IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN THE MATTER OF: G.C., a Person Coming Under the Juvenile Court Law	S252057 (Sixth District Court of Appeal, Case No. H043281)
PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. G.C., Defendant and Appellant.	

CRC 8.25(b)

APPELLANT'S REPLY BRIEF ON THE MERITS

ON APPEAL FROM A JUDGMENT
OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA
THE HONORABLE KENNETH L. SHAPIRO, JUDGE
CASE NUMBER 3-14-JV40902

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By appointment of the Supreme Court
Under the Sixth District Appellate Program

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ARGUMENT

In the opening brief on the merits, G.C. argued that her timely notice of appeal stemming from Petition E vested the appellate court with jurisdiction over her entire wardship case, which included Petitions A and B. (OBM 14 - 24.) As part of this jurisdiction, the appellate court could consider the effect of an error under *In re Manzy W.* (1997) 14 Cal.4th 1199; this type of error can be corrected at any time by an appellate court because it resulted in an unauthorized sentence. (OBM 16 - 24.) G.C. further argued the requirement that the court must make a determination as to whether "wobbler" offenses were misdemeanors or felonies in Petitions A and B is not merely administrative. Because the juvenile court failed to make the designation, the matter

must be remanded for strict compliance with Welfare and Institutions Code[1] section 702. (OBM 24 - 25.) Last, G.C. argued the failure to correct this error would deprive appellant of her Fourteenth Amendment right to due process. (OBM 25.)

Respondent contends that because G.C. appealed only from the dispositional order for Petition E, the appellate court was without jurisdiction to make a determination under section 702 with respect to Petitions A and B. (RBM 18.) Respondent does not argue that the appellate court lacked jurisdiction over the case upon the filing of the notice of appeal from Petition E, but rather maintains that there is no ongoing obligation to correct the *Manzy W.* error and that absent such a duty, the appellate court did not have jurisdiction over the *Manzy W.* issue stemming from prior petitions. (RBM 18 – 26.) Respondent contends that the failure of the juvenile court to make a designation under section 702 is not an unauthorized sentence (RBM 26 – 31) and suggests that G.C. can file a motion in the juvenile court under section 775 to allow the juvenile court to make the determination (RBM 31 - 37). Last, respondent posits that G.C.'s due process rights were not violated. (RBM 37 – 38.)

For the following reasons, respondent's arguments are misplaced.

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[1] All further statutory references are to the Welfare and Institutions Code, unless otherwise noted.

ARGUMENT

I. THE JUVENILE COURT'S FAILURE TO EXPRESSLY DECLARE WHETHER AN OFFENSE IS A FELONY OR A MISDEMEANOR (SEE *IN RE MANZY W.* (1997) 14 CAL.4TH 1199) CAN BE CHALLENGED ON APPEAL FROM ORDERS IN A SUBSEQUENT WARDSHIP PROCEEDING

A. AN APPELLATE COURT CAN CONSIDER A *MANZY W.* ERROR IN AN APPEAL FOLLOWING A SUBSEQUENT WARDSHIP PROCEEDING

As set forth in the opening brief (OBM 14 – 15), when a juvenile commits an offense that can either constitute a misdemeanor or a felony, the juvenile court must make an affirmative finding about the offense level. (§ 702 [court shall "declare the offense to be a misdemeanor or felony"]; *Manzy W., supra,* 14 Cal.4th at p. 1209.) If an affirmative finding is not made, the appellate court must determine whether "the record as a whole establishes that the juvenile court was aware of its discretion to treat the offense as a misdemeanor and to state a misdemeanor-length confinement limit." (*Ibid.*) If the juvenile court fails to make this designation, the matter must be remanded "for strict compliance." (*Id.* at p. 1204.)

The majority below wrongly concluded that it did not have jurisdiction to consider whether the juvenile court erred in failing to make proper *Manzy W.* determinations for prior petitions. (*In re G.C.* (2018) 27 Cal.App.5th 110, 117.) Here, G.C. filed a timely notice of appeal from Petition E (CT 458 – 460), which vested the appellate court with jurisdiction over G.C.'s entire delinquency case. As part of that jurisdiction, the alleged *Manzy W.* errors could be corrected on appeal since they constitute an unauthorized sentence. (OBM 16.)

Respondent does not contend that the appellate court lacked jurisdiction over the case upon the filing of the notice of appeal from Petition E. (RBM 18.) Instead, she argues that because the juvenile court does not have an ongoing duty to correct *Manzy W.* errors, the appellate court did not have jurisdiction over the *Manzy W.* issue. (RBM 18 - 21.)

This argument has little relevance as to the appellate court's jurisdiction. As argued in the opening brief, the appellate court had jurisdiction over G.C.'s case since a timely notice of appeal was filed on February 1, 2016 after the dispositional hearings on Petition E. (Cal. Rules of Court, rule 8.104, subd. (a)(1).) (OBM 15.) This notice of appeal vested the appellate court with jurisdiction over the case. Whether an appellate court can then look to - and consider – errors from earlier orders is a matter of waiver. (*In re Jesse W.* (2001) 93 Cal.App.4th 349, 355; *In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1251; *In re Daniel K.* (1998) 61 Cal.App.4th 661, 667 - 668) or res judicata. (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1150.) Here, no such problem of waiver or res judicata existed since the alleged *Manzy W.* errors constituted an unauthorized sentence which can be corrected at any time by an appellate court. (OBM 16 – 17.)

Respondent argues there is no ongoing duty to correct under *Manzy W.* because that issue was not considered in *Manzy W.* (RBM 19.) While the question of whether there was an ongoing duty was not before this Court in *Manzy W.*, the holding places an obligatory duty on juvenile courts to make express designations. Because the determination as to whether offenses were misdemeanors or felonies, as required by *Manzy W.*, is relied upon in calculating the maximum term of confinement in later wardship proceedings, this duty is ongoing. (*Manzy W., supra*, 14 Cal. 4th at pp. 1204, 1207 – 1208.) As such, any errors relating to it result in unauthorized orders that can be corrected on an appeal from later wardship proceedings where a timely notice of appeal is filed.

Respondent erroneously claims that "[t]he order dismissing the appeal should be affirmed because appellate jurisdiction in one case did not extend time to appeal the judgment in the earlier case." (RBM 9 - 10.) Juvenile proceedings are all part of one case. (See § 602; see also *In re Antoine D.* (2006) 137 Cal.App.4th 1314, 1320.) The timely notice of appeal from Petition E therefore vested the appellate court with jurisdiction over the entire case, which included Petitions A and B.

Respondent argues that section 702 is a "prophylactic[2] statute" designed to prevent the miscalculation of a maximum term of confinement, and the purpose of section 702 is to help in the calculation of current and future maximum confinement time, citing *Manzy W.* (RBM 19 - 20.) While *Manzy W.* found that *one* purpose of making a determination under section 702 is to prevent a later miscalculation of confinement time, it did not state that this is the only purpose. (*Manzy W., supra,* 14 Cal.4th at p. 1205.) This Court also observed that "the purpose of the statute is not solely administrative. As *Kenneth H.* and *Ricky H.* acknowledge, the requirement that the juvenile court declare whether a so-called 'wobbler' offense was a misdemeanor or felony also serves the purpose of ensuring that the juvenile court is aware of, and actually exercises, its discretion under Welfare and Institutions Code section 702. For this reason, it cannot be deemed merely 'directory.'" (*Id.* at p. 1207, citation omitted.)

Respondent is correct that nothing in section 702 itself mandates postjudgment review for *Manzy W.* error. (See RBM 19 – 20.) This argument is little more than a red herring. After all, most statutes do not expressly provide this for postjudgment review as part of their plain language, and the decision in *Manzy W.* itself indicates conclusively that postjudgment review *is* available to correct these types of errors. (*Manzy W., supra,* 14 Cal.4th at pp. 1210 – 1211.)

In addition, respondent is mistaken when she argues that this was a nonappealable order, citing *People v. Mendez* (1999) 19 Cal.4th 1084 and *In re Shaun R.* (2010) 188 Cal.App.4th 1129. (RBM 21.) Neither case involved an unauthorized sentence under *Manzy W.* In *Mendez,* this Court found the appeal was properly dismissed because the defendant failed to secure a certificate of probable cause before he challenged his competence to enter a plea. (*Mendez, supra,* 19 Cal.4th at p. 1104.) In *Shaun R.*, the appellate court found that probation conditions imposed in a prior disposition were final

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[2] The Merriam-Webster Dictionary defines "Prophylactic" as "tending to prevent or ward off." (https://www.merriam-webster.com/dictionary/prophylactic.)

and not appealable. (*Shaun R., supra*, 188 Cal.App.4th at p. 1138.) Since neither case dealt with an unauthorized sentence, they have no relevance here.

Respondent argues that the Indian Child Welfare Act [ICWA] and *In re Isaiah W.* (2016) 1 Cal.5th 1 are not applicable to the present appeal because ICWA provides an ongoing notice requirement, while section 702 does not. (RBM 24 – 25.) As set forth in the opening brief, while ICWA may expressly set forth a court's continuing duty, section 702, and cases which interpret it, sets forth the importance of making a misdemeanor/felony determination and how it can result in grave problems later for the youth. (*Manzy W., supra*, 14 Cal.4th at p. 1205 – 1209; see also *In re Eddie M.* (2003) 31 Cal.4th 480, 487; *People v. Lloyd* (1998) 17 Cal.4th 658, 669; *In re Ramon M.* (2009) 178 Cal.App.4th 665, 675.) *Manzy W.* determinations can easily be likened to ICWA notice/inquiry requirements because both present similar ongoing duties to the trial courts – in ICWA, the duty is set forth in the statute, while the case law interpreting section 702 does. Similar to *Isaiah W.* in which the court found an affirmative and continuing duty to inquire whether a child is or may be an Indian child, *Manzy W.* creates an ongoing duty on the juvenile court since it needs to accurately calculate the maximum confinement time on each new petition. (*Manzy W., supra*, 14 Cal.4th at p. 1206.) (OBM 21, 23.)

Respondent's attempt to distinguish *In re P.A.* (2012) 211 Cal.App.4th 23 and *In re A.C.* 224 Cal.App.4th 590 (RBM 25), cases resulting in custodial confinement as opposed to probation, would effectively render a *Manzy W.* error correctable only when a minor is subject to custodial time, yet not when the minor receives probation. Such a distinction does not exist in the statute and contravenes the importance of judicial economy. By correcting the *Manzy W.* error *before* custodial time is imposed, courts can help to prevent miscalculations in future cases.

Respondent's claim that the G.C.'s argument "contravenes the plain language and prophylactic legislative purpose of section 702..." (RBM 20) is without merit. The language in section 702 is mandatory. Section 702 provides in relevant part that "If the minor is found to have committed an offense which would in the case of an adult be

punishable alternatively as a felony or a misdemeanor, the court *shall* declare the offense to be a misdemeanor or felony." (Italics added.) Respondent's attempt to argue that this is nothing more than a discretionary sentence choice (RB 27) is contradicted by *Manzy W.* itself where the error was corrected. The "failure to make the mandatory express declaration requires remand of this matter for strict compliance with Welfare and Institutions Code section 702." (*Manzy W., supra*, 14 Cal.4th at p. 1204.) While the juvenile court can resolve the issue in different ways, *Manzy W.* makes clear that the juvenile court *must* make a determination. (*Id.* at p. 1204.) The mandatory nature of 702 indicates why it constitutes an unauthorized sentence.

Respondent argues *Ramon M., supra*, 178 Cal.App.4th 665, "departs from ordinary rules of appellate jurisdiction..." and she again contends that section 702 is discretionary. (RBM 28 - 29.) As set forth in the opening brief, the *Ramon M.* court was clear when it stated that section 702 "requires strict compliance. (*Manzy W., supra*, 14 Cal.4th at p. 1204)." (*Ramon M, supra,* 178 Cal.App.4th at p. 675.) A claim is not forfeited because the juvenile court's failure to make affirmative findings is tantamount to an unauthorized sentence that may be raised on appeal at any time. (*Id.* at p. 675.) (OBM 18 - 19.) The reliance on *People v. Nguyen* (2009) 46 Cal.4th 1007, by the *Ramon M.* court showed the practical import of juvenile adjudications, including, potentially, felony/misdemeanor determinations, in future proceedings. (*Ramon, supra*, 178 Cal.App.4th at p. 675.) As such, it supported a claim that compliance with section 702 was not merely administrative, but obligatory, and resulted in an unauthorized sentence that could have real consequences going forward. (*Id.* at pp. 675 – 676.)

Respondent contends that *Ricky H.* (1981) 30 Cal.3d 176 is inapplicable because it did not involve a prior adjudication, and the court's failure to state a maximum term of confinement is what resulted in the unauthorized sentence. (RBM 27.) As set forth in the opening brief, in *Ricky H.*, this Court remanded a juvenile case since the juvenile court did not accurately set forth the maximum term of confinement under section 726 and because the court had not made the appropriate felony/misdemeanor determination under section 702. (*Id.* at pp. 191 – 192.) While the *Ricky H.* court only expressly concluded

that the first error constituted an unauthorized sentence, it was the second error (i.e. the violation of section 702) that the court found warranted remand and correction. (*Ibid.*) This Court found that because section 702 requires that ..."the court shall declare the offense to be a misdemeanor or felony," and the record did not indicate that the juvenile court made an express finding as to whether the offense was a misdemeanor or a felony, the matter required remand to "determine the character of the offense as required by section 702." (*Ibid.*) (OBM 18.)

As argued in the opening brief, while neither *Ricky* nor *Ramon* is directly on point, both cases provide support for the argument that the dispositional order of March 13, 2015 was "tantamount to an unauthorized sentence" because the juvenile court failed to state whether the three vehicle theft violations in Petition A and Petition B were felonies or misdemeanors. (OBM 18.)

Contrary to respondent's claim (RBM 30), G.C.'s argument does not contravene the purposes of a timely notice of appeal at all. As here, there was a timely notice of appeal, which gave the appellate court jurisdiction, and the unauthorized nature of the prior *Manzy W.* error serves an exception to the waiver rule. The decision in *Manzy W.* places an obligatory duty on juvenile courts to make express misdemeanor/felony determinations. (*Manzy W., supra*, 14 Cal. 4th at p. 1204.) Since this determination is relied upon in calculating the maximum term of confinement in later wardship proceedings, this duty is an ongoing one. (*Id.* at pp. 1207 – 1208.) As such, any errors relating to it result in unauthorized orders that can be corrected on an appeal from later wardship proceedings where a timely notice of appeal is filed. Because a timely notice of appeal was filed after the disposition on Petition E, the appellate court had jurisdiction to consider the issue.

Respondent concedes the failure of the juvenile court to make a designation needs correction. (RBM 31.) She argues that G.C. could file a motion in the juvenile court under section 775 to correct this error. (RB 31 - 37.) Section 775 provides "Any order made by the court in the case of any person subject to its jurisdiction may at any time be

changed, modified, or set aside, as the judge deems meet and proper, subject to such procedural requirements as are imposed by this article."

The existence of section 775 does not mean an unauthorized sentence cannot be challenged on appeal and does not preclude the appellate court from correcting errors on appeal. In fact, if there are other issues on appeal, it is more economical for the appellate court to make the correction. This court should not adopt this argument as a way to reject G.C.'s claim.

B. THE JUVENILE COURT BELOW FAILED TO EXPRESSLY FIND WHETHER G.C.'S VIOLATIONS OF VEHICLE CODE SECTION 10851 CONSTITUTED MISDEMEANORS OR FELONIES

As argued in the opening brief, existing case law indicates that remand is required in the present case to comply with the requirements of section 702. (OBM 24 – 25.) The mere existence in the record of documents referring to felony/misdemeanor consideration is insufficient to constitute an affirmative finding, and absent other evidence, will require remand. In *Ricky H., supra*, 30 Cal.30 176, for example, the minor admitted a violation of Penal Code section 245, subdivision (a)(1), which could have been punished by the court as either a misdemeanor or a felony. (*Id.* at p. 191.) The petition described the offense as a felony, and the minor admitted the truth of that charge. (*Ibid.*) Nonetheless, this court held that the fact that the juvenile petition filed by the prosecution stated the offense was a felony was insufficient to meet the requirements. "[T]he preparation of a petition is in the hands of the prosecutor, not the court. The mere specification in the petition of an alternative felony/misdemeanor offense as a felony has been held insufficient to show that the court made the decision and finding required by section 702." (*Ibid.*, citing *In re Jeffrey M.* (1980) 104 Cal.App.3d 16, 23.) Similarly, notations on minute orders are also insufficient. (*Ramon M., supra*, 178 Cal.App.4th at p. 675, citing, *Ricky H., supra*, 30 Cal.3d at pp. 191 – 192.)

In the instant case, the two vehicle offenses charged in Petition A and the one vehicle offense charged in Petition B could constitute either misdemeanors or felonies.

(Veh. Code, §10851, subd. (a).) The offenses were all charged and admitted as felonies, but neither factor is sufficient to meet the burden under section Welfare and Institutions Code section 702. (*Ricky H., supra*, 30 Cal.3d at p. 191; *Nancy C., supra,* 133 Cal.App.4th at p. 512.) As such, remand is required.

C. THE FAILURE TO CORRECT THIS ERROR WOULD DEPRIVE APPELLANT OF HER FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS

The misapplication of state law results in the deprivation of an individual's liberty interest in violation of the due process clause. (U.S. Const., 14th Amend.; see also *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) Here, the juvenile court misapplied section 702 in failing to make an affirmative finding. Accordingly, the failure to correct this error will infringe on appellant's constitutional rights. Respondent argues that because there is no state law violation, G.C.'s right of due process was not violated. (RBM 38.) This is incorrect, here G.C. had a liberty interest in the correct determination of whether her offenses were misdemeanors or felonies under section 702.

Respondent is correct that this Court has taken a narrow view of the holding of *Hicks* stating that it only applies in the jury context. (See *People v. Gonzales* (2013) 56 Cal.4th 353, 385.) (RBM 37.) The majority opinion in *Cabana v Bullock* (1986) 547 U.S. 375 notes as much in dicta, in a footnote. (*Id.* at p. 386, fn. 4.) This Court should extend *Hicks* more broadly, Justice Brennan's dissent in *Cabana* seems to do just this, citing a passage from *Hicks* emphasizing how an "arbitrary disregard of the petitioner's right to liberty is a denial of due process of law." (*Id.* at pp. 405-406 [dissenting op. of Brennan, J., citation omitted].) The holding in *Hicks* is not necessarily so narrow.

CONCLUSION

For the reasons expressed above, this case should be reversed and remanded to the Alameda County juvenile court for a finding whether G.C.'s violations of Vehicle Code Section 10851, subdivision (a) (Petitions A, B) constituted misdemeanors or felonies.

Dated: May 28, 2019

Respectfully submitted,

SIDNEY S. HOLLAR
Attorney for Appellant
G.C.

Certificate of Word Count

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that Appellant's Reply Brief on the Merits in *People v. G.C.* contains 3,266 words, according to the computer program I used to prepare this brief.

SIDNEY S. HOLLAR

DECLARATION OF SERVICE

In re G.C., S252057

I, SIDNEY S. HOLLAR, declare that I am over 18 years of age, and not a party to the within cause; my business address is 5214F Diamond Heights Blvd., #127, San Francisco, California 94131. I served a true copy of the attached:

APPELLANT'S REPLY BRIEF ON THE MERITS

On the following, by placing same in an envelope addressed as follows:

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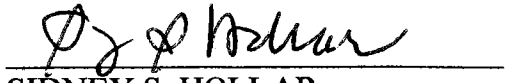
I declare under penalty of perjury that the foregoing is true and correct. Executed on May 28, 2019, at San Francisco, California.



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