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

APPELLANT'S REPLY BRIEF ON THE MERITS

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Relying on the plain meaning of the words used in Penal Code section 1170.18, the well-settled principle that the electorate is presumed to know the law, and the electorate's stated intent to reduce sentences associated with various nonserious and nonviolent theft and drug offenses, appellant asserts the trial court erred when it found appellant's 2007 transportation conviction ineligible for Proposition 47 resentencing. Respondent disagrees. She reasons the statute limits application of Proposition 47's recall and resentencing procedures to convictions of the specifically-listed code sections – of which transportation is not one; she

reasons nothing in the new statute allows appellant to negate the jury's transportation conviction; she complains following appellant's interpretation would deprive the government of its ability to prove appellant intended to sell the methamphetamine when he possessed it; and she asserts appellant's understanding of the statutory language would create absurd results. Statutory language contradicts respondent's arguments; and respondent's broad characterization of appellant's position is incorrect. Appellant urges this court to follow the actual language used by the electorate and grant appellant the resentencing relief requested.

PENAL CODE SECTION 1170.18 AUTHORIZES RECALL AND RESENTENCING FOR A CONVICTION THAT WOULD HAVE BEEN A MISDEMEANOR HAD THE LAWS CREATED BY PROPOSITION 47 BEEN IN EFFECT AT THE TIME THE CONVICTION AT ISSUE OCCURRED.

THE STATUTE DEFINES ELIGIBILITY FOR RECALL AND RESENTENCING NOT ON THE CODE SECTION OF THE CONVICTION BUT BASED ON THE UNDERLYING CONDUCT OF THE OFFENSE.

BECAUSE THE ACTS UNDERLYING APPELLANT'S TRANSPORTATION CONVICTION WOULD AMOUNT ONLY TO A MISDEMEANOR UNDER THE LAWS CREATED BY PROPOSITION 47, RESENTENCING IS AUTHORIZED.

Appellant and respondent agree that the recall and resentencing eligibility consideration at issue in this case is controlled by Penal Code[1] section 1170.18, subdivision (a). That section provides:

> 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 Sections 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act.

(§ 1170.18, subd. (a).) Well-settled rules of statutory interpretation guide the analysis how to implement Proposition 47's resentencing provisions set forth in this subdivision.

In the appellant's Opening Brief on the Merits, hereinafter "ABOM," appellant demonstrated how the plain language of this statute directs the court to assess eligibility for recall and resentencing based on the underlying conduct of the conviction at issue and to answer the question whether, based on that conduct, defendant would have been guilty of a misdemeanor under the act had the act been in effect at the time of the offense. (ABOM, pp. 19-46.) Respondent claims eligibility is based on the

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

assessment whether the code section defendant has been convicted of violating is one of the code sections of the offenses added or amended by Proposition 47. (RBOM, pp. 12, 15.) But respondent's position would require this court to rewrite that statute. Such rewriting is the province of the Legislature, or the electorate, and not this court.

And respondent's position is illogical in light of the fact two of the code sections set forth in Proposition 47 did not exist before the electorate passed this initiative, namely section 459.5 and 490.2. How can eligibility be based on violation of a code section that did not exist at the time the conviction occurred? Respondent also raises arguments that are not supported by the statutory language at issue and are not supported by the facts of the case. Appellant urges the court to reject respondent's interpretation.

A. Respondent's Position That Recall And Resentencing Eligibility Is Based On Whether Appellant's Count Of Conviction Appears In The List Of Crimes In Section 1170.18, Subdivision (a) Is Unpersuasive In Light Of Principles Of Statutory Construction And The Statutory Language At Hand.

1. It Is A Fundamental Tenant Of Statutory Construction That, When Interpreting A Statute, A Court Cannot Add Language That The Lawmaker Did Not Include. Appellant Urges This Court To Reject Respondent's Interpretation Which Would Require Rewriting The Statute.

Respondent agrees it is a fundamental rule of statutory construction that "insert[ing] additional language into a statute violate[s] the cardinal rule of statutory construction that courts must not add provisions to statutes. [Citations.] 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. [Citation.]" (*People v. Guzman* (2005) 35 Cal.4th 577, 587; Respondent's Brief on the Merits, hereinafter "RBOM," p. 24.)

> It is true, of course, that we occasionally have used the concept of drafters' error in applying statutes. However, we "do[ ] not lightly assume drafting error...." [Citation.] "Consistent with the separation of powers doctrine (Cal. Const., art. III, § 3), we have previously limited ourselves to relatively minor rewriting of statutes and, even then, only resorted to that drastic tool of construction when it has been obvious that a word or number had been erroneously used or omitted. [Citations.]" [Citation.] Although we may partially rewrite a statute "when compelled by necessity and supported by firm evidence of the drafters' true intent [citation], we should not do so

> when the statute is reasonably susceptible to an interpretation that harmonizes all its parts without disregarding or altering any of them." [Citation.] We follow this restrained approach to conform to the "necessary limitations on our proper role in statutory interpretation." [Citation.]

(*Ibid.*, internal citations omitted.)

Respondent does not argue that there is a drafting error in Penal Code section 1170.18, subdivision (a). Instead, respondent asserts that only convictions of specified offenses qualify for resentencing under Proposition 47. That is, only convictions of the section 1170.18, subdivision (a)'s listed statutory offenses of Health and Safety Code section 11350, 11357, or 11377, or Penal Code section 459.5, 473, 476a, 490.2, 496, or 666 are eligible for recall and resentencing. (RBOM, pp. 5-6, 15, 20.)

Respondent reasons that because appellant's Health and Safety Code section 11379 conviction is not included in this list, it is not eligible for recall and resentencing under Proposition 47. (RBOM, pp. 23-24.) Respondent's interpretation – that the list set forth in section 1170.18, subdivision (a) defines recall and resentencing eligibility by the statutory count of conviction – would require a rewriting of the statute; appellant urges this court to reject respondent's understanding.

Section 1170.18, subdivision (a) authorizes and provides for an evidentiary-based assessment for the court to follow when determining

eligibility for resentencing; it directs the trial court to *resentence* eligible petitioners in accordance with the listed code sections. Based on the plain language of the statute as it is actually written, the listed code sections follow and must therefore be understood to apply to the word "resentencing".

> 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 judgement 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 Sections 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act.

(§ 1170.18, subd. (a), underscore added.)

Respondent's interpretation, by contrast, would require different statutory language in order to be valid. Instead of the evidentiary-based definition used by the electorate for the court to follow to assess eligibility for resentencing, respondent interprets the statute as if it provides a specific list of code section *convictions* that are eligible for resentencing. If respondent's interpretation were the correct one, the statute would read, with underscore added:

> A person currently serving a sentence for a conviction, whether by trial or plea, of Sections 11350, 11357, or 11377 of the Health and Safety Code, or Sections 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, may petition for a recall of sentence before the trial

court that entered the judgement of conviction in his or her case to request resentencing.

The underscore shows how respondent's interpretation would require a different statutory presentation. This list of offenses created or amended by Proposition 47 would necessarily have to be moved. And, under respondent's interpretation, the list would modify the term "conviction" instead of the term "resentencing." Such rewriting is not appropriate. The electorate specifically included the list of statutes at the end of this new subdivision, not at the beginning. And, it specifically included the list not to define eligibility for resentencing but to explain how "resentencing" is to occur.

Respondent further fails to address two arguments which support appellant's understanding of the statutory language. First, appellant pointed out that if this specific statutory list at the end of subdivision (a) set forth which convictions are eligible for retroactive Proposition 47 relief, the electorate would have repeated the list in subdivision (f) to define which convictions are eligible for redesignation as a misdemeanor even where the defendant has completed his or her sentence. (ABOM, pp. 21-22; see *Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276 [statutes not read in isolation but with reference to entire law].) While respondent's brief references that these pages contain essentially appellant's argument that the

new statute calls for an assessment of the underlying conduct to determine resentencing eligibility (RBOM, p. 17), it notably does not address this crucial, logical point.

Second, appellant pointed out how the linguistic structure of the phrases shows the statutory list modifies the parameters of resentencing, not eligibility for resentencing. (ABOM, pp. 22-23.) Notably, respondent does not answer this logical point either.

There is also a third argument which demonstrates the error of respondent's position. If the list of statutes present in subdivision (a) was meant to define eligibility for recall and resentencing by the code section of conviction, it would not be repeated again in subdivision (b) which comes into play only after the court has determined the conviction at issue is eligible for recall and resentencing consideration. As in subdivision (a), the statutory list in subdivision (b) describes how resentencing is to occur. In subdivision (a), the electorate used the phrase "in accordance with" before the statutory list whereas in subdivision (b) it used the phrase "pursuant to" before the statutory list. These phrases carry equivalent meanings and direct the court that the resentencing is guided by the penal structure set forth in the delineated new and amended statutes.

And there is a fourth argument. If the list defined eligibility for

recall and resentencing, it would necessarily include section 459. As even respondent concedes, burglary convictions may be eligible for recall and resentencing under Proposition 47. (RBOM, p. 32.) But the list does not include section 459. To the contrary, it includes section 459.5, a new statutes that provide for new misdemeanor sentences in the case of certain types of burglaries.

2. Respondent's Claim That An Uncodified Provision Of Proposition 47 Creates Eligibility For Retroactive Resentencing Based On The Identification Of The Count Of Conviction Should Be Rejected.

Respondent relies on an uncodified section of Proposition 47 to assert the electorate has defined eligibility for recall and resentencing by reference to the specific code section of the count of conviction. From this premise, respondent then jumps to the maxim *expressio unius est exclusio alterius* and reasons that because the code section of appellant's count of conviction – Health and Safety Code section 11379 – is not included in list of offenses created or amended by Proposition 47, it is not eligible for recall and resentencing. (RBOM, pp. 15-17.)

Certainly the preamble of Proposition 47 is relevant to this court's interpretation of section 1170.18, subdivision (a). As this court has recognized,

> [b]ecause the most reasonable interpretation of a provision may be reflected, in part, by evidence of the enacting body's intent beyond the statutory language itself, in its history and background [citation], we also consider the measure as presented to the voters with any uncodified findings and statements of intent. In considering the purpose of legislation, statements of the intent of the enacting body contained in a preamble, while not conclusive, are entitled to consideration. [Citation.] Although such statements in an uncodified section do not confer power, determine rights, or enlarge the scope of a measure, they properly may be utilized as an aid in construing a statute. [Citations.]

(*People v. Canty* (2004) 32 Cal.4th 1266, 1280-1281 [review of uncodified findings and declarations section of Proposition 36, enacted in 2000, to assist in resolution of the new statute's eligibility language whether misdemeanor conviction is "related to the use of drugs" under section 1210.1, subdivision (b)(2)]; see also *People v. Floyd* (2003) 31 Cal.4th 179 [operation of savings clause contained in the uncodified section of Proposition 36, enacted in 2000, means sentencing provisions of new law did not apply to cases where judgement had been imposed but was not yet final at the time the electorate created the new law.])

The uncodified section respondent relies upon does not resolve the issue as respondent claims it does.

The section respondent references, section 3(4) is part of a general overview of the electorate's reasons for enacting and amending the laws set forth in Proposition 47. It states:

Sec. 3. Purpose and Intent.

In enacting this act, it is the purpose and intent of the people of the State of California to:

(1) Ensure that people convicted of murder, rape and child molestation will not benefit from this act.

(2) Create the Safe Neighborhoods and Schools Fund, with 25 percent of the funds to be provided to the State Department of Education for crime prevention and support programs in K-12 schools . . . .

(3) Require misdemeanors instead of felonies for nonserious crimes like petty theft and drug possession, unless the defendant has prior convictions for specified violent or serious crimes.

(4) Authorize consideration of resentencing for anyone who is currently serving a sentence for any of the offenses listed herein that are now misdemeanors.

(5) Require a thorough review of criminal history and risk assessment of any individuals before resentencing to en,sure that they do not pose a risk to public safety.

(6) This measure will save significant state corrections dollars on an annual basis . . . .

(Ballot Pamp., Gen. Elec. (Nov. 4, 2014) Proposition 47, § 3(4), p. 70; Historical and Statutory Notes, 32A Pt. 3 West's Ann. Gov. Code (2016 supp.) foll. § 7599, p. 163.)

Section 3(4) does not specifically explain how to determine whether a person "is currently serving a sentence for any of the offenses listed herein that are now misdemeanors." It tells the voter that the new law will

provide for resentencing consideration for the eligible cases – "anyone who is currently serving a sentence for any of the offenses listed herein that are now misdemeanors." Not surprisingly, this statutory overview prepared for the voters does not explicitly spell out how the court is to determine whether a person "is currently serving a sentence for any of the offenses listed herein that are now misdemeanors." Does the court look to the code section number of the conviction at issue and determine if that number corresponds to an offense in the list of statutes amended or created by Proposition 47? Respondent's answer is yes. (RBOM, p. 15 – if the code of conviction is not in the list of offenses, it is not eligible for recall and resentencing.)

But this approach makes no sense for several offenses that did not even exist until the electorate enacted Proposition 47. For example, before the new statutes were created, a defendant never suffered a section 459.5 shoplifting conviction and a defendant never suffered a section 490.2 petty theft conviction. It is impossible for a defendant to be serving a sentence for these offenses because they did not exist at the time the electorate voted on Proposition 47.

Importantly, based on the italicized text of the Proposed Law immediately following the uncodified sections, the voter would know that

sections 459.5 and 490.2 are newly added sections to the Penal Code and the voter would know a person could not have been convicted of these offense before the electorate passed Proposition 47. (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) Proposition 47, p. 70 [**Proposition 47** ¶¶ ". . . new provisions proposed to be added are printed in *italic type* to indicate that they are new."]

Any rational voter would know by application of basic logic that assessment of resentencing eligibility could not be made based on a bare comparison of the code section of the count of conviction at issue to the list of crimes added or modified by Proposition 47.

Instead of providing specifics of how eligibility for resentencing is to be determined, as respondent claims, uncodified Section 3(4) sets forth the electorate's intent as to how resentencing will occur. This section does so with a general, broad statement. Review shows this text is a shortened summary of recall and resentencing that will occur under Proposition 47, not a road-map how that recall and resentencing is to occur. That detail is set forth in the statute.

Notably, the section is similar to the summarizing text set forth by the Legislative Analyst and discussed in the ABOM, pages 48-51, but not addressed in respondent's brief. "**Proposal** . . . The measure also allows

certain offenders who have been previously convicted of such crimes to apply for reduced sentences." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) analysis of Prop. 47 by Legis. Analyst, p. 35.) "**Resentencing of Previously Convicted Offenders** This measure allows offenders currently serving felony sentences for the above crimes to apply to have their felony sentences reduced to misdemeanor sentences." (*Id.* at p. 36.)

Under respondent's interpretation – only statutory convictions which are included in the list set forth at the end of section 1170.18, subdivision (a) are eligible for recall and resentencing – a section 459 commercial burglary based on an illegal entry to commit a low-level theft offense could never be eligible for recall and resentencing under Proposition 47. This is because a section 459 conviction is not in the list of new or amended offenses. And yet much later in its brief (RBOM, p. 32), when discussing a related subject, respondent acknowledged some commercial burglary convictions are eligible for recall and resentencing. Such logical inconsistency demonstrates respondent's position is not sound.

The logical outcome of respondent's position: (1) that it is impossible for a section 459.5 or section 490.2 conviction to be eligible for recall and resentencing because these crimes did not exist before Proposition 47, and (2) that a commercial burglary conviction would never

be eligible for recall and resentencing because the statutory section of that crime is not in the list, demonstrates respondent's interpretation presents an unworkable reality.

And more importantly, respondent's approach is directly contradicted by the statutory language. It is the enacted language of section 1170.18, subdivision (a) which told the electorate and informs the court how to determine if defendant is "anyone who is currently serving a sentence for any of the offenses listed herein that are now misdemeanors." (Historical and Statutory Notes, *supra*, § 3(4) at p. 163.) It is the enacted language which directs the inquiry to be a factually-based one: is the person "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...." (§ 1170.18, subd. (a).)

3. Statutory Language Refutes Respondent's Claim That Eligibility Determination Of Recall And Resentencing Under Section 1170.18, Subdivision (a) Is Different For Property And Drug Offenses.

Respondent next asserts that there is a fundamental difference between the property and drug offenses added or amended by Proposition 47. Because of this fundamental difference, a factually-based assessment for Proposition 47 recall and resentencing eligibility is necessary for some

property crimes but not for any drug crimes. (RBOM, pp. 17-23.) Essentially respondent's position boils down to: because the factually-based eligibility assessment is necessary for most property crimes, it is authorized. Because the factually-based eligibility assessment is not necessary for any drug crimes, it is not authorized.

A sober review of section 1170.18, subdivision (a) shows it does not provide different eligibility tests based on whether the conviction at issue is a drug offense or a property offense. It sets forth the same eligibility test for all convictions. And contrary to respondent's claim, the new and revised crimes of Proposition 47 do not create recall and resentencing eligibility tests. Only section 1170.18, subdivision (a) delineates the proper test.

It is important to note that although the factually-based eligibility assessment for Proposition 47 recall and resentencing will be much less commonly made for a drug crime than for a property crime, it is nevertheless still appropriate for situations such as presented in the instant case.

Respondent's position is unpersuasive.

4. Because The Law Presumes The Electorate Which Enacted Proposition 47 Knew About The Legislature's Earlier Clarification Of The Elements Defining Health And Safety Code Section 11379 And The Resulting De Facto Change To Health And Safety Code Section 11377, There Was No Need For Proposition 47 To Affirmatively Reference This Change.

In the opening brief, appellant pointed out that when the electorate enacted Proposition 47, the simple drug possession crime of Health and Safety Code section 11377 encompassed not only basic acts of possession of contraband but, as a result of the Legislature's recent amendment of Health and Safety Code section 11379, it became the exclusive statute to criminalize acts of transportation of contraband unless the government had proven the transporter also had an intent to sell the contraband. Because the law presumes the electorate to be aware of these changes – in essence, a recodification of the crime of basic transportation so it is no longer a straight felony and can now only be prosecuted as a misdemeanor under Health and Safety Code section 11377, the electorate necessarily incorporated the changes in its understanding of Health and Safety Code section 11377 as amended by Proposition 47. As a result, because appellant's conviction involved only basic transportation without any intent to sell, it is eligible for recall and resentencing. (ABOM, pp. 28-38.)

Respondent agrees as she must that the electorate is "presumed to be

aware of existing laws and judicial construction thereof." (*In re Lance W.* (1985) 37 Cal.3d 873, 890, fn. 11; RBOM, p. 23.) This principle is a well-settled one. "The drafters of an initiative and the voters who enacted it are presumed to have been aware of the existing statutory law and its judicial construction. [Citations.]" (*People v. Superior Court* (*Gevorgyan*) (2001) 91 Cal.App.4th 602, 610, disapproved of on other grounds by *Guillory v. Superior Court* (2003) 31 Cal.4th 168, 178, fn. 5; *People v. Weidert* (1985) 39 Cal.3d 836, 844 ["The enacting body is deemed to be aware of existing laws and judicial constructions in effect at the time legislation is enacted"].)

But respondent then dispenses with this presumption and turns this time-honored principle on its head when she reasons: because the electorate did not include any mention of the clarification of Health and Safety Code section 11379, and the resulting expanded possession crime, when it enacted Proposition 47, it intended to exclude pre-2014 Health and Safety Code section 11379 convictions from Proposition 47 recall and resentencing eligibility. (RBOM, pp. 23-25.) Respondent misunderstands the presumption at play. Only if the electorate affirmatively excluded the pre-2014 Health and Safety Code section 11379 conviction from recall and resentencing eligibility would appellant's conviction be precluded from Proposition 47 recall and resentencing consideration. This the electorate

did not do.[2] Absent the affirmative exclusion outlined above, the new law applies to appellant's conviction.[3]

In the ABOM, appellant discussed this court's *People v. Shabazz* (2006) 38 Cal.4th 55 opinion and showed how it supported appellant's position. (ABOM, pp. 33-35.) There, this court found the doctrine of transferred intent applicable to the criminal-street-gang special circumstance allegation enacted by Proposition 21 (the Gang Violence and Juvenile Crime Prevention Act of 1998) in 2000. (*Shabazz, supra*, 38 Cal.4th at p. 66.) To support the decision, this court found the electorate was presumed to know about the doctrine of transferred intent when it enacted Proposition 21 (*id.* at p. 65, fn. 8), the Proposition contained no affirmative language preventing application of this doctrine (*id.* at p. 64),

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[2]The electorate knew how to exclude persons from Proposition 47 recall and resentencing consideration. (§ 1170.18, subd. (i) [recall and resentencing/designation provisions not applicable if defendant has a delineated "super strike" prior conviction or who must register as a sex offender].)

[3]Respondent asserts the electorate's failure to include Health and Safety Code section 11379 in this list of statutes set forth in section 1170.18, subdivision (a) evidences an intent not to include this conviction in offenses eligible for recall and resentencing. (RBOM, p. 24 "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." [italics original].) But as explained *infra*, this statutory list does not define eligibility. The absence of appellant's conviction from this list does not preclude relief.

there was no sound reason why the doctrine should not apply (*ibid.*), and application of the doctrine furthered the intent and purposes of the Proposition. (*Id.* at pp. 64-65.)

Respondent claims *Shabazz* does not "assist" appellant's argument (RBOM, p. 25) because in the instant situation: "there is no language to support the conclusion that the electorate intended to address Health and Safety Code section 11379 or other drug crimes generally with Proposition 47." (RBOM, p. 26.) With this claim, respondent exposes its misunderstanding of the presumption at issue.

Just as in *Shabazz*, where this court found "[n]othing in the language of this statute indicates an intent to exempt its provisions from the well-established transferred intent doctrine" (*Shabazz*, *supra*, 38 Cal.4th at p. 64), there is nothing in the language of the statutes created by Proposition 47 to indicate an intent to exempt pre-2014 Health and Safety Code section 11379 convictions from the recall and resentencing provision. And there is nothing in the language of the statutes created by Proposition 47 to indicate an intent not to follow the expanded understanding that Health and Safety Code section 11377 included possessory acts of transportation not for sale after the Legislature amended Health and Safety Code section 11379 in 2014. As in *Shabazz*, here, there is no sound reason why Proposition 47

recall and resentencing should not apply to appellant's minor transportation conviction. As in *Shabazz*, application of Proposition 47's recall and resentencing provision furthers the electorate's intent that nonserious and nonviolent drug crimes be punished as misdemeanors. Respondent's assertion *Shabazz* is unhelpful to appellant's position crumbles after reviewing this court's reasoning in that case.

B. Respondent's Procedural Arguments Are Unpersuasive In Light of Principles Of Statutory Construction And The Actual Facts Of This Case.

Respondent next makes a series of procedural arguments which reflect a misunderstanding of the relief appellant seeks. It appears respondent believes appellant seeks to convert his felony transportation conviction to a misdemeanor possession conviction, seeks to negate the jury's finding, and seeks to deny the prosecution the ability to prove appellant did have the intent to sell the small amount of methamphetamine found on the car floor in which appellant was riding, has not met his burden of proving eligibility, and promotes a resolution that would run afoul of section 954. (RBOM, p. 27.) Appellant will address the arguments in the order they have been presented.

At the outset, it is important to emphasize what appellant seeks. He seeks recall and resentencing of his transportation conviction under section

1170.18, subdivision (b). Contrary to respondent's claim, appellant is not trying to "convert" the transportation conviction to a possession conviction. The conviction the jury reached in 2007 would remain if the court grants appellant the relief he seeks. The structure and language of section 1170.18 provide no means by which to "convert" or "change" a conviction. Instead, and only, this statute provides for recall and resentencing. The conviction itself, reached by jury or by plea, remains. If appellant's conviction qualifies for recall and resentencing, and if the court thereafter finds appellant does not pose an uncreasonable risk of danger to public safety, the court will recall appellant's sentence and resentence him to a misdemeanor pursuant to [enumerated sections]." (§ 1170.18, subd. (b).) Section 1170.18 provides no authority to invalidate the conviction itself.

1. Respondent's Claim Appellant Would Not Have Committed Only A Misdemeanor Had Proposition 47 Been In Effect When Appellant Committed His Offense Misses A Key Fact.

In the second portion of the briefing, respondent takes a different tact and appears to acknowledge that the test for eligibility for recall and resentencing under Proposition 47 is a fact-based one which is made by asking whether, if the Act had been in effect when defendant committed his crime, the crime would be a misdemeanor. As respondent summarizes: "The Act requires that eligibility be based on whether the Act would have

rendered the crime a misdemeanor *when the crime was committed.*" (RBOM, p. 28, italics original.)

Respondent cites to a portion of appellant's brief and implies that appellant's core argument asserts he is eligible for recall and resentencing because, if appellant had "committed the acts he did after the electorate enacted Proposition 47 . . . his actions would constitute only a simple possession crime." (RBOM, p. 28.; ABOM, pp. 45-46.) Unfortunately, respondent has taken appellant's statement out of context and has missed text in prior pages where appellant delineated the proper test. (See ABOM, pp. 14-15, 19, 27, 28, 36, 40-41, 53-54.)

With respect to the context in which the quoted sentence is written, it is taken from a discussion of *People v. Bush* (2016) 245 Cal.App.4th 992. (ABOM, pp. 42-46.) The sentence respondent quoted answered a point specifically discussed in *Bush* and showed how the instant case differed from *Bush*, where the Court of Appeal had found defendant's section 368, subdivision (b) conviction not eligible for recall and resentencing under Proposition 47. (*Bush*, *supra*, at pp. 995-996.) On appeal, defendant in *Bush* contended his theft from an elder offense qualified for recall and resentencing under the electorate's newly created section 490.2 definition. (*Id.* at p. 1002.) Partly because a conviction under section 368 still retained

its wobbler status even after Proposition 47 became law, the *Bush* Court of Appeal rejected defendant's claim. (*Id.* at pp. 1004-1005.) The ABOM includes the sentence respondent has quoted to show how the transportation conviction in his case differs from theft from an elder offense in *Bush*. The ABOM did not include the quoted sentence to enunciate the proper test set forth by section 1170.18, subdivision (a).

Appellant agrees the test for eligibility is "whether defendant 'would have been guilty of a misdemeanor' had the new law been in effect at the time of the offense." (ABOM, p. 4.)

Respondent claims appellant is not eligible for recall and resentencing had the criminal statutes of Proposition 47 been in effect when appellant committed his transportation crime because the Legislature did not amend the transportation crime until 2014. (RBOM, pp. 28-29.) But respondent's reasoning misses a key fact and, as a result of this omission, is unpersuasive.

Before the electorate enacted Proposition 47, the Legislature had amended the transportation crime to ensure only transportation for sale would be criminalized under Health and Safety Code section 11379. This act necessarily expanded the understanding of the Health and Safety Code section 11377 possession offense so it now exclusively includes possessory

acts of transportation where there is no intent to sell the contraband, i.e., basic transportation with no intent to sell can no longer be prosecuted under Health and Safety Code sections 11377 and 11379; basic transportation can only be prosecuted under Health and Safety Code section 11377. When the electorate thereafter enacted Proposition 47, it revised Health and Safety Code section 11377. (See Ballot Pamp., Gen. Elec. (Nov. 4, 2014) Proposition 47, § 13, p. 73.) The language of this revised statute contains no text which addresses or changes the Legislature's earlier 2014 amendment to Health and Safety Code section 11379. Certainly, if it had wanted to, the electorate could have included language in the revised statute to show this possession crime did not encompass transportation of contraband for personal use. It did not, however. Therefore, the revised Health and Safety Code section 11377 of Proposition 47 necessarily encompasses the prior change made by the Legislature. Had Health and Safety Code section 11377, revised by Proposition 47, been in effect when appellant committed his offenses, he would have been guilty only of a misdemeanor. His transportation conviction is therefore eligible for recall and resentencing.

2. Because The Government Secured Convictions For Both Transportation And Possession Of Methamphetamine, And Because The Trial Court And The Court Of Appeal Recognized Both Crimes Were Based On The Same Act When They Stayed The Sentence For The Possession Offense Under Section 654, Respondent's Claim The Jury Never Determined Whether Appellant Possessed The Methamphetamine When He Transported It Fails.

Respondent claims there is a problem about how to convert appellant's valid transportation conviction to a misdemeanor possession conviction because the jury was not required to determine if appellant possessed the methamphetamine when he transported it. (RBOM, pp. 29-31.) Appellant is not arguing his transportation conviction needs to be converted to a different conviction. The transportation conviction remains. Appellant argues he is eligible for resentencing on this conviction.

It appears respondent is arguing that because the jury never determined whether appellant possessed the methamphetamine, the court cannot determine whether appellant is eligible for Proposition 47 recall and resentencing. In light of the facts of this case, respondent's initial conclusion is not supported.

While it is true that when determining guilt for a bare charge of transportation a jury is not required to determine if defendant possessed the contraband, such is not the situation in this case. Here, the government

charged appellant both with transportation and with possession. (C.T. pp. 3-5.) And the jury convicted appellant of both crimes. (Supp. C.T. pp. 1-2.) And the trial court ordered sentence for the possession count to be stayed under section 654 at the initial July 11, 2008 sentencing hearing. (Supp. C.T. pp. 20-21 [clerk's minutes], 22 [abstract of judgement]; R.T. p. 28.) And the Court of Appeal ordered the sentence for the possession count to be stayed under section 654 in the intermediate decision below after the trial court had failed to stay the sentence on the possession count following resentencing under Proposition 47. (Supp. C.T. p. 31; E063107 Slip Opn., p. 3.) And, the Attorney General conceded the sentence for the possession count should be stayed. (E063107 Slip Opn., p. 3; see generally *People v. Correa* (2012) 54 Cal.4th 331, 340, citing with approval *People v. Roberts* (1953) 40 Cal.2d 483, 491 [holding possession, sale, and attempt to transport heroin constitute only one act].)

Under the facts of this case, the jury determined appellant possessed the methamphetamine when he transported it. True, guilt for both offenses may be based on aiding and abetting liability, but an aider and abettor in is equally liable for the criminal acts as the direct perpetrator. (*People v. Lopez* (2011) 198 Cal.App.4th 1106, 1118.) Thus, despite the theory of liability, the jury nevertheless found appellant possessed the

methamphetamine when he transported it. This is not situation of aiding and abetting transportation of contraband which is exclusively in the possession of another. (See *People v. Rogers* (1971) 5 Cal.3d 129, 134.)

Even absent this jury verdict, the court is still equipped to determine appellant's eligibility for Proposition 47 recall and resentencing. Just as a court is equipped to determine eligibility for recall and resentencing under Proposition 47, for example, whether a burglary conviction at issue involved a commercial establishment (§ 459.5) or whether a receiving stolen property conviction at issue involved property with a value that did not exceed $950 (§ 496), the court here is equipped to determine eligibility for recall and resentencing under Proposition 47 – whether appellant intended to sell the methamphetamine when he transported it. No prior jury verdict on this new element is required for the court to execute its eligibility determination and determine whether the acts underlying the 2007 transportation offense would have been only been a misdemeanor under Health and Safety Code section 11377 as it was amended by Proposition 47, had that code section been in effect at the time of the 2007 offense.

3. Respondent's Claim That To Prove Eligibilty For Proposition 47 Recall And Resentencing Appellant Must Prove He Did Not Transport The Methamphetamine Has No Support In The Statutory Structure Enacted By The Electorate.

Without citation to any statute or case-law, respondent claims that for appellant to be eligible for recall and resentencing under section 1170.18, subdivision (a), appellant would have "to demonstrate not only that he actually or constructively possessed the methamphetamine, but also that he did *not* transport the methamphetamine." (RBOM, p. 32.) Respondent apparently bases this claim on the rationale that the jury validly found appellant guilty of the offense of transportation in 2007 and eligibility for Proposition 47 recall and resentencing of this valid conviction would disregard this valid verdict. To do so, respondent reasons, appellant must prove he is not guilty of the underlying conviction. (RBOM, pp. 31-33.)

Respondent is incorrect. Proposition 47 provides no such requirement for recall and resentencing eligibility. (§ 1170.18, subd. (a).)

All persons eligible for recall and resentencing under Proposition 47 and its newly enacted section 1170.18, delineated retroactive application, are serving a sentence for a valid felony conviction -- found either by jury or by a plea of guilty or nolo contendre. Appellant is not special in this

regard. As this court stated when it reviewed an equal protection argument with respect to Proposition 47:

> Persons resentenced under Proposition 47 were serving a proper sentence for a crime society had deemed a felony (or a wobbler) when they committed it. Proposition 47 did not have to change that sentence at all. Sentencing changes ameliorating punishment need not be given retroactive effect. " 'The Legislature properly may specify that such statutes are prospective only, to assure that penal laws will maintain their desired deterrent effect by carrying out the original prescribed punishment as written.'" (*People v. Floyd* (2003) 31 Cal.4th 179, 188, 1 Cal.Rptr.3d 885, 72 P.3d 820, quoting *In re Kapperman* (1974) 11 Cal.3d 542, 546, 114 Cal.Rptr. 97, 522 P.2d 657; see *People v. Mora, supra*, 214 Cal.App.4th at p. 1484, 154 Cal.Rptr.3d 837.) "The voters have the same prerogative." (*Floyd*, at p. 188, 1 Cal.Rptr.3d 885, 72 P.3d 820.) Here, the voters have given Proposition 47 some retroactive effect. Some persons originally sentenced as felons can receive the benefit of a favorable resentencing.

(*People v. Morales* (2016) 63 Cal.4th 399, 408–09.) Appellant is one of the persons entitled to receive the benefit of a favorable resentencing consideration because his transportation conviction qualifies under section 1170.18, subdivision (a).

4. Respondent's Assertion The People Were Deprived Of The Opportunity To Contest Appellant Had Not Satisfied His Burden To Prove Eligibility For Recall And Resentencing Is Incorrect. The Court Held A Hearing On The Issue, Which The Prosecutor Attended. The Prosecutor Raised No Objection To Appellant's Characterization That His Transportation Crime Was For Personal Use.

Citing *People v. Conley* (2016) 63 Cal.4th 646, respondent complains that if this court finds appellant's transportation conviction eligible for recall and resentencing under section 1170.18, respondent will be deprived of the opportunity to prove appellant had the intent to sell the methamphetamine when he transported it. (RBOM, pp. 34-36.) Respondent misunderstands the posture of this case and, as a result, presents an unsupported claim. A review of the record shows the People did, indeed, have ample opportunity to contest appellant's characterization his transportation of the methamphetamine was for personal use.

This case does not involve a request under *In re Estrada* (1965) 63 Cal.2d 740, to retroactively apply an ameliorative statute to a conviction that is not yet final. Indeed, appellant spent pages in the ABOM explaining how appellant does not make his request under this principle. (ABOM, pp. 39-42.) Further, unlike defendant in *Conley*, appellant here did not make his request ameliorative resentencing in a direct appeal from the underlying conviction.

Appellant made his request for recall and resentencing under the procedures set forth in section 1170.18. He filed a petition in pro per requesting resentencing. (C.T. pp. 26-28.) The government responded by filing a form, an opposition sheet with the bare claim "not eligible on Count 1". (C.T. pp. 29-30.) Defense counsel thereafter filed written points and authorities, pursing the position appellant repeated in the Court of Appeal and in this court as well. (Supp. C.T. pp. 25-38.) Thereafter, the trial court held a hearing on the question of appellant's eligibility for resentencing. (R.T. pp. 33-37; C.T. p. 31.)

At this hearing, appellant claimed his transportation offense qualified for recall and resentencing because:

> MR. KNIGHT: . . . it is fairly clear from the record that it was for personal use, and any transportation was just a transportation of methamphetamine for personal use and, therefore, because of that, because the transportation counts were modified just recently, had he been convicted today, he would have been convicted of possession for personal use.
>
> THE COURT: You believe that is why the statute would attach as if it were an 11377(a)?
>
> MR. KNIGHT: "Yes. And as the statute states in a number of areas, it should be literally construed and the resentencing provisions of 1170.18(a) are – do not list the crimes that would be eligible for resentencing. It simply says whether a person currently serving a sentence for a conviction whether by trial or plea would have been guilty of a misdemeanor under this act had it been in place.
>
> THE COURT: This act had it been in place?

MR. KNIGHT: Yes. And I understand that there is a difficult step in this because the fact that the transportation was modified after Mr. Martinez was convicted.

THE COURT: But before the act passed?

MR. KNIGHT: Yes. And because the act is presumed to have incorporated other charges, I don't think the expansive reading of the theft counts are – I don't think the expansive reading of the theft counts – I am sorry. Let me reword that. I don't think the theft counts are the only ones that are expansively read.

I think because the drafters are inferred to have understood that 11379 could also be for personal use, that is probably why they were saving words in 1170.18 by saying simply had they been convicted today, it would have been a misdemeanor.

(C.T. pp. 33-34.)

The government never objected to appellant's characterization that the transportation crime involved personal use and she never offered to present any evidence of intent to sell to contradict appellant's understanding of the crime. (R.T. pp. 33-34.) The People's one assertion in the entire hearing claimed "Proposition [sic] is very clear 11379 is precluded. And even if one could follow the legal jumps defense counsel is making to get 11379 included, it's still clear 1170.18 is not the way to remedy that particular situation that you're in." (R.T. p. 36.)

These facts show the People have, indeed, had a chance to prove appellant transported the methamphetamine with an intent to sell and thus did not qualify for recall and resentencing under section 1170.18. These

facts show the District Attorney affirmatively chose not to contest this factual description. "The prosecutor's silence during defense counsel's representations of these facts effectively forfeited the People's objection that defendant did not carry his burden. (*People v. Gerold* (2009) 174 Cal.App.4th 781, 784, 94 Cal.Rptr.3d 649; *People v. Huerta* (Sept. 21, 2016, No. E065365) ___ Cal.App.5th ___ [2016 WL 5118295, at p. 3].)

The government has not been deprived of an opportunity to contest appellant's claimed basis for Proposition 47 recall and resentencing eligibility. The government has, indeed, had a chance to present evidence. The fact the People chose not to do so at the hearing provided by the trial court does not preclude appellant's requested relief.

5. Respondent's Claim That Finding Appellant Eligible For Proposition 47 Recall And Resentencing Would Result In A Windfall Under Section 954 Is Incorrect.

Respondent next claims that if this court finds appellant's transportation conviction eligible for Proposition 47 recall and resentencing under section 1170.18, subd. (a), and if the trial court exercises its discretion, recalls appellant's felony sentence, and thereafter if the trial court imposes a misdemeanor sentence, appellant will receive an improper windfall under section 954. (RBOM, pp. 36-37.)

Respondent misunderstands what happens when the trial court

recalls and resentences the conviction. As discussed *infra* at the outset of section B., based on the statutory language of section 1170.18, subdivision (b), if the offense qualifies under subdivision (a), the court will resentence defendant for that conviction as if it were a misdemeanor. There is no language in the statute allowing for the court to convert or change the conviction at issue. So, if a second-degree burglary conviction qualifies for resentencing, the conviction remains under section 459, but the court merely orders a misdemeanor sentence for that conviction. And here, if the court grants Proposition 47 relief, the Health and Safety Code section 11379 conviction remains and the trial court would merely order a misdemeanor sentence for that conviction.

> (b) If the petitioner satisfies the criteria in subdivision (a), the petitioner's felony sentence shall be recalled and the petitioner resentenced to a misdemeanor pursuant to 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 . . . .

Because the original conviction remains and relief under Proposition 47 would result in resentencing only, there would be no windfall under section 954.

C. Respondent's Conjecture That Appellant's Understanding Of Proposition 47 Would Result In Dire Consequences And A Flurry Of Litigation Rests On The Insertion Of The Term "Also" Into Section 1170.18, Subdivision (A) And Is Unfounded.

Finally, respondent fears that if this court were to adopt appellant's understanding how courts are to determine eligibility for recall and resentencing under section 1170.18, absurd results would follow because Proposition 47 recall and resentencing eligibility would be awarded to any felony conviction where the defendant also committed a qualifying crime. (RBOM, pp. 37-41.) Taking this logic to its conclusion, respondent reasons that, for example, a conviction of cultivation of marijuana (Health & Saf. Code, § 11358) would qualify for recall and resentencing if the person convicted of marijuana cultivation also possessed the marijuana under Health and Safety Code section 11357. (RBOM, p. 38) Or a conviction of slaughtering a horse for human consumption under section 598c could qualify for recall and resentencing if the defendant also happened to possess a usable amount of methamphetamine under Health and Safety Code section 11377 when he slaughtered the horse. (RBOM, p. 40.)

Respondent's argument is based on the insertion of the word "also" into section 1170.18, subdivision (a). Under respondent's understanding, the subdivision would read:

> A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would also 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 judgement of conviction in his or her case to request resentencing . . . .

As discussed by both appellant and respondent, statutory interpretation should not result in such rewriting. (*People v. Guzman, supra,* 35 Cal.4th at p. 587.)

Eligibility for recall and resentencing under section 1170.18, subdivision (a) focuses the low-level theft or drug conviction defendant wants to be recalled and resentenced, and it asks the question: whether based on the facts of that low-level conviction, defendant would actually have been convicted of a misdemeanor as defined in the new and revised laws in Proposition 47, and not a felony, had Proposition 47 been in effect at the time the defendant committed the crime. Under respondent's scenarios, the focus is enlarged so wide that retroactive sentencing under Proposition 47 would not serve the electorate's intent. Under respondent's scenarios, the question would be whether defendant committed the conviction on which he seeks recall and resentencing and also whether he would have been guilty of a qualifying low-level nonviolent or nonserious property or drug crime. The eligibility question is not whether the defendant has committed any crime that would have been a misdemeanor

under Proposition 47 had it been enacted when defendant committed the conviction at issue. It is whether the acts underlying the felony conviction he wants to be recalled and resentenced would actually constitute a misdemeanor under the new laws amended and created by Proposition 47, had these new laws been in effect at the time the acts which constituted the conviction occurred.

It has been almost two years since the electorate passed Proposition 47. There has been no flurry of litigation as respondent fears. And appellant knows of no cases presenting the argument respondent posits. Respondent's fears are unfounded.

CONCLUSION

A measured review of the record and the language of the section 1170.18 supports appellant's understanding of the statute. Respondent's arguments, not based in law or fact, are unpersuasive. Appellant requests this court reverse the ruling of the Court of Appeal and order the case to be remanded to the trial court so it can assess whether it should recall and resentence appellant's transportation conviction as a misdemeanor.

Dated: October 3, 2016

Respectfully submitted,

APPELLATE DEFENDERS, INC.

Cindi B. Mishkin

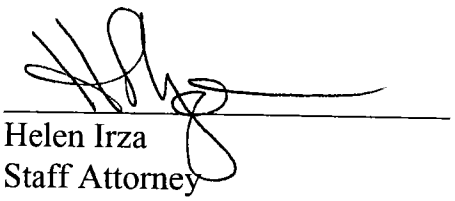
Attorney at Law, SBN 169537
Attorney for Mario Martinez

CERTIFICATION OF WORD COUNT

I, Helen Irza, hereby certify that, according to the computer program used to prepare this document, appellant's petition for review, contains 8,359 number of words. (Cal. Rules of Court, rule 8.520(c)(1).)

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

Executed October 3, 2016 in San Diego, California.



Helen Irza
Staff Attorney
State Bar No. 190680

PROOF OF SERVICE BY MAIL

Case Name: People v. Mario Martinez

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

I declare:

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

On October 3, 2016, I served the attached

APPELLANT'S REPLY BRIEF ON THE MERITS

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

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(eservice only
to SDAG.Docketing@doj.ca.gov)

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Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at San Diego, California on October 3, 2016.

Furthermore, I, Will Bookout, declare I electronically served from my electronic notification address of wrb@adisandiego.com, the same referenced above document on May 14, 2013, at 4:12 pm to the following entity and electronic notification addresses: SDAG.Docketing@doj.ca.gov.

I declare under penalty of perjury that the foregoing is true and correct, and this declaration was executed at San Diego, California, on October 3, 2016

Will Bookout
(Typed Name)

Will Bookout
(Signature)