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

RESPONDENT'S SUPPLEMENTAL BRIEF

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UNLIKE THE THEFT-RELATED STATUTES AT ISSUE IN *PAGE*, THE TRANSPORTATION OF METHAMPHETAMINE FOR PERSONAL USE IS NOT EXCLUSIVELY ENCOMPASSED BY THE SIMPLE DRUG POSSESSION STATUTE THAT WAS AMENDED BY PROPOSITION 47

Respondent files this supplemental brief under California Rules of Court, rule 8.520(d). After briefing in this case was complete, this court issued its decision in *People v. Page* (Nov. 30, 2017, S230793) __Cal.4th__ [2017 WL 5895782] (*Page*). In that case, this court concluded that a defendant with a Vehicle Code section 10851 conviction is not categorically ineligible for resentencing under Proposition 47. (*Page*, *supra*, 2017 WL 5895782 *1.) This court reasoned that since one of the ways in which Vehicle Code section 10851 may be violated is by theft of a vehicle, a person may be resentenced under Penal Code section 1170.18, subdivision (a), if it can be demonstrated that the conviction was based on vehicle theft and the vehicle was worth $950 or less. (*Id.* at *6.) In reaching that holding, this court explained that Penal Code section 1170.18 permitted resentencing in accordance with, among other provisions, Penal Code section 490.2. (*Ibid.*) Because section 490.2 redefined petty theft to include "obtaining any property by theft" where the value of the property was $950 or less, this court reasoned that it necessarily included the theft form of Vehicle Code section 10851, even though Vehicle Code section 10851 was not itself mentioned in the ballot materials or enumerated in Penal Code section 1170.18. (*Ibid.*)

The holding in *Page* does not affect the outcome of this case for one principal reason: Health and Safety Code section 11377 and the other two drug statutes amended by Proposition 47 did not create a new umbrella drug possession crime, nor did they contain an exclusivity provision to preclude the charging of other felony drug crimes. This stands in contrast to Penal Code section 490.2 as applied to theft crimes in *Page*, and Penal

Code section 459.5 as applied to shoplifting crimes in *People v. Gonzales* (2017) 2 Cal.5th 858 (*Gonzales*). Furthermore, Penal Code section 1170.18, subdivision (a), authorizes resentencing only if the defendant would have been guilty of a misdemeanor had Proposition 47 been in effect *at the time of the offense*. Although the timing of the offense was irrelevant in *Page*, because Health and Safety Code section 11377 was not rewritten to create a new, exclusive umbrella crime for drug-related offenses, the timing of appellant's offense is dispositive. If appellant had committed the same crime today, he could be found guilty of a misdemeanor under Health and Safety Code section 11377. But the reduction of simple drug possession to a misdemeanor, by itself, does not provide appellant with resentencing relief under Proposition 47. Even if the misdemeanor version of section 11377 had existed at the time of appellant's offense in 2007, the drafters did not create an exclusive umbrella crime that would preempt other felony drug charges, and appellant still could have been charged and convicted of felony drug transportation under Health and Safety Code section 11379.

Appellant's claim fails, primarily, because his criminal conduct is not *exclusively* encompassed by any of the nine criminal statutes added or amended by Proposition 47. Relief under Penal Code section 1170.18, subdivision (a), is dependent upon whether a person would have been guilty of a misdemeanor under one of the nine amended or added theft or drug crimes had Proposition 47 been in effect at the time of the offense. Section 11377 contains no umbrella language that would explicitly incorporate conduct of other drug-related offenses such as transportation for personal use. But even if it did, section 1170.18 does not state what occurs when criminal conduct punishable under one of the amended criminal statutes could have *also* been punished as a felony under a different criminal statute at the time of the offense. The solution to that problem is contained within the language of the misdemeanor criminal statutes themselves.

In *Page*, this court determined that conduct punishable by Vehicle Code section 10851 can *sometimes* fall within the ambit of Penal Code section 490.2 if necessary conditions are met. (*Page*, *supra*, 2017 WL 5895782 *1.) If a crime involved the theft of a car valued less than $950, theoretically that offense could have been charged under either Penal Code section 490.2 or Vehicle Code section 10851, both of which criminalize that conduct. But according to the language of section 490.2, theft involving property valued less than $950 cannot be charged under any other statute. This court determined that defendants in that scenario could have *only* been punished under Penal Code section 490.2 at the time of the offense: "we conclude that obtaining an automobile worth $950 or less by theft constitutes petty theft under section 490.2 and is punishable *only* as a misdemeanor, regardless of the statutory section under which the theft was charged." (*Page*, *supra*, 2017 WL 5895782 *6, italics added.)

The defendant in *Page* could have "only been guilty of a misdemeanor" had Proposition 47 been in effect at the time of his offense because the addition of Penal Code section 490.2 encompassed a wide range of criminal conduct both by use of the umbrella phrase "obtaining any property by theft" and by exclusion of all other definitions of grand theft that could have also been charged. Because Penal Code section 490.2 states, "Notwithstanding Section 487 or any other provision of law defining grand theft," this court determined that this exclusivity provision protected section 490.2's ameliorative operation "against interference from other statutory provisions defining certain conduct as grand theft." (*Id.* at *5.) If the defendant in *Page* had stolen a car in 2007 and it was valued at less than $950, even if he could have previously been charged under Vehicle Code section 10851, the language of Penal Code section 490.2 necessarily precluded the prosecutor's ability, at the time of the offense, to charge appellant with a felony under the Vehicle Code. (*Ibid.* ["Nevertheless,

section 490.2 plainly indicates that 'after the passage of Proposition 47, "obtaining any property by theft" constitutes petty theft if the stolen property is worth less than $950.'"].)

Similarly, this court found in *People v. Gonzales*, *supra*, 2 Cal.5th 858 that if Proposition 47 had been in effect when the defendant had committed the act of theft by false pretenses in 2013 (charged then as second degree burglary), he would have instead been charged and convicted of shoplifting under the newly added Penal Code section 459.5. (*Id.* at p. 875.) The People argued that, even if Gonzales engaged in conduct punishable under section 459.5, he was ineligible for resentencing because he could have instead been charged with felony commercial burglary for entering the bank with the intent to commit identity theft. (*Ibid.*) This court rejected that argument, because Penal Code section 459.5, subdivision (b), requires that any act of shoplifting "*shall be charged* as shoplifting" and no one charged with shoplifting "may also be charged with burglary or theft *of the same property.*" (*Ibid.*) Thus, at the time Gonzales committed his offense in 2013, a prosecutor would have been unable to charge and convict him with anything other than misdemeanor shoplifting, because the exclusivity provision of Penal Code section 459.5 would have necessarily precluded it.

Here, by contrast, Health and Safety Code section 11377 does not contain umbrella language or an exclusivity provision equivalent to that found in Penal Code sections 459.5 and 490.2. Unlike the circumstances in *Page* and *Gonzales*, appellant could not have "only been guilty of a misdemeanor" in 2007, even if Proposition 47's amended Health and Safety Code section 11377 had existed at that time. Section 11377 does not incorporate other types of drug-related conduct like transportation of drugs for personal use or possession for sale, and without any language like that found in Penal Code sections 490.2 or 459.5 that could have protected the ameliorative effect of section 11377 "against interference from other

statutory provisions" like felony drug transportation, it cannot be concluded that appellant would have "only been guilty of a misdemeanor" at the time of his offense. (*Page*, *supra*, 2017 WL 5895782 *5.)

Unlike these situations, appellant would not have had the benefit of an exclusivity provision to prevent him from being charged with felony drug transportation at the time of his offense. Health and Safety Code section 11377, as amended by Proposition 47, states that "every person who possesses any controlled substance ... shall be punished by imprisonment in a county jail for a period of not more than one year." Section 11377 does *not* state, "all possessory offenses must be charged as simple possession." Nor does it state "transportation of a controlled substance for personal use must be charged as simple possession." Whereas Penal Code section 490.2, states, "Notwithstanding Section 487 or any other provision of law defining grand theft," and Penal Code section 459.5, states, "Any act of shoplifting as defined in subdivision (a) shall be charged as shoplifting," section 11377 does not contain equivalent language that would exclude the charging of other crimes. For example, Health and Safety Code section 11377, even as it now stands after Proposition 47, would not require the prosecution to charge a defendant who possesses methamphetamine with the intent to sell (Health & Saf. Code, § 11378) with simple possession instead. Even if the conduct *could* be charged as a misdemeanor under section 11377, it is not *required* by the language of the statute.

Prior to the 2014 amendment, Health and Safety Code section 11379 stated, "every person who transports, imports into this state, sells, furnishes, administers, or gives away [or offers or attempts to do so] ... any controlled substance ... shall be punished by imprisonment." (Health & Saf. Code, § 11379, subd. (a); Stats. 2001, ch. 841 (A.B. 258), § 7.) Without language in amended section 11377 stating that "transportation of a controlled substance for personal use must be charged under this statute," there is no

requirement that transportation of methamphetamine without the intent to sell must have been charged under section 11377 at the time of the offense. Thus, if a prosecutor in 2007 were faced with the decision of prosecuting appellant with misdemeanor simple possession under amended section 11377 or felony drug transportation under section 11379, there is no exclusive umbrella language contained within amended section 11377 that could prevent appellant from being charged with felony drug transportation. Unlike *Gonzales*, where "[a] defendant must be charged only with shoplifting when the statute applies," appellant would have been properly charged and convicted under Health and Safety Code section 11379. (*Gonzales*, *supra*, 2 Cal.5th at p. 876.) The absence of any exclusive umbrella language in section 11377, therefore, precludes appellant from obtaining relief under Penal Code section 1170.18, subdivision (a).

Because Health and Safety Code section 11377 does not contain umbrella language or an exclusivity provision, the timing of appellant's offense is dispositive under Penal Code section 1170.18, subdivision (a). That statute provides eligibility only if a person would have been guilty of a misdemeanor had Proposition 47 been in effect *at the time of the offense*. This situation, therefore, stands in contrast to *Page*, where the timing of the offense was not at issue. Here, appellant would not have been convicted of a misdemeanor under Proposition 47 in 2007; he would only have been convicted of a misdemeanor after 2014 based on changes to Health and Safety Code section 11379. The difference is that section 11377 was not amended by Proposition 47 to contain exclusive umbrella language, such that, *at the time of appellant's offense* in 2007, a prosecutor would have necessarily charged and convicted appellant with a misdemeanor under section 11377 instead of a felony under section 11379.

To be clear, respondent does not argue that appellant must have been *convicted* of one of the nine enumerated offenses amended or added by

Proposition 47 in order to be eligible for resentencing relief. Although appellant argues repeatedly in his reply brief that respondent's position is that he must have been convicted under one of the nine enumerated theft or drug statutes (Reply 4, 6-10, 15-16, 20 fn. 3), respondent has not presented such an untenable claim. The fact that Penal Code section 490.2 did not exist at the time of appellant's offense in 2007 is enough to preclude that argument. (*Page*, *supra*, 2017 WL 5895782 *4.) Instead, respondent has consistently argued that appellant is eligible only if, at the time he committed his offense, he would have been guilty of one of the nine enumerated misdemeanor offenses that were added or amended by Proposition 47. (Answer 15-17.)

Another way to consider the limits of appellant's position is to understand how Proposition 47 *could* have been drafted in order to provide him with any relief. In order for appellant to be eligible for resentencing, the drafters of Proposition 47 would have had to amend the Act in one of four ways: (1) the drafters could have amended Health and Safety Code section 11379 to make an explicit distinction between felony transportation of drugs for sale and misdemeanor transportation of drugs for personal use; (2) the drafters could have amended Health and Safety Code section 11377 by including umbrella language that specifically incorporated transportation of drugs for personal use, but also an exclusivity provision that precluded charging the crime under section 11379; (3) the drafters could have changed the operative language of Penal Code section 1170.18, subdivision (a), to provide relief for individuals if their "offenses would have been committed after this act became effective;" (4) or the drafters could have rewritten Penal Code section 1170.18, subdivision (a), slightly differently, and provided relief for individuals who would have been guilty of a misdemeanor "had this act been in effect at the time of the offense, as well as all other statutory amendments that occurred after the offense." But the

drafters made none of those four changes, and therefore, the electorate cannot be understood to have believed they were providing relief for individuals with felony convictions for drug transportation when they voted to enact Proposition 47.

In sum, even though this court determined in *Page* that *some* conduct criminalized by Vehicle Code section 10851 is now eligible for Proposition 47 relief due to the expansive theft language that exists in Penal Code section 490.2 (*Page*, *supra*, 2017 WL 5895782 *6), that same reasoning does not apply to appellant's situation. There is no exclusive umbrella language for related drug crimes as there is for theft and shoplifting offenses under Proposition 47, and Penal Code section 1170.18 requires that the time of the offense be considered when determining resentencing eligibility. Even though appellant and others like him may have wished that the legislative amendment to Health and Safety Code section 11379 were retroactive, Proposition 47 cannot provide him with any relief.

CONCLUSION

Accordingly, for the reasons here and in the prior brief, respondent urges this court to affirm the Court of Appeal's judgment in full.

Dated: December 21, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Respondent's Supplemental Brief uses a 13 point Times New Roman font and contains 2,488 words.

Dated: December 21, 2017

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DECLARATION OF ELECTRONIC SERVICE (VIA TRUEFILING)

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.

On December 21, 2017, I electronically served the attached **Respondent's Supplemental Brief,** in compliance with California Rules of Court, rules 8.360(d)(1), (2) as follows:

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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 December 21, 2017, at San Diego, California.

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SD2016700575