Case No. S219178

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff and Appellant,

SUPREME COURT
FILED

SEP 25 2014

Frank A. McGuire Clerk

Deputy

vs.

ISAIAS ARROYO
Defendant and Respondent,

DEFENDANT/RESPONDENT'S OPENING BRIEF ON THE MERITS

From the Published Opinion of the Court of Appeal
Fourth District, Division Three, No. G048659

Orange County Superior Court No.: 12ZF0158
The Honorable William Froeberg, Judge, Dept. C-40

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE, *Plaintiff and Appellant,* vs. ISAIAS ARROYO, *Defendant and Respondent.*	**OPENING BRIEF ON THE MERITS** From the Published Opinion of the Court of Appeal Fourth District Division Three No. G048659 O.C. Sup. Ct. No. 12ZF0158

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

ISSUE PRESENTED

May the criminal prosecution of a juvenile offender under Welfare and Institutions Code section 707, subdivision (d), be commenced by grand jury indictment or only by the filing of an information after a preliminary hearing?

STATEMENT OF CASE

On December 18, 2012 Plaintiff/Appellant prosecution, presented evidence to the grand jury and requested that they return an indictment against minor Defendant/Respondent Arroyo, hereinafter "Arroyo" and six co-defendants, on the following charges:

- Count 1: Penal Code section 182(a)(1)/187(a) [conspiracy to commit murder];
- Count 2: Penal Code section 186.22(a) [street terrorism].

The prosecution also requested that the grand jury find that Arroyo vicariously/personally used a firearm during the commission of the offense charged in Count One (Penal Code section 12022.53(b)/(c) (1)), and that he committed the offense for the benefit of, at the direction of, and in association with a criminal street gang, with the specific intent to promote, further or assist in criminal conduct by gang members (Penal Code section 186.22(b)).

The grand jury obliged the prosecutor, and Arroyo was arraigned on an Indictment in case 12ZF0158 on December 19, 2012. (C.T.[1] 1) Arroyo

[1] C.T. refers to Volumes 1 and 2 of the Clerk's Transcript on Appeal.

entered “not guilty” pleas to all of the charges and denied all of the enhancements contained therein. (S.C.T.[2] 2)

On May 24, 2013 Arroyo filed a Demurrer to the Indictment (C.T. 132-140) and a Notice and Motion to Dismiss the Indictment pursuant to Penal Code section 995/939.71 and exhibits in support thereof. (C.T. 141 – C.T. 443) On June 17, 2013 the People filed an Opposition to the Demurrer. (C.T. 444-460) On June 26, 2013 Arroyo filed a reply to the People's Opposition. (C.T. 461 – 467)

On June 28, 2013 Arroyo's Demurrer to Indictment 12ZF0158 was heard, and sustained, by the Honorable William R. Froeberg, Orange County Superior Court. As a result of that order, Arroyo was dismissed from Indictment 12ZF0158. (S.C.T. 8-9)

The prosecution filed a Notice of Appeal on July 2, 2013. (C.T. 468; S.C.T. 9)

Oral argument on the matter was set in the Court of Appeal on March 17, 2014.

On April 28, 2014 the Court of Appeal filed its unpublished opinion, which reversed the judgment of the Orange County Superior Court. On

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[2] S.C.T. refers to the Supplemental Clerk's Transcript on Appeal.

April 29, 2014 the People filed a Request for Publication, which was granted by the Court of Appeal on May 1, 2014.

Arroyo filed his Petition for Review of the Court of Appeal's opinion in this Court on June 9, 2014 and the Court granted that Petition on July 23, 2014.

STATEMENT OF FACTS

The issue presented by this case is entirely procedural. As such, the facts of the incident which gave rise to the charges contained in the indictment are not particularly material. The following is a very brief statement of the incident, taken from the Demurrer filed by Arroyo in the Superior Court:

> On the evening of October 19, 2012, Santa Ana police officers observed a carload of individuals that they believed to be Los Compadres gang members drive slowly and walk through 1900 to 2200 West Myrtle Street in Santa Ana. A subsequent car stop revealed seven individuals and one loaded 5-shot revolver. (C.T. 134-135)

ARGUMENT

CRIMINAL PROSECUTION OF A JUVENILE OFFENDER UNDER WELFARE AND INSTITUTIONS CODE SECTION 707, SUBDIVISION (d), MAY NOT BE COMMENCED BY GRAND JURY INDICTMENT, AND MAY ONLY BE COMMENCED BY THE FILING OF AN INFORMATION AFTER A PRELIMINARY HEARING.

I.

INTRODUCTION

The issue in this case involves interpretation of the language contained in California Welfare and Institutions (W&I) Code section 707, subdivision (d)(4), which was implemented in 2000 after passage of California Proposition 21, the Gang Violence and Juvenile Crime Prevention Act.

Since 1961, with some exceptions, juveniles accused of committing crimes in California have been dealt with primarily by the Juvenile Division of the Superior Court, hereinafter "Juvenile Court", pursuant to W&I Code section 602, subdivision (a), which reads:

> Except as provided in subdivision (b), any person who is under the age of 18 years when he or she violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime other than an ordinance

> establishing a curfew based solely on age, is within the jurisdiction of the juvenile court, which may adjudge the person to be a ward of the court.

In 2000, prior to the passage of Proposition 21, the only means of prosecuting minors in Courts of General Criminal Jurisdiction, hereinafter "Adult Courts", were (1) W&I Code section 602, subdivision (b) for minors 16-17 years old who committed a very short list of offenses, (2) W&I Code section 707, subdivision (a), (b) or (c) for minors 16-17 years old, or (3) W&I Code section 707, subdivision (d) for minors 14-15 years old. W&I Code section 602(b) represented the "mandatory direct-file" offenses, those that were required to be prosecuted in Adult Court. (W&I Code section 602(a)). W&I Code sections 707(a) thru (d) were discretionary, but ***required*** a fitness hearing in the juvenile court. (W&I Code section 707(a), (b), (c), (d)) In short, the prosecution had no vehicle to, unilaterally, decide to prosecute a minor in Adult Court. Proposition 21 drastically changed that.

As will be explained below, the plain language of current W&I Code section 707, subdivision (d)(4) requires prosecutors to proceed by way of complaint and preliminary examination rather than grand jury and indictment when discretionarily filing charges against minors in Adult Court.

Such a conclusion is also supported by a review of changes to W&I Code sections 707 and 602 made by Proposition 21. It is also supported by a review of relevant existing case law on the Proposition and on the issue.

II.

PROPOSITION 21 AND WELFARE AND INSTITUTIONS CODE SECTION 707(d) (4)

Proposition 21 was passed by voters at the March 7, 2000, Primary Election. Relevant to the present case, the initiative significantly broadened the circumstances in which prosecutors may, at their discretion, unilaterally file charges against minors as young as 14 years old in adult court, rather than in juvenile court. Specifically, the initiative completely re-wrote subdivision (d) of W&I Code section 707, to allow prosecutors to bypass Juvenile Court review entirely, and, at their own discretion, file charges against minors directly in Adult Court. Subdivisions (1), (2) and (3) of the newly written subdivision (d) specify what age minors may be filed on in adult court for which crimes. Subdivision (4), which is directly at issue in the present case, applies to "any case in which the district attorney or other appropriate prosecuting officer" files charges against a minor pursuant to this subdivision. (W&I Code section 707(d) (4))

While Proposition 21 was undeniably intended to make it easier for prosecutors to file a broader range of charges against minors in Adult Court, it did not give them carte blanche. Prosecutors' newfound power to file in Adult Court at their own discretion, conferred by Proposition 21, was not completely without any safeguards.

Proposition 21 rewrote subdivision (d)(4) of W&I Code section 707, so that it now reads:

> In any case in which the district attorney or other appropriate prosecuting officer has filed an accusatory pleading against a minor in a court of criminal jurisdiction pursuant to this subdivision, the case shall then proceed according to the laws applicable to a criminal case. ***In conjunction with the preliminary hearing as provided in Section 738 of the Penal Code, the magistrate shall make a finding*** that reasonable cause exists to believe that the minor comes within this subdivision. If reasonable cause is not established, the criminal court shall transfer the case to the juvenile court having jurisdiction over the matter. (W&I Code section 707(d) (4); emphasis added)

As will be discussed below, Proposition 21 also made changes to W&I Code section 602, specifically to subdivision (c), that are instructive in answering the issue presented in this case.

III.

THE PLAIN LANGUAGE OF WELFARE AND INSTITUTIONS CODE SECTION 707(d)(4) MANDATES THAT PROSECUTION OF JUVENILE OFFENDERS UNDER THAT SECTION ONLY BE COMMENCED BY THE FILING OF AN INFORMATION AFTER A PRELIMINARY HEARING AT WHICH A MAGISTRATE MAKES A SPECIFIED FINDING.

A court's primary task in construing a statute is to determine the legislature's intent. (*Brown v. Kelly Broadcasting Company* (1989) 48 Cal.3d 711, 724) The court first looks at the words of the statute themselves. (*Id.*) When the statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it. (*People v. Overstreet* (1986) 42 Cal. 3d 891, 895) The plain language of the statute establishes what was intended by the Legislature. (See *People v. Ramirez* (1995) 33 Cal. App. 4th 559, 566 [it is unnecessary to look beyond the plain words of the statute to determine intent.].)

The prosecution's arguments to the contrary notwithstanding, W&I Code section 707, subdivision (d) (4) is not ambiguous. "[I]n sum, the People's contention that section 707(d)(4) does not require a preliminary hearing is the product of a strained attempt to create ambiguity where none exists." (*People v. Superior Court (Gevorgyan)*, (2001) 91 Cal.App.4th 602,

615)

When it interpreted W&I Code section 602 and 707 *Gevorgyan* stated, "'We begin with the fundamental rule that our primary task in construing a statute is to determine the Legislature's intent.' 'The court turns first to the words themselves for the answer.' 'When the statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it.'" (*Gevorgyan, supra,* at p. 610, internal citations omitted)

The drafters of an initiative and the voters who enacted it are presumed to have been aware of the existing statutory law and its judicial construction. (*In re Harris* (1989) 49 Cal. 3d 131, 136.)

Having laid the above "statutory analysis" foundation, the Gevorgyan Court stated, "Thus, the drafters of Proposition 21 presumably knew that the grand jury and indictments were not part of juvenile court statutory law. They were also presumably aware that the only judicial treatment of indictments under juvenile court law was set forth in Aguirre, a case in which the indictment of a juvenile was relevant only to satisfy statute of limitations concerns, and the defendant was ultimately charged by information and given a post-indictment preliminary hearing. Finally, the drafters presumably knew that the California Constitution was amended by Proposition 115 in 1990 to add article I, section 14.1, which provides that 'if

a felony is prosecuted by indictment, there shall be no post-indictment preliminary hearing.' This constitutional amendment abrogated previous judicial decisions and established that a defendant is no longer entitled to a post-indictment preliminary hearing or any other similar procedure." (*Gevorgyan*, supra at pp. 610-611, internal citations omitted)

An in-depth review of ***the language*** used in W&I Code section 707, subdivision (d)(4) clearly and unambiguously shows that the intent of the legislature in enacting the section was to require preliminary examinations in all prosecutions conducted under the section.

A.

In conjunction with the preliminary hearing

Subdivision (d) (4) of W&I Code section 707 requires that a specific finding be made "***in conjunction with the preliminary hearing***"; which would not be possible if the prosecution were allowed to proceed by way of a grand jury hearing/indictment. As *Gevorgyan* pointed out, "[P]ost-indictment preliminary hearings have long since been abolished in California". (*Id*) Article I, section 14.1 of the California Constitution expressly states, "If a felony is prosecuted by indictment, there shall be no post-indictment preliminary hearing". (Cal. Const. Art. I. §14.1) Article I, §14.1 was enacted pursuant to the passage of California Proposition 115, and

was effective June 6, 1990. Post-indictment preliminary hearings had long since been abolished at the time of Proposition 21's passage in 2000.

B.

As provided in section 738 of the Penal Code

Subdivision (d) (4) of W&I Code section 707 further requires that the preliminary examination be conducted "as provided in section 738 of the Penal Code". Section 738 of the Penal Code states:

> Before an information is filed there ***must*** be a preliminary examination of the case against the defendant and an order holding him to answer made under Section 872. The proceeding for a preliminary examination must be commenced by written complaint, as provided elsewhere in this code. (Penal Code section 738, emphasis added)

Penal Code section 738 ***requires*** that a preliminary examination be conducted. Subdivision (d)(4) of W&I Code section 707 requires a preliminary examination as provided in Penal Code section 738 in any case in which the prosecution elects to file on a juvenile offender in criminal court. The language in both of these section is crystal clear, and mandatory.

C.

The magistrate shall make a finding

Finally, Subdivision (d) (4) of W&I Code section 707 specifically states that "the magistrate" shall make the necessary finding that the minor comes within the section. The statute does not provide ***any*** authority for anyone other than the magistrate to make this finding. The statute does not say that the magistrate "or the functional equivalent of the magistrate" shall make the finding. If the prosecution were allowed to proceed by way of an indictment there would be no way for a magistrate to make the required finding. The statute does not authorize a grand jury to make the required finding.

D.

The language of §707(d) *does* mandate that a discretionary direct-file prosecution be commenced by complaint and preliminary hearing

The prosecution, and the Court of Appeal, have taken pains to attempt to parse out, stretch, and manipulate language from Proposition 21 and section 707(d)(4) to erroneously argue that the statute does not "expressly bar[s] commencing a criminal action against a minor by indictment". (DCA *Arroyo* opinion p. 7) The Court of Appeal's opinion erroneously focused ***only*** on the words "accusatory pleading" and "proceed according to the laws

applicable to a criminal case". (DCA *Arroyo* Opinion p. 6) The Court of Appeal favors this general language over the very specific language that ***requires*** a preliminary hearing. Furthermore, not to put too fine a point on the exact words used, but the statute does not say that the case must proceed according to ***all*** of the laws applicable to a criminal case. The filing of a complaint, followed by a preliminary hearing conducted by a magistrate, would comply with the statute's directives. A prosecution by way of an indictment, that eliminated the use of a preliminary hearing and the involvement of a magistrate, would not.

"Ordinarily, if the statutory language is clear and unambiguous, there is no need for judicial construction. A statute is regarded as ambiguous if it is capable of two constructions, both of which are reasonable. [Citations.]" (*Snukal* v. *Flightways Manufacturing, Inc.* (2000) 23 Cal.4th 754, 778 [internal quotations and citations omitted].) "In conjunction with the preliminary hearing as provided in Section 738 of the Penal Code, the magistrate shall make a finding..." is ***not capable of two constructions***.

There is simply no way to reconcile the Court of Appeal's holding with W&I Code section 707(d)(4)'s requirement that "when" the prosecution files on a minor in criminal court, it must be "in conjunction with the

preliminary hearing", and that "a magistrate" "shall" make a finding. The black letter language of the statute is perfectly clear and unambiguous.

This interpretation of the language of W&I Code section 707(d)(4) was also adopted by the Supreme Court in *Manduley v. Superior Court* (2002) 27 Cal.4th 527, the seminal case on the constitutionality of Proposition 21. The Court, in *Manduley*, stated:

> Where the prosecutor files an accusatory pleading directly in a court of criminal jurisdiction pursuant to section 707(d), at the preliminary hearing ***the magistrate*** must determine whether "reasonable cause exists to believe that the minor comes within the provisions of" the statute. (*Manduley*, supra at p. 550, emphasis added)

Further support for the position that section 707(d) (4) only contemplates prosecutions by way of complaint and preliminary hearings is found in *Manduley's* discussion of the due process implications of Proposition 21. In that regard, *Manduley, supra*, held:

> To the extent this provision [§707(d)] creates a protected liberty interest that minors will be subject to the jurisdiction of the criminal court only upon the occurrence of the conditions set forth therein, the statute does require a judicial determination, ***at the preliminary hearing***...(*Manduley, supra* at p. 564, emphasis added)

There is simply no way to reconcile the People's skewed interpretation of W&I Code section 707(d) (4) with the section's black and

white requirement that "when" the prosecution files on a minor in criminal court, it must be "in conjunction with the preliminary hearing", and that "a magistrate" "shall" make a finding.

While the Court of Appeal's opinion in the present case stated that W&I Code section 707(d) (4) "can be interpreted to allow for criminal prosecution of a minor by indictment", it never explained, or even addressed, how a magistrate would make the required findings in conjunction with a preliminary hearing in such a situation; which is specifically required by the language of the statute.

IV.

CHANGES TO THE LANGUAGE OF WELFARE AND INSTITUTIONS CODE SECTIONS 602 AND 707 MADE BY PROPOSITION 21 SUPPORT THE CONCLUSION THAT PRELIMINARY HEARINGS ARE REQUIRED FOR "DISCRETIONARY" DIRECT-FILE PROSECUTIONS.

Proposition 21 caused dramatic changes to the language of both W&I Code section 602 and 707. A review of those changes further supports the conclusion that juveniles prosecuted under the "discretionary" direct-filing provisions of W&I Code section 707(d)(4) are entitled to a preliminary hearing and may not be prosecuted in a criminal court by way of an indictment.

Welfare and Institutions Code Section 602

Prior to the passage of Proposition 21 in 2000, W&I Code section 602, which codifies "mandatory" direct-filing of minors, included a subdivision (c), which stated, in pertinent part:

> (c) Any minor directly charged under subdivision (b) shall have the right to a preliminary hearing to determine if there is probable cause to hold him or her to answer. (§602(c), effective until March 7, 2000)

On March 8, 2000, as a result of Proposition 21, W&I Code section 602 was modified to completely delete subdivision (c), and any language that gave minors prosecuted in "mandatory" direct-file cases the right to a preliminary hearing.

Welfare and Institutions Code Section 707

Conversely, prior to the passage of Proposition 21, section 707 ***did not*** contain any language that guaranteed minors a right to a preliminary hearing.

On March 8, 2000, as a result of Proposition 21, W&I Code section 707 was drastically revised. A significant part of that revision was the creation of subdivision (d) (4), which specifically included the requirement of a preliminary hearing.

Conclusion from the change in language

The analysis of these changes made by Proposition 21 is simple and

inescapable.

Prior to Proposition 21, minors who were prosecuted under "mandatory" direct-filings (W&I Code section 602) were entitled to a preliminary examination; after its passage they were not. The legislature specifically eliminated the language that guaranteed that right in W&I Code section 602.

At the exact same time, the legislature specifically included the language that guaranteed a right to a preliminary hearing for minors prosecuted under "discretionary" direct-filings in W&I Code section 707(d)(4).

V.

EXISTING CASELAW SUPPORTS THE CONCLUSION THAT MINORS PROSECUTED PURSUANT TO THE WELFARE AND INSTITUTIONS CODE SECTION 707(d) (4) ARE ENTITLED TO PRELIMINARY HEARINGS.

In *People v. Superior Court (Gevorgyan)*, (2001) 91 Cal.App.4th 602, disapproved on other grounds in *Guillory v. Superior Court* (2003) 31 Cal 4th 168, Division One of the Second District Court of Appeal held, in relevant part, that prosecutors may not proceed by way of indictment when charging minors in Adult Court pursuant to W&I Code section 707(d) (4). In *Gevorgyan*, three minors were indicted on special circumstances murder,

attempted murder and street terrorism charges. The indictment, also alleged that one of the minors, Karen Terteryan, personally killed the victim. The incident which gave rise to the charges occurred on May 5, 2000, which was just after the passage and enactment of Proposition 21. Terteryan was prosecuted in Adult Court via W&I Code section 602(b), and Gevorgyan and co-defendant Anait Msryan were prosecuted in Adult Court via W&I Code section 707(d)(4).

In the portion of the opinion relevant to the present case, the Court first pointed out that nowhere in the W&I Code relevant to Juvenile Court Law, nor in the summary, argument or analysis of Proposition 21 do the words "grand jury" or "indictment" appear. From this, the Court surmised that the concept that" a grand jury's ability to indict juveniles is unquestioned" was "an overstatement that begs the question raised". (*Gevorgyan, supra,* at pp. 607-608) The *Gevorgyan* Court also pointed out that *People v. Aguirre*, (1991) 227 Cal.App.3d 3733, was the only California Appellate Court opinion that discussed the propriety of the use of indictments against minors (*Gevorgyan*, supra at p. 608).

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[3] A case that was relied upon heavily by the prosecution and the Court of Appeal in the present case.

Gevorgyan went on to state that the "cornerstone of the *Aguirre*[4] analysis was that the defendant 'cited no case authority for his contention that the grand jury has no jurisdiction to indict a minor, and our own research has not found any cases in California, or any other state which supports that conclusion.'" (*Gevorgyan, supra,* at p. 615) The *Gevorgyan* Court then pointed out that Proposition 21 undercut the *Aguirre* rationale "by its lack of reference to indictment and to inclusion of language incompatible with the indictment set forth in sections 602, subdivision (b), and 707, subdivision (d). These statutes now constitute the authority, which the *Aguirre* court found lacking, that a juvenile cannot be prosecuted in adult court without being granted a preliminary hearing." (*Id.*)

While this Court later disapproved of *Gevorgyan's* holding as it relates to the prosecution of minors for W&I Code section 602(b) offenses in *Guillory v. Superior Court* (2003) 31 Cal.4th 168, it left the holding intact as it relates to minors prosecuted for W&I Code section 707(d) offenses. In *Guillory*, the defendant was 14 years old when she personally killed Calvin Curtis. She was charged with special circumstance murder, first degree residential robbery, carjacking, kidnapping for robbery, kidnapping for carjacking, child abuse, and kidnapping. As the defendant's charges fell

[4] *Aguirre* was a pre-Proposition 21 case.

within W&I Code section 602(b), her case was filed directly in Adult Court, where the prosecutor obtained an indictment.

The trial court overruled the defendant's demurrer, which argued that a minor could not be indicted under section 602(b). The Court of Appeal denied the defendant's petition for a writ of mandate in a published opinion. (*Guillory, supra,* at p. 172) This Court granted Guillory's petition for review, and ultimately affirmed the Court of Appeal's ruling, holding that minor defendants can be prosecuted in Adult Court by way of indictment ***for W&I Code section 602(b) offenses.*** However, that holding was limited to W&I Code section 602(b) prosecutions in footnote five, which stated "*People v. Superior Court (Gevorgyan), supra,* 91 Cal.App.4th 602, 110 Cal.Rpts.2d 668, is disapproved to the extent it is inconsistent with this opinion." (*Guillory, supra,* at fn. 5) In affirming the Court of Appeal's opinion, the *Guillory* Court found that it was "significant that section 602(b), ***as amended by Proposition 21, contains no express reference to a preliminary hearing***". (*Guillory, supra,* at p. 176, emphasis added) Conversely, W&I Code section 707(d) (4), as amended by Proposition 21 ***does*** expressly reference a preliminary hearing.

VI.

THE CALIFORNIA SUPREME COURT HAS DETERMINED THAT MINORS PROSECUTED PURSUANT TO WELFARE AND INSTITUTIONS CODE §707(d) ARE ENTITLED TO A JUDICIAL DETERMINATION AT A PRELIMINARY HEARING.

In *Manduley v. Superior Court*, (2002) 27 Cal.4th 537, this Court examined a number of challenges to the changes implemented by the passage of Proposition 21. Specifically discussing the Due Process challenge raised by the defendants in *Manduley*, and the one protected liberty interest that minors do possess, this Court stated, "the statute does require a judicial determination, ***at the preliminary hearing***, 'that reasonable cause exists to believe that the minor comes within the provisions' of the statute." (*Manduley*, at p. 564, emphasis added)

This Court has held that prosecutions of minors under W&I Code section 707(d) "require" a "preliminary hearing". That requirement cannot be fulfilled if the People are allowed to proceed by way of grand jury hearing/indictment.

The interpretation adopted by the Court of Appeal's opinion in the present case ignores this holding from *Manduley* and strips the minor of the only protected liberty interest that this Court has said they are entitled to.

VII.

IT IS REASONABLE AND LOGICAL TO INFER THAT THE LEGISLATURE WOULD REQUIRE COMPLAINTS AND PRELIMINARY HEARINGS IN DISCRETIONARY DIRECT-FILE CASES, EVEN WHERE THEY APPROVED THE USE OF INDICTMENTS IN MANDATORY DIRECT-FILE CASES.

It is reasonable to infer that the legislature and the courts would require that the prosecution proceed by way of complaint and preliminary examinations, and disallow the use of indictments, when the prosecution utilizes W&I Code section 707(d)'s discretionary direct-file provisions. This is true even when the Court considers the fact that the law allows the prosecution to proceed by way of indictment when utilizing W&I Code section 602's mandatory direct file provisions.

The Court should first consider the fact that there are important differences between W&I Code sections 707(d) and 602. Under W&I Code section 707(d), the prosecution has the exclusive right to determine whether the charges will be filed in juvenile court or criminal court. Under section 602, the prosecution ***must*** file the case in criminal court. Section 707(d) applies to a wide variety of charges. Not only does the section address a minimum of 30 specific enumerated offenses (those listed in section 707,

subdivision (b)), but it includes a number of catch-all provisions (section 707, subdivisions (b) (18) and (21), sections 707, subdivisions (d) (2) (B) and (C)) to make it even broader. Section 602, subdivision (b) only applies to eight very specific offenses.

The Court should also consider the important differences between preliminary examinations and grand jury proceedings. Despite the argument that the grand jury is the "functional equivalent" of a magistrate, defendants in grand jury proceedings lack a number of protections that defendants have in preliminary examinations, which include the right to be present, the right to have an attorney present, the right to confrontation and cross examination of witnesses, and the right to present exculpatory evidence. This last right actually highlights one of the most glaring rationales for holding that minors subject to section 707, subdivision (d) prosecutions are entitled to preliminary examinations.

If minors who are the subject of ***discretionary*** direct filings (section 707, subdivision (d)(4)) are not guaranteed preliminary examinations, then the same agency, usually the same prosecutor, that makes the determination of whether or not to direct-file a case is responsible for the presentation of evidence to the grand jury. This includes a determination of what evidence to put on, what evidence to exclude, what evidence constitutes exculpatory

evidence, whether or not to introduce the exculpatory evidence and in what manner that evidence is presented. When considering these powerful decisions the Court should be mindful of the old, but very accurate, adage that a prosecutor has so much control over grand juries that they could convince them to indict a ham sandwich[5].

Arroyo agrees that, in a very technical sense, prosecution by way of preliminary hearing before a magistrate is not "superior" to prosecution by way of a grand jury indictment. (DCA *Arroyo* opinion, page 10) However, it is impossible to ignore the fact that individuals prosecuted by way of preliminary hearings enjoy significant safeguards that those prosecuted by way of indictment do not, including those outlined above.

The present case is a perfect example of prosecutorial overreaching in a grand jury proceeding. The Court can see from Arroyo's Penal Code section 995/939.71 Motion filed on May 24, 2013 (C.T. 141 – 443) that during the grand jury proceedings, the prosecutor failed to present the grand jury with a number of clearly exculpatory statements by several of the defendants (C.T. 165 – 167), affirmatively misrepresented statements made by defendants (C.T. 166 – 167), misrepresented the nature of critical

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[5] Attributed to New York State Court of Appeals Chief Judge Solomon Wachtler in a January 31, 1985 New York Daily News article.

predicate convictions (C.T. 169 – 171), made improper argumentative remarks to the grand jury regarding the defendants themselves (C.T. 171), and improperly instructed the grand jury (C.T. 174 – 177).

It is reasonable to infer that the legislature, and later the courts, in *Gevorgyan, supra,* and *Guillory, supra,* would be mindful of the power that prosecutors would have if they were allowed to make a completely unchecked, unilateral decision to prosecute 14 year olds in criminal court for a wide variety of less than the "worst of the worst" offenses, and then have that power magnified by the unfettered ability to control grand jury proceedings regarding the case.

With adult offenders and juveniles charged under W&I Code section 602, the prosecution does not make the first determination; that choice is made for them. Given these considerations, and the reality of grand jury hearings (as opposed to the "urban myths" that surround them, it is logical to assume that the legislature and the courts would require that a probable cause determination, at the earliest litigated stage of criminal proceedings, be made ***by a magistrate***, and not by the "functional equivalent of a magistrate".

VIII.

REQUIRING THE PROSECUTION TO PROCEDE BY WAY OF A COMPLAINT AND PRELIMINARY HEARING WHEN THEY CHARGE MINORS UNDER W&I CODE SECTION 707(d) IS NOT INCONSISTENT WITH THE PURPOSE AND GOALS OF PROPOSITION 21.

The California Legislative Service report for Proposition 21 (2000) stated,

> "Dramatic changes are needed in the way we treat juvenile criminals, criminal street gangs, and the confidentiality of the juvenile records of violent offenders if we are to avoid the predicted, unprecedented surge in juvenile and gang violence. Californians deserve to live without fear of violent crime and to enjoy safe neighborhoods, parks, and schools. This act addresses each of these issues with the goal of creating a safer California, for ourselves and our children, in the Twenty-First Century" (2000 Cal. Legis. Service Prop 21 (WEST), Section 2, sudb. (k)

In order to meet the proposition's stated goals, Proposition 21 gave prosecutor's the unprecedented ability to circumvent the juvenile courts entirely in charging decisions involving minors as young as 14 years old. Prior to the passage of Proposition 21, prosecutors were required to hold fitness hearings for ***any minor*** they wanted to charge in criminal court, except those charged with the commission of the very few crimes listed

W&I Code section 602(b), who were over 16 years old when they committed their current offense. (See W&I Code section 602(b), pre-March 7, 2000) Essentially, prior to the passage of Proposition 21, the prosecution only had the ability to charge certain 16 year olds, accused of committing 10 different crimes, in criminal courts without judicial approval.

Proposition 21 dramatically changed the prosecution's ability to charge minors in criminal courts. Post-Proposition 21, prosecutors may charge minors as young as 14 years old, ***without judicial approval***, charged with a minimum of an additional 30 crimes[6], even without the ability to indict these minors.

The proposition further increased the prosecution's ability to deal with criminal street gangs and violent offenders, and meet the goal of a safer California, by ***specifically deleting*** the requirement that minors subject to "mandatory" direct filings under W&I Code section 602(b) be afforded preliminary examinations.

The prosecution cannot plausibly argue that in order to meet the goals and intent of Proposition 21 they must be allowed the unfettered right to

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[6] Those listed in W&I Code section 707(b).

indict any juvenile that ***they*** elect to charge pursuant to W&I Code section 707(d).

CONCLUSION

While this Court has determined that discretionary direct-filing of juveniles in Adult Court is constitutional, it has also held that there are checks on that ability; most notably the "judicial determination", by a magistrate, at the preliminary hearing that the minor comes within the provisions of the statute. That check represents a judicial ability to send a minor's case back to the appropriate juvenile court at the earliest possible litigated hearing. While the Courts should be interested in treating "the most dangerous" juveniles as adults, they should be just as interested in sending those that are not deserving of this treatment to juvenile court as soon in the process as possible.

The opinion by the Court of Appeal below ignores the plain language of the statute as well as the prior holding of this Court. The intent of the framers of Proposition 21, the voters of the State of California and the legislature can all be respected and followed by requiring prosecutors to file complaints and conduct preliminary hearings in all cases in which the prosecutors independently determine that a minor should be charged in Adult Court pursuant to W&I Code section 707(d) (4).

Dated: September 23, 2014

Respectfully submitted,

FRANK DAVIS
Alternate Defender
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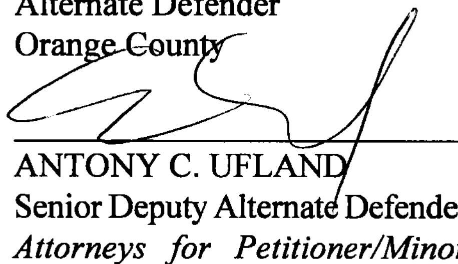

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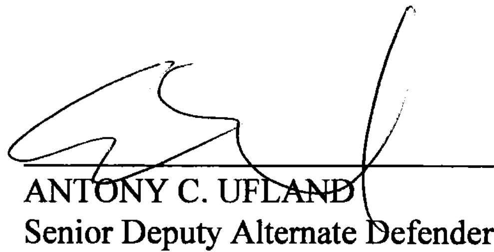
CERTIFICATE OF WORD COUNT

[California Rules of Court, Rule 28.1(e) (1)]

I certify that the text of Petitioner's Petition for Review consists of 5,787 words as counted by "Word", the word-processing program used to generate it.

Dated this 23rd day of September, 2014



ANTONY C. UFLAND
Senior Deputy Alternate Defender

DECLARATION OF SERVICE

The People v. Isaias Arroyo
(Case No. G048659; O.C.S.Ct. No. 12ZF0158)

STATE OF CALIFORNIA)
) ss
COUNTY OF ORANGE)

Antony Ufland, declares that he is a citizen of the United States, a resident of Orange County, over the age of 18 years, not a party to the above-entitled action and has a business address at 600 West Santa Ana Blvd, #600, Santa Ana, CA 92701.

That on the 23rd day of September, 2014, I served a copy of the Opening Brief on the Merits in the above-entitled action by depositing a copy thereof in a sealed envelope, postage thereon fully prepaid, in the United States Mail at Santa Ana, California. Said envelope was addressed as follows:

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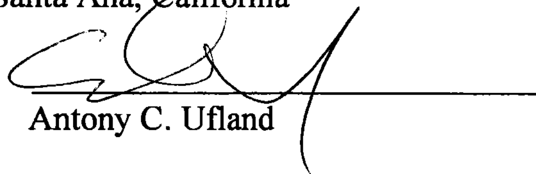
I declare under penalty of perjury that the foregoing is true and correct.
Executed on this 23rd day of September, at Santa Ana, California



Antony C. Ufland