IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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| PEOPLE OF THE STATE OF CALIFORNIA, | |
| Plaintiff/Appellant, | No. S219178 |
| vs. | DCA No. G048659 |
| ISAIAS ARROYO, | (Superior Court Case No. 12ZF0158) |
| Defendant/Respondent. | |



**ANSWER BRIEF ON THE MERITS**

FOLLOWING THE APPEAL FROM THE
SUPERIOR COURT OF ORANGE COUNTY
THE HONORABLE WILLIAM R. FROEBERG, JUDGE PRESIDING

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## INTRODUCTION

Proposition 21, also known as the Gang Violence and Juvenile Crime Prevention Act, was passed by voters on March 7, 2000. Among other things, Proposition 21 permits prosecutors to file charges against juveniles accused of committing certain types of crimes directly in criminal court.[1] (Welf. & Inst. Code, § 707, subd. (d) (707(d)).)[2] This case raises the question whether, after the passage of Proposition 21, a minor may be prosecuted under section 707(d) in criminal court by way of grand jury indictment.

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[1] As used in this brief, "criminal court" is merely a reference to a court of criminal jurisdiction, in contrast to a juvenile court. (See Welf. & Inst. Code, § 707.01 [contrasting "juvenile court" with "court of criminal jurisdiction"].)

[2] All further undesignated section references are to the Welfare and Institutions Code.

At the time voters passed Proposition 21 the existing statutory and case law established that the grand jury had the authority to indict anyone – including minors – who committed an offense within its jurisdiction. Neither Proposition 21 nor the statutory provisions it enacted expressly revoked or abridged this historic authority to indict minors. Furthermore, there is no language in the ballot materials or arguments related to Proposition 21 that would support the conclusion that voters intended to either (1) limit the historic authority of the grand jury to indict minors, or (2) create an absolute right for a select class of individuals – i.e., minors prosecuted pursuant to section 707(d) – to have a preliminary hearing. To the contrary, as noted by this Court, Proposition 21

> [W]as intended to expand, not revoke, the authority of courts of criminal jurisdiction over juveniles, including the authority of grand juries over juveniles. [Fn. omitted.]

(*Guillory v. Superior Court* (2003) 31 Cal.4th 168, 177, fn. omission in original.)

Although Proposition 21 did create a procedural right under section 707(d) that requires the magistrate to make a finding at the preliminary hearing "that reasonable cause exists to believe that the minor comes within" the provisions of the statute (Welf. & Inst. Code, § 707, subd. (d)(4)), that right – like all of the other rights any defendant enjoys at the preliminary hearing,

which indicted defendants do not have – only comes into play *if* prosecution of the minor is commenced by information. If the prosecution is commenced by grand jury indictment, no such right exists. But that voters created a procedural right which applies only *at* the preliminary hearing does not mean the voters thereby intended to create the absolute right to *have* a preliminary hearing. Moreover, if the drafters of Proposition 21 had intended to grant such an exclusive right to individuals prosecuted under section 707(d) – and at the same time to revoke the authority of the grand jury over those individuals – they would have expressly said so. Instead, the drafters stated that prosecutions under section 707(d) "shall then proceed according to the laws applicable to a criminal case." (Welf. & Inst. Code, § 707, subd. (d)(4).) And, under the California Constitution, the laws applicable to a criminal case states that felonies shall be prosecuted *either* by indictment or information. (Cal. Const., art. I, § 14.) Thus, when consideration is given to the historical authority of grand juries to indict persons of any age, as well as the voters' intent in enacting Proposition 21 to expand the authority of criminal courts over minors, it is apparent that prosecution of a minor pursuant to section 707(d) may be commenced by indictment.

## ARGUMENT

### 1. Prosecution Of A Minor, Against Whom Charges May Be Filed Directly Pursuant To Welfare And Institutions Code Section 707, Subdivision (d), May Be Commenced By Indictment.

Traditionally, a person accused of committing a crime while under the age of 18 could not be prosecuted in a court of criminal jurisdiction unless a juvenile court first found that person unfit for the juvenile court's jurisdiction. (Former Welf. & Inst. Code, § 602, as amended by Stats. 1976, ch. 1071, § 12, p. 4819; former Welf. & Inst. Code, § 707, as amended by Stats. 1998, ch. 936, § 21.5; Welf. & Inst. Code, § 707.01, subd. (a)(1).) The requirement of a fitness hearing applied in all cases involving juveniles, except in specified situations where the minor previously had been found unfit for treatment under juvenile court law. (Welf. & Inst. Code, § 707.01, subd. (a)(5) & (6).)

Proposition 21 fundamentally changed the treatment of juvenile offenders. Proposition 21 provided that,

> Juveniles 14 years of age or older charged with committing certain types of murder or a serious sex offense generally would no longer be eligible for juvenile court and would have to be tried in adult court.

(Ballot Pamp., Primary Elec. (Mar. 7, 2000) analysis of Prop. 21 by Legislative Analyst, p. 45.) More specifically, Proposition 21 changed section 707, giving prosecutors discretion to file charges directly against juvenile offenders in the

criminal court for specified offenses. (Welf. & Inst. Code, § 707, subd. (d).) As contrasted with the treatment of offenses listed in subdivision (b) of section 602, where prosecution in the criminal court is mandatory, the offenses listed in subdivision (b) of section 707 may be prosecuted in the criminal court or the juvenile court at the discretion of the prosecutor.

Section 707, subdivision (d)(4) states the following:

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

(Welf. & Inst. Code, § 707, subd. (d)(4).)

The issues in this case arise from the relationship of the first sentence of section 707, subdivision (d)(4) to the second and third sentences. The People contend the meaning of the second and third sentences is clear; *if* the district attorney commences the prosecution of a minor pursuant to section 707(d) by way of information, the magistrate is required to make a finding at the preliminary hearing that reasonable cause exists to believe the minor comes within this statute, and, if reasonable cause is not established, the case must be

transferred to the juvenile court. The People and defendant disagree whether a prosecution pursuant to section 707(d) *can only* be commenced by information. Defendant contends a prosecution under section 707(d) must be commenced by way of information. The People, on the other hand, contend a prosecution under section 707(d) may be commenced by either complaint *or* indictment.

In interpreting a statute amended by a voter initiative like Proposition 21 a reviewing court applies the same principles that generally govern statutory construction. (*People v. Rizo* (2000) 22 Cal.4th 681, 685.) The court first looks at the "'language of the statute, giving the words their ordinary meaning.'" (*Ibid.*, quoting *People v. Birkett* (1999) 21 Cal.4th 226, 231.)

> In the construction of a statute ..., the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such construction is, if possible, to be adopted as will give effect to all.

(Code Civ. Proc., § 1858.) "The statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme." (*People v. Rizo, supra*, 22 Cal.4th at p. 685, citing *Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276.)

> When the [statutory] language is ambiguous, "[the court] refer[s] to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet."

(*People v. Rizo, supra*, 22 Cal.4th at p. 685, quoting *People v. Birkitt, supra*, 21 Cal.4th at p. 243.) Only if the voters' intent is still unclear after application of these rules should the reviewing court consider whether to construe the statute most favorably to the offender. (*People v. Rizo, supra*, 22 Cal.4th at pp. 685-686.) Furthermore,

> The drafters of an initiative and the voters who enacted it are presumed to have been aware of the existing statutory law and its judicial construction. [Citations.]

(*People v. Superior Court (Gevorgyan)* (2001) 91 Cal.App.4th 602, 610, overruled on other grounds in *Guillory v. Superior Court, supra*, 31 Cal.4th at p. 178, fn. 5.)

With these rules of statutory construction in mind, it is apparent that neither the drafters of Proposition 21 nor the voters intended to (1) limit the procedures by which the district attorney may prosecute felonies, (2) revoke the historic authority of the grand jury to indict minors, or (3) create the absolute right to a preliminary hearing for a select class of individuals.

> "The California Constitution specifies that felonies [shall] be prosecuted either by 'indictment or, after examination and commitment by a magistrate, by information.' (Cal. Const., art I, § 14.)"

(*Guillory v. Superior Court, supra*, 31 Cal.4th at p. 173, modification in original.) Penal Code section 949 provides in relevant part that

> The first pleading on the part of the people in the superior court in a felony case is the indictment, information, or the complaint in any case certified to the superior court under Section 859a.

Thus,

> "'[T]he *first pleading by the prosecution* in felony cases may be either an *indictment* or an information.' (4 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Pretrial Proceedings, § 169, p. 374, italics added.)"

(*Guillory v. Superior Court, supra,* 31 Cal.4th at p. 174.)

Subdivisions (d)(1), (d)(2), and (d)(3) of section 707 state, in relevant part, that "the district attorney ... may file *an accusatory pleading* against a minor ... in a court of criminal jurisdiction" under certain specified circumstances. (Emphasis added.) The first sentence of subdivision (d)(4) of section 707 states:

> In any case in which the district attorney ... has filed *an accusatory pleading* against a minor in a court of criminal jurisdiction pursuant to this subdivision, the case shall then proceed according to the laws applicable to a criminal case.

(Welf. & Inst. Code, § 707, subd. (d)(4), emphasis added.)

As we pointed out above, the first accusatory pleading on the part of the district attorney in the superior court in a felony case may be a complaint, an information, *or an indictment.* It is reasonable to conclude that in using the broad term "accusatory pleading," rather than the more specific terms complaint or information, the drafters of subdivision (d)(4) of section 707 intended that prosecutions under section 707(d) could be commenced by *either* of the traditional methods, indictment or information. Had the drafters intended that prosecutions under section 707(d) could only be commenced by way of information, it is reasonable to assume they would have said so.

The conclusion that the drafters intended that prosecutions under section 707(d) could be commenced either by indictment or information is further supported by the language in the second clause of the first sentence of section 707, subdivision (d)(4), that "the case shall then proceed according to the laws applicable to a criminal case." A prosecution that is commenced by way of indictment "proceed[s] according to the laws applicable to a criminal case." (Welf. & Inst. Code, § 707, subd. (d)(4).) Thus, the plain language of section 707, subdivision (d)(4) places no limitation on the procedures by which the district attorney may commence the prosecution of a minor pursuant to section 707(d).

Moreover, the unambiguous language of Penal Code section 917 states that "[t]he grand jury may inquire into all public offenses committed or triable within the county and present them to the court by indictment." "The grand jury is a judicial body that is part of the judicial branch of government." (*Guillory v. Superior Court, supra,* 31 Cal.4th at p. 174.) "The grand jury serves as the functional equivalent of a magistrate who presides over a preliminary examination on a felony complaint." (*Stark v. Superior Court* (2011) 52 Cal.4th 368, 406.) It is the duty of both the magistrate and the grand jury to "'determine whether sufficient evidence has been presented to support holding a defendant to answer on a criminal complaint.'" (*Ibid.*, quoting *Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1027.)

Furthermore, the Court of Appeal recognized in *People v. Aguirre* (1991) 227 Cal.App.3d 373, that the broad and unambiguous language of Penal Code section 917 means that minors who are alleged to have violated a criminal law may be charged by indictment, even though a petition filed by the district attorney in juvenile court was the usual method by which juvenile court proceedings seeking a determination of wardship were commenced. (*People v. Aguirre, supra,* 227 Cal.App.3d at p. 380.) The court found no cases in

California or any other jurisdiction which "limit the authority of the grand jury to indict persons of any age, providing the offense has been committed or is triable within the county." (*People v. Aguirre, supra,* 227 Cal.App.3d at p. 378.) The court thus concluded,

> In light of the fact that complaints and indictments are both accusatory pleadings, it is clear the law contemplates a person may appear before the court upon an accusatory pleading such as a grand jury indictment filed in the superior court, even though he or she was in fact under the age of 18 years at the time the offenses were committed.

(*Id.* at p. 381.) This Court has also affirmed "the grand jury's historic authority to indict minors ...." (*Guillory v. Superior Court, supra,* 31 Cal.4th at p. 176.)

Therefore, at the time Proposition 21 was enacted the established law clearly permitted the district attorney to commence a felony prosecution against a minor by way of grand jury indictment. The drafters of Proposition 21, and the voters who adopted it, are presumed to have been aware that all felony prosecutions could be by way of indictment and that the grand jury had the authority to indict minors. Thus, absent express language to the contrary, it is reasonable to conclude the drafters and voters intended for prosecutions under section 707(d) to be by *either* of the constitutionally sanctioned methods for prosecuting a felony, namely by information *or* by indictment.

This interpretation not only comports with the recognized intention of Proposition 21 to "'expand, not revoke, ... the authority of grand juries over juveniles[]'" (*Guillory v. Superior Court, supra*, 31 Cal.4th at p. 177), but it also harmonizes section 707(d) with Penal Code section 917 and complies with the rules of statutory construction. The conclusion that offenses prosecuted under section 707(d) may be commenced by indictment is consistent with the broad language of Penal Code section 917 that "[t]he grand jury may inquire into *all* public offenses committed or triable within the county and present them to the court by indictment." (Emphasis added.) "[T]he word 'all' means 'all' and not 'some.'" (*Joshua D. v. Superior Court* (2007) 157 Cal.App.4th 549, 558.) To harmonize section 707(d) with the broad reach of Penal Code section 917 it is necessary to interpret the former section as authorizing the indictment of individuals prosecuted under that section.

In contrast, defendant's contention that prosecutions under section 707(d) may only be by information directly conflicts with Penal Code section 917. Defendant's interpretation of section 707(d) *implicitly* revokes the grand jury's authority to inquire into *all* public offenses. According to defendant, after the passage of Proposition 21 the grand jury has the authority to inquire into all public offenses committed or triable within the county *except* those committed under the circumstances set out in section 707(d). Stated another

way, defendant's interpretation of section 707(d) would implicitly create a class of individuals – i.e., minors who commit felonies under the conditions set out in section 707(d) – whom the grand jury would no longer have the authority to indict.

Although the voters undoubtedly have the power to curtail the authority of the grand jury in this way, defendant can point to nothing in the language of Proposition 21, section 707(d), or the ballot materials to support his argument that the drafters of Proposition 21 or the voters intended to revoke the authority of the grand jury to inquire into *all* public offenses or to create a class of individuals who were beyond the reach of the grand jury's inquiry. On the contrary, as we pointed explained above, Proposition 21 "was intended to expand, not revoke, ... the authority of grand juries over juveniles. [Fn. omitted.]" (*Guillory v. Superior Court, supra*, 31 Cal.4th at p. 177, fn. omitted in original.) As noted by this Court in a similar context, "It ... seems unlikely such a limitation on the grand jury's historic authority to indict minors ... would go unmentioned." (*Id.*, at p. 176.)

A further reason for rejecting defendant's interpretation of section 707(d) is that it would impliedly repeal the power of a grand jury to indict a minor. As we explained previously, grand juries have historically had the right

to indict minors for the commission of public offenses. Prior to 1879, the *only* means of prosecuting felonies was by indictment. (Cal. Const. of 1849, art. I, § 8; *People v. Vierra* (1885) 67 Cal. 231, 232.) The juvenile court system did not exist before 1909. (Stats. 1909, ch. 133, § 1, p. 213; *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 596 [dis. opn. of Kennard, J.].) At early common law, all persons 14 years of age and older had the capacity to commit crimes and were considered fully responsible for their criminal conduct. (*In re Gladys R.* (1970) 1 Cal.3d 855, 863-864.) Thus, from 1849 to 1879 the only means of initiating the prosecution of juveniles for felonies was by indictment.

Today, the power of grand juries to indict juveniles is confirmed by statutory and case law. Penal Code section 917 provides that the grand jury may investigate all public offenses committed within the county. A minor may commit a "public offense," or "crime." (Pen. Code, § 26, subd. One, [persons of all ages are capable of committing crimes, except for children under the age of 14 when there is no clear proof they knew the wrongfulness of the act charged against them].) Appellate decisions have consistently held that minors may commit public offenses. (*People v. Aguirre, supra*, 227 Cal.App.3d at p. 379; *In re Paul C.* (1990) 221 Cal.App.3d 43, 50.) Accordingly, because a minor may commit a public offense, the unrestricted language of Penal Code section 917 gives the grand jury the power to indict a minor for the

commission of a public offense. The authority of the grand jury to indict minors has also been recognized by the courts, specifically this Court in *Guillory* and the Court of Appeal in *Aguirre.*

If, as defendant contends, section 707(d) contains language incompatible with the indictment of a minor, then Proposition 21 has amended by implication the statutory authority of grand juries to indict minors as set out in Penal Code section 917. But an implied repeal of Penal Code section 917 would violate accepted rules of statutory construction.

The doctrine of implied repeal holds that when two statutes concern the same subject matter and cannot be reconciled with each other, the more recent statute is deemed to have repealed the first statute by implication. (*In re Thierry S.* (1977) 19 Cal.3d 727, 744.) Repeals by implication are disfavored, and there is a strong presumption against the repeal of a statute in this manner. (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 379.) The presumption against implied repeal is so strong that

> "'"[i]n order for the second law to repeal or supersede the first, the former must constitute a revision of the entire subject, so that the court may say that it was intended to be a substitute for the first."'" [Citation.]

(*Ibid.*)

The doctrine of implied repeal is properly invoked only when one of two situations arises. The first situation is when

> [T]here is no rational basis for harmonizing the two potentially conflicting statutes [citation], and the statutes are "irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation." [Citation.]

(*In re White* (1969) 1 Cal.3d 207, 212.) The second arises "where the later provision gives undebatable evidence of an intent to supersede the earlier[]" provision. (*Hays v. Wood* (1979) 25 Cal.3d 772, 784, citation omitted.)

Neither of the two conditions necessary to implement the doctrine of implied repeal is met by the enactment of Proposition 21. Section 707(d) does not even mention grand juries, so it cannot reasonably be said to be a revision of the entire subject. Furthermore, section 707(d) and Penal Code section 917 are easily harmonized when section 707(d) is interpreted to authorize criminal prosecutions that are commenced by either indictment or information. Penal Code section 917 authorizes the indictment of a minor, and section 707(d) does not expressly preclude indictment of a minor. Moreover, as discussed above, section 707(d)(4)'s reference to a preliminary hearing can reasonably be understood to mean that *when* a case brought against a minor pursuant to section 707(d) is commenced by way of information, *then* the magistrate must make the required finding at the preliminary hearing. In other words, section 707(d) does not state that a prosecution under that section *must* be commenced by way of information.

Defendant's interpretation, which would preclude the grand jury from indicting minors for offenses committed under the circumstances of section 707(d), would also lead to absurd results. According to this Court's decision in *Guillory,* minors who commit crimes under the circumstances set out in section 602 may be indicted. (*Guillory v. Superior Court, supra*, 31 Cal.4th at p. 178.) The crimes committed under the circumstances of section 602 are the most serious offenses; so much so that the Legislature has decreed that the district attorney *must* file these cases in criminal court.[3] At the other end of the spectrum, both this Court (in *Guillory*) and the Court of Appeal (in *Aguirre*) have concluded that the grand jury has the authority to indict minors who commit *any* crime. Section 707(d), which was enacted "with the goal of creating a safer California," gives prosecutors the discretion to file criminal charges against minors in adult court for serious or violent crimes. (*Solano v. Superior Court* (2009) 169 Cal.App.4th 1361, 1371, quoting Voter Information Guide, Primary Elec. (Mar. 7, 2000) text of Prop. 21, § 2, subds. (f)-(k), p. 119.)

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[3] Subdivision (b) of section 602 provides:

> Any person who is alleged, when he or she was 14 years of age or older, to have committed one of the following offenses *shall* be prosecuted under the general law in a court of criminal jurisdiction[.]

(Emphasis added.)

It would make little sense for the drafters of Proposition 21 to carve out serious and violent felonies committed by minors as an exception to the grand jury's historic authority to investigate *all* public offenses, including felonies committed by minors. Under the interpretation espoused by defendant, the grand jury would have the authority to indict minors for the most heinous crimes (Welf. & Inst. Code, § 602) and for minor offenses (Pen. Code, § 917), but the grand jury would not be authorized to indict minors who commit serious and violent offenses falling under section 707(d). This is an absurd result, and courts should interpret statutes to avoid absurd results. (*People v. Moore* (2004) 118 Cal.App.4th 74, 78.)

Defendant's interpretation of section 707(d) also violates the rules of statutory construction because it requires the Court to read into the statute implicit language mandating that a prosecution under section 707(d) may only be by information. Defendant's interpretation would essentially have the Court change the language in the first sentence of section 707(d)(4) to read something like,

> "In any case in which the district attorney ... has filed *a complaint* against a minor in a court of criminal jurisdiction pursuant to this subdivision, *the minor shall have the right to a preliminary hearing.*"

That is in essence what defendant contends; individuals prosecuted under section 707(d) have the absolute right to a preliminary hearing. Defendant is

inviting the Court to read into section 707(d) an absolute right to a preliminary hearing. But

> Doing so would violate the cardinal rule that a statute "... is to be interpreted by the language in which it is written, and courts are no more at liberty to add provisions to what is therein declared in definite language than they are to disregard any of its express provisions."

(*Wells Fargo Bank v. Superior Court* (1991) 53 Cal.3d 1082, 1097, quoting *People v. Campbell* (1902) 138 Cal. 11, 15, omission in original.)

Moreover, if the drafters of Proposition 21 had wanted to provide individuals who are prosecuted under section 707(d) with the absolute right to a preliminary hearing, it is reasonable to conclude that they would have expressly done so. In fact, as noted by this Court in *Guillory*, the drafters of Proposition 21 *deleted* such express language from former subdivision (c) of section 602, which provided in part:

> "Any minor directly charged under subdivision (b) *shall have the right to a preliminary hearing to determine if there is probable cause to hold him or her to answer.*"

(*Guillory v. Superior Court, supra*, 31 Cal.4th at p. 176, citing Stats. 1999, ch. 996, § 12.2, italics added by Court.) It is thus apparent that the drafters of Proposition 21 and section 707(d) knew exactly what language to use if they wanted to provide individuals prosecuted under section 707(d) with the right to a preliminary hearing. That the drafters did not use such language in section

707(d) strongly supports the conclusion they did not intend to create the right to a preliminary hearing in prosecutions under section 707(d).

In summary, defendant's interpretation of section 707(d) – i.e., that preliminary hearings are mandated in prosecutions under 707(d) – is not viable because it undermines the intent of Proposition 21's drafters and the electorate, violates the rules of statutory construction, creates disharmony within the statutory framework, and results in absurd results. The People's interpretation, on the other hand, requires no additional language (implicit or explicit), harmonizes section 707(d) and Penal Code section 917, and is consistent with the intent of the drafters and voters to expand the authority of grand juries over minors. Thus, the People urge this Court to hold that prosecutions under section 707(d) may be commenced by either information or indictment.

### 2. Changes To The Language Of Welfare and Institutions Code Sections 602 And 707 Made By Proposition 21 Do Not Support The Conclusion That Preliminary Hearings Are Required For Discretionary Direct-File Prosecutions Of Minors Under Welfare and Institutions Code Section 707, Subdivision (d).

Defendant's contention that changes in the language of sections 602 and 707 made by proposition 21 support the conclusion that preliminary hearings are required for discretionary direct-file prosecutions of minors is without merit.

Prior to 2000, a person who committed a crime under the age of 18 could only be prosecuted in adult court after a judicial determination that he or she was unfit for adjudication under the juvenile law. But in 1999 the legislature enacted the "'No More Victims' Violence Prevention and School Safety 2000 Strategy." (Stats. 1999, ch. 996, § 1.) Among the changes brought about by this law were amendments to section 602. Subsection (b) was added to require the prosecutor to file certain very serious offenses directly in adult court. Subdivision (c) was also added. This subdivision provided:

> Any minor directly charged under subdivision (b) shall have the right to a preliminary hearing to determine if there is probable cause to hold him or her to answer. If the magistrate holds the defendant minor to answer for a crime set forth in subdivision (b), the prosecutor may file an information charging one or more of these enumerated crimes and any other properly joined crimes or enhancements. The case shall proceed in criminal court unless the defendant minor prevails in a motion to dismiss pursuant to Section 995 of the Penal Code, including pursuant to any appeal or writ arising from the motion to dismiss.

(Former Welf. & Inst. Code, § 602, subd. (c), added by Stats. 1999, ch. 996, § 12.2, p. 15 and repealed by Initiative Measure (Prop. 21, § 18, approved March 7, 2000, eff. March 8, 2000).) This subdivision was deleted by Proposition 21.

Defendant's contention that Proposition 21's deletion of subdivision (c) from section 602 evidenced an intention on the part of the voters to allow grand jury indictments in mandatory direct-file cases against minors is unpersuasive. Indeed, despite the apparently clear statement that "[a]ny minor directly charged under subdivision (b) *shall have the right to a preliminary hearing* ... ," (Former Welf. & Inst. Code, § 602, subd. (c), emphasis added) this Court concluded this language could be ambiguous. With respect to this language this Court observed,

> It could be that in referring to "the right to a preliminary hearing" in former subdivision (c), the Legislature simply intended to indicate that minors falling within the purview of former section 602(b) were entitled to the same panoply of protections adults received in criminal court. If so, nothing in the language of current section 602(b) indicates it was intended to newly give such a right, especially since the language "the right to a preliminary hearing" is omitted.

(*Guillory v. Superior Court, supra*, 31 Cal.4th at p. 176.) On the other hand, this Court mused, the language of former section 602, subdivision (c) could be interpreted to mean that "minors had the [absolute] right to a preliminary hearing under the former statute." (*Guillory v. Superior Court, supra*, 31 Cal.4th at p. 176.) But if the language "shall have the right to a preliminary hearing" can, in context, be ambiguous and thus not preclude prosecution by

way of indictment, then the conclusion that the reference to a preliminary examination in section 707, subdivision (d)(4) does not preclude the prosecution of minors by way of indictment is even stronger.

More significant, we believe, is that the same people who deleted former subdivision (c) from section 602 also wrote the language in subdivision (d)(4) of section 707. As stated, former section 602, subdivision (c) contained the language

> "Any minor directly charged under subdivision (b) *shall have the right to a preliminary hearing* to determine if there is probable cause to hold him or her to answer."

(Emphasis added.) Since the drafters of Proposition 21 amended sections 602 and 707 at the same time, it is reasonable to conclude the drafters of section 707, subdivision (d)(4) were aware of the language of former section 602, subdivision (c), which they themselves deleted. Thus, if the drafters of Proposition 21 had wanted to create an absolute right to a preliminary hearing in section 707, subdivision (d)(4), they knew exactly what express language they should use to do so. That the drafters did not use such express language – when they clearly must have been aware of it – strongly supports the conclusion they did not intend to create a right to a preliminary hearing for individuals prosecuted under section 707(d).

### 3. *People v. Aguirre* Is Still Good Law, And It Permits The Indictment Of Minors Under Welfare And Institutions Code Section 707, Subdivision (d).

Defendant's reliance on *People v. Superior Court (Gevorgyan), supra*, 91 Cal.App.4th 602, is misplaced. In that case three minors were charged by grand jury indictment as adults under sections 602 and 707, as amended by Proposition 21. The indictment alleged the minors committed murder with the special circumstance that the murder was committed to further the activities of a street gang, attempted murder, and street terrorism. The indictment further alleged that the first minor personally killed the victim (Welf. & Inst. Code, § 602, subd. (b)(1)) and that the other two minors committed an offense that, if committed by an adult, would be punishable by death or life imprisonment (Welf. & Inst. Code, § 707, subd. (d)(2)(A)) and was committed for the benefit of a criminal street gang (Welf. & Inst. Code, § 707, subd. (d)(2)(C)(ii).)

The first minor demurred on the ground that the indictment was precluded because section 602, subdivision (b)(1), required that the prosecutor, rather than a grand jury, allege the existence of a special circumstance and allege that the minor personally killed the victim. The other two minors demurred on the ground that the indictment was precluded because section 707, subdivision (d)(1), required that the district attorney or other prosecuting officer file the accusatory pleading, and that section 707, subdivision (d)(4),

required a preliminary hearing. The trial court overruled the first minor's demurrer. The trial court also overruled the other two minors' demurrer but found the prosecution could not proceed unless these minors were afforded a preliminary hearing.

The Court of Appeal issued a writ of mandate directing the trial court to vacate its orders overruling the demurrers and to enter new and different orders sustaining the demurrers. (*People v. Superior Court (Gevorgyan), supra,* 91 Cal.App.4th at p. 616.) The court held that, under its express language Proposition 21 requires that minors be prosecuted by way of information following a preliminary hearing and not by grand jury indictment. (*People v. Superior Court (Gevorgyan), supra,* 91 Cal.App.4th at p. 616.)

The *Gevorgyan* court first addressed the People's argument that under *Aguirre,* "'[a] grand jury's authority to indict juveniles is unquestioned. [Citations.]'" (*People v. Superior Court (Gevorgyan), supra,* 91 Cal.App.4th at p. 608, omissions in original.) The court rejected *Aguirre's* broad statement that nothing in the juvenile court law suggests that minors alleged to have violated a criminal statute may not be initially charged by complaint or by indictment, ...." (*People v. Aguirre, supra,* 227 Cal.App.3d at p. 380, citation & fn. omitted), distinguishing it as,

> [A] case in which the indictment of a juvenile was relevant only to satisfy statute of limitations concerns, and the defendant was ultimately charged by information and given a postindictment preliminary hearing.

(*People v. Superior Court (Gevorgyan), supra,* 91 Cal.App.4th at pp. 610-611.) The court further determined that

> [P]roposition 21 has undercut the rationale of *Aguirre* by its lack of reference to indictment [and?] its inclusion of language incompatible with indictment set forth in sections 602, subdivision (b), and 707, subdivision (d). These statutes now constitute the authority, which the *Aguirre* court found lacking, that a juvenile cannot be prosecuted in adult court without being granted a preliminary hearing.

(*People v. Superior Court (Gevorgyan), supra,* 91 Cal.App.4th at p. 615.) The court also found the trial court had "misconceiv[ed] the limited nature of *Aguirre*[]" in refusing to dismiss the indictments against the defendants. (*Id.* at p. 615.) In this context, the court went on to examine sections 602 and 707.

The court stated that

> [T]o implement the mandatory direct filing procedure of section 602, subdivision (b) there were two significant qualifications. First it must be alleged the minor committed murder [citation] or one of several enumerated sex offenses [citation]. [Fn. omitted.]

(*People v. Superior Court (Gevorgyan), supra,* 91 Cal.App.4th at p. 611.) The second was,

> [W]ith respect to murder, special circumstances must be "alleged by *the prosecutor*, and *the prosecutor* [must] allege[] that the minor personally killed the victim." (§ 602, subd. (b)(1) italics added.) Similarly, with respect to the enumerated sex offenses, mandatory direct filing applies only when "*the prosecutor* alleges that the minor personally committed the offense, and ... *the prosecutor* alleges one of the circumstances" supporting application of the one strike law. (§ 602, subd. (b)(2), italics added.)

(*People v. Superior Court (Gevorgyan), supra,* 91 Cal.App.4th at p. 611, emphasis in original, omissions in original.)

After reviewing the traditional role of the grand jury, the court explained that,

> [A]n indictment does not contain allegations made by *the prosecutor*. Rather, the allegations are made by the grand jury, albeit with the prosecutor's assistance.

(*People v. Superior Court (Gevorgyan), supra,* 91 Cal.App.4th at p. 612, emphasis in original.) The court went on to conclude,

> [I]t is only *the prosecutor* who can make the allegations necessary for a mandatory direct filing in adult court. Thus, section 602, subdivision (b)(1) and (2) precludes the use of indictment by grand jury.

(*People v. Superior Court (Gevorgyan), supra,* 91 Cal.App.4th at p. 612, emphasis in original.)

Using similar reasoning, the court concluded it was improper to indict a juvenile under section 707, subdivision (d). The court noted that

> Although an indictment is an "accusatory pleading" (Pen. Code, § 691, subd. (c)), it is the foreperson of the grand jury, not the district attorney, who presents an indictment to be filed (id., § 944). And there is no precedent for designating the foreperson of the grand jury a "prosecuting officer."

(*People v. Superior Court (Gevorgyan), supra,* 91 Cal.App.4th at p. 612.)

From this the court reasoned that

> The use of the words "district attorney or other appropriate prosecuting officer has filed" indicates an intent to proceed by way of a preliminary hearing, because such language is not consistent with a grand jury proceeding.

(*Id.* at p. 613.) The court also noted,

> [T]he reference to the preliminary hearing itself, which sets forth the requirement that the magistrate shall make a finding of reasonable cause that the minor falls within the scope of section 707, subdivision (d)(4). Given that our state Constitution now forbids a defendant who is being prosecuted by indictment from being afforded a preliminary hearing [citation], the reference to the duty of the magistrate strongly suggests that the drafters of Proposition 21 did not envision grand jury indictment as being a part of the new statutory scheme.

(*People v. Superior Court (Gevorgyan), supra,* 91 Cal.App.4th at pp. 613-614.)

The court rejected the People's argument that because no complaint is filed in cases where a grand jury returns an indictment, "'it follows, ... that the reference in section 707, subdivision (d)(4), to 'the preliminary hearing as provided for in Section 738' ...." (*People v. Superior Court (Gevorgyan), supra,* 91 Cal.App.4th at p. 614) does not apply in cases commenced by indictment, and that,

> "'Section 707, subdivision (d)(4), should instead be read as a requirement imposed upon the magistrate when a preliminary hearing is held as to section 707, subdivision (d), cases; ....'"

(*People v. Superior Court (Gevorgyan), supra,* 91 Cal.App.4th at p. 614, emphasis in original.)

Finding no support for the People's argument in the specific language of Proposition 21, the court looked to the initiative's purpose. Coming back to the idea that the language of section 707 required the *prosecutor* to initiate proceedings, the court concluded that

> [T]he Legislative Analyst's explanation that *prosecutors* would be allowed to file directly in adult court is inconsistent with the notion of prosecution accomplished by grand jury indictment. In sum, the People's contention that section 707, subdivision (d)(4), does not require a preliminary hearing is the product of a strained attempt to create ambiguity ....

(*People v. Superior Court (Gevorgyan), supra,* 91 Cal.App.4th at pp. 614-615, italics in original.)

The court concluded that sections 602 and 707 had to be interpreted together under Proposition 21 and that the procedures for juvenile adjudication in adult court had to be harmonized. Interesting – for purposes of this case – is that the Court of Appeal found the argument for permitting indictment of juveniles *stronger* under section 707 than section 602:

> Finally, even if we deem the language of section 707, subdivision (d) susceptible of an interpretation that would support indictment, the language of section 602, subdivision (b) clearly is not. One of our tasks is to bring harmony to the statutory scheme implemented by Proposition 21. It would do violence to that scheme to conclude that defendants subject to the mandatory direct filing provisions of section 602, subdivision (b), may not be indicted while at the same time concluding that indictment is proper with respect to defendants subject to discretionary direct filing under section 707, subdivision (d).

(*People v. Superior Court (Gevorgyan), supra,* 91 Cal.App.4th at p. 615.)

In *Guillory* this Court addressed the issue of whether minors prosecuted under section 602 may be indicted. This Court disagreed with *Gevorgyan's* reasoning and held that a minor *could* be indicted under section 602. This Court pointed out that,

> "The People of the State of California are the plaintiff in every criminal proceeding (Pen. Code, § 684), and the public prosecutor has the sole responsibility to represent the People of the State of California in the prosecution of criminal offenses. [Citation.] Accordingly, '*the first pleading by the prosecution* in felony cases may be either an *indictment* or an information.' (4 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Pretrial Proceedings, § 169, p. 374, italics added.)"

(*Guillory v. Superior Court, supra,* 31 Cal.4th at p. 174, emphasis in original.)

This Court further explained that the grand jury is the functional equivalent of the magistrate at a preliminary examination:

> "It is important to understand the role that the grand jury plays in the indictment process. The grand jury is a judicial body that is part of the judicial branch of government. [Citation.] The role of the grand jury in an indictment proceeding is to 'determine whether probable cause exists to accuse a defendant of a particular crime.' [Citation.] In this capacity, the grand jury serves as the functional equivalent of a magistrate who presides over a preliminary examination on a felony complaint. 'Like the magistrate, the grand jury must determine whether sufficient evidence has been presented to support holding a defendant to answer on a criminal complaint.' [Citation.] Thus, the grand jury serves as part of the charging process in very much the same manner as does a magistrate in a prosecution initiated by complaint."

(*Guillory v. Superior Court, supra,* 31 Cal.4th at p. 174.) Hence,

> [O]nce an indictment is filed in the trial court and the prosecutor carries forward a prosecution based on that pleading, the indictment necessarily contains the prosecutor's allegations.

(*Id.* at p. 175.)

This Court further observed that "section 602(b) does not come into play until after the indictment is filed in the trial court." (*Guillory v. Superior Court, supra,* 31 Cal.4th at p. 175.) This Court noted that "[s]ection 602(b) provides that certain minors 'shall be prosecuted under the general law in a court of criminal jurisdiction[,]'" and that "[a]rguably, the time at which a minor is 'prosecuted under the general law in a court of criminal jurisdiction' (*ibid.*) is following the filing of an indictment." (*Guillory v. Superior Court, supra,* 31 Cal.4th at p. 175.) This Court concluded this was

> [B]ecause *the trial court cannot determine whether the allegations satisfy the section 602(b) criteria, and hence the minor is properly in a court of criminal jurisdiction on that basis, until the indictment is filed.* Once the indictment is filed in the trial court, it is the prosecutor who proceeds with the criminal action. Thus, the allegations in the indictment essentially become his own. (See Pen. Code, § 949.)

(*Guillory v. Superior Court, supra,* 31 Cal.4th at p. 175, emphasis added.)

Although this Court did not expressly disapprove *Gevorgyan's* holding with respect to its decision regarding section 707(d), this Court implicitly disapproved it by rejecting the Court of Appeal's rationale, which was the same as to both section 602(b) and 707(d). The *Gevorgyan* court had held that

minors could not be indicted under either section 602 or 707 because it concluded the language of those statutes required the allegations to be brought by the prosecutor and proceeding by way of indictment did not comply with that requirement. (*People v. Superior Court (Gevorgyan), supra*, 91 Cal.App.4th at p. 612.) This Court's rejection of that rationale applies to *Gevorgyan's* analysis of both section 602, subdivision (b) and 707(d).

Further relying on *Gevorgyan*, defendant also contends the reliance on *Aguirre* by the People and the Court of Appeal in its decision below is misplaced. This contention too is without merit.

The *Gevorgyan* court rejected the court's holding in *Aguirre* that minors may be charged by indictment, stating that,

> [T]he indictment of a juvenile was relevant only to satisfy statute of limitations concerns, and the defendant was ultimately charged by information and given a postindictment preliminary hearing.

(*People v. Superior Court (Gevorgyan), supra*, 91 Cal.App.4th at pp. 610-611.) This interpretation of *Aguirre* is wrong, and the Court of Appeal in this case was not bound by the decision in *Gevorgyan*. (*Prescod v. Unemployment Ins. Appeals Bd.* (1976) 57 Cal.App.3d 29, 39; *Greyhound Lines, Inc. v. County of Santa Clara* (1986) 187 Cal.App.3d 480, 485.)

Although the *Aguirre* court did deal with statute of limitations issues, it did not simply hold that the indictment of a minor tolled the limitations

period, even though the indictment of a minor was otherwise invalid. Instead, the court concluded,

> [I]t is clear the law contemplates a person may appear before the court upon an accusatory pleading such as a grand jury indictment filed in the superior court[] ....

(*People v. Aguirre, supra*, 227 Cal.App.3d at p. 381.)

The *Aguirre* court acknowledged that section 604 required the superior court to suspend proceedings upon an indictment of a minor and to certify the case to juvenile court if it found the defendant was under the age of 18 when he committed the offense. (*People v. Aguirre, supra*, 227 Cal.App.3d at p. 381.) But, the court concluded, the requirements under section 604 did not render the original indictment invalid or render it a nullity. (*People v. Aguirre, supra*, 227 Cal.App.3d at p. 381.) If the juvenile court were to find the minor defendant unfit for its jurisdiction, it would transfer the matter back to adult court, and the case would proceed upon the original indictment. (Welf. & Inst. Code, § 707.01, subd. (a); *People v. Aikens* (1969) 70 Cal.2d 369, 372 [indicted minor tried in adult court after juvenile court found him unfit for its jurisdiction]; *In re Hartman* (1949) 93 Cal.App.2d 801, 802-803 [prosecution of indicted juvenile proceeded in juvenile court after transfer from adult court].)

Thus, under the juvenile court law as it existed before Proposition 21 minors could properly be indicted. Under defendant's interpretation of *Gevorgyan,* however, indictments would be treated as nullities subject to demurrer. But such a result is inconsistent with the historical treatment of accusatory pleadings, including indictments, under section 604. Such a result would also be inconsistent with Proposition 21's intent to expand, not revoke, the authority of grand juries over juveniles.

Moreover, *Gevorgyan's* rejection and limitation of *Aguirre* is inconsistent with this Court's interpretation of that case. In *Guillory*, this Court cited with approval *Aguirre*'s statement that "'no cases limit the authority of the grand jury to indict persons of any age, providing the offense has been committed or is triable within the county[.]" (*Guillory v. Superior Court, supra*, 31 Cal.4th at p. 173, quoting *People v. Aguirre, supra*, 227 Cal.App.3d at p. 378.) Thus, when this Court in *Guillory* disapproved *Gevorgyan* "to the extent it is inconsistent with [the Court's] opinion," it disapproved *Gevorgyan*'s erroneous interpretation of *Aguirre*. (*Guillory v. Superior Court, supra*, 31 Cal.4th at p. 178, fn. 5.)

### 4. Precluding The Grand Jury From Indicting Minors Under Welfare and Institutions Code Section 707, Subdivision (d) Is Inconsistent With The Purposes And Goals Of Proposition 21.

Defendant further contends that requiring the district attorney to proceed by way of information when he charges minors under section 707(d) is not inconsistent with the purpose and goals of Proposition 21. He is wrong.

"The general object of [Proposition 21] is to address the problem of violent crime committed by juveniles and gangs – not simply to reduce crime generally." (*Manduley v. Superior Court, supra*, 27 Cal.4th at pp. 575-576.) Proposition 21

> "[W]as intended to expand, not revoke, the authority of courts of criminal jurisdiction over juveniles, *including the authority of grand juries over juveniles*. [Fn. omitted.]"

(*Guillory v. Superior Court, supra*, 31 Cal.4th at p. 177, fn. omission in original, emphasis added.) Since the grand jury historically had the authority to indict juveniles, it seems unlikely that a ballot measure that was intended to *expand* the authority of grand juries over minors, "would have silently, or at best obscurely, decided so important and controversial a public policy matter and created a significant departure from the exiting law[,]" (*In re Christian S.* (1994) 7 Cal.4th 768, 782), by revoking the grand jury's authority to indict

minors under section 707(d) and by granting an absolute right to a preliminary to a limited class of individuals.

Grand jury proceedings and preliminary hearings are two completely different and separate methods of commencing a felony criminal prosecution. Each has its own separate set of procedures and evidentiary rules, which are set forth in different sections of the Penal Code. This Court has pointed out

> [T]hat there is a considerable disparity in the procedural rights afforded defendants charged by the prosecutor by means of an information and defendants charged by the grand jury in an indictment[,] [Fn. omitted]

(*Hawkins v. Superior Court* (1978) 22 Cal.3d 584, 587, abrogated on other grounds by Constitutional Amendment, as recognized by *Bowens v. Superior Court* (1991) 1 Cal.4th 36, 46.) This Court observed that this disparity *strongly* favors defendants charged by information. (*Hawkins v. Superior Court, supra.*, 22 Cal.3d at p. 587.) For example, a defendants accused by information have the right to a preliminary hearing before a neutral and legally trained magistrate, the right to be represented by a retained or appointed attorney, the right to confront and cross-examine witnesses, the right to personally appear, and the right to present exculpatory evidence. (*Hawkins v. Superior Court, supra*, 22 Cal.3d at p. 587.) Defendants accused by indictment have none of these rights. (*Ibid.*)

Yet, this Court has acknowledged that "[t]he California Constitution expressly sanctions the prosecution of felony cases by grand jury indictment. [Citations.] [Fn. omitted.]" (*Bowens v. Superior Court, supra*, 1 Cal.4th at p. 40.) Furthermore, despite the disparity in procedural rights between felony cases commenced by information and those commenced by indictment, this Court "[p]erceive[d] an abundance of legitimate justifications for the state's discretionary use of the indictment procedure to initiate felony prosecutions." (*Id.*, at p. 43.)

The right under section 707, subdivision (d)(4) to a finding by the magistrate at the preliminary hearing that reasonable cause exists to believe the defendant comes within the provisions of the statute is simply another procedural right that defendants charged by information have that defendants charged by indictment do not. If a minor is charged under section 707(d) by information, the minor will have *all* the rights enumerated above, including the right to a preliminary hearing and the right to have the magistrate make finding that there is reasonable cause to believe the minor comes within the statute. On the other hand, if the minor is charged by information, the minor will have none of these rights.

But the fact that the drafters of Proposition 21 created an additional procedural right that defendants prosecuted pursuant to section 707(d) by

information have that defendants charged by indictment do not have, does not mean the drafters intended that prosecutions pursuant to section 707(d) could *only* be commenced by information. It is reasonable to infer that Proposition 21's drafters intended the procedural right to the magistrate's finding to come into play *only if* the minor is charged by information. If, instead, the minor is prosecuted by indictment, the rights and rules applicable to grand jury proceedings would govern. Had the drafters of Proposition 21 felt that the magistrate's finding that the minor came within section 707(d) was an absolutely necessary prerequisite to the prosecution of a minor in criminal court, it is reasonable to assume they would have made that clear with express language mandating that prosecutions pursuant to section 707(d) could only be by way of information and that minors prosecuted under section 707(d) had the absolute right to a preliminary hearing. That the drafters did not use such express mandatory language supports the conclusion they only intended the right to the magistrate's finding at the preliminary hearing to apply if and when a prosecution pursuant to section 707(d) was by information.

Moreover, the circumstance that a magistrate may exercise certain powers or have certain obligations, which the grand jury does not have, does

not mean that a case may only be commenced by way of information. Consider, for example, the magistrate's power under Penal Code section 17, subdivision (b)(5), to reduce certain felonies that were filed as felonies – so-called "wobblers" – to misdemeanors at the preliminary examination.[4] Under Penal Code section 17, subdivision (b)(5) defendants charged by information have the opportunity during the preliminary examination to persuade the magistrate to reduce felony wobblers to misdemeanors – an opportunity defendants charged by grand jury indictment do not have. One could argue that because Penal Code section 17, subdivision (b)(5) mentions magistrates and preliminary hearings the Legislature intended that wobblers could only be

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[4] Penal Code section 17 provides in relevant part:

> (b) When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances: (¶)...(¶) (5) When, at or before the preliminary examination or prior to filing an order pursuant to Section 872, the magistrate determines that the offense is a misdemeanor, in which event the case shall proceed as if the defendant had been arraigned on a misdemeanor complaint.

(Pen. Code, § 17, subd. (b).)

prosecuted by information. But of course Penal Code section 17, subdivision (b)(5) has never been interpreted in such a manner. Penal Code section 17, subdivision (b)(5) is just one example of a right or procedure that is available when a prosecution is commenced by way of information that is not available when a prosecution is commenced by way of indictment.

Moreover, nothing in the language of Proposition 21 or the ballot materials indicates that the drafters intended to limit or restrict the historical power of the grand jury to indict minors. The Proposition 21 ballot materials make no reference to "indictment" or "grand jury." (*People v. Superior Court (Gevorgyan), supra,* 91 Cal.App.4th at p. 607.) Because the drafters of an initiative and the voters who approve it are presumed to have been aware of the existing statutory law and its judicial construction (*Horwich v. Superior Court, supra*, 21 Cal.4th at p. 283; *In re Harris* (1989) 49 Cal.3d 131, 136), this Court can reasonably infer that the drafters of Proposition 21 as well as the voters, who were presumably aware of the statutory and case authority authorizing grand juries to indict minors, chose not to restrict the power of the grand jury.

### 5. This Court Has Not Determined That Minors Prosecuted Under Welfare and Institutions Code Section 707, Subdivision (d) Have An Absolute Right To A Preliminary Hearing.

Defendant's contention that this Court has adopted an interpretation of section 707(d) that precludes the grand jury from indicting minors is without merit. It is true that in *Manduley* this Court made the comment that,

> To the extent [section 707(d)] creates a protected liberty interest that minors will be subject to the jurisdiction of the criminal court only upon the occurrence of the conditions set forth therein, the statute *does* require a judicial determination, at the preliminary hearing, "that reasonable cause exists to believe that the minor comes within the provisions" of the statute. [Citation.]

(*Manduley v. Superior Court, supra*, 27 Cal.4th at p. 564, emphasis in original.) But the issues raised in *Manduley* involved facial constitutional challenges to Proposition 21. (*Id.* at pp. 544-546.) In describing the changes made by Proposition 21, *Manduley* observed,

> Where the prosecutor files an accusatory pleading directly in a court of criminal jurisdiction pursuant to section 707(d), at the preliminary hearing the magistrate must determine whether "reasonable cause exists to believe that the minor comes within the provisions of" the statute .... If such reasonable cause is not established, the case must be transferred to the juvenile court. [Citation.]

(*Manduley v. Superior Court, supra*, 27 Cal.4th at p. 550.) But *Manduley* involved a prosecution of several minors that was commenced by the filing of a felony complaint, and the above-quoted language merely explained the

procedure applicable to the facts of the case. *Manduley* did not consider or discuss the issue of how a criminal prosecution of a minor may be commenced. Hence, this Court did not consider whether prosecution of a minor could also be commenced by indictment, whether a grand jury could *also* make the determination that reasonable cause exists to believe the minor comes within the provisions of section 707(d), or whether that determination would ultimately be made by the trial court by way of a motion (e.g., Pen. Code, § 995) brought following the minor's indictment. And, "it is axiomatic that cases are not authority for propositions not considered. [Citations.]" (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176.)

Although the drafters of Proposition 21 did not intend to create an absolute right to a preliminary hearing for those individuals who are prosecuted pursuant to section 707(d), it stands to reason that the drafters had some purpose for including in section 707, subdivision (d)(4) the language "[i]n conjunction with the preliminary hearing ..., the magistrate shall make a finding that reasonable cause exists to believe that the minor comes within" the statute. The most reasonable explanation for the inclusion of this language in section 707(d) is that the drafters wanted to create a pretrial gatekeeping mechanism to ensure that minors whose crimes did not qualify for prosecution in the criminal court, either because of their age or the circumstances of their

crimes, were not erroneously tried in criminal court and that their cases were expeditiously transferred to the juvenile court. It seems apparent the drafters wanted to make sure that when the district attorney files a case against a minor under section 707(d) there is a pretrial determination that the circumstances of the case warrant prosecution in the criminal court, i.e., "that reasonable cause exists to believe that the minor comes within" the statute. But can this pretrial gatekeeping function only occur at the preliminary hearing? In other words, is it any more likely that a case commenced by indictment, rather than information, will erroneously proceed to trial in the criminal court even though reasonable cause to believe a minor comes within section 707(d) is lacking? As we explain below, the answer is no.

Section 707, subdivision (d)(4)'s requirement that a case filed under section 707(d) "shall ... proceed according to the laws applicable to a criminal case[]" ensures that a case filed under section 707(d) will not proceed to trial in the criminal court unless there is reasonable cause to believe the minor comes within the statute, regardless whether the case was commenced by indictment or information. This is because the determination whether reasonable cause exists to believe the minor comes within section 707(d) will ultimately be made by the criminal court judge after the indictment or information has been filed. Stated another way, the gatekeeping function for

prosecutions brought under section 707(d) will be performed by the criminal court judge, regardless whether the case is commenced by indictment or information, because that judge – not the magistrate – has the final word on whether or not reasonable cause exists to believe the minor comes within the statute.

This conclusion is supported by the decision in *Solano v. Superior Court, supra*, 169 Cal.App.4th 1361, in which the Court of Appeal concluded that when a magistrate does not hold a minor to answer for any crime for which direct filing under section 707(d) is permitted the prosecutor can seek review of the magistrate's findings in the criminal court before any transfer to the juvenile court. (*Solano v. Superior Court, supra*, 169 Cal.App.4th at p. 1368.) The court explained that,

> The magistrate's statutory role in conducting the preliminary hearing also supports our conclusion that the criminal court must consider whether to transfer the case to the juvenile court. Upon making the holding order, the magistrate loses jurisdiction over the case [citation], and cannot transfer the case to the juvenile court.

(*Solano v. Superior Court, supra*, 169 Cal.App.4th at p. 1369.)

The court pointed out that

> "[m]agistrates presiding at preliminary hearings do not sit as judges of courts, and exercise none of the powers of judges in court proceedings.... The office is purely a statutory one and the powers and duties of the functionary are solely those given by the statute; and those powers are precisely the same whether exercised by virtue of one office or that of another." (*People v. Newton* (1963) 222 Cal.App.2d 187, 189, 34 Cal.Rptr. 888.) "The magistrate serves a function different from the function of the trial judge. While the magistrate makes a determination of probable cause in connection with a preliminary hearing [citation], the trial judge may review the magistrate's finding of probable cause and reverse it [citation]. [¶] Even though the voters and Legislature have made it possible for judges to serve in either role, the roles are still distinct and take place at different levels – that is, the magistrate makes determinations reviewable by the trial judge. When [the Court of Appeal] undertake[s] review of a case, [it is] reviewing the actions of the trial judge who had the ability to review the findings of the magistrate. [Citation.]"

(*Solano v. Superior Court, supra*, 169 Cal.App.4th at pp. 1369-1370, quoting *People v. Hart* (1999) 74 Cal.App.4th 479, 485-486, citation omissions and first modification in original.)

Thus, the court held,

> [T]he prosecutor may seek review of the magistrate's findings in the criminal court by filing an information before the case is transferred to the juvenile court.

(*Solano v. Superior Court, supra*, 169 Cal.App.4th at p. 1368.) In concluding that "section 707, subdivision (d)(4) does not suggest that an immediate transfer to the juvenile court is required without review[,]" the court explained, "the act of transferring the case to the juvenile court is accomplished by the *criminal court judge*[,]" not the magistrate. (*Solano v. Superior Court, supra*, 169 Cal.App.4th at p. 1370, emphasis added.) Moreover,

> In considering whether to transfer a case to juvenile court, the criminal court may analyze the bases for the magistrate's finding or failure to find reasonable cause to believe the minor comes within section 707, subdivision (d).

(*Solano v. Superior Court, supra*, 169 Cal.App.4th at p. 1370.) Thus, the determination whether a minor shall be subject to prosecution in the criminal court pursuant to section 707(d) is not made by the magistrate, but by the criminal court judge *after* an information has been filed.

The *Solano* court's conclusion that it is the criminal court judge who ultimately determines whether there is reasonable cause to believe a minor comes within section 707(d) is consistent with this Court's similar observation

in *Guillory* that "section 602(b) does not come into play until after the indictment is filed in the trial court." (*Guillory v. Superior Court, supra*, 31 Cal.4th at p. 175.) As this Court explained,

> Section 602(b) provides that certain minors "shall be prosecuted under the general law in a court of criminal jurisdiction." It then makes reference to the language at issue here regarding the prosecutor's allegations. Arguably, the time at which a minor is "prosecuted under the general law in a court of criminal jurisdiction" (*ibid.*) is following the filing of an indictment. That is because the trial court cannot determine whether the allegations satisfy the section 602(b) criteria, and hence the minor is properly in a court of criminal jurisdiction on that basis, until the indictment is filed.

(*Guillory v. Superior Court, supra*, 31 Cal.4th at p. 175.) Similarly, it is the criminal trial court judge who determines whether reasonable cause exists to believe the minor comes within section 707(d). This necessarily occurs after the information is filed.

Moreover, what is good for the gander must certainly also be good for the goose. Hence, just as the People may challenge the magistrate's determination that a case *does not* satisfy the requirements of section 707(d), so must the minor be able to challenge the magistrate's determination there *is* reasonable cause to believe the minor comes within the parameters of section 707(d). If the minor does not agree with the magistrate's finding that reasonable cause exists to believe he or she comes within the statute, the minor

can challenge the finding by filing a motion in criminal court pursuant to Penal Code section 995. Penal Code section 995 requires, in pertinent part, that "the indictment or information shall be set aside by the court in which the defendant is arraigned, upon his or her motion," (Pen. Code, § 995, subd. (a)) if the defendant has been indicted or committed "without reasonable or probable cause." (Pen. Code, § 995, subd. (a)(1)(B) and (a)(2)(B).)

In ruling on a Penal Code section 995 motion,

> [T]he criminal court may analyze the bases for the magistrate's finding or failure to find reasonable cause to believe the minor comes within section 707, subdivision (d).

(*Solano v. Superior Court, supra*, 169 Cal.App.4th at p. 1370.) If the criminal court judge disagrees with the magistrate's finding, the judge may reverse it. (*People v. Hart, supra*, 74 Cal.App.4th at p. 485.) Thus, when a case is filed under the provisions of section 707(d) by way information, the ultimate determination whether reasonable cause exists to believe the minor comes within the statute is made by the criminal court judge.

At this juncture it is important to point out that the finding the magistrate is required to make under subdivision (4) of section 707(d) is *not* in any way a fitness finding; it is merely a legal determination that the *facts* of the case establish reasonable cause to believe the minor comes within the provisions of section 707(d). (*Manduley v. Superior Court, supra,* 27 Cal.4th at pp. 549-550.) Therefore, the determination whether a minor comes within the provisions of section 707(d) is purely a finding of legal sufficiency based on the age of the defendant and, in some circumstances, the facts of the case. The question is simply whether there is reasonable cause to believe the minor comes within the provisions of the statute; that is, reasonable cause to believe the minor is at least 16 years of age and has committed an offense enumerated in section 707, subdivision (b), or the minor is at least 14 years of age and has

committed such an offense under circumstances set forth in section 707, subdivision (d)(2)(C)[5]. (*Manduley v. Superior Court, supra,* 27 Cal.4th at pp.

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[5] Section 707, subdivision (d)(2)(C) provides:

(2) Except as provided in subdivision (b) of Section 602, the district attorney or other appropriate prosecuting officer may file an accusatory pleading against a minor 14 years of age or older in a court of criminal jurisdiction in any case in which any one or more of the following circumstances apply:

(¶) ... (¶)

(C) The minor is alleged to have committed an offense listed in subdivision (b) in which any one or more of the following circumstances apply:

(i) The minor has previously been found to be a person described in Section 602 by reason of the commission of an offense listed in subdivision (b).

(ii) The offense was committed for the benefit of, at the direction of, or in association with any criminal street gang, as defined in subdivision (f) of Section 186.22 of the Penal Code, with the specific intent to promote, further, or assist in criminal conduct by gang members.

(iii) The offense was committed for the purpose of intimidating or interfering with any other person's free exercise or enjoyment of a right secured to him or her by the Constitution or laws of this state or by the Constitution or laws of the United States and because of the other person's race, color, religion, ancestry, national origin, disability, gender, or sexual orientation, or because the minor perceives that the other person has one or more of those characteristics, as described in Title 11.6 (commencing with Section 422.55) of Part 1 of the Penal Code.

(iv) The victim of the offense was 65 years of age or older, or blind, deaf, quadriplegic, paraplegic, developmentally disabled, or confined to a wheelchair, and that disability was known or reasonably should have been known to the minor at the time of the commission of the offense.

549-550.) As this Court explained,

> Section 707(d), as amended by the initiative, authorizes specified charges against certain minors to be filed directly in a court of criminal jurisdiction, *without a judicial determination of unfitness under the juvenile court law.*

(*Manduley v. Superior Court, supra,* 27 Cal.4th at p. 549, emphasis added.)

Thus,

> In circumstances in which section 707(d) applies, the statute dispenses with the requirement of "a particularized evidentiary hearing to adjudicate the individual juvenile's fitness or suitability for juvenile court treatment, ...."

(*Manduley v. Superior Court, supra,* 27 Cal.4th at p. 556.) In other words, "pursuant to section 707(d), neither the juvenile court nor the criminal court renders a decision whether the minor is fit for a juvenile court disposition." (*Manduley v. Superior Court, supra,* 27 Cal.4th at p. 565.) The age of the defendant and the "circumstances set forth in section 707(d)(2)(C)" are simply additional facts relating to the minor, the minor's prior criminal history, the victim, or the underlying criminal offense, which the finder of fact must find there is probable cause to believe exist.

As the "functional equivalent" of a magistrate, a grand jury is just as well equipped as the magistrate to determine whether or not there is reasonable cause to believe these additional facts exist. Once the grand jury has returned its indictment, the defendant can challenge the grand jury's decision by filing

a motion pursuant to Penal Code section 995. (Pen. Code, § 995, subd. (a)(1).) In ruling on the minor's motion the criminal court judge will review either the transcript of the grand jury proceedings, when a case is commenced by indictment, or the preliminary hearing transcript, when the case is commenced by information, and decide, based on the facts, whether reasonable cause exists to believe the minor comes within section 707(d). In either event, the facts supporting reasonable cause will either be in the transcript, or they won't. If the facts in the transcript do not establish reasonable cause to believe the minor comes within section 707(d), the criminal court judge will transfer the case to the juvenile court. Hence, whether a case filed under section 707(d) proceeds to trial in criminal court or is transferred to juvenile court will ultimately depend, not on whether the magistrate or grand jury makes a finding that reasonable cause exists to believe the minor comes within the statute, but rather on whether the criminal court judge finds *factual* support in the record – i.e., transcript – that reasonable cause exists to believe the minor comes within provisions of section 707(d). And, a minor against whom charges have been filed pursuant to section 707(d) has the same opportunity to challenge the sufficiency of the evidence on which the grand jury relied in determining that probable cause exists to believe the minor comes within section 707(d) as does the minor who challenges the sufficiency of the evidence on which the

magistrate based his or her findings. Thus, to the extent that section 707(d) creates any protected liberty interest – i.e., the interest not to be prosecuted in the criminal court unless he or she comes within section 707(d) – that interest is satisfied regardless whether the prosecution is commenced by way of indictment or information.

## CONCLUSION

Section 707(d) does not require the prosecution of a minor pursuant to that section must only be commenced by information. Moreover, Proposition 21 did not expressly or impliedly revoke or abridge the historic authority of the grand jury to indict juveniles. Nor is there any statement in the ballot materials or arguments related to Proposition 21 that would support the conclusion that voters intended to either (1) limit the historic authority of the grand jury to indict minors, or (2) create an absolute right for a select class of individuals to have a preliminary hearing. Furthermore, to preclude the grand jury from indicting minors under section 707(d) would be inconsistent with the purpose and goals of Proposition 21, which, this Court has observed,

> [W]as intended to expand, not revoke, the authority of courts of criminal jurisdiction over juveniles, including the authority of grand juries over juveniles. [Fn. omitted.]

(*Guillory v. Superior Court, supra*, 31 Cal.4th at p. 177, fn. omission in original.)

Accordingly, for all the above reasons, the People respectfully urge this Court to affirm the decision of the Court of Appeal in this case.

Dated this 24th day of October, 2014.

Respectfully submitted,

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BY: 
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**CERTIFICATE OF WORD COUNT**
**[California Rules of Court, Rule 8.520(c)]**

The text of the Answer Brief on the Merits consists of 12,271 words as counted by the word-processing program used to generate this brief.

Dated this 24th day of October, 2014.

Respectfully submitted,

TONY RACKAUCKAS, DISTRICT ATTORNEY
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## PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA )
) ss
COUNTY OF ORANGE )

RE: ISAIAS ARROYO
SUPREME COURT CASE NO. S219178; DCA CASE NO.G048659
SUPERIOR COURT CASE NO. 12ZF0158

I am a citizen of the United States; I am over the age of eighteen years and not a party to the within entitled action; my business address is: Office of the District Attorney, County of Orange, 401 Civic Center Drive West Santa Ana, California 92701.

On October 24, 2014, I served the within **ANSWER BRIEF ON THE MERITS** on interested parties in said action by placing a true copy thereof enclosed in a sealed envelope, in the United States mail at Santa Ana, California, that same day, in the ordinary course of business, postage thereon fully prepaid, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct.
Executed on October 24, 2014 at Santa Ana, California.

LISA GOMEZ
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