In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

MARIO MARTINEZ,

Defendant and Appellant.

Case No. S231826

Fourth Appellate District, Division Two, Case No. E063107
Riverside County Superior Court, Case No. RIF136990
The Honorable Becky Dugan, Judge Presiding

ANSWER BRIEF ON THE MERITS

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INTRODUCTION

Appellant Mario Martinez was arrested after being caught with a usable amount of methamphetamine on the passenger floorboard of a vehicle in which he was riding. A jury convicted him of possession of methamphetamine, under Health and Safety Code section 11377, and transportation of methamphetamine, under Health and Safety Code section 11379. Seven years later, section 11379 was amended by the Legislature to add an element requiring that the transportation occur with the intent to sell, which was not a requirement at the time appellant committed that offense. The amendment was not made retroactive, and appellant's conviction remained final. Later that same year, the voters passed Proposition 47, the Safe Neighborhoods and School Act (the Act), which made certain enumerated drug and property offenses misdemeanors and allows persons to petition for resentencing if they are currently serving sentences for felony convictions that would have been misdemeanors under the Act. Nothing in the Act, or in the statutes that implemented it, mentions section 11379. Appellant nonetheless argues that the Act should apply to his transportation conviction under section 11379 because he claims the underlying facts of his crime show that he possessed a usable amount of methamphetamine during the commission of the offense, and that conduct falls within the language of Health and Safety Code section 11377, which was reduced to a misdemeanor by the Act. The Court of Appeal rejected appellant's invitation to rewrite the Act, and this Court should too.

First, the plain language of Penal Code section 1170.18, which was added to implement the Act, limits relief to specifically enumerated offenses, and Health and Safety Code section 11379 is not included in that list. Although some unenumerated property crimes are affected by the Act, the enumerated drug crimes did not redefine "possession" to incorporate any other unenumerated drug offenses. Second, even if Proposition 47 had

been in effect when appellant committed his transportation offense, the Act offers him no procedure for converting a felony transportation offense to a misdemeanor possession offense. Possession is not an element of transportation, and the Act does not permit him to negate the jury's finding that he committed all of the elements of that offense. The numerous unintended consequences that arise from applying the Act to felony transportation offenses compel the conclusion that appellant's interpretation is ill-conceived. Third, and finally, appellant's proposed rule that Proposition 47 allows relief for *any* felony crime in which the underlying facts satisfy the elements of any of the misdemeanor offenses listed in Penal Code section 1170.18 would cause absurd results. Appellant's rule would defy the voters' intent, would launch a flurry of litigation over unrelated felony offenses, and would create dangerous precedent for the scope of future criminal initiatives.

STATEMENT OF THE CASE

A. Appellant's 2007 Conviction and Sentence

On August 9, 2007, the Riverside County District Attorney filed an information charging appellant with transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a); count 1), and possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a); count 2). (CT 3-4.) The information further alleged that appellant had five prison priors (Pen. Code, § 667.5, subd. (b)), and two prior "strike" convictions (Pen. Code, §§ 667, subds. (c) & (e)(2)(A), 1170.12, subd. (c)(2)(A)). (CT 4-5.) On December 4, 2007, a jury convicted appellant of both counts. (Supp. CT 2.) In a bifurcated proceeding, the prosecutor dismissed one of the prison prior allegations, and the superior court found the remaining four prison prior allegations and two prior "strike" allegations true. (Supp. CT 3-4.)

On July 11, 2008, the superior court struck one of the prior strike convictions and sentenced appellant to 12 years in state prison calculated as follows: The court imposed an eight year sentence (four years doubled for the prior strike conviction) on count 1, plus one year for each of the four prison priors. (SCT 16-17; CT 20-23; RT 28-29.) The court stayed the punishment on count 2 pursuant to Penal Code section 654. (CT 20, 22; RT 28.)

B. The 2014 Amendment of Health and Safety Code Section 11379

When appellant was charged and convicted of the transportation of methamphetamine in 2007, Health and Safety Code section 11379 provided that any person who "transports" specified controlled substances, including methamphetamine, shall be punished for a felony:

> Except as otherwise provided in subdivision (b) ... every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport any controlled substance ... shall be punished by imprisonment in the state prison for a period of two, three, or four years.

(Health & Saf. Code, § 11379, subd. (a); Stats. 2001, ch. 841, § 7.)

At that time, the transportation of methamphetamine could be for the purpose of sale *or* for personal use. In 1971, this Court determined that the word "transport" as used in Health and Safety Code section 11351, meant "a knowing transportation of marijuana, whether for personal use, sale, distribution or otherwise." (*People v. Rogers* (1971) 5 Cal.3d 129, 137.) Lower courts routinely relied on this interpretation of "transport" to include personal use in the context of other drug statutes, including the subsequently enacted Health and Safety Code sections 11352 and 11379. (See *People v. Cortez* (1985) 166 Cal.App.3d 994, 997-998 [Health & Saf.

Code, § 11352]; *People v. Eastman* (1993) 13 Cal.App.4th 668, 673-674 [Health & Saf. Code, § 11379].)

In 2013, the Legislature set out to amend the law to limit prosecutions under Health and Safety Code section 11379 to only those defendants who transported a controlled substance with the intent to sell. On October 3, 2013, Governor Brown signed Assembly Bill No. 721 (AB 721). Effective January 1, 2014, AB 721 (2013–2014 Reg. Sess.) amended subdivisions (a) and (c) of Health and Safety Code section 11379 to add the requirement that the transportation be "for sale."

> (a) [E]very person who transports ... any controlled substance ... shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for a period of two, three, or four years. [¶] ... [¶] (c) For purposes of this section, 'transports' means to transport for sale.

(Health & Saf. Code, § 11379, subds. (a) & (c); Stats. 2013, ch. 504, § 2 (AB 721).)

The amendment effectively added an additional element to the crime of transportation, which now requires that the transportation of drugs be for the purpose of sale, rather than for personal use. (*People v. Eagle* (2016) 246 Cal.App.4th 275, 278 ["'This bill makes it expressly clear that a person charged with this felony must be in possession of drugs with the intent to sell. Under AB 721, a person in possession of drugs ONLY for personal use would remain eligible for drug possession charges. However, personal use of drugs would no longer be eligible for a SECOND felony charge for transportation'"].) The amendment to Health and Safety Code section 11379 was not made retroactive by the Legislature, and the law is applied retroactively only to those defendants whose judgments of conviction were not final as of January 1, 2014, when the amendment took effect. (*Id.* at p. 279 ["because the judgment was not final, defendant is entitled to benefit retroactively from the changes to section 11379"].)

Remittitur issued in appellant's appeal of his conviction on September 22, 2010 (Court of Appeal Case No. E046651), so his judgment was final more than three years before the amendment to Health and Safety Code section 11379.

C. The 2014 Voter Enactment of the Safe Neighborhoods and Schools Act

On November 4, 2014, the voters approved Proposition 47, the "Safe Neighborhoods and Schools Act" ("the Act"), and it became effective the next day. (Cal. Const., art. II, § 10 (a) ["An initiative statute or referendum approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise"]; *People v. Morales* (2016) 63 Cal.4th 399, 404 (*Morales*).) The declared purposes of Proposition 47 included the following: reducing felonies for certain "nonserious, nonviolent crimes like petty theft and drug possession" to misdemeanors; "authoriz[ing] consideration of resentencing for anyone who is currently serving a sentence" for the listed offenses; "ensur[ing] that people convicted of murder, rape, and child molestation will not benefit;" and "requir[ing] a thorough review of criminal history and risk assessment of any individuals before resentencing to ensure that they do not pose a risk to public safety." (2014 Cal. Legis. Serv. Prop. 47 (Proposition 47) (WEST), § 3; *People v. Diaz* (2015) 238 Cal.App.4th 1323, 1328.)

To achieve those purposes, Proposition 47 first reduced certain specified nonserious, nonviolent felonies to misdemeanors. (*Diaz*, *supra*, 238 Cal.App.4th at p. 1325.) These specified offenses included, for example, simple drug possession, shoplifting, and receipt of stolen property valued at $950 or less. (Pen. Code, § 1170.18, subd. (a).) As relevant to this matter, simple possession of a controlled substance under Health and Safety Code section 11377 is explicitly listed in Penal Code section 1170.18 as

one of "those sections [that] have been amended or added" by Proposition 47. (*Ibid.*)

Proposition 47 next provided a process by which those already convicted of these specified offenses can petition to have those convictions reduced to misdemeanors. Specifically, "[a] person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section . . . had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing . . . ." (Pen. Code, § 1170.18, subd. (a).) This procedure requires that the trial court determine whether the prior conviction would necessarily be a misdemeanor. If so, "the petitioner's felony sentence shall be recalled and the petitioner resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (Pen. Code, § 1170.18, subd. (b).) The term "unreasonable risk of danger to public safety" means "an unreasonable risk that the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667." (Pen. Code, § 1170.18, subd. (c).) Thus, the court must find the petitioner poses an unreasonable risk of committing a limited list of offenses such as murder, molestation of a child, a sexually violent offense, or an offense punishable by life in prison or death. (Pen. Code, § 667, subd. (e)(2)(C)(iv).)[1]

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[1] Penal Code section 667, subdivision (e)(2)(C)(iv) lists eight felonies or classes of felonies: "(I) A 'sexually violent offense' as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code. [¶] (II) Oral copulation with a child who is under 14 years of age, and who is more than 10 years younger than he or she as defined by Section 288a,

(continued...)

D. Appellant's Petition for Recall of Sentence and Subsequent Appeal

On November 13, 2014, just after the passage of the Act, appellant petitioned to have his felony convictions for transportation of methamphetamine and possession of methamphetamine reduced to misdemeanor convictions. (CT 26-28.) The People conceded that he was eligible for a reduction of his simple possession charge, but argued that he was ineligible for resentencing on the transportation conviction. (CT 29.) The court granted the petition as to the simple possession conviction, reduced the conviction to a misdemeanor, and sentenced appellant to 364 days in county jail, which was ordered to run concurrent to appellant's previous 12-year sentence. (CT 31.) The court denied appellant's petition as to the transportation conviction after determining that Health and Safety Code section 11379, subdivision (a), is not eligible for sentence reduction under Penal Code section 1170.18. (CT 31; RT 35.)

Appellant appealed the superior court's denial of his petition. (CT 32-34.) He argued that (1) the superior court erred by denying his petition for resentencing under Penal Code section 1170.18 because the Act should be

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(...continued)
sodomy with another person who is under 14 years of age and more than 10 years younger than he or she as defined by Section 286, or sexual penetration with another person who is under 14 years of age, and who is more than 10 years younger than he or she, as defined by Section 289. [¶] (III) A lewd or lascivious act involving a child under 14 years of age, in violation of Section 288. [¶] (IV) Any homicide offense, including any attempted homicide offense, defined in Sections 187 to 191.5, inclusive. [¶] (V) Solicitation to commit murder as defined in Section 653f. [¶] (VI) Assault with a machine gun on a peace officer or firefighter, as defined in paragraph (3) of subdivision (d) of Section 245. [¶] (VII) Possession of a weapon of mass destruction, as defined in paragraph (1) of subdivision (a) of Section 11418. [¶] (VIII) Any serious and/or violent felony offense punishable in California by life imprisonment or death."

liberally construed to apply its ameliorative effects to his transportation conviction under Health and Safety Code section 11379; and (2) his misdemeanor punishment should have been stayed under Penal Code section 654. The People conceded that his count 2 punishment should have been stayed. With respect to appellant's first claim, the People argued that the plain language of Proposition 47 and Penal Code section 1170.18 contained no reference to Health and Safety Code section 11379 and contemplated no sentence reductions for felons convicted of that crime.

The Fourth District California Court of Appeal, Division Two, affirmed the superior court's denial of the petition. It held that the Act does not apply to convictions of Health and Safety Code section 11379 because the Act's plain language did not address that offense. The Act enumerated specific statutes that were eligible for reduction to misdemeanors, but the list of crimes notably did not include Health and Safety Code section 11379.

Appellant petitioned for review, raising two issues: 1) whether the Act permits relief for *any* felony conviction that, based on the facts underlying the offense, satisfies the elements of any of the misdemeanor offenses listed in Penal Code section 1170.18; and 2) whether appellant's conviction under Health and Safety Code section 11379 qualifies for resentencing as a misdemeanor under Health and Safety Code section 11377, considering he was convicted of the crime before the California Legislature added the additional element requiring that the transportation be for sale. (ABOM 1-2.) This Court granted the petition without limiting the issues.

STATEMENT OF FACTS[2]

Around 12:35 p.m. on May 29, 2007, Officer Josh Hiraoka of the Riverside County Sheriff's Department was driving his patrol car southbound on Hunter Street in Glen Avon. The officer saw a red 1987 Toyota parked partially in the street and partially in the dirt pull off area in front of a residence. A man was leaning over the front passenger side window speaking to the passenger. As Officer Hiraoka pulled up, the man saw him, stepped away from the Toyota, and began walking northbound. The car immediately pulled into the street heading south. The officer looked at the license plate and noticed the month sticker was not identifiable. He followed the Toyota.

The passenger, later identified as defendant, leaned forward three or four times in a continuous motion. The Toyota turned right onto Mission Street. Officer Hiraoka activated his overhead lights and notified dispatch that he was making a traffic stop. Both vehicles stopped, and the officer walked up to the front driver's side of the Toyota. The driver was later identified as 23-year-old Candace Eves. The officer informed Eves he had stopped her to check if her license and registration were up to date. He also asked defendant if he had any identification on him. Defendant, who was 47 years old, had no identification but provided his name and date of birth. Eves gave the officer her driver's license and registration, and the officer checked the computer in his patrol car to see if Eves had any warrants for her arrest. He discovered that Eves had a felony warrant for possession of stolen property, and that the registered owner of the car was Julia Martinez, who was later identified as defendant's mother.

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[2] The facts are derived from the unpublished opinion in *People v. Martinez*, Fourth District Court of Appeal, Division Two, case number E046651, issued June 22, 2010 in appellant's initial appeal from his 2008 judgment of conviction. Appellant filed a request for judicial notice of the opinion with this Court on July 7, 2016. The unpublished opinion is also citable under California Rules of Court, rule 8.1115(b)(2), because the opinion is relevant to this criminal action, demonstrates the reasons for his convictions, and provides context for his appellate claims.

Officer Hiraoka informed Eves of her felony warrant and asked her to step out of the car. He arrested Eves and placed her in the backseat of the patrol car. He asked and received Eves's permission to search the Toyota. He walked to the passenger side and asked defendant to step out of the car. As defendant moved his right foot out of the car, the officer saw a small clear plastic bag that had been on the floor mat between defendant's feet. After defendant exited the Toyota, the officer detained him and called for backup. He searched defendant but did not find any contraband. After a backup unit arrived, the officer examined the plastic bag and saw that it was twisted closed on one end and contained a white crystal-like substance, which the parties stipulated was .38 grams of methamphetamine. He searched the car but did not find any other contraband. Neither defendant nor Eves appeared to be under the influence of methamphetamine.

Officer Hiraoka arrested defendant and transported him and Eves to the station. Defendant received and waived his *Miranda*[3] rights. Defendant acknowledged the Toyota was his mother's; however, he claimed the methamphetamine did not belong to him and did not know who it belonged to. Defendant said he had driven the car from his mother's residence and picked up Eves on Dell Street. While parked on Hunter Street, defendant had moved to the passenger seat and Eves took over driving. Defendant did not explain why Eves became the driver. Later on, defendant "guaranteed" Officer Hiraoka that the methamphetamine did not belong to Eves, that she did not use drugs, and that she was never in the passenger seat. Later that day, Julia Martinez retrieved her car.

Eves testified under the grant of immunity. She stated she was currently in custody after being arrested for failure to appear in court and for an outstanding warrant for receiving stolen property and vehicle theft. Both crimes had been charged as felonies, but Eves pied guilty to them as misdemeanors. She then failed to surrender to serve her sentence of six months in jail. Eves met defendant on May 28, 2007, at a motel in Rubidoux. The next day, around 11:00 a.m., defendant used the Toyota to drive her to a friend's house to buy methamphetamine.

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[3] *Miranda v. Arizona* (1966) 384 U.S. 436.

Eves bought .2 grams of methamphetamine at the house with her own money and placed it in her bra, while defendant stayed in the car. Defendant dropped Eves off at a friend's home with the understanding that he would pick her up later and they would smoke the methamphetamine together.

When defendant returned to pick up Eves, she drove the Toyota because she had a license and defendant did not. While driving, Eves saw some old neighborhood friends on the side of the street and pulled over to speak with them. She saw the officer pull his patrol car behind her and she started driving. She was concerned because she had the drugs in her bra. Eves told defendant to "stop moving around" or they would get in trouble. The police car followed them, and Eves tried to throw the drugs into an air conditioner vent to the right of the steering wheel. She missed the vent, and the drugs fell onto the floor next to defendant's feet. She did not know whether defendant saw the drugs. They were pulled over by Officer Hiraoka. When Eves was interviewed by the officer, she denied the drugs were hers.

Julia Martinez testified for the defense. She stated that when she met Eves just before trial, Eves said, "I'm sorry. The stuff was mine."

(*People v. Martinez* (June 22, 2010, E046651) [nonpub. opn.].)

ARGUMENT

THE SUPERIOR COURT PROPERLY DENIED APPELLANT'S PETITION FOR RECALL OF SENTENCE AND FOUND APPELLANT INELIGIBLE FOR RELIEF BECAUSE PROPOSITION 47 DOES NOT APPLY TO CONVICTIONS UNDER HEALTH AND SAFETY CODE SECTION 11379

Appellant was lawfully convicted of felony transportation of methamphetamine under Health and Safety Code section 11379. His conviction remains valid today, even after the Legislature's 2014 amendment to section 11379, which added an additional element requiring that transportation occur with the intent to sell. The electorate enacted Proposition 47 in November 2014, which included no language permitting appellant to reduce his felony transportation conviction to a misdemeanor

possession offense. Nonetheless, appellant contends the Act permits him to do so because the conduct underlying his conviction appears to satisfy the elements of simple possession of a controlled substance under Health and Safety Code section 11377, which is enumerated in the Act, and the electorate would have been aware of the Legislature's 2014 amendment to section 11379 and implicitly incorporated that amendment into the Act. Appellant, therefore, claims he should receive the benefit of Proposition 47 as to his transportation conviction. (ABOM 28, 42.) Even more broadly, appellant claims the drafters intended for the Act to apply to *any* crime in which the underlying conduct satisfies the elements of any of the enumerated offenses covered by the Act. (ABOM 13-14, 19-23.) Appellant's contentions should be rejected.

The plain language of the Act limits relief to specifically enumerated offenses, and section 11379 is not included in that list. Unlike the Act's amended property crime statutes, some of which redefine grand theft and commercial burglary, the enumerated drug possession statutes do not redefine possession or add any other language to incorporate enumerated drug offenses, such as section 11379. Further, the omission of any reference to the Legislature's amendment of Health and Safety Code section 11379 in the Act or the Voter Information Guide weakens appellant's argument that the Act incorporates pre-2014 transportation convictions.

But even if the Act had been in effect when appellant committed his offense, as required by Penal Code section 1170.18, he would still not be entitled to relief. If the Act were in effect in 2007 when appellant committed his crime, it would still be a felony transportation offense rather than a possession offense. The 2007 jury was not required to determine whether appellant actually or constructively possessed the methamphetamine, because that is not an element of the transportation offense. Further, the Act offers no procedure for negating the jury's finding,

beyond a reasonable doubt, that all of the elements of Health and Safety Code section 11379 were satisfied. And even assuming the Legislature's amendment could be read as permitting appellant to use the Act to convert his conviction to a possession offense, such a reading would deprive the People of the opportunity to prove the intent to sell element.

Finally, appellant's argument that the Act broadly applies to any felony conviction that offers facts that would satisfy the elements of enumerated misdemeanor offenses under the Act should be rejected. The Act contains no language incorporating unenumerated crimes other than very specific language added to a couple of the amended property crime statutes that redefined a small class of grand theft and commercial burglary offenses. Extending that procedure to drug possession offenses is untenable because it would re-write the statute and also require the re-litigation of a wide variety of valid felony convictions that the electorate did not intend to be affected by Proposition 47.

A. The Act, Including Penal Code section 1170.18 and Health and Safety Code Section 11377, Clearly and Unambiguously Omits Any Reference to Health and Safety Code Section 11379 or Any Other Drug Offense

Although appellant's 2007 felony transportation conviction was unaffected by the Legislature's 2014 amendment to Health and Safety Code section 11379, he argues the Act permits him to reduce his felony conviction to a misdemeanor because the underlying facts of his offense appear to be equivalent to a misdemeanor possession of methamphetamine offense under Health and Safety Code section 11377 as amended by the Act. (ABOM 19-24.) Appellant is mistaken. The Act includes no reference to Health and Safety Code section 11379 or any other unenumerated drug offense in any of its sections. (See Act, §§ 1-18.) Further, unlike some of the amended property crime statutes amended or added to the Act, the enumerated drug possession offenses did not redefine "possession" to

incorporate other unenumerated drug crimes or provide any procedure for permitting other drug offenses to be included.

1. General Principles of Statutory Construction

The interpretation of a ballot initiative is governed by the same rules that apply in construing a statute enacted by the Legislature. (*People v. Park* (2013) 56 Cal.4th 782, 796.) First, the language of the statute is given its ordinary and plain meaning. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 901 (*Robert L.*).) "When statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it." (*People v. Hendrix* (1997) 16 Cal.4th 508, 512 [internal quotations and citations omitted].)

Second, the statutory language is construed in the context of the statute as a whole and within the framework of the overall statutory scheme to effectuate the voters' intent. (*Ibid.*) Statutory interpretation canons are employed to determine the meaning of the statute's plain language. For example, the statutory interpretation canon *expressio unius est exclusio alterius* ("expressio unius") means that inclusion of one thing in a statute indicates exclusion of another thing not expressed in the statute. (E.g. *Gikas v. Zolin* (1993) 6 Cal.4th 841, 852.) This canon has force only when the items expressed in a statute are members of an "associated group or series," which justifies the conclusion that items not mentioned were excluded by deliberate choice, not inadvertence. (E.g. *Barnhart v. Peabody Coal Co.* (2003) 537 U.S. 149, 168.) Where a statute lists specific exemptions, courts may not infer additional exemptions unless there is a *clear* legislative intent that such additional exemptions are intended. (*Wildlife Alive v. Chickering* (1976) 17 Cal.3d 190, 195, superseded by statute in *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086.)

Third, where the language is ambiguous, the court will look to "other indicia of the voters' intent, particularly the analyses and arguments

contained in the official ballot pamphlet." (*Robert L.*, *supra*, 30 Cal.4th at p. 900; *People v. Floyd* (2003) 31 Cal.4th 179, 187–188 [ballot pamphlet information is a valuable aid in construing the intent of voters].) Any ambiguities in an initiative statute are "not interpreted in the defendant's favor if such an interpretation would provide an absurd result, or a result inconsistent with apparent [electorate] intent." (*People v. Cruz* (1996) 13 Cal.4th 764, 782, internal citation and quotation omitted.) Ultimately, the court's duty is to interpret and apply the language of the initiative "so as to effectuate the electorate's intent." (*Robert L.*, *supra*, 30 Cal.4th at p. 900.)

2. The Act States Proposition 47 Relief May Be Granted for the "Offenses Listed" in Penal Code Section 1170.18, and Health and Safety Code Section 11379 Is Not Included Among Them

The Act, in an un-codified section declaring the "Purpose and Intent," states in part: "In enacting this act, it is the purpose and intent of the people of the State of California to: ... [¶] (4) Authorize consideration of resentencing for anyone who is currently serving a sentence for any of the offenses *listed herein* that are now misdemeanors." (2014 Cal. Legis. Serv. Prop. 47 (Proposition 47) (WEST), § 3, emphasis added.) A conviction under Health and Safety Code section 11379 remains a felony today. The Act did not change this. It added or amended only the following sections—three drug offenses and six property offenses— to make them subject to misdemeanor punishment: sections 11350, 11357, or 11377 of the Health and Safety Code, and sections 459.5, 473, 476a, 490.2, 496, and 666 of the Penal Code. (Pen. Code, § 1170.18.) Health and Safety Code section 11379 is not included among that list, nor is it referenced within the three amended Health and Safety Code sections. The Act's express inclusion of only particular enumerated offenses implies the drafters intended to exclude non-enumerated offenses, like Health and Safety Code section 11379.

Under the well-established statutory interpretation canon *expressio unius est exclusio alterius*, the Act's inclusion of only particular offenses demonstrates legislative intent to omit Health and Safety Code section 11379. As discussed above, this statutory interpretation canon means that inclusion of one thing in a statute indicates the drafters intended to exclude another thing not expressed in the statute. (E.g. *Gikas v. Zolin*, *supra*, 6 Cal.4th at p. 852.) This canon has force only when the items expressed in a statute are members of an "associated group or series," which justifies the conclusion that items not mentioned were excluded by deliberate choice, not inadvertence. (E.g. *Barnhart v. Peabody Coal Co.*, *supra*, 537 U.S. at p. 168.) Where a statute lists specific exemptions, courts may not infer additional exemptions unless there is a *clear* legislative intent that such additional exemptions are intended. (*Wildlife Alive v. Chickering*, *supra*, 17 Cal.3d at p. 195.)

For example, in *People v. Guzman* (2005) 35 Cal.4th 577 (*Guzman*), this Court held that Guzman, who committed nonviolent drug possession offenses (NDPOs) while on probation for offenses that were not NDPOs, was not entitled to mandatory probation under the Substance Abuse and Crime Prevention Act of 2000 (Proposition 36). This Court held that the plain language of Proposition 36 expressly addressed only 1) probationers who were already on probation for NDPO at the effective date of the Act or 2) those who receive probation under the Act for an NDPO. (*Id.* at p. 588.) This Court stated that under the *expressio unius* canon, "the Act's express inclusion only of probationers who are on probation for NDPO's implies the drafters' intent to exclude probationers who, like defendant, are on probation for non-NDPO's." (*Ibid.*)

Here, as in *Guzman*, Penal Code section 1170.18 lists specific enumerated crimes, and that list does not include Health and Safety Code section 11379. The electorate's intent to limit application of the Act to the

listed offenses is clear—the plain language of the statute states that a petitioner may request resentencing in accordance with particular listed code sections that have been "added or amended" by the Act. (Pen. Code, § 1170.18.) The logical inference is that any section not added or amended by the Act is not included or affected by the Act. There is no logical reason for mentioning only certain statutes if the electorate intended to include others. The statute's plain language illustrates the drafters' intent to limit the applicable offenses to those listed in the text.

Notably, it is undisputed that the 2014 amendment to Health and Safety Code section 11379 was not retroactive for defendants whose judgments of conviction were final as of January 1, 2014, when the amendment took effect. (See *People v. Eagle*, *supra*, 246 Cal.App.4th at p. 279.) If the explicit amendment of section 11379 cannot be applied retroactively to disrupt appellant's conviction for that offense, it would make little sense that Proposition 47—which makes no mention of Health and Safety Code section 11379 at all—could do so.

3. Unlike Some of the Amended Property Crimes, the Plain Language of the Act Does Not Permit the Three Amended Drug Possession Offenses to Incorporate Any Other Drug Offenses

Appellant argues that, despite the absence of any reference to Health and Safety Code section 11379 throughout the Act, it is appropriate to include section 11379 and other offenses within the Act's purview because a Penal Code section 1170.18 eligibility determination "calls for an assessment of the underlying conduct" of the conviction. (ABOM 20-22.) Appellant argues this conduct assessment is permissible for any offense because Penal Code sections 459.5 and 490.2, which were added by the Act, specifically require an assessment of whether the underlying conduct involved any type of larceny or theft crime that falls within the parameters listed in each section. Appellant, however, is mistaken. There is a

fundamental difference between the enumerated property crime offenses of the Act and the enumerated drug offenses. Three of the property crime statutes—Penal Code sections 459.5, 490.2, and 473—explicitly permit an analysis of the underlying conduct during the eligibility determination because of express language that redefines some forms of commercial burglary, theft, and forgery. But the language found in those three property offense statutes does not give courts the ability to assess the underlying conduct of *any* criminal offense in existence. The enumerated drug offense statutes, in contrast to the property offense statutes, contain no language that would permit such an action.

At its core, Proposition 47 set out to reduce two types of nonserious and nonviolent crimes from wobblers or felonies to misdemeanors: property and drug offenses. (See Voter Information Guide, Gen. Elec. (Nov. 4, 2014) Official Title and Summary, p. 35.) Under the property crimes category, the Act added two new statutes and amended four others. The Act added Penal Code section 459.5, which decreases the punishment for larceny committed in a specified way by creating a new crime: "Notwithstanding [Penal Code s]ection 459, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed [$950]" (Pen. Code, § 459.5, subd. (a).) The Act also added Penal Code section 490.2, which decreases the punishment for any type of grand theft involving a value less than $950: "Notwithstanding [Penal Code s]ection 487 or another provision of defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed [$950]." (Pen. Code, § 490.2, subd. (a); see also Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of proposed law, §§ 5, 8, pp. 71-72.) The Act also amended Penal Code sections 473, 476a, 496, and

666 to limit punishment to no more than one year, and section 473 was further modified to treat as a misdemeanant any person "guilty of forgery relating to a check, bond, bank bill, note, cashier's check, traveler's check, or money order" not exceeding $950. (Pen. Code, § 473; see also Voter Information Guide, Gen. Elec., *supra*, text of proposed law, §§ 6, 7, 9, 10, pp. 71-72.)

Through the added language of some of these property offense statutes, the Act set out to redefine *some* forms of larceny/commercial burglary, grand theft, or forgery that fit the specific requirements set forth in the statutory language. And based on this newly expansive language now found in the property offense statutes, the lower courts have been called upon to address the applicability of the Act to many different property crimes, with mixed results. Indeed, this Court has granted review of several cases involving property crimes under the Act: *People v. Romanowkski* (S231405); *People v. Page* (S230793); *People v. Garness* (S231031); *People v. Gonzales* (S231171).

By contrast, the amended drug possession statutes did not receive similarly expansive language that enables the inclusion of, or redefines, other unenumerated drug offenses. The Act amended only three drug possession offenses: Health and Safety Code sections 11350, 11357, and 11377. (Act, §§ 11-13.) These three Health and Safety Code sections were amended only by limiting punishment to up to one year in county jail except for persons with specified prior convictions. (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of proposed law, §§ 11-13, pp. 72-73.) The amendments to the three drug possession statutes did not redefine "possession" to encompass other drug crimes, nor did they contain any other language, or reference other drug crimes, which, like the property offenses, specifically permit an assessment of underlying conduct during an eligibility determination under Penal Code section 1170.18. And the Act

certainly did not create any new drug offenses, as was the case with shoplifting under Penal Code section 459.5.

Nor does Penal Code section 1170.18 expand the number of drug offenses eligible for reduction. Although appellant argues subdivision (a) of section 1170.18 suggests his conviction under Health and Safety Code section 11379 would be eligible for reduction (AOBM 19-23), there is no language to support his claim. Subdivision (a) states:

> A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ("this act") had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act.

(Pen. Code, § 1170.18, subd. (a).) No part of subdivision (a) incorporates Health and Safety Code section 11379 into the purview of Proposition 47. Even considering the language, "currently serving a sentence for a conviction . . . of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section . . . had this act been in effect at the time of the offense," the words cannot reasonably be interpreted to incorporate pre-2014 convictions under Health and Safety Code section 11379. Those convictions for transportation of a controlled substance, regardless of whether the intent to sell was an element at the time of conviction, are not equivalent to convictions for simple possession under Health and Safety Code sections 11350, 11357, or 11377. As explained in further detail, *infra*, possession is not an essential element of a transportation offense. (*People v. Rogers*, *supra*, 5 Cal.3d at p. 134.) Thus, even if the Act had been in effect in 2007, a person convicted of section 11379 in that year would still be guilty of felony transportation of

methamphetamine, and not necessarily simple possession under section 11377, despite the changes undertaken by Proposition 47.

Appellant also argues in a footnote that the Three Strikes Reform Act of 2012 (Proposition 36) is instructive because it, too, provides for a factual assessment of convictions to determine eligibility rather than require a strict review of the enumerated statutes. (AOBM 22, fn. 7.) But in contrast to the three drug possession statutes in the Act that provide no room for factual assessments, Proposition 36 contained explicit language that permits the superior court to apply factual criteria to determine eligibility. Penal Code section 1170.126, which was added by Proposition 36, disqualified a petitioning inmate from resentencing if, "[d]uring the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intend to cause great bodily injury to another person." (Pen. Code, § 1170.126, subd. (e)(1); citing Pen. Code, §§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).) That language requires the superior court to make an assessment of the underlying facts of a conviction to determine eligibility. (*People v. Bradford* (2014) 227 Cal.App.4th 1322, 1332.) The possession offense statutes enumerated in the Act, by contrast, offer no language that would require or permit such an analysis.

Appellant offers two recent Court of Appeal cases, *People v. Contreras* (2015) 237 Cal.App.4th 868 (*Contreras*) and *People v. Perkins* (2016) 244 Cal.App.4th 129 (*Perkins*), in support his position that the Act permits the analysis of the underlying conduct of a conviction to determine whether it qualifies for reduction to a misdemeanor. (AOBM 24-27.) Although appellant is correct that both opinions state that a factual review of the record of conviction is required, both of these cases deal with property offenses, not drug offenses. In *Contreras*, the defendant argued

that the Court of Appeal could reduce his felony second degree burglary conviction to a misdemeanor[4] despite the fact that his petitions for recall of sentence were pending below. (*Contreras*, *supra*, 237 Cal.App.4th at p. 890.) The Court of Appeal rejected appellant's claim, concluding "[t]he trial court's decision on a section 1170.18 petition is inherently factual, requiring the trial court to determine whether the defendant meets the statutory criteria for relief." (*Contreras*, *supra*, 237 Cal.App.4th at p. 892.) Hence, whether "the value of the property defendant stole disqualifies him from resentencing under sections 459.5 and 1170.18 ... is a factual finding that must be made by the trial court in the first instance." (*Ibid.*)

Perkins, *supra*, 244 Cal.App.4th 129, is equally inapposite because of the underlying property crime at issue. In *Perkins*, the defendant argued the trial court erroneously denied his petition to reduce his felony receiving stolen property conviction to a misdemeanor and also failed to consider whether his theft of a firearm conviction was eligible. (*Id.* at p. 135.) The Court of Appeal found that he had not met his burden on his petition by failing to provide any information on the nature and value of the stolen property to assist the trial court in determining eligibility. (*Id.* at p. 137.)

Although both *Contreras* and *Perkins* state that a trial court is entitled to perform a factual analysis of the underlying conviction to determine whether a defendant is eligible for recall of sentence under Penal Code section 1170.18, both cases do so in the context of property offenses. Neither case addresses other drug offenses that are not included in the trio of Health and Safety Code sections 11350, 11357, and 11377. Indeed, respondent has been unable to find any Court of Appeal opinion stating that

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[4] The defendant also wished to have his felony conviction under Health and Safety Code section 11350 reduced to a misdemeanor directly by the Court of Appeal, but the court declined to do so before the lower court had ruled on the defendant's Penal Code section 1170.18 petition.

a factual analysis can be conducted to determine eligibility for a drug offense that is not included among the three enumerated Health and Safety Code statutes.

4. The Act and Voter Information Guides Omit any Reference to the Legislature's Amendment of Health and Safety Code Section 11379, Which Supports the Conclusion that the Electorate Did Not Intend for the Act to Incorporate Pre-2014 Convictions Under Health and Safety Code Section 11379

Appellant argues that when the electorate enacted Proposition 47 in November 2014, it was aware of the Legislature's recent amendment to Health and Safety Code section 11379, and therefore the Act necessarily incorporated the amendment into the understanding of what acts constitute a violation of Health and Safety Code section 11377. (AOBM 32-38.) On the contrary, the absence of any mention of the Legislature's recent amendment more reasonably demonstrates that the Act intended to *exclude* pre-2014 convictions under section 11379. Assembly Bill No. 721 was signed into law on October 3, 2013, and it became effective January 1, 2014. In enacting new laws, both the Legislature and the electorate are "presumed to be aware of existing laws and judicial construction thereof." (*In re Lance W.* (1985) 37 Cal.3d 873, 890, fn. 11.) Accordingly, appellant is correct that the drafters and the electorate are presumed to be aware of the recent amendment to section 11379, which became effective only months before the passage of Proposition 47. And it is telling that the drafters of the Act declined to address the newly amended section 11379 to encompass pre-2014 convictions even though that the Legislature amended that statute only a few months before.

Despite appellant's contention that the electorate must have intended for transportation convictions to be included among the amended possession statutes, nothing in the language of the Act, including Penal

Code section 1170.18 and Health and Code section 11377, suggests that the electorate intended to include pre-2014 convictions under Health and Safety Code section 11379. It strains credulity to suggest that the drafters meant to *include* pre-2014 convictions under section 11379 while *excluding* it from the enumerated offenses for which resentencing relief may be granted.

Considering the plain language of the Act does not incorporate pre-2014 convictions under Health and Safety Code section 11379, nor does it reference the Legislature's 2014 amendment to the statute, this Court should not insert additional language to afford appellant relief. As this Court has stated, "'insert[ing]' additional language into a statute 'violate[s] the cardinal rule of statutory construction that courts must not add provisions to statutes. This rule has been codified in California as [Code of Civil Procedure] section 1858, which provides that a court must not insert what has been omitted from a statute." (*People v. Guzman*, *supra*, 35 Cal.4th at p. 587 (citations omitted).) Courts have no power to add something to a statute to conform it to an assumed intent that does not appear from the statute's language. (*Wells Fargo Bank v. Superior Court* (1991) 53 Cal.3d 1082, 1099.) As Justice Traynor noted: "[W]ords ... stand in immobilized sentry, reminders that whether their arrangement was wisdom or folly, it was wittingly undertaken and not to be disregarded." (*Ibid.*, quoting *People v. Knowles* (1950) 35 Cal.2d 175, 182 [internal quotations omitted].) The court should not partially rewrite a statute unless it is "compelled by necessity and supported by firm evidence of the drafters' true intent." (*People v. Guzman*, *supra*, 35 Cal.4th at p. 587.)

Furthermore, unless a statute's plain language is ambiguous, the court should not examine legislative history to determine the drafters' intent. (*Robert L.*, *supra*, 30 Cal.4th at p. 900.) Here, there is no ambiguity: The Act does not include Health and Safety Code section 11379. Nor do the three drug possession statutes amended by the Act contain any language

that would incorporate pre-2014 convictions under section 11379 or any other drug offenses. In any event, the ballot materials for Proposition 47 do not help appellant. Although appellant states the language of the Voter Information Guide discussing "drug possession" demonstrates the electorate's intent to incorporate pre-2014 convictions under Health and Safety Code section 11379 (ABOM 18), it does not discuss transportation offenses or the 2014 amendment to section 11379. As this Court has previously explained, "'In the case of a voters' initiative statute, ... we may not properly interpret the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less.'" (*People v. Morales* (2016) 63 Cal.4th 399, 407, quoting *Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114.) Thus, although appellant attempts to invoke vague statements about "drug possession" in the ballot materials to enlarge the scope of the Act to include other drug offenses, there is no reason to assume "the voters believed the proposition would include what it did *not* state." (*People v. Morales*, *supra*, 63 Cal.4th at p. 406.)

In any event, the Voter Information Guide stated in the Official Title and Summary that the Act "[r]equires misdemeanor sentence instead of felony for *certain* drug possession offenses." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) Official Title and Summary, p. 34, italics added.) The use of "certain" reveals an intent to limit the number of drug offenses eligible under Proposition 47. The Act did not redefine "possession" in the drug offense statutes, which compels the reasonable conclusion that the drafters and electorate simply did not intend to incorporate a wide range of drug-related offenses.

People v. Shabazz (2006) 38 Cal.4th 55, which appellant cites in support of his claim that the electorate would have been aware of the Legislature's recent amendment, does not assist him. (ABOM 33-35.)

Shabazz was convicted of murder with a special circumstance finding that the crime was committed to promote gang activity. The gang finding subjected him to a penalty of life in prison without the possibility of parole. (Pen. Code, § 190.2, subd. (a)(22).) The electorate enacted Penal Code section 190.2, subdivision (a)(22), as part of Proposition 21 in the March 2000 primary election. (*Shabazz*, *supra*, 38 Cal.4th at pp. 64-65.) The defendant argued on appeal that, because he shot and killed an unintended target, section 190.2, subdivision (a)(22), which requires that he "intentionally killed the victim," was inapplicable to him. (*Id.* at p. 62.) This Court disagreed, and found that application of the transferred intent doctrine is strongly supported by the purpose underlying section 190.2, subdivision (a)(22), and that the electorate intended to address gang-related crime generally and were presumed to considered the doctrine on transferred intent. (*Id.* at p. 65, fn. 8.) Unlike in *Shabazz*, there is no language to support a conclusion that the electorate intended to address Health and Safety Code section 11379 or other drug crimes generally with Proposition 47. Instead, the drafters and the electorate should be presumed to have been aware of the Legislature's amendment of section 11379 only months before they enacted Proposition 47, and to have disregarded it as irrelevant to the express language of the Act.

In sum, the plain language of the Act, including Penal Code section 1170.18 and Health and Safety Code section 11377, does not consider relief for persons convicted of transportation under Health and Safety Code section 11379. The plain language of the Act instead demonstrates an intent to exclude relief to persons convicted of section 11379, and appellant cannot frustrate the intent of the voters by circumventing such plain language.

B. Even If the Act Had Been in Effect When Appellant Committed His Transportation Offense, He Would Still Not Be Entitled to Relief; Applying Appellant's Interpretation Requires Several Procedural Steps That the Act Does Not Provide

Even if the Act had been in effect at the time of appellant's offense (Pen. Code, § 1170.18, subd. (a) [A person ... who would have been guilty of a misdemeanor ... had this act been in effect at the time of the offense may petition]), appellant could not convert his felony transportation conviction to a misdemeanor possession conviction. Despite appellant's arguments that he should receive the benefit of the Act, there are several problems with permitting him to reduce his felony transportation conviction to a misdemeanor. First, his 2007 transportation conviction predated the 2014 amendment by seven years, and his actions at that time still constituted the crime of transportation, rather than mere possession. Second, the Act did not redefine possession to incorporate the crime of transportation. The Act offers no procedure for negating a jury's finding that appellant committed the crime of transporting methamphetamine, rather than possessing it. Third, even if a jury never previously determined that appellant transported the methamphetamine with the intent to sell, as now required under the statute, interpreting the Act in a way that offers him relief would deny the prosecution an opportunity to demonstrate that he actually intended to sell the methamphetamine. Furthermore, appellant has the burden of demonstrating that his offense is eligible for reduction, i.e., it meets the elements of possession of methamphetamine. He has not done so. Finally, converting appellant's felony transportation conviction to a second misdemeanor possession conviction for the same act would run afoul of Penal Code section 954.

1. To Qualify for Resentencing, the Act Requires That a Felony Conviction Would Have Been Considered a Misdemeanor Under the Act Had the Act Had Been in Effect at the Time of the Offense; It Is Impossible for Appellant to Establish That Condition for His 2007 Transportation Conviction

Appellant argues that if he "committed the acts he did after the electorate enacted Proposition 47 . . . [his actions] would constitute only a simple possession crime." (AOBM 45-46.) Respondent does not disagree entirely with appellant's position as he phrases it. If appellant had committed his crime in December 2014, after the enactment of Proposition 47, the prosecutor would have had to prove that appellant had the intent to sell the methamphetamine when he transported it, because the amendment to Health and Safety Code section 11379 had already taken effect on January 1, 2014. Thus, appellant's actions, without additional evidence of an intent to sell, would have constituted nothing more than simple possession, as long as it was also established that he actually or constructively possessed the methamphetamine when he transported it.

But Penal Code section 1170.18 does not hinge on whether the Act would have been committed *after* the enactment of Proposition 47. The actual language of the Act states: "A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ("this act") *had this act been in effect at the time of the offense* may petition for a recall of sentence." (Pen. Code, § 1170.18, subd. (a), italics added.) The Act requires that eligibility be based on whether the Act would have rendered the crime a misdemeanor *when the crime was committed.*

In appellant's case, even if the Act had been in effect in 2007, his criminal actions would have still constituted a felony transportation offense under Health and Safety Code section 11379, regardless of whether he

intended to sell the methamphetamine. The Legislature did not amend the section 11379 to require an intent to sell until seven years later. Accordingly, appellant is not a person "who would have been guilty of a misdemeanor ... had [the Act] been in effect at the time of the offense." (Pen. Code, § 1170.18, subd. (a).) He is, therefore, ineligible to petition for a recall of sentence under the Act.

2. The Act Provides No Procedure for Negating the Jury's Finding That Appellant Committed the Crime of Transportation Rather Than Possession

Unlike Penal Code sections 459.5 and 490.2, which redefined some forms of burglary and grand theft, Health and Safety Code section 11379 and the other two drug statutes amended by the Act did not redefine the crimes. As explained *ante*, the Act did not redefine possession to incorporate other types of drug crimes like transportation. Considering that fact, a problem arises about how to convert appellant's valid transportation conviction to a misdemeanor possession conviction. In 2007, the jury was not required by Health and Safety Code section 11379 to determine whether appellant possessed the methamphetamine when he transported it, and, in the absence of a new definition of possession that incorporates transportation, the Act provides no procedure for negating the jury's finding that all of the elements of transportation were satisfied.

a. The jury was not required to determine whether appellant possessed the methamphetamine when he transported it

The first issue with converting appellant's felony transportation conviction to a misdemeanor possession conviction is the jurors never had an opportunity to determine whether appellant actually or constructively possessed the methamphetamine when they found him guilty of transporting it. Possession is not an element of transportation under Health and Safety Code section 11379. This Court recognized in *People v. Rogers*,

supra, 5 Cal.3d 129, that "[a]lthough possession is commonly a circumstance tending to prove transportation, it is not an essential element of that offense and one may 'transport' marijuana or other drugs even though they are in the exclusive possession of another." (*Id.* at p. 131.) "For example, were defendant shown to have aided and abetted his passengers in carrying, conveying or concealing drugs in their possession, his conduct would have sustained a conviction of transportation." (*Ibid.*) As appellant concedes in his opening brief, simple possession of methamphetamine is not a lesser included offense of transportation of methamphetamine, and therefore "[n]ot all drug transportation crimes suffered before 2014 and the Legislature's clarification of Health and Safety Code section 11379 could constitute simple possession of a controlled substance." (AOBM 40; see also *Rogers*, *supra*, 5 Cal.3d at p. 134; *People v. Watterson* (1991) 234 Cal.App.3d 942, 947.)

Admittedly, appellant was convicted of both transportation of methamphetamine *and* possession of methamphetamine, and he successfully petitioned for a reduction of his possession conviction to a misdemeanor. (CT 31; Supp. CT 2.) Thus, one would reasonably expect that he could demonstrate he was in possession of the methamphetamine when he committed the transportation offense. Indeed, appellant concludes that he "necessarily possessed the methamphetamine while the car moved," and "[h]is criminal act was not committed by agency or aiding and abetting." (AOBM 42.) However, the facts underlying his conviction do not necessarily support appellant's conclusion that he actually or even constructively possessed the methamphetamine. (ASOB 42.)

At the 2007 trial, the jury was instructed on aiding and abetting liability. (See CT 100-101; Case No. E046651.) Further, the prosecutor argued in closing that even if appellant did not control the drugs, his guilt was established by aider and abettor liability:

> So in light of all that went on, the defendant drove her to the house. He knows she's buying it. And she's in the car with the dope, in his car. He [is] willing [to] let her possess it in his car. This is his car. It's not her car. It is clear even under this theory of the case, that Mr. Martinez himself had control over the item or at least the right to control it, either himself or through another person, Candance[sic] Eves.
>
> Even if that is not enough, ladies and gentlemen, certainly the liability for being an aider and abettor is certainly present. If you believe what Ms. Eves said, "It was my dope, but Mario took me to go get it and we were going to party with it later."
>
> Even if you believe it was her dope, she committed the crime. The defendant knew she had intended to commit the crime. He continued to assist her and then his conduct did, in fact, assist her in the commission of the crime.

(2 RT 312; Case No. E046651.) Thus, considering the jury was instructed on an aiding and abetting theory of liability, and the prosecutor argued that theory in closing argument, it cannot necessarily be concluded that the jury found appellant was in actual or even constructive possession of the methamphetamine for the purposes of his transportation conviction. (See *People v. Mitchell* (1975) 53 Cal.App.3d 21, 24 ["where a defendant is held liable as an aider and abettor it is obvious that the "sale" offense may be committed without the aider and abettor having actual or constructive possession."].)

b. The Act does not permit appellant to eliminate the jury's finding that he committed the offense of transportation

In addition to Health and Safety Code section 11379 lacking possession as an essential element, the Act provides no procedural mechanism for disregarding the jury's valid finding that all of the elements of transportation were met at the time of his conviction. Appellant concedes that his 2007 conviction for felony transportation was final long before he petitioned under Penal Code section 1170.18, and retroactive application of

the Legislature's amendment "could never result in [the] reduction of the crime to a misdemeanor." (AOBM 39-40.) Further, unlike Penal Code sections 495.5 and 490.2, Health and Safety Code section 11377 does not incorporate other drug convictions like transportation. Thus, in order to conclude that appellant merely possessed, rather than transported, the methamphetamine at the time of his offense, he would need to demonstrate not only that he actually or constructively possessed the methamphetamine, but also that he did *not* transport the methamphetamine. Essentially, adopting appellant's interpretation would require him to prove that he did not commit the crime of transportation, despite the fact that the jury already found that he did so beyond a reasonable doubt. The Act does not offer any procedure that would accommodate such revisionist history.

Admittedly, some of the amended property crimes under the Act did change the definition of some commercial burglary and theft offenses. Penal Code section 459.5, for example, was added by the Act to change some forms of commercial burglary to misdemeanor shoplifting. "Notwithstanding Section 459, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars." (Pen. Code, § 459.) Thus, for a defendant who had previously been convicted of commercial burglary under Penal Code section 459, if the value of the property was $950 or less, the Act explicitly permits the conversion of that felony burglary conviction to a misdemeanor shoplifting conviction, regardless of the fact that a jury previously found that all of the elements of burglary were satisfied. The Act specifically contemplated such a transformation. By contrast, because the Act did not redefine possession to encompass crimes like transportation or possession for sale, appellant is

left with no procedure to modify his conviction—and disregard the jury's findings in the process.

Appellant argues *People v. Bush* (2016) 245 Cal.App.4th 992, supports his interpretation that he can convert his transportation conviction to a possession conviction. (AOBM 42-46.) In *Bush*, the defendant was convicted of theft from an elder, under Penal Code section 368, subdivision (d). (*Id.* at p. 995.) He petitioned for relief under Proposition 47, and was denied. The Court of Appeal affirmed, finding that not only was section 368 not one of the specified offenses eligible under Penal Code section 1170.18, it was not included in the new definition of "theft" in Penal Code section 490.2, subdivision (a), because section 368 remained a wobbler under amended Penal Code section 666. (*Id.* at pp. 1002, 1004-1005.)

Appellant argues that whereas Bush's crime still constituted a wobbler even after the enactment of Proposition 47, the Legislature "executed a significant clarification" to the transportation statute before the electorate enacted the Act that would render his crime a simple possession offense. (AOBM 45-46.) But as stated *ante*, the Legislature's amendment adding an intent to sell element to Health and Safety Code section 11379 was *not* made retroactive, and the Act was not drafted in a way as to permit appellant to make the legislative amendment retroactive to his conviction. Furthermore, for a crime to be reduced to a misdemeanor, it must have qualified as a misdemeanor under the Act at the time of the offense. Appellant's crime still constituted a felony transportation offense in 2007, regardless of the Legislature's subsequent amendment. Finally, drug possession offenses, unlike the property offenses, were not redefined to incorporate any other unenumerated drug offenses. *Bush*, which involves the new definition of larceny, has no relevance to appellant's case, where "possession" was not redefined to include transportation.

3. Converting Appellant's Conviction to a Misdemeanor Based on the Legislature's 2014 Amendment Would Deprive the Prosecution of the Opportunity to Prove That He Had the Intent to Sell

Even if appellant were correct that the electorate implicitly was aware of and incorporated the 2014 amended Health and Safety Code section 11379 into the Act, he would receive a profoundly unfair windfall if his transportation conviction were reduced to a misdemeanor because he was convicted before an intent to sell was required. As explained *ante*, the Legislature's 2014 amendment to Health and Safety Code section 11379 adding an intent to sell element did not take effect until January 1, 2014, and the change was not made retroactive. Implementing appellant's interpretation of the Act would deprive the prosecution of the opportunity to prove appellant is guilty of the post-2014 version of section 11379.

When a statutory amendment adds an element to a crime that did not exist when a defendant was tried, the People are entitled to an opportunity to prove the missing element beyond a reasonable doubt. (*People v. Figueroa* (1993) 20 Cal.App.4th 65, 71-72.) Although the facts in the current record may not necessarily support a finding that appellant had the intent to sell the bindle of methamphetamine found at his feet, providing the People with the opportunity to prove that element would be necessary. (See *People v. Balderas* (1985) 41 Cal.3d 144, 199, fn. 25 ["Now that both parties are aware of the importance of the intent issue, both must have the opportunity to introduce all evidence at their command on that issue"].) However, remand for retrial is inappropriate where, as in appellant's case, a valid judgment of conviction has been final for several years. (*In re Estrada* (1965) 63 Cal.2d 740, 745.)

This Court addressed a related issue recently in *People v. Conley* (2016) 63 Cal.4th 646. In *Conley*, the defendant was sentenced under the

Three Strike law. While his appeal was pending, the electorate enacted the Three Strikes Reform Act of 2012, which included a resentencing provision very similar to that created by Proposition 47. The defendant argued that because his judgment was not final when the Reform Act was enacted, he was entitled to automatic resentencing. (*Conley*, *supra*, 63 Cal.4th at pp. 655-656.) This Court disagreed, reasoning that the Reform Act expressly addressed the question of retroactivity by creating Penal Code section 1170.126, the "sole purpose of which is to extend the benefits of the Act retroactively." (*Id.* at p. 657.)

In its analysis, this Court recognized a glaring issue that would arise with the pleading requirements set forth in the Reform Act if the new laws applied retroactively to non-final judgments. Applying the Reform Act automatically to defendants with non-final judgments would skirt the pleading and proof requirements and deny prosecutors an opportunity to prove the disqualifying factors. "Unless defendants were to be resentenced solely based on the existing trial court record—leaving the prosecution without the opportunity to plead and prove the presence of disqualifying factors or offenses that have become newly relevant under the Act—trial courts presumably would have to permit prosecutors to hold mini-trials for the sole purpose of determining whether, for example, the defendant's offense of conviction involved arming with a firearm or an intent to cause great bodily injury." (*Conley*, *supra*, 63 Cal.4th at p. 660.) But this Court determined that single-issue trials were not the system the voters intended to create, and concluded that the Reform Act required all inmates—with both final and non-final judgments— to seek relief under Penal Code section 1170.126. (*Id.* at pp. 660-661.)

In this case, as in *Conley*, appellant wishes to use the Act to receive a retroactive benefit to his conviction and sentence. And like *Conley*, the People in this case have already proven all of the elements of the crime that

were necessary at the time of the conviction. Even assuming it were necessary for the People to prove that appellant also had the intent to sell in order to avoid converting the conviction to a misdemeanor possession offense, they would be afforded the opportunity to prove that fact in a single-issue trial. (*Conley*, *supra*, 63 Cal.4th at pp. 660; citing *People v. Figueroa*, *supra*, 20 Cal.App.4th 65.) And like *Conley*, it is "difficult to escape the conclusion that the Act does not address the complexities involved" with requiring the People to prove additional elements of the transportation offense in order to avoid a reduction to a possession offense because "the electorate did not contemplate that these provisions would apply." (*Id.* at pp. 660-661.)

4. Reducing Appellant's Transportation Conviction to a Duplicate Simple Possession Conviction Would Provide Him with an Additional Windfall Under Penal Code section 954

Appellant's interpretation of the Act would provide him with an immediate windfall by converting his felony transportation offense to a misdemeanor simple possession offense. But applying appellant's interpretation of the Act would also provide him with an additional windfall under Penal Code section 954. By attempting to use the Act to convert appellant's transportation conviction to a simple possession conviction, Penal Code section 954 would also permit him to strike one of his duplicated simple possession convictions.

Under Penal Code section 954, "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different of the same class of crimes or offenses, under separate counts . . . [and] the defendant may be convicted of any number of the offenses charged . . . ." Penal Code section 954 only "authorizes multiple convictions for different or distinct offenses," *not* multiple convictions for the same crime for the

same act. (See *People v. Vidana* (Aug. 18, 2016, S224546) __ Cal.4th __, 2016 WL 4395674, [p. 24].)

Here, appellant was already charged and convicted of simple possession of methamphetamine under count 2. If his transportation conviction were also converted into a simple possession conviction, appellant would receive an *additional* possession conviction for the same bindle of drugs. Under Penal Code section 954, one of his two simple possession conviction could then be stricken since he would be convicted of the same offense for the same act. (*People v. Vidana*, *supra*, __ Cal.4th __ [pp. 3, 25]; see also *People v. Moran* (1970) 1 Cal.3d 755, 763 ["If the evidence supports the verdict as to a greater offense, the conviction of that offense is controlling, and the conviction of the lesser offense must be reversed"].) This would constitute two windfalls for appellant: converting his felony transportation to a misdemeanor under the Act, and then striking it altogether under Penal Code section 954. The electorate did not contemplate, nor did the Act address, such unintended consequences that would arise from the application of appellant's interpretation of the statute. Considering that courts must avoid interpreting statutes in a way that would produce absurd and unreasonable consequences that the electorate did not intend (*People v. Mendoza* (2000) 23 Cal.4th 896, 907-908), the complicated procedural contrivances that become necessary to implement appellant's interpretation of the law compel the conclusion that his interpretation is wrong.

C. Applying Appellant's Proposed Rule Broadly to Any Felony Offense That Contains Facts That Satisfy the Elements of One of the Act's Enumerated Offenses Would Lead to Unintended Consequences and a Flurry of Litigation

Appellant's rule of broad application can be summarized as follows: Proposition 47 allows relief for any felony conviction which involves facts

that appear to satisfy the elements of any of the misdemeanor offenses listed in Penal Code section 1170.18. (AOBM 1, 13-14.) The problem with appellant's proposed rule is that it would lead to absurd results and would cause a flurry of litigation over crimes that the electorate did not intend for Proposition 47 to affect. The Act was never intended to be applied to Health and Safety Code section 11379 or other unenumerated offenses that were not redefined by the language found in Penal Code sections 459.5 and 490.2. By attempting to extract misdemeanor offenses from unenumerated felonies, the Act would require that trial courts find elements that were not required by the original offense, while also denying the existence of elements that were already found true beyond a reasonable doubt. Nonetheless, appellant claims broadly that Proposition 47 allows relief for any felony conviction that satisfied the elements of any of the enumerated misdemeanor offenses. (AOBM 13-14.) Such a broad, sweeping rule is untenable.

Extrapolating appellant's proposed rule to other nonserious and nonviolent drug crimes reveals the absurd consequences of his interpretation. The offense of cultivation of marijuana, charged under Health and Safety Code section 11358, provides an instructive example. According to appellant's rule, if a person were convicted of section 11358, and the record of conviction demonstrated that the person also possessed marijuana while he or she cultivated the marijuana, that person would be eligible for resentencing because the misdemeanor offense of unauthorized possession of marijuana, charged under Health and Safety Code section 11357, could be factually parsed from the cultivation offense. But section 11358 was not mentioned in the Act. (See Act, §§ 1-18.) Moreover, "[c]ultivation requires more than simple possession; it includes planting, cultivating, harvesting, drying and processing marijuana. (Health & Saf. Code, § 11358.)" (*People v. Sharp* (2003) 112 Cal.App.4th 1336, 1340.)

But applying appellant's rule, persons convicted of felony cultivation would receive the benefit of the Act and see their felony reduced to a misdemeanor possession offense. One reviewing court has already concluded that persons convicted of section 11358 are not similarly situated to persons convicted of section 11357 who are eligible under the Act, because persons convicted of different crimes are not similarly situated for equal protection purposes. (*People v. Descano* (2016) 245 Cal.App.4th 175, 182.) As that court noted, "[d]efendant was convicted of a different crime that those the people of the State of California, through the initiative process, and the Legislature, through the enactment of Penal Code section 1170.18, have deemed eligible for resentencing." (*Id.* at p. 185.)

Appellant's broad rule would also encompass many other drug offenses, including possession with intent to manufacture methamphetamine, which is charged under Health and Safety Code section 11383.5, and is not included in the Act. (See Act, §§ 1-18.) Subdivision (e) of that section provides in relevant part: "[a]ny person who possesses essential chemicals sufficient to manufacture hydriodic acid or a reducing agent, with the intent to manufacture methamphetamine, is guilty of a felony...." (Health and Saf. Code, § 11383.5, subd. (e).) Even though the Act did not contemplate the modification of the crime of manufacture of methamphetamine, under appellant's rule, if the manufacture had also involved the possession of enough methamphetamine for personal use, that person would be eligible for a reduction of his felony conviction to a misdemeanor.

Because appellant's proposed rule has no limit to the types of crimes that can be swept into its fold, the rule could conceivably be twisted into the absurd. Taken to its logical extreme, appellant's broad rule could be applied to all nonserious and nonviolent offenses that, like transportation of methamphetamine, do not contain possession of a controlled substance as

an element of the offense, but involve facts that potentially meet the elements of drug possession. For instance, if a person were to slaughter a horse for human consumption, a felony offense in violation of Penal Code section 598c, that person would not be eligible under the Act to reduce his or her prison term of "16 months, or two or three years." (Pen. Code, § 598c, subd. (c).) Under appellant's broad rule, however, if the facts in the record of conviction revealed that the person possessed a usable amount of methamphetamine in his pocket while he slaughtered the horse for human consumption, courts tasked with evaluating petitions under Penal Code section 1170.18 could later parse the possession offense from the horse slaughter offense, and reduce the felony to a misdemeanor. Much like appellant's transportation offense, even though possession of methamphetamine is not an element of the crime of horse slaughter for consumption, appellant's proposed rule would cause the Act to convert an unrelated crime to a misdemeanor that the electorate never intended to change.

Considering the almost endless number of nonserious and nonviolent felonies in the Penal Code, appellant's broad rule would burden the trial courts with an inordinate amount of litigation of cases that incidentally involved drug possession. To hold now that Proposition 47 covers pre-2014 convictions under Health and Safety Code section 11379 would defy the voters' intent, would open up litigation for other unrelated offenses, and would create dangerous precedent for the scope of future criminal initiatives. "[The court] may not properly interpret the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less." (*People v. Park, supra*, 56 Cal.4th at p. 796, internal citations omitted; accord, *People v. Johnson* (2015) 61 Cal.4th 674, 682.) Accordingly, the only reasonable interpretation of Proposition 47 is that it does not impact Health and Safety Code section 11379, either

expressly or impliedly, nor any other offense that incidentally involved drug possession or other crimes enumerated in the Act. As there is no evidence of an intent for the Act to affect transportation of methamphetamine or other unrelated offenses, this Court should not rewrite the statutes to include them. (See *Guzman*, *supra*, 35 Cal.4th at p. 587.)

CONCLUSION

Based on the arguments above, respondent respectfully requests this Court affirm the Court of Appeal's judgment in full.

Dated: August 31, 2016

Respectfully submitted,

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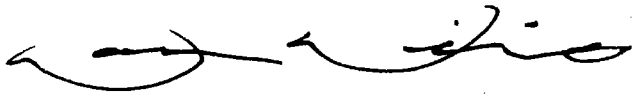

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CERTIFICATE OF COMPLIANCE

I certify that the attached Answer Brief on the Merits, uses a 13 point Times New Roman font and contains 12,784 words.

Dated: August 31, 2016

KAMALA D. HARRIS
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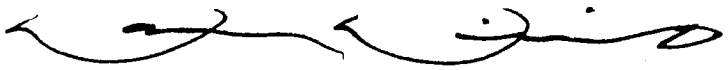

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DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **People v. Mario Martinez** Case No.: **S231826**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On August 31, 2016, I served the attached **Answer Brief on the Merits,** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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and, furthermore I declare, in compliance with California Rules of Court, rules 2.251(i)(1)(A)-(D) and 8.71 (f)(1)(A)-(D), I electronically served a copy of the above document on August 31, 2016, to Appellate Defenders, Inc.'s electronic service address eservice-criminal@adi-sandiego.com; to Sylvia W. Beckham, Appellant's attorney's electronic service address by 5:00 p.m. on the close of business day at beckham_law@cox.net and to Kevin J . Lane, Court Administrator, Fourth Appellate District, Division Two via TrueFiling electronic filing system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 31, 2016, at San Diego, California.

L. Hernández
Declarant

L. Hernández
Signature

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