IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN THE MATTER OF: G.C., a Person Coming Under the Juvenile Court Law	S252057 (Sixth District Court of Appeal, Case No. H043281)
PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. G.C., Defendant and Appellant.	

APPELLANT'S OPENING BRIEF ON THE MERITS

ON APPEAL FROM A JUDGMENT
OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA
THE HONORABLE KENNETH L. SHAPIRO, JUDGE
CASE NUMBER 3-14-JV40902

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By appointment of the Supreme Court
Under the Sixth District Appellate Program

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ISSUE PRESENTED

Can the juvenile court's failure to expressly declare whether an offense is a felony or a misdemeanor (see *In re Manzy W.* (1997) 14 Cal.4th 1199) be challenged on appeal from orders in a subsequent wardship proceeding?

STATEMENT OF APPEALABILITY

This is an appeal authorized by Welfare and Institutions Code section 800[1].

[1] Unless otherwise specified, all future statutory references are to the Welfare and Institutions Code.

STATEMENT OF THE CASE

On October 2, 2014, a three count petition was filed in the Santa Clara County juvenile court, alleging two felony counts of theft or unauthorized use of a vehicle under Vehicle Code section 10851, subdivision (a), and one misdemeanor count of driving while unlicensed under Vehicle Code section 12500, subdivision (a). (CT[2] 7 – 11; "Petition A".)

On October 27, 2014, a one count petition was filed in the Santa Clara County juvenile court, alleging one felony count of theft or unauthorized use of a vehicle under Vehicle Code section 10851, subdivision (a). (CT 18 - 22; "Petition B".)

On October 28, 2014, G.C. admitted two counts of vehicle theft in Petition A and one count of vehicle theft in Petition B, all of which were sustained as felonies. (CT 56 – 60; 2RT 53 - 58.) The misdemeanor count of driving while unlicensed under Vehicle Code section 12500, subdivision (a) in Petition A was dismissed. (2RT 53.)

On November 14, 2014, G.C. was charged in the Santa Clara juvenile court with misdemeanor vandalism under Penal Code section 594, subdivision (a)(b)(2)(A). (CT 80 – 84; "Petition C".) On November 19, 2014, G.C. admitted this allegation. (CT 99 – 102; 4RT 117 - 119.)

On February 13, 2015, G.C. was charged with felony vandalism in the Santa Clara juvenile court under Penal Code section 594, subdivision (a)/(b)(1). (CT 152 – 157; Petition "D".) On February 19, 2015, a second charge of misdemeanor petty theft under Penal Code section 484/488 was added to this petition. (CT 155, 188; 12RT 227.) That same day, G.C. admitted the petty theft charge, and the vandalism charge was dismissed. (CT 187 – 191; 12RT 227 – 229.)

On February 19, 2015, the Santa Clara County juvenile court found that G.C. and her mother resided in Alameda County and ordered the matter (Petitions A, B, C, and D) transferred to Alameda County for disposition. (CT 187 – 189, 192 – 195; 12 RT 228 –

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[2] "CT" refers to the Clerk's Transcript; "RT" refers to the Santa Clara County Reporter's Transcript, "ACRT" refers to the Alameda County Reporter's Transcript; "Santa Cruz RT" refers to the Santa Cruz County Reporter's Transcript.

229.) At none of these hearings did the court affirmatively state on the record that these offenses constituted misdemeanors or felonies; additionally, the record does not establish the court knew of its discretion to treat these offenses as misdemeanors. (See, e.g. 3RT, 4RT, 5RT, 6RT, 7RT, 9RT.)

On February 27, 2015, the Alameda County juvenile court accepted the transfer from Santa Clara County. (CT 358; 13RT 384 - 385.) On March 13, 2015, the Alameda County juvenile court held a disposition hearing on Petitions A, B, C, and D. (CT 201 – 203, 331 – 333; ACRT 6 – 9.) The court adjudged G.C. a ward and released G.C. to her mother on probation. (CT 334 – 336; ACRT 6 - 9.)

In July, 2015, a one count petition was filed in Santa Cruz County juvenile court, alleging misdemeanor possession of burglary tools in violation of Penal Code section 466. (CT 267, 274.) On July 14, 2015, G.C. admitted this charge in Santa Cruz County. (CT 267; Santa Cruz RT 304 – 307.) Because G.C. was a resident of Alameda County, the Santa Cruz County juvenile court ordered the matter transferred to Alameda County for disposition. (Santa Cruz RT 303 – 304, 307.) On August 7, 2015, the Alameda County juvenile court accepted transfer of the case from Santa Cruz. (CT 288.)

On September 10, 2015, the Alameda County juvenile court held a disposition hearing on the Santa Cruz petition and continued G.C. on probation. (CT 267 – 268.)

On October 30, 2015, G.C. was charged in Alameda County juvenile court with violating the terms of her probation when she left home on October 22, 2015, and remained away without permission and without notifying the probation officer. (CT 206 - 208, 259 – 261; "E" petition.)

On November 9, 2015, G.C. admitted the probation violation in Alameda County juvenile court, and the court transferred the case back to Santa Clara County juvenile court. (CT 214 - 215; 4RT 901 - 903.) On November 19, 2015, the Santa Clara County juvenile court accepted the transfer of Petition E from Alameda County. (CT 379 – 383, 14RT 434.)

On December 30, 2015, the disposition hearing on Petition E was held in Santa Clara County juvenile court. (CT 400 - 404.) The court continued G.C. as a ward of the

court and ordered standard terms and conditions of probation. (CT 400 – 404; 17RT 716, 720.) A hearing on the validity of several gang and electronic search conditions was held on January 26, 2016. (CT 457; 18RT 859 - 878.) The court imposed certain gang and electronic search conditions. (CT 457 – 458; 18RT 874 - 876.)

G.C. filed a timely notice of appeal on February 1, 2016. (CT 458 – 460.) On September 12, 2018, the Sixth District Court of Appeal issued a published decision affirming the judgment. (*In re G.C.* (2018) 27 Cal.App.5th 110.) G.C. did not file a petition for rehearing.

On December 19, 2018, this Court granted G.C.'s petition for review.

STATEMENT OF FACTS

Petition A- filed October 2, 2014 in Santa Clara County

On September 15, 2014, G.C. used a shaved key to open a 1996 Honda Accord in Santa Clara County and start the car, which did not belong to her. (CT 9, 91.) After she crashed the car, the police arrived and issued G.C. a citation. (CT 89, 91 -92.) The following day, G.C. started the ignition of a different 1996 Honda Accord using a shaved key. (CT 92.) While driving this car to her friend's house, she was stopped by the police and arrested for driving a stolen car. (CT 92.)

Petition B – filed October 27, 2014 in Santa Clara County

On October 27, 2014, G.C. again used a shaved key to start a car, which did not belong to her. (CT 92.) Police noticed the swerving car and started following. (CT 92.) Later, the car G.C. was driving was surrounded by officers at gun point and she was arrested. (CT 92.)

Petition C – filed November 14, 2014 in Santa Clara County

On October 20, 2014, Santa Clara County Sheriff's deputies stopped the car G.C. was in on Highway 17. (CT 344.) Because G.C. had been reported as missing, the sheriffs detained her. (CT 344.) While G.C. was in the back of the patrol car waiting for

officers to return her home, she tagged the backseat of the patrol car; she wrote "13 East Side San Jose X3", "Fuck the Pigs" and "SUR". (CT 344.)

Petition D - filed February 13, 2015 filed in Santa Clara County

G.C. threw away her EMP transmitter, worth $575.00, in early February 10, 2015. (CT 160.)

Petition filed on July 9, 2015 filed in Santa Cruz County

On May 2, 2015, G.C. was in a stolen car when it crashed in Santa Cruz. When the police stopped her, they found a tool used to start cars without a key. (CT 270 - 271.)

Petition E - filed October 30, 2015 in Alameda County

On October 28, 2015, no one answered the door when probation went to G.C.'s home. Probation called G.C.'s mother, and she said G.C. had not been home for about one week. (CT 266.)

SUMMARY OF ARGUMENT

The present case focuses on whether a juvenile court's failure to expressly declare a wobbler offense to be a felony or a misdemeanor (see *In re Manzy W.* (1997) 14 Cal.4th 1199) is an issue that can be challenged on an appeal from orders in subsequent wardship proceedings. In the present case, G.C. timely appealed from the contested dispositional hearing on Petition E, held on December 30, 2015. (CT 458 – 460.) During the dispositional hearing on Petitions A, B, C, and D on March 13, 2015, the Alameda County juvenile court failed to properly determine whether the three vehicle theft true findings from Petitions A and B constituted misdemeanors or felonies. (CT 201 – 203, 331 – 333; ACRT 6 – 9.) Such findings had not been previously made at the associated jurisdictional hearings. (CT 56 – 59, 99 – 102, 187 - 191; 2RT 53 – 58, 4RT 117 – 119; 12RT 227 – 229.)

The lower court below erred in concluding that G.C. could not make *Manzy W.* challenges as to her prior petitions. (*G.C., supra*, 27 Cal.App.5th at p. 117.) Because a timely notice of appeal was filed from the most recent disposition, the appellate court had jurisdiction to consider whether the juvenile court erred by failing to determine whether the vehicle theft violations in Petition A and Petition B were felonies or misdemeanors. Section 702 states: "If the minor is found to have committed an offense which would in the case of an adult be punishable alternatively as a felony or a misdemeanor, the court shall declare the offense to be a misdemeanor or felony." If the juvenile court fails to make this designation, the matter must be remanded "for strict compliance." (*Manzy W., supra*, 14 Cal.4th at p. 1204.)

Justice Greenwood was correct in her dissenting opinion. (*G.C., supra*, 27 Cal.App.5th at pp. 117 – 119 (dis. opn. of Greenwood, J.).) Because G.C. filed a timely notice of appeal from the juvenile court's December 30, 2015 disposition hearing, the appellate court could properly consider the issue from the prior petitions. The failure to state whether a wobbler is a felony or a misdemeanor is tantamount to an unauthorized sentence, and the failure to comply with section 702 is cognizable on appeal even though the minor failed to raise it in the trial court. (*In re Ramon M.* (2009) 178 Cal.App.4th 665, 675.) As explained by Justice Greenwood, the juvenile court has "an ongoing obligation" under *Manzy W., supra*, 14 Cal.4th 1199 to make a designation as to whether the offenses are misdemeanors or felonies. (*G.C., supra*, 27 Cal.App.5th at pp. 117, 118 (dis. opn. of Greenwood, J.).) In analogous circumstances, this court has found no lack of jurisdiction by raising such an issue in a later appeal. (*In re Isaiah W.* (2016) 1 Cal.5th 1, at pp. 10, 14 [considering error in violating requirements of Indian Child Welfare Act [ICWA]].)

The majority here incorrectly concluded that the errors were not tantamount to an unauthorized sentence. In so doing, it ignored why an ongoing obligation exists and how a previous *Manzy W.* error can later affect the juvenile. As observed by Justice Greenwood in the dissent, "[t]he Supreme Court based its decision [in *Manzy W.*] on its recognition that Section 702 provides equal protection to youthful offenders by ensuring that a minor not be held 'in physical confinement longer than an adult convicted of the

same offense. (*Manzy W., supra*, 14 Cal.4th at p. 1205).'" (*G.C., supra*, 27 Cal.App.5th at p. 118 (dis. opn. of Greenwood, J.).) The misdemeanor/felony designation impacts future adjudications due to the aggregation of current and future petitions. (*Ibid.*) If the juvenile court fails to designate whether an offense is a misdemeanor or a felony, the juvenile could be held in physical custody longer than the lawful term and, under the majority's reasoning, would preclude a later appeal from an unlawful term of confinement. (*Ibid.*)

For these reasons, this Court should reverse the lower court's order and remand the case to allow the juvenile court to make a proper misdemeanor/felony determination.

ARGUMENT

I. THE JUVENILE COURT'S FAILURE TO EXPRESSLY DECLARE WHETHER AN OFFENSE IS A FELONY OR A MISDEMEANOR (SEE *IN RE MANZY W.* (1997) 14 CAL.4TH 1199) CAN BE CHALLENGED ON APPEAL FROM ORDERS IN A SUBSEQUENT WARDSHIP PROCEEDING

A. INTRODUCTION

The Court of Appeal's decision below creates a split of authority about whether a juvenile court's failure to designate offenses as misdemeanors or felonies under section 702 can be raised on appeal from subsequent proceedings. In *Ramon M., supra,* 178 Cal.App.4th 655, the court concluded that such an error constituted an unauthorized sentence that can be corrected at any time. The majority here found that an appellate court had no jurisdiction to consider such a claim if a timely notice of appeal was not filed after the error was initially made. (*G.C., supra,* 27 Cal.5th at p. 117.) For the reasons set forth below, this Court should follow the analysis in *Ramon M.*

B. RELEVANT PROCEEDINGS BELOW

On October 2, 2014, a three count petition was filed in the Santa Clara juvenile court, alleging two counts of felony theft or unauthorized use of a vehicle under Vehicle

Code section 10851, subdivision (a), and one misdemeanor count of driving while unlicensed under Vehicle Code section 12500, subdivision (a). (CT 7 – 11; "Petition A".) On October 27, 2014, a one count petition was filed in the Santa Clara juvenile court, also alleging felony theft or unauthorized use of a vehicle under Vehicle Code section 10851, subdivision (a). (CT 18 - 22; "Petition B".)

On October 28, 2014, G.C. admitted two counts of vehicle theft in Petition A and one count of vehicle theft in Petition B. (CT 56 – 59; 2RT 53 - 58.) The juvenile court stated, "Court does find a factual basis for all counts. The Court finds [G.C.] has knowingly and intelligently waived her rights. Freely and voluntarily entered an admission to the two petitions." (2RT 58.) The court ordered G.C. detained until the disposition date. (2RT 59.)

On February 19, 2015, the Santa Clara County juvenile court ordered the matter transferred to Alameda County for disposition because G.C. was living there. (CT 187 – 189.) At no time did the court affirmatively state on the record that these offenses constituted misdemeanors or felonies, nor is there any indication that the court knew of its discretion to treat these offenses as misdemeanors. (See, e.g. 3RT, 4RT, 5RT, 6RT, 7RT, 9RT.)

On March 13, 2015, the Alameda County juvenile court held a disposition hearing on Petitions A and B, as well as two subsequent petitions G.C. had admitted. (CT 201 – 203, 331 – 333; ACRT 6 – 9.) The court did not make any findings regarding whether the vehicle theft charges under Petitions A and B were misdemeanors or felonies. (CT 201 – 203, 331 – 333; ACRT 1 – 10.)

G.C. filed a timely notice of appeal from the dispositional hearing on Petition E on February 1, 2016. (CT 458 – 460.)

C. APPLICABLE LEGAL PRINCIPLES

When a juvenile commits an offense that can either constitute a misdemeanor or a felony, the juvenile court must make an affirmative finding about the offense level. (§

702 [court shall "declare the offense to be a misdemeanor or felony"]; *Manzy W., supra*, 14 Cal.4th at p. 1209.) An affirmative finding is made only if the court states its finding on the record. (See, e.g., *In re Ricky H.* (1981) 30 Cal.3d 176, 191.)

If an affirmative finding is not made, the appellate court must determine whether "the record as a whole establishes that the juvenile court was aware of its discretion to treat the offense as a misdemeanor and to state a misdemeanor-length confinement limit." (*Manzy W., supra,* 14 Cal.4th at p. 1209.) Appellate courts have found that an affirmative finding was not made even where there was an admission of an allegation charged as a felony (*In re Nancy C.* (2005) 133 Cal.App.4th 508, 512), or where a court calculated the maximum term of confinement as if the offense was a felony (*Manzy W., supra*, 14 Cal.4th at pp. 1207-1208).

In *Manzy W.* the minor admitted to possession of a controlled substance under Health and Safety Code section 11377, subdivision (a), and joyriding under Penal Code section 499b, both of which were wobblers and charged as felonies. (*Manzy W., supra*, 14 Cal.4th at pp. 1201, 1202.) During the disposition hearing, the prosecutor and defense counsel agreed with the dispositional report prepared by probation, which stated that the maximum term of confinement for felony possession of a controlled substance was three years. (*Id.* at pp. 1202 – 1203.) The juvenile court imposed a maximum term of confinement of three years to the Youth Authority for the possession offense. (*Id.* at p. 1203.)

On appeal, the minor argued that the juvenile court erred when it failed to state whether the violations were misdemeanors or felonies. (*Manzy W., supra*, 14 Cal.4th at p. 1203.) The appellate court agreed and remanded the case to the juvenile court for compliance with section 702. (*Ibid.*)

This Court affirmed the finding of the appellate court, concluding that the "failure to make the mandatory express declaration requires remand of this matter for strict compliance with Welfare and Institutions Code section 702," citing *In re Kenneth H.* (1983) 33 Cal.3d 616, 619 and *Ricky H., supra,* 30 Cal.3d at p. 191. (*Manzy W., supra*, 14 Cal.4th at p. 1204.) This court noted that this duty is not merely administrative. "[T]he

requirement that the juvenile court declare whether a so-called 'wobbler' offense was a misdemeanor or felony also serves the purpose of ensuring that the juvenile court is aware of, and actually exercises, its discretion under Welfare and Institutions Code section 702. For this reason, it cannot be deemed merely 'directory'." (*Manzy W., supra,* 14 Cal.4th at p. 1207, citation omitted.) If the juvenile court fails to make this designation, the matter must be remanded "for strict compliance." (*Id.* at p. 1204.)

D. AN APPELLATE COURT CAN CONSIDER A *MANZY W.* ERROR IN AN APPEAL FOLLOWING A SUBSEQUENT WARDSHIP PROCEEDING

The majority below wrongly concluded that it did not have jurisdiction to consider whether the juvenile court erred in failing to make prior *Manzy W.* determinations. (*G.C., supra*, 27 Cal.App.5th at p. 117.) This holding misconstrues the nature of the alleged error as well as jurisdictional limitations. It should not be followed by this Court. The general rule is the court of appeal has fundamental jurisdiction if there is a timely appeal from the judgment or an appealable order after judgment. (See *Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 670.) Here, the appellate court had jurisdiction over G.C.'s case since a timely notice of appeal was filed on February 1, 2016 after the dispositional hearings on Petition E, which were appealable orders. (Cal. Rules of Court, rule 8.104, subd. (a)(1).)

Whether an appellate court can then look to - and consider – errors from earlier orders is a matter of waiver (*In re Jesse W.* (2001) 93 Cal.App.4th 349, 355; *In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1251; *In re Daniel K.* (1998) 61 Cal.App.4th 661, 667 - 668) or res judicata. (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1150). In *Jesse W.*, for example, the appellate court found the father waived an appeal from the referee's disposition order in a dependency matter even though it was not countersigned by a juvenile court judge as required by section 249. (*Jesse W., supra*, 93 Cal.App.4th at pp. 354 - 355.) "The rule serves vital policy considerations of promoting finality and reasonable expedition, in a carefully balanced legislative scheme, and preventing late-

stage 'sabotage of the process' through a parent's attacks on earlier orders." (*Jesse W., supra,* 93 Cal.App.4th at p. 355, citation omitted.)

Similarly, the appellate court in *Melvin A.* found a failure to timely appeal an appealable order waives a claim from that order. There, the trial court stayed its order terminating the parents' parental rights. (*Melvin A., supra*, 82 Cal.App.4th at p. 1247.) The court did not stay three other orders made the same day: the termination the mother's visitation with her children, the denial of a request for a substitution of attorney, and the denial of her request for a continuance. (*Id.* at pp. 1247, 1251.) The appellate court found that because the three orders were not stayed, they were separately appealable from the termination of parental rights order. The mother's notice of appeal was untimely because it was filed after the stay of the termination of parental rights was lifted. (*Id.* at p. 1251.)

In *Daniel K., supra,* 61 Cal.App.4th 661, the appellate court found that a failure to appeal an order denying discovery in a dependency matter waived an issue from this order. (*Id.* at p. 666.) There, the juvenile court denied the mother's motion for modification of a guardianship order under section 388. (*Id.* at p. 663.) She appealed because the juvenile court did not hold an evidentiary hearing and denied her continued discovery request. (*Ibid.*) The mother waited to raise the discovery issue until she appealed from the denial of the modification motion. (*Id.* at p. 667.) The appellate court found that because the discovery order was separately appealable under section 395, and she failed to file a notice of appeal within 60 days of the discovery ruling, her claim on appeal was untimely. (*Ibid.*)

Unlike the aforementioned cases, no such problem of waiver or res judicata existed here since the alleged *Manzy W.* errors constituted an unauthorized sentence which can be corrected at any time by an appellate court. The majority's conclusion should not be followed since it ignores this distinction.

In her dissenting opinion, Justice Greenwood concluded as much, finding that the failure to designate the offenses as misdemeanors or felonies "resulted in unauthorized orders with respect to the subsequent disposition of G.C.'s case." (*In re G.C., supra*, 27

Cal.App.5th at pp. 118 – 119 (dis. opn. of Greenwood, J.) citing *Ricky H., supra,* 30 Cal.3d at p. 191 and *Ramon M., supra,* 178 Cal.App.4th at p. 675.)

The majority here disagreed with *Ramon M., supra,* 178 Cal.App.4th 665, finding that its reliance on *Ricky H., supra,* 30 Cal.3d 176, and *People v. Nguyen* (2009) 46 Cal.4th 1007, were misplaced. (*G.C., supra,* 27 Cal.App.5th at pp. 116 – 117.) While neither case is directly on point, they do provide support for the argument that the dispositional order of March 13, 2015 was "tantamount to an unauthorized sentence" because the court failed to state whether the three vehicle theft violations in Petition A and Petition B were felonies or misdemeanors.

In *Ricky H.*, this Court remanded a juvenile case since the juvenile court did not accurately set forth the maximum term of confinement under section 726 and because the court had not made the appropriate felony/misdemeanor determination under section 702. (*Ricky H., supra,* 30 Cal.3d at pp. 191 – 192.) While the *Ricky H.* court only expressly concluded that the first error constituted an unauthorized sentence, it was the second error (i.e. the violation of section 702) that the court found warranted remand and correction. (*Ibid.*) This Court found that because section 702 requires that ..."the court shall declare the offense to be a misdemeanor or felony," and the record did not indicate that the juvenile court made an express finding as to whether the offense was a misdemeanor or a felony, the matter required remanded to "determine the character of the offense as required by section 702." (*Ibid.*)

The majority here found that *Ricky H.* "had nothing to do with the jurisdictional requirement that an appellant file a timely notice of appeal" and that the unauthorized sentence in *Ricky H.* did not involve an untimely notice of appeal. (*G.C., supra,* 27 Cal.App.5th at p. 116.) In addition, the appellate court stated that the *Ramon M.* court's reliance on *Nguyen, supra,* 46 Cal.4th 1007 was also incorrect because it did not involve an untimely notice of appeal. (*Id.* at pp. 116 - 117.)

The majority was incorrect when it failed to follow *Ramon M.* In that case the juvenile court found that a dispositional error which failed to state whether a wobbler is a felony or a misdemeanor is tantamount to an unauthorized sentence, and held that the

failure to comply with Section 702 was cognizable on appeal even though the minor failed to first raise it in the juvenile court. (*Ramon M, supra,* 178 Cal.App.4th at p. 675.) The *Ramon M.* court was clear when it stated that "Section 702 states 'If the minor is found to have committed an offense which would in the case of an adult be punishable alternatively as a felony or a misdemeanor, the court shall declare the offense to be a misdemeanor or felony.' This provision requires strict compliance. (*Manzy W., supra,* 14 Cal.4th at p. 1204)." (*Ibid.*) A claim is not forfeited because the juvenile court's failure to make affirmative findings is tantamount to an unauthorized sentence that may be raised on appeal at any time. (*Ibid.*)

While the majority is correct that *Nguyen* did not deal with the timeliness of a notice of appeal, that is not why the *Ramon M.* court relied upon it. Instead, it showed the practical import of juvenile adjudications (including, potentially, felony/misdemeanor determinations) in future proceedings. (*Ramon, supra,* 178 Cal.App.4th at p. 675.) As such, it supported a claim that compliance with section 702 was not merely administrative, but obligatory, and resulted in an unauthorized sentence. (*Id.* at pp. 675 – 676.)

As argued by Justice Greenwood in the dissent, "[t]he Supreme Court [in *Manzy W.*] based its decision on its recognition that Section 702 provides equal protection to youthful offenders by ensuring that a minor not be held 'in physical confinement longer than an adult convicted of the same offense. (*Manzy W., supra,* 14 Cal.4th at p. 1205).'" (*G.C., supra,* 27 Cal.App.5th at p. 118 (dis. opn. of Greenwood, J.).) Moreover, as argued in the dissent, the designation impacts "future adjudications." (*Manzy W., supra,* 14 Cal.4th*Id.* at p. 1205)." (*Ibid.*) Because juvenile courts often aggregate current and prior offenses, the failure to designate an offense as a misdemeanor or a felony could result in a juvenile being held in physical custody longer than the lawful term. (*Ibid.*) The majority's holding therefore precludes a later appeal from an unlawful term of confinement. (*Ibid.*)

In addition, in the dissenting opinion, Justice Greenwood stated that G.C. filed a timely appeal "because the juvenile court had an ongoing obligation to determine whether

her prior offenses were misdemeanors or felonies." (*G.C., supra*, 27 Cal.App.5th at p. 117 (dis. opn. of Greenwood, J.) .) Given this ongoing duty, a prior *Manzy W.* error results in an unauthorized order with respect to the subsequent disposition of G.C.'s case and could properly be raised in the present appeal.

The dependency system provides a helpful analogy, particularly as to the notice and inquiry requirements under the Indian Child Welfare Act (ICWA). ICWA requires juvenile courts to make an inquiry into a dependent child's potential status as an Indian child and notify all relevant tribes of the pending dependency proceedings. (§ 224.2, subd.(b), Cal. Rules of Court, rule 5.481, subd. (a) and (b).) While this should be done early on in the dependency case, errors relating to ICWA can be raised in appeals from later dependency proceedings since a juvenile court has an ongoing duty under ICWA. (*Isaiah W., supra*, 1 Cal.5th at p. 10; see also §§ 224.2, 224.3, subd. (a).)

Very recently, in *Isaiah W.* this Court discussed this ongoing duty and why a later appeal could raise earlier challenges relating to ICWA. In *Isaiah W.*, the minor was removed from his parents' care in December 2011. (*Isaiah W., supra*, 1 Cal.5th at p. 6.) At the detention hearing, the minor's mother told the court she may have American Indian ancestry. (*Ibid.*) Although the court "had no reason to know that Isaiah was an Indian child," the court ordered the Department of Children and Family Services to investigate the claim. (*Ibid.*) At the jurisdiction and disposition hearing on January 20, 2012, the agency informed the court that Isaiah's grandfather may have had Blackfeet ancestry and his great-great-grandmother may have been a member of the Cherokee tribe. The juvenile court found that notice to a tribe was not required because the possibility that he was an Indian child was too remote. (*Ibid.*) At the disposition hearing the court placed Isaiah in foster care. (*Ibid.*) The mother did not appeal from this order, nor did she object to the court's determination that no notice was required under ICWA. (*Ibid.*)

On April 10, 2013 the juvenile court terminated the mother's parental rights. (*Isaiah W., supra,* 1 Cal.5th at p. 7.) On June 5, 2013, she appealed from this order on the grounds that the court had reason to know Isaiah was an Indian child and failed to order notice as required by ICWA. (*Id.* at p. 7.) The lower appellate court found that because

the mother had failed to appeal the ICWA applicability within 60 days of the disposition order, she was foreclosed from raising the ICWA finding on appeal of the termination hearing. (*Ibid.*) Her appeal, which was filed one and a half years later, was not timely filed from the disposition hearing. (*Ibid.*)

This Court reversed the finding of the appellate court, stating that the "juvenile court had a *continuing* duty to inquire whether Isaiah was an Indian child in all dependency proceedings..." (*Isaiah W., supra*, 1 Cal.5th at p. 102, emphasis in original.) Based on this duty, the order terminating the parental rights 'necessarily premised on a *current* finding by the juvenile court that it had no reason to know Isaiah was an Indian child and thus ICWA notice was not required.'" (*Ibid.*, emphasis in original.) " Properly understood, [the mother's] present appeal does not seek to challenge the juvenile court's finding of ICWA's inapplicability underlying the ... dispositional order. It instead seeks to challenge the juvenile court's finding of ICWA's inapplicability underlying the ... order terminating her parental rights. [The mother's] inaction in the face of the earlier order does not preclude her from now claiming in this appeal that the juvenile court erred in finding ICWA notice unnecessary." (*Ibid.*)

This Court further reasoned, "The plain language of [section 224.3, subdivision (a)]—declaring an 'affirmative and continuing duty' that applies to 'all dependency proceedings' (*Ibid.*)—means that the juvenile court in this case had a *present* duty to inquire whether Isaiah was an Indian child at the ... proceeding to terminate [the mother's] parental rights, even though the court had previously found no reason to know Isaiah was an Indian child at the [disposition] proceeding to place Isaiah in foster care. Because the validity of the [termination] order is necessarily premised on the juvenile court's fulfillment of that duty, there is nothing improper or untimely about [the mother's] contention in this appeal that the juvenile court erred in discharging that duty." (*Ibid.*, emphasis in original.) This Court reversed and remanded the case, finding, the mother was not precluded from raising the issue of ICWA compliance after failing to appeal the original ICWA findings at the dispositional hearing due to the trial court's ongoing and

affirmative duty determine ICWA's applicability. The juvenile court had a continuing duty to inquire as to Isaiah's Indian status. (*Id at* p. 14.)

Manzy W. determinations can easily be likened to ICWA notice/inquiry requirements because both present similar ongoing duties to the trial courts. Similar to *Isaiah W.* in which the court found an affirmative and continuing duty to inquire whether a child is or may be an Indian child, *Manzy W.* creates an ongoing duty on the juvenile court since it needs to accurately calculate the maximum confinement time on each new petition. (*Manzy W., supra*, 14 Cal.4th at p. 1206.)

In some circumstances, the court can look at earlier orders. ICWA notice in dependency cases is one example because the court has a continuing duty to ensure proper notice under ICWA. (*Isaiah W, supra,* 1 Cal.5th at pp. 10-14; see also *In re Jessica G.* (2001) 93 Cal.App.4th 1180, 1190-1191 [appointment of guardian ad litem without due process permits challenging orders not immediately appealed; otherwise, a Catch-22].) Further, when notice of the writ requirement is not given at a hearing setting the section 366.26 [termination of parental rights] hearing in a dependency case, the claims from the hearing can be raised in an appeal from the next appealable order. (*In re A. A.* (2016) 243 Cal.App.4th 1220; *In re T.W.* (2011) 197 Cal.App.4th 723, 729-731 [notice of writ requirement was mailed to the correct address but without the ZIP code, though it was not returned]; *In re Frank B.* (2011) 192 Cal.App.4th 532, 539 [court failed to advise noncustodial father of writ rights); *In re Lauren Z.* (2008) 158 Cal.App.4th 1102, 1110 [mother failed to receive notice of right to file writ petition challenging the dependency court's termination of reunification services]; *In re Athena P.* (2002) 103 Cal.App.4th 617, 625 [court failed to advise parent of writ petition requirement].

While the juvenile court has a continuing duty to accurately calculate the maximum confinement time, several claims concerning disposition actually cannot be raised immediately from an order placing the minor on probation. For example, a claim that a punishment must be stayed under Penal Code section 654 is not ripe when the minor is merely placed on probation. (*People v. Wittig* (1984) 158 Cal.App.3d 124, 137; *People v. Stender* (1975) 47 Cal.App.3d 413, 425.) And the juvenile court is not

required to set the maximum confinement time until the minor is placed out of home. (*In re A.C.* (2014) 224 Cal.App.4th 590, 591-592; see also *In re P.A.* (2012) 211 Cal.App.4th 23, 30-32.) Thus, there is no argument that raising a *Manzy W.* error in a later appeal puts the courts at a disadvantage because they must now look at old facts. This is already the situation in other contexts. A *Manzy W.* issue often does not become a practical concern until the minor is placed out of home and the calculation of the maximum confinement time must be calculated.

In short, the decision in *Manzy W.* places an obligatory duty on juvenile courts to make express misdemeanor/felony determinations. (*Manzy W., supra,* 14 Cal. 4th at p. 1204.) Since this determination is relied upon in calculating the maximum term of confinement in later wardship proceedings, this duty is an ongoing one. (*Id.* at pp. 1207 – 1208.) As such, any errors relating to it result in unauthorized orders that can be corrected on an appeal from later wardship proceedings where a timely notice of appeal is filed. Because a timely notice of appeal was filed after the disposition on Petition E, the appellate court had jurisdiction to consider the issue.

The majority opinion's holding has other collateral consequences that are worth noting. In some cases, a record under section 786 may only be sealed if the juvenile court determines the offense is a misdemeanor. (see Pen. Code §§ 245, 12022.5, and 12022.53.) Without a determination, a juvenile record which could be sealed if the court determines it is a misdemeanor, may not be sealed. In addition, juvenile records which are not sealed can be used against the defendant in sentence aggravation in adult court. (see Cal. Rule of Court, rule 4.414, subd. (b); rule 4.420, subd. (b); 4.421, subd. (b); and rule 4.423, subd. (b).) A *Manzy W.* error effects this because if the juvenile court finds the offenses to be misdemeanors, which can be sealed, the juvenile records cannot be used in adult context.

The policy implications of record sealing cannot be underestimated. The California legislature recently enacted Section 786, which mandates youth must have their juvenile record sealed immediately upon satisfactory completion of probation. Expungement typically allows offenders to tell prospective employers, landlords,

but neither factor is sufficient to meet the burden under section Welfare and Institutions Code section 702. (*Ricky H., supra*, 30 Cal.3d at p. 191; *Nancy C., supra,* 133 Cal.App.4th at p. 512.) As such, remand is required.

F. THE FAILURE TO CORRECT THIS ERROR WOULD DEPRIVE APPELLANT OF HER FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS

The misapplication of state law results in the deprivation of an individual's liberty interest in violation of the due process clause. (U.S. Const., 14th Amend.; see also *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) Here, the juvenile court misapplied section 702 in failing to make an affirmative finding. Accordingly, the failure to correct this error will infringe on appellant's constitutional rights.

CONCLUSION

For the reasons expressed above, this case should be reversed and remanded to the Alameda County juvenile court for a finding whether G.C.'s violations of Vehicle Code Section 10851, subdivision (a) (Petitions A, B) constituted misdemeanors or felonies.

Dated: February 21, 2019

Respectfully submitted,

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G.C.

Certificate of word count

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that Appellant's Opening Brief on the Merits in *People v. G.C.* contains 6429 words, according to the computer program I used to prepare this brief.

SIDNEY S. HOLLAR

DECLARATION OF SERVICE

In re G.C., S252057

I, SIDNEY S. HOLLAR, declare that I am over 18 years of age, and not a party to the within cause; my business address is 5214F Diamond Heights Blvd., #127, San Francisco, California 94131. I served a true copy of the attached:

APPELLANT'S OPENING BRIEF ON THE MERITS

On the following, by placing same in an envelope addressed as follows:

G.C.
(appellant)

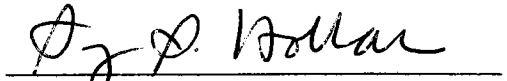
Sixth District Appellate Program
95 South Market Street, #570
San Jose, CA 95113

Office of the Attorney General, State of California
455 Golden Gate Avenue, #11000
San Francisco, CA 94102

Sixth District Court of Appeal
333 West Santa Clara Street, #1060
San Jose, CA 95113

Each said envelope was then, on February 21, 2019, sealed and deposited in the United States Mail at San Francisco, California, San Francisco County, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 21, 2019, at San Francisco, California.



SIDNEY S. HOLLAR