S231826

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE,	) No. _____
	)
Plaintiff and Respondent,	) 4th Dist. No. E063107
	)
vs.	) (Super. Ct. No. SWF136990)
	)
MARIO MARTINEZ,	)
	)
Defendant and Appellant.	)

PETITION FOR REVIEW

After a Decision by the Court of Appeal
Fourth Appellate District, Division Two, Case No. E063107

On Appeal from the Superior Court of the County of Riverside
The Honorable Becky L. Dugan, Case No. SWF136990

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system

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Defendant and Appellant.	)

PETITION FOR REVIEW

TO THE HONORABLE TANI CANTIL-SAKAUYE, THE CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Appellant, MARIO MARTINEZ, hereby petitions this Honorable Court for review in the above-entitled matter of the unpublished Opinion filed December 15, 2015, by the Court of Appeal of the State of California, Fourth Appellate District, Division Two. A copy of the Opinion is attached hereto as an appendix.

* * *

ISSUES PRESENTED FOR REVIEW

1. Does Proposition 47 allow relief for *any* felony conviction that, based on the facts underlying the offense, satisfies the elements of any of the misdemeanor offenses listed in section 1170.18?

2. Had Proposition 47 been in effect when defendant committed the offense of transportation of methamphetamine (for personal use in violation of Health and Safety Code section 11379), would that offense qualify for resentencing pursuant to section 1170.18 as a misdemeanor violation of Health and Safety Code section 11377, taking into consideration that prior to enactment of Proposition 47, the Legislature reduced the offense of transportation of methamphetamine for personal use to a misdemeanor?

NECESSITY FOR REVIEW

Review by the Supreme Court of a decision of the Court of Appeal should be granted "when necessary to secure uniformity of decision or to settle an important question of law." (Cal. Rules of Court, rule 8.500(b)(1).) There is at present a split of authority in the Courts of Appeal on the first issue presented. Both issues are important questions of law. At present, there are estimated hundreds of petitioning defendants seeking relief pursuant to Penal Code section 1170.18. Review is necessary because the issues presented are likely to arise in hundreds if not thousands of cases and therefore warrant review in this Court.

As to the first issue presented, some decisions have implicitly held that felony offenses not listed in section 1170.18, i.e. second degree "commercial" burglary, are eligible for reduction to or reclassification as one of the listed misdemeanor offenses, depending on the facts underlying the felony conviction meeting the elements of the listed misdemeanors. (Sixth Dist., *People v. Contreras* (2015) 237 Cal.App.4th 868, 892; First Dist. Div. Five, *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444; Fourth

Dist. Div. One *People v. Sherow* (2015) 239 Cal.App.4th 875; Second Dist. Div. 5, Dec. 4, *In re J.L.* (2015) 242 Cal.App.4th 1108.)

More recently, the Court of Appeal has continued to hold, at least implicitly if not expressly, that section 1170.18 is available to reduce *any* felony conviction if the facts of the offense match the elements of one of the misdemeanors listed in section 1170.18, even if the felony conviction is not itself addressed in Proposition 47. (Second Dist. Div. 8, Nov. 13, *People v. Romanowski* (2015) 242 Cal.App.4th 151 [§ 484e, subd. (d)]; Fourth Dist. Div. Two, Dec. 23, *People v. Gomez* (2015) — Cal.App.4th ___ [2015 Cal.App. LEXIS 1152] [Veh. Code, § 10851]; Second Dist. Div. Four, Dec. 24, *People v. Thompson* (2015) — Cal.App.4th ___ [2015 Cal.App. LEXIS 1160] [§ 484e, subd. (d)].)

However, other recent decisions have decided that the only felony offenses eligible for relief are those expressly listed in section 1170.18 (although this makes no sense as discussed, *post*). (See Fourth Dist. Div. Two, Oct 23, *People v. Page* (2015) 241 Cal.App.4th 714; Fourth Dist. Div. One, Nov. 12, *People v. Gonzales* (2015) 224 Cal.App.4th 35; Second Dist. Div. Five, Nov. 20, *People v. Acosta* (2015) 242 Cal.App.4th 521; Second Dist. Div. Two, Dec. 2, *People v. King* (2015) 242 Cal.App.4th 1312; Third Dist., Dec. 30, *People v. Haywood* (2015) — Cal.App.4th ___ [2015 Cal. App. LEXIS 1168].)

Review should be granted because there are certainly hundreds, and perhaps thousands of defendants like Martinez with *felony* convictions for violating Health and Safety Code section 11379 for transporting a small amount of methamphetamine for personal use. All of these defendants should have been convicted of only a misdemeanor violation of Health and Safety Code section 11377, according to the legislative intent behind the January 1, 2014 amendment of section 11379. That legislative intent,

considered together with the intent and purpose of Proposition 47, favors allowing such defendants to petition for resentencing or apply pursuant to section 1170.18 for reclassification of their felony conviction for transportation of a controlled substance for personal use, even though the conviction has long been final.

STATEMENT OF THE CASE

On December 4, 2007, a jury found Appellant and Petitioner, Mario Martinez, guilty of transportation of methamphetamine (Health & Saf. Code, § 11379), and simple possession of methamphetamine (§ 11377, subd. (a)). (1ACT 1–2.)[1/] In a bifurcated bench trial, the court found Martinez had suffered a prior conviction for first degree burglary (§ 459) on December 30, 2002, and a prior conviction for attempted robbery (§§ 664/211) on October 14, 1988, as alleged under the Three Strikes law (§ 1170.12). The court also found that Martinez had served four prior prison terms (§ 667.5, subd. (b)). (1CT 22, 1ACT 3–4.) .

Judgment was pronounced on July 11, 2008. Probation was denied. (1RT 27–28.) The court exercised discretion to dismiss the alleged attempted robbery strike in furtherance of justice. (1RT 26.) Martinez was ordered to serve an aggregate term of 12 years in prison. (1CT 20–21, 1RT 28–29.)

On November 13, 2014, Martinez filed a petition pursuant to section 1170, seeking modification of the sentence. Pursuant to section 1170.18, Martinez averred that he had no disqualifying prior convictions, and requested reduction of the current conviction on Count 2, for simple possession of methamphetamine to a misdemeanor. (1CT 26–28.) Counsel

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1. Throughout, "CT" refers to the Clerk's Transcript and "RT" to the Reporter's Transcript, while "ACT" refers to the Augmented Clerk's Transcript in Case No. E063107.

appointed to represent Martinez filed a brief seeking resentencing also on Count 1, transportation for personal use, with a memorandum of points and authorities. (1RT 33, 1ACT 25–31.) The prosecutor filed a response opposing Martinez's petition, asserting that Martinez was not eligible for resentencing on Count 1, and resentencing on Count 2 would not change the aggregate sentence. (1CT 29.)

On March 13, 2015, the Court granted Martinez's petition in part. The conviction for Count 2, simple possession, was reduced to a misdemeanor. The court resentenced Martinez to 365 days in jail to be served concurrent with the prison term. The court rejected Martinez's argument in favor of reducing the Count 1 transportation conviction to a misdemeanor. (1CT 31, 1RT 35.)

Martinez timely filed notice of appeal on March 16, 2015. (1CT 32.) On appeal, Martinez argued that Penal Code section 1170.18, enacted as part of Proposition 47, should be liberally construed to provide post-conviction relief for those convicted of any felony which, if committed after passage of section 1170.18, would be punishable as a misdemeanor. Martinez also argued that the court's order resentencing Martinez must be modified to stay punishment for count 2.

In an unpublished Opinion filed on December 15, 2015, the Court of Appeal rejected the primary argument for two reasons. First, the Opinion reasoned that the only felony offenses eligible for relief under section 1170.18, are those convictions for violating the finite set of statutes listed therein. (Opinion, pp. 5–6.) Second, the Opinion concluded that even applying Proposition 47 to the offense committed in 2007, the offense of transportation of methamphetamine for personal use would still be a felony because the amendment of Health and Safety Code section 11379, making transportation for person use a misdemeanor, did not go into effect until

January 1, 2014. (Opinion, pp. 6–7.) The Court of Appeal directed modification of the judgment to stay the misdemeanor sentence on count 2. (Opinion, p. 7.)

STATEMENT OF FACTS

For purposes of this Petition, Martinez adopts the statement of the facts in the Opinion, page 2, setting forth the facts underlying his conviction for possession and transportation of a small amount of methamphetamine.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF GRANTING REVIEW

I

Any Felony is Eligible for Relief Under Section 1170.18 So Long as the Facts Underlying the Offense Satisfy the Elements of One of the Enumerated Misdemeanors

Requesting relief under sections 1170.18, subdivision (a), is quite similar to the statutory procedure set forth in section 1170.126. These sections are close statutory cousins. Both specify that they constitute a "post-conviction release proceeding." (Cf. § 1170.126, subd. (m), § 1170.18, subd. (o).) Therefore, the court must look to the record of conviction, including the appellate opinion, in deciding whether offense is eligible for resentencing. (*People v. Hicks* (2014) 231 Cal.App.4th 275, 286.) "What the trial court decides is a question of law, i.e., whether the facts in the record of conviction are the proper subject of consideration, and whether they establish eligibility." (*People v. Oehmigen* (2014) 232 Cal.App.4th 1, 7.) For these reasons, the facts underlying Martinez's conviction for transportation of methamphetamine are reviewed to determine whether the offense is one of the enumerated misdemeanors in section 1170.18.

A split of authority has developed in the Courts of Appeal on the application of section 1170.18, when the defendant seeks relief for a felony conviction under a statute that is not expressly listed therein. For instance, Penal Code section 459 second degree commercial burglary is not listed in section 1170.18. Nevertheless, it has been accepted that as a matter of law a commercial burglary conviction might be eligible for resentencing to shoplifting under section 459.5, enacted as part of Proposition 47, and one of the statutes listed in 1170.18.

At least four cases have held that whether a particular felony commercial burglary conviction is eligible to be reduced to misdemeanor shoplift/attempted shoplifting depends on the facts.

> [T]o qualify for resentencing under the new shoplifting statute, the trial court must determine whether defendant entered "a commercial establishment with intent to commit larceny while that establishment [was] open during regular business hours," and whether "the value of the property that [was] taken or intended to be taken" exceeded $950. (§ 459.5.)

(*People v. Contreras, supra,* 237 Cal.App.4th at p. 892, as quoted in *People v. Rivas-Colon, supra,* 241 Cal.App.4th 444 [on petition for resentencing, defendant had burden to prove, and failed to prove the value of hats he took from NFL store on Pier 39 did not exceed $950; the record indicated the value was $1,437.74, rendering him ineligible for resentencing for shoplifting]; see also *People v. Sherow, supra,* 239 Cal.App.4th 875 [defendant with commercial burglary conviction might be resentenced to misdemeanor shoplifting but only if he satisfy's a burden to prove the elements of shoplifting in the commission of the offense]; *In re J.L., supra,* 242 Cal.App.4th 1108 [theft of another student's cell phone from school locker not eligible because school is not a commercial establishment].)

On this side of the split of authority this interpretation has been applied to offenses other than commercial burglary. As Martinez maintains, these cases hold that section 1170.18 is available to reduce *any* felony conviction if the facts of the offense match the elements of one of the misdemeanors listed in section 1170.18, even if the felony conviction is not itself addressed in Proposition 47. (*People v. Gomez, supra,* 2015 Cal.App. LEXIS 1152 [Veh. Code, § 10851 may be reduced to a petty theft conviction depending on underlying facts]; *People v. Thompson, supra,* 2015 Cal.App. LEXIS 1160 [§ 1170.18 eligible for violation of § 484e, subd. (d), grand theft acquisition and retention of access card account information is eligible because it is a form of grand theft with minimal value unless card is used]; *People v. Romanowski, supra,* 242 Cal.App.4th 151 [accord as to potential eligibility for conviction under § 484e, subd. (d), and remanded for determination of value of property].)

However, the same Division from which *Sherow* originated filed a conflicting decision in *People v. Gonzales, supra,* 224 Cal.App.4th 35.[2/] The *Gonzales* decision upheld the denial of the defendant's petition for resentencing on his commercial burglary conviction on two grounds. First, the court determined that the entry into a bank to commit theft by fraudulently inducing the bank to consensually hand over cash did not amount to larceny, in particular "caption" or taking without consent. Second, the *Gonzales* decision concluded that there was no authority to resentence persons convicted of crimes other than those expressly enumerated in section 1170.18. Therefore, according to the limited reasoning in that case, all commercial burglary defendants are ineligible for resentencing to misdemeanor shoplifting punishment.

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2. A Petition for Review was filed in *Gonzales* on December 15, 2015, in Case No. S231171.

The latter holding in *Gonzales* echoed the reasoning from another case addressing in an analogous situation, where the defendant sought resentencing for a felony conviction for unlawfully taking or driving a vehicle (Veh. Code, § 10851), to petty theft under Penal Code section 490.2, a statute enacted with Proposition 47 and listed in section 1170.18. (*People v. Page, supra,* 241 Cal.App.4th 714.)[3/] *Page* held that a defendant is not entitled to resentencing to petty theft for an offense that satisfies the elements petty theft under newly enacted section 490.2, based on the circumstances that (1) Proposition 47 did not amend section 10851, leaving its wobbler status intact and (2) section 10851 is not included among the enumerated sections amended or added by Proposition 47.

The *Page* decision recognized that a violation of section 10851 is a lesser included offense of grand theft auto, which is an offense redefined by Proposition 47 by way of enactment of section 490.2, but disagreed with the defendant's argument that by applying 490.2 to reduce the greater offense, it logically also must apply to reduce the lesser included offense. (*Page, supra*, at pp. 717–719; see also *People v. Acosta, supra,* 242 Cal.App.4th 521 [attempted vehicle burglary not eligible for relief under § 1170.18 regardless of underlying facts because it is not a "listed" felony]; *People v. King, supra,* 242 Cal.App.4th 1312 [§ 1170.18 does not apply to violation of § 484e, subd. (d), grand theft acquisition and retention of access card account information because that crime is grand theft regardless of the value of targeted merchandise when card was used]; *People v. Haywood, supra*, 2015 Cal.App. LEXIS 1168 [Veh. Code, § 10851 may not be reduced to a petty theft conviction regardless of underlying facts].)

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3. A Petition for Review was filed in *Page* on November 24, 2015, in Case No. S230793.

The *Gonzales-Page* interpretation, adopted in some form by these more recent decisions, misapplies the rule of statutory interpretation that inclusion of one indicates an intention to exclude others (*expressio unius est exclusio alterius*) because limiting resentencing or reclassification of convictions predating section 1170.18 to only those offenses listed therein goes against the express provisions of section 1170.18. Section 1170.18 is unambiguous and without need of interpretation.

These interpretations also violate the "cardinal rule of statutory construction" to give effect to all words and provisions of a statute and leave no part superfluous or inoperative (see *Pham v. Workers' Comp. Appeals Bd.* (2000) 78 Cal.App.4th 626, 634–635), because it renders the inclusion in section 1170.18, of the *new* misdemeanor offenses codified as Penal Code sections 459.5 and 490.2, superfluous, as discussed, *post.* Review is necessary because, as expressed in section 1170.18, a defendant is eligible to have any "felony" reduced if it would have been one of the listed misdemeanors in section 1170.18 had Proposition 47 been in effect when the offense was committed.

The intent of section 1170.18/Proposition 47 was to "'reduce penalties "for certain nonserious and nonviolent property and drug offenses from *wobblers or* felonies to misdemeanors."'" (*T.W. v. Superior Court* (2015) 236 Cal.App.4th 646, 652, emphasis added.) Wobbler status is therefore irrelevant. Moreover, respectfully, this reasoning in *Page* also does not appreciate that if reconsidered under Proposition 47, there are two pivotal circumstances which were not explicitly relevant to the misdemeanor sentencing option (§ 17, subd. (b)) prior to enactment of the act, i.e., whether the conduct was theft versus driving, and the value of the value of the vehicle.

More problematic, *Gonzales, Page, Acosta, King,* and *Haywood* are wrong in holding that the only felony convictions eligible for relief under section 1170.18, are those that are expressly listed therein. In the case presented for review, consistent with that erroneous interpretation of section 1170.18, the Court of Appeal, Fourth District, Division Two, has again misapplied the rule of statutory construction that inclusion of one indicates an intention to exclude others (*expressio unius est exclusio alterius*). (Opinion, pp. 5–6.) This rule of statutory construction does not apply for two reasons. First, limiting resentencing or reclassification of convictions predating section 1170.18 to only those offenses listed therein goes against the express provisions of section 1170.18, which applies to any "felony," that would have been a misdemeanor had Proposition 47 been in effect at the time the offense was committed. The only limitations on application of section 1170.18, is that the felony must satisfy the elements of one of the listed misdemeanor offenses.

To ascertain the meaning of a statute, a court begins with the express language of the statute itself. (*Leroy T. v. Workmen's Comp. Appeals Bd.* (1974) 12 Cal.3d 434, 438.) If the statute is clear and unambiguous on its face, then there is no need for construction and the court should not indulge in it. (*People v. Benson* (1998) 18 Cal.4th 24, 80.) A court must simply ascertain and declare what the substance of the statute is and not "insert what has been omitted or. . . omit what has been inserted." (Code Civ. Proc., § 1858.) Where the language is plain and admits of no more than one meaning the statute is not ambiguous and the rules which are to aid doubtful meanings need no discussion. (*Caminetti v. United States* (1917) 242 U.S. 470, 485 [37 S.Ct. 192, 61 L.Ed. 442]; *Armstrong v. County of San Mateo* (1983) 146 Cal.App.3d 597, 610.)

Second, the Courts of Appeal in *Gonzales, Page, Acosta, King,* and *Haywood* have interpreted section 1170.18 in a manner which renders the act's inclusion in section 1170.18, of the new Penal Code sections 459.5 and 490.2, entirely superfluous. Proposition 47 enacted these new sections to the Penal Code (459.5 and 490.2) and, from the effective date forward, there would be prosecution and punishment for those new offenses. If there was no intent by the Electorate to allow for retroactive resentencing or reclassification of any other offenses other than those listed in section 1170.18, then section 1170.18 would not have listed sections 459.5 and 490.2. There is no reason to mention those sections unless the retroactive application for relief under section 1170.18 was meant to apply to prior felony *offenses* that factually amount to these newly created misdemeanor crimes, regardless of the code section of the prior felony conviction.

Because the disposition in this case was based in part upon the holding that even though Martinez established the facts underlying his felony conviction for transportation of methamphetamine satisfied the elements of a misdemeanor listed in section 1170.18, i.e., Health and Safety Code section 11377, he would still not be eligible for resentencing on his felony conviction because section 11379 is not listed in section 1170.18, should review be granted in either *Page* or *Gonzales*, this Court should also grant review in this case as well. Briefing in this case may be deferred pending resolution of this important question of law. (Rule 8.512(d)(2).)

II

Allowing Resentencing/Reclassification for Felony Transportation of Methamphetamine for Personal Use is Consistent With the Intents and Purposes of Proposition 47 and Preceding Legislation Amending Section 11379

The Court of Appeal concluded that even applying Proposition 47 to the transportation offense committed in 2007, the offense of transportation of methamphetamine for personal use would still be a felony because the amendment of Health and Safety Code section 11379, making transportation for person use a misdemeanor, did not go into effect until January 1, 2014. (Opinion, pp. 6–7.) Martinez presented a novel argument to the Superior Court, which was rejected, but which is nevertheless meritorious and worthy of review.

At the time of Martinez's 2008 conviction, Health and Safety Code section 11379 prescribed a prison term of two, three, or four years for "every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport," any controlled substance specified in the statute, including methamphetamine. As a result, prosecutors used that wide range of conduct listed in the former version of the statute to prosecute individuals who were in possession of drugs for only personal use, and who are not in any way involved in a drug trafficking enterprise. (See, e.g., *People v. Emmal* (1998) 68 Cal.App.4th 1313, 1316–1317 [transportation of methamphetamine is punishable regardless of quantity or distance traveled, and regardless of whether driver was impaired or possessed the substance for sale]; *People v. Lacross* (2001) 91 Cal.App.4th 182, 187 [illegal transportation may be effected by bicycle].)

Assembly Bill No. 721, passed in 2013, became effective January 1, 2014. (Stats 2013, ch. 504 § 2.) AB 721 amended the elements of section 11379 subdivision (a), felony sales or transportation of a controlled substance, to require proof that defendants like Martinez transported the illegal substance have done so *for the purpose of sales.* (§ 11379, subd.(c).) AB 721 explains that 11379 was being modified because the ambiguities in the law "allowed for prosecutors to charge drug users—who are not in any way involved in drug trafficking—with TWO crimes for simply being in possession of drugs." (2013 California Assembly Bill No. 721, California 2013–2014 Regular Session, Committee Report April 15, 2013 [emphasis in the original].)

This ambiguous law applied to Martinez, and he was convicted of both possession and transportation despite a lack of evidence that he was involved in a drug trafficking enterprise. There is no evidence that the small amount of methamphetamine transported was for the purpose of sales. He was charged and convicted of two crimes for simply being in possession of drugs in a moving vehicle. This is demonstrated by the court's decision pursuant to section 654[4] at the time judgment was imposed to stay punishment for the conviction under 11377. The conduct underlying Martinez's transportation conviction today would amount to a mere violation of section 11377 which is expressly covered by the Act, and designated as a misdemeanor.

Subsequently, Proposition 47 was enacted "to ensure that prison spending is focused on violent and serious offenses" and to retain harsher

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4. Section 654, subdivision (a), provides in relevant part, that "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

sentences and the cost of implementing those punishments, "for people convicted of dangerous crimes like murder, rape, and child molestation." (Prop. 47, § 2.) The ballot arguments similarly state its remedial purpose of reducing the population of "California's overcrowded prisons" and "focus[ing] law enforcement dollars on violent and serious crime while providing new funding for education and crime prevention programs that will make us all safer." (Official Voter Information Guide, Gen. Elec. (Nov. 4, 2014) argument in favor of Prop. 47, p. 38.)

The Act should be liberally construed to effectuate its purposes. Section 1170.18 provides:

> A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor *under the act that added this section* ("this act") had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act.

(*Ibid.*, emphasis added.) Under the current law, transportation for personal use is punishable only as misdemeanor possession in violation of Health and Safety Code section 11377, which is a misdemeanor under the Act that added section 1170.18.

The Act should be liberally construed to effect its purpose and allow Martinez to proceed on a petition for resentencing of his conviction for violating former section 11379, because *the underlying conduct* of possession for personal use, is expressly designated to be a misdemeanor under the Act, and because transportation under those circumstances was

earlier reduced to a misdemeanor by virtue of the additional element of intent to sell being added to section 11379. Therefore, Martinez is a person currently serving a sentence for a conviction that would have been a misdemeanor under Prop. 47 had the act been in effect at the time of his offense. Prop. 47 is presumed to have incorporated AB 721 when it was enacted. Both the Legislature and the electorate are "presumed to be aware of existing laws and judicial construction thereof." (*In re Lance W.* (1985) 37 Cal.3d 873, 890, fn. 11.)

This Court must determine its meaning by construing section 1170.18 in harmony with the nature and obvious purpose of the statute. (*Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified Sch. Dist.* (1978) 21 Cal.3d 650, 659; *People v. Williams* (1992) 10 Cal.App.4th 1389, 1393.) A broad and liberal interpretation is to be applied to effectuate the purposes of the law. (Prop. 47 at §§ 15 ["broadly construed to accomplish its purposes"] & 18 ["liberally construed to effectuate its purposes"].)

AB 721 and the Act have the same purpose and intent with regard to reserving felony punishment to those offenders who possess drugs for purpose of drug trafficking, and saving tax dollars previously spent on the prosecution and punishment of those who possession and transport for personal use, to be used to deal with more serious offenders. Therefore, this Court is obliged to harmonize these statutes, both internally and with each other. (*Dyna-Med, Inc. v. Fair Employment & Housing Com.*(1987) 43 Cal.3d 1379, 1387; *People v. Caudillo* (1978) 21 Cal.3d 562, 585 [statutes relating to the same subject matter should be construed together and harmonized if possible]; C*ooley v. Superior Court* (2002) 29 Cal.4th 228, 248 [same].)

The drafters did not have to specify 11379 as an eligible crime because transportation for personal use is now only a violation of 11377.

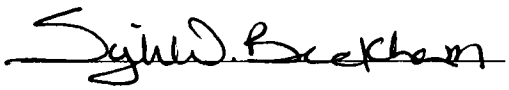
The drafters did not limit resentencing provisions solely to listed crimes but instead limited resentencing provisions to persons currently serving a sentence who would have been guilty of a misdemeanor had it been in effect at the time of the offense. The question is *whether the conduct and facts underlying the offense amount to a misdemeanor under the Act,* rather than the statutory designation of the formerly felony conviction. Because Martinez would only have been guilty of a misdemeanor had AB 721 been in effect when he committed the offense, and the conduct underlying his offense is that which is expressly designated as a misdemeanor under the Act, section 1170.18 should be liberally construed to apply to render Martinez eligible for resentencing relief.

CONCLUSION

Appellant and Petitioner Mario Martinez respectfully requests this Court exercise its discretion to grant review of the important issues of law to settle a split of authority, and to address a novel issue that is likely to arise in countless other cases.

Respectfully submitted,

Dated: January 12, 2016



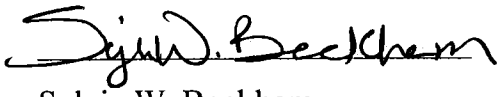
Sylvia W. Beckham

Representing Appellant by appointment of the Court of Appeal under the Appellate Defenders, Inc. independent case system

CERTIFICATE OF LENGTH

I, Sylvia W. Beckham, counsel for Mario Martinez, certify that the Petition for Review, was produced using 13-point Times New Roman type including footnotes, and the word processing program, WordPerfect, used to generate this brief indicates that the word count for this document is 4,568 words.

Dated: January 12, 2016



Sylvia W. Beckham

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MARIO MARTINEZ,

Defendant and Appellant.

E063107

(Super.Ct.No. RIF136990)

OPINION

APPEAL from the Superior Court of Riverside County. Becky Dugan, Judge. Affirmed with directions.

Sylvia W. Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina, Meagan J. Beale and Parag Agrawal, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Mario Martinez appeals from an order denying in part his petition for resentencing under the Safe Neighborhoods and Schools Act of 2014 (Proposition 47) and Penal Code section 1170.18. He contends that Proposition 47 should be construed to provide postconviction relief for those convicted of any felony that would be punishable as a misdemeanor if committed after the passage of Proposition 47 and Penal Code section 1170.18. He further contends that his sentence for possession of methamphetamine should be stayed under Penal Code section 654. The People concede, and we agree, that the sentence for possession of methamphetamine should be stayed.

FACTS AND PROCEDURAL BACKGROUND

On May 19, 2015, we took judicial notice of our unpublished opinion in *People v. Martinez* (June 22, 2010, E046651). The underlying facts are taken from that opinion.

In May 2007, deputies stopped a vehicle in which defendant was a passenger because the month sticker was not identifiable on the license plate. While the vehicle was being pulled over, defendant leaned forward three or four times. The driver was subsequently arrested on a felony warrant and gave consent to search the vehicle. On the floor mat near defendant's feet, the deputies found a baggie containing 0.38 grams of methamphetamine.

In December 2007, a jury found defendant guilty of transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a)—count 1) and possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)—count 2). The trial court found true the allegations of four prior prison terms and two strike priors. The trial court

sentenced defendant to an aggregate term of 12 years in state prison, which included staying the sentence for count 2 under Penal Code section 654. The trial court thereafter struck a prior strike after finding, among other things, that the quantity of the controlled substance involved was quite small and that defendant's role in the offense was "rather minor."

In November 2014, defendant filed a petition under Penal Code section 1170.18 seeking modification of his sentence. The People conceded that defendant was entitled to resentencing on count 2 but contended he was not eligible as to count 1. The trial court reduced defendant's conviction for simple possession to a misdemeanor but denied his request to reduce his transportation conviction to a misdemeanor.

DISCUSSION

Standard of Review

When interpreting a voter initiative, "we apply the same principles that govern statutory construction." (*People v. Rizo* (2000) 22 Cal.4th 681, 685.) We first look "'to the language of the statute, giving the words their ordinary meaning.'" (*Ibid.*) We construe the statutory language "in the context of the statute as a whole and the overall statutory scheme." (*Ibid.*) If the language is ambiguous, we look to "'other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet.'" (*Ibid.*)

Proposition 47 and Statutory Amendments

On November 4, 2014, voters approved Proposition 47, which went into effect the next day. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) Proposition 47 reduced certain drug- and theft-related crimes from felonies or wobblers to misdemeanors for qualified defendants and added, among other statutory provisions, Penal Code section 1170.18. Penal Code section 1170.18 creates a process through which qualified persons previously convicted of crimes as felonies, which would be misdemeanors under the new definitions in Proposition 47, may petition for resentencing. (See generally *People v. Lynall* (2015) 233 Cal.App.4th 1102, 1108-1109.) Specifically, Penal Code section 1170.18, subdivision (a), provides: "A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under [Proposition 47] that added this section . . . had [Proposition 47] been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by [Proposition 47]."

Defendant's Conviction of Transportation of Methamphetamine

A conviction of transportation of a controlled substance under Health and Safety Code section 11379, subdivision (a), is not an offense specifically addressed in Penal Code section 1170.18, subdivision (a). At the time of defendant's conviction, courts interpreted Health and Safety Code section 11379 as applying to transportation even for

personal use. (E.g., *People v. Emmal* (1998) 68 Cal.App.4th 1313, 1316-1317.) However, effective January 1, 2014, the statute was amended to add the requirement that the transportation be for sale: "For purposes of this section, 'transports' means to transport for sale." (Health & Saf. Code, § 11379, subd. (c).) Defendant argues that the conduct underlying his transportation conviction would today amount to a mere violation of Health and Safety Code section 11377, which *is* expressly covered by Proposition 47 and is designated as a misdemeanor.

Under long established principles, a statute lessening punishment is presumed to apply to all cases not yet reduced to final judgment when the statute becomes effective. (*In re Estrada* (1965) 63 Cal.2d 740, 744-748 (*Estrada*).) Defendant's conviction for transportation of methamphetamine under Health and Safety Code section 11379, subdivision (a), was final in 2010; the amendment to that statute changing the elements of the offense became effective on January 1, 2014.

Defendant's argument amounts to an attempt to interpret Proposition 47 in such a way as to provide retroactive relief not available under *Estrada.* However, as noted, Proposition 47 and Penal Code section 1170.18, subdivision (a), do not specifically list Health and Safety Code section 11379 as a crime to which misdemeanor sentencing now applies. The Legislature's inclusion of specific statutory sections, but not Health and Safety Code section 11379, shows the Legislature intended to exclude section 11379. Under the statutory interpretation canon *expressio unius est exclusio alterius*, the inclusion of one thing in a statute indicates exclusion of another thing not expressed in the statute. (*People v. Whitmer* (2014) 230 Cal.App.4th 906, 917-918.) Thus, when the

items expressed in a statute are members of an associated group or series, a conclusion is justified that items not mentioned were excluded by deliberate choice, not inadvertence. (*The Formula Inc. v. Superior Court* (2008) 168 Cal.App.4th 1455, 1463.)

For example, in *People v. Gray* (1979) 91 Cal.App.3d 545, 551, the court concluded that the legislative inclusion of only four crimes as exceptions to the sentence enhancement for great bodily injury in the commission of a felony (Pen. Code, § 12022.7) demonstrated the legislative intent to exclude other crimes, like attempted murder, from the list. When a statute lists specific exemptions, courts may not infer additional exemptions in the absence of a clear legislative intent that such exemptions are intended. (*Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 195, superseded by statute on another ground as stated in *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1107.) We therefore reject defendant's contention that his conviction of a violation of Health and Safety Code section 11379, subdivision (a), was eligible for resentencing.

Defendant further argues that just as in a proceeding under Penal Code section 1170.126, the underlying conduct should be examined to determine eligibility for resentencing under Penal Code section 1170.18. The required showing under Penal Code section 1170.18 is whether the petitioner "would have been guilty of a misdemeanor under [Proposition 47] had [it] been in effect *at the time of the offense*." (Pen. Code, § 1170.18, subd. (a).) If Proposition 47 had been in effect when defendant committed his offense in 2007, he would still be guilty of a felony not covered by Proposition 47

because the amendment to Health and Safety Code section 11379 did not go into effect until 2014.

Stay of Sentence for Possession of Methamphetamine

In resentencing defendant for his conviction of possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)), now designated a misdemeanor, the trial court imposed a concurrent term. Defendant's original felony sentence for that offense was stayed under Penal Code section 654. The People concede, and we agree, that the sentence for misdemeanor possession of methamphetamine should likewise be stayed.

DISPOSITION

The trial court is directed to issue an amended abstract of judgment and minute order reflecting that defendant's punishment for misdemeanor possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)—count 2) is stayed pursuant to Penal Code section 654, and to forward copies of the amended documents to the appropriate authorities. In all other respects, the order appealed from is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McKINSTER
J.

We concur:

HOLLENHORST
Acting P. J.

MILLER
J.

PROOF OF SERVICE BY MAIL

(Cal. Rules of Court, rules 1.21 & 8.50.)

People v. Mario Martinez, Case No. E063107

I, Sylvia W. Beckham, declare: I am over the age of 18 years and not a party to the case; I am employed in the County of Ventura, California, where the mailing occurs; and my business address is 226 West Ojai Avenue, Suite 101 PMB 529, Ojai, California, 93023-3278.

I further declare that I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service, and that the correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business.

On January 12, 2016, I caused to be served the Petition for Review by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

Hon. Becky L. Dugan
C/O Clerk of the Superior Court
Hall of Justice, 4100 Main Street
Riverside, CA 92501-3626

Office of the District Attorney
County of Riverside
3960 Orange Street
Riverside, CA 92501

Mario Martinez
2847 Donner Way
Riverside, CA 93509

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Office of the Public Defender
4200 Orange Street
Riverside, CA 92501

I then sealed each envelope and, with the postage thereon fully prepaid, I placed each for deposit in the United States Postal Service, this same day, at my business address shown above, following ordinary business practices.

PROOF OF SERVICE BY ELECTRONIC SERVICE

(Cal. Rules of Court, rules 2.251(i)(1)(A)–(D) &8.71(f)(1)(A)–(D).)

Furthermore, I, Sylvia W. Beckham, declare I electronically served from my electronic service address of s.beckham@att.net the above-referenced document on January 12, 2016, before 5:00 PM, to the following entities:

APPELLATE DEFENDERS, INC., eservice-criminal@adi-sandiego.com

CALIFORNIA ATTORNEY GENERAL, ADIEService@doj.ca.gov

COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO via e-submission

I declare under the penalty of perjury under the laws fo the State of California the foregoing is true and correct.

Executed on January 12, 2016