

March 2020



THE ACCESS PROJECT

Second Chance Remedies:

EXPUNGEMENTS, PROP. 47, PROP.64

NUTS AND BOLTS: SOME DEFINITIONS

Types of Crimes:

- Felonies: crimes for which prison is an available sentence
- Misdemeanors: crimes for which jail time up to one year is an available sentence
- Infractions: “citation” crimes for which fine or short jail time are available sentences

NUTS AND BOLTS: SOME DEFINITIONS

Incarceration Sentences:

- State Prison: for felonies ONLY (usually more than one year; can be less if the person has already served part of a sentence)
- County Jail: for misdemeanors and infractions. BUT:
- Felony Jail: for post-Realignment “non/non/non” incarceration
- Pretrial Jail: people who didn’t make bail

NUTS AND BOLTS: SOME DEFINITIONS

Non-Incarceration Sentences:

- Probation: BROAD discretion. Can be for any crime. Can be modified, extended, terminated, revoked
- Restitution: repayment to crime victim. Need to note restitution!
- IMP SS: suspended sentence
- Fines: there are always fines
- Work Program: community service
- Diversion: drug program or other “wait and see” sentences

NUTS AND BOLTS: SOME DEFINITIONS

Typical Sentence

COURT: NAM:001
19881128 CASC SOLANO

CNT:001 #C24735
524 PC-ATTEMPTED EXTORTION TOC:F
DISPO:DISMISSED/FOJ/MOTION OF PROSECUTOR

CNT:002
242 PC-BATTERY TOC:M
*DISPO:CONVICTED
CONV STATUS:MISDEMEANOR
SEN: 024 MONTHS PROBATION, 054 DAYS JAIL, FINE, IMP SEN SS
* * * *

NUTS AND BOLTS: SOME DEFINITIONS

Important Notes on Statutes:

- Wobbler: a crime for which the prosecutor has discretion to charge as either a felony or misdemeanor.
- Wobblette: a crime for which the prosecutor has discretion to charge as either a misdemeanor or infraction (very short list)

NUTS AND BOLTS: SOME DEFINITIONS

Misdemeanor

is guilty of a misdemeanor, punishable by imprisonment in a county jail for not more than one year, a fine of not more than one thousand dollars (\$1,000), or by both a fine and imprisonment.

Felony

(2) Robbery of the second degree is punishable by imprisonment in the state prison for two, three, or five years.

Wobbler

(b) Burglary in the second degree: by imprisonment in the county jail not exceeding one year or imprisonment pursuant to subdivision (h) of Section 1170.

shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison.

NUTS AND BOLTS: SOME DEFINITIONS

Important Notes on Statutes:

Most common criminal codes:

- Penal/ PEN/ PC
- Vehicle/ VEH/ VC
- Health & Safety/ HS/ HSC
- Business & Professions/ BP/ BPC
- Welfare & Institutions/ WI/ WIC

Parentheses and decimals matter!

These are all DIFFERENT crimes:

VEH 14601

VEH 14601(a)

VEH 14601.1

VEH 14601a

WHAT ARE SECOND CHANCE REMEDIES?

REDUCTIONS

Felony → Misdemeanors

Penal Code § 17(b) (Wobblers without prison time)

Prop. 47 (Penal Code § 1170.18)

Prop. 64 (Health & Safety Code § 11365.1)

Misdemeanors → Infractions

Penal Code § 17(d)(2) (“Wobblettes”)

WHAT ARE SECOND CHANCE REMEDIES?

EXPUNGEMENTS

[Penal Code § 1203.4](#): any conviction with probation

[Penal Code § 1203.4a](#): misdemeanor convictions w/o probation

[Penal Code § 1203.41](#): Realignment

[Penal Code § 1203.42](#): Prealignment

Reductions: Prop. 64

Felony reduction to misdemeanor

- Prop. 64 legalized and regulated marijuana in CA
- Backward-looking: Anyone convicted of possession or sale (not wholesale) can have conviction reduced to misdemeanor. Codified at [Health & Safety Code § 11361.5](#).
- All Prop. 64 crimes have “marijuana” or “cannabis” in the description!
- Important because it allows felony convictions with prison to be reduced and expunged.

Reductions: Prop. 47

Felony reduction to misdemeanor

- Prop. 47 re-classified several common crimes from wobbler status to misdemeanor only. Removes prosecutorial discretion to charge minor crimes as felonies.
- Backward-looking: Anyone convicted of a Prop. 47 felony can have conviction reduced to misdemeanor. Codified at [Penal Code § 1170.18](#).
- For affected property crimes: applies only to those with value under \$950.
- Important because it allows felony convictions with prison to be reduced and expunged.

Reductions: PC §§ 17(b) and 17(d)(2)

Section 17(b) reduces a “wobbler” felony to a misdemeanor.

- Only applies to felonies where no prison time was served
- Always discretionary -- client may not want to do it if conviction is mandatory expungement
- 17(b) or pardon are the only ways to have firearms rights restored in California

Section 17(d)(2) reduces a “wobblette” misdemeanor to infraction

- Applies to very few crimes. E.g. disturbing the peace, trespassing.

PC § 1203.4:

- Most common remedy
- Applies to any conviction -- (felony or misdemeanor) where probation is part of the sentence (even with jail or fines, etc.)

PC § 1203.4a:

- Applies to misdemeanors and infractions only
- Only when probation is not granted (jail or fine)

RAP Analysis Step by Step: Expungement under §1203.4

Mandatory 1203.4 Dismissal

- Convicted of any misdemeanor OR felony; **AND**
- Granted probation (even if there was also some jail time); **AND**
- **SUCCESSFULLY** completed probation.

Discretionary 1203.4 Dismissal:

- Convicted of any misdemeanor OR felony; **AND**
- Did **NOT** successfully complete probation
- DUI (VC § 23152) and a few other misdemeanors are **ALWAYS** discretionary.

RAP Analysis Step by Step: Expungement under §1203.4a

1203.4a applies only to misdemeanors or infraction with no probation granted.

- *Must* have completed sentence plus one year since judgment entered.
- 1203.4a mandatory: Client “has lived an honest and upright life” (i.e. has no conviction or arrest leading to conviction in the year since judgment);
- 1203.4a discretionary: Should be granted in the interests of justice (discretionary; needs declaration)

Expungement: §1203.4: “Successfully completed probation”

Successfully completed:

- Probation was terminated early pursuant to 1203.3 PC (beware of the language “early termination” or “early dismissal” it rarely means probation was successful)
- No further adjudications (such as a conviction or probation violation) during probation period
- Arrest that does not lead to conviction is ok (due process)

Expungement: §1203.4: “Not successfully completed probation”

Not Successfully Completed:

- Probation is modified, extended, or reinstated
- Probation is “terminated unsuccessfully” (resulting in jail time in current case or different case)
- Probation is “revoked”- be careful!
- Conviction in another case
- Incarceration in another case

Expungement: §1203.4: “Probation revoked”

Felonies only:

- If probation is “revoked,” case is treated as if probation was never granted. Ignore probation and analyze based on the jail or prison sentence. 1203.4 no longer applies.

Examples:

- Probation revoked and prison imposed;
- Probation revoked and “felony jail” imposed (realignment sentencing)
- Probation revoked in ANOTHER case and prison or felony jail imposed.

Expungement Remedies: PC §§ 1203.41 and 1203.42

PC § 1203.41 Expungement for Realignment Sentencing:

- Felony conviction with county jail sentence after AB 109 (10/1/2011)
- Extra time period from date of release; always discretionary.

PC § 1203.42 Expungement for “Prealignment” Sentencing:

- Equalizes treatment of similar convictions across time
- Pre-AB 109 prison cases are treated the same as Realignment cases

Expungement Remedies: PC §§ 1203.41 and 1203.42

- PC §§ 1203.41 (2014) and 1203.42 (2018) are recently enacted remedies for the most serious crimes that can be expunged. The convictions they address are always felonies with incarceration time.
- Judges are least familiar with and least likely to grant petitions under these statutes.
- Declarations for these cases should be strong
- Set client expectations