



## Cheat Sheet on Prop 47 and PC § 18.5 for Immigration Advocates

For a more comprehensive analysis of how Prop 47 and PC § 18.5 affect immigrants, click [here](#).

### **New PC § 18.5 Means Misdemeanors Carry a Maximum Possible 364 Days**

Under Penal Code § 18.5, as of January 1, 2015 all one-year misdemeanor convictions will have a potential sentence of 364 days. The 364-day limit helps immigrants because:

- An LPR or refugee is deportable for conviction of a crime involving moral turpitude (CIMT) committed within 5 years of admission, if it has a potential sentence of 365 days or more – but *not* 364 days.
- An undocumented person is barred from non-LPR cancellation if convicted of CIMT with potential sentence of 365 days or more – but *not* 364 days.
- Some offenses are aggravated felonies only if a sentence of 365 days or more is imposed, including suspended sentence. After 1/1/15, that will not be possible for a misdemeanor.

**Past convictions.** SB 1310, which created § 18.5, did not include specific retroactivity language. It appears that it will apply to misdemeanors where probation continued through 1/1/15, and to felonies or wobblers designated as a misdemeanor after 1/1/15 (whether by PC § 17 or by Prop 47). There is concern that it could be held not to apply to misdemeanors where probation was completed before 1/1/15. Stay tuned for further developments (see [www.ilrc.org/crimes](http://www.ilrc.org/crimes)).

### **Prop 47 Turns Some Felonies into Misdemeanors**

Prop 47 provides that some property crimes (where the amount taken was less than \$950) and drug possession should be punished as straight misdemeanors rather than wobblers or felonies.

**Past convictions.** Prop 47 explicitly applies to past convictions. If a felony sentence still is being served, the person can apply for designation as a misdemeanor *and* request re-sentencing. However, if the sentence has been completed, it appears that the person just can apply for designation as a misdemeanor. Compare Penal Code §§ 1170.10(a) and (f). Conviction of receipt of stolen property or forgery is an “aggravated felony” for immigration purposes *if* a one-year sentence is imposed. Merely getting the offense designated a misdemeanor may not be enough to cure this.

**Disqualifiers.** Persons with serious priors (“super-strikes” and some sex offender registrants) are not eligible for Prop 47 treatment. Essentially, they will be charged with a wobbler or felony offense as if Prop 47 had not passed, and will not be able to re-designate prior felony convictions as misdemeanors.

Prop 47 can help immigrants in several ways:

**Removes a felony conviction, which is an enforcement priority.** Conviction of any felony puts a noncitizen in the first priority group for detention and removal, and makes the person nearly ineligible for prosecutorial discretion. See [DHS Memo](#). A change to a misdemeanor may help.

**Misdemeanor possession of a controlled substance is not a bar to DAPA, DACA.** For most immigration purposes, simple possession is treated the same regardless of misdemeanor or felony designation. The exception is DAPA and DACA, which are barred by conviction of any felony, a “significant misdemeanor,” or three misdemeanors arising out of separate incidents. A misdemeanor conviction for simple possession is not a “significant misdemeanor” as long as a sentence of 90 or 91 days (DAPA, DACA) was not imposed. See [ILRC materials on DAPA](#).

**Receipt of stolen property, passing bad checks, forgery.** For these wobblers, if the amount taken was \$950 or less, the offense should be treated as a straight misdemeanor with a potential sentence of a year – or 364 days if the new conviction, or hopefully the re-designation to a misdemeanor, occurs after 1/1/15. This is useful because:

- These misdemeanor convictions will not bar DAPA or DACA, as long as they don’t have a 90/91-day sentence imposed or constitute the third misdemeanor.
- A 364-day misdemeanor gets the moral turpitude benefits discussed above in PC § 18.5.
- If the person was sentenced to a year or more, conviction of receipt of stolen property or forgery is an aggravated felony. If the person can be re-sentenced to 364 days or less, it will no longer be an aggravated felony. Designation as a misdemeanor without re-sentencing may not be enough.

**Theft and Burglary: Six-Month Misdemeanors.** Prop 47 created three ways to get to a misdemeanor with a maximum six-month sentence. First, it provides that theft of \$950 or less is petty theft, a six-month misdemeanor, rather than any kind of grand theft, which is a wobbler. See PC § 490.2. Second, if a conviction for petty theft with a prior, PC § 666 (a wobbler), is based on a petty theft as defined above, then that petty theft is simply punished as a six-month misdemeanor; the recidivist sentence enhancement at § 666 does not apply. Finally, some conduct has been removed from commercial burglary: “shoplifting” is a new six-month misdemeanor defined as entering a store when it is open for business with the intent to steal \$950 or less worth of goods. See PC § 459.5.

A six-month misdemeanor rather than a felony has key benefits.

- A misdemeanor petty theft conviction will not bar DAPA or DACA, as long as it doesn’t have a 90/91-day sentence imposed or does not constitute the third misdemeanor.
- A six-month misdemeanor is a CIMT with less than potential one-year sentence; see discussion of PC § 18.5, above. (If the priority is to avoid a CIMT, however, it may be safer to stay with commercial burglary.)
- Assume that conviction of theft is an aggravated felony if a sentence of a year or more is imposed, including suspended sentence. If any of the above changes are made, the plea is to a new offense with a maximum six months. While best practice is to get the one-year sentence withdrawn and a sentence of less than six months imposed, advocates at least will have a strong argument here that because the plea is to a different offense, the new sentence limit should apply.