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Case No.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff and Appellant,

vs.

ISAIAS ARROYO
Defendant and Respondent,

PETITION FOR REVIEW

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

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

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

Petitioner, Isaias Arroyo, hereby petitions this honorable court for review to consider the published opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division Three, filed on April 28, 2014 and ordered published on May 1, 2014. The opinion reversed the Orange County Superior Court's June 28, 2013 order, which granted Petitioner's Demurrer, and holds that Welfare and Institutions Code (W&I) section 707, subdivision (d)(4), does not require the prosecution to conduct a preliminary examination when charging a minor defendant in adult criminal court on W&I §707 offenses. The opinion holds that the prosecution may

instead seek an indictment from the grand jury against minor defendants on discretionary direct-file cases. A true copy of the court's published opinion is attached hereto as Appendix A. A true copy of the May 1, 2014 Order Certifying the Opinion for Publication is attached hereto as Appendix B.

Petitioner requests that this court grant review to settle an important issue of state wide import, with far reaching impact, and to settle a discrepancy between precedent established by this court and the Second District Court of Appeal on one hand, and the opinion issued by the Court of Appeal in this matter on the other.

ISSUE PRESENTED FOR REVIEW

The ultimate issue in this case is whether the language of W&I Code §707(d) (4) means what it says, or if it includes additional directives hidden between the lines; specifically, does the section entitle a minor defendant, who is charged in adult criminal court in a ***discretionary*** direct-file case, to a preliminary hearing and findings by a magistrate, or is the prosecution able to circumvent judicial review by presenting the minor's case to a grand jury and requesting an indictment?

This Court has previously examined the Constitutionality and language of Proposition 21, which implemented the discretionary "direct-filing" aspects of W&I Code §707, in *Manduley v. Superior Court* (2002) 27

Cal.4th 537. This Court, in *Manduley, supra,* discussed the safeguards contained in W&I Code §707(d), one of which was the specific requirement that a ***magistrate*** be the one to make a judicial determination on whether or not a minor comes within the subdivision. The decision of the Court of Appeals in the present case fails to recognize the protection and procedure clearly required by §707(d) (4), and mandated by this Court in *Manduley, supra.*

NECESSITY FOR REVIEW

One of the most far-reaching and prolific consequences of the enactment of Proposition 21 has been the District Attorneys' ability to file cases directly in "adult" criminal court for minors aged 14 – 17, thereby avoiding the tedious task of seeking a judicial stamp of approval. While Proposition 21 was intended to allow the prosecution to independently file certain types of charges in a general criminal court, it also implemented a "safety valve" in subdivision (d) (4) of W&I Code §707.

While the language of the section is clear and unambiguous, the Court of Appeals' opinion in the present case adds language not present in the statute, and strips minors of the only protection they have in discretionary "direct file" cases.

Review of the Court of Appeals opinion in the present case is

necessary in order to settle a question that is ***vital*** to the orderly and proper prosecution and defense of minors discretionarily "direct filed" under W&I Code §707(d) (1) and (2), and to settle a conflict between precedent established by this court and the Second District Court of Appeal versus the opinion issued by the Court of Appeal in the present matter.

STATEMENT OF CASE (12ZF0158)

On December 18, 2012 the Orange County District Attorney's Office (People) presented evidence to the grand jury and requested that they return an indictment against Petitioner on the following charges:

- Count 1: Penal Code §182(a)(1)/187(a) [conspiracy to commit murder];
- Count 2: Penal Code §186.22(a) [street terrorism].

The People also requested that the indictment allege that Petitioner vicariously/personally used a firearm during the commission of the offense charged in Count One (Penal Code §12022.53(b)/(c) (1)), and that he committed the offense for the benefit of, at the direction of, and in association with a criminal street gang, with the specific intent to promote, further or assist in criminal conduct by gang members (Penal Code §186.22(b)).

The grand jury obliged the prosecution, and Petitioner was arraigned on an Indictment in case 12ZF0158 on December 19, 2012. Petitioner entered "not guilty" pleas to all of the charges and denied all of the enhancements contained therein.

On May 24, 2013 Petitioner filed a Demurrer to the Indictment and a Notice and Motion to Dismiss the Indictment pursuant to Penal Code §§995/939.71 and exhibits in support thereof. On June 17, 2013 the People filed an Opposition to the Demurrer. On June 26, 2013 Petitioner filed a reply to the People's Opposition.

On June 28, 2013 Petitioner's Demurrer to Indictment 12ZF0158 was heard, and sustained, by the Honorable William R. Froeberg, Orange County Superior Court. As a result of that order, Petitioner was dismissed from Indictment 12ZF0158.

The People filed a Notice of Appeal on July 2, 2013 (Court of Appeal case number G048659), and filed an Opening Brief on August 8, 2013. Petitioner filed a Respondent's Brief in G048659 on October 9, 2013. The People filed a Reply Brief on November 27, 2013. The matter was set for oral argument on March 17, 2014.

On April 28, 2014 the Court of Appeal filed its unpublished opinion, which reversed the judgment of the Orange County Superior Court. On

April 29, 2014 the People filed a Request for Publication, which was granted by the Court of Appeal on May 1, 2014.

ARGUMENT

WELFARE AND INSTITUTIONS CODE §707(d)(4) REQUIRES THAT PROSECUTIONS OF MINORS IN DISCRETIONARY DIRECT-FILE CASES, PURSUANT TO §707(d), PROCEED BY WAY OF PRELIMINARY HEARING AND REQUIRE A MAGISTRATE TO MAKE CERTAIN FINDINGS IN CONJUNCTION WITH THAT HEARING. THIS REQUIREMENT PRECLUDES THE USE OF GRAND JURY HEARINGS AND INDICTMENTS FOR MINORS PROSECUTED UNDER W&I CODE §707(d).

I.

INTRODUCTION

That District Attorneys have the ability to file minors' cases directly in adult criminal courts under certain situations is a given. If a prosecuted minor is the appropriate age, and the charge(s) filed are among those described in the statute, then W&I Code §707(d) permits the filing in adult criminal court without a fitness hearing. This discretionary direct-filing procedure was authorized by the passage of California Proposition 21 in 2001. One of Proposition 21's goals was to allow the prosecution of the most

violent juvenile offenders in adult criminal courts, as opposed to juvenile courts. As such, it entrusted with the prosecution the ability to make an initial determination of which juveniles fit within this classification. But, as this Court has pointed out, that right was not completely unfettered.

Where the prosecution files a minor's case directly in adult criminal court pursuant to W&I Code §707(d), in conjunction with the preliminary hearing as provided in Section 738 of the Penal Code, a ***magistrate*** shall make a finding that reasonable cause exists to believe that the minor comes within the subdivision. (W&I Code §707(d) (4), emphasis added). Section 707(d) (4) specifically contemplates review and specific findings by a "magistrate"; not by a "magistrate or grand jury"; not by a "magistrate or the functional equivalent of a magistrate". The language is simple and precise.

The language in W&I Code §707(d) (4) is clear and unambiguous. "Ordinarily, if the statutory language is clear and unambiguous, there is no need for judicial construction. A statute is regarded as ambiguous if it is capable of two constructions, both of which are reasonable. [Citations.]" (*Snukal* v. *Flightways Manufacturing, Inc.* (2000) 23 Cal.4th 754, 778 [internal quotations and citations omitted].) "In conjunction with the preliminary hearing as provided in Section 738 of the Penal Code, the magistrate shall make a finding..." is ***not capable of two constructions***.

The Second District Court of Appeal specifically found W&I Code §707(d) (4) to be unambiguous on this exact issue in *People v. Superior Court (Gevorgyan)*, (2001) 91 Cal.App.4th 602, and this Court implicitly affirmed that finding in *Guillory v. Superior Court* (2003) 31 Cal.4th 168, when it reversed *Gevorgyan's* ban on indictments for juveniles, but only insofar as it applied to ***mandatory*** direct filings pursuant to W&I Code §602 offenses.

II.

THE LANGUAGE OF W&I CODE §707(d) MANDATES THAT A DISCRETIONARY DIRECT-FILED PROSECUTION BE SUBJECT TO A MAGISTRATE'S FINDING IN CONJUNCTION WITH A PRELIMINARY EXAMINATION.

There is simply no way to reconcile the People's skewed interpretation of W&I Code §707(d) (4) with the section's black and white requirement that "when" the prosecution files on a minor in criminal court, it must be "in conjunction with the preliminary hearing", and that "a magistrate" "shall" make a finding.

The concept of a required preliminary hearing and findings by a magistrate was also adopted by this Court in *Manduley v. Superior Court* (2002) 27 Cal.4th 527, the seminal case on the constitutionality of Proposition 21. The Court, in *Manduley*, stated:

> Where the prosecutor files an accusatory pleading directly in a court of criminal jurisdiction pursuant to section 707(d), at the preliminary hearing the magistrate must determine whether "reasonable cause exists to believe that the minor comes within the provisions of" the statute. (*Manduley*, *supra* at p. 550)

While the Court of Appeal's opinion in the present case stated that W&I Code §707(d) (4) "can be interpreted to allow for criminal prosecution of a minor by indictment", it never explained, or even addressed, how a magistrate would make the required findings in conjunction with a preliminary hearing in such a situation; which is specifically required by the section.

III.

CHANGES TO THE LANGUAGE OF WELFARE AND INSTITUTIONS CODE §§ 602 AND 707 MADE BY PROPOSITION 21 SUPPORT THE CONCLUSION THAT PRELIMINARY EXAMINATIONS ARE REQUIRED FOR "DISCRETIONARY" DIRECT-FILE PROSECUTIONS.

Proposition 21 caused dramatic changes to the language of both W&I Code §§602 and 707. A review of those changes further supports the conclusion that juveniles prosecuted under the "discretionary" direct-filing provisions of W&I Code §707(d)(4) are entitled to a preliminary hearing and may not be prosecuted in a criminal court by way of an indictment.

Welfare and Institutions Code Section 602

Prior to the passage of Proposition 21 in 2000, W&I Code §602, which codifies "mandatory" direct-filing of minors, included a subdivision (c), which stated, in pertinent part:

> (c) Any minor directly charged under subdivision (b) shall have the right to a preliminary hearing to determine if there is probable cause to hold him or her to answer. (§602(c), effective until March 7, 2000, emphasis added)

On March 8, 2000, as a result of Proposition 21, W&I Code §602 was modified to completely delete subdivision (c), and any language that gave minors prosecuted in "mandatory" direct-file cases the right to a preliminary hearing.

Welfare and Institutions Code Section 707

Conversely, prior to the passage of Proposition 21, §707 ***did not*** contain any language that guaranteed minors a right to a preliminary hearing.

On March 8, 2000, as a result of Proposition 21, W&I Code §707 was drastically revised. A significant part of that revision was the creation of subdivision (d) (4), which specifically included the requirement of a preliminary hearing.

Conclusion from the change in language

The analysis of these changes made by Proposition 21 is simple and

inescapable.

Prior to Proposition 21, minors who were prosecuted under "mandatory" direct-filings (W&I Code §602) were entitled to a preliminary examination; after its passage they were not. The legislature specifically eliminated the language that guaranteed that right in W&I Code §602.

At the exact same time, the legislature specifically included the language that guaranteed a right to a preliminary hearing for minors prosecuted under "discretionary" direct-filings in W&I Code §707(d)(4).

IV.

THE CALIFORNIA SUPREME COURT HAS DETERMINED THAT MINORS PROSECUTED PURSUANT TO THE DISCRETIONARY DIRECT-FILE PROVISIONS OF WELFARE AND INSTITUTIONS CODE §707(d) ARE ENTITLED TO A JUDICIAL DETERMINATION AT A PRELIMINARY HEARING.

In *Manduley v. Superior Court*, (2002) 27 Cal.4th 537, this Court examined a number of challenges to the changes implemented by the passage of Proposition 21. Specifically discussing the Due Process challenge raised by the Defendants in *Manduley*, and the one protected liberty interest that minors do possess, this Court stated, "the statute does require a judicial determination, ***at the preliminary hearing***, 'that reasonable cause exists to believe that the minor comes within the provisions' of the statute." (*Manduley*, at p. 564, emphasis added)

This Court has held that prosecutions of minors under W&I Code §707(d) "require" a "preliminary hearing". That requirement cannot be fulfilled if the People are allowed to proceed by way of grand jury hearing/indictment.

The interpretation adopted by the Court of Appeal's opinion in the present case ignores this holding from *Manduley* and strips the minor of the only protected liberty interest that this Court has said they are entitled to.

CONCLUSION

The issue presented in this opinion is an important one of state-wide concern. The number of minors filed directly in California's adult criminal courts increases every year. The number of juveniles that California's District Attorneys decide deserve to be tried as adults goes up every year. While this Court has determined that this practice is constitutional, it has also held that there are checks on that ability; most notably the "judicial determination" at the preliminary hearing that the minor comes with the provisions of the statute. That check represents a judicial ability to send a minor's case back to the appropriate juvenile court at the earliest possible litigated hearing. The question raised by this case is crucial to the orderly and uniform prosecution of minors. While the Courts should be interested in treating "the most dangerous" juveniles as adults, they should be just as

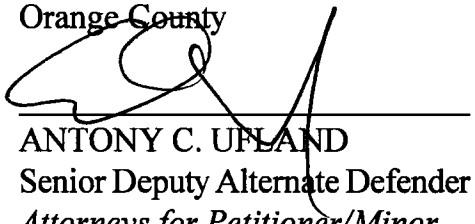
interested in sending those that are not deserving of this treatment to juvenile court as soon in the process as possible.

Petitioner respectfully requests this Court to grant review in this matter to decide the important issue presented herein.

Dated: June 6, 2014

Respectfully submitted,

FRANK DAVIS
Alternate Defender
Orange County



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APPENDIX A
(Court of Appeal Published Opinion)

Filed 4/28/14; pub. order 5/1/14 (see end of opn.)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Appellant, v. ISAIAS ARROYO, Defendant and Respondent.	G048659 (Super. Ct. No. 12ZF0158) O P I N I O N

Appeal from an order of the Superior Court of Orange County, William R. Froeberg, Judge. Reversed.

Tony Rackauckas, District Attorney, and Stephan Sauer, Deputy District Attorney for Plaintiff and Appellant.

Frank Davis, Alternate Defender, and Antony C. Ufland, Deputy Alternate Defender for Defendant and Respondent.

* * *

The Orange County Grand Jury issued an indictment that charged defendant Isaias Arroyo and six other persons with conspiracy to commit murder (Pen. Code, §§ 187 & 182) and active participation in a criminal street gang (Pen. Code, § 186.22, subd. (a)), plus alleged the defendants committed count 1 for the benefit of, at the direction of, or in association with a criminal street gang (Pen. Code, § 186.22, subd. (b)). The indictment included a finding defendant and two others "were fourteen years old or over on the date of the violation and the conspiracy to commit murder charge[] . . . falls within . . . Welfare and Institutions Code section 707[, subdivision] (d)(2)." (Hereafter section 707(d); all further undesignated statutory references are to the Welfare and Institutions Code.)

Defendant initially pleaded not guilty to the charges and denied the enhancement allegation. He then demurred to the indictment, arguing "[section] 707(d) mandates that the prosecution proceed by way of [a] preliminary hearing and [i]nformation" when filing criminal charges against a minor in adult court, and thus "the grand jury . . . had no legal authority to inquire into the offenses charged as they relate to [defendant] as he was a juvenile at the time . . . ."

The court allowed defendant to withdraw his plea and sustained the demurrer on its merits, concluding section 707(d)(4) "requires a magistrate's determination that [a] juvenile" qualifies for prosecution in adult criminal court and thus the case could not proceed by way of an indictment. The People appeal from this ruling. (Pen. Code, § 1238, subd. (a)(2) [prosecution may appeal from order sustaining demurrer].) We agree the trial court erred in interpreting the statute and reverse.

DISCUSSION

1. Standard of Review

A defendant may demur to an indictment on the ground the grand jury issuing it "had no legal authority to inquire into the offense charged." (Pen. Code, § 1004, subd. (1).) We liberally construe an accusatory pleading, giving it "'a reasonable interpretation and read[ing it] as a whole with its parts considered in their context.'" (*People v. Keating* (1993) 21 Cal.App.4th 145, 150-151; see also *People v. Biane* (2013) 58 Cal.4th 381, 388.)

Since "a demurrer lies only to challenge the sufficiency of the pleading" (italics omitted) and "is limited to those defects appearing on the face of the accusatory pleading, [it] raises only issues of law." (*People v. Biane, supra,* 58 Cal.4th at p. 388.) In addition, this case requires us to construe statutory language governing when a juvenile may be prosecuted in an adult criminal court under the Gang Violence and Juvenile Crime Prevention Act of 1998 (Proposition 21) approved by the electorate in 2000. Thus, "interpretation of [the Act] is subject to de novo review on appeal." (*Solano v. Superior Court* (2009) 169 Cal.App.4th 1361, 1366.)

2. Background

Generally, "any person . . . under the age of 18 years when he or she violates any law of this state . . . defining crime . . . is within the jurisdiction of the juvenile court . . . ." (§ 602, subd. (a); *Solano v. Superior Court, supra,* 169 Cal.App.4th at p. 1367.) Before the enactment of Proposition 21, there were only a few exceptions to this rule. The prosecution was required to file criminal cases in adult court against a person 16 years old charged with certain enumerated crimes if the minor had previously been declared a ward of the juvenile court for committing a felony when at

least 14 years of age. (Stats. 1999, ch. 996, § 12.2; *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 549.) While under certain limited circumstances a minor as young as 14 years of age could be prosecuted in adult criminal court, the prosecution could only proceed against him or her after the juvenile court conducted a hearing and found the minor unfit to be dealt with in juvenile court. (Stats. 1998, ch. 936, § 21.5; *Manduley v. Superior Court, supra,* 27 Cal.4th at pp. 548-549.)

Proposition 21 broadened the scope of circumstances where prosecutors can file criminal charges against juveniles without the necessity of a prior fitness hearing in the juvenile court and even requires the filing of some criminal actions in adult court. Section 707(d)(1) and (2) now declare that, under certain circumstances, "the district attorney or other appropriate prosecuting officer *may file* an *accusatory pleading* in a court of criminal jurisdiction against any minor" who is either at least 16 years old and charged with one of the crimes listed in subdivision (b) of the statute or at least 14 years of age if one or more criteria are met. (Italics added.) And section 602, subdivision (b) was amended to declare "[a]ny person who is . . . 14 years of age or older . . . *shall* be prosecuted under the general law in a court of criminal jurisdiction" if he or she is charged with first degree murder with special circumstances or certain sex crimes. (Italics added.)

Pertinent to this case, section 707(d)(2)(A) allows for a prosecution of a 14 year old in adult criminal court when "[t]he minor is alleged to have committed an offense that if committed by an adult would be punishable by death or imprisonment in the state prison for life." Count 1 of the indictment charges defendant with conspiracy to commit murder. Under Penal Code section 182, "in the case of conspiracy to commit murder, . . . the punishment shall be that prescribed for murder in the first degree." (Pen. Code, § 182, subd. (a) 2d unnumbered par.) First degree murder is punishable "by death, imprisonment in the state prison for life without the possibility of parole, or

imprisonment in the state prison for a term of 25 years to life." (Pen. Code, § 190, subd. (a).) Here, the indictment contains an express finding defendant fell within the terms of section 707(d)(2).

3. The Prosecution of a Minor by Indictment

Relying on the second sentence of section 707(d)(4), defendant argues an adult criminal prosecution against a minor cannot be commenced by a grand jury indictment. He claims that sentence means "'when' the prosecution files [criminal charges against] a minor in [a] criminal court, it must be 'in conjunction with the preliminary hearing,' and that 'a magistrate' 'shall' make a finding" the juvenile falls within section 707(d)'s criteria. Consequently, defendant asserts the prosecution could not charge him with a gang-related conspiracy to commit murder by grand jury indictment. We find this strained construction of section 707(d)(4) unsupportable.

"In interpreting a statute enacted by means of a voter initiative, '"'we turn first to the language of the statute, giving the words their ordinary meaning.'"' [Citation.] Statutory language must be '"'construed in the context of the statute as a whole and the overall statutory scheme [in light of the electorate's intent].'"'" (*Solano v. Superior Court, supra,* 169 Cal.App.4th at pp. 1366-1367.)

With certain exceptions not relevant here, "public offenses must be prosecuted by indictment or information." (Pen. Code, § 682; see also Cal. Const., art. I, § 14.) Cases have recognized the historical authority of grand juries to issue indictments even against a minor. (*Guillory v. Superior Court* (2003) 31 Cal.4th 168, 173; *People v. Aguirre* (1991) 227 Cal.App.3d 373, 378.)

Section 707(d)(4) declares: "In any case in which the district attorney or other appropriate prosecuting officer has filed an accusatory pleading against a minor in a court of criminal jurisdiction pursuant to this subdivision, the case shall then proceed

according to the laws applicable to a criminal case. In conjunction with the preliminary hearing as provided in Section 738 of the Penal Code, the magistrate shall make a finding that reasonable cause exists to believe that the minor comes within this subdivision. If reasonable cause is not established, the criminal court shall transfer the case to the juvenile court having jurisdiction over the matter."

The subdivision's first sentence states that when a "district attorney or other appropriate prosecuting officer has filed *an accusatory pleading* against a minor in a court of criminal jurisdiction pursuant to this subdivision, *the case shall then proceed according to the laws applicable to a criminal case*." (Italics added.) Subdivision (d)(1) and (2) of section 707 also refer to filing "*an accusatory pleading*" (italics added) in enumerating the circumstances when a minor can be charged in adult criminal court. The Penal Code defines the phrase "'accusatory pleading'" as "an indictment, an information, an accusation, and a complaint." (Pen. Code, § 691, subd. (c); see also Pen. Code, § 949.) The last clause of the first sentence also requires the case to "proceed according to the laws applicable to a criminal case." (§ 707(d)(4).) In another context we held in *Solano v. Superior Court, supra,* 169 Cal.App.4th 1361, the first sentence of section 707(d)(4) "strongly supports the . . . argument that minors should be treated the same as adults insofar as their cases should proceed according to the laws applicable in criminal cases." (*Id.* at p. 1369.) Thus, the language of section 707(d)(4) can be interpreted to allow criminal prosecution of a minor by indictment under the criteria of subdivision (d)(1) or (2).

Defendant focuses his argument on the references to the finding required by a magistrate at a preliminary hearing conducted under Penal Code section 738 [requiring "a preliminary examination of the case against the defendant and an order holding him to answer" "[b]efore an information is filed"] appearing in the second and third sentences of section 707(d)(4). But neither sentence expressly bars commencing a criminal action

against a minor by indictment. Nor do they mandate that such a prosecution proceed solely by way of an information after a preliminary hearing. Further, contrary to defendant's assertion these sentences do not create the "right to a preliminary hearing," but merely require that a magistrate who conducts a preliminary hearing on a complaint filed against a juvenile under section 707(d)(4) "make a finding that reasonable cause exists to believe that the minor comes within this subdivision."

Guillory v. Superior Court, supra, 31 Cal.4th 168 rejected an analogous argument in holding prosecutors could proceed by an indictment when required to charge a juvenile in adult criminal court under section 602, subdivision (b). Recognizing Proposition 21 addressed "'the problem of violent crime committed by juveniles and gangs' in part by making 'certain minors more accountable for serious crimes'" and that it "'expand[ed] . . . the authority of courts of criminal jurisdiction over juveniles, including the authority of grand juries over juveniles'" (*id.* at pp. 176-177), *Guillory* concluded "[i]t therefore seems unlikely such a limitation on the grand jury's historic authority to indict minors . . . would go unmentioned" (*id.* at p. 176).

In *Guillory*, the Supreme Court cited with approval this court's earlier opinion in *People v. Aguirre, supra,* 227 Cal.App.3d 373, a pre-Proposition 21 case that rejected a claim the commencement of a criminal prosecution against a minor by indictment was a nullity. (*Guillory v. Superior Court, supra,* 31 Cal.4th at p. 173.) There the defendant participated in assaulting two persons in 1981. The grand jury timely issued an indictment charging the defendant and his accomplices with several crimes. But the defendant fled and was not arrested until 1987. At his arraignment, it was discovered he was only 16 years old when the crimes occurred. The matter was remanded to the juvenile court where, after the defendant was found unfit to be dealt with in that tribunal, the case was returned to adult court. Under the then-applicable case law, the case proceeded by way of a preliminary hearing and the filing of an information. On

appeal, the defendant argued his prosecution was untimely because the initial indictment was a nullity and the subsequent proceedings did not commence until after the six-year statute of limitation had expired. *Aguirre* rejected this argument, stating, "no cases limit the authority of the grand jury to indict persons of any age, providing the offense has been committed or is triable within the county." (*People v. Aguirre, supra,* 227 Cal.App.3d at p. 378.)

Defendant cites *People v. Superior Court (Gevorgyan)* (2001) 91 Cal.App.4th 602 (disapproved in part in *Guillory v. Superior Court, supra,* 31 Cal.4th at p. 178, fn. 5) to reach a different conclusion. *Gevorgyan* involved the indictment of three juveniles, one subject to section 602, subdivision (b), and two others charged under section 707(d). The Court of Appeal ordered the indictment dismissed as to all three juveniles. It concluded that since the statutes referred to charges either "alleged by the prosecutor" (§ 602, subd. (b)(1)) or filed by "the district attorney or other appropriate prosecuting officer" (§ 707(d)(1), (2), & (4)) they impliedly barred commencement of a criminal prosecution against an allegedly eligible juvenile by a grand jury indictment. (*People v. Superior Court (Gevorgyan), supra,* 91 Cal.App.4th at pp. 611-615.)

Discussing section 707(d) *Gevorgyan* stated: "The use of the words 'district attorney or other appropriate prosecuting officer has filed' indicates an intent to proceed by way of a preliminary hearing, because such language is not consistent with a grand jury proceeding. So, too, the reference to the preliminary hearing itself, which sets forth the requirement that the magistrate shall make a finding of reasonable cause that the minor falls within the scope of section 707[](d)(4). Given that our state Constitution now forbids a defendant who is being prosecuted by indictment from being afforded a preliminary hearing [citation], the reference to the duty of the magistrate strongly suggests that the drafters of Proposition 21 did not envision grand jury indictment as being a part of the new statutory scheme." (*People v. Superior Court (Gevorgyan), supra,* 91 Cal.App.4th at pp. 613-614.)

Guillory disapproved of *Gevorgyan's* interpretation of section 602, subdivision (b), rejecting the theory the statute's reference to charges "alleged by a prosecutor" meant a juvenile could be charged in adult criminal court only by an information after a preliminary hearing. *Guillory* explained, "'When the district attorney chooses to proceed by indictment rather than by information, the indictment itself must be "draw[n]" by the district attorney. [Citation.] . . . The prosecutor alleges the facts contained in the indictment and is bound by rule 5-110 of the California Rules of Professional Conduct, which prohibits prosecutors from "institut[ing] or caus[ing] to be instituted criminal charges when the member knows or should know that the charges are not supported by probable cause." . . . Therefore, while the indictment may contain the allegations of the grand jury, it also contains the allegations of the prosecutor, who drafts the indictment and who is bound to exercise discretion to initiate the prosecution only upon such charges that the prosecutor knows are supported by probable cause. [¶] 'Not only does the indictment contain the allegations of the prosecutor when first presented to the grand jury, . . . it also effectively contains the prosecutor's allegations when returned by the grand jury and filed with the court. As noted above, the indictment is the first pleading of the prosecution charging the defendant with a crime. The prosecutor does not thereafter file a separate document containing the charging allegations against the defendant.'" (*Guillory v. Superior Court, supra,* 31 Cal.4th at p. 174.)

Gevorgyan's parallel construction of section 707(d)(4) suffers from the same defect as its now-disapproved interpretation of section 602, subdivision (b). In analyzing both statutes, *Gevorgyan* arbitrarily focused on a few terms and failed to """"construe[that language] in the context of the statute as a whole and the overall statutory scheme [in light of the electorate's intent]."""" (*Solano v. Superior Court, supra,* 169 Cal.App.4th at p. 1367.) In addition, while acknowledging the California Constitution bars a preliminary hearing where a criminal prosecution proceeds by

indictment (Cal. Const., art. I, § 14.1), it failed to acknowledge the Constitution also declares "[f]elonies shall be prosecuted as provided by law, either by indictment or, after examination and commitment by a magistrate, by information" (Cal. Const., art. I, § 14). Thus, we conclude *Gevorgyan's* analysis of section 707(d)(4) is wrong and decline to follow it.

Defendant also argues his interpretation of this statute is supported by the Supreme Court's opinion in *Manduley v. Superior Court, supra,* 27 Cal.4th 537. This argument lacks merit. *Manduley* concerned facial constitutional challenges to Proposition 21. (*Id.* at p. 544-546.) In describing the changes made by Proposition 21, *Manduley* noted, "Where the prosecutor files an accusatory pleading directly in a court of criminal jurisdiction pursuant to section 707(d), at the preliminary hearing the magistrate must determine whether 'reasonable cause exists to believe that the minor comes within the provisions of' the statute . . . . If such reasonable cause is not established, the case must be transferred to the juvenile court." (*Id.* at p. 550.) But *Manduley* involved the prosecution of several minors commenced by the filing of a felony complaint (*id.* at p. 546) and the above-quoted language merely explained the procedure applicable to the facts of the case. "It is well settled that language contained in a judicial opinion is '"to be understood in the light of the facts and issue then before the court, and an opinion is not authority for a proposition not therein considered."'" (*People v. Banks* (1993) 6 Cal.4th 926, 945.) *Manduley* did not consider or discuss the issue of how an adult criminal prosecution of a juvenile under Proposition 21 must be commenced.

Finally, defendant seeks to uphold his strained construction of section 707(d)(4) by relying on the legal urban myth that the commencement of a criminal prosecution by an information after a preliminary hearing before a magistrate is superior to one commenced by a grand jury indictment. In *Bowens v. Superior Court* (1991) 1 Cal.4th 36, the Supreme Court upheld California Constitution, article I, section 14.1 which bars postindictment preliminary hearings. In that opinion, the court

discussed the "important goals" provided by "utilization of the grand jury indictment process." (*Bowens v. Superior Court, supra,* at p. 43, fn. 3.) As noted above, *Guillory* found use of the grand jury procedure does not give a prosecutor any more of an unfettered right to prosecute a defendant than a case commenced by felony complaint followed by a preliminary hearing before a magistrate. (*Guillory v. Superior Court, supra,* 31 Cal.4th at p. 174.) *Guillory* also explained, "'the role [of] the grand jury'" is that of "'a judicial body'" which "'is to "determine whether probable cause exists to accuse a defendant of a particular crime." [Citation.] In this capacity, the grand jury serves as the functional equivalent of a magistrate who presides over a preliminary examination on a felony complaint. "Like the magistrate, the grand jury must determine whether sufficient evidence has been presented to support holding a defendant to answer on a criminal complaint." [Citation.] Thus, the grand jury serves as part of the charging process in very much the same manner as does a magistrate in a prosecution initiated by complaint.'" (*Ibid.*)

If, as defendant urges, the prosecutor in this case failed to comply with his statutory obligation to "inform the grand jury of [the] nature and existence" of "exculpatory evidence" of which he "is aware" (Pen. Code, § 939.71, subd. (a)), upon remand he may refile and proceed with his motion to dismiss the indictment. (See *Johnson v. Superior Court* (1975) 15 Cal.3d 248, 253-255; *McGill v. Superior Court* (2011) 195 Cal.App.4th 1454, 1463, 1515-1516; *Berardi v. Superior Court* (2007) 149 Cal.App.4th 476, 481.)

We conclude the trial court erred in sustaining the demurrer to the indictment.

DISPOSITION

The order sustaining the demurrer to the indictment is reversed and the matter remanded to the superior court for further proceedings not inconsistent with this opinion.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.

APPENDIX B
(Court of Appeal Order Certifying the Opinion for Publication)

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Appellant,

v.

ISAIAS ARROYO,

Defendant and Respondent.

G048659

(Super. Ct. No. 12ZF0158)

ORDER CERTIFYING OPINION FOR PUBLICATION

Plaintiff and Appellant has requested that our opinion in this matter filed April 28, 2014, be certified for publication. It appears that our opinion meets the standards set forth in California Rules of Court, rule 8.1105(c). The request is GRANTED. The opinion is ordered published in the Official Reports.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.

CERTIFICATE OF WORD COUNT

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

I certify that the text of Petitioner's Petition for Review consists of 2,686 words as counted by "Word", the word-processing program used to generate it.

Dated this 6th day of June, 2014

ANTONY C. UFLAND
Senior Deputy Alternate Defender

DECLARATION OF SERVICE

The People v. Isaias Arroyo
(Case No. G048659; O.C.S.Ct. No. 12ZF0158)

STATE OF CALIFORNIA)
) ss
COUNTY OF ORANGE)

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

That on the 6th day of June, 2014, I served a copy of the Petition for Review in the above-entitled action by depositing a copy thereof in a sealed envelope, postage thereon fully prepaid, in the United States Mail at Santa Ana, California. Said envelope was addressed as follows:

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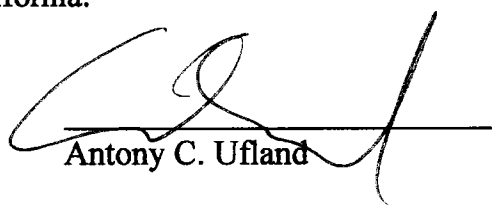
I declare under penalty of perjury that the foregoing is true and correct. Executed on this 6th day of June, 2014, at Santa Ana, California.



Antony C. Ufland