SUPREME COURT
FILED

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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Frank A. McGuire Clerk

Deputy

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

MARIO MARTINEZ
Defendant and Appellant.

Case No. S231826

Fourth District Court of Appeal, Case No. E063107
Riverside Superior Court, Case No. RIF136990

APPELLANT'S OPENING BRIEF ON THE MERITS

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STATEMENT OF ISSUES IN THE PETITION 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?

INTRODUCTION

In the November 2014 general election, the California electorate enacted Proposition 47: The Safe Neighborhoods and Schools Act. The new and revised laws of this proposition, among other actions, redefined some elements of nonserious and nonviolent theft offenses and reclassified these crimes, as well as nonserious and nonviolent drug offenses, from felonies to misdemeanors. It reduced the corresponding sentences of these crimes. When the voters enacted these new and revised laws, they provided for broad, retroactive application of the reduced sentences. This case explores how to determine whether a transportation of methamphetamine conviction that occurred before enactment of Proposition 47, and where the Legislature added a new "transport for sale" element to the transportation crime after appellant's conviction but shortly before the enactment of

Proposition 47, is eligible for recall and resentencing as a simple possession crime.

Section 1170.18 defines which convictions are eligible for retroactive application of the new ameliorative sentencing laws created and modified by Proposition 47; retroactivity applies not only to convictions where the defendant is currently serving his sentence but also to convictions where the defendant has already served his sentence. To determine eligibility for resentencing, Proposition 47 directs trial courts to review the facts underlying the conviction at issue based on the new and revised laws created by Proposition 47. But this review cannot occur in a vacuum. The new and revised laws created by Proposition 47 necessarily incorporate statutory changes that occurred after the conviction but before Proposition 47 became effective. This is so because the electorate is imputed to know of all intervening statutory changes between the time of a potentially eligible conviction and the time when it created Proposition 47.

Given this specific statutory directive, the trial court should assess appellant's eligibility for Proposition 47 recall and resentencing of his 2007 transportation conviction not by reference to the statute he was convicted under before Proposition 47 became effective. Rather, statutory language created by Proposition 47 tells the court that it must determine eligibility by

answering the question whether defendant "would have been guilty of a misdemeanor" had the new law been in effect at the time of the offense.

That is, to determine eligibility for Proposition 47 recall and resentencing, the court must look at the facts underlying the conviction in light of the laws that came between the conviction and Proposition 47, as well as the laws amended and created by Proposition 47. And here, as a result of the Legislature's 2014 clarification to the elements of transportation, making it clear that to be criminal the transportation had to be for sale, and the fact appellant did not transport the contraband for sale, the eligibility determination created by Proposition 47 reveals appellant's conviction would only be a misdemeanor. He would have been guilty of no more than simple possession. The trial court erred when it failed to consider recall and resentencing appellant for this drug crime that would be a misdemeanor had the new and revised laws of Proposition 47, understood within the context of the laws created between the conviction and Proposition 47, been in effect in 2007 when officers found contraband on the floorboard of the car in which appellant was riding.

STATEMENT OF THE CASE

A. Underlying Convictions Proceedings

On August 9, 2007, the People filed a two count Information alleging appellant had violated Health and Safety Code section 11379, subdivision (a) [unlawful transportation of methamphetamine – count 1] and Health and Safety Code section 11377, subdivision (a) [unlawful possession of methamphetamine – count 2]. In addition to these substantive counts, the Information alleged appellant had served five prior prison terms within the meaning of Penal Code[1] section 667.5, subdivision (b) and had two strike priors within the meaning of sections 667, subdivisions (c)-(e) and 1170.12, subdivision (c)(2)(A). (C.T. pp. 3-5.)

On December 4, 2007, after hearing evidence, a jury found appellant guilty of both counts as charged. Appellant withdrew his previous admission to the prior strike convictions/prison term enhancements and waived jury trial for their resolution. (Supp. C.T. pp. 1-2.) Ten days later, the court granted the People's motion to dismiss the third prior prison term enhancement and found all remaining allegations true. (Supp. C.T. pp. 3-4.) After multiple continuances (Supp. C.T. pp. 5-15), on July 11, 2008, the

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[1]Future statutory references are to the Penal Code unless otherwise indicated.

court dismissed one strike prior under *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (Supp. C.T. pp. 16-17; R.T. pp. 20-26) and ordered appellant to serve a 12 year prison term: the upper second strike eight year term for count 1 [four years, doubled for the second strike] and a year for each prior prison term enhancement. It stayed the four year concurrent term on count 2 under section 654. Finally, it awarded mandatory fines and fees. (C.T. pp. 20-21 [clerk's minutes], 22-25 [abstract of judgement]; R.T. pp. 26-30.)

B. Proposition 47 Application

1. Proceedings

On November 13, 2014, in pro per, petitioner filed a petition for recall and resentencing under section 1170.18 (Proposition 47). (C.T. pp. 26-28.) On December 18, 2014, the People filed a response. (Supp. C.T. pp. 20-21.) Petitioner, by then represented by counsel, filed a reply. (Supp. C.T. pp. 25-38.) On March 13, 2015, the trial court denied resentencing for count 1 and granted the request for count 2. It then vacated the previously-imposed sentence on count 2 and ordered appellant to serve a 364 day term, concurrent to count 1. (C.T. p. 31; R.T. pp. 33-37.) Appellant filed a notice of appeal (C.T. p. 32) and an amended notice of appeal (C.T. p. 34) shortly thereafter.

In an opinion filed December 15, 2015, the Court of Appeal affirmed the lower court's Proposition 47 rulings and ordered the new misdemeanor 364 day sentence on count 2 to be stayed under section 654. (Slip opn., page 7.)

2. Arguments Made In The Trial Court

In the written petition appellant prepared, he requested modification of his sentence under Proposition 47 "changing a felony to misdemeanor 11377 A my charge." (C.T. p. 28.) He asked the court to "[C]onsider [R]emedial sentence for a program or [R]elease or modification." (C.T. p. 28.)

In its response, the People asserted appellant was "not eligible on Count 1" and conceded he was entitled to resentencing "Only as to Count 2. Should not change overall prison sentence." (Supp. C.T. p. 20.) The court appointed counsel and set the matter for conference. (Supp. C.T. p. 21.) In written filings, appellant asserted he was eligible for resentencing under Proposition 47 because, as a result of the Legislative change to Health and Safety Code section 11379, enacted on January 1, 2014, he would be convicted only of simple possession were he convicted today. This is so, he asserted, because there was no evidence the small amount of methamphetamine was transported for sale. (C.T. pp. 27-31.)

At the hearing on March 13, 2015, counsel emphasized the record showed appellant transported the methamphetamine for personal use. (R.T. p. 33.) Because the Legislature had recently modified the transportation crime, were appellant to have been convicted today, he would have been convicted of possession for personal use. (R.T. p. 33.) Counsel argued literal construction of the statute was proper to assess whether section 1170.18 applied to appellant and noted the language did not list crimes eligible for resentencing. Rather, it simply "says whether a person currently serving a sentence for a conviction whether by trial or plea would have been guilty of a misdemeanor under this act had it been in place." (R.T. p. 34.) Because the Legislature modified the transportation crime before the electorate passed Proposition 47, and because the electorate is presumed to have incorporated other charges – it is not only the theft counts that are to be expansively read – were appellant to be convicted today, he would be convicted of a misdemeanor. (R.T. p. 34.)

After characterizing appellant's position as imaginative (R.T. p. 34), the court denied appellant's petition as to count 1 and granted it on count 2. (R.T. p. 35.) It reasoned Proposition 47 was very specific as to drug counts, Health and Safety Code section 11379 still exists, and the electorate did not include it in this list of eligible counts. Different from the drug counts is

the statute's treatment of theft counts. It lists specific theft statutes but also contains the generic inclusive language about all and any thefts. (R.T. p. 35.) Determinative for the court was the fact that the electorate could have but did not include Health and Safety Code section 11379 in the statute's list of crimes eligible for reduction. (R.T. pp. 35, 36.)

STATEMENT OF FACTS[2]

Shortly after noon on May 29, 2007, Riverside County Sheriff's Department Officer Hirakoa followed the car in which appellant was a passenger after noticing the month sticker on the license plate was not identifiable. While the Officer Hirakoa followed the car, appellant leaned forward several times. Officer Hirakoa turned on his overhead lights and stopped the car.

After reviewing the driver's license and the car registration, Officer Hirakoa discovered an outstanding warrant for the driver, Candace Eves. He asked her to step out of the car and, after she did so, he arrested her. He then walked to the passenger side of the car and asked appellant to step out

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[2]This factual statement is taken from the Court of Appeal's unpublished opinion, filed on June 22, 2010, in appellant's original direct appeal from the underlying criminal convictions. (*People v. Martinez* (June 22, 2010, E046651) [nonpub. opn.].) The Court of Appeal took judicial notice of this earlier opinion. In conjunction with this opening brief on the merits, appellant has filed a new motion for judicial notice.

of the car. Appellant moved his right foot to exit the car, and Officer Hirakoa saw a small clear plastic bag on the car floor mat.

After appellant got out of the car and a backup officer arrived, Officer Hirakoa examined the small bag and saw it contained methamphetamine. He searched appellant and the car, but found no additional contraband. Neither appellant nor the driver appeared to be under the influence of methamphetamine.

Appellant claimed the methamphetamine did not belong to him.

The driver, testifying under a grant of immunity, explained that appellant drover her to a friend's house, where she had purchased the methamphetamine. For safekeeping, she placed it in her bra. She and appellant then had plans to smoke the methamphetamine together later when appellant picked her up. After he did so, she drove the car because she had a valid driver's license. When Officer Hirakoa began following them, she knew she had the methamphetamine in her bra and became concerned. She tried to throw the methamphetamine into the air conditioner vent but the methamphetamine fell to the floor mat, landing near appellant's feet.

When the driver was interviewed, she denied the methamphetamine was hers. When the driver met appellant's mother just before trial, the driver said: "I'm sorry. The stuff was mine."

BECAUSE THE CRIMINAL CONDUCT UNDERLYING APPELLANT'S TRANSPORTATION OF METHAMPHETAMINE CONVICTION WOULD HAVE AMOUNTED ONLY TO A MISDEMEANOR POSSESSION OF METHAMPHETAMINE CONVICTION HAD THE SAFE NEIGHBORHOODS AND SCHOOLS ACT BEEN IN EFFECT AT THE TIME OF APPELLANT'S OFFENSE, NECESSARILY VIEWING THIS ACT IN THE CONTEXT IN WHICH IT WAS ENACTED AND NOT IN ISOLATION, THE TRIAL COURT ERRED WHEN IT FOUND APPELLANT'S CONVICTION INELIGIBLE FOR PROPOSITION 47 RECALL AND RESENTENCING CONSIDERATION..

On November 4, 2014, the voters enacted the Safe Neighborhoods and Schools Act (hereafter Proposition 47). The new and revised laws became effective the next day. (Cal. Const., art. II, § 10, subd. (a).) In order to redirect funds from incarcerations costs so they could be redistributed to three broad purposes: K-12 education, services to victims of crimes, and public agencies aimed at mental health treatment, substance abuse treatment and diversion programs for defendants in the criminal justice system, the initiative made significant changes to felony sentencing laws involving nonserious and nonviolent property and drug crimes. Specifically, it added sections 459.5, 490.2, and 1170.18 and amended sections 473, 476a, 496, and 666, as well as Health and Safety Code sections 11350, 11357, and 11377. To allocate these redirected funds, Proposition 47 also added chapter 33 to the Government Code. (Gov. Code, § 7599 et seq.; Voter

Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, §§ 4–14, pp. 70–74.)

Integral to the electorate's scheme is the explicit retroactive application of Proposition 47's revised sentencing structure.[3] For retroactive application of the new and revised laws, section 1170.18 guides recall and resentencing of eligible convictions where the sentence is currently being served[4] and designation as misdemeanors of eligible convictions where the sentence is completed. Under the statutory language, eligibility for recall and resentencing of a conviction currently being served or eligibility for designation as a misdemeanor of a completed sentence of a conviction is based not on the mere identification of which specific statute appellant violated at the time of his offense. And, eligibility is not determined by simply looking at the list of statutes created and revised by Proposition 47. Rather, section 1170.18 directs that eligibility be determined by looking at the conviction's underlying conduct to answer the

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[3]Of course, application of these new statutory changes operates prospectively as well. (§ 3.) Prosecution of pending and future offenses simply proceeds under the newly created or amended statutes. This case does not involve the prospective application of Proposition 47.

[4]This appeal concerns recall and resentencing of a defendant currently serving a sentence under section 1170.18, subdivisions (a) and (b).

question whether appellant would have been guilty of a misdemeanor under the new and revised laws of Proposition 47.[5]

When the electorate created this scheme to assess whether recall and resentencing or designation of a conviction as a misdemeanor is appropriate, it necessarily took into account and assimilated the Legislature's earlier clarification that the crime of transportation occurred only where the transportation is for sale. Only ten months before the electorate passed Proposition 47, the Legislature had clarified physical movement of contraband, for example by car or bicycle, could constitute the transportation crime only if it involved transportation for sale. At most, transportation of contraband for personal use could amount to a nonserious, nonviolent drug possession crime. It is within this context, knowing the clarification of the law and leaving the clarification in place, that the electorate created the scheme of the retroactive application of Proposition 47.

When considering eligibility for retroactive application of Proposition 47 relief, the court must analyze whether, based on these new

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[5]Eligibility for relief is precluded if defendant has a prior "super strike" or a prior conviction requiring registration under section 290, subdivision (c). (§ 1170.18, subd. (i); see *People v. Perkins* (2016) 244 Cal.App.4th 129, 138.) Appellant has no such prior convictions.

and revised laws, appellant would have been guilty of these new and revised crimes had they been in effect at the time the offense occurred. In this case, had these new laws been in effect at the time appellant committed his offense in 2007, he would have been guilty only of a misdemeanor. This is because the record of conviction shows appellant transported the contraband in a car only for personal use, an act considered a nonviolent and nonserious possession crime at the time Proposition 47 was enacted. The trial court erred when it failed to consider recall and resentence of appellant's nonserious and nonviolent drug transportation crime. Reversal and remand for the unreasonable risk of danger to public safety consideration under section 1170.18, subdivision (b) is appropriate.

A. Principles of Statutory Interpretation Are Well Settled. The Language Of The Statute And The Intent Of The Lawmaker Guide The Instant Analysis.

This case considers the meaning of the new statute, section 1170.18, subdivision (a), defining which convictions are eligible to request resentencing under the new and revised laws created by Proposition 47. It presents a question of statutory interpretation, which is reviewed de novo. (*People v. Prunty* (2015) 62 Cal.4th 59, 71.) When interpreting a voter initiative, courts apply the same analysis used for statutory interpretation. (*People v. Rizo* (2000) 22 Cal.4th 681, 685.) As with analysis of any law,

this court "strive[s] to ascertain and effectuate" the electorate's intent. (*People v. Castanada* (2000) 23 Cal.4th 743, 746.)

The court first turns "to the statutory language, giving the words their ordinary meaning. [Citation.] If the statutory language is not ambiguous, then the plain meaning of the language governs. [Citation.]." (*People v. Lopez* (2005) 34 Cal.4th 1002, 1006.) "'[T]he plain meaning rule does not prohibit a court from determining whether the literal meaning of a measure comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute." [Citation.] The language is construed in the context of the statute as a whole and the overall statutory scheme, and we give "significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose. [Citation.]" [Citations.] The intent of the law prevails over the letter of the law, and "the letter will, if possible, be so read as to conform to the spirit of the act. [Citation.]" [Citation.]" (*People v. Canty* (2004) 32 Cal.4th 1266, 1276-77.)

"When the language is susceptible of more than one reasonable interpretation, however, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and

the statutory scheme of which the statute is a part. [Citations]." (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1008.) In addition, when assessing the meaning of a ballot initiative's ambiguous language, courts "refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet." (*People v. Birkett* (1999) 21 Cal.4th 226, 243.) "If a penal statute is still reasonably susceptible to multiple constructions, then we ordinarily adopt the " 'construction which is more favorable to the offender....' " [Citation]." (*People v. Rizo* (2000) 22 Cal.4th 681, 685-86

B. The Electorate's Intent, When Enacting Proposition 47, Is Clearly Presented In The Ballot Pamphlet.

The Electorate's intent underlying its approval of Proposition 47 is not a mystery. It is specifically stated in the ballot pamphlet. Section 3 provides in pertinent part: "In enacting this act, it is the purpose and intent of the people of the State of California to: (1) Ensure that people convicted of murder, rape, and child molestation will not benefit from this act. (2) Create the Safe Neighborhoods and Schools Fund [with specific distribution of the fund]. (3) Require misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession, unless the defendant has prior convictions for specified violent or serious crimes. (4) Authorize consideration of resentencing for anyone who is currently serving a

sentence for any of the offenses listed herein that are now misdemeanors. . . ." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 3, p. 70.) And the act ends with the specific direction that: "[t]his act shall be broadly construed to accomplish its purposes." (*Id.* at p. 74, § 15..)

Based on the language, this court should construe retroactive application of Proposition 47 resentencing to ensure misdemeanor treatment "for nonserious, nonviolent crimes like petty theft and drug possession . . . " and consideration of a misdemeanor sentence "for anyone who is currently serving a sentence for any of the offenses listed herein that are now misdemeanors." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 3, p. 70; see generally *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 716.) Appellant's interpretation serves this intent. Under the laws as they were written after the electorate enacted Proposition 47, his acts amounted to a simple, nonserious and nonviolent drug possession crime. The electorate intended such a crime to be treated as a misdemeanor. Failure to recognize this reality and failure to allow consideration of resentencing under Proposition 47 would frustrate this intent.

C. The Plain Language Of Section 1170.18, Subdivision (A) Directs Resentencing Consideration For A Past Conviction That Would Be A Misdemeanor Under The New And Revised Statutes.

Section 1170.18, subdivision (a) defines those convictions, where the defendant is currently serving a sentence, which are eligible for resentencing under the new and revised statutes created by Proposition 47. It states:

> (a) 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.

(§ 1170.18, subd. (a).) The plain language instructs the court to assess eligibility for resentencing through the laws created and amended by Proposition 47. Eligibility assessment is based on the analysis whether the defendant is a person "who would have been guilty of a misdemeanor under the act.) (*Ibid.*, underscore added.) The court must use the new and revised laws of Proposition 47 when it looks back at the conduct at issue and determines what the conviction would have been based on this conduct had the new and revised laws been in effect at the time of the offense. If the conviction at issue would have been a misdemeanor under these new and

revised laws, defendant may petition for recall and resentencing under section 1170.18, subdivision (a), and the court must consider recall and resentencing under section 1170.18, subdivision (b).[6]

The eligibility determination for Proposition 47 relief is not a simple identification of which specific code section defendant had been convicted of violating before the electorate passed Proposition 47. It calls for assessment of the underlying conduct of the offense to determine whether that conduct would be defined as a misdemeanor under the newly created and revised code sections. This must be so because some of the criminal statutes referenced in subdivision (a), such as shoplifting under section 459.5 and petty theft under section 490.2, did not even exist until the electorate created Proposition 47. Were retrospective relief available only if the defendant had been convicted of any of the specific statutes listed at the end of section 1170.18, subdivision (a), the interpretation would not make sense. This is because defendant could never obtain retrospective relief for a section 459.5 shoplifting crime in that, before Proposition 47, this precise statute never existed. Instead, the electorate directed the court to look back at the facts of the conviction to determine eligibility. Such an

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[6]As referenced in footnote 5, appellant does not have any of these disqualifying prior convictions.

approach recognizes and supports the electorate's intent that nonserious and nonviolent theft and drug crimes be eligible for Proposition 47 resentencing or reclassification.

Such an approach also honors the fundamental principle that courts "do not construe statutes in isolation, but rather read every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.' [Citation.]" (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276.) The instant case is about eligibility for relief where defendant is still serving a sentence for the conviction he claims is eligible for recall and resentencing. But the entire scheme also provides for relief where a defendant has completed his sentence for the conviction he claims is eligible for designation as a misdemeanor. The only difference in these two scenarios is whether the defendant is still serving or has served his sentence.

In both circumstances, the subdivisions that direct application of Proposition 47 provide the same test to assess eligibility: whether the defendant "would have been guilty of a misdemeanor under the act that added this section . . . had this act been in effect at the time of the offense. . . ." (§ 1170.18, subd. (a) & 1170.18, subd. (f) ["who would have been guilty of a misdemeanor under this act had this act been in effect at the time

of the offense..."].) Eligibility for retroactive relief is not based on the specific statutory section defendant violated. Rather, it is the acts underlying that conviction which are key to the court's assessment of eligibility for retroactive application.[7]

Notably, subdivision (a) provides a list of statutes whereas subdivision (f) does not. It has been argued that this list is the limit for

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[7] Such structure to assess eligibility for ameliorative resentencing is not unique to Proposition 47. The electorate also created similar framework when it enacted The Three Strikes Reform Act of 2012 (Proposition 36) two years earlier. In Proposition 36, the electorate defined convictions ineligible for resentencing. Under section 1170.176, subdivision (e), an inmate is eligible for resentencing if it his current Three Strikes conviction is not a serious or violent felony (§ 1170.126, subd. (e)(1)) and, inter alia, "[t]he inmate's current sentence was not imposed for any of the offenses appearing in clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12." That is, a conviction is not eligible for resentencing if "'[d]uring the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person.' (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).)" (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1029.)

Courts of Appeal have found this factual determination of eligibility was not satisfied by a simple look at which criminal statute the defendant had been convicted of violating. Rather, eligibility under this specific statutory language created by the electorate necessarily involved an assessment of the facts of the case. (*People v. Bradford* (2014) 227 Cal.App.4th 1322, 1332; *People v. Arevalo* (2016) 244 Cal.App.4th 836, 848 ["By referring to those facts attendant to commission of the actual offense, the express statutory language requires the trial court to make a factual determination that is not limited by a review of the particular statutory offenses and enhancements of which petitioner was convicted."].)

determining eligibility for relief. Eligibility is not so circumscribed. If the list in subdivision (a) outlined which prior statutory violations were eligible for recall and resentencing, it would be repeated in subdivision (f), the other subdivision directing retroactive application, as well. It is not so repeated.

Instead, the list provides guidance for resentencing, not eligibility. Section 1170.18, subdivision (a) provides, in relevant part after setting forth the test for eligibility of retroactive application discussed *infra*, the person may petition "to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, or 666 of the Penal Code, as those sections have been amended or added by this act." The plain words inform how resentencing will occur – "in accordance with" the listed new and revised statutes. In fact, this list is repeated in the subsequent subdivision (b), with again the modifier that petitioner will be "resentenced to a misdemeanor pursuant to" the listed new and revised statutes. The list guiding resentencing does not appear in subdivision (f) because a defendant who gains relief under this subdivision, a defendant who has completed his or her sentence, need not be resentenced. To grant relief in this context, the court must only designate the conviction as a misdemeanor. (§ 1170.18, subd. (f).)

1. The Approach In *People v. Contreras* Supports Appellant's Understanding.

Court of Appeal opinions have recognized the propriety of this analysis and taken this logical approach. In *People v. Contreras* (2015) 237 Cal.App.4th 868, during the pendency of defendant's appeal, the electorate passed Proposition 47. Defendant argued he should receive the benefit of this new law and the Court of Appeal must resentence him for his drug possession and burglary crimes. (*Id.* at pp. 889-891.) The Court of Appeal refused to consider recall and resentencing under Proposition 47 in the first instance. Instead, it noted eligibility for Proposition 47 relief with respect to defendant's burglary count necessarily involved a review of the facts of the case in light of the new shoplifting statute.

To rule on the Proposition 47 petition, the *Contreras* court recognized the trial court would have to determine whether the crime defendant committed would have been a misdemeanor had Proposition 47 been in effect at the time the drug possession and burglary crimes were committed. "The trial court's decision on a section 1170.18 petition is inherently factual, requiring the trial court to determine whether the defendant meets the statutory criteria for relief. For example, to 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.)" (*Contreras*, *supra*, 237 Cal.App.4th at p. 892; see also *People v. Sherow* (2015) 239 Cal.App.4th 875, 879.)

The *Contreras* court's acknowledgment that the trial court would need to review the facts underlying the conviction in light of the laws created and modified by Proposition 47 – e.g., did the burglary involve a commercial establishment, was the commercial establishment open during the crime, was the value of the subject property under $950 – in order to assess whether the conviction is eligible for Proposition 47 relief supports appellant's approach.

2. The Approach In *People v. Perkins* Supports Appellant's Understanding

Similarly, in *People v. Perkins* (2016) 244 Cal.App.4th 129, the Court of Appeal considered application of Proposition 47 in the context of nonserious and nonviolent theft crimes: receiving stolen property and theft of a firearm. Proposition 47 made these theft crimes misdemeanors when the value of the property at issue did not exceed $950. (See, e.g., §§ 495.5, 473, 476a, 490.2, 496.) Although the Court of Appeal affirmed the trial court's denial of Mr. Perkins's Proposition 47 petition, it did so without

prejudice to allow defendant to file a proper petition that presented evidence of valuation and thus eligibility. (*Perkins, supra*, 244 Cal.App.4th at p. 142.)

Defendant in *Perkins* had filed his Proposition 47 petition when the law was new and before courts had published opinions about which party bore the burden of proof in these petitions and before courts had published opinions about what type of evidence could support the petitions. Further, the form defendant used to file his Proposition 47 petition contained no space or directions for defendant to include valuation information. (*Perkins*, *supra*, 244 Cal.App.4th at pp. 139-140.) Given these considerations, as well as the fact that the form had even omitted potentially eligible convictions under section 487 (*id.* at p. 141), the Court of Appeal found the proper remedy would permit defendant to file a new petition. (*Ibid.*)

The *Perkins* court implicitly found the superior court would assess the facts of the underlying convictions at issue to determine whether the conduct would have constituted misdemeanors had Proposition 47 been in effect when they were committed. Because eligibility for relief depends upon the facts, the court would focus on the value of the items at hand – whether the value did not exceed $950. (*Perkins, supra*, 244 Cal.App.4th at

p. 141.) And directly applicable to this assessment would be the petition's description of the property at issue as well as attached "evidence, whether a declaration, court documents, record citations, or other probative evidence showing he is eligible for relief." (*Id.* at p. 140; see also at p. 141.) Like *Contreras,* the *Perkins* court recognized that the trial court would need to review the facts underlying the convictions in light of the laws created and modified by Proposition 47 – e.g., was the value of the subject items under $950 – in order to assess whether the conviction is eligible for Proposition 47 relief.

Both cases support appellant's approach. As discussed in *Contreras* and *Perkins*, the trial court would need to assess the facts underlying appellant's conviction to determine whether he qualified for Proposition 47 resentencing. Here, similarly, the trial court would need to assess the facts underlying appellant's conviction to determine whether he qualified for Proposition 47 resentencing. Once the trial court would execute this analysis under the law as it existed when the electorate enacted Proposition 47, it is inescapable appellant possessed methamphetamine when he was a passenger in the car driven by Ms. Eves. Given this reality, appellant's prior transportation conviction is eligible for recall and resentencing under section 1170.18, subdivision (a).

D. Under Liberal Construction Principles, The Electorate's Intent To Recall And Resentence Nonviolent And Nonserious Drug Crimes, And The Principle The Electorate Is Presumed To Know Existing Law, Specifically Here The Legislature's 2014 Clarification Of The Transportation Crime, The Transportation Conviction Appellant Committed In 2007 Is Eligible For Proposition 47 Recall And Resentencing Under Health And Safety Code Section 11377.

Appellant's transportation conviction under Health and Safety Code section 11379 would only amount to a nonviolent and nonserious drug possession offense under the Health and Safety Code section 11377 revised by Proposition 47 were it committed after Proposition 47 became effective. This is because the electorate's revision of Health and Safety Code section 11377 possession crime occurred after the Legislature had clarified that, to be a transportation crime, transportation of contraband must be for sale. Because it is this revised Health and Safety Code section 11377 conviction which is the lense through which to assess appellant's eligibility for Proposition 47 relief, the trial court erred when it denied appellant's petition.

1. The Legislature's Amendment To Health And Safety Code Section 11379, Clarifying That Transportation Must Be For Sale To Be A Crime Under That Statute, Became Effective January 1, 2014.

In 2007, when appellant violated the law by possessing methamphetamine while a passenger in a car, Health and Safety Code section 11379, subdivision (a) provided, in pertinent part: "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 [contraband] . . . shall be punished by imprisonment in the state prison for a period of three, four, or five years."

At that time, courts had interpreted the statute to include conduct involving transportation for personal use. (See *People v. Rogers* (1971) 5 Cal.3d 129; *People v. Eastman* (1993) 13 Cal.App.4th 668, 676, fn. 8 [statute interpreted in *Rogers* essentially identical to Health and Safety Code section 11379]; *People v. Cortez* (1985) 166 Cal.App.3d 994, 997-998 [interpretation of Health and Safety Code section 11352 is bound by *Rogers*]; *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 contraband for sale].)

People v. Rogers, *supra*, 5 Cal.3d 129 is the main case discussing this analysis. There, this court found transportation of marijuana under former Health and Safety Code section 11531[8] did not require "a specific intent to transport contraband for the purpose of sale or distribution, rather than personal use." (*Id.* at p. 134.) The court reached this understanding because the statutory language did not convey such specific intent. "Neither the word 'transport,' the defining terms 'carry,' 'convey,' or 'conceal,' nor section 11531 read in its entirety, suggests that the offense is limited to a particular purpose or purposes. [¶] . . . [N]othing in that section exempts transportation (or importation) of marijuana for personal use. Had the Legislature sought to restrict the offense of transportation to situations involving sale or distribution, it could easily have so provided." (*Id.* at pp. 134-135.)

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[8]Shortly after the *Rogers* opinion, the Legislature repealed former Health and Safety Code section 11531 defining the crime of transportation of marijuana. (Stats. 1972, ch. 1407, § 2.) In the same chapter (Stats. 1972, ch. 1407, § 3), the Legislature enacted Health and Safety Code section 11379, which tracked the language of former Health and Safety Code section 11351 and broadened the transportation crime to apply not only to marijuana but also to other controlled substances including methamphetamine. (See *People v. Eastman*, *supra*, 13 Cal.App.4th at p. 675, fn. 7.)

Justice Mosk penned a vigorous dissent, noting the majority's interpretation did not serve the purposes of the statute to control illicit narcotics and dangerous drugs and created unjust results. (*Rogers*, *supra*, 5 Cal.3d at pp. 139-151 [dis. opn. of Mosk, J.).) "Under the majority's reading of section 11531, the severe penalties there prescribed could be inflicted on every person who is found to be in possession of a small quantity of marijuana for his personal use but happens at the time to be in motion, either in a vehicle, on foot, or otherwise" (*Id.* at p. 139.)

In 2013, the Legislature clarified the transportation crime of Health and Safety Code section 11379 required an intent to sell. To this end, it added subdivision (c): "For purposes of this section, 'transports' means to transport for sale." The governor signed the bill on October 3, 2013; the new law became effective January 1, 2014. (Stats. 2013, ch. 504, § 2; Gov. Code, § 9600.) Legislative history expressly reveals the intent of the statutory clarification under the Author's Statement:

> AB 721 would clarify the Legislature's intent to only apply felony drug transportation charges to individuals involved in drug trafficking or sales. Currently, an ambiguity in state law allows 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. While current law makes it a felony for any person to import, distribute or transport drugs, the term 'transportation' used in the Health and Safety Code has been widely interpreted to apply to ANY type of movement - even walking down the street and ANY amount of drugs, even if the evidence shows the

> drugs are for personal use and there is no evidence that the person is involved in drug trafficking. As a result, prosecutors are using this wide interpretation to prosecute individuals who are in possession of drugs for only personal use, and who are not in any way involved in a drug trafficking enterprise.
>
> This bill makes it expressly clear that a person charged with this felony must be in possession of drugs with the intent to sell. Under AB 721, a person in possession of drugs ONLY for personal use would remain eligible for drug possession charges. However, personal use of drugs would no longer be eligible for a SECOND felony charge for transportation.

(Assem. Com. on Public Safety, comments on Assem. Bill No. 721 (2013–2014 Reg. Sess.) for hearing on April 16, 2013, p. 2.)

To violate this revised statute after January 1, 2014, the defendant must transport the contraband with the intent to sell it.

2. When The Electorate Enacted Proposition 47, Knowing About The Legislature's Clarification Of The Elements Defining Transportation Under Health and Safety Code Section 11379, It Necessarily Incorporated This Statutory Change In Its Understanding Of What Acts Constituted A Violation Of Health And Safety Code Section 11377.

It is well settled the electorate is deemed to know this earlier clarification to the transportation crime when it considered and enacted Proposition 47. Because the electorate did not modify the clarification of this crime and purposefully created a specific retroactive analysis using, inter alia, Health and Safety Code section 11377 as it was amended by

Proposition 47, the court must as well incorporate this change in its assessment whether Proposition 47 applies to appellant's 2007 transportation conviction. The *People v. Shabazz* (2006) 38 Cal.4th 55 decision well illustrates this principle.

In *Shabazz*, defendant killed a woman when his intended target, a rival gang member who was sitting next to the woman, saw defendant's firearm and ducked. (*Shabazz, supra,* 38 Cal.4th at p. 60.) A jury convicted defendant of first degree murder and found true two allegations: he personally and intentionally discharged a firearm causing death and committed the acts within the meaning of the criminal-street-gang special circumstance under Penal Code section 190.2, subdivision (a)(22). (*Ibid.*) This court considered whether the criminal-street-gang special circumstance applied to defendant. Defendant contended it did not because the specific language of that allegation required defendant "intentionally killed the victim" and he did not intentionally kill the woman who died. Instead, he meant to kill the rival gang member sitting next to her. (*Id.* at p. 61.)

Ultimately, this court found the doctrine of transferred intent applied within the special circumstance context. (*Shabazz, supra*, 38 Cal.4th at pp. 63-66.) After noting the United States Supreme Court had approved of Ohio's application of the transferred intent doctrine to render a defendant

there eligible for a death sentence, this court then reviewed the purpose of the statute at issue. It was enacted through Proposition 21, the Gang Violence and Juvenile Crime Prevention Act of 1998, to provide severe penalties for gang-related felonies. Specifically, Proposition 21 provided, inter alia: "Life without the possibility of parole or death should be available for murderers who kill as part of any gang-related activity." (*Id.* at p. 65.) This generic language conveyed an intent not to limit the crimes to a particular class of victim but to focus the crime on the "act of gang-related killing". (*Ibid.*) It was gang-related violence which posed a threat to all – whether the victim is a gang member or not. The identity of the victim did not make the defendant's gang-related killing less blameworthy. (*Ibid.*)

Notably, this court rejected defendant's position the electorate had unlikely considered the doctrine of transferred intent. "We are unpersuaded; it is well settled that voters are presumed to know the law. [Ctation.]" (*Shabazz*, *supra*, at p. 65, fn. 8, internal quotation marks omitted.) Affirming the electorate's intent to reduce gang-related activity, this court reasoned application of a special-circumstance allegation to a gang-related killing, regardless of the identity of the victim as a gang member, furthered the purpose. The trial court had properly instructed on

the transferred intent doctrine relating to the special-circumstance allegation; and the Court of Appeal had properly upheld the special circumstance finding. (*Id.* at p. 66.)

Just as this court rejected the position in *Shabazz* that the electorate did not consider the doctrine of transferred intent when it enacted Proposition 21, this court should reject the position that the electorate did not consider the Legislature's earlier clarification of Health and Safety Code section 11379 when it enacted Proposition 47. Creation of these new and revised laws necessarily incorporated the understanding that some of the drug transportation convictions suffered prior to January 1, 2014 would qualify as simple nonviolent and nonserious drug possession crimes. The electorate included no language in the new and revised laws indicating the prior legislative clarification should be reversed or not recognized. Similarly, it included no language indicating resentencing consideration would be unavailable for prior drug transportation crimes. And it certainly knew how to include such restrictive language if it wanted to do so. (See e.g., § 1170.18, subd. (i) [defendant ineligible for Proposition 47 relief if specified prior convictions or required to register under section 290, subdivision (c)].) To the contrary, the electorate honored and retained the earlier clarification to the transportation conviction when it specified the

current version of Health and Safety Code section 11377 – the version created by Proposition 47 – as the lense by which to evaluate eligibility for resentencing.

Notably, the facts underlying appellant's transportation conviction are not more serious because they occurred in 2007 as opposed to 2014 when the electorate enacted Proposition 47. At both times, his acts constituted nonviolent and nonserious drug possession. The electorate's specific retroactive application of Proposition 47 recall and resentencing recognizes this fact and serves its broad intent – to provide a misdemeanor sentence for nonviolent drug possession crimes.

This court's recent *People v. Morales* (June 16, 2016, S228030) ___ Cal.4th ___ [2016 WL 3346571] opinion supports appellant's understanding the electorate knew of the Legislature's prior clarification of the transportation crime and intended to incorporate that clarification into the Proposition 47 ameliorative, retroactive resentencing. In *Morales*, this court considered whether, when a person is resentenced under Proposition 47 and his credit for time already served exceeds the new sentence, and the court orders the person to serve a parole period, the "excess credit for time served can be credited against this parole period." (*Morales*, *supra*, slip opn., p. 2.) Defendant argued that in this situation excess credits could

reduce the parole period based on the long-established principle set forth in *In re Sosa* (1980) 102 Cal.App.3d 1002 and section 2900.5. Under section 2900.5, excess credits could apply not only to reduce the term of imprisonment (§ 2900.5, subd. (a)) but also to reduce a period of parole. (§ 2900.5, subd. (c).)

For two reasons, this court found it could not assume the electorate intended Proposition 47 retroactive relief to include application of excess credits to reduce parole as the Legislature had in section 2900.5. First, Proposition 47 did not include any affirmative statement outlining such application as had section 2900.5. (*Morales*, *supra*, slip opn., p. 6.) While section 1170.18 specifically stated the former principle (§ 1170.18, subd. (d)), it did not state the later. Instead, it directed that the person whose sentence had been recalled and reduced would be subject to parole in the court's discretion. (*Ibid.*) And second, the purpose underlying section 2900.5, "to equalize the treatment of those who could and those who could not post bail" (*ibid.*) was irrelevant to Proposition 47 resentencing.

Because the new section 1170.18 statutory language was ambiguous, this court also reviewed the legislative history to understand the electorate's intent. In the official ballot pamphlet, this court noted direct and specific language informing the voter that resentenced offenders would be required

to serve parole, unless the judge exercised its discretion not to impose such a requirement. (*Morales*, *supra*, slip opn., p. 7.) This court found any reasonable voter would easily understand the direct and "entirely unambiguous" statement. (*Ibid.*) It concluded: "We have no reason to believe any voter intended to curtail or eliminate the court's discretion to impose parole whenever excess credits exist, and much more reason to conclude the opposite." (*Ibid.*)

Unlike the situation in *Morales,* the ballot material contains no affirmative language indicating an earlier conviction of transportation, where the contraband is not transported for sale, is not eligible for recall and resentencing. And, as in *Morales*, there is no reason to assume the voters believed Proposition 47 "would include what it did *not* state," (*Morales*, *supra*, slip opn., p. 7) – a rejection of the Legislature's recent clarification of Health and Safety Code section 11379. And unlike the situation in *Morales*, the purpose underlying Proposition 47 – resentencing for nonserious and nonviolent drug crimes – supports appellant's understanding of the eligibility determination. Accordingly, the *Morales* analysis confirms appellant's position.

3. Appellant Does Not Claim Relief Is Appropriate Under *In re Estrada* Principles And Could Not Make Such An Argument Because The Legislature's Clarification of Health And Safety Code Section 11379 Did Not Transform Any Transportation Crimes To Possessory Crimes.

It is important to understand not only what appellant is arguing, but also what he is not arguing. The Court of Appeal opinion mischaracterized appellant's argument as "as attempt to interpret Proposition 47 in such a way as to provide retroactive relief not available under [*In re*] *Estrada* [(1965) 63 Cal.2d 740]." (*People v. Martinez* (June 22, 2010, E046651) [nonpub. opn.], page 2.) Appellant did not make the argument in the Court of Appeal that resentencing him to a misdemeanor was appropriate under *Estrada*. Just as appellant's argument in this court does not rely on *Estrada* principles, appellant's argument in the Court of Appeal did take this approach.

Estrada presents an exception to the general rule that statutory amendments are not retroactive, unless expressly so stated by the Legislature. In *Estrada*, this court ruled that when a statutory amendment has the effect of mitigating the punishment, it is applied retroactively to all convictions not yet final on the effective date of the amendment. (*Estrada*, *supra*, 63 Cal.2d at pp. 744-745.) *Estrada* has no application here for two reasons. First, appellant's transportation conviction was long final before

he petitioned for recall and resentencing under Proposition 47. Second, and more importantly, because simple possession is not a lesser included offense of transportation as discussed immediately below, retroactive application of the Legislature's statutory change to Health and Safety Code section 11379 under *Estrada* could never result in reduction of the crime to a misdemeanor. It would instead invalidate the transportation conviction and allow the People to retry the offense to prove the new intent to sell element. (*People v. Ramos* (2016) 244 Cal.App.4th 99 [where Health and Safety Code section 11379 retroactively applies to defendant under *Estrada*, court reversed transportation conviction and remanded for retrial or admission of the transportation crime].)

Not all drug transportation crimes suffered before 2014 and the Legislature's clarification of Health and Safety Code section 11379 could constitute simple possession of a controlled substance (Health & Saf. Code, § 11377) that would qualify for recall and resentencing under Proposition 47. This is because simple possession is not a lesser included offense of transportation of a controlled substance. The electorate recognized this reality when it created as a measure for Proposition 47 retroactive application not an analysis of what statutory violation the earlier conviction involved. Rather, the electorate created a factual analysis using the lense of

the new and revised statutes: "had this act been in effect at the time of the offense." (§ 1170.18, subd. (a).)

"An offense is necessarily included in another if . . . the greater statutory offense cannot be committed without committing the lesser because all of the elements of the lesser offense are included in the greater." (*People v. Hughes* (2002) 27 Cal.4th 287, 365-366.) In making this determination, the courts look to: (1) the statutory definition of the two offenses; and (2) the allegations in the charging documents. (*People v. Thomas* (1991) 231 Cal.App.3d 299, 305.) Notably, courts do not look to the facts presented at trial to execute the lesser included offense analysis. (*Hughes*, *supra*, 27 Cal.4th at p. 306.)

Courts have concluded one can be convicted of transporting drugs without possessing them. Thus, possession of contraband is not a lesser included offense of transportation of contraband. (*Thomas*, *supra*, 231 Cal.App.3d at 305 ["By definition possession is not an essential element of transportation because the latter offense can be committed without also committing possession."]; *People v. Watterson* (1991) 234 Cal.App.3d 942, 947 ["[P]ossession of narcotics for sale is not necessarily included in the offense of transportation of narcotics."]; *Rogers*, *supra*, 5 Cal.3d at p. 134, fn. omitted ["Although possession is commonly a circumstance tending to

prove transportation, it is not an essential element of that offense and one may 'transport' marijuana or other drugs even though they are in the exclusive possession of another" as by aiding and abetting the transportation of drugs by others.].)

In this case, a review of the facts underlying appellant's transportation conviction reveals that were his crime committed after the electorate enacted Proposition 47 he would have committed a simple drug possession crime. Officer Hirakoa found the methamphetamine on the car floor mat, where appellant had been sitting. Appellant necessarily possessed the methamphetamine while the car moved. His criminal act was not committed by agency or aiding and abetting. Based on these discrete facts, appellant's crime would constitute a violation of Health and Safety Code section 11377 as it was amended by Proposition 47. His conviction qualifies for Proposition 47 recall and resentencing consideration.

4. The Recent *People v. Bush* Opinion Supports Appellant's Interpretation.

The recent case *People v. Bush* (2016) 245 Cal.App.4th 992, well illustrates the logic of this application when it found a theft from an elder offense under section 368, subdivision (b) not eligible for Proposition 47 reduction consideration. There, defendant filed a Proposition 47 petition contending two theft from an elder convictions and three receiving stolen

property convictions under section 496 merited Proposition 47 recall and resentencing to misdemeanors. (*Id.* at p. 995.) After the trial court denied the petition, defendant appealed. The Court of Appeal found the section 368 conviction ineligible for Proposition 47 relief, but remanded the case for factual consideration regarding the receiving stolen property counts. (*Id.* at pp. 995-996.)

On appeal, defendant had contended the theft from an elder convictions were eligible for Proposition 47 recall and resentencing consideration under the electorate's newly created section 490.2. (*Bush*, *supra*, 245 Cal.App.4th at p. 1002.) Section 490.2 provides "any theft crime in which the value of the stolen property does not exceed $950 shall be punished as a misdemeanor." (*Ibid.*) Defendant reasoned the section 368 crime was eligible for resentencing because "section 490.2 encompasses a section 368 theft offense if the section 368 crime qualifies under section 490.2 as punishable as a misdemeanor petty theft of property not exceeding $950, and the defendant does not have a super strike prior." (*Id.* at p. 1003.)

The *Bush* court found the theft from an elder crime did not qualify as one of the nonserious nonviolent theft crimes eligible for Proposition 47 resentencing. To resolve the question, the court looked to principles of

statutory interpretation. (*Bush*, *supra*, 245 Cal.App.4th at pp. 1003-1004.) The court noted Proposition 47 "either amended the statutes of the existing crimes to reflect eligibility for resentencing (§§ 473 (forgery), 476a (check fraud); 496 (receiving stolen property); and 666 (petty theft with a prior theft-related conviction) or enacted new crimes intended to be subject to Proposition 47 (§§ 459.5 (shoplifting), and 490.2 (petty theft repeat offender)." (*Bush*, *supra*, 245 Cal.App.4th at p. 1004.)

The court found it significant that Proposition 47 did not list section 368 as a crime eligible for resentencing nor did it amend section 368 to change the crime's punishment from a wobbler to a misdemeanor. (*Bush*, *supra*, 245 Cal.App.4th at p. 1004.) The only amendment the Legislature had made to section 368 since 2011 was one in 2015 which permitted issuance of a restraining order, under added subdivision (l). (*Ibid.*) In fact, when the electorate rewrote section 666 as part of Proposition 47, it added specific language "excluding section 368 from the limited punishment under section 666 of one year in jail or prison." (*Ibid.*) Given this exclusion, and the fact section 368 still gives courts discretion to sentence an offender who preys on "vulnerable elders and dependent adults" more severely than a basic theft crime listed in section 1170.18, the court concluded the electorate did not intend to provide Proposition 47 eligibility

for section 368 convictions. (*Id.* at pp. 1004-1005.) Indeed, the fact that section 368 statute still retained its wobbler status figured strongly in the court's analysis. "Proposition 47 did not amend section 368 to eliminate this discretion and require misdemeanor status. Therefore defendant cannot establish that his section 368 violation would have been a misdemeanor had Proposition 47 been in effect at the time of sentencing." (*Bush, supra*, 245 Cal.App.4th at p. 1005.)

This *Bush* case adds an important understanding to the analysis whether a current conviction is eligible for Proposition 47 recall and resentencing. Not only must the court consider facts underlying the current conviction but it also must consider whether the Legislature or the electorate had amended the statute of the conviction after that conviction occurred and, if so, the nature of the amendment. In *Bush*, the Legislature had amended the underlying statute on only a minor, collateral aspect. The acts defendant Bush committed would still constitute a wobbler crime even if that defendant had committed the actions after the electorate enacted Proposition 47. Here, by contrast, the Legislature had executed a significant clarification to the underlying transportation statute after appellant's conviction and before the electorate enacted Proposition 47. Had appellant committed the acts he did after the electorate enacted

Proposition 47, they would not constitute a wobbler crime. They would constitute only a simple possession crime.

E. If The Statute Is Ambiguous, Review of the Legislative History Supports Appellant's Position.

If this court finds the statutory language of section 1170.18, subdivision (a) ambiguous, review of legislative history reveals the electorate did not intend to preclude appellant's analysis. When the electorate considered Proposition 47, the ballot provided arguments both supporting and against the initiative, as well as the Analysis by the Legislative Analyst. The documents discussed retroactive application of Proposition 47 in broad terms, and the Legislative Analyst's analysis supports appellant's position.

The arguments against the Proposition 47, as well as the rebuttal arguments, discussed retroactivity not in terms of how to assess which convictions qualify for recall and resentencing but in terms of whether there can be resentencing for an offender who has a violent or serious prior conviction. The argument in favor of Proposition 47 did not mention retroactive application of resentencing under Proposition 47. (Voter Information Guide, Gen. Elec. (Nov. 5, 1996) argument in favor of Prop. 47, p. 38.) The rebuttal to the argument in favor of Proposition 47 discussed retroactive application only in a broad and generalized manner.

The two sentences are: "1. Prop. 47 supporters admit that 10,000 inmates will be eligible for early release. They wrote this measure so that judges will not be able to block the early release of these prison inmates, many of whom have prior convictions for serious crimes, such as assault, robbery and home burglary." (*Id.*, rebuttal to argument in favor of Proposition 47, p. 38.) Moreover, this rebuttal argument was overstated in light of section 1170.18, subdivision (b), which gives the court discretion not to recall and resentence petitioner if such resentencing "would pose an unreasonable risk of danger to public safety."

The argument against Proposition 47 continued this generalized discussion of retroactive application of Proposition 47, focusing on release of inmates with concerning violent prior convictions. After noting that 10,000 inmates will be eligible for early release if Proposition 47 passes, the argument continued:

> • *Prop. 47 will require the release of thousands of dangerous inmates.* Felons with prior convictions for armed robbery, kidnapping, carjacking, child abuse, residential burglary, arson, assault with a deadly weapon, and many other serious crimes will be eligible for early release under Prop. 47. These early releases will be virtually mandated by Proposition 47. While Prop. 47's backers say judges will be able to keep dangerous offenders from being released early, this is simply not true. Prop. 47 prevents judges from blocking the early release of prisoners except in very rare cases. For example, even if a judge finds that the inmate poses a risk of committing crimes like kidnapping, robbery, assault, spousal abuse, torture of

> small animals, carjacking or felonies committed on behalf of a criminal street gang, Proposition 47 requires their release.

(Voter Information Guide, Gen. Elec. (Nov. 4, 2014) argument against Prop. 47, p. 39.) Besides this concern with defendants who have prior violent or serious felony convictions obtaining resentencing and then release under the new laws, the argument against Proposition 47 contained no discussion how assessment of retroactive application of the new law is made. Finally, the rebuttal to the argument against Proposition 47 reiterated "[t]here is no automatic release. It includes strict protections to protect public safety and make sure rapists, murderers, molesters and the most dangerous criminals cannot benefit." (*Id.*, rebuttal to argument against Proposition 47, p. 39.)

It is the Analysis by the Legislative Analyst that provided discussion how retroactive application of the new and revised laws of Proposition 47 was to function. That generalized, simplified discussion supports appellant's analysis. Under the Proposal section, the analysis told the voter: "This measure reduces penalties for certain offenders convicted of nonserious and nonviolent property and drug crimes. The measure also allows certain offenders who have been previously convicted of such crimes to apply for reduced sentences." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) analysis of Prop. 47 by Legis. Analyst, p. 35.) Thus, the

Analysis informed the voter about the retroactive application of the reduced sentencing laws to nonserious and nonviolent drug crimes. After the Proposal section, the Analysis set forth the reduced penalties of the following nonserious and nonviolent property and drug offenses: grand theft, shoplifting, receiving stolen property, writing bad checks, check forgery, and drug possession. (*Ibid.*) When discussing shoplifting, the Analysis explained the petty theft described by shoplifting could be charged as a burglary before Proposition 47 but that after the enactment of the new laws, "shoplifting property worth $950 or less would always be a misdemeanor and could not be charged as a burglary." (*Ibid.*) These statements essentially told the voters that, with respect to shoplifting, the law would be modified such that the qualifying petty theft crimes would be defined as shoplifting and could not be a burglary.

In terms of drug possession, the Analysis stated: "Under current law, possession for personal use of most illegal drugs (such as cocaine or heroin) is a misdemeanor, a wobbler, or a felony–depending on the amount and type of drug. Under this measure, such crimes will always be misdemeanors. The measure would not change the penalty for possession of marijuana, which is currently either an infraction or a misdemeanor." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) analysis of Prop. 47 by Legis.

Analyst, pp. 35-36.) The Analysis told the voter possession of drugs for personal use would be a misdemeanor.

It is within this context that the voters read and understood the following heading: "Resentencing of Previously Convicted Offenders". The first sentence of this section read: "This measure allows offenders currently serving felony sentences for the above crimes to apply to have their felony sentences reduced to misdemeanor sentences." This opening sentence supports appellant's understanding because it told the voters retroactivity would operate for offenders currently serving a sentence for acts that constitute the delineated crimes, and this application necessarily was not dependent upon the exact statutory conviction. Rather, it was dependent upon what crime defendant had committed.

Retroactive application is not dependent upon the actual statutory conviction because, as previously discussed in the Analysis, some statutory definitions did not exist before Proposition 47. How could the offender be serving a sentence for a shoplifting conviction if the statute defining this conviction had not exited before Proposition 47? The voters knew that eligibility for reduction to a misdemeanor would be based on an assessment of the facts underlying the existing conviction. Was the offender with a burglary conviction currently serving a sentence for acts that would be a

shoplifting crime under the new law? If so, he would be eligible for resentencing.

From the Analysis and basic logic, the voters knew that if the offender's burglary conviction would now constitute shoplifting crime under the new law created by Proposition 47, an "above crime" defined by the Analysis, the offender would be eligible for resentencing. Similarly, from the Analysis, the voters understood that some prior theft convictions which could have constituted a felony grand theft conviction before Proposition 47 because of the type of property stolen would constitute only a petty theft crime after Proposition 47. Given that the crime would be a misdemeaor under the new law, an offender would be eligible for retroactive resentencing. The voter necessarily understood that Proposition 47 would redefine certain crimes. With this understanding, when the Analysis told the voter retroactive application of Proposition 47 resentencing would be allowed for "offenders currently serving felony sentences for the above crimes," the voters necessarily understood eligibility for retroactive application to mean assessment of the facts of the current conviction. Did the facts of that current conviction constitute a crime under the new Proposition 47 laws? If so, the offender was entitled to recall and resentencing consideration.

F. The Court of Appeal Opinion Misreads The Statutory Language of Section 1170.18, Subdivision (A).

The Court of Appeal opinion misreads the statutory language at issue – section 1170.18, subdivision (a) – and reasons because the statutory list at the end of the subdivision does not include appellant's Health and Safety Code section 11379 conviction, appellant's conviction for this offense is not eligible for Proposition 47 reduction. (*People v. Martinez* (June 22, 2010, E046651) [nonpub. opn.], page 2.) As discussed *infra*, eligibility for relief is not made based on a comparison of the statutory conviction and the satutes set forth in this list. Before enactment of Proposition 47, there was never a section 459.5 offense or even the section 490.2 statute. Eligibility is not assessed whether the offender's conviction is for one of these enumerated crimes. Rather, eligibility is made, as appellant asserted, based on the factual assessment whether he would have been guilty of one of the enumerated crimes had the new and revised statutes been in effect at the time of the offense.

Finally, the Court of Appeal opinion improperly formulates the Proposition 47 retroactive assessment. The opinion reasons "[i]f 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." (*People v. Martinez* (June 22, 2010, E046651) [nonpub. opn.], page 3.) Such restrictive understanding of the new statutes fails to recognize the principle that the new statutes must be viewed in context of the criminal law in existence at the time the electorate passed Proposition 47. At the time the electorate revised and created these laws, it necessarily incorporated all prior changes to them. So, when it revised section 11377 to constitute a misdemeanor, the electorate understood that simple possession of contraband encompassed possessory acts of transporting the contraband as long as there was no intent to sell. The Court of Appeal's isolated interpretation is not appropriate.

CONCLUSION

Proposition 47 redefined several nonserious and nonviolent theft and drug crimes and significantly reduced the sentences for these crimes. The electorate specifically made these sentencing reductions retroactive to certain convictions. To determine eligibility for retroactive ameliorative sentencing, the court must review the facts of the conviction and determine whether the facts would constitute a nonserious and nonviolent theft or drug crime as defined by the new and revised nonserious and nonviolent theft and drug crimes. That is, were these new and revised laws in effect at the time defendant committed his acts and defendant's acts would constitute a

crime under the new and revised definitions, he would be eligible for ameliorative resentencing. Such retrospective review cannot be made in isolation, but necessarily must take into account prior statutory changes that inform the understanding of the new and revised statutes. Specifically here, the electorate necessarily incorporated the Legislature's clarification of the transportation offense, to penalize only transportation for sale. The electorate included no language to the contrary in the new and revised laws it enacted with Proposition 47. When this analysis is executed, defendant's transportation conviction, based on his acts of possessing methamphetamine in a car, under the new and revised Proposition 47 laws, would constitute the revised nonserious and nonviolent drug possession crime under Health and Safety Code section 11377. He did not move the methamphetamine with the intent to sell it. Given these facts, the conviction is eligible for Proposition 47 recall and resentencing.

Dated: June 30, 2016

Respectfully submitted,

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Attorney for Mario Martinez

CERTIFICATION OF WORD COUNT

I, Cindi B. Mishkin, hereby certify that, according to the computer program used to prepare this document, appellant's petition for review, contains 11,350 number of words. (Cal. Rules of Court, rule 8.520(c)(1).)

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

Executed June 30, 2016 in San Diego, California.

Cindi B. Mishkin
Staff Attorney
State Bar No. 169537

PROOF OF SERVICE BY MAIL

Case: People v. Mario Martinez

Supreme Court No. S231826
Court of Appeal No. E063107
Superior Court No. RIF136990

I declare:

I am employed in the County of San Diego, California. I am over 18 years of age and not a party to the within entitled cause; my business address is 555 West Beech Street, Suite 300, San Diego, California 92101-2939.

On July 1, 2016, I served the attached

APPELLANT'S OPENING BRIEF ON THE MERITS

of which a true and correct copy of the document filed in the cause is affixed, by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

Attorney General
(eservice only
to adieservice@doj.ca.gov)

Clerk, Riverside County Superior Court
Attn: Appeals Division
Hall of Justice
4100 Main Street
Riverside, CA 92501

Riverside County District Attorney
Attn: Appeals Division
3960 Orange Street
Riverside, CA 92501

Court of Appeal
Fourth District, Division Two
3389 Twelfth Street
Riverside, CA 92501 (via TrueFiling)

MARIO MARTINEZ #T24140
5150 O'Byrnes Ferry Road
Jamestown, CA 95327

California Supreme Court
Earl Warren Building
350 McAllister Street Room 1295
San Francisco, CA 94102-4738
(via UPS & e-service)

Joshua A. Knight
Office of the Public Defender
30755-D Auld Road, Suite 2233
Murrieta, CA 92562

SYLVIA W. BECKHAM
Attorney at Law
1072 Casita Pass Road, PMB 314
Carpinteria, CA 93013

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, rule 2.260(f)(1)(A)-(D).)

Furthermore, I, Will Bookout, declare I electronically served from my electronic notification address of wrb@adi-sandiego.com, the same referenced above document on July 1, 2016, at 11:42 am to the following entity and electronic notification address: ADIEService@doj.ca.gov.

I declare that I electronically submitted a copy of this document to the United States Supreme Court on its website at http://www.courts.ca.gov/24590.htm in compliance with the court's Terms of Use.

I declare under penalty of perjury that the foregoing is true and correct, and this declaration was executed at San Diego, California, on July 1, 2016, at 11:42 am.

Will Bookout
(Typed Name)

Will Bookout
(Signature)