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 SUPPLEMENTAL BRIEF

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California Rules of Court, rule 8.520(d) permits filing of a supplemental brief to discuss new authorities not available in time to be included in the party's brief on the merits.

Since briefing has been complete in *Martinez*, this court has issued three opinions which address the question whether various theft-related felonies are eligible for recall of sentence under Proposition 47: *People v. Gonzales* (2017) 2 Cal.5th 858 (*Gonzales*), *People v. Romanowski* (2017) 2 Cal.5th 903 (*Romanowski*) and, most recently, *People v. Page* (Nov. 30,

2017, S230793) ___ Cal.5th ___ [2017 WL 589782] (*Page*), and one opinion which analyzes whether Proposition 47 clarified the dangerousness standard ("unreasonable risk to public safety") that applies to the resentencing assessment in the Three Strikes context: Proposition 36 – *People v. Valencia* (2017) 3 Cal.5th 347 (*Valencia*) .

All of these opinions are relevant to the issue at hand in *Martinez*. And the most recent opinion, *Page*, strongly supports appellant's argument that determining eligibility for Proposition 47 resentencing is a fact-based inquiry assessing whether defendant "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." (Pen. Code,[1] § 1170.18, subd. (a).)

Respondent asserts *Page* does not affect the outcome of this case because unlike with the Vehicle Code theft offense discussed there, Proposition 47 neither created an umbrella drug possession offense nor did it create an exclusivity provision within the drug offenses it modified. Respondent's argument, which ignores well-settled rules of statutory construction and would create a result conflicting with the electorate's intent, is unpersuasive.

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

WELL-SETTLED RULES OF STATUTORY CONSTRUCTION – THAT THE ELECTORATE IS PRESUMED TO KNOW EXISTING LAW WHEN CREATING A NEW LAW AND THAT THE STATUTE AT ISSUE SHOULD BE INTERPRETED IN A MANNER THAT DOES NOT CONFLICT WITH THE LAWMAKER'S INTENT – SUPPORT APPELLANT'S ARGUMENT: BECAUSE THE CRIMINAL CONDUCT UNDERLYING APPELLANT'S TRANSPORTATION OF METHAMPHETAMINE CONVICTION WOULD HAVE AMOUNTED ONLY TO A MISDEMEANOR POSSESSION OF METHAMPHETAMINE CONVICTION HAD PROPOSITION 47 BEEN IN EFFECT AT THE TIME OF APPELLANT'S OFFENSE, HIS FELONY CONVICTION IS ELIGIBLE FOR RESENTENCING.

In *Page*, this court considered whether a defendant convicted of Vehicle Code section 10851 is eligible for resentencing under Proposition 47. Disagreeing with the lower courts, the unanimous opinion reasoned that even though section 1170.18 does not specifically refer to Vehicle Code section 10851, Proposition 47's newly created petty theft statute (§ 490.2) encompassed the theft-based Vehicle Code section 10851 offense and created the possibility for that defendant's resentencing eligibility. (*Page*, *supra*, 2017 WL 5895782 *1.) As part of the analysis, this court relied on its prior *People v. Garza* (2005) 35 Cal.4th 866 opinion, wherein it found Vehicle Code section 10851 has a broad sweep and penalizes both theft and non-theft conduct. (*Id.* at p. * 3.) Within this framework, the court reasoned that if the Vehicle Code section 10851 conviction is based on theft conduct, and the vehicle is valued under $950, defendant "would have been

guilty only of a misdemeanor had section 490.2 been in effect at the time," (*id.* at p. *4) and thus eligible for Proposition 47 resentencing consideration.

Rejecting the government's argument that the Vehicle Code section 10851 offense could not be eligible because the section 490.2 did not explicity reference this specific offense in its newly created language, this court noted the electorate's use of broad initial language: "Nothwithstanding Section 487 or any other provision of law defining grand theft" in this new section. And, importantly, the court commented there was "[n]othing in the operative language of the subdivision suggest an intent to restrict the universe of covered theft offenses to those offenses that were expressly designated as 'grand theft' offenses before the passage of Proposition 47." (*Page*, *supra*, at p. *5.) In addition, the court recognized this understanding is consistent with the stated intent of the electorate – that the Proposition be construed "broadly" and "liberally" to fulfill its purpose. (*Id.* at p. *6.) Ultimately, because defendant's petition was filed soon after Proposition 47 became effective, and failed to carry the burden that had only more recently been articulated, this court affirmed the lower court's denial of the resentencing petition "without prejudice" so that defendant could file a new petition with sufficient factual support. (*Id.* at p. *8.)

Just as the analysis in *Page* revealed that a factual assessment of the conduct underlying defendant's Vehicle Code section 10851 conviction may show that defendant is eligible for resentencing under Proposition 47, so too does the analysis in this case reveal a factual assessment of the conduct underlying Mr. Martinez's Health and Safety Code section 11379 conviction demonstrate he is eligible for resentencing under Proposition 47. In *Page*, eligibility for resentencing occurred through assessment whether the offense qualifies under Proposition 47's newly created section 490.2; here, eligibility for resentencing occurs through assessment whether the offense qualifies under Proposition 47's modified Health and Safety Code section 11377. The *Page* opinion directly supports appellant's position that eligibility for resentencing under Proposition 47 is made based on a factual inquiry of the offense at hand.

A. The Established Statutory Interpretation Principle: The Electorate Is Aware Of Existing Law When It Creates New Legislation, Supports Appellant's Analysis.

Important to the instant analysis is the well-settled principle of statutory interpretation that the electorate was "aware of existing laws at the time the initiative was enacted." (*Valencia*, *supra*, 3 Cal.5th at p. 369; *Gonzales*, *supra*, 2 Cal.5th at p. 869 [electorate's use of specific legal term "larceny" within new shoplifting statute – section 459.5 – evidences intent to use the term as it is used in the already-existing burglary statute such that new shoplifting statute penalizes entry into a commercial establishment open during regular business hours with intent to commit both larcenous and nonlarcenous takings of property under $950]; *Romanowski*, *supra*, 2 Cal.5th at p. 909 [because of presumption electorate is aware of existing laws, and fact that the Legislature had previously made it clear theft of access card information constitutes grand theft, no need for electorate to spell out all possible grand theft crimes in newly created section 490.2].) When the electorate modified Health and Safety Code section 11377, it knew that the Legislature had made a significant change to the transportation statute, effective less than a year before. As quoted in the opening brief (ABOM, pp. 31-32) and available on the World Wide Web to anyone with a computer, the legislator who authored the change to the

transportation statute wrote a statement that he proposed the change because prosecutors were essentially overcharging defendants who moved drugs for personal use but were not involved in drug trafficking. (Assem. Com. on Public Safety, comments on Assem. Bill No. 721 (2013-2015 Reg. Sess.) for hearing on April 16, 2013, p. 2.) The electorate knew that the Legislature had added an intent to sell element to the crime of transportation such that after the change, possessory movement of contraband without an intent to sell could at most be prosecuted as a crime of possession.

After January 1, 2014, where the perpetrator possessed and moved contraband but did not have an intent to sell, the prosecution could not charge the perpetrator who moved the contraband with transportation under Health and Safety Code section 11379. The electorate knew simple possessory movement of contraband was thereafter considered a low-level felony. It is within this context that the electorate enacted Proposition 47. Significantly, when it enacted Proposition 47, the electorate chose not to change the language of the amended Health and Safety Code section 11377; it chose not to change the language of Health and Safety Code section 11379 to remove the element the Legislature had added; and it chose not to create any new transportation crime.[2] Instead, the electorate affirmed that

[2]Certainly the electorate could have included more restrictive language when it modified this offense through Proposition 47, as it did

conduct involving possession of contraband, as well as possessory movement of contraband where there was no intent to sell, was a crime worthy of only misdemeanor punishment. Not only did Proposition 47 revise punishment of the possessory offense – that encompassed movement of contraband without intent to sell – to constitute only a misdemeanor in the future, but the electorate also intended retroactive resentencing for this minor possession offense.

B. In Proposition 47's Modified Drug Crime Context, There Is No Need For A New Umbrella Drug Crime

Respondent asserts the *Page* holding does not affect this case because Proposition 47 "did not create a new umbrella drug possession crime" and because Proposition 47 drug crime statutes did not "contain an exclusivity provision to preclude the charging of other felony drug crimes." (Respondent's Supplemental Brief, herein after "RSB," page 4.) From this conclusion respondent reasons that appellant could not satisfy the eligibility test for retroactive resentencing because, under the created test, appellant

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with the forgery crime. (§ 473; see also *People v. Gollardo* (2017) 17 Cal.App.5th 547 [forgery of prescription under Health and Safety Code section 11368 not eligible for reduction under Proposition 47, as that statute not modified by the initiative and that specific crime not affirmatively included within the language of section 473].) *Gollardo* also supports appellant's interpretation. There, the statute at issue was never modified. But here, as delineated in the briefing, the statute at issue was modified before the electorate passed Proposition 47 and the initiative did not disturb the modification.

would be guilty not only of misdemeanor possession but also of felony transportation. He grounds this argument in *Gonzales* and *Page* which discussed newly created Proposition 47 crimes: sections 495.5 and 490.2, respectively. (*Gonzales*, *supra*, 2 Cal.5th 858; *Page*, *supra*, 2017 WL 5895782].) Respondent's understanding of Health and Safety Code section 11377, modified by Proposition 47, and the eligibility test created by the electorate, is mistaken.

It appears Respondent's argument is based on the fact that the newly created shoplifting (§ 459.5) and petty theft statutes (§ 490.2) created new umbrella crimes. But Respondent forgets the context in which the electorate modified Health and Safety Code section 11377 and thus Respondent would have required redundant legislation unnecessary to support the relief appellant seeks. Here, the electorate when enacting Proposition 47 did modify Health and Safety Code section 11377. And it did so within the context of the Legislature's prior amendment of Health and Safety Code section 11379. Within this context, the electorate specifically chose not to disrupt the Legislature's earlier modification. So, when the electorate passed Proposition 47, it necessarily incorporated the earlier change which had been made to the transportation crime. Given that the electorate acted within this context, there was no need for it to create a

new umbrella drug crime. Possessory movement of contraband without the intent to sell could at most be punished by the Health and Safety Code section 11377 statute revised by Proposition 47. And section 1170.18, subdivision (a) authorizes appellant to seek resentencing under this modified possession statute. No new umbrella drug crime is necessary.

C. Nor Is There A Need For An Exclusivity Provision In The Modified Drug Possession Crime.

Moreover, unlike the context of the new property crimes: sections 495.5, subdivision (b) [shoplifting] and 490.2, subdivision (a) [petty theft], there was no need for the electorate to create an exclusivity provision within the modified Health and Safety Code section 11377 context. The exclusivity provisions in the theft crimes context limit the prosecution's charging discretion and ensure that going forward after the enactment of Proposition 47, prosecutors will charge the denominated non-serious non-violent property crimes as misdemeanors and not in some creative manner as felonies.

In the non-serious, non-violent drug possession context, the prosecution already could not charge movement of contraband, without the intent to sell, as a felony because the Legislature had amended the transportation crime 11 months before the electorate passed Proposition 47. Were the prosecution to charge movement of contraband, without the intent

to sell, as a crime under the more serious transportation crime in 2014 even before the electorate enacted Proposition 47, any court would have stricken the charge. There was simply no need for the electorate to add exclusivity provisions to further the electorate's intent.

D. If Section 1170.18, Subdivision (a) Is Ambiguous, This Court Should Consider Extrinsic Evidence.

If this court finds the language of section 1170.18, subdivision (a) ambiguous, this court must adopt an interpretation that furthers the electorate's intent. (See *Valencia*, *supra*, 3 Cal.5th 347.) As in the *Valencia* case, where this court found the language ambiguous as to whether the dangerousness assessment of section 1170.18, subdivision (c) applied in the Proposition 36 context (*id.* at pp. 360-364), this court should "turn to evidence, outside the measure's express provisions, to ascertain the voter's intent in approving the initiative." (*Id.* at p. 364.) Appellant will not repeat the arguments set forth in the ABOM which outlines this evidence, but refers the court back to the analysis in the event the court determines the statute is ambiguous. (ABOM, pp. 46-51.)

E. Appellant's Interpretation Furthers The Electorate's Intent; Respondent's Position Does Not.

There is no question about the electorate's intent when it enacted Proposition 47. "One of Proposition 47's primary purposes is to reduce the

number of nonviolent offenders in state prisons, thereby saving money and focusing prison on offenders considered more serious under the terms of the initiative." (*Harris v. Superior Court* (2016) 1 Cal.5th 984, 992.) "The Act also expressly states an intent to '[r]equire misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession, unless the defendant has prior convictions for specified violent or serious crimes.' (Voter Information Guide, text of Prop. 47, § 3, par. (3), p. 70.)" *People v. Gonzales* (2017) 2 Cal.5th 858, 870.) In addition, the voters instructed Proposition 47 "be construed 'broadly' and 'liberally' to effectuate its purposes." (*Page*, *supra*, at p. *6.)

Even before the electorate passed Proposition 47, the Legislature recognized the offense appellant committed amounted to, at most, a low-level drug possession offense. The electorate did not change this understanding and even increased its assessment of the offense as a non-serious one by classifying it, at most, as a misdemeanor. For all acts equivalent to appellant's, committed after Proposition 47, the government could secure at most a misdemeanor conviction. Under appellant's interpretation, the resentencing provisions of Proposition 47 would also ensure the offense under which possessory movement of contraband, without intent to sell, could be punished, could be resentenced as if it were

a misdemeanor offense. But under Respondent's interpretation, the acts prior to January 1, 2014 would remain felonies. Such a result hardly furthers the electorate's intent to reduce the prison/jail population for nonserious offenders.

Respondent's interpretation is also not logical. In essence, under Respondent's interpretation, to execute the test for resentencing eligibility, a court must take only the bare Proposition 47 statutes, without any context, and transport them back in time to when the offense was committed. One can understand why the electorate chose the offense commission date as the reference point. The date of commission of the offense is the one used in criminal law to assess what punishment is to be imposed, not the date of conviction or the date of sentencing. But one cannot understand why the electorate would create the awkward test advanced by respondent – using only the isolated laws created and modified by Proposition 47 to determine if appellant would have been guilty of a misdemeanor. These laws must be understood in the context in which they were created. Thus, when the court executes the eligibility test, it is logical for the court to assess the earlier conduct within the entire context in which the electorate created Proposition 47, not just a handful of statutes.

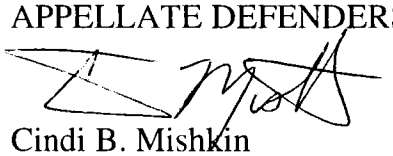
CONCLUSION

In light of the plain language used by the electorate, logic, and the reality that it is appellant's interpretation which honors the electorate's intent, Respondent's new arguments are unpersuasive.

Dated: December 22, 2017

Respectfully submitted,

APPELLATE DEFENDERS, INC.



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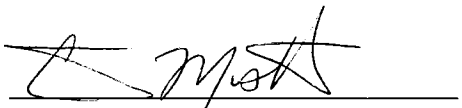
CERTIFICATION OF WORD COUNT

I, Cindi B. Mishkin, hereby certify that, according to the computer program used to prepare this document, appellant's petition for review, contains 2651 number of words. (Cal. Rules of Court, rule 8.520(d)(2).)

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

Executed December 22, 2017 in San Diego, California.



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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 December 22, 2017, I served the attached

APPELLANT'S SUPPLEMENTAL BRIEF

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I declare under penalty of perjury that the foregoing is true and correct, and this declaration was executed at San Diego, California, on December 22, 2017

Will Bookout
(Typed Name)

Will Bookout
(Signature)