

LEXSTAT CAL PEN CODE § 17 B

DEERING'S CALIFORNIA CODES ANNOTATED
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*** THIS DOCUMENT REFLECTS ALL URGENCY LEGISLATION ENACTED ***
THROUGH 2007-2008 THIRD EXTRAORDINARY SESSION CH. 6 AND
CH. 12 OF THE 2008 REGULAR SESSION APPROVED 4/29/08

PENAL CODE
Preliminary Provisions

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Cal Pen Code § 17 (2008)

§ 17. "Felony," "misdemeanor," and "infraction" distinguished; Reduction of misdemeanors to infractions

(a) A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime or public offense is a misdemeanor except those offenses that are classified as infractions.

(b) When a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances:

(1) After a judgment imposing a punishment other than imprisonment in the state prison.

(2) When the court, upon committing the defendant to the Youth Authority, designates the offense to be a misdemeanor.

(3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor.

(4) When the prosecuting attorney files in a court having jurisdiction over misdemeanor offenses a complaint specifying that the offense is a misdemeanor, unless the defendant at the time of his or her arraignment or plea objects to the offense being made a misdemeanor, in which event the complaint shall be amended to charge the felony and the case shall proceed on the felony complaint.

(5) When, at or before the preliminary examination or prior to filing an order pursuant to Section 872, the magistrate determines that the offense is a misdemeanor, in which event the case shall proceed as if the defendant had been arraigned on a misdemeanor complaint.

(c) When a defendant is committed to the Youth Authority for a crime punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, the offense shall, upon the discharge of the defendant from the Youth Authority, thereafter be deemed a misdemeanor for all purposes.

(d) A violation of any code section listed in Section 19.8 is an infraction subject to the procedures described in Sections 19.6 and 19.7 when:

Cal Pen Code § 17

(1) The prosecutor files a complaint charging the offense as an infraction unless the defendant, at the time he or she is arraigned, after being informed of his or her rights, elects to have the case proceed as a misdemeanor, or;

(2) The court, with the consent of the defendant, determines that the offense is an infraction in which event the case shall proceed as if the defendant had been arraigned on an infraction complaint.

(e) Nothing in this section authorizes a judge to relieve a defendant of the duty to register as a sex offender pursuant to Section 290 if the defendant is charged with an offense for which registration as a sex offender is required pursuant to Section 290, and for which the trier of fact has found the defendant guilty.

HISTORY:

Enacted 1872. Amended Code Amdts 1873-74 ch 196 § 1; Stats 1947 ch 826 § 1; Stats 1957 ch 1012 § 1; Stats 1959 ch 532 § 1; Stats 1963 ch 919 § 1; Stats 1968 ch 1192 § 2, operative January 1, 1969; Stats 1969 ch 1144 § 1; Stats 1975 ch 664 § 1; Stats 1976 ch 1070 § 1, effective September 21, 1976; Stats 1980 ch 1270 § 1. Amended Stats 1989 ch 897 § 5; Stats 1998 ch 960 § 1 (AB 2680).

NOTES:**Editor's Notes**

Stats 1985 ch 265 repealed the second version of this statute that was to become operative January 1, 1986, and repealed the uncodified note (Stats 1980 ch 1270 § 5) governing the operative dates of each version. Accordingly, the first version is operative until further legislative action occurs.

Amendments:**1873-74 Amendment:**

Prior to 1873-74 the section read: "A felony is a crime which is, or may be, punishable with death, or by imprisonment in the State Prison. Every other crime is a misdemeanor."

1873-74 Amendment amended the section to read: "A felony is a crime which is punishable with death or by imprisonment in the State Prison. Every other crime is a misdemeanor. When a crime, punishable by imprisonment in the State Prison, is also punishable by fine or imprisonment in a County Jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the State Prison."

1947 Amendment:

Amended the section to read: "A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime is a misdemeanor. When a crime, punishable by imprisonment in the state prison, is also punishable by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment other than imprisonment in the state prison, unless the court commits the defendant to the California Youth Authority. Where a court commits a defendant to the California Youth Authority upon conviction of a crime punishable by imprisonment in the state prison or fine or imprisonment in a county jail, in the discretion of the

court, the crime shall be deemed a felony until and unless the court, after the person committed has been discharged from control by the California Youth Authority, and only if he was not placed in a state prison by the authority during the period of such control, on application of the person so committed and discharged, makes an order determining that the crime of which he was convicted was a misdemeanor."

1957 Amendment:

Amended the section to read: "A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime is a misdemeanor. When a crime, punishable by imprisonment in the state prison, is also punishable by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the state prison."

1959 Amendment:

Added a sentence at the end of the section to read: "Where a court commits a defendant to the Youth Authority upon conviction of a crime punishable, in the discretion of the court, by imprisonment in the state prison or fine or imprisonment in a county jail, the crime shall be deemed a misdemeanor."

1963 Amendment:

Added the second paragraph to read: "Where a court grants probation to a defendant without imposition of sentence upon conviction of a crime punishable in the discretion of the court by imprisonment in the state prison or imprisonment in the county jail, the court may at the time of granting probation, or, on application of defendant or probation officer thereafter, declare the offense to be a misdemeanor."

1968 Amendment:

Amended the second sentence by adding (1) "or public offense" after "crime"; and (2) "except those offenses that are classified as infractions" at the end.

1969 Amendment:

Amended the section to read as at present, except for the following Amendments.

1975 Amendment:

Substituted "or prior to filing an order pursuant to Section 872," for "and with the consent of the prosecuting attorney and the defendant," in subd (b)(5).

1976 Amendment:

(1) Amended subd (b)(2) by (a) substituting ", upon committing" for "commits"; and (b) adding ", designates the offense to be a misdemeanor"; and (2) added subd (c).

1980 Amendment:

Added subd (d).

1989 Amendment:

(1) Added feminine pronouns; and (2) substituted "Section 19.8" for "Section 19e" and "Sections 19.6 and 19.7" for "Sections 19c and 19d" in subd (d)(1).

1998 Amendment:

Added subd (e).

Historical Derivation:

- (a) Criminal Practice Act §§ 4, 5 (Stats 1851 ch 29 §§ 4, 5 p 212).
- (b) Stats 1850 ch 119 §§ 4, 5 p 275.
- (c) Field's Draft NY Pen C §§ 5, 6.
- (d) NY Pen C §§ 5, 6.

Note

Stats 1976 ch 1070 also provides:

SEC. 7. The amendments to *Section 17 of the Penal Code* made by Section 1 of this act relating to commitments to the Youth Authority are applicable to all persons who may be or presently are under the jurisdiction of the Youth Authority as a result of a commitment from a court pursuant to *Section 1731.5 of the Welfare and Institutions Code*.

SEC. 8. If any provision of the amendments to *Section 17 of the Penal Code* made by Section 1 of this act, relating to commitments to the Youth Authority, or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of *Section 17 of the Penal Code* which can be given effect without the invalid provision or application, and to this end the provisions of *Section 17 of the Penal Code* are severable.

Stats 1980 ch 1270 also provides:

SEC. 4. If any word, phrase, clause, or sentence in any section amended or added by this act, or any section or provision of this act, or application thereof to any person or circumstance, is held invalid, such invalidity shall not affect

any other word, phrase, clause, or sentence in any section amended or added by this act, or any other section, provisions or application of this act, which can be given effect without the invalid word, phrase, clause, sentence, section, provision or application and to this end the provisions of this act are declared to be severable.

SEC. 5. Sections 1, 3, and 4 of this act shall remain operative only until January 1, 1986, and on such date are repealed. Section 2 of this act shall become operative January 1, 1986.

JCRPC Comment:

1989

This section is amended to reflect the renumbering of PC §§ 19c, 19d, & 19e.

Cross References:

Punishment as misdemeanor of public offense for which no punishment is prescribed: *Pen C § 19.4.*

Application of provisions of law, relating to misdemeanors, to infractions: *Pen C § 19.7.*

Discretion to charge certain petty theft as misdemeanor or infraction: *Pen C § 490.1.*

Youth Authority: *Pen C §§ 6001 et seq.*

Imposition of involuntary trust on proceeds of sale of story of felony by convicted felon: *CC § 2225.*

Collateral References:

Cal Forms Pl & Practice (Matthew Bender) ch 4 "Abortion and Birth Control Methods".

Cal Forms Pl & Practice (Matthew Bender) ch 71 "Attorney Discipline".

Cal Forms Pl & Practice (Matthew Bender) ch 80-92 "Automobiles".

2 Witkin Summary (10th ed) Workers' Compensation § 193.

11 Witkin Summary (10th ed) Husband and Wife § 58.

Cal. Legal Forms, (Matthew Bender) § 100.122.

Judicial Council of California Civil Jury Instructions, *CACI Nos. 1402, 1404* (Matthew Bender).

Cal Jur 3d (Rev) Alcoholic Beverages § 37, Attorneys at Law § 262, Criminal Law §§ 68 et seq., 3332-3334.

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 2125, Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions

Defending Your Client in a Misdemeanor Case (Including a DUI). CEB Action Guide, Winter 1992.

Cal Criminal Defense Prac., ch 40, "Accusatory Pleadings".

Law Review Articles:

Capital punishment. *42 ABAJ 113.*

Proposition 36 Eligibility: Are Courts and Prosecutors Following or Frustrating the Will of Voters? *36 McGeorge LR 627.*

Career Criminals Targeted: The Verdict is in, California's Three Strikes Law Proves Effective. *37 Golden Gate LR 461.*

The "three strikes" dilemma: crime reduction at any price? *36 Santa Clara LR 107.*

Specific denunciation of act as felony as modification of § 17. *11 SCLR 298.*

Where to Commit a Crime If You Can Only Spare a Few Days to Serve the Time: the Constitutionality of California's Wobbler Statutes as Applied in the State Today. *33 Southwestern U LR 497.*

Prosecutor's role in California sentencing; plea bargaining. *20 UCLA LR 1396.*

Attorney General's Opinions:

Classification of crime committed by escape from prison. *2 Ops. Cal. Atty. Gen. 351.*

Effect of commitment to Youth Authority upon reduction of punishment from felony to misdemeanor. *4 Ops. Cal. Atty. Gen. 25.*

Classification of offense of issuing bad check without previous conviction thereon. *26 Ops. Cal. Atty. Gen. 249.*

Classification of crime committed in violation of Subdivision Act. *27 Ops. Cal. Atty. Gen. 69.*

Sentence to county jail for offenses punishable in the alternative. *28 Ops. Cal. Atty. Gen. 279.*

Degree of crime on conviction, suspension of sentence, and commitment to Youth Authority. *31 Ops. Cal. Atty. Gen. 200.*

Annotations:

Power to try, in his absence, one charged with misdemeanor. *68 ALR2d 638.*

Effect of abolition of capital punishment on procedural rules governing crimes punishable by death-post-Furman decisions. *71 ALR3d 453.*

Hierarchy Notes:

Pen Code Note

NOTES OF DECISIONS 1. Generally 2. Constitutionality 3. Sentence as Determinative of Nature of Offense 4. Particular Offenses 5. Effect of Imposition of Fine or Jail Term 6. Judicial Discretion

1. Generally

Imprisonment in the state prison is provided as part of the punishment only in case of a felony, and if a fine is imposed in addition to the sentence of imprisonment, the court cannot adjudge that it be enforced by further imprisonment in the state penitentiary. *Ex parte Arras* (1889) 78 Cal 304, 20 P 683, 1889 Cal LEXIS 588.

The power to define offenses and affix penalties rests with the legislature, and if a defendant is sentenced to serve a term in state prison, the crime is a felony, otherwise a misdemeanor. *People v. Perini* (1892) 94 Cal 573, 29 P 1027, 1892 Cal LEXIS 731.

Where statute provides punishment both by fine and by imprisonment in state prison, conjunctively, crime is felony and not misdemeanor. *People v. Boren* (1903) 139 Cal 210, 72 P 899, 1903 Cal LEXIS 801.

Whether a crime is a felony or misdemeanor is determined by the punishment prescribed or inflicted in cases where the superior court is clothed with discretion to determine whether the sentence shall be executed by imprisonment either in state prison or in jail. *People v. Sacramento Butchers' Protective Asso.* (1910, Cal App) 12 Cal App 471, 107 P 712, 1910 Cal App LEXIS 332.

Under California law, all crimes are either felonies or misdemeanors and this section was enacted to provide a convenient division of crimes into the lesser and the greater, to the end that, in other legislation, the terminology and segregation provided might be taken advantage of whenever it became necessary to draw a distinction or to allow a difference between crimes of the greater and crimes of the lesser magnitude. *In re Application of Thompson* (1918, Cal App) 37 Cal App 344, 174 P 86, 1918 Cal App LEXIS 241.

This section is necessarily the gauge by which the guilt or innocence of a defendant with reference to any prior conviction of felony must be determined. *People v. Camperlingo* (1924, Cal App) 69 Cal App 466, 231 P 601, 1924 Cal App LEXIS 97.

In cases where either felony or misdemeanor punishment may be imposed for the same criminal act, the charge may be prosecuted as a felony. *People v. Collins* (1925) 195 Cal 325, 233 P 97, 1925 Cal LEXIS 375.

High and low grade misdemeanors, as such, are unknown to California law. *In re Application of Luna* (1927) 201 Cal 405, 257 P 76, 1927 Cal LEXIS 483.

Although a jail sentence might be equal to or exceed a sentence in state prison rendered upon conviction of a like offense, the one would be misdemeanor only, while the other would be a felony. *People v. Pantages* (1931) 212 Cal 237, 297 P 890, 1931 Cal LEXIS 621.

Legislature may classify crimes and prescribe severer punishment for commission of one class than for another as deterrent against commission of more heinous crimes in exercise of its police power and in protection of life and property. *People v. Smith* (1933) 218 Cal 484, 24 P2d 166, 1933 Cal LEXIS 526.

It is within function of legislature to make laws defining what breaches of public peace shall be made punishable and degrees of same crime requiring different measure of punishment. *People v. Pociask* (1939) 14 Cal 2d 679, 96 P2d 788, 1939 Cal LEXIS 373.

This section applies only to crimes under the state statutes. *Caminetti v. Imperial Mut. Life Ins. Co.* (1943, Cal App)

59 Cal App 2d 476, 139 P2d 681, 1943 Cal App LEXIS 344.

The law of the jurisdiction in which a prior offense was committed, rather than this section or former Pen C § 644 (see now Pen C § 667.7), determines whether or not a crime committed outside California is a felony or misdemeanor for purposes of impeachment. *People v. Theodore* (1953, Cal App) 121 Cal App 2d 17, 262 P2d 630, 1953 Cal App LEXIS 1304.

Rule that where language which is reasonably susceptible of two constructions is used in penal law, ordinarily that construction which is more favorable to offender will be adopted, should not be applied to change manifest, reasonable, legislative purpose, as expressed in this section, that alternatively punishable offense remains felony until pronouncement of misdemeanor sentence or, if imposition of sentence is suspended, purpose expressed by § 1203.4, read with this section, that offense remains felony until statutory rehabilitation procedure has been had, at which time defendant is restored to his former status in society insofar as state of legislation is able to do so, with one exception, namely, that record in criminal case may be used against him for limited purposes in any criminal proceeding thereafter brought against him. *People v. Banks* (1959) 53 Cal 2d 370, 1 Cal Rptr 669, 348 P2d 102, 1959 Cal LEXIS 354.

The 1959 amendment of this section, changing effect of commitment to California Youth Authority from felony to misdemeanor conviction, does not operate retroactively, and determination at subsequent trial of whether commitment to Youth Authority was felony depends on date of conviction. *People v. Tucker* (1962, Cal App 4th Dist) 209 Cal App 2d 391, 25 Cal Rptr 788, 1962 Cal App LEXIS 1698.

Court properly refused to accept defendant's offered admissions relating to prior commitments to Youth Authority prior to 1959 amendment of this section, such admissions being made without conceding that commitments were for felonies, and such court had no alternative but to proceed to trial as though issue of prior conviction had been denied where law was settled by appellate court decision that 1959 amendment had no retroactive effect. *People v. Tucker* (1962, Cal App 4th Dist) 209 Cal App 2d 391, 25 Cal Rptr 788, 1962 Cal App LEXIS 1698.

Judgment that accused minor "having been duly convicted ... of the crime of Felony ... be punished by the commitment to the California Youth Authority for term prescribed by law" is in accord with this section. *Adams v. United States* (1962, 9th Cir Ariz) 299 F2d 327, 1962 US App LEXIS 6015.

Though this section and Pen C § 1202a provide that felony is crime punishable by imprisonment in state prison, and that if judgment is for imprisonment in state prison judgment shall direct that defendant be delivered into custody of Director of Corrections at state prison, and former § 6450 (see now W & I C §§ 3000 et seq.), relating to involuntary commitment of narcotics addicts convicted of misdemeanor, provides that addict shall be delivered "to the custody of the Director of Corrections," it does not follow that person committed under former § 6450 is actually undergoing imprisonment in state prison for felony; all persons who are delivered "into the custody of the Director of Corrections" are not necessarily defendants under judgment of imprisonment in state prison. *In re De La O* (1963) 59 Cal 2d 128, 28 Cal Rptr 489, 378 P2d 793, 1963 Cal LEXIS 149, 98 ALR2d 705, cert den (1963) 374 US 856, 83 S Ct 1927, 10 L Ed 2d 1076, 1963 US LEXIS 1248.

In repealing an amendment to this section, Legislature is presumed to have known of judicial interpretation that had been placed on original wording thus reenacted. *People v. Zaccaria* (1963, Cal App 1st Dist) 216 Cal App 2d 787, 31 Cal Rptr 383, 1963 Cal App LEXIS 2083, overruled *People v. Navarro* (1972) 7 Cal 3d 248, 102 Cal Rptr 137, 497 P2d 481, 1972 Cal LEXIS 191.

Crime of which defendant was convicted prior to 1959 amendment of this section must be deemed felony where, though he was committed to Youth Authority, there was no evidence that he obtained an order determining his crime to be misdemeanor. *People v. Garcia* (1964, Cal App 2d Dist) 227 Cal App 2d 345, 38 Cal Rptr 670, 1964 Cal App LEXIS 1190, cert den (1964) 379 US 949, 85 S Ct 446, 13 L Ed 2d 546, 1964 US LEXIS 44.

Defendant was not deprived of due process and equal protection of law by refusal to apply retroactively 1959

amendment to *Pen C § 17*, deeming crime punishable by imprisonment in state prison or fine or imprisonment in county jail misdemeanor where court commits defendant to Youth Authority, since no part of Penal Code is retroactive unless expressly declared so (§ 3) and amendment to § 17 does not so declare. *People v. Aranda* (1965) 63 Cal 2d 518, 47 Cal Rptr 353, 407 P2d 265, 1965 Cal LEXIS 206, superseded by statute as stated in *People v. Fuentes* (1998, Cal App 5th Dist) 61 Cal App 4th 956, 72 Cal Rptr 2d 237, 1998 Cal App LEXIS 150, superseded by statute as stated in *Richardson v. Newland* (2004, ED Cal) 342 F Supp 2d 900, 2004 US Dist LEXIS 21901.

Section contains no language indicating that legislature intended retrospective effect be given to 1959 amendment thereto; therefore, defendant's conviction before amendment must be determined as felony or misdemeanor for purposes of habitual offender law according to statute's provision at time of his conviction. *People v. Fork* (1965, Cal App 1st Dist) 233 Cal App 2d 725, 43 Cal Rptr 804, 1965 Cal App LEXIS 1408.

The rules of construction requiring penal statutes to be interpreted to give effect to the legislative intent and to avoid absurd results make the 1963 amendment to *Pen C § 17*, enabling the court to change certain crimes from felonies to misdemeanors when judgment and/or imposition of sentence is suspended and probation granted, applicable to those on probation at the time of the effective date of the amendment. Such application is not retroactive within the meaning of *Pen C § 3*. *Meyer v. Superior Court of Sacramento County* (1966, Cal App 5th Dist) 247 Cal App 2d 133, 55 Cal Rptr 350, 1966 Cal App LEXIS 946.

When a defendant is granted probation and a sentence is actually imposed for a crime punishable by imprisonment in the State prison or in the discretion of the court by imprisonment in the county jail (*Pen C § 17*), the characterization of the crime, as a felony or misdemeanor, depends on the sentence imposed. *Meyer v. Superior Court of Sacramento County* (1966, Cal App 5th Dist) 247 Cal App 2d 133, 55 Cal Rptr 350, 1966 Cal App LEXIS 946.

Under *Pen C § 17*, prior to the 1963 amendment, when judgment and/or imposition of sentence was suspended and defendant was granted probation on being convicted of a crime punishable in the state prison or in the discretion of the court by fine or imprisonment in the county jail, the crime remained a felony unless and until, during the period of probation, the court revoked probation and imposed a fine or imprisonment in the county jail. *Meyer v. Superior Court of Sacramento County* (1966, Cal App 5th Dist) 247 Cal App 2d 133, 55 Cal Rptr 350, 1966 Cal App LEXIS 946.

The 1963 amendment to *Pen C § 17*, relating to crimes punishable in the state prison or in the discretion of the court by fine or imprisonment in the county jail, enables the court either immediately to declare the crime a misdemeanor, by exercising such discretion, or, on suspending sentence and/or imposition of punishment, to reduce it to a misdemeanor, later, without the necessity of imposing a fine or imprisonment in the county jail. *Meyer v. Superior Court of Sacramento County* (1966, Cal App 5th Dist) 247 Cal App 2d 133, 55 Cal Rptr 350, 1966 Cal App LEXIS 946.

When, under the 1963 amendment to *Pen C § 17*, a court is empowered to change a crime from a felony to a misdemeanor, it may do so after the probationary period has expired, and after the probationer has had his record expunged under *Pen C § 1203.4*, thus restoring to him the right to carry concealable weapons. *Meyer v. Superior Court of Sacramento County* (1966, Cal App 5th Dist) 247 Cal App 2d 133, 55 Cal Rptr 350, 1966 Cal App LEXIS 946.

Where a party is sentenced under *H & S C § 11501*, third paragraph, to a term of 15 years to life, and must serve 15 years before release or parole, that one of the prior convictions carried an alternative sentence of 1 year in the county jail with probation, rather than the imprisonment in the state prison, makes it nonetheless a felony and it is properly a conviction for a felony offense and a valid basis for such extended sentence. *Barbosa v. Wilson* (1967, 9th Cir Cal) 385 F2d 319, 1967 US App LEXIS 4700.

When a statute provides a choice between a county jail and a State Prison sentence, *Pen C § 17*, contemplates the authority of the trial judge, exercising his discretion, as to which is the more appropriate to a given defendant. *People v. Smith* (1968, Cal App 2d Dist) 259 Cal App 2d 868, 66 Cal Rptr 586, 1968 Cal App LEXIS 2032.

Once a trial court exercises its jurisdiction by taking action that characterizes an alternatively punishable offense as

a misdemeanor, defendant's subsequent conduct will not convert his crime to a felony so as to subject him to state imprisonment. *People v. Hannon* (1971) 5 Cal 3d 330, 96 Cal Rptr 35, 486 P2d 1235, 1971 Cal LEXIS 255.

The purpose of *Pen C* § 17, subd. (b)(4), is to vest a district attorney with the right to extend more lenient treatment to an offender by electing to have a crime, otherwise punishable as a felony or as a misdemeanor, treated as a misdemeanor for all purposes. However, that election ceases when the filing of the misdemeanor complaint is aborted by the judicial act of a dismissal order, in which case a felony complaint may be filed for the same offense. *Necochea v. Superior Court* (1972, Cal App 2d Dist) 23 Cal App 3d 1012, 100 Cal Rptr 693, 1972 Cal App LEXIS 1275.

In a prosecution on three counts relating to forgery (*Pen C* § 470 and former *Pen C* § 475a), each offense being punishable either as a felony or as a misdemeanor, the fact that the district attorney initially elected to file the complaint as a misdemeanor under *Pen C* § 17(b)(4), did not entitle the defendant, upon dismissal of that complaint in the interest of justice after arraignment but before defendant entered a plea, to dismissal of a new information charging the same offenses as felonies. *Necochea v. Superior Court* (1972, Cal App 2d Dist) 23 Cal App 3d 1012, 100 Cal Rptr 693, 1972 Cal App LEXIS 1275.

The fact that a felony charge of sale of a substance falsely represented to be a narcotic had been reduced by a magistrate to a misdemeanor did not preclude the prosecution from filing a new felony complaint charging sale of heroin, after dismissal of the original charge, where a further analysis of the substance sold indicated the presence of heroin. In adopting *Pen C* § 17(b)(5), permitting such reduction in case of a crime punishable either as a felony or a misdemeanor, the Legislature had in view the unburdening of the superior courts from cases that were likely to result in no more than misdemeanor penalties, the consequent more expeditious handling of such cases, the encouragement of guilty pleas by defendants who could know in advance that no penalty could be imposed more severe than a jail sentence or a fine, and the consequent saving of time to municipal courts by the elimination of some preliminary hearings. Dismissal of the subsequently filed felony charge would not serve any of those purposes. *People v. Ayala* (1973, Cal App 2d Dist) 34 Cal App 3d 360, 109 Cal Rptr 193, 1973 Cal App LEXIS 808.

The actions of a magistrate in suspending proceedings on a misdemeanor complaint and ordering the filing of a new felony complaint, following defendant's objection to being tried as a misdemeanant on a burglary count, did not comport with the statutory direction of *Pen C* § 17, requiring that "the [misdemeanor] complaint shall be amended to charge the felony and the case shall proceed on the felony complaint," and, when the magistrate decided to reduce the new felony complaint to a misdemeanor, his order to dismiss the new felony complaint and to resume proceedings under the original misdemeanor complaint did not comply with the requirement that "the case shall proceed as if the defendant had been arraigned on a misdemeanor complaint." *Larson v. Municipal Court* (1974, Cal App 2d Dist) 41 Cal App 3d 360, 116 Cal Rptr 1, 1974 Cal App LEXIS 795.

Under *Pen C* § 17, subd. (b)(4), providing that a crime punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, is a misdemeanor for all purposes if the prosecuting attorney files a complaint specifying that the offense is a misdemeanor without objection by the defendant, an election by the prosecutor to prosecute the offense as a misdemeanor is not conclusive, and it does not prevent dismissal of the misdemeanor complaint and initiation of a felony prosecution based on the same occurrence. *Malone v. Superior Court* (1975, Cal App 3d Dist) 47 Cal App 3d 313, 120 Cal Rptr 851, 1975 Cal App LEXIS 1024.

In providing that a crime alternatively punishable as a felony or misdemeanor shall be deemed a misdemeanor "for all purposes" when the offender is committed to the Youth Authority (*Pen C* § 17, subd. (b)(2)), the Legislature did not intend to limit the custodial period of such offender to one year or less. To conclude otherwise would be to nullify *Welf. & Inst. Code*, § 1770, providing that a youthful offender, committed to the authority upon conviction of an "alternative" offense, can be detained until his 23rd birthday and even longer if he is deemed to be a danger to the public. *People v. Edmondson* (1976, Cal App 2d Dist) 62 Cal App 3d 677, 133 Cal Rptr 297, 1976 Cal App LEXIS 1945.

The determination of whether a defendant is guilty of a misdemeanor or a felony is not a question for the jury (*Pen*

C § 17 subd (b)). *People v. Burres* (1980, Cal App 1st Dist) 101 Cal App 3d 341, 161 Cal Rptr 593, 1980 Cal App LEXIS 1401, overruled *People v. Colantuono* (1994) 7 Cal 4th 206, 26 Cal Rptr 2d 908, 865 P2d 704, 1994 Cal LEXIS 12.

In the context of a postindictment preliminary examination, pursuant to *Pen C § 17*, subd. (b)(5), a magistrate has jurisdiction to determine a felony to be a misdemeanor. *People v. Municipal Court (Kong)* (1981, Cal App 1st Dist) 122 Cal App 3d 176, 175 Cal Rptr 861, 1981 Cal App LEXIS 2012.

In a prosecution for false imprisonment, battery with serious bodily injury, and rape, the trial court did not err in denying defendant's motion to set aside the information as to the battery charge, which had not been included in the complaint filed in municipal court but was added to the information by amendment shortly before trial. Defendant was not deprived of his right under *Pen C § 17*, subd. (b), (5), to have the magistrate determine whether he should be held to answer on a felony or misdemeanor charge for the "hybrid" offense of battery. Since defendant was present at the preliminary hearing with counsel, he had notice of the potential charges he might have to face in superior court. By failing to request the magistrate to find that any battery thereafter charged against him should be charged as a misdemeanor, defendant waived any objection to the prosecutor thereafter charging him with felony battery in superior court. *People v. Manning* (1982, Cal App 5th Dist) 133 Cal App 3d 159, 183 Cal Rptr 727, 1982 Cal App LEXIS 1705.

Upon defendant's motion to reduce a charge of felonious burglary (*Pen C § 459*) to a misdemeanor pursuant to *Pen C § 17*, the magistrate erred in inquiring whether defendant would plead guilty to the misdemeanor and in giving consideration to his response in exercising his discretion to deny the motion; consequently, the trial court erred in denying defendant's subsequent motion to set aside the information. *Hartman v. Superior Court* (1982, Cal App 5th Dist) 135 Cal App 3d 205, 185 Cal Rptr 182, 1982 Cal App LEXIS 1896.

A defendant is not discharged from the Youth Authority until he completes his parole, for purposes of *Pen C § 17*, subd. (c), providing that an offense resulting in a commitment to the Youth Authority shall be deemed a misdemeanor upon the discharge of defendant. Therefore, in a prosecution for grand theft and other offenses, the trial court did not err in permitting the prosecutor to use an adult forgery conviction resulting in defendant's commitment to the Youth Authority to impeach him, even though he had been released from the Youth Authority at the time of trial, where he was still on parole and was thus subject to the control of the Authority. *People v. Seaton* (1983, Cal App 3d Dist) 146 Cal App 3d 67, 194 Cal Rptr 33, 1983 Cal App LEXIS 2052.

The provision in *Pen C § 17*, subd. (c), reducing an offense to a misdemeanor upon a defendant's discharge from the Youth Authority is not applicable to a dishonorable discharge. A statute cannot be given its literal meaning if the result would be absurd, and allowing the statute to apply to a dishonorable discharge would pervert the rehabilitative principles on which it is grounded. *People v. Goodner* (1990, Cal App 6th Dist) 226 Cal App 3d 609, 276 Cal Rptr 542, 1990 Cal App LEXIS 1341, review denied (1991, Cal) 1991 Cal LEXIS 1165.

In a prosecution for felony sexual battery by restraint (*Pen C § 243.4*, subd. (a)) and felony false imprisonment by violence, menace, fraud, or deceit (*Pen C §§ 236, 237*), the magistrate at the preliminary hearing acted in excess of her authority under *Pen C § 17*, subd. (b)(5) (reduction of felony-misdemeanor ['wobbler'] to misdemeanor), in ordering both charges reduced to misdemeanors. *Pen C § 17*, subd. (b)(5), does not authorize a magistrate to reduce a straight felony to a misdemeanor, nor is that power found in any other statute. Although *Pen C § 243.4*, subd. (a), is a 'wobbler' and the magistrate could have reduced the charge to misdemeanor sexual battery, she purported to reduce the offense to a different crime, simple battery (*Pen C § 242*), which was beyond the power conferred by *Pen C § 17*, subd. (b)(5). False imprisonment under *Pen C §§ 236* and *237*, is not a 'wobbler,' and the court had no discretion to treat it as a misdemeanor. *People v. Superior Court (Feinstein)* (1994, Cal App 2d Dist) 29 Cal App 4th 323, 34 Cal Rptr 2d 503, 1994 Cal App LEXIS 1049, modified (1994, Cal App 2d Dist) 30 Cal App 4th 470a.

A superior court judge, acting as a municipal court magistrate, erred in granting defendant's motion under *Pen C § 17*, subd. (b)(5), to reduce a felony burglary charge to a misdemeanor, where that judge had previously held defendant

to answer within the meaning of *Pen C § 872*. *Pen C § 17*, subd. (b)(5), gives the magistrate the authority to reduce a felony at the preliminary hearing or prior to the filing of an order pursuant to *Pen C § 872*. After defendant was held to answer, an information charging a felony offense was later filed, vesting jurisdiction in the superior court. Thus, the case was properly before the superior court, and therefore the municipal court and its magistrates had no jurisdiction over the charges. *Pen C § 17*, subd. (b)(5), was not applicable, and the events had not yet occurred to trigger the superior court's authority to consider reduction to a misdemeanor under *Pen C § 17*. Also, the prosecution did not waive the issue by failing to object, since lack of jurisdiction is not waived and may be raised at any time. *People v. Silva* (1995, *Cal App 4th Dist*) 36 *Cal App 4th* 231, 43 *Cal Rptr 2d* 8, 1995 *Cal App LEXIS* 592.

In a prosecution for receiving stolen property (*Pen C § 496*, subd. (a)), a "wobbler" offense, in which a prior serious felony conviction was alleged, because the trial court exercised its discretion under *Pen C § 17*, subd. (b)(3), to reduce the current offense from a felony to a misdemeanor when granting probation at the initial sentencing, its authority was not superseded by the three strikes law (*Pen C § 667*). *Pen C § 17*, is sui generis and specifically leaves the determination of the nature of the current wobbler conviction to the discretion of the judge to be determined at sentencing. The three strikes law does not nullify that statutory authority and procedure for wobblers by automatically creating a new straight felony when qualifying priors are found true. Although such an interpretation may be harmonious with the legislative intent in enacting the law, it ignores the plain language of the statute, which makes it clear that the current conviction must be a felony to trigger application of the three strikes law. Moreover, it must be presumed that the Legislature was clearly aware of the court's powers under *Pen C § 17*, subd. (b), when it enacted the three strikes law. Thus, the Legislature in enacting that law did not intend to abrogate the trial judge's long-standing powers under *Pen C § 17*, subd. (b)(1) (wobbler as misdemeanor based on punishment), and did not intend to supersede the court's authority under *Pen C § 17*, subd. (b)(3), to determine whether a wobbler should be reduced to a misdemeanor when such authority is exercised at the initial sentencing. *People v. Superior Court (Perez)* (1995, *4th Dist*) 38 *Cal App 4th* 347, 45 *Cal Rptr 2d* 107, 1995 *Cal App LEXIS* 899.

Because provisions of the three strikes law specifically include within the definition of prior felony convictions those in which imposition of sentence or judgment has been suspended, execution of sentence has been stayed, or the defendant has been committed to specified institutions other than state prison (*Pen C § 667*, subd. (d)(1)(A)-(D)), at a minimum, the intent of the Legislature concerning the continued viability of the trial court's use of at least *Pen C § 17*, subd. (b)(3) (reduction of "wobbler" offense to misdemeanor when granting probation), is in question, is ambiguous, and should be construed as favorably to the defendant as reasonably possible considering the language and the circumstances. Therefore, such limiting language in *Pen C § 667*, subd. (d)(1), must be construed to merely nullify the portion of a court's power under *Pen C § 17*, subd. (b)(3), that previously could be exercised after the initial sentencing to reduce a felony to a misdemeanor. This interpretation is consistent with the Legislature's intent to impose longer prison terms for those more serious repeat offenders who commit a new crime which is serious enough to be classified a felony at the initial sentencing hearing. *People v. Superior Court (Perez)* (1995, *4th Dist*) 38 *Cal App 4th* 347, 45 *Cal Rptr 2d* 107, 1995 *Cal App LEXIS* 899.

Although the three strikes law (*Pen C § 667*, subds. (b)-(i)) does not abrogate the discretion of trial courts to declare "wobbler" offenses to be misdemeanors under *Pen C § 17*, subd. (b)(1), the trial court abused its discretion based on the manner in which it declared defendant's offenses of second degree commercial burglary and petty theft with a prior theft-related conviction to be misdemeanors rather than felonies. The choice between a felony and a misdemeanor under *Pen C § 17*, subd. (b)(1), is dependent on a determination by the official who, at the particular time, possesses knowledge of the special facts of the individual case and may, therefore, intelligently exercise the legislatively granted discretion. In this case, the trial court's discretion was guided solely by the trial judge's personal antipathy for the effect that the three strikes law would have on defendant, who had been caught shoplifting three bottles of liquor in the present case, and had three prior felony convictions. Although the court was aware of defendant's background and the nature of his present offenses, these considerations were shunted into the background in an effort to avoid the court's otherwise clear expression that a felony sentence was appropriate. Thus, in order to escape the consequences of the three strikes law at any price, the trial court impermissibly reasoned backwards from the sentence it wished to avoid to the only

available alternative. A sentence based on such an approach constitutes a failure to exercise discretion as required by the law. *People v. Dent* (1995, Cal App 2d Dist) 38 Cal App 4th 1726, 45 Cal Rptr 2d 746, 1995 Cal App LEXIS 995.

Pen C § 17, subd. (b)(4), provides that when a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes when the prosecuting attorney files in a court having jurisdiction over misdemeanor offenses a complaint specifying that the offense is a misdemeanor. The purpose of this provision is to permit the selection of offenders who merit more lenient treatment, to encourage guilty pleas by limiting the potential penalty, and to save court time and expense. *County of Los Angeles v. Civil Service Com.* (1995, Cal App 2d Dist) 39 Cal App 4th 620, 46 Cal Rptr 2d 256, 1995 Cal App LEXIS 1034, review denied (1996, Cal) 1996 Cal LEXIS 1145.

A magistrate properly concluded he was not permitted to exercise his discretion a second time under *Pen C* § 17, subd. (b)(5), to reduce a felony charge brought under a "wobbler" statute (*Pen C* § 646.9, subd. (a) [stalking]) to a misdemeanor, after the case had been returned to him by the superior court via an order, issued under *Pen C* § 871.5, reinstating as a felony the wobbler count previously dismissed by the magistrate at the preliminary hearing under *Pen C* § 871. Thus, after the magistrate refused to consider reducing the felony charge to a misdemeanor the second time the matter was before him, and defendant was arraigned on the charge in superior court, the superior court erred in dismissing the felony under *Pen C* § 995, on the ground that a denial of a substantial right occurred as a result of the magistrate's refusal. The magistrate had considered the *Pen C* § 17, subd. (b)(5), option in the first instance, and he decided to dismiss the pertinent charge entirely. After the superior court remanded the case pursuant to *Pen C* § 871.5, the magistrate was not entitled to yet another "exercise of discretion" under *Pen C* § 17, subd. (b)(5). This was particularly so in view of the fact that the superior court reviewed the magistrate's original order of discharge under *Pen C* § 871.5, and determined that the charge should be reinstated as a felony. As a consequence of the resulting order, it was no longer within the magistrate's power to reduce the felony charge to a misdemeanor. His authority was then simply to issue the holding order under *Pen C* § 872. *People v. Draper* (1996, Cal App 1st Dist) 42 Cal App 4th 1627, 50 Cal Rptr 2d 335, 1996 Cal App LEXIS 174.

Because *Pen C* § 290, subd. (g)(2), failure to register as a sex offender, defines an offense which may alternatively be punished as either a felony or a misdemeanor, and *Pen C* § 17, defines an offense as a felony or a misdemeanor based on the punishment authorized in the statute, the trial court imposed an authorized sentence when it sentenced defendant to county jail for violation of the statute. Prior to the 1995 amendment to *Pen C* § 290, failing to register as a sex offender was exclusively a misdemeanor, and the motivation for the change appears to have been to increase registration and promote the prosecution of offenders, rather than limit a sentencing judge's discretion. The trial court's authority to exercise discretion under *Pen C* § 17, was not abrogated by the "three strikes" law (*Pen C* § 1170.12). Since the sentence was authorized, and the People did not object to it, any claim of error on appeal was waived. *People v. Carranza* (1996, Cal App 6th Dist) 51 Cal App 4th 528, 59 Cal Rptr 2d 134, 1996 Cal App LEXIS 1142, review denied (1997, Cal) 1997 Cal LEXIS 1397.

Prior convictions that subject a defendant to the sentencing provisions of the three strikes law (*Pen C* § 667, subds. (b)-(i)) do not preclude a trial court from reducing a current wobbler offense originally charged as a felony either by imposing a misdemeanor sentence (*Pen C* § 17, subd. (b)(1)), or by declaring it a misdemeanor upon a grant of probation (*Pen C* § 17, subd. (b)(3)). Both versions of the three strikes law specifically acknowledge that wobblers classified as misdemeanors at the time of the initial sentencing do not trigger increased penalties (*Pen C* §§ 667, subd. (d)(1), 1170.12, subd. (b)(1)). Until the trial court pronounces sentence on the new offense, it cannot be determined if a predicate current felony exists for application of the three strikes law; where the trial court has exercised its discretion to impose a punishment other than imprisonment in state prison, which by operation of law renders the conviction a misdemeanor, the three strikes law is not triggered. The same rationale applies to a grant of probation pursuant to *Pen C* § 17, subd. (b)(3). Although presumptively aware of preexisting law, including *Pen C* § 17, subd. (b)(1) & (3), neither the Legislature nor the electorate specifically limited the court's power under these provisions in regard to determining the nature of the current conviction in the three strikes law. While in many instances the three strikes law was intended to restrict courts' discretion in sentencing repeat offenders, it left *Pen C* § 17, subd. (b), undisturbed. *People v. Superior*

Court (Alvarez) (1997) 14 Cal 4th 968, 60 Cal Rptr 2d 93, 928 P2d 1171, 1997 Cal LEXIS 7, rehearing denied (1997, Cal) 1997 Cal LEXIS 1229.

The prosecutor's unreviewable discretion to charge a wobbler offense as a felony or misdemeanor differs significantly from the trial court's authority to sentence a wobbler as a felony or misdemeanor under *Pen C § 17(b)*. The action of a district attorney in filing an information is not in any way an exercise of a judicial power or function. The initial determination of the charge to be filed relates only to what is clearly the province of the public prosecutor historically, i.e., the discretion whether or not to prosecute. By contrast, the trial court's sentencing function becomes operative only when the prosecutor has made that charging decision. Nor is the separation of powers doctrine implicated, because review of a trial court's exercise of discretion pursuant to § 17(b) does not involve the prosecutor's consent to the disposition of a criminal charge pending before the court. Rather, any finding of abuse is a further exercise of judicial power by the appellate court. *People v. Superior Court (Alvarez) (1997) 14 Cal 4th 968, 60 Cal Rptr 2d 93, 928 P2d 1171, 1997 Cal LEXIS 7, rehearing denied (1997, Cal) 1997 Cal LEXIS 1229.*

Read in conjunction with the relevant charging statute, the decision whether to reduce a wobbler offense at sentencing to a misdemeanor under *Pen C § 17(b)*, rests solely in the discretion of the court. By its terms, the statute sets a broad generic standard. Since all discretionary authority is contextual, those factors that direct similar sentencing decisions are relevant, including the nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, or the defendant's traits of character as evidenced by his or her behavior and demeanor at the trial. When appropriate, judges should also consider the general objectives of sentencing, such as those set forth in former CRC Rule 410 (see now *CRC Rule 4.410*). A determination made outside the perimeters drawn by individualized consideration of the offense, the offender, and the public interest exceeds the bounds of reason. *People v. Superior Court (Alvarez) (1997) 14 Cal 4th 968, 60 Cal Rptr 2d 93, 928 P2d 1171, 1997 Cal LEXIS 7, rehearing denied (1997, Cal) 1997 Cal LEXIS 1229.*

The fact that a wobbler offense originated as a three strikes filing owing to a defendant's prior serious felony convictions (*Pen C § 667(b)-(i)*) will not invariably or inevitably militate against reducing the charge to a misdemeanor at the time of sentencing pursuant to *Pen C § 17(b)*. Nevertheless, the current offense cannot be considered in a vacuum; given the public safety considerations underlying the three strikes law, the record should reflect a thoughtful and conscientious assessment of all relevant factors, including the defendant's criminal history. Furthermore, in evaluating the severity of a three strikes sentence relative to the gravity of the charge, the court must remain cognizant that the present violation of law only triggers the mandated penalty, which ultimately is the consequence of both that offense and the defendant's recidivist status. The determination to reduce a wobbler under *Pen C § 17(b)*, can be properly made only when the sentencing court focuses on considerations that are pertinent to the specific defendant being sentenced, not an aversion to a particular statutory scheme; the record must demonstrate a reasoned consideration. *People v. Superior Court (Alvarez) (1997) 14 Cal 4th 968, 60 Cal Rptr 2d 93, 928 P2d 1171, 1997 Cal LEXIS 7, rehearing denied (1997, Cal) 1997 Cal LEXIS 1229.*

In a prosecution for possession of methamphetamine (*H & S C § 11377(a)*), where defendant, by virtue of his admitted four prior serious felony convictions, was subject to the sentencing provisions of the three strikes law (*Pen C § 667(b)-(i)*), the trial court did not abuse its discretion at sentencing when it reduced defendant's current offense to a misdemeanor pursuant to *Pen C § 17(b)*, and placed defendant on probation. The standard in reviewing such an exercise of discretion is extremely deferential and restrained. Notwithstanding defendant's recidivist status (four residential burglaries which he apparently committed to support a drug habit), the balance of other factors warranted reduction of the charge: defendant cooperated with law enforcement, his burglary priors were relatively old and did not involve violence, and the trial court observed his demeanor during the course of the trial, including his testimony he had been caring for a disabled friend when he was stopped and the drugs were discovered. Furthermore, the record did not evidence a purposeful intent to evade a three strikes sentence solely because of personal antipathy to the law on the part of the trial court. *People v. Superior Court (Alvarez) (1997) 14 Cal 4th 968, 60 Cal Rptr 2d 93, 928 P2d 1171, 1997 Cal LEXIS 7, rehearing denied (1997, Cal) 1997 Cal LEXIS 1229.*

A trial court's authority under *Pen C § 17(b)*, to declare "wobbler" offenses to be misdemeanors was not abrogated by the three strikes law (*Pen C § 667(b)-(i)*). *People v. Bishop* (1997, Cal App 2d Dist) 56 Cal App 4th 1245, 66 Cal Rptr 2d 347, 1997 Cal App LEXIS 624.

The trial court properly determined that defendant's qualifying prior felony conviction as a juvenile was a strike under the three strikes law (*Pen C § 667(b)-(i)*), even though the felony was later reduced to a misdemeanor pursuant to *Pen C § 17(c)* (when defendant convicted of "wobbler" is discharged from Youth Authority, offense shall thereafter be deemed a misdemeanor for all purposes). *Pen C § 667(d)(1)*, a later-enacted statute, makes clear, "notwithstanding any other law," that the word "conviction" in the three strikes law has the narrow meaning of a verdict or guilty plea and is not affected by later events. The phrase "notwithstanding any other law," is a "term of art" expressing a legislative intent to have the specific statute control despite the existence of other law that might otherwise govern. Moreover, where two statutes addressing the same subject are irreconcilable, the later in time will prevail over the earlier. Although the three strikes law did not override a trial court's *Pen C § 17(b)*, discretion to sentence a "wobbler" as a misdemeanor or as a felony, the express language of *Pen C § 667(d)(1)*, establishes the Legislature did intend that it prevail over *Pen C § 17*, subd. (c), in determining whether a prior conviction qualifies as a strike. *People v. Franklin* (1997, Cal App 5th Dist) 57 Cal App 4th 68, 66 Cal Rptr 2d 742, 1997 Cal App LEXIS 651, rehearing denied (1997, Cal App 5th Dist) 57 Cal App 4th 1138, 1997 Cal App LEXIS 727, review denied (1997, Cal) 1997 Cal LEXIS 8305.

Magistrate's reduction of a felony charge to a misdemeanor, pursuant to *Pen C § 17(b)(5)*, is not a dismissal under *Pen C § 871*. *Pen C § 871.5* specifically references several dismissal statutes, but does not list *Pen C § 17(b)(5)* reductions as a basis for the motion; therefore, such action is not properly the subject of a motion for reinstatement of a felony complaint. *People v. Williams* (2003, Cal App 4th Dist) 105 Cal App 4th 1329, 130 Cal Rptr 2d 234, 2003 Cal App LEXIS 147, rehearing denied (2003, Cal App 4th Dist) 2003 Cal App LEXIS 286, review gr, unpublished (2003, Cal) 134 Cal Rptr 2d 51, 68 P3d 344, 2003 Cal LEXIS 3011, affd in part and revd in part, superseded (2005) 35 Cal 4th 817, 28 Cal Rptr 3d 29, 110 P3d 1239, 2005 Cal LEXIS 5038.

Pen C § 1238 does not provide for appellate review of the magistrate's order reducing a wobbler felony charge to a misdemeanor pursuant to *Pen C § 17(b)(5)*. *People v. Williams* (2003, Cal App 4th Dist) 105 Cal App 4th 1329, 130 Cal Rptr 2d 234, 2003 Cal App LEXIS 147, rehearing denied (2003, Cal App 4th Dist) 2003 Cal App LEXIS 286, review gr, unpublished (2003, Cal) 134 Cal Rptr 2d 51, 68 P3d 344, 2003 Cal LEXIS 3011, affd in part and revd in part, superseded (2005) 35 Cal 4th 817, 28 Cal Rptr 3d 29, 110 P3d 1239, 2005 Cal LEXIS 5038.

Defendant's prior state conviction for assault with a deadly weapon was not a misdemeanor for purposes of federal law and could serve as a predicate conviction. The prior conviction was a felony. *United States v. Qualls* (1997, 9th Cir Cal) 108 F3d 1019, 1997 US App LEXIS 3785.

Trial court, with the consent of the accused and over the objection of the prosecutor, was not authorized by statute, *Pen C § 17(d)*, to reduce a misdemeanor charge of petty theft under *Pen C § 484(a)*, to an infraction; the appellate court concluded that the California Legislature had not intended to add petty theft to the list of misdemeanors that the trial court could reduce to an infraction. *People v. Campbell* (2002, Cal Super Ct) 104 Cal App 4th Supp 1, 129 Cal Rptr 2d 601, 2002 Cal App LEXIS 5224.

On petitioner inmate's convictions under *Pen C §§ 473, 496(a)*, for forgery and possession of stolen property, which were "wobbler" crimes under *Pen C § 17(b)*, counsel was not ineffective for not filing a motion to reduce the charges to misdemeanors because, even if such a motion had been filed, given the inmate's criminal history, and the nature and circumstances in which the current offenses were committed, the motion would likely have been denied; habeas relief was denied. *Cuong Van Nguyen v. Knowles* (2004, ND Cal) 2004 US Dist LEXIS 7317.

In a driving-under-the-influence (DUI) case, felony prosecution was not barred after the State discovered that defendant had a third prior DUI offense and dismissed a misdemeanor charge of the same offense. Categorizing the crime for purposes of a one-dismissal or two-dismissal rule hinged on the seriousness of the current charge, not the

charge dismissed; thus two previous dismissals of charges for the same offense were required to bar a new felony charge. *Burris v. Superior Court* (2005) 34 Cal 4th 1012, 22 Cal Rptr 3d 876, 103 P3d 276, 2005 Cal LEXIS 15.

People could not appeal a magistrate's determination under *Pen C § 17(b)(5)* that wobbler offenses charged as felonies were misdemeanors by bringing a motion to reinstate a felony complaint under *Pen C § 871.5*; although the superior court's denial of the People's motion to reinstate the felony complaint was appealable, the appeal was without merit because the superior court could not properly review, under § 871.5, the magistrate's determination that the wobbler offenses charged as felonies were misdemeanors. *People v. Williams* (2005) 35 Cal 4th 817, 28 Cal Rptr 3d 29, 110 P3d 1239, 2005 Cal LEXIS 5038, rehearing denied (2005, Cal) 2005 Cal LEXIS 7296.

Term "any crime" in *Pen C § 182*, for the purposes of California conspiracy law, means a crime as defined by the law of California and not by another jurisdiction. The vicarious liability doctrine applicable to conspiracies exists to extend the liability of those who are guilty of conspiracies to commit California crimes and not to commit federal crimes, and it would be odd for a defendant to be vicariously liable for a serious California crime based on an agreement that is not criminal under *California law*. *People v. Zacarias* (2007, 4th Dist) 2007 Cal App LEXIS 1988.

2. Constitutionality

The classification of felonies and misdemeanors made by this section does not violate any constitutional provision. *People v. Dawson* (1930) 210 Cal 366, 292 P 267, 1930 Cal LEXIS 396.

Former Veh C § 500 did not unlawfully delegate legislative authority to a trial judge to transform a felony to a misdemeanor merely because it granted a discretion to punish the offense by imprisonment in either the state prison or the county jail, since this section contemplated the exercise of that discretion. *People v. Pryor* (1936, Cal App) 17 Cal App 2d 147, 61 P2d 773, 1936 Cal App LEXIS 540.

The fixing of penalties for a crime is a legislative function. What constitutes an adequate penalty is a matter of legislative judgment and discretion, and the courts will not interfere therewith unless the penalty prescribed is clearly and manifestly cruel and unusual. *In re Anderson* (1968) 69 Cal 2d 613, 73 Cal Rptr 21, 447 P2d 117, 1968 Cal LEXIS 268, cert den (1972) 406 US 971, 32 L Ed 2d 671, 92 S Ct 2415, 1972 US LEXIS 2371.

Pen C § 17(b)(5), violates the doctrine of separation of powers set forth in *Cal Const Art III, § 1*, insofar as the statute requires the consent of the prosecutor before a magistrate may exercise the power to determine that a charged offense is to be tried as a misdemeanor. *Esteybar v. Municipal Court for Long Beach Judicial Dist.* (1971) 5 Cal 3d 119, 95 Cal Rptr 524, 485 P2d 1140, 1971 Cal LEXIS 241.

Pen C § 17(b)(4), which requires the consent of a defendant to an order of a committing magistrate reducing a felony offense to a misdemeanor, is valid and enforceable and is not unconstitutional as violating the concept of separation of powers. The advantage to a defendant of the speedier review of a municipal court-magisterial determination of the factual basis for a charge prosecuted as a felony, by two and perhaps three levels of judicial authority, is of enough importance that he cannot be deprived of that right over his objection. Thus, defendant was entitled to a writ of prohibition barring a municipal court from proceeding with a misdemeanor prosecution of a burglary charge where he did not consent to the reduction of the charge from a felony. *Larson v. Municipal Court* (1974, Cal App 2d Dist) 41 Cal App 3d 360, 116 Cal Rptr 1, 1974 Cal App LEXIS 795.

Pen C § 17(b)(5), providing that an offense punishable as a misdemeanor or a felony is a misdemeanor for all purposes if a magistrate determines "with the consent of the prosecuting attorney and the defendant," that it is a misdemeanor, is unconstitutional insofar as it requires the consent of the prosecutor before a magistrate may exercise the power to determine that a charged offense is to be tried as a misdemeanor. Since the exercise of a judicial power may not be conditioned on the approval of either the executive or legislative branches of government, requiring the district attorney's consent violates the doctrine of separation of powers. *Malone v. Superior Court* (1975, Cal App 3d

Dist) 47 Cal App 3d 313, 120 Cal Rptr 851, 1975 Cal App LEXIS 1024.

The constitutional sanctions against ex post facto laws (*U.S. Const. Art. I, § 9, cl. 3; Cal Const Art I, § 9*) were violated by Stats. 1976, ch. 1070, § 7, whereunder persons committed to the Youth Authority before its effective date, on conviction of crimes alternatively punishable as misdemeanors or felonies, were rendered subject to the 1976 amendment to *Pen C § 17(b)(2)*. Under this amendment, the provision that such a crime was a misdemeanor for all purposes "When the court commits the defendant to the Youth Authority" was altered to "When the court, upon committing the defendant to the Youth Authority, designates the offense to be a misdemeanor," thereby, in the absence of such designation, extending such a defendant's maximum custodial period by two years by virtue of *W & I C § 1771* (discharge on 25th birthday after conviction of a felony) and of *W & I C § 1770* (discharge on 23rd birthday after conviction of a misdemeanor). *In re Dewing* (1977) 19 Cal 3d 54, 136 Cal Rptr 708, 560 P2d 375, 1977 Cal LEXIS 116.

3. Sentence as Determinative of Nature of Offense

Some offenses may be punished either as felonies or as misdemeanors, and in such cases punishment inflicted must determine grade of offense, and right of appeal depends on nature and extent of punishment. *People v. Cornell* (1860) 16 Cal 187, 1860 Cal LEXIS 204.

Under the Criminal Practices Act, any offense punishable by death or imprisonment in a state prison was a felony and any offense for which that grade of punishment could not in any circumstances be inflicted was a misdemeanor. *People v. War* (1862) 20 Cal 117, 1862 Cal LEXIS 21.

A misdemeanor is an act or omission for which punishment, other than death or imprisonment in state prison, is provided by statute. *Pillsbury v. Brown* (1874) 47 Cal 477, 1874 Cal LEXIS 37.

Whether a crime is a felony depends upon the punishment. *People v. Smith* (1904) 143 Cal 597, 77 P 449, 1904 Cal LEXIS 865; *People v. Bigelow* (1928, Cal App) 94 Cal App 28, 270 P 460, 1928 Cal App LEXIS 520.

Misdemeanors are not defined as being punishable by fine or imprisonment in jail, but are those offenses for which penalty imposed is other than death or imprisonment in state prison. *Union Ice Co. v. Rose* (1909, Cal App) 11 Cal App 357, 104 P 1006, 1909 Cal App LEXIS 143.

An offense punishable by imprisonment in the state prison is a felony. *People v. Barnard* (1923, Cal App) 63 Cal App 562, 219 P 756, 1923 Cal App LEXIS 350.

The phrase "punishable by imprisonment in the state prison" implies an imprisonment expressly authorized by law, either by directly providing for imprisonment in such prison as a punishment for the commission of a particular offense or by denominating the offense a felony and providing generally for such imprisonment of those convicted of felonies for which a punishment is not prescribed. *In re Application of Humphrey* (1923, Cal App) 64 Cal App 572, 222 P 366, 1923 Cal App LEXIS 276.

Any offense punishable by death or imprisonment in state prison is a felony. *People v. Collins* (1925) 195 Cal 325, 233 P 97, 1925 Cal LEXIS 375.

Under a statute omitting to declare the offense therein defined to be a felony and which does not provide punishment by incarceration in state prison, only misdemeanor punishment can be imposed. *In re Application of Wilson* (1925) 196 Cal 515, 238 P 359, 1925 Cal LEXIS 336.

Where the offense was such that the defendant might have been punished either by imprisonment in state prison or county jail or by fine or by both fine and imprisonment, and the sentence provided that he be confined in state prison until discharged according to law, the effect of this section is that he must be deemed to have been convicted of a

felony, notwithstanding that his offense would have been reduced to misdemeanor if the judgment had imposed a punishment other than imprisonment in the state prison. *Frankfort v. Superior Court of California* (1925, Cal App) 71 Cal App 357, 235 P 60, 1925 Cal App LEXIS 603.

A defendant cannot complain that the jury classed the offense of which he was found guilty as a felony where they recommended, and the court administered, a jail term. *People v. Ray* (1928, Cal App) 92 Cal App 417, 268 P 382, 1928 Cal App LEXIS 916.

A prior conviction of an offense punishable in this state as a felony is for a felony notwithstanding such conviction was under a federal statute and the defendant was sentenced to imprisonment in a federal penitentiary. *People v. Bigelow* (1928, Cal App) 94 Cal App 28, 270 P 460, 1928 Cal App LEXIS 520.

If 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. *In re Rosencrantz* (1931) 211 Cal 749, 297 P 15, 1931 Cal LEXIS 755; *People v. Brown* (1942, Cal App) 52 Cal App 2d 428, 126 P2d 406, 1942 Cal App LEXIS 298.

Where upon revocation of probation after a plea of guilty to offenses amounting to felony the court imposed a jail term, it made the offenses misdemeanors. *People v. Lippner* (1933) 219 Cal 395, 26 P2d 457, 1933 Cal LEXIS 403.

The characterization given to a penalized act by the legislature is immaterial in determining whether it is a felony or misdemeanor since the sole test is the nature and extent of the punishment imposed. *People v. Trimble* (1936, Cal App) 18 Cal App 2d 350, 63 P2d 1173, 1936 Cal App LEXIS 217.

A crime which may be punished by imprisonment in the state prison is deemed a felony, unless the court in its discretion imposes a fine or jail sentence. *In re Application of Rogers* (1937, Cal App) 20 Cal App 2d 397, 66 P2d 1237, 1937 Cal App LEXIS 814.

An information charging petty theft need not include the designation of felony or misdemeanor where the nature of the offense may not be determined until sentence is pronounced. *People v. Brown* (1942, Cal App) 52 Cal App 2d 428, 126 P2d 406, 1942 Cal App LEXIS 298.

One convicted of a crime made punishable by imprisonment either in state prison or county jail and who has received a jail sentence is serving sentence for a misdemeanor at the time of his escape. *People v. Wilson* (1943, Cal App) 59 Cal App 2d 610, 139 P2d 673, 1943 Cal App LEXIS 361.

In interpretation of this section, as applied to crime which is punishable either as felony or misdemeanor charge stands as felony for every purpose up to judgment, and if judgment be felonious in that event it is felony after as well as before judgment, but if judgment is for misdemeanor it is deemed misdemeanor for all purposes thereafter, judgment not to have retroactive effect. *People v. Banks* (1959) 53 Cal 2d 370, 1 Cal Rptr 669, 348 P2d 102, 1959 Cal LEXIS 354.

Where crime is punishable either as felony or misdemeanor, such as assault with deadly weapon, it is only after judgment imposing punishment other than imprisonment in state prison that this type of case is reduced from felony to misdemeanor. *People v. Smith* (1961, Cal App 1st Dist) 195 Cal App 2d 735, 16 Cal Rptr 12, 1961 Cal App LEXIS 1515.

In determining at trial whether defendant was previously convicted of felony or misdemeanor, date of previous conviction is determinative. *People v. Ramsey* (1962, Cal App 1st Dist) 202 Cal App 2d 856, 21 Cal Rptr 406, 1962 Cal App LEXIS 2553, overruled *People v. Navarro* (1972) 7 Cal 3d 248, 102 Cal Rptr 137, 497 P2d 481, 1972 Cal LEXIS 191.

Offense punishable either as felony or misdemeanor is felony unless and until another punishment is imposed, and

where imposition of sentence is deferred, as by granting of probation, offense remains felony. *People v. Zaccaria* (1963, Cal App 1st Dist) 216 Cal App 2d 787, 31 Cal Rptr 383, 1963 Cal App LEXIS 2083, overruled *People v. Navarro* (1972) 7 Cal 3d 248, 102 Cal Rptr 137, 497 P2d 481, 1972 Cal LEXIS 191.

Offense that is punishable by imprisonment or confinement in the state prison or the county jail is and remains felony until court sentences defendant to lesser punishment. *People v. Finley* (1963, Cal App 2d Dist) 219 Cal App 2d 330, 33 Cal Rptr 31, 1963 Cal App LEXIS 2378, cert den (1964) 377 US 912, 12 L Ed 2d 181, 84 S Ct 1174, 1964 US LEXIS 1477.

It was improper for superior court to impose on defendant punishment for felony, after plea of guilty to misdemeanor, based on his previous conviction for issuing fraudulent check under § 476a, where information charged only misdemeanor of issuing check not in excess of \$50 and where judge, in imposing sentence, acted on probation reports disclosing previous offense which did not give defendant opportunity to dispute such additional facts. *People v. Smith* (1964, Cal App 2d Dist) 231 Cal App 2d 140, 41 Cal Rptr 661, 1964 Cal App LEXIS 788.

Felony is crime "punishable" by state prison sentence, and not one "punished" by such sentence. *Burr v. Immigration & Naturalization Service* (1965, 9th Cir) 350 F2d 87, 1965 US App LEXIS 4751, cert den (1966) 383 US 915, 86 S Ct 905, 15 L Ed 2d 669, 1966 US LEXIS 2293.

Character of crime that may be either felony or misdemeanor, depending on punishment imposed (*Pen C § 17*), is determined for all purposes, including impeachment, by punishment specified by sentence, and it was not error to impeach defense witness by showing conviction of such crime where no sentence was imposed, since under such circumstance offense remained felony. *People v. Samarjian* (1966, Cal App 2d Dist) 240 Cal App 2d 13, 49 Cal Rptr 180, 1966 Cal App LEXIS 1311.

If an offense is punishable either as a felony by imprisonment in the state prison, or as a misdemeanor by imprisonment in the county jail, it is deemed felony for all purposes up to the imposition of sentence. *Barker v. California-Western States Life Ins. Co.* (1967, Cal App 5th Dist) 252 Cal App 2d 768, 61 Cal Rptr 595, 1967 Cal App LEXIS 1567, cert den (1968) 390 US 922, 88 S Ct 855, 19 L Ed 2d 982, 1968 US LEXIS 2581.

Where an offense is alternatively a felony or misdemeanor, depending on the sentence, and the court suspends the pronouncement of judgment or imposition of sentence and grants probation, the offense is regarded a felony for all purposes until judgment or sentence, and if no judgment is pronounced, it remains a felony; spending a part of a probation period in a county jail is but a condition of probation and is not a sentence within the meaning of *Pen C § 17*. *People v. Esparza* (1967, Cal App 5th Dist) 253 Cal App 2d 362, 61 Cal Rptr 167, 1967 Cal App LEXIS 2355, cert den (1968) 390 US 968, 88 S Ct 1082, 19 L Ed 2d 1174, 1968 US LEXIS 2485.

Unless and until a misdemeanor sentence is imposed, the conviction for an offense alternatively punishable as a misdemeanor or a felony, remains a felony for all purposes. *People v. Bozigian* (1969, Cal App 2d Dist) 270 Cal App 2d 373, 75 Cal Rptr 876, 1969 Cal App LEXIS 1535.

The sentencing of a defendant to a county jail as a condition of probation after conviction of a felony did not render the offense a misdemeanor within the meaning of *Pen C § 17*, where the trial judge specifically provided that he would declare the crime to be a misdemeanor only after the defendant demonstrated that he "behaved himself" during the following year. *People v. Livingston* (1970, Cal App 1st Dist) 4 Cal App 3d 251, 84 Cal Rptr 237, 1970 Cal App LEXIS 1523.

Even in a crime which permits a county jail sentence as an alternative to imprisonment in the state prison, when the defendant has entered a guilty plea but judgment has not been pronounced, he stands convicted of a felony. *People v. Tiner* (1970, Cal App 4th Dist) 11 Cal App 3d 428, 89 Cal Rptr 834, 1970 Cal App LEXIS 1744, overruled *People v. Beagle* (1972) 6 Cal 3d 441, 99 Cal Rptr 313, 492 P2d 1, 1972 Cal LEXIS 141.

Pursuant to *Pen C § 17(b)(2)*, relating to felony-misdemeanor offenses, commitment of defendant to the Youth Authority on conviction for such an offense denominates the offense as a misdemeanor, so as to preclude imposition of a felony punishment therefor on him on being returned to the committing court by the Authority under *W & I C § 1737.1*, permitting such return for, among other reasons, incorrigibility. *People v. Hannon (1971) 5 Cal 3d 330, 96 Cal Rptr 35, 486 P2d 1235, 1971 Cal LEXIS 255*.

A commitment to the Youth Authority on conviction of an optional sentence offense reduced that offense unconditionally to a misdemeanor for all purposes thereafter, except during the years when the 1947 amendment to *Pen C § 17*, defining felonies and misdemeanors, was in effect. (Disapproving any expressions to the contrary in *People v. Zaccaria (1963) 216 Cal App 2d 787, 31 Cal Rptr 383, 1963 Cal App LEXIS 2083; People v. Palacios (1968) 261 Cal App 2d 566, 68 Cal Rptr 137, 1968 Cal App LEXIS 1778; People v. Ramsey (1962) 202 Cal App 2d 856, 21 Cal Rptr 406, 1962 Cal App LEXIS 2553*; and declaring that no implication of agreeing therewith is to be drawn from the Supreme Court's citation of those decisions in *People v. Hannon (1971) 5 Cal 3d 330, 96 Cal Rptr 35, 486 P 2d 1235, 1971 Cal LEXIS 255*.) *People v. Navarro (1972) 7 Cal 3d 248, 102 Cal Rptr 137, 497 P2d 481, 1972 Cal LEXIS 191*.

Although in adopting *Pen C § 17(b)(5)*, which makes a misdemeanor-felony offense a misdemeanor for all purposes when, at or before a preliminary examination, the magistrate so determines, the Legislature intended to exclude any criminal punishment greater than might be imposed for a misdemeanor, it did not intend to wipe out all consequences attached to the crime as a felony. The enactment of subd (b)(5) had in view the unburdening of the superior court from cases likely to result in no more than misdemeanor penalties, the consequent more expeditious handling of such cases, the encouragement of guilty pleas by defendants who could know in advance that no penalty could be imposed more severe than a jail sentence or a fine, and the consequent saving of time to municipal courts by the elimination of some preliminary hearings. *Henry v. Department of Motor Vehicles (1972, Cal App 4th Dist) 25 Cal App 3d 649, 102 Cal Rptr 36, 1972 Cal App LEXIS 1063*.

A municipal court misdemeanor conviction of possession of marijuana was not a "felony offense" or an offense "punishable as a felony" so as to be chargeable as a prior conviction for the purpose of enhancement of penalties on conviction of subsequent felony charges of possession of marijuana under former *H & S C § 11530* (see now *H & S C 11357*), and possession of a restricted dangerous drug under former *H & S C § 11910* (see now *H & S C 11377*), where the offense giving rise to the municipal court conviction was initially charged by the prosecutor as a misdemeanor as permitted by *Pen C § 17(a)*. Under former *H & S C §§ 11533* (see now *H & S C 11537 et seq.*), *11914* (see now *H & S C 11381*), a "felony offense" or an "offense punishable as a felony" is an offense for which the law prescribes imprisonment in the state prison as either an alternative or the sole penalty, regardless of the sentence received, but the prosecutor's action in charging the offense as a misdemeanor removed the alternative of a prison sentence; it was a misdemeanor from the moment the complaint was filed. *People v. Garnett (1973, Cal App 1st Dist) 31 Cal App 3d 255, 107 Cal Rptr 197, 1973 Cal App LEXIS 1067*.

A youthful offender who, under *W & I C § 1731.5*, was committed to the Youth Authority at the age of 18 and who was therefore subject to detention for about 5 years (*W & I C § 1770*) was not thereby denied his rights to equal protection under the rule that a defendant, simply because of his age, may not be singled out for a potentially greater maximum period of incarceration than an adult convicted of the same offense, where, though the offense of which he was convicted was one punishable either as a felony or a misdemeanor (thus theoretically rendering it, in the case of one committed to the Youth Authority, a misdemeanor "for all purposes" under *Pen C § 17(b)(2)*), an adult's maximum period of incarceration for the offense in question, namely, assault with a deadly weapon (*Pen C § 245(a)*), was for life. *People v. Edmondson (1976, Cal App 2d Dist) 62 Cal App 3d 677, 133 Cal Rptr 297, 1976 Cal App LEXIS 1945*.

The legislative intent of *Pen C § 17*, (defining crimes as felonies, misdemeanors, or infractions punishable under California law), is to provide a convenient division of crimes into lesser and greater offenses, in order to allow other penal statutes to draw distinctions and allow differences between crimes of greater and lesser magnitude, and does not draw a jurisdictional line between criminal and noncriminal conduct where the classification of an offense affects penalties for escape or other crimes. *People v. Davis (1985, Cal App 1st Dist) 166 Cal App 3d 760, 212 Cal Rptr 673*,

1985 Cal App LEXIS 1873.

In a prosecution in which defendant was found guilty of first degree burglary and sentenced to four years for violating *Pen C* § 459, and in which allegations of three prior burglary convictions were found true, the trial court did not err in imposing an enhancement under *Pen C* § 667(a) (enhancement for prior serious felony), for one of the prior convictions, even though defendant was sentenced to the Youth Authority for that crime. Although under *Pen C* § 17(c), the crime of a defendant committed to the Youth Authority is deemed a misdemeanor upon discharge, defendant was dishonorably discharged, and the Legislature did not intend to afford dishonorably discharged persons the benefits of § 17(c). Further, since the trial court, in sentencing defendant to the Youth Authority at the time of the earlier conviction, did not designate the conviction as a misdemeanor pursuant to *Pen C* § 17(b)(2), it was a felony for all purposes. *People v. Lassiter* (1988, Cal App 2d Dist) 202 Cal App 3d 352, 248 Cal Rptr 320, 1988 Cal App LEXIS 565.

In a criminal prosecution, the trial court exceeded its jurisdiction in approving defendant's negotiated plea of nolo contendere to a charge of lewd conduct with his minor child (*Pen C* § 288(a)) in exchange for reducing his conviction on that charge to misdemeanor child molestation (former *Pen C* § 647a, see now *Pen C* § 647.6) on the condition that he successfully complete probation. That plea condition conflicted with *Pen C* §§ 17 (conviction of felony not alternatively punishable by fine or imprisonment in county jail may not be reduced to misdemeanor), 1192.5 (negotiated plea may only specify exercise of those powers legally available to court), and 1203.4 (prohibition of withdrawal of felony plea and entry of nolo contendere plea to different crime without dismissal). *People v. Beebe* (1989, Cal App 3d Dist) 216 Cal App 3d 927, 265 Cal Rptr 242, 1989 Cal App LEXIS 1292.

Robbery is a straight felony, and *Pen C* § 17, does not authorize the reduction of straight felonies to misdemeanors, nor does it, or any other statute, authorize the modification of a final conviction of robbery to one of grand theft. The term "straight felony" designates those felony offenses that are punishable only as felonies, i.e., by death or imprisonment in state prison, as opposed to alternative felonies/misdemeanors which are punishable in the court's discretion by imprisonment in the state prison, or by fine or imprisonment in the county jail. *People v. Mendez* (1991, Cal App 1st Dist) 234 Cal App 3d 1773, 286 Cal Rptr 216, 1991 Cal App LEXIS 1157, review denied (1991, Cal App 1st Dist) 1991 Cal App LEXIS 1295.

An order of the trial court setting aside a defendant's robbery conviction (*Pen C* § 211), substituting a misdemeanor grand theft conviction (*Pen C* § 487), and sealing the records of the resultant misdemeanor conviction, was an act in excess of the trial court's jurisdiction where it was made without legislative authority. Because defendant was convicted of a straight felony, and committed to the California Youth Authority, his entitlement to postconviction relief was governed by the gubernatorial pardon authority (*Cal Const Art V*, § 8; *Pen C* §§ 4800 et seq.) and *W & I C* § 1772. Neither *Pen C* § 17, nor *Pen C* § 1203.45, permitted the relief granted and there was no other controlling statutory authority. Therefore, the fact that defendant was convicted of robbery remained of record in the *People v. Mendez* (1991, Cal App 1st Dist) 234 Cal App 3d 1773, 286 Cal Rptr 216, 1991 Cal App LEXIS 1157, review denied (1991, Cal App 1st Dist) 1991 Cal App LEXIS 1295.

The trial court properly denied the defendant's motion to reduce her felony convictions, which were "wobblers," to misdemeanors pursuant to *Pen C* § 17(b)(3), where defendant was convicted by guilty plea of forgery and receiving stolen property, and where defendant was placed on probation after sentence was imposed and execution of judgment was suspended. *Pen C* § 1203.4 was not applicable in that *Pen C* § 17 governs the specific matter of reduction of a "wobbler" from a felony to a misdemeanor after a grant of probation. Although a trial court may have the greater power to change a plea from guilty to not guilty in the case of any felony after successful completion of probation, the limitation set forth in *Pen C* § 17(b)(3) must be applied when considering the specific remedy of reducing a wobbler. *Pen C* § 1203.3 does not permit a trial court to reduce a felony to a misdemeanor in a situation where the trial court imposes and suspends a sentence at the time it grants probation. Whatever options are available to a trial court under *Pen C* § 1203.3, its authority to reduce a felony to a misdemeanor remains limited by *Pen C* § 17(b)(3). There is nothing to suggest that *Pen C* § 1203.3 was added to abrogate the limitation in *Pen C* § 17(b)(3) that a trial court may declare a "wobbler" to be a misdemeanor only where the court has granted probation to the defendant without imposition of

sentence, or that *Pen C § 1203.3* was added to expand the authority of the trial court under *Pen C § 17(b)(3)*. *People v. Wood* (1998, *Cal App 2d Dist*) 62 *Cal App 4th* 1262, 73 *Cal Rptr 2d* 308, 1998 *Cal App LEXIS* 295.

An assault conviction which was a "wobbler" was automatically rendered a misdemeanor under *Pen C § 17(b)(1)*, and therefore could not constitute a prior serious felony conviction with the meaning of the Three Strikes law (*Pen C § 667(d)(1)*), when the trial court suspended proceedings, granted summary probation, ordered defendant to serve one year in the county jail and directed that probation be terminated upon completion of the jail term. *People v. Glee* (2000, *Cal App 2d Dist*) 82 *Cal App 4th* 99, 97 *Cal Rptr 2d* 847, 2000 *Cal App LEXIS* 549, review denied (2000, Cal) 2000 *Cal LEXIS* 8120.

Under *Pen C §§ 17(b)(1)* and (3), where an offense is alternatively a felony or misdemeanor, it is regarded as a felony for every purpose until judgment. Such an offense becomes a misdemeanor if judgment is entered imposing a punishment other than imprisonment in the state prison, or if a court grants probation to a defendant without imposition of sentence and declares the offense to be a misdemeanor. *United States v. Gomez-Hernandez* (2002, 8th Cir Iowa) 300 *F3d* 974, 2002 *US App LEXIS* 17780, rehearing denied (2002, 8th Cir) 2002 *US App LEXIS* 21779, cert den (2003) 537 *US* 1138, 154 *L Ed 2*, 123 *S Ct* 931, 2003 *US LEXIS* 461, cert den (2003) 537 *US* 1138, 154 *L Ed 2*, 123 *S Ct* 929, 2003 *US LEXIS* 460.

Because petitioner had been previously convicted of robbery and burglary which were considered serious felonies, California's three strike law, was triggered when petitioner was charged with felony theft; this crime was considered wobblers because it could have been treated either as a felony or as a misdemeanor by the trial judge. The trial judge could at a preliminary examination or at sentencing reduce the offense to a misdemeanor to avoid triggering the three strikes law. *Ewing v. California* (2003) 538 *US* 11, 155 *L Ed 2*, 123 *S Ct* 1179, 2003 *US LEXIS* 1952.

Although an offense can be a misdemeanor or a felony under a "wobbler" statute depending on the punishment imposed, where prospective deportee's grand theft offense was determined to be a misdemeanor by the state court, since he received less than a six-month sentence, the Board of Immigration Appeals erred in finding that the "petty offense" exception did not apply to his attempt to suspend his deportation on the grounds that he had been involved in criminal activity. *Garcia-Lopez v. Ashcroft* (2003, 9th Cir) 334 *F3d* 840, 2003 *US App LEXIS* 12928.

Since the state court judge imposed probation on prospective deportee for committing the offense of grand theft, did not impose a sentence, and declared the offense to be a misdemeanor, the Board of Immigration Appeals erred in determining that it was not bound by the state court judge's characterization of the offense as a misdemeanor and in finding that the "petty offense" exception did not exist in the proceedings to deport him on the ground that he was involved in criminal activity. *Garcia-Lopez v. Ashcroft* (2003, 9th Cir) 334 *F3d* 840, 2003 *US App LEXIS* 12928.

Trial court erred in concluding that the reduction of an applicant's prior felony conviction to a misdemeanor had no effect on his eligibility to apply for a teaching credential; once a court had reduced the applicant's wobbler offense to a misdemeanor pursuant to *Pen C § 17*, the crime was thereafter regarded as a misdemeanor "for all purposes." *Gebremicael v. California Com. on Teacher Credentialing* (2004, *Cal App 3d Dist*) 118 *Cal App 4th* 1477, 13 *Cal Rptr 3d* 777, 2004 *Cal App LEXIS* 825.

For purposes of collection of DNA information under *Pen C § 296*, an offender was convicted of a felony when he pled guilty to an alternatively punishable offense as a felony; hence, the collection of his blood and saliva samples was not an illegal seizure under the *Fourth Amendment*, *U.S. Const. amend. IV*, although the offender was later sentenced for a misdemeanor in accordance with *Pen C § 17(b)*. *Coffey v. Superior Court* (2005, *Cal App 1st Dist*) 129 *Cal App 4th* 809, 29 *Cal Rptr 3d* 59, 2005 *Cal App LEXIS* 840, rehearing denied (2005, Cal App 1st Dist) 2005 *Cal App LEXIS* 971.

For purposes of collection of DNA information under *Pen C § 296*, an offender is convicted of a felony when he pleads guilty to an alternatively punishable offense as a felony, even if the charge is later reduced under *Pen C § 17*.

Coffey v. Superior Court (2005, Cal App 1st Dist) 129 Cal App 4th 809, 29 Cal Rptr 3d 59, 2005 Cal App LEXIS 840, rehearing denied (2005, Cal App 1st Dist) 2005 Cal App LEXIS 971.

4. Particular Offenses

A plea of guilty of petit larceny with a prior conviction confesses the prior conviction and the defendant must be sentenced for a felony. *People v. Delany* (1874) 49 Cal 394, 1874 Cal LEXIS 347.

Where a defendant charged with assault with a deadly weapon with intent to commit murder is convicted of assault with a deadly weapon and sentenced to jail, the offense for which he is convicted is misdemeanor. *People v. Aubrey* (1879) 53 Cal 427, 1879 Cal LEXIS 30.

Robbery is a felony punishable by imprisonment in state prison. *People v. Rodrigo* (1886) 69 Cal 601, 11 P 481, 1886 Cal LEXIS 694.

The crime of assault with a deadly weapon, a felony, is reduced to a misdemeanor when the court imposes a fine as punishment. *In re Sullivan* (1906, Cal App) 3 Cal App 193, 84 P 781, 1906 Cal App LEXIS 181.

Since the Cartwright Act § 4 declares that violations of its provisions shall be declared a conspiracy against trade and provides a punishment without stating where the punishment shall take place, violations are misdemeanors. *Union Ice Co. v. Rose* (1909, Cal App) 11 Cal App 357, 104 P 1006, 1909 Cal App LEXIS 143.

Inasmuch as the Volstead Act, the penal provisions of which were adopted by the Wright Act, contained no provisions as to the place of punishment but merely provided that for a second or subsequent offense a violator should be fined and imprisoned and did not specify whether the offenses should constitute felonies or misdemeanors, a court exceeded its jurisdiction in sentencing a violator to pay a fine and to be imprisoned in state prison upon his conviction of a second offense. *In re Application of Humphrey* (1923, Cal App) 64 Cal App 572, 222 P 366, 1923 Cal App LEXIS 276.

A violation of former Veh Act § 146 is a felony, though no punishment is annexed to its definition, since under this section such a felony, not being punishable by death, must be punished by imprisonment in state prison. *In re Application of Gohlke* (1925, Cal App) 72 Cal App 536, 237 P 779, 1925 Cal App LEXIS 514.

Notwithstanding a defendant's plea of guilty to receiving stolen property, a felony, when his sentence is a term in jail the conviction is for misdemeanor only. *People v. Lando* (1928, Cal App) 92 Cal App 405, 268 P 439, 1928 Cal App LEXIS 918.

The offense of attempt to commit burglary, to which the defendant pleaded guilty, became a misdemeanor when he was sentenced to a jail term. *People v. Redding* (1928, Cal App) 93 Cal App 169, 269 P 197, 1928 Cal App LEXIS 715.

The crime of conspiracy to commit misdemeanor, punishable under *Pen C* § 182 either by imprisonment in the county jail or the state penitentiary, is a felony or a misdemeanor, according to the punishment prescribed by the sentence. *People v. Campbell* (1934, Cal App) 1 Cal App 2d 109, 36 P2d 198, 1934 Cal App LEXIS 1236.

By a plea of guilty of statutory rape, punishable by imprisonment in either the county jail or the state prison, the defendant stood convicted of a felony punishable by a term in state prison. *In re Application of Tantlinger* (1935, Cal App) 8 Cal App 2d 157, 47 P2d 301, 1935 Cal App LEXIS 632.

A defendant convicted of violation of the Narcotic Act is convicted of a felony but his status may be changed by imposition of a punishment other than imprisonment in state prison. *People v. Christman* (1940, Cal App) 41 Cal App 2d 158, 106 P2d 32, 1940 Cal App LEXIS 218.

Although second degree burglary may be punished by imprisonment in state prison or county jail, its status as a felony can be changed by a judgment imposing a punishment other than imprisonment in the state prison. *People v. Williams* (1945) 27 Cal 2d 220, 163 P2d 692, 1945 Cal LEXIS 232.

Violation of § 337a, prohibiting bookmaking, is punishable by imprisonment in county jail or state prison and it is therefore, under this section, a felony for every purpose up to judgment, and by judgment other than imprisonment in state prison it loses that character prospectively only, without retroactive effect. *People v. Graff* (1956, Cal App 1st Dist) 144 Cal App 2d 199, 300 P2d 837, 1956 Cal App LEXIS 1702.

In prosecution for attempted robbery, evidence was properly admitted, for purpose of impeachment, that defendant had been convicted in 1958 of possession of narcotics under former H & S C § 11500 (see now H & S C § 11350), offense punishable either by imprisonment in state prison or in county jail, though defendant had been in fact committed to California Youth Authority, since under judicial construction of this section, as it stood in 1958, such alternatively punishable crime constituted felony despite such commitment. *People v. Zaccaria* (1963, Cal App 1st Dist) 216 Cal App 2d 787, 31 Cal Rptr 383, 1963 Cal App LEXIS 2083, overruled *People v. Navarro* (1972) 7 Cal 3d 248, 102 Cal Rptr 137, 497 P2d 481, 1972 Cal LEXIS 191.

In prosecution for receiving stolen property, court properly found prior conviction for possession of narcotics under former H & S C § 11500 (see now H & S C 11350) to constitute felony conviction where punishment for such offense was fixed at imprisonment in county jail or state prison, though record showed that imposition of sentence was suspended, that probation was granted, and that defendant was required to serve six months in county jail as condition of probation; where offense is punishable by either imprisonment in county jail or state prison, offense is deemed felony unless and until defendant is sentenced to term in county jail, and requirement that defendant serve time in county jail as condition of probation, grant of probation being discretionary act on part of court, did not constitute imposition of sentence to county jail. *People v. Esters* (1963, Cal App 1st Dist) 220 Cal App 2d 917, 34 Cal Rptr 264, 1963 Cal App LEXIS 2329.

Character of offense of issuing bad checks, as misdemeanor or felony, is fixed by punishment imposed. *People v. Natividad* (1963, Cal App 4th Dist) 222 Cal App 2d 438, 35 Cal Rptr 237, 1963 Cal App LEXIS 1686.

The offense described in former Veh C § 23101 (see now Veh C § 23153), defining felony drunk driving, must be deemed a felony for all purposes including the determination of the contractual rights of the parties under an insurance policy, unless the offense was actually reduced to a misdemeanor after conviction by the imposition of a fine or by imprisonment in a county jail. *Barker v. California-Western States Life Ins. Co.* (1967, Cal App 5th Dist) 252 Cal App 2d 768, 61 Cal Rptr 595, 1967 Cal App LEXIS 1567, cert den (1968) 390 US 922, 88 S Ct 855, 19 L Ed 2d 982, 1968 US LEXIS 2581.

A conspiracy to commit a misdemeanor is a felony. *People v. Miles & Sons Trucking Service, Inc.* (1968, Cal App 4th Dist) 257 Cal App 2d 697, 65 Cal Rptr 465, 1968 Cal App LEXIS 2496.

Pen C § 17, does not automatically reduce crimes punishable only by death or imprisonment to misdemeanors, and in a prosecution for theft from the person, the trial court did not err in finding that defendant had suffered a prior felony conviction, where he had been committed to the Youth Authority pursuant to a conviction of lewd and lascivious acts on a child (*Pen C § 288*), and where such violation is punishable only by imprisonment in a State Prison. *People v. Palacios* (1968, Cal App 4th Dist) 261 Cal App 2d 566, 68 Cal Rptr 137, 1968 Cal App LEXIS 1778, overruled *People v. Navarro* (1972) 7 Cal 3d 248, 102 Cal Rptr 137, 497 P2d 481, 1972 Cal LEXIS 191.

Conviction of a felony under the California Corporate Securities Law was not improper where the law itself did not state that a violation was "a felony", but where such statute provided that violation thereof was punishable by imprisonment in state prison, and the Penal Code defines a felony as a crime punishable by death or by imprisonment in the state prison. *Morrison v. Walker* (1968, 9th Cir Cal) 404 F2d 1046, 1968 US App LEXIS 4534.

In a burglary prosecution tried to by court without a jury, the trial court properly found the allegation of a prior felony conviction to be true, where, on defendant's conviction thereof (a prior burglary), the proceedings had been suspended without imposition of sentence and probation granted for three years, although after defendant had been sentenced to prison in the instant case, a misdemeanor sentence was pronounced on the prior offense, such sentence having no retroactive effect on the standing of that offense as a felony. *People v. Bozigian* (1969, Cal App 2d Dist) 270 Cal App 2d 373, 75 Cal Rptr 876, 1969 Cal App LEXIS 1535.

An unauthorized grant of grace or clemency, achieved by imposing a county jail sentence in a marijuana possession case where a sentence to state prison alone was required, did not have the effect of reducing the offense to that of a misdemeanor. *People v. Sproul* (1969, Cal App 2d Dist) 3 Cal App 3d 154, 83 Cal Rptr 55, 1969 Cal App LEXIS 1367.

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.

The discretion to choose between treatment of a violation of former H & S C § 11503 (see now H & S C 11355, offer to sell a narcotic and delivery of a non-narcotic substance) as a felony or as a misdemeanor is given first to the prosecuting attorney (*Pen C § 17(b)(4)*); next a power to select the class of treatment is given to the magistrate at the preliminary hearing (*Pen C § 17(b)(5)*), but only with the concurrence of the prosecuting attorney; the power of the superior court to reduce the grade of the particular offense is limited to its power to pronounce a misdemeanor sentence, which has the effect of accomplishing such a reduction from that time forward (*Pen C § 17(b)(1)*). *People v. Clark* (1971, Cal App 2d Dist) 17 Cal App 3d 890, 95 Cal Rptr 411, 1971 Cal App LEXIS 1540.

Defendant who had pleaded guilty to possession of marijuana, an offense punishable either by confinement in the county jail or the state prison, could not be sentenced as a felon, where the court had previously suspended proceedings, granted him probation, and declared the offense to be a misdemeanor. Even though the defendant had falsified his criminal record in interviews with the probation officer, the matter was governed by *Pen C § 17(b)(3)*, providing that such an offense is a misdemeanor for all purposes when the court has granted probation without imposition of sentence and has declared the offense to be a misdemeanor. *In re Williams* (1972, Cal App 2d Dist) 28 Cal App 3d 53, 104 Cal Rptr 528, 1972 Cal App LEXIS 735.

In the case of a defendant who was 18 years old at the time of the offense and trial, who was tried as an adult and convicted of possession of a sawed-off shotgun, a potential felony, in violation of the dangerous weapons control law (*Pen C § 12020*), which was an optional sentence statute providing for punishment either as a misdemeanor or as a felony by imprisonment in state prison for not more than three years, defendant was properly committed to the Youth Authority for a period of not in excess of three years. The fact that a Youth Authority commitment is to be treated in all respects thereafter as a misdemeanor (*Pen C § 17(b)*), did not mean the misdemeanor jail term superseded the maximum term to which defendant might have been sentenced had a felony sentence to state prison been imposed, and defendant was not denied that equal protection of the law which results when a youthful defendant is threatened with an extension of incarceration to the Youth Authority beyond the maximum to which he could be subjected if he were sentenced as an adult. *People v. Herron* (1976, Cal App 2d Dist) 62 Cal App 3d 643, 133 Cal Rptr 287, 1976 Cal App LEXIS 1940.

A count of a criminal complaint charging defendant with carrying a concealed firearm after having previously been

convicted of a felony (*Pen C § 12025*, subd. (b)), charged defendant with a felony, not an offense which may be either a felony or a misdemeanor. Accordingly, at defendant's preliminary hearing, the magistrate lacked the authority to deem the offense a misdemeanor pursuant to *Pen C § 17*, subd. (b)(5), which empowers a magistrate to hold a defendant to answer to a misdemeanor when the complaint charges a public offense which may be either a felony or misdemeanor. *People v. Municipal Court (White) (1979, Cal App 1st Dist) 88 Cal App 3d 206, 151 Cal Rptr 861, 1979 Cal App LEXIS 1283*.

Defendant, charged in the first count of a misdemeanor complaint with violating *Pen C § 270*, by wilfully failing to furnish his minor child with necessary food, clothing, shelter, medical attendance, or other remedial care, and, in a second count, with violating *Pen C § 166*, subd. 4, by wilfully disobeying a court order requiring him to make support payments, was not entitled to have the complaint amended to charge a felony pursuant to *Pen C § 17*, subd. (b)(4), which gives a misdemeanor defendant that right if the charged crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail. The complaint alleged violation of only that part of *Pen C § 270*, which is solely a misdemeanor, and the additional allegation of the second count did not change the crime to one punishable as a felony. Since defendant's case did not fall within *Pen C § 17*, subd. (b)(4), it was governed by the rule that the sole discretionary power to bring criminal charges and to select their nature rests with the prosecutor. *Metcalfe v. Municipal Court (1981, Cal App 2d Dist) 125 Cal App 3d 303, 178 Cal Rptr 47, 1981 Cal App LEXIS 2319*.

In a prosecution arising from an incident in which defendant and a confederate entered a store and stole a handbag, in which defendant was charged as an aider and abettor of felony second degree burglary and felony petty theft with a prior theft conviction, and in which the confederate pleaded no contest to a misdemeanor, the trial court did not err in denying defendant's requests to reduce the charged offenses from felonies to misdemeanors under *Pen C § 17*, subd. (b) (misdemeanor defined), and *Pen C § 659* (aiding in misdemeanor). *Pen C § 659*, did not apply to reduce the offenses to misdemeanors. The charged offenses are "wobblers" that are punishable either as felonies or misdemeanors. An aider and abettor is liable as a principal, and the fact that another principal is acquitted or convicted of a lesser offense does not bar the conviction of the aider and abettor for the charged offense. In this case, the offenses could only be misdemeanors if so charged by the prosecutor or so sentenced by the trial court. Instead, they were charged and sentenced as felonies. The fact that the confederate was ultimately sentenced on a misdemeanor had no effect on the nature of defendant's offenses or sentence. Moreover, defendant was the instigator of the offenses, his criminal record was more substantial than the confederate's, and defendant was not a mere aider and abettor to the burglary as opposed to the theft. *People v. Rose (1997, Cal App 2d Dist) 56 Cal App 4th 990, 65 Cal Rptr 2d 887, 1997 Cal App LEXIS 609, review denied (1997, Cal) 1997 Cal LEXIS 7750*.

A "wobbler," which is an offense that confers discretion as to felony or misdemeanor punishment (*Pen C § 17(b)*), becomes a misdemeanor only after judgment. Accordingly, in a prosecution against a county employee in which the defendant was acquitted of felony embezzlement but found guilty of the misdemeanor equivalent (*Pen C §§ 504, 514*), the petty theft found by the jury was not a "wobbler" to which § 17(b) could apply, since the trial court had no discretion but to impose misdemeanor punishment. *People v. Stanfill (1999, Cal App 1st Dist) 76 Cal App 4th 1137, 90 Cal Rptr 2d 885, 1999 Cal App LEXIS 1079*.

In a prosecution for falsifying information to obtain government benefits for in-home health services that were not in fact provided (*W & IC § 14014*), the trial court properly declared the crimes to be misdemeanors under *Pen C § 17(b)*, since § 14014 defines a misdemeanor/wobbler offense, rather than a misdemeanor/straight felony offense. Section 14014 tracks the punishment provisions of the theft statutes, and the phrase "guilty of a misdemeanor or felony," as used in § 14014, means that the defendant will be punished as either a misdemeanor or a felon to the same extent that he would have been if convicted of theft. *People v. Douglas (2000, Cal App 2d Dist) 79 Cal App 4th 810, 94 Cal Rptr 2d 500, 2000 Cal App LEXIS 254*.

When a court acts under *Pen C § 17* to specify that a conviction for driving under the influence of alcohol shall be treated as a misdemeanor "for all purposes," that offense may not afterwards be pled as a prior felony conviction under

the terms of former Veh C § 23175.5 (now Veh C § 23550.5), even though the offense may have been originally punished as a felony. *People v. Camarillo* (2000, Cal App 1st Dist) 84 Cal App 4th 1386, 101 Cal Rptr 2d 618, 2000 Cal App LEXIS 892.

Since reckless driving is not a reducible misdemeanor, defendant's conviction for reckless driving as an infraction was reversed, and the cause was remanded for a new trial. *People v. Dibacco* (2004, Cal Super Ct) 117 Cal App 4th Supp 1, 12 Cal Rptr 3d 258, 2004 Cal App LEXIS 393.

Where defendant was charged with three crimes classified as wobblers, namely, inflicting corporal injury on a spouse, Pen C § 273.5, dissuading a witness, Pen C § 136.1, and causing injury to a phone line, Pen C § 591, the felony statute, Pen C § 805(a), controlled the applicable statute of limitations, rather than the misdemeanor statute of limitations, Pen C § 17(b)(5), and the State therefore had three years to file the charges against defendant. *People v. Sillas* (2002, Cal Super Ct) 100 Cal App 4th Supp 1, 123 Cal Rptr 2d 340, 2002 Cal App LEXIS 4461.

In a trial for discharging a firearm at an occupied building, Pen C § 246, a lesser-included-offense instruction was warranted for grossly negligent discharge of a firearm, Pen C § 246.3, because there was reason to infer that defendant fired away from the building and thus that the lesser but not the greater offense was committed. The court noted that § 246.3 was a "wobbler" offense under Pen C § 17(b). *People v. Overman* (2005, Cal App 4th Dist) 126 Cal App 4th 1344, 24 Cal Rptr 3d 798, 2005 Cal App LEXIS 250, review denied (2005, Cal) 2005 Cal LEXIS 6795.

Charge of filing a false statement had to be deemed a felony because Pen C § 805(a) prevailed over Pen C § 17 for statute of limitations purposes. Thus, Pen C §§ 801.5, and 803(c), providing a four-year term for all fraud-type felonies, applied, even though the prosecution chose to charge defendant with a misdemeanor violation of Pen C § 532a. *People v. Soni* (2005, Cal App 4th Dist) 134 Cal App 4th 1510, 36 Cal Rptr 3d 864, 2005 Cal App LEXIS 1944, review denied (2006, Cal) 2006 Cal LEXIS 5004.

In a case in which defendant was convicted of offenses that arose from his attack on the prosecutor when the jury's verdicts were being read during his prior trial for making criminal threats under Pen C § 422, defendant's prior convictions for criminal threats were properly treated as strikes. Defendant had been found guilty by a jury of three violations of § 422, which could be punished as a felony or misdemeanor, but were prosecuted as felonies and, when the jury rendered guilty verdicts, they constituted strike convictions subject only to their reduction to misdemeanors at sentencing, which did not occur because defendant was ordered to serve a state prison term. *People v. Queen* (2006, Cal App 3d Dist) 141 Cal App 4th 838, 46 Cal Rptr 3d 332, 2006 Cal App LEXIS 1145, review denied (2006, Cal) 2006 Cal LEXIS 13558.

In a criminal malpractice action, the attorney was entitled to summary judgment because the client failed to create a triable issue as to his actual innocence on either a charge of felony vandalism, to which the attorney advised him to plead guilty, or on a lesser included misdemeanor offense to which the client later pled guilty with new counsel. In reducing the felony to a misdemeanor, the trial court relied on Pen C § 17(b), which provides that a wobbler can be deemed a misdemeanor when the court imposes a punishment other than imprisonment. *Sangha v. LaBarbera* (2006, Cal App 4th Dist) 146 Cal App 4th 79, 52 Cal Rptr 3d 640, 2006 Cal App LEXIS 2050.

Defendant's sentence for violating 21 U.S.C.S. §§ 841(a)(1) and 846 was vacated and remanded for resentencing because he was improperly sentenced as a career offender under U.S. Sentencing Guidelines Manual § 4B1.1. His 1995 conviction for assault with a deadly weapon other than a firearm did not subject him to the career offender enhancement because it was a misdemeanor under California law because when the California court sentenced him to 365 days in county jail, Pen C § 17(b)(1) operated to convert that offense to a misdemeanor for all purposes. *United States v. Bridgeforth* (2006, 9th Cir Cal) 441 F3d 864, 2006 US App LEXIS 7658.

Defendant's conviction for possession of a firearm by a convicted felon had to be reversed where, at the time he was charged, his predicate felony conviction for evading an officer in violation of Veh C § 2800.2(a) had been reduced

to a misdemeanor under *Pen C § 17* after he successfully completed probation, and that conviction thus could not be considered a felony to serve as the basis for a charge that he had violated *Pen C § 12021(a)(1)*. *People v. Gilbreth* (2007, 1st Dist) 156 Cal App 4th 53, 67 Cal Rptr 3d 10, 2007 Cal App LEXIS 1711.

5. Effect of Imposition of Fine or Jail Term

Insofar as a conviction of an offense authorizes imprisonment in the county jail it is a misdemeanor, and insofar as it authorizes punishment in the state prison it is a felony; the complaint then may charge the case as a felony, but after judgment affixing the penalty for misdemeanor, it must be deemed a misdemeanor for all purposes. *In re O'Shea* (1909, Cal App) 11 Cal App 568, 105 P 776, 1909 Cal App LEXIS 109.

When a crime is punishable by imprisonment either in state prison or county jail, in the discretion of the court, it must be deemed a felony for all purposes until after a judgment imposing a punishment by imprisonment in jail. *Morris v. Moore* (1923, Cal App) 61 Cal App 314, 214 P 995, 1923 Cal App LEXIS 520.

In a prosecution under a charge, the punishment for which is either by imprisonment in state prison or in jail, the charge, in contemplation of this section, stands as a felony both before and after judgment; but if the judgment is for misdemeanor punishment, it is deemed a misdemeanor for all purposes thereafter but does not have a retrospective effect insofar as the one year statute of limitations is concerned. *Doble v. Superior Court of San Francisco* (1925) 197 Cal 556, 241 P 852, 1925 Cal LEXIS 267, overruling, *People v. Gray* (1902) 137 C 267, 70 P 20, 1902 Cal LEXIS 544; *People v. Cowan* (1940, Cal App) 38 Cal App 2d 144, 100 P2d 1079, 1940 Cal App LEXIS 620; *People v. Weaver* (1943) 56 CA2d 732, 133 P2d 818, 1943 Cal App LEXIS 240.

The one year statute of limitations applicable to misdemeanors does not apply to a prosecution of one charged with receiving stolen property, a felony, in which case the charge is one of felony for all purposes and up to the time of judgment though the accused is sentenced to the county jail, although for all purposes after judgment the offense may be deemed a misdemeanor. *People v. Mitchell* (1930, Cal App) 109 Cal App 116, 292 P 692, 1930 Cal App LEXIS 491.

This section has a prospective operation, and it is only for purposes subsequent to judgment, if a fine or county jail sentence is imposed, that the offense is deemed a misdemeanor. *In re Application of Miller* (1933) 218 Cal 698, 24 P2d 766, 1933 Cal LEXIS 567.

As the offense of violation of Veh Act § 146 is designated a felony, it remains such until the court has rendered a judgment imposing a fine only. *In re Application of Miller* (1933) 218 Cal 698, 24 P2d 766, 1933 Cal LEXIS 567.

Where upon a plea of guilty of violation of Veh C § 146 the court imposes a fine, the offense is deemed a misdemeanor subsequent to the judgment. *In re Application of Miller* (1933) 218 Cal 698, 24 P2d 766, 1933 Cal LEXIS 567.

The imposition of a jail sentence upon conviction of violation of former Veh C § 500, a felony, did not change the nature of the offense since the law merely assumed that if, in the discretion of the trial judge, the accused was sentenced to jail, it should be deemed a misdemeanor. *People v. Pryor* (1936, Cal App) 17 Cal App 2d 147, 61 P2d 773, 1936 Cal App LEXIS 540.

The character of an offense is not changed from felony to misdemeanor by the mere imposition of a fine or jail sentence; but the offense is a felony for all purposes except that "after a judgment imposing a punishment other than imprisonment in the state prison," it shall thereafter be deemed to be a misdemeanor. *In re Application of Rogers* (1937, Cal App) 20 Cal App 2d 397, 66 P2d 1237, 1937 Cal App LEXIS 814.

If punishment imposed for violation of § 337a (bookmaking) is other than imprisonment in the state prison, the offense is deemed a misdemeanor as respects the defendant's request for bail pending appeal. *People v. Oreck* (1945, Cal App) 69 Cal App 2d 317, 158 P2d 940, 1945 Cal App LEXIS 663.

Where crime may be either misdemeanor or felony, depending on punishment imposed, it is the punishment specified by the sentence which determines character of crime for all purposes, including that of impeachment. *People v. Hamilton* (1948) 33 Cal 2d 45, 198 P2d 873, 1948 Cal LEXIS 285, overruled *People v. Guiuan* (1998) 18 Cal 4th 558, 76 Cal Rptr 2d 239, 957 P2d 928, 1998 Cal LEXIS 4034.

Unauthorized act of grace or clemency in sentencing defendant to county jail term does not have effect of changing character of prior crime from felony to misdemeanor. *People v. Kelley* (1958, Cal App 2d Dist) 161 Cal App 2d 215, 326 P2d 177, 1958 Cal App LEXIS 1720.

Where, by virtue of *Pen C § 18*, a felony offense is punishable by fine or imprisonment in county jail, and a trial court, pursuant to *Pen C § 17(b)(1)*, enters judgment imposing something other than imprisonment in state prison, the crime is a misdemeanor for purpose of *Cal Const Art II, § 4*. *League of Women Voters of California v. McPherson* (2006, Cal App 1st Dist) 145 Cal App 4th 1469, 52 Cal Rptr 3d 585, 2006 Cal App LEXIS 2028.

Cal Const Art II, § 4 does not apply to persons on felony probation. Where a trial court suspends imposition of sentence and places a defendant on probation, the defendant has not suffered a conviction for purposes of *Cal Const Art II, § 4*, and thus is entitled to vote. *League of Women Voters of California v. McPherson* (2006, Cal App 1st Dist) 145 Cal App 4th 1469, 52 Cal Rptr 3d 585, 2006 Cal App LEXIS 2028.

Where a probationer is ordered to serve time in a local facility because either imposition or execution of sentence has been suspended, he or she has not been imprisoned for the conviction of a felony, but has been confined as a condition of probation and, accordingly, is entitled to vote. *League of Women Voters of California v. McPherson* (2006, Cal App 1st Dist) 145 Cal App 4th 1469, 52 Cal Rptr 3d 585, 2006 Cal App LEXIS 2028.

6. Judicial Discretion

Court rejected the habeas petitioner's claim that she received ineffective assistance of counsel in violation of the Sixth Amendment due to her attorney's failure to move the court to reduce her charged wobbler offenses to misdemeanors and therefore avoid triggering the California Three Strikes law, *Pen C § 667*, because her attorney did not have the option of asking the court to reduce the wobbler offenses to misdemeanors, as he had already entered into a plea agreement with the State on petitioner's behalf and any attempts by her attorney to request that the court reduce the wobblers to misdemeanors would have been contrary to the plea agreement. Also, a trial court retains discretion to determine whether a wobbler should be reduced to a misdemeanor under *Pen C § 17(b)(1)* and (3). *Connelly v. Henry* (2005, ND Cal) 2005 US Dist LEXIS 33829.

Because imposition of sentence was suspended for defendant's violation of *Pen C § 245(a)(1)*, an assault offense that is punishable as either a felony or a misdemeanor, the trial court retained jurisdiction as provided in *Pen C §§ 1203(a), 1203.2(c), 1203.3(a)*, and *Cal. Rules of Court, Rule 4.435(b)(1)* and could exercise its discretion, after an early termination of probation, to determine whether to grant defendant's motion to reduce the offense to a misdemeanor under *Pen C § 17(b)*, regardless of defendant's admission of an enhancement under *Pen C § 12022.7(a)* that he inflicted great bodily injury in the commission of the offense. *People v. Feyrer* (2007, Cal App 2d Dist) 151 Cal App 4th 506, 59 Cal Rptr 3d 871, 2007 Cal App LEXIS 858, review gr, depublished (2007, Cal) 2007 Cal LEXIS 9659.

Trial court has discretion to reduce a wobbler offense to a misdemeanor under *Pen C § 17(b)(3)* despite the admission of an enhancement applicable only to felonies. *People v. Feyrer* (2007, Cal App 2d Dist) 151 Cal App 4th 506, 59 Cal Rptr 3d 871, 2007 Cal App LEXIS 858, review gr, depublished (2007, Cal) 2007 Cal LEXIS 9659.