

California “Wobblers”: How to Determine Whether a Prior California Conviction Was a Felony or a Misdemeanor

There is considerable confusion among federal practitioners about when a California offense that may be punished either as a felony or a misdemeanor (a “wobbler”) is a felony for federal sentencing purposes. In reviewing cases for purposes of sentence commutation, you may run across a California wobbler and have to determine whether it was accurately counted as a felony at sentencing. You are unlikely to find cases where a defendant’s sentence was mistakenly enhanced based on a wobbler that was improperly categorized as a felony. This is because wobblers are felonies unless and until they are made misdemeanors, and in most instances it will be obvious when a wobbler has become a misdemeanor. But mistakes can happen, and have happened. *See, e.g., U.S. v. Bridgeforth*, 441 F.3d 864, 870-72 (9th Cir. 2006) (reversing career offender sentence based on wobbler).

In most instances, it will be obvious when a wobbler is a misdemeanor because it will be labeled a misdemeanor, either by the prosecutor or the court. Most confusion arises when the federal practitioner is attempting to determine whether the sentence imposed converts a wobbler into a misdemeanor. A simplified version of the rule is: **The sentence converts a wobbler into a misdemeanor only when a misdemeanor county jail sentence is actually imposed; not when imposition of sentence is suspended, not when a defendant is sentenced to serve a felony sentence in county jail under realignment, and not when a county jail term is imposed as a condition of probation.**

For the non-simplified version, read on:

The Law

Under California law, felonies are punishable by 16 months, 2 years, or 3 years, unless the statute of conviction specifies another term. (CPC § 18(a)). Misdemeanors are punishable by no more than 6 months, unless the statute of conviction specifies another term. (CPC § 19). Wobblers are punishable by either a felony sentence or no more than one year in county jail. *See, e.g., CPC § 245(a)(1)*. If a person charged with a wobbler is **sentenced** (not ordered to serve county jail as a condition of probation) to one year or less in county jail, it is a misdemeanor. (CPC § 17(b)(1)).

Both felons and misdemeanants can be placed on probation, but neither probation nor any county jail term ordered as a condition of probation is considered a “judgment,” and thus probation will never, by itself, convert a wobbler into a misdemeanor under CPC § 17(b)(1). Where a person charged with a wobbler is placed on probation as a final disposition, check to see if the offense has been charged as a misdemeanor (CPC § 17(b)(4)), reduced to a misdemeanor (CPO § 17(b)(5)), or declared a misdemeanor (CPC § 17(b)(3)).

Beginning October 1, 2011, many felony sentences could be ordered to be served in

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county jail pursuant to California Penal Code § 1170(h), under California’s “realignment.” For cases being reviewed for purposes of sentence commutation, you are unlikely to have to deal with convictions for offenses that occurred after October 1, 2011. Therefore, for these purposes, you can generally assume that a county jail sentence (again, an actual sentence—not a county jail term imposed as a condition of probation) converted the wobbler into a misdemeanor.

The relevant statutes are quoted verbatim below, with explanatory comments in brackets:

California Penal Code § 17. Felony and Misdemeanor Defined

(a): A felony is a crime that is punishable with death, by imprisonment in the state prison, or notwithstanding any other provision of law, by imprisonment in a county jail under the provisions of subdivision (h) of Section 1170 [California’s realignment, which allows some felony terms to be spent in county jail]. Every other crime or public offense is a misdemeanor except those offenses that are classified as infractions.

[This means that, under California law, if the defendant goes to state prison, that’s a felony; if the defendant gets to stay in County Jail, but under CPC § 1170(h), that is still a felony.]

(b): When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170 [which are felony sentences], or by fine or imprisonment in the county jail [which is a misdemeanor sentence, it is a misdemeanor for all purposes [only] under the following circumstances [otherwise it is a felony]:

- (1)** After a judgment imposing a punishment other than imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170.
- (2)** When the court, upon committing the defendant to the Division of Juvenile Justice, 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

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the case shall proceed as if the defendant had been arraigned on a misdemeanor complaint.

§ 18. Punishment for felony not otherwise prescribed; alternate sentence to county jail

(a) Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a felony is punishable by imprisonment for 16 months, or two or three years in the state prison unless the offense is punishable pursuant to subdivision (h) of Section 1170.

[This is the default, as many statutes do not state a term of imprisonment; these statutes are punishable by 16/2/3.]

(b) Every offense which is prescribed by any law of the state to be a felony punishable by imprisonment or by a fine, but without an alternate sentence to the county jail for a period not exceeding one year, may be punishable by imprisonment in the county jail not exceeding one year or by a fine, or by both.

[These are “stealth wobblers” where punishment prescribed is punishment in prison *or fine* . Do not be fooled; these are very rare.]

§ 19. Punishment for misdemeanor; punishment not otherwise prescribed

Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding one thousand dollars (\$1,000), or by both.

[This is the default. Wobblers always state a maximum of one year, so the 6-month maximum will not apply.]

Applications

1. A wobbler (CPC § 17(b)) is a felony unless and until it becomes a misdemeanor. *See US v. Robinson*, 967 F.2d 287, 283 (9th Cir. 1992).

It will be obvious if a wobbler is charged as a misdemeanor (CPC § 17(b)(4)), reduced to a misdemeanor at prelim (CPC § 17(b)(5)), or declared a misdemeanor on later application by the defendant (CPC § 17(b)(3)).

2. The more complicated question is whether the sentence imposed makes the offense a misdemeanor:
 - a. On a wobbler, if a defendant has a sentence of one year or less **imposed**, it is a

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misdemeanor. CPC § 17(b)(1).

b. If a defendant is initially placed on probation, but probation is terminated, and a sentence of one year or less is **imposed**, it is a misdemeanor. *U.S. v. Bridgeforth*, 441 F.3d 864 (9th Cir. 2006).

c. If a defendant has a sentence of one year or less **imposed**, but has **execution** of sentence suspended, and is placed on probation, it is a misdemeanor. *U.S. v. Vieczas-Soto*, 562 F.3d 903 (8th Cir. 2003)

d. BUT if a defendant has **imposition** of sentence suspended, is placed on probation, and is ordered to serve one year or less in county jail **as a condition of probation**, this is a felony. [this is the most common scenario]. *U.S. v. Robinson*, 967 F.3d 287 (9th Cir. 1992); *U.S. v. Adams*, 716 F.3d 1066 (8th Cir. 2013); *but see U.S. v. Vieczas-Soto*, 562 F.3d 903 (8th Cir. 2003) (holding that where it is not clear whether sentence was imposed or not on grant of probation, not a felony).

e. If the defendant in the scenario immediately above is subsequently violated on his probation, has his probation terminated, and is sentenced to one year county jail, this is a misdemeanor. *U.S. v. Bridgeforth*, 441 F.3d 864 (9th Cir. 2006).

3. This analysis is further complicated by California law that allows defendants to “waive” back time and serve more than one year on a misdemeanor.¹

a. This should not affect the above analysis. But, to avoid confusion, you should be aware that if--for example, in scenario (2)(e) above--the defendant was sentenced to one year or less in county jail but actually served more than one year in county jail (not under § 1170(h)) because he had previously served a county jail term as a condition of probation, the wobbler is still a misdemeanor because the defendant has been sentenced to a term that is not state prison or under § 1170(h).

b. Just to be clear, this means that same sentence could garner 3 criminal history points under the guidelines, or be deemed a sentence of more than 13 months under USSG § 2L1.2, and still be considered a misdemeanor under statutes that define a felony as punishable by more than one year. *Cf. U.S. v. Buzo-Zepeda*, 609 F.3d 1024 (9th Cir. 2010); *U.S. v. Gomez-Leon*, 545 F.3d 777 (9th Cir. 2008).

¹This is necessitated by a combination of CPC § 19.2, which provides that the most time that can be spent in county jail is one year, unless sentenced pursuant to § 1170(h), and CPC § 2900.2, which provides that all days spent in custody are credited on a jail sentence, including any period imposed as a condition of probation.

4. The law is unsettled how to treat wobblers that were declared misdemeanors at a later date, pursuant to § 17(b)(3).
 - a. In the context of determining whether an alien has entered the country *after* a felony conviction, the Ninth Circuit has held that a such a declaration, at least where the order is not explicitly nunc pro tunc, does not alter the conviction's status as a felony for § 2L1.2. *See U.S. v. Salazar-Mojica*, 634 F.3d 1070 (9th Cir. 2011); *see also U.S. v. Yopez*, 704 F.3d 1087 (9th Cir. 2012) (holding that nunc pro tunc early termination of probation did not alter probation status for purpose of safety valve).
 - b. There is, however, a strong argument that a nunc pro tunc order declaring a felony a misdemeanor would work to convert a felony to a misdemeanor for purposes of the career offender guideline, § 851 and ACCA--because those guidelines/statutes require that the defendant have prior convictions for a felony, which a nunc pro tunc order should defeat.

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