*

Where defendant left restaurant without paying for his meal, his conduct came within provisions of § 537, making it misdemeanor to defraud innkeeper; therefore, superior court was without jurisdiction to try defendant and his conviction of petty theft with prior felony conviction must be reversed. *People v. Fiene (1964, Cal App 2d Dist) 226 Cal App 2d 305, 37 Cal Rptr 925, 1964 Cal App LEXIS 1283.*

Where defendant directly attacks a prior conviction used to elevate his conviction from a misdemeanor to a felony, on the basis that he was not then represented by counsel and had not waived that right, and the record is silent on the issue, an appellate court is precluded from considering the constitutional validity of the prior conviction, that court, in reviewing a judgment of a lower court, being limited to the matters contained in the record below. *People v. Fairchild (1967, Cal App 1st Dist) 254 Cal App 2d 831, 62 Cal Rptr 535, 1967 Cal App LEXIS 1461,* cert den *(1968) 391 US 955, 88 S Ct 1861, 20 L Ed 2d 870, 1968 US LEXIS 1611.*

On appeal after a conviction of petty theft in which a prior conviction had been charged, the issue whether defendant was advised of her right to counsel and waived the same prior to her "confession" prior to Escobedo by pleading guilty to the charged prior offense was moot where the trial judge, after hearing evidence on the prior

conviction, determined that there was insufficient evidence to sustain a finding that defendant was legally convicted of the prior, struck the allegation from the information, and instructed the jury to ignore it; and in any event the issue could not be raised on appeal where there was nothing in the record to suggest that defendant was interrogated while in custody or made any extrajudicial statements, prerequisite for application of Escobedo, at the time of the alleged prior offense. *People v. McQuiston (1968, Cal App 2d Dist) 264 Cal App 2d 410, 70 Cal Rptr 531, 1968 Cal App LEXIS 2099.*

On appeal after a conviction of petty theft in which a prior conviction had been alleged, issues relating to the procedures used to determine the truth of the alleged prior conviction were moot as related to the prior itself and could be considered only in the perspective of substantial prejudice to defendant's rights on the trial of the theft charged, where the trial judge, after hearing evidence thereon, determined that there was insufficient evidence to sustain a finding that defendant was "legally convicted" of the prior, struck the allegation from the information, and instructed the jury to ignore it. *People v. McQuiston (1968, Cal App 2d Dist) 264 Cal App 2d 410, 70 Cal Rptr 531, 1968 Cal App LEXIS 2099.*

On appeal from a conviction of petty theft with two prior convictions, defendant failed to establish that he was denied equal protection of the law by the trial court's application of *Pen C § 666*, which provides increased punishment for persons convicted of petty theft who have been previously convicted of petty theft, grand theft, burglary or robbery and have served a term therefor in any penal institution or have been imprisoned therein as a condition of probation for such offense, where defendant's claim rested on the premise that he had spent time in custody in connection with the prior offenses only because he was unable to afford bail following booking. Anyone who is arrested for petty theft, booked and released immediately following completion of booking, whether by posting bail or on his own recognizance, is deemed to have served one day in custody. Furthermore, defendant made no showing that he was unable to post bail because of indigency or that, at the time of his prior arrests, either arraigning court refused to reduce bail or release him on his own recognizance because of his indigency. *People v. Valenzuela (1981, Cal App 5th Dist) 116 Cal App 3d 798, 172 Cal Rptr 284, 1981 Cal App LEXIS 1545.*

Following his conviction for petty theft with a prior conviction of petty theft (*Pen C §§ 488*, *666*), defendant should have raised any issues as to sentencing errors on appeal from the sentence; such issues were not timely raised following the revocation of defendant's probation. Furthermore, any issue as to his alleged inability to comply with a probation condition that he abstain from drinking alcohol should have been raised at the sentencing hearing or at the probation revocation hearing; his failure to do so precluded him from raising the issue on appeal of the revocation. *People v. Mitchell (1981, Cal App 4th Dist) 125 Cal App 3d 715, 178 Cal Rptr 188, 1981 Cal App LEXIS 2353.*

Order vacating a habeas corpus petitioner's conviction of second degree murder, *Cal. Penal Code §§ 187*, 189, and attempted murder, *Cal. Penal Code §§ 187*, 664, on the basis of newly discovered evidence did not bar retrial. *In re Cruz (2003, Cal App 2d Dist) 104 Cal App 4th 1339, 129 Cal Rptr 2d 31, 2003 Cal App LEXIS 1,* review denied (2003, Cal) *2003 Cal LEXIS 2710.*

SUGGESTED FORMS

Allegation Charging Petit Theft With Prior Conviction of Theft