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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Respondent, v. JOE PEREA, Petitioner and Appellant.	B271624 (Los Angeles County Super. Ct. No. KA071979)

APPEAL from an order of the Superior Court of Los Angeles County, Salvatore Sirna, Judge. Affirmed.

Brad Kaiserman, under appointment by the Court of Appeal, for Petitioner and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Mary Sanchez, Deputy Attorney General, and Paul S. Thies, Deputy Attorney General, for Respondent.

In 2008, defendant Joe Perea pleaded no contest to voluntary manslaughter. At sentencing, the trial court imposed a one-year enhancement under Penal Code section 667.5, subdivision (b) that was based on a prior felony drug offense. Several years later, Perea filed a petition under Penal Code section 1170.18, enacted as part of The Safe Neighborhoods and Schools Act (Proposition 47), to designate his prior drug offense as a misdemeanor. After his petition was granted, Perea filed a second petition seeking to strike the one-year enhancement that had been imposed as part of his sentence in 2008 because the underlying drug offense was no longer a felony. The trial court denied the petition. We affirm, concluding that the redesignation of an offense under section 1170.18 does not apply retroactively to invalidate a sentence enhancement that became final prior to the enactment of Proposition 47.

FACTUAL BACKGROUND

In 2005, the District Attorney of the County of Los Angeles filed an information charging defendant Joe Perea with murder (Penal Code, § 187[1]) and various additional offenses. Perea later plead no contest to voluntary manslaughter. In January of 2008, the court sentenced Perea to an aggregate term of 16 years in prison, which included a one-year enhancement under section 667.5, subdivision (b) (hereafter section 667.5(b)) for a prior drug possession conviction he had suffered in 1999.

Following the enactment of Proposition 47, which became effective November 5, 2014 (see *People v. Riviera* (2015) 233 Cal.App.4th 1085, 1089 (*Riviera*), Perea filed a petition pursuant to section 1170.18 requesting that the trial court designate his 1999 drug possession conviction as a misdemeanor. (See § 1170.18, subs. (f), (g).) On February 22, 2016, the trial court granted the petition. Shortly thereafter, Perea filed a second petition requesting the court to strike the section 667.5(b) enhancement that had been imposed on him in 2008 because the underlying drug offense no longer qualified as a felony. The trial court denied the petition.

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[1] Unless otherwise noted, all further statutory citations are to the Penal Code.

DISCUSSION

Perea argues that under the sentencing provisions set forth in Proposition 47, the trial court was required to strike the one-year section 667.5(b) enhancement that was imposed as part of his sentence in 2008 because the offense underlying that enhancement has since been designated as a misdemeanor.

A. Summary of Relevant Statutes and Case Law

1. Summary of sections 667.5(b) and 1170.18

This case involves the application of two statutes: the prior prison term enhancement provision set forth in section 667.5(b), and Proposition 47's sentencing provision, set forth in section 1170.18.

"[S]ection 667.5(b) . . . provides a special sentence enhancement for [a] particular subset of 'prior felony convictions' that were deemed serious enough by earlier sentencing courts to warrant actual imprisonment. . . ." (*People v. Jones* (1993) 5 Cal.4th 1142, 1148.) Imposition of the enhancement "requires proof that the defendant '"(1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction; (3) completed that term of imprisonment; and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction."' [Citation.]"[2] (*People v. Abdallah* (2016) 246 Cal.App.4th 736, 742 (*Abdallah*); see also *People v. Tenner* (1993) 6 Cal.4th 559, 563.) "Courts sometimes refer to the fourth requirement, which exempts from the enhancement defendants who have not reoffended for five years, as '"washing out."' [Citations.]. . . . 'According to the "washout" rule, if a defendant is free from both prison custody and the commission of a new felony for any five-year period following

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[2] Section 667.5, subdivision (b) states, in relevant part: "[W]here the new offense is any felony for which a prison sentence . . . is imposed[,] . . . the court shall impose a one-year term for each prior separate prison term . . . for any felony; provided that no additional term shall be imposed under this subdivision for any prison term . . . prior to a period of five years in which the defendant remained free of both the commission of an offense which results in a felony conviction, and prison custody. . . ."

discharge from custody or release on parole, the enhancement does not apply.' [Citation.]" (*Abdallah, supra,* 246 Cal.App.4th at p. 742.)

The Safe Neighborhoods and Schools Act, commonly known as Proposition 47 (hereafter Proposition 47 or the Act), "makes certain drug and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors). . . ." (*Riviera, supra,* 233 Cal.App.4th at p. 1091.) Proposition 47 also created section 1170.18, which establishes a mechanism for resentencing and reclassifying felony convictions for offenses that are now misdemeanors under the Act.

Under section 1170.18, subdivision (a), a person "currently serving" a felony sentence for an offense that is now a misdemeanor under Proposition 47 may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47. A person who satisfies the criteria in section 1170.18 shall have his or her sentence recalled and be "resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).)

Section 1170.18, subdivisions (f) and (g) provide that persons who have completed felony sentences for offenses that would now be misdemeanors under Proposition 47 may file an application with the trial court to have their felony convictions "designated as misdemeanors." (§ 1170.18, subd. (f).) Subdivision (k) (hereafter 1170.18(k)), in turn, provides that "[a]ny felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction [for various firearm prohibitions]." The Act further provides: "Nothing in this and related sections is intended to diminish or abrogate the finality of judgments in any case not falling within the purview of this act." (§ 1170.18, subd. (n).)

2. Summary of recent decisions analyzing the effect of a section 1170.18 redesignation on a prior prison term enhancement

In *Abdallah, supra,* 246 Cal.App.4th 736, this court considered the effect of a Proposition 47 reclassification on a prior prison term enhancement. The defendant in *Abdallah* was charged with several felony counts, including possession of methamphetamine while armed with a firearm (Health & Saf. Code, § 11370.1). The information included a special allegation under section 667.5(b) asserting that the defendant had served a term of imprisonment for a prior felony conviction in 2002, and was then convicted of a second felony in 2011 (resulting in a suspended sentence) that he had committed within five years of completing his term on the 2002 conviction. In June of 2014, a jury convicted the defendant of the offenses charged in the information. Prior to sentencing, the defendant obtained an order under section 1170.18 recalling his 2011 felony conviction, and reclassifying it as a misdemeanor. At sentencing, the trial court imposed a one-year enhancement under section 667.5(b), concluding that the prosecution had established the defendant had served a prior prison term for a felony conviction (the 2002 conviction), and then committed a second felony within five years of his completion of that prison term (the 2011 conviction).

On appeal, the defendant argued that the section 667.5(b) enhancement was invalid based on the "washout rule." Specifically, he argued that because his 2011 felony conviction had been reclassified as a misdemeanor under Proposition 47, he had not committed a felony conviction within five years of completing his prison term for the 2002 felony conviction. The Attorney General, however, argued that the Proposition 47 reclassification had no effect on the section 667.5(b) enhancement because the defendant's 2011 conviction was a felony at the time he had committed that offense.

In our analysis, we explained that "Proposition 47 borrowed the 'for all purposes' language of section 1170.18, subdivision (k), from section 17, subdivision (b), which describes the effect of a judicial declaration that a wobbler offense is a misdemeanor. (See § 17, subd. (b)(3) [where a crime is a wobbler, 'it is a misdemeanor for all purposes . . . [w]hen . . . the court declares the offense to be a misdemeanor']." (*Abdallah, supra,* 246 Cal.App.4th at p. 745.) We further explained that in *People v. Park* (2013) 56

Cal.4th 782 (*Park*), the Supreme Court had relied on this "for all purposes" language in reversing a "prior serious felony conviction" enhancement (see § 667, subd. (a)) that the trial court had imposed based on an offense that another court had previously declared to be a misdemeanor under section 17(b). "The Supreme Court held that 'when the court in the prior proceeding properly exercised its discretion by reducing the [felony] conviction to a misdemeanor, that offense no longer qualified as a prior serious felony within the meaning of section 667, subdivision (a), and could not be used, under that provision, to enhance defendant's sentence.' [Citation.] The court observed that . . . 'reduction of a wobbler to a misdemeanor under . . . section 17(b) generally precludes its use as a prior felony conviction in a subsequent prosecution.' [Citation.]" (*Abdallah, supra*, 246 Cal.App.4th at pp. 745-746 [citing and quoting *Park, supra*, 56 Cal.4th at p. 794].)

We concluded that "the same logic applies to sections 667.5, subdivision (b), and 1170.18, subdivision (k). [The fourth requirement of] [s]ection 667.5, subdivision (b) excludes from the prior prison term enhancement a defendant who has neither committed 'an offense which results in a felony conviction' nor been subject to [a prison term] within five years of release on parole or official discharge from another felony conviction resulting in the defendant's incarceration. Once the trial court recalled [the defendant's] 2011 felony sentence and resentenced him to a misdemeanor, section 1170.18, subdivision (k), reclassified that conviction as a misdemeanor 'for all purposes.' [Citation.] Therefore, at the time of sentencing . . ., [the defendant] was not a person who had committed 'an offense which result[ed] in a felony conviction' within five years after his release on parole for his prior conviction. [Citations.] Thus, the trial court erred by imposing the one-year sentence enhancement under section 667.5, subdivision (b)." (*Abdallah, supra,* 246 Cal.App.4th at p. 746.)

In *People v. Evans* (2016) 6 Cal.App.5th 894 (*Evans*)), District Four agreed with *Abdallah's* reasoning, and concluded "that Section 1170.18(k) prohibits a court from imposing a section 667.5(b) enhancement based on an offense that has already been reclassified a misdemeanor." (*Id.* at p. 901.) Although *Abdallah* considered the effect of a Proposition 47 reclassification in the context of section 667.5(b)'s fourth element ("the wash out" rule), *Evans*

concluded the same analysis applied to section 667.5(b)'s first element, which requires proof that the defendant "'"was previously convicted of a felony. . . ."'" (*Abdallah, supra,* 246 Cal.App.4th at p. 742.) Citing *Abdallah* and *Park*, the *Evans* court explained that once a trial court has reclassified a prior felony offense to be a misdemeanor, the "for all purposes" language in section 1170.18(k) prohibits the offense from serving as the basis for any subsequent section 667.5(b) enhancement.

B. Section 1170.18 Does Not Apply Retroactively to Invalidate a Section 667.5(b) Enhancement Imposed in a Judgment that Became Final Prior to Proposition 47's Enactment

In this case, Perea argues that once a prior felony conviction has been designated a misdemeanor pursuant to section 1170.18, the conviction cannot support a section 667.5(b) enhancement, even if the enhancement was imposed as part of a sentence that became final before Proposition 47 was enacted. Thus, Perea contends that a redesignation of a prior felony conviction under Proposition 47 applies both prospectively, barring a court from imposing a section 667.5(b) enhancement based on any offense that has previously been designated a misdemeanor, and retroactively, invalidating any section 667.5(b) enhancement that was imposed and became final before Proposition 47 was enacted, and before the redesignation occurred.

Abdallah and *Evans* support Perea's contention that once a felony offense has been designated as a misdemeanor under section 1170.18, the offense cannot support a section 667.5(b) enhancement in any subsequent proceeding. Neither case, however, considered whether Proposition 47 allows a trial court to retroactively strike a section 667.5(b) enhancement where, as here, the enhancement was imposed in a judgment that became final prior to Proposition 47's enactment.[3] Indeed, in both cases the courts specifically

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[3] The California Supreme Court has granted review in several cases that addressed this issue, all of which concluded that a redesignation order does not invalidate a previously-imposed section 667.5(b) enhancement that became final prior to Proposition 47's enactment. (See *People v. Valenzuela*, review granted March 30, 2016, S232900 (lead case); *People v. Carrea*, review granted April 27, 2016, S233011; *People v. Williams*, review granted May 11,

noted that they were not required to address that issue. (See *Abdallah, supra*, 246 Cal.App.4th at pp. 746-747 [explaining that defendant's case did not involve a retroactive application of Proposition 47 because the underlying conviction was redesignated as a misdemeanor before the enhancement was imposed]; *Evans, supra*, 6 Cal.App.5th at p. 901 [clarifying that defendant was not challenging "whether Proposition 47 . . . allows 'the courts to strike prison prior enhancements imposed prior to Proposition 47 based on prior convictions designated as misdemeanors after judgment and sentence have become final'"].)

"In interpreting a voter initiative, we apply the same principles that govern our construction of a statute." (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900.) "Whether a [penal] statute operates prospectively or retroactively is, at least in the first instance, a matter of legislative intent. When the Legislature has not made its intent on the matter clear with respect to a particular statute, the Legislature's generally applicable declaration in [Penal Code] section 3 provides the default rule: 'No part of [the Penal Code] is retroactive, unless expressly so declared.' . . . [S]ection 3 . . . codif[ies] 'the time-honored principle . . . that in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature . . . must have intended a retroactive application.' [Citations.]." (See *People v. Brown* (2012) 54 Cal.4th 319-320 (*Brown*).) The same principle applies to a statute enacted through a ballot initiative. (See *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1208-1209 ["in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature or the voters must have intended a retroactive application"].) "In applying this principle, [our courts] have been cautious not to infer retroactive intent from vague phrases and broad, general language in statutes. [Citations.] Consequently, '"a statute that is ambiguous with respect to retroactive application is construed . . . to be unambiguously prospective."'" (*Brown, supra,* 54 Cal.4th at p. 320.)

2016, S233559; *People v. Ruff*, review granted May 11, 2016, S233201; *People v. Jones* (2016) 1 Cal.App.5th 221, 229, review granted Sept. 14, 2016, S235901 (*Jones*).)

Applying those principles here, we reject Perea's assertion that a Proposition 47 redesignation is intended to apply retroactively to invalidate past sentencing enhancements that became final prior to its enactment. Proposition 47 does not contain any language declaring that its provisions are automatically retroactive. Instead, the initiative sets forth two mechanisms that allow certain categories of offenders to seek redesignation and resentencing on certain categories of felony convictions that have become final. First, a defendant "currently serving" a sentence for a felony that would now be a misdemeanor may petition for recall of the felony and resentencing as a misdemeanor. (§ 1170.18, subds. (a), (b).) Second, a defendant who has "completed his or her sentence" for a felony that would now be a misdemeanor may petition for redesignation of that offense to a misdemeanor. As the Fourth District explained in *Jones*, *supra,* 1 Cal.App.5th at p. 229, rev. granted, neither of these procedures provides a mechanism to retroactively strike a previously-imposed sentence enhancement: "The focus of these procedures is redesignation of convictions, not enhancements. Neither procedure provides for either the recall and resentencing or the redesignation, dismissal, or striking of sentence enhancements. [Citations.] No similar provision provides a process for offenders to seek to strike or otherwise redesignate sentencing enhancements. It follows that nothing in the language of section 1170.18 allows or even contemplates the retroactive redesignation, dismissal, or striking of sentence enhancements imposed in a final judgment entered before Proposition 47 passed, even where the offender succeeds in having the underlying conviction itself deemed a misdemeanor." (*Id.* at pp. 228-229.)

Moreover, section 1170.18, subdivision (n) expressly states that "Nothing in this and related sections is intended to diminish or abrogate the finality of judgments in any case not falling within the purview of this act." Reading a third mechanism into Proposition 47 that allows offenders to challenge an enhancement that became final prior to the Act's enactment would effectively contravene this provision. Because previously-imposed sentence enhancements do not "fall[] within the purview" of the Act, we must avoid any interpretation of section 1170.18 that would diminish their finality.

Perea, however, argues that section 1170.18(k), which states that a felony that has been designated as a misdemeanor "shall be considered a misdemeanor for all purposes," provides a statutory basis for retroactively striking a section 667.5(b) enhancement. Perea appears to contend that the phrase "for all purposes" necessarily includes retroactive relief from any collateral effect of a redesignated offense, including sentence enhancements.

As we explained in *Abdallah, supra,* 246 Cal.App.4th 736, the "for all purposes" language in section 1170.18(k) was "borrowed" from identical language in section 17(b), which describes the effect of a judicial declaration that a wobbler offense is a misdemeanor. (*Id*. at p. 745.) Our Supreme Court, in turn, has construed the phrase "for all purposes" as used in section 17(b) to operate prospectively, explaining that once a wobbler offense has been declared a misdemeanor, "the offense is a misdemeanor from that point on, but not retroactively." (*People v. Feyrer* (2010) 48 Cal.4th 426, 439; see also *Park, supra*, 56 Cal.4th at pp. 794 ["reduction of a wobbler to a misdemeanor under . . . section 17(b) generally precludes its use as a prior felony conviction in a subsequent prosecution"]; *Rivera, supra,* 233 Cal.App.4th at p. 1100 [under "the language [in] section 17(b), . . . the reduction of the offense to a misdemeanor does not apply retroactively"]; *People v. Moomey* (2011) 194 Cal.App.4th 850, 857 [misdemeanor status of a wobbler offense is "not . . . given retroactive effect"].)

Our courts have further concluded that, given its identical language ("for all purposes") and its analogous subject matter (addressing the effect of designating a felony as a misdemeanor), section 1170.18(k) should be interpreted in the same manner as section 17(b). (*Rivera, supra,* 233 Cal.App.4th at p. 1100; *Abdallah, supra,* 246 Cal.App.4th at p. 746; cf. *People v. Cornett* (2012) 53 Cal.4th 1261, 1269, fn. 6 ["identical language appearing in separate statutory provisions should receive the same interpretation when the statutes cover the same or analogous subject matter"]; *In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1437 ["When legislation has been judicially construed and a subsequent statute on a similar subject uses identical or substantially similar language, the usual presumption is that the Legislature intended the same construction"].) Consistent with our Supreme Court's interpretation of section 17(b) we "presume . . . the phrase 'shall be

considered a misdemeanor for all purposes' in section 1170.18, subdivision (k) does not apply retroactively." (*Rivera, supra,* 233 Cal.App.4th at p. 1100.)[4]

In sum, we conclude that because section 1170.18 provides no procedure for dismissing or striking sentence enhancements that were imposed, and became final, prior to Proposition 47's enactment, we cannot infer voters intended the Act to apply retroactively to past sentence enhancements. In the absence of any express language allowing the dismissal of past sentence enhancements, we construe section 1170.18(k)'s direction that any redesignated conviction "shall be considered a misdemeanor for all purposes" to apply prospectively, precluding future sentence enhancements based on felony convictions redesignated as misdemeanors under Proposition 47.[5]

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[4] Defendant cites *Park, supra*, 56 Cal.4th 782 and *People v. Flores* (1979) 92 Cal.App.3d 461 (*Flores*), in support of his argument that section 1170.18(k) requires retroactive application of the Act to allow the dismissal or striking of a sentence enhancements that was imposed before the underlying offense was redesignated. Both cases are distinguishable, however, because both involved a prospective application of a redesignated offense. *Park* held that the defendant's current felony sentence could not be enhanced for a prior conviction that had been previously reduced to a misdemeanor under section 17(b). The Court explained that once a wobbler has been "reduc[ed] . . . to a misdemeanor[,] . . . section 17(b) generally precludes its use as a prior felony conviction in a subsequent prosecution." (*Park, supra*, 56 Cal.4th at p. 794.) Similarly, the court in *Flores* held that the defendant's current felony sentence for selling heroin could not be enhanced based on a prior felony conviction for marijuana possession because the Legislature had reduced the marijuana offense to a misdemeanor before the defendant's heroin conviction. (See *Flores, supra*, 92 Cal.App.3d at p. 471.) In contrast to *Park* and *Flores*, the sentence enhancement at issue in this case was imposed, and became final, years before the felony underlying the enhancement had been redesignated as a misdemeanor.

[5] Because we conclude the plain and unambiguous language of section 1170.18 prohibits the dismissal of a sentence enhancement that became final prior to the Act's enactment based on the subsequent redesignation of a prior offense, we need not consider Perea's alternative arguments that: (1) the analysis and arguments in the official ballot pamphlet show the voters

3. Imposing the Section 667.5(b) Enhancement Does Not Violate the Equal Protection Clause

Perea additionally argues that even if Proposition 47 was not intended to retroactively invalidate any section 667.5(b) enhancement that was predicated on an offense that has now been designated a misdemeanor, he is nonetheless "entitled to relief under the equal protection clauses of the U.S. and California Constitutions." More specifically, Perea contends that "continuing to subject those who have had their felonies reduced to misdemeanors to the section [667.5(b)] enhancement, when going forward, those same individuals would not be subject to the enhancement[,] violates equal protection. There is no rational basis for treating Perea differently than a person who has already had their prior conviction reduced to a misdemeanor under Proposition 47, and now, should that person be sentenced to a new offense, not have the one year enhancement applied to him or her."

The California Supreme Court has rejected claims that the state equal protection clause is violated where classes of criminal defendants are treated differently based on the effective date of a statute lessening the punishment for a particular offense. (See *People v. Floyd* (2003) 31 Cal.4th 179, 189 (*Floyd*) ["'[a] reduction of sentences only prospectively from the date a new sentencing statute takes effect is not a denial of equal protection"].)

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intended Proposition 47 to apply to previously-imposed sentence enhancements (*People v. Rizo* (2000) 22 Cal.4th 681, 685 (*Rizo*) ["When the language is ambiguous, 'we refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet"]; *Moore v. Superior Court* (2004) 117 Cal.App.4th 401, 406 fn. 6 [when "the language of the statute itself is clear and unambiguous, [courts] need not concern [them]selves with the . . . ballot pamphlet"]); and (2) the rule of liberal construction requires that we interpret Proposition 47 retroactively. (See *Rizo, supra,* 22 Cal.4th at pp. 684-685 ["If a penal statute is . . . reasonably susceptible to multiple constructions, then we ordinarily adopt the "'construction which is more favorable to the offender'"'"]; *Di Genova v. State Board of Education* (1962) 57 Cal.2d 167, 174 ["the legislative intent in favor of the retrospective operation of a statute cannot be implied from the mere fact that the statute is remedial and subject to the rule of liberal construction"].)

Likewise, the United States Supreme Court has held that the "[Fourteenth] Amendment does not forbid statutes and statutory changes to have a beginning, and thus to discriminate between the rights of an earlier and later time." (*Sperry & Hutchinson Co. v. Rhodes* (1911) 220 U.S. 502, 505 (*Sperry*); see also *Floyd, supra*, 31 Cal.4th at p. 191 [citing and quoting *Sperry* in concluding that a statute which prospectively reduces a sentence does not violate the federal equal protection clause].) "The same rule applies to changes in sentencing law that benefit defendants." (*People v. Lynch* (2012) 209 Cal.App.4th 353, 359.) Consequently, we conclude Perea has not shown that the trial court's refusal to strike his sentence enhancement violated his right to equal protection of the laws.

DISPOSITION

The order is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

KEENY, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.