COPY

Case No. S219178

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff and Appellant,

vs.

ISAIAS ARROYO
Defendant and Respondent,

DEFENDANT/RESPONDENT'S REPLY BRIEF

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

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

ORANGE COUNTY ALTERNATE DEFENDER'S OFFICE

FRANK DAVIS
Alternate Defender
ANTONY C. UFLAND
Senior Deputy Alternate Defender
EMAIL: Tony.Ufland@altdef.ocgov.com
State Bar No. 157620
600 W. Santa Ana Blvd, #600
Santa Ana, California 92701
Telephone: (714) 568-4160
Fax: (714) 568-4200
Attorneys for Defendant/Respondent

Case No. S219178

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff and Appellant,

vs.

ISAIAS ARROYO
Defendant and Respondent,

DEFENDANT/RESPONDENT'S REPLY BRIEF

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

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

ORANGE COUNTY ALTERNATE DEFENDER'S OFFICE

FRANK DAVIS
Alternate Defender
ANTONY C. UFLAND
Senior Deputy Alternate Defender
EMAIL: Tony.Ufland@altdef.ocgov.com
State Bar No. 157620
600 W. Santa Ana Blvd, #600
Santa Ana, California 92701
Telephone: (714) 568-4160
Fax: (714) 568-4200
Attorneys for Defendant/Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

United States Supreme Court:

California Supreme Court:

STATUTES

U.S. CONSTITUTION

CALIFORNIA CONSTITUTION

OTHER AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

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

ISSUE PRESENTED

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

REPLY

ARGUMENT

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

I.

BEFORE THE PASSAGE OF PROPOSITION 21 IN 2000, GRAND JURIES DID NOT POSSESS ANf UNRESTRICTED ABILITY TO INDICT JUVENILES.

Much of the prosecution's argument in support of its position that grand juries may indict juveniles prosecuted for Welfare and Institutions Code section 707(d) offenses relies on an erroneous understanding of the grand jury's ***pre-Proposition 21*** ability to indict juveniles. If the grand jury was not able to indict juveniles ***prior to*** Proposition 21, then barring them from doing so ***after*** Proposition 21 could hardly be described as limiting or revoking the grand jury's authority.

Penal Code section 917 states that "The grand jury may inquire into all public offenses committed or triable within the county and present them to the court by indictment". (Cal. Pen. Code § 917) By its very terms, section 917 limits the grand jury's tools in furthering criminal charges to the presentation of an indictment. A grand jury may not file a criminal

complaint or information in adult court[1], and it certainly cannot file a petition in juvenile court. An "indictment" is, and always has been, defined as an accusation in writing, presented by the grand jury to a competent court, charging a person with a public offense." (Cal. Penal Code § 889; Stats. 1872, ch. III, § 917.)

Although the grand jury in California is the descendant of the common law grand jury, and although the powers of the grand jury are broad, the grand jury's powers are "carefully defined and limited by statute." (*People v. Superior Court (1973 Grand Jury)* (1975) 13 Cal.3d 430, 437.) A grand jury acts without authority when its actions are not based on a specific legislative provision, and the grand jury has only those powers that the Legislature has deemed appropriate and that have been expressly conferred upon the grand jury by statute. (*McClatchy Newspapers v. Superior Court* (1988) 44 Cal.3d 1162, 1179.)

In 1961, by statute, the juvenile court had exclusive jurisdiction over all minors under the age of sixteen, original jurisdiction over minors sixteen to eighteen, and jurisdiction concurrent with adult courts over minors eighteen to twenty-one. (Form. Welf. & Inst. Code §§ 600-602, 604, 707;

---

[1] As used in this brief, "adult 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"].)

Goldfarb and Little, *1961 California Juvenile Court Law: Effective Uniform Standards for Juvenile Court Procedure, 51* Cal. Law Rev. 421, 423 (1963).)

While grand juries may have had the ability to present indictments in cases involving juveniles in a very historic sense, that is prior to the creation of the juvenile court system in California, that ability, in a broad sense, has not existed in California since at least 1961.

As far as the prosecution's argument regarding the limitation or revocation of the grand jury's ability to indict is concerned, the only relevant period of inquiry is the era immediately preceding and following the passage of Proposition 21, namely 1999 and 2000. In other words, what was the grand jury's ability to indict juveniles immediately prior to, and immediately following the passage of the Proposition?

As is discussed supra, in 1999, the grand jury's only prosecutorial vehicle was an indictment, which had to be filed in a competent court. In that same year, nearly exclusive jurisdiction of all individuals who were under the age of eighteen at the time they violated any law was vested in the juvenile court. (Welf. & Inst. Code § 602) Unless covered by the very narrow exceptions in subsection (b) of Welfare and Institutions Code section 602, minors ***had to be*** charged in ***juvenile court***.

Furthermore, the only vehicle by which a minor could be charged in

juvenile court in 1999 was by way of a petition, filed by the prosecuting attorney, pursuant to Welfare and Institutions Code section 650, subsection (c), which read:

> Juvenile court proceedings to declare a minor a ward of the court pursuant to Section 602 are commenced by the filing of a ***petition*** by the ***prosecuting attorney***.
>
> (Welf. & Inst. Code § 650(c), emphasis added.)

Furthermore, in 1999, those minors who, pursuant to Welfare and Institutions Code section 602, subsection (b), were required to be filed on in "adult court" were entitled to a preliminary hearing under Welfare and Institutions Code section 602, subsection (c), which read:

> 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 prosecution 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(c), repealed by Proposition 21 (2000).)

Thus, immediately prior to the passage of Proposition 21 in 2000 grand juries could not file indictments against minors in "adult court" because "adult courts" lacked jurisdiction over minors, and they could not

file indictments in juvenile court, because juvenile courts did not, and do not now, recognize indictments as a means of prosecuting minors. Furthermore, grand juries could not present indictments against those minors who were filed on directly in "adult court" because they had a right to a preliminary hearing.

Arroyo's position regarding the absolute right to a preliminary hearing for minors charged in "adult court" pursuant to the discretionary direct filing provisions of Welfare and Institutions Code section 707(d)(4) ***does not*** limit, or curtail, or revoke the grand jury's 1999 ability to indict minors at all, because they did not have such an ability to begin with. Furthermore, Arroyo's position on this issue still allows for a significant expansion of the authority of courts of criminal jurisdiction over juveniles. It also allows for the expansion of grand juries' authority over juveniles, in that it undoubtedly gave grand juries the ability to indict juveniles prosecuted under Welfare and Institutions Code section 602(b) offenses.

Once the illusion of the grand jury's "historic" authority to indict minors is removed, the prosecution's arguments regarding unintended limiting/revoking results (Answer Brief p. 7), the creation of a distinct class of individuals that would be immune from indictment (Answer Brief, p. 12-13), and the "absurd results" that would be reached under Arroyo's interpretation (Answer Brief, p. 17) all disappear.

II.

REQUIRING THE PROSECUTION TO PROCEED BY WAY OF COMPLAINT AND PRELIMINARY HEARING IN WELFARE AND INSTITUTIONS CODE SECTION 707(d) CASES WOULD NOT AMOUNT TO AN IMPLIED REPEAL OF PENAL CODE SECTION 917.

The prosecution erroneously argues that Arroyo's interpretation of Welfare and Institutions Code section 707(d) (4) would amount to an implied repeal of Penal Code section 917.

The doctrine of implied repeal is described as follows:

> When two or more statutes concern the same subject matter and are in irreconcilable conflict the doctrine of implied repeal provides that the most recently enacted statute expresses the will of the Legislature, and thus to the extent of the conflict impliedly repeals the earlier enactment. (*In re Thierry S.* (1977) 19 C3d. 727, 744.)

However, implied repeal of statutes is not favored, and there is a presumption against operation of the doctrine. (*Cal. Drive-In Restaurant Assn. v. Clark* (1943) 22 Cal.2d 287, 292.) Such implied repeals are recognized "only when there 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. The courts are bound, if possible, to maintain the integrity of both statutes if the two may stand together.'" (*In re Thierry*

S., supra at p. 744, citing *In re White* (1969) 1 Cal.3d 207, 212.)

"Repeal may be found where (1) 'the two acts are so inconsistent that there is no possibility of concurrent operation,' or (2) 'the later provision gives undebatable evidence of an intent to supersede the earlier' provision. [Citations]." (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1038.) The doctrine "is appropriate in those limited situations where it is necessary to effectuate the intent of drafters of the newly enacted statute." (*Id.*) "In 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. (*Board of Supervisors v. Lonergan* (1980) 27 Cal.3d 855, 868, quoting *Penziner v. West American Finance Co.* (1937) 10 Cal.2d 160, 176". (*Id.*)

Section 707(d)'s limitation of a grand jury's ability to indict juvenile in discretionary direct-file cases does not supersede the grand jury's ability to indict individuals under Penal Code section 917. It does not even supersede their ability to hand down indictments against all juvenile offenders. It merely carves out an exception to the pre-existing scope of a grand jury's ability to indict individuals, and only insofar as it relates to the grand jury's ability to indict juveniles prosecuted in discretionary direct-file proceedings under section 707(d). "'[W]hen constitutional provisions can

reasonably be construed so as to avoid conflict, such a construction should be adopted. [Citations.] As a means of avoiding conflict, a recent, specific provision is deemed to carve out an exception to and thereby limit an older, general provision.' " (*Strauss v. Horton* (2009) 46 Cal.4th 364, 407, citing *Bowens v. Superior Court* (1991) 1 Cal.4th 36.) In *Strauss* the California Supreme Court held that they were required to view the adoption of Proposition 8 as carving out an exception to the preexisting scope of the privacy and due process clauses of the California Constitution as interpreted by the majority opinion in their earlier *Marriage Cases*, (2008) 43 Cal.4th 757, rather than viewing it as an implied repeal of those clauses.

Section 707(d)'s proscription against indictments for juveniles prosecuted in discretionary direct-filings can easily be reconciled with Penal Code section 917's authorization for the grand jury to inquire into public offenses.

III.

A PLAIN READING OF WELFARE AND INSTITUTIONS CODE SECTION 707(d) (4) AS IT IS WRITTEN SUPPORTS THE CONCLUSION THAT THE SECTION MANDATES PROSECUTION BY COMPLAINT AND PRELIMINARY HEARING.

Contrary to the prosecution's argument, Welfare and Institutions Code section 707(d) (4) does not need to be re-written at all in order for this Court to find that a minor prosecuted under the section is entitled to a preliminary hearing. That section reads, in its entirety:

> 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(d) (4))

The statute clearly states that a ***magistrate shall*** make the necessary finding ***in conjunction with the preliminary hearing as provided in Section 738 of the Penal Code***.

Ironically, in order for the Court to adopt the prosecution's interpretation of the section, it would require a significant re-write, to read as follows:

> 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 ***all of*** the laws applicable to a criminal case.
>
> 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, 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.
>
> ***In any case in which the district attorney seeks an indictment from the grand jury against a minor pursuant to this subdivision, no such finding needs to be made.***

As the prosecution pointed out, a cardinal rule of statutory construction prohibits this Court from adding provisions to a statute that were not included by the Legislature. (*McAllister v. California Coastal Com.*, (2008) 169 Cal. App. 4th 912, 947.) In the construction of statutes the Judge is not to insert what has been omitted, or to omit what has been inserted. (Penal Code § 1858.) This Court cannot add that required language into the statute.

The prosecution also erroneously suggests that the words "accusatory pleading" in the statute support the position that discretionary

prosecution of a minor under Welfare and Institutions Code section 707(d) may be by way of complaint/preliminary hearing or grand jury hearing/indictment. The Penal Code states that an "accusatory pleading" includes "an indictment, an information, an accusation and a complaint". (Cal. Pen. Code § 691(c).) However, Welfare and Institutions Code section 707(d) (4) clearly states that where an "accusatory pleading" has been filed a magistrate shall make a finding in conjunction with a preliminary hearing as provided in Penal Code section 738. Under the express terms of the statute, even assuming the prosecution was allowed to obtain an indictment from a grand jury, in order to comply with the directives of Welfare and Institutions Code section 707(d)(4), they would ***thereafter*** be required to get the necessary finding from a magistrate in what would amount to a post-indictment preliminary hearing; which of course was a practice banned by Article 1, section 14.1 of the California Constitution, with the passage of Proposition 115 in 1990.

Furthermore, Welfare and Institutions Code section 707(d) (4) states that after a case is filed, the case "shall then proceed ***according to the laws*** of applicable to a criminal case." (Welf. & Inst. Code § 707(d) (4), emphasis added.) The Legislature's decision not to use the term "all" when discussing the manner in which a case prosecuted pursuant to Welfare and Institutions Code section 707(d) (4) indicates an intent that not "all" laws

applicable to criminal cases would apply, and that prosecution of minors under the section would be subject to limitations written into the section and other statutes. As the prosecution has pointed out, "The word 'all" means 'all' and not 'some'." (*Joshua D. v. Superior Court* (2007) 157 Cal.App.4th 549, 558.) If the Legislature had intended for "all" of the laws applicable to criminal cases to apply to a prosecution pursuant to Welfare and Institutions Code section 707(d)(4), they easily could have done so.

IV.

THE MANDATORY FINDING, BY A MAGISTRATE, AT A PRLIMININARY HEARING, THAT A MINOR COMES WITH THE STATUTE IS A "PROTECTED LIBERTY INTEREST", NOT A "PROCEDURAL RIGHT".

This Court, in *Manduley v. Superior Court* (2002) 27 Cal.4th 527, in discussing constitutionally protected liberty interests and due process guarantees, stated:

> To the extent this provision 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 herein, the statute *does* require a judicial determination, at the preliminary hearing, "that reasonable cause exists to believe that the minor comes within the provisions of the statute."
>
> (*Manduley, supra,* at p. 564, emphasis original)

It is important to note that this comment was made by this Court in response to the *Manduley* petitioners' argument that Welfare and

Institutions Code section 707(d) deprived them of a due process right to be subject to the jurisdiction of the juvenile court. The Court essentially stated that minors do not have a constitutionally protected right to be under the jurisdiction of the juvenile court, ***however***, the statute did create a protected liberty interest when it required a judicial determination at the preliminary hearing.

In the present case the prosecution mischaracterizes this "protected liberty interest" as merely a procedural right, only applicable when the prosecution chooses to proceed by way of Complaint. The prosecution erroneously suggests that this language was likely only intended to create a pretrial gatekeeping mechanism to ensure that minors whose crimes did not qualify for prosecution in adult court were not erroneously tried in adult court. Interestingly, the prosecution seems to suggest that even this procedural mechanism would be available only to minors prosecuted by way of Complaint and not those that the prosecution elects to take to the grand jury.

The Fifth Amendment to the United States Constitution states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense, to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, ***nor be deprived of*** life, ***liberty***, or property, ***without due process of law***; nor shall private property be taken for public use, without just compensation.

(U.S. Const., 5th Amend., emphasis added)

The protected liberty interests guaranteed by the Fifth Amendment are made applicable to the states by the Fourteenth Amendment which states, in pertinent part:

> ...nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

(U.S. Const., 14th Amend.)

The California Constitution specifically provides an identical guarantee, where it states, in pertinent part:

> A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws...

(Calif. Const., Art 1, § 7, subd. (a))

This Court, in *Manduley*, held that Welfare and Institutions Code section 707(d) created a ***protected liberty interest***, a constitutionally guaranteed, due process right, to a determination ***at the preliminary hearing***. The Court never referred to this right as a gatekeeping mechanism.

The prosecution's argument is further flawed when it questions whether or not that duty can only be performed by the magistrate at a preliminary hearing, or by the trial judge at a later date. (People's Reply Brief, p. 44) First, according to the black letter language of the statute, that finding, that reasonable cause exists to believe that the minor comes within the statute, ***IS*** to be made by the magistrate, ***IN CONJUNCTION*** with the preliminary hearing. The statute does not authorize any other individual to make that initial determination, or authorize the initial determination to be made at any other time. The prosecution's argument that it can, and ultimately is, made by the trial judge is not supported by the words employed in the statute.

Furthermore, according to the prosecution, the finding that ***shall*** be made by the ***magistrate*** isn't required at a grand jury hearing (People's Reply Brief, p. 38). The prosecution argues that this mandatory finding is simply another "procedural right" afforded to defendants charged by complaint that those charged by indictment are not.

However, unlike the other "procedural rights" described by the prosecution that only defendants charged by way of complaint enjoy, this "right" creates a necessary finding to be made at preliminary hearings. This creates two dilemmas.

First, it lowers the burden of proof for the prosecution when it proceeds by way of grand jury and indictment. Instead of being required to establish all of the criminal elements plus the elements that establish that a minor comes within the provisions of the statute (that the minor is a particular age and that the offense charged is included in the statute), at a grand jury hearing the prosecution would only have to prove up the elements of the offenses. Such an interpretation would essentially negate two elements that would need to be proved. None of the other traditional procedural differences between preliminary hearings and grand jury hearings described by the prosecution have that effect. A magistrate at a preliminary hearing could not hold a minor defendant to answer on a Welfare and Institutions Code section 707(d) discretionary direct filing unless the prosecution provided evidence that the minor came within the provisions of the section. However, under the prosecution's interpretation, at a grand jury hearing, the prosecution would not be required to present any such evidence, and an indictment could be returned without any such showing.

Reviewing ex post facto laws, in *Carmell v. Texas* (2000) 529 U.S. 513, the United States Supreme Court stated:

> "A law reducing the quantum of evidence required to convict an offender is as grossly unfair as, say, retrospectively eliminating an element of the offense, increasing the punishment for an existing offense, or lowering the burden of proof [citation]. In each of these instances, the government subverts the presumption of innocence by reducing the number of elements it must prove to overcome that presumption; by threatening such severe punishment so as to induce a plea to a lesser offense or a lower sentence; or by making it easier to meet the threshold for overcoming the presumption. Reducing the quantum of evidence necessary to meet the burden of proof is simply another way of achieving the same end. [Fn. omitted.]"
>
> (*Carmell v. Texas,* at p. 532-533)

If, as the prosecution suggests, the two-element finding that ***shall*** be made by the magistrate ***does not apply*** where the ***prosecution decides*** to prosecute a minor by way of a grand jury hearing and an indictment, then the law would impermissibly reduce the quantum of evidence necessary to convict minors, would lower the burden of proof for the prosecution, and would essentially eliminate elements of the offense ***only when prosecution was by way of indictment***.

Such an interpretation would certainly create an Equal Protection problem. "The concept of equal protection recognizes that persons who are similarly situated with respect to a law's legitimate purposes must be treated equally." (*People v. Brown* (2012) 54 Cal.4th 314, 328; *In re Antazo*

(1970) 3 Cal.3d 100, 110.) Identically situated minors charged in adult court ***at the sole discretion of the prosecution***, would be subjected to disparate levels of proof, and would enjoy disparate levels of protections, depending on whether, ***at the sole discretion of the*** prosecution, their case proceeded by way of complaint/preliminary hearing versus grand jury hearing/indictment.

Second, since Welfare and Institutions Code section 707(d) (4) requires that a magistrate make a specific finding in conjunction with the preliminary hearing, it follows that a failure by the magistrate to make such a finding, or an erroneous finding by the magistrate, would entitle a minor defendant to a dismissal of the ensuing information pursuant to Penal Code section 995. A Penal Code section 995 motion to set aside lies either where (a) the defendant has not been legally committed, or (b) the defendant was committed without reasonable or probable cause. (Pen. Code § 995.) An illegal commitment results where a defendant has been denied a substantial right. (*De Woody v. Superior Court* (1970) 8 Cal.App. 3d 52, 55; *Foster v. Superior Court* (1980) 107 Cal.App.3d 218, 224-225.)

Since, according to the prosecution, the grand jury is not required to make such a finding, a minor prosecuted on an indictment for a Welfare and Institutions Code section 707(d) offense would not be entitled to such a challenge, and could be denied what would be considered a "substantial right" if the prosecution was by way of complaint and preliminary hearing, without any legal recourse.

V.

THE PROSECUTION'S RELIANCE ON *PEOPLE V. AGUIRRE* (1991) 227 CAL.APP.3D 373, IS MISPLACED.

In *People v. Aguirre*, (1991) 227 Cal.App.3d 373, the defendant committed multiple felonies, including sex crimes, during a nighttime assault on a young couple on the beach in 1981. The offenses were subject to a six-year statute of limitations, and an indictment charging the defendant with those crimes was returned in 1985. When the defendant was later arrested and appeared in superior court, it was discovered that he was 16 years old at the time of the crimes. Criminal proceedings were suspended and the matter was certified to juvenile court, where the defendant appeared in 1988. The juvenile court found the defendant unfit and returned him to superior court. There, he was arraigned and given a preliminary hearing. After the defendant was held to answer, the People filed an information that was identical to the 1985 indictment. The

defendant pleaded guilty to the charges in the information. By the time the defendant in Aguirre had been brought before the juvenile court, more than six years had elapsed since the commission of his offenses.

The prosecution's reliance on *Aguirre* is misplaced for a number of reasons. First, *Aguirre* itself was found to be superseded by statute in *People v. Superior Court (Gevorgyan)*, (2001) 91 Cal.App.4th 602, when it stated "[T]hese 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." (*Gevorgyan, supra* at p. 615)

Second, the rationale and cornerstone of *Aguirre*, which was issued in 1991, was that the court could find no authority to suggest that a grand jury had no ability to indict a juvenile, and the grand jury's powers to indict were historically unlimited. *Gevorgyan* held that the amended language in section 707(d) was clearly a limit placed on that ability.

Third, *Gevorgyan* expressly found that "Proposition 21 has undercut the rationale of Aguirre by its lack of reference to indictment its inclusion of language incompatible with indictment set forth in sections 602, subdivision (b), and 707, subdivision (d)." (*Gevorgyan, supra*, at p. 615.) *Gevorgyan* also stated, "Nowhere in the text of this law, both before and after the adoption of Proposition 21, do the words 'grand jury' or 'indictment' appear. Nor are they included in the summary, argument, or

analysis of Proposition 21 that was submitted to the voters. Yet, the People assert that under *People v. Aguirre*, citation omitted... '[a] grand jury's authority to indict juveniles is unquestioned. [Citations.]' The assertion is an overstatement that begs the question raised in this case." (*Gevorgyan, supra* at pp. 607-608.)

As it relates to the question of indictments for juveniles prosecuted for Welfare and Institutions Code section 707(d) offenses, *Aguirre* is no longer controlling.

CONCLUSION

The plain language of Welfare and Institutions Code section 707(d)(4) grants minors prosecuted under the statute a right to a preliminary hearing as provided in Penal Code section 738 at which a magistrate is required to make a finding that the minor comes within the statute. This was the conclusion reached by the Court of Appeal in *Gevorgyan*, which described the prosecution's arguments to hold otherwise an "attempt to create ambiguity where none exists." (*People v. Superior Court (Gevorgyan)* (2001) 91 Cal.App.4th 602, 615.) If the legislature did not intend to make a finding by the ***magistrate*** mandatory "in any case" involving a prosecution under this section, then it needed to say so. "If Parliament does not mean what it says it must say so." (*DuBois v. Workers'*

Comp. Appeals Bd., (1993) 5 Cal. 4th 382, 391, quoting Herbert, *The Uncommon Law* (6th ed. 1948) p. 313.)

Any way that it is viewed, Proposition 21 was a boon to California prosecutors. Whether or not prosecutors are able to take discretionary direct-file cases to the grand jury, the changes enacted by the Proposition have tremendously expanded California prosecutors' ability to try minors in adult court. At its core, Proposition 21 gave prosecutors significant decision making capabilities that they did not have prior to 2000. With so much new power vested in the Executive, it makes sense that the Legislature would require a check on that power ***at the earliest possible litigated stage*** of criminal proceedings, by a competent judicial officer; an unquestionably unbiased representative from a different branch of the government.

While caselaw still supports the position that the grand jury is the functional equivalent of a magistrate, examples abound in the modern criminal justice world to suggest that the grand jury may not exactly be the "protective bulwark between the ordinary citizens and an overzealous prosecutor" that it was originally intended to be. (*Johnson v. Superior Court* (1975) 15 Cal.3d 248, 253.) As early as 1973, the United States Supreme Court has recognized that "The grand jury may not always serve its historic role as a protective bulwark standing solidly between the

ordinary citizen and an overzealous prosecutor..." (*U.S. v. Dionisio* (1973) 410 U.S. 1, 17) In his dissent in the *Dionisio* case, Justice Douglas went even further, stating "It is, indeed, common knowledge that the grand jury, having been conceived as a bulwark between the citizen and the Government, is now a tool of the Executive." (*U.S. v. Dionisio, supra,* dissent of Justice Douglas, p. 23.)

The Legislature recognized that under Proposition 21, prosecutors could ***unilaterally*** make a decision to take a minor out of juvenile court entirely and try them in adult court. After that, if no check (i.e. a preliminary hearing) was implemented, prosecutors would be allowed to ***unilaterally*** decide to take the minor's case to a grand jury, where they would be able to ***unilaterally*** make all sorts of critical decisions (e.g. what, if any, exculpatory evidence was presented to the grand jury, what grand juror questions were answered or not, what inappropriate arguments were made, etc.) without any guidance or control by a judicial officer.

In short, the Legislature understood that without requiring that prosecutors proceed by way of complaint/preliminary hearing, Proposition 21 would create a very hungry child, with a very large sweet tooth, left all alone in a very well stocked candy store. For that reason, this Court must reverse the decision of the Court of Appeal below and affirm the order by the Superior Court which granted defendant/respondent's demurrer.

Dated: 12/19/14

Respectfully Submitted,

FRANK DAVIS
Alternate Defender
Orange County

ANTONY C. UFLAND
Senior Deputy Alternate Defender
Attorneys for Defendant/Respondent
Gerardo Juarez

CERTIFICATE OF WORD COUNT

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

I certify that the text of Defendant/Respondent Isaias Arroyo's' Reply Brief consists of 5,518 words as counted by "Word", the word-processing program used to generate it.

Dated this 19th day of December, 2014

ANTONY C. UPLAND
Senior Deputy Alternate Defender

DECLARATION OF SERVICE

The People v. Isaias Arroyo
Supreme Court Case No. S219178
DCA Case No. G048659
Superior Court Case No. 12ZF0158

STATE OF CALIFORNIA)
) ss
COUNTY OF ORANGE)

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

That on the 19th day of December, 2014, I served a copy of Defendant/Respondent Isaias Arroyo's Reply Brief in the above-entitled action by depositing a copy thereof in a sealed envelope, postage thereon fully prepaid, in the United States Mail at Santa Ana, California. Said envelope was addressed as follows:

ATTORNEY GENERAL
State of California
P.O. Box 85266
San Diego, CA 92186-5266

CLERK OF THE COURT
COURT OF APPEAL
Fourth Appellate District, Div. 3
601 W. Santa Ana Blvd.
Santa Ana, CA 92701

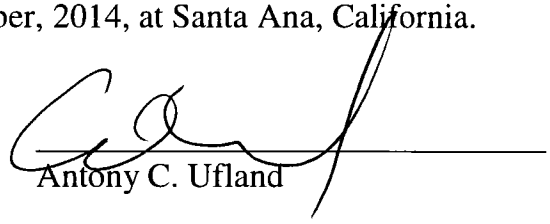
TONY RACKAUCKAS
DISTRICT ATTORNEY
401 Civic Center Dr.
Santa Ana, CA 92701
Attn: Law & Motion

DEPUTY COUNTY CLERK
Attn: Hon. William R. Froeberg
Orange County Superior Court
Dept. C40
700 Civic Center Drive West
Santa Ana, CA 92701

ISAIAS ARROYO
2521 Deegan Dr.
Santa Ana, CA 92704

APPELLATE DEFENDERS INC.
555 W. Beech St., Ste. 300
San Diego, CA 92101

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 19th day of December, 2014, at Santa Ana, California.



Antony C. Ufland