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No. _____

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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| In re<br><br>**JOHN MANUEL GUIOMAR,**<br><br>On Habeas Corpus. | H043114<br>(Monterey<br>County Superior<br>Court No.<br>SS131590A,<br>SS131650A) |

From the Superior Court of Monterey County,
The Honorable Pamela L. Butler,
and Lydia M. Villarreal, Judges



**PETITION FOR REVIEW**

After the Decision of the Court of Appeal, Sixth Appellate District,
Filed November 7, 2016, Modifying the Judgment of the Superior Court

SIXTH DISTRICT APPELLATE PROGRAM
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## MISCELLANEOUS

No. _____

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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| In re<br><br>**JOHN MANUEL GUIOMAR,**<br><br>On Habeas Corpus. | H043114<br>(Monterey County Superior Court No. SS131590A, SS131650A) |

**PETITION FOR REVIEW**

**TO: The Honorable Tani Cantil-Sakauye, Chief Justice, and the Associate Justices of the California Supreme Court:**

John Manuel Guiomar, petitioner in the Court of Appeal, respectfully petitions this Court for review of the published decision, attached as exhibit 1 to this petition, by the Court of Appeal, Sixth Appellate District, filed on November 7, 2016 after the issuance of an order to show cause. The court of appeal corrected its decision on November 17, 2016 to address a clerical error. (Exh. 2.)

**ISSUES PRESENTED**

This is another case concerning Proposition 47, the Safe Neighborhood and Schools Act (Gen. Elec. (Nov. 4, 2014)). Petitioner had received a six year prison sentence on four different cases. He filed a petition under Penal Code section 1170.18 on two of the cases to reduce them to misdemeanors. The court did so, but it also increased the sentence on a robbery conviction in

a third case to be six years long. In the fourth case, petitioner had been convicted of a felony failure to appear on a felony matter, but the underlying felony matter that he failed to appear on has been reduced to a misdemeanor under Proposition 47.

1. Was petitioner prejudicially deprived of his right to be present at the sentencing hearing (U.S. Const., 14th Amend. [due process clause]; Cal. Const., art. I, §§ 7, 15 [due process clauses]; Pen. Code, §§ 977, 1193) where petitioner could have argued that the court should not impose a "stipulated" term of six years?

2. Was the court required to vacate petitioner's felony conviction for a failure to appear on a felony under Penal Code section 1320.5 when the offense for which he failed to appear had been reduced to a misdemeanor under Penal Code section 1170.18?

3. After granting the petition in two cases to reduce the convictions to misdemeanors under Penal Code section 1170.18, did the court have jurisdiction to resentence petitioner on the two other cases not before the court?

4. Was trial counsel ineffective for not objecting to the six year term or "stipulat[ing]" to it, for not moving to vacate the felony conviction for failing to appear, or for failing to object to petitioner being sentenced *in absentia*?

## REASON TO GRANT REVIEW

First, a defendant has a due process and statutory right to be present at a sentencing hearing. The court of appeal agreed that a sentencing hearing after finding a defendant eligible under Proposition 47 qualifies as one in which petitioner had the right to be present. (Opn. at pp. 14-15.) The court concluded deprivation of the right was harmless. (Opn. at pp. 15-16.) This conclusion cannot be supported by the record. The court restructured the sentence to be six years because of a stipulation. While the record was not clear, the stipulation either concerned the stipulated six year sentence at the plea bargain or trial counsel entered a new stipulation at the new sentencing hearing. (Pet. exh. F.)[1] With petitioner absent, no one argued the court had the authority to impose a shorter sentence than six years or that it should under the facts of the case. Had petitioner been present, he would have presented the arguments made in his pro per habeas petition that the court had the power to impose a sentence of less than six years and should do so under the facts of the case. He would have refused to enter any new stipulation for a six year sentence, especially since there was nothing gained from such a concession. It cannot be concluded the court necessarily would have imposed the same sentence had petitioner been present.

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[1] References to a "pet. exh." are to the exhibits to the habeas corpus petition filed in the court of appeal.

Review is appropriate because no case to date has defined a defendant's right to be present at a new sentencing hearing held under Proposition 47 and when such an error is prejudicial. As is clear from the large number of Proposition 47 cases decided by the court of appeal and on review in this court, this area of the law is not well defined and the problem is likely to recur. With the passage of the Adult Use of Marijuana Act, permitting petitions to reduce certain marijuana convictions (Prop. 64, § 8.7 (Gen. Elec. (Nov. 8, 2016)), enacting Health & Saf. Code, § 11361.8), this is an issue that is likely to recur in other contexts as well.

Second, the court of appeal decided petitioner's felony conviction for a failure to appear on a felony under Penal Code section 1320.5[2] was not affected, though the offense for which he failed to appear has been reduced to a misdemeanor under section 1170.18. (Opn. at pp. 11-13.) As the court of appeal acknowledged (opn. at p. 11, fn. 3), this issue is related to two cases already on review. In *People v. Valenzuela* (2016) 244 Cal.App.4th 692 (review granted Mar. 30, 2016, S232900), this court is considering whether a defendant is eligible for resentencing on the penalty enhancement for serving a prior prison term on a felony conviction after the superior court had reclassified the underlying felony as a misdemeanor under the provisions of

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[2] Unless otherwise specified, all further statutory references are to the Penal Code.

Proposition 47. In *People v. Buycks* (2015) 241 Cal.App.4th 519 (review granted Jan. 13, 2016, S231765), this court is considering whether a defendant is eligible for resentencing on the penalty enhancement for committing a new felony while released on bail on a drug offense even though the superior court had reclassified the conviction for the drug offense as a misdemeanor under the provisions of Proposition 47. This case presents whether a defendant is eligible for resentencing on the felony conviction of failing to appear on a felony when the underlying felony has been reclassified as a misdemeanor under Proposition 47.

Third, several courts have held that the court may nonetheless restructure the sentence from charges or cases not within the scope of the petition. (*People v. Mendoza* (Nov. 15, 2016. B272222) __ Cal.App.5th __ [2016 Cal.App. lexis 975]; *People v. Cortez* (2016) 3 Cal.App.5th 308, 311-317; *People v. McDowell* (2016) 2 Cal.App.5th 978, 983; *People v. Rouse* (2016) 245 Cal.App.4th 292, 300; *People v. Roach* (2016) 247 Cal.App.4th 178, 183-187; *People v. Sellner* (2015) 240 Cal.App.4th 699, 701-702.) The court of appeal followed the cases. (Opn. at pp. 5-9.) However, "[u]nder the general common law rule, a trial court is deprived of jurisdiction to resentence a criminal defendant once execution of the sentence has commenced. [Citations.]" (*People v. Karaman* (1992) 4 Cal.4th 335, 344.) Petitioner filing a petition under Penal Code section 1170.18 provided the court jurisdiction

in two cases, but the other two cases were never properly before the court. Carving out an exception to the general rule for Proposition 47 cases runs counter of the express intent of the electorate to save costs and decrease punishment for qualified individuals. (Prop. 47, § 3.)

Finally, this case concerns the role of trial counsel at the resentencing hearing. It is understandable that trial courts try to handle the resentencing petitions as efficiently as possible. From the perspective of the defendants and the public, however, important decisions are being made. A defendant has the right counsel at the sentencing hearing, especially if he is not brought to court. (*Rouse, supra,* 245 Cal.App.4th at p. 301.) And he is entitled to the effective assistance of counsel. (*Glover v. United States* (2001) 531 U.S. 198, 204; see *Lafler v. Cooper* (2012) 566 U.S. __ [132 S.Ct. 1376, 1385-1386].) Trial counsel was given the file just before the sentencing hearing and asked to stand in for the attorney who normally handled the calendar. The file had a note with instructions. Trial counsel did what he was told, without petitioner present or consulting with him. (Trav. pet. G.) This included not opposing a six year sentence. Petitioner's representation was ineffective. Trial counsel never sought to have petitioner present, failed to argue that the felony conviction for the failure to appear was no longer valid, and failed to argue that the court should impose a sentence of less than the original six years, though re-imposing the six year sentence required restructuring the sentence

of cases that petitioner did not bring to court.

Accordingly, review is appropriate in order "to secure uniformity of decision" and "to settle an important question of law." (Cal. Rules of Court, rule 8.500(b)(1).)

## STATEMENT OF THE CASE

Petitioner's convictions arose from four cases in the Monterey County Superior Court. Pursuant to a plea bargain, it was agreed he would serve a total of six years, which was imposed on March 24, 2014. (Pet. exh. F.)

In case no. SS131590A, petitioner was convicted of robbery (§ 211) with a prior "strike" conviction (§§ 667, subds. (b)-(i), 1170.12), and he was sentenced to serve 4 years in prison (the lower term doubled).

Petitioner was arrested for felony possession of narcotics (Health & Saf. Code, § 11350, subd, (a)) in case no. SS130616A. He was released on bail and failed to appear. He was charged in case no. SS131650A with a felony failure to appear on a felony (§ 1320.5) with a prior strike conviction. He pled no contest in both cases, but he did not admit the prior strike conviction, which was dismissed as part of the bargain. The court imposed a consecutive term of 8 months for the failure to appear and a concurrent term of two years for drug possession.

In case no. SS131649A, petitioner was convicted of commercial burglary (§§ 459, 460, subd. (b)) with a prior strike conviction, and he was

sentenced to serve a consecutive term of 1 year 4 months.

After the passage of Proposition 47, enacting section 1170.18, Mr. Guiomar filed petitions for resentencing in cases nos. SS130616A and SS131649A. In case no. SS130616A, the petition was filed on December 15, 2014, and the court reduced the conviction for drug possession to a misdemeanor on February 25, 2015. (Pet. exh. B.)

Mr. Guiomar petitioned on March 31, 2015 to reduce the commercial burglary conviction to a misdemeanor in case no. SS131649A. (Pet. exh. C.) The court appointed counsel but did not transport petitioner from prison, and he did not appear at his sentencing hearing. On May 6, 2015, the court granted the petition to reduce the conviction for commercial burglary to a misdemeanor. However, it also resentenced petitioner in cases nos. SS131590A and SS13650A. It imposed six years for robbery (the middle term doubled) and a concurrent term of four years for the failure to appear (the middle term doubled). (Pet. exhs. A at pp. 2-3 [abstract of judgment], D, E, F [minute orders of the resentencing hearing].)

Mr. Guiomar filed a petition for writ of habeas corpus in the Monterey County Superior Court on October 21, 2015, and the court denied relief on December 16, 2015. (Exh. F.)

Mr. Guiomar filed a new habeas corpus petition on January 5, 2016 in the court of appeal to renew his claims; the court of appeal issued an order to

show cause and appointed counsel on April 26, 2016. A supplemental habeas corpus petition was filed on July 7, 2016, and an order to show cause was issued on August 4, 2016. In addition to the claims raised in this review petition, it was also claimed that the four year concurrent sentence for the failure to appear was unauthorized. On November 7, 2016, the court of appeal agreed the four year term was unauthorized (opn. at p. 16), but it otherwise rejected petitioner's claims. No rehearing petition was filed, but the court of appeal corrected its decision on November 17, 2016 to address a clerical error. (Exh. 2.)

## STATEMENT OF FACTS

The facts of the underlying cases are irrelevant to the claims raised.

## ARGUMENT

### I. THE TRIAL COURT VIOLATED PETITIONER'S RIGHT TO BE PRESENT AT THE RESENTENCING HEARING, AND TRIAL COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING.

#### A. Petitioner had a Right to be Present at a New Sentencing Hearing.

"Pronouncement and judgment . . . is a critical stage in the criminal prosecution when the constitutional rights to appear and defend, in person and with counsel [citation] apply" (*In re Cortez* (1971) 6 Cal.3d 78, 88, internal quotation marks omitted; §§ 977, 1193.)

Under the due process clause of the Fourteenth Amendment to the United States Constitution, the defendant has the right to be present at any critical stage, including sentencing. (*United States v. Gagnon* (1985) 470 U.S. 522, 526.) Similarly, article I, section 15 of the California Constitution states: "The defendant in a criminal cause has the right . . . to have the assistance of counsel for the defendant's defense, to be personally present with counsel . . . . [¶] Persons may not . . . be deprived of life, liberty, or property without due process of law." At the hearing, the defendant has a right to "present evidence with respect to mitigation of sentence (Pen. Code, § 1204)." (*Cortez, supra,* 6 Cal.3d at p. 88.)

A defendant does not have the right to be present to correct a sentence. (*People v. Rodriguez* (1998) 18 Cal.4th 253, 258.) But resentencing here was more than a mere correction of a sentence. The court had discretion at the hearing to simply reduce the conviction for commercial burglary to a misdemeanor and leave the remaining sentences of 4 years 8 months untouched. If it had done so, petitioner would not now be before this court. Instead, the court exercised its discretion to restructure the sentence to be six years (this assumes the court had the discretion to restructure the sentence at all, which petitioner disputes in the original habeas corpus petition).

The court of appeal agreed petitioner was deprived of his right to be present. (Opn. at pp. 14-15.)

### B. Sentencing Petitioner *in Absentia* Requires Reversal.

The unconstitutional *in absentia* sentencing is a structural error and a new hearing must be ordered. (*People v. Mora* (2002) 99 Cal.App.4th 397, 399; *People v. Arbee* (1983) 143 Cal.App.3d 351, 355-356.) The court of appeal disagreed, stating that neither case addressed whether the error was structural. (Opn. at p. 15.) But in both cases, the court ordered a new sentencing hearing without consideration of prejudice. (*Mora,* at p. 399; *Arbee,* at pp. 355-356.)

The court of appeal relied on *People v. Davis* (2005) 36 Cal.4th 510, 532 to conclude reversal is not required if the error was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 24. (Opn. at p. 15.) But the case concerned a defendant's absence from a pretrial hearing. This case concerns the absence from the entire sentencing hearing, and this is equivalent of being absent from the entire trial in the sense that there was a structural error in the sentencing hearing. Under these circumstances, the entire sentence must be reversed.

In any event, reversal is required under any standard. "The United States Supreme Court has recognized that a criminal defendant's need for counsel may be greatest at the time of sentencing because the judge then frequently 'moves within a large area of discretion' and may want to bring to his aid every consideration that defendant's counsel can appropriately urge."

(*People v. Cropper* (1979) 89 Cal.App.3d 716, 719-720, quoting *Carter v. Illinois* (1946) 329 U.S. 173, 178.)

The court operated under the view that the six year sentence was stipulated. (Pet. exh. F.) It was not clear if the stipulation referred to the plea bargain or a new stipulation by trial counsel at the resentencing hearing, and the court of appeal faulted petitioner for not obtaining the transcript of the resentencing hearing. (Opn. at pp. 15-16.) But under either scenario, prejudice exists.

It is most likely the court was under the mistaken view that it was required to impose the six years that was originally agreed to as part of the plea bargain. (Trav. exh. G.) First, there was no reason to stipulate to a six year sentence at the resentencing hearing because petitioner was entitled to have the two qualifying convictions reduced to misdemeanors. Second, in *People v. Dunn* (2016) 248 Cal.App.4th 518, the court reversed Judge Pamela L. Butler, the same superior court judge in this case, when she refused to resentence a defendant under Proposition 47 because it would purportedly deprive the prosecution of the benefit of the plea bargain. (*Id.* at pp. 525-527.) The court also ruled that the prosecution could not attempt to withdraw the plea. (*Id.* at pp. 527-532; see also *Harris v. Superior Court* (Nov. 10, 2016, S231489) __ Cal.5th __ [2016 Cal. Lexis 9040].) *Harris* was on review at the time of the resentencing hearing, but this only demonstrates that if the court

acted with a misapprehension that is was bound to impose the six year sentence that was "stipulated" at the time of the plea bargain, then the court would have benefitted with more information from petitioner.

Alternatively, trial counsel stipulated at the resentencing hearing to a six year sentence without consulting with petitioner. There was no tactical reason for this. The court was required to reduce the qualifying convictions to misdemeanors. Nothing was gained from such a stipulation. Had petitioner been present, he would have objected to such a stipulation.

In exercising its sentencing discretion, the court needed to have all relevant information. (*People v. Tran* (2015) 242 Cal.App.4th 877, 887 ["[t]o exercise the power of judicial discretion all the material facts in evidence must be both known and considered, together also with the legal principles essential to an informed, intelligent and just decision" (internal quotation marks omitted)].) In making this decision, the court necessarily needed information concerning petitioner's rehabilitation in prison. (See *Van Velzer v. Superior Court* (1984) 152 Cal.App.3d 742, 744 [the court may consider mitigating information after the last sentencing hearing].) Both the court and trial counsel would have benefitted from petitioner's input before resentencing. Because he was deprived of his right to be present, his arguments that the court lacked the authority to resentence him on the robbery case or to keep the failure to appear a felony had to be made by way of a habeas corpus petition.

If he were present, he would have been able to argue this at the sentencing hearing in the first place. He also would have been able to provide information concerning his rehabilitation in prison, which was directly relevant to the court's sentencing discretion.

Review is appropriate for this court to make clear when the failure to bring the defendant for sentencing is prejudicial.

**II. THE TRIAL COURT FAILED TO PROPERLY VACATE PETITIONER'S CONVICTION FOR FAILURE TO APPEAR ON A FELONY COUNT UNDER SECTION 1320.5 WHERE THE PREREQUISITE OFFENSE WAS REDUCED TO A MISDEMEANOR BY THE COURT, AND THEREFORE THAT CONVICTION SHALL BE CONSIDERED A MISDEMEANOR FOR ALL PURPOSES, INCLUDING THE RESULTING OFFENSE FOR FAILURE TO APPEAR, AND THEREFORE SECTION 1320.5 CONVICTION MUST BE VACATED.**

Petitioner's felony conviction for failing to appear on a felony is based on his failure to appear in 2014 for possession of narcotics. Subsequently, the court reduced the narcotics conviction to a misdemeanor under Proposition 47. It did not change the felony designation of the failure to appear. Because a felony violation of section 1320.5 requires the underlying crime to be a felony, the conviction for failure to appear must be reduced to a misdemeanor.

Enacted as part of Proposition 47, section 1170.18, subdivision (k) provides that once a defendant is resentenced to a misdemeanor, that offense "shall be considered a misdemeanor for all purposes" with an exception not

applicable here. Because the court resentenced petitioner on all four cases, the question was whether it should impose a felony term for failing to appear at resentencing.

Section 1320.5 states: "Every person who is charged with or convicted of the commission of a felony, who is released from custody on bail, and who in order to evade the process of the court willfully fails to appear as required, is guilty of a felony."

In *People v. Park* (2013) 56 Cal.4th 782, the defendant was convicted of felony assault with a deadly weapon. The conviction was subsequently reduced to a misdemeanor pursuant to section 17, subdivision (b). Section 17, subdivision (b) states that when a crime is so reduced, "it is a misdemeanor for all purposes." He was then charged with a new serious felony. The court held he could not receive an enhancement for committing a serious felony with a prior serious felony conviction (§ 667, subd. (a)) because he no longer had a prior serious felony conviction. (*Park,* at p. 793.)

Like section 17, a conviction reduced to a misdemeanor under Proposition 47 shall be treated as "a misdemeanor for all purposes," but for an exception that does not apply here. (§ 1170.18, subd. (k).) Petitioner failed to appear on a charge of felony possession of drugs. But it is now a misdemeanor. When the court resentenced petitioner on all his cases, it should not have imposed a felony sentence for the failure to appear.

The court of appeal relied on *People v. Walker* (2002) 29 Cal.4th 577. (Opn. at p. 13.) In that case, this court decided that a bail enhancement (Pen. Code, § 12022.1) can attach to a felony charge of failing to appear. But it did not address the issue of whether a conviction for a failure to appear on a felony can survive when the underlying crime is no longer a felony.

Because guidance is needed, review is appropriate.

## III. THE TRIAL COURT LACKED JURISDICTION TO RESENTENCE PETITIONER ON THE ROBBERY AND FAILURE TO APPEAR CONVICTIONS BECAUSE SECTION 1170.18 DOES NOT AUTHORIZE REDUCTION TO MISDEMEANOR EITHER COUNT AND THEREFORE THE COURT HAS NO AUTHORITY TO RESENTENCE PETITIONER ON THOSE COUNTS.

"Under the general common law rule, a trial court is deprived of jurisdiction to resentence a criminal defendant once execution of the sentence has commenced. [Citations.]" (*Karaman, supra,* 4 Cal.4th at p. 344.) Section 1170.18, enacted by the passage of Proposition 47, permits resentencing in cases where the defendant petitions for resentencing and is eligible for relief. Subdivision (a) states:

> A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who 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 may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act.

The statute does not permit resentencing on other cases where there is not a qualifying conviction.

The court of appeal decided that when a defendant has been sentenced on several charges, the court can restructure the sentence on other cases upon resentencing under Proposition 47. (Opn. at p. 5, citing *Roach, supra,* 247 Cal.App.4th at pp. 183-187 and *Sellner, supra,* 240 Cal.App.4th at p. 701; see also *Cortez, supra,* 3 Cal.App.5th at pp. 311-317; *McDowell, supra,* 2 Cal.App.5th at p. 983; *Rouse, supra,* 245 Cal.App.4th at p. 300.) In those cases, the defendants argued that the court lacked the authority to resentence them on cases not covered by Proposition 47. They pointed to the intent of the voters to reduce sentences, not to restructure them and accomplish nothing meaningful. (*Roach,* at p. 184; *Sellner,* at p. 702.) Petitioner made the same argument. (Pet. at pp. 7-12.) The courts rejected the arguments, stating there was nothing in the statute that specifically prohibited restructuring the entire sentence. (*Roach,* at p. 185; *Sellner,* at p. 702.)

The rule, however, is that a court lacks jurisdiction to change a final judgment, unless statute provided otherwise. (*Karaman, supra,* 4 Cal.4th at p. 344.) There was nothing in Proposition 47 that vested the court with jurisdiction to restructure the sentence on other cases. On the contrary, Proposition 47 specifically states: "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)), a provision the courts failed to consider in *Roach* and *Sellner*. The court lacked the jurisdiction to increase a sentence in cases not within the purview of the act.

The court of appeal disagreed. (Opn. at pp. 7-9.) It reasoned that the separate cases were part of petitioner's aggregate term. (§ 1170.1, subd. (a).) And the sentencing court "retained jurisdiction" over all components of the aggregate sentence, so long as the total sentence did not exceed the original sentence. (Opn. at p. 7, citing § 1170.18, subd. (n).) But as the court of appeal acknowledged, in *Sellner* and *Roach,* the defendants sought resentencing on the principal term. The remaining sentence of subordinate terms would be unauthorized because there must be at one principal term. (Opn. at p. 8.) Here, however, petitioner did not seek resentencing on the principal term. Simply reducing the convictions on the two convictions that qualify under Proposition 47 would not leave an unauthorized sentence.

The court of appeal analogized the situation to when a sentence is reversed on appeal or when it is recalled under section 1170, subdivision (d). (Opn. at pp. 8-9.) But the purpose of an appeal or to recall a sentence is not to reduce a sentence. The express purpose of Proposition 47 is to save money by reducing sentences for qualified defendants. (Prop. 47, § 3.)

The court of appeal disagreed that this result was inconsistent with the purpose of Proposition 47 since Proposition 47 does not mandate reducing a

sentence in every case. (Opn. at pp. 7-8.) It is true the initiative does not require reducing a sentence in every case; some qualified convictions might have been imposed concurrently to a principal term and it would be impossible in that situation to reduce the sentence. Nonetheless, it frustrated the purpose of the initiative not to reduce the sentence by increasing unrelated sentences terms that do not need to be adjusted.

Proposition 47 specifically states: "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).) Increasing lawful terms on unrelated cases abrogated the finality of the judgment in those cases. The court lacked the jurisdiction to increase an authorized sentence in a case not within the purview of the act.

## IV. PETITIONER WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT HIS RESENTENCING HEARING.

The right to effective assistance of counsel is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by article I, section 15 of the California Constitution, entitling a defendant to "the reasonably competent assistance of an attorney acting as his [or her] diligent, conscientious advocate." (*People v. Ledesma* (1987) 43 Cal.3d 171, 215; *Strickland v. Washington* (1984) 466 U.S. 668, 684.) This is measured by objective standards of reasonableness under prevailing professional norms.

(*Strickland,* at p. 688.)

In order to show ineffective assistance of counsel, it must be shown that (1) counsel's representation was deficient in that it fell short of prevailing professional standards of reasonableness; and (2) there is a reasonable probability that but for counsel's errors, the result of the case would have been different. (*Strickland, supra,* 466 U.S. at pp. 687, 694.)

The right to effective assistance of counsel applies at sentencing. (*Glover, supra,* 531 U.S. at p. 204; see *Lafler, supra,* 132 S.Ct. at pp. 1385-1386].) The right to counsel also attaches at a resentencing hearing under Proposition 47. (*Rouse, supra,* 245 Cal.App.4th at p. 301.) Trial counsel has a duty to object to unfavorable sentencing decisions. (*Glover,* at p. 204; *People v. Scott* (1994) 9 Cal.4th 331, 351;.) "An attorney undoubtedly has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy . . . ." (*Florida v. Nixon* (2004) 543 U.S. 175, 189.) "Criminal defense attorneys have a duty to investigate carefully all defenses of fact and law that may be available to the defendant . . . . Counsel should promptly advise his client of his rights and take all actions necessary to preserve them." (*People v. Pope* (1979) 23 Cal.3d 412, 425, internal quotation marks omitted.)

Trial counsel's performance was deficient when he failed to object to sentencing petitioner *in absentia.* There can be no tactical reason because a

criminal defendant has a right to be present unless there is a personal waiver. Not only is there no personal waiver, but there was no evidence trial counsel was authorized to waive his appearance. Assuming the court had the power to restructure the sentence, it imposed the maximum sentence permitted by law. (§ 1170.18, subd. (e).) There was no advantage to waiving petitioner's appearance when a lesser sentence was possible with proper input from petitioner.

Trial counsel's performance was also deficient if he stipulated or acquiesced to a six year sentence at the resentencing hearing since there was no advantage for doing so. He was deficient for failing to object to the six year sentence, arrived at by increasing the term for robbery in another case, for failing to argue that the conviction for failing to appear should have been reduced to a misdemeanor, and for failing to consult with petitioner before the resentencing hearing. There can be no tactical reason because the court was required to reduce the convictions for possessing narcotics and for commercial burglary. There was no advantage for agreeing or acquiescing to the same sentence or leaving the conviction for failing to appear unchanged.

Respondent argued that petitioner made no effort to obtain an explanation from trial counsel. (Ret. at p. 27.) But he did. In his informal reply, he included an exhibit from the public defender's office stating that his trial counsel, Jeremy Dzubay, no longer worked there. (Informal Reply exh.

A.) In any event, Dzubay told appellate counsel that the stipulated sentence appears to be referring to the plea bargain. (Trav. exh. G.) He provided no tactical reason for entering into a stipulation or for not challenging the failure to argue that the failure to appear conviction should be reduced to a misdemeanor. (Trav. exh. G.) He appeared at resentencing because he was filling in, relying on information in the file and note left for him. (Trav. exh. G.)

Nor could there be a tactical reason. Even if a court possesses the power to restructure a sentence on other cases when it grants relief under Proposition 47, "[u]nder no circumstances may resentencing under this section result in the imposition of a term longer than the original sentence." (§ 1170.18, subd. (e).) The most the court could have possibly imposed was six years, so there was no advantage to agreeing to six years.

## CONCLUSION

For the foregoing reasons, petitioner respectfully requests this Court to grant review.

DATED: December 6, 2016

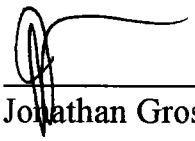
Respectfully submitted,
SIXTH DISTRICT APPELLATE PROGRAM

By: _____
Jonathan Grossman
Attorney for Petitioner
John Manuel Guiomar

## CERTIFICATION OF WORD COUNT

I, Jonathan Grossman, certify that the attached PETITION FOR REVIEW contains 5379 words.

Executed under penalty of perjury at San Jose, California, on December 6, 2016.



Jonathan Grossman

EXHIBIT 1

Filed 11/7/16

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

| | |
|---|---|
| In re JOHN MANUEL GUIOMAR,<br><br>on Habeas Corpus. | H043114<br>(Monterey County<br>Super. Ct. Nos. SS131590A,<br>SS131650A) |

## I. INTRODUCTION

In March of 2014, petitioner John Manuel Guiomar entered into a plea agreement that resolved four cases and resulted in four convictions (one in each case). The trial court imposed a six-year aggregate sentence, comprised of a four-year term for robbery, a consecutive 16-month term for burglary, a consecutive eight-month term for failure to appear on a felony charge, and a concurrent two-year term for possession of a controlled substance.

In November of 2014, the electorate passed Proposition 47, which reclassified certain felony drug and theft related offenses as misdemeanors, including possession of a controlled substance and certain burglary offenses. (Prop. 47, as approved by voters, Gen. Elec. (Nov. 4, 2014), eff. Nov. 5, 2014.)

In April of 2015, petitioner filed a petition for recall of sentence under Proposition 47. (See § 1170.18, subd. (a).) The trial court granted the petition as to petitioner's convictions of burglary and possession of a controlled substance, designating those offenses as misdemeanors. The trial court then resentenced petitioner to another six-year aggregate term by imposing a six-year term for the robbery and a concurrent four-year term for the failure to appear.

In his petition for writ of habeas corpus, petitioner contends that the trial court lacked jurisdiction to increase the terms for his robbery and failure to appear convictions. Petitioner also contends the trial court erred by failing to vacate his conviction for failure to appear on a felony charge, because the underlying felony offense was the possession of a controlled substance count, which had been reduced to a misdemeanor. Additionally, petitioner contends he received ineffective assistance of counsel at his resentencing hearing, because his counsel did not object to the increased terms for the robbery and failure to appear convictions.

In a supplemental petition for writ of habeas corpus, petitioner contends he was denied the right to be present at his resentencing hearing and that his trial counsel was ineffective for failing to object to his absence at the resentencing hearing. Petitioner also contends that he received an unauthorized second-strike sentence for his conviction of failure to appear on a felony charge, because the trial court had dismissed the strike allegation as to that count.

For reasons that we will explain, we reach the following conclusions. First, when a defendant's aggregate sentence includes multiple felony offenses, some of which are reduced to misdemeanors pursuant to Proposition 47, a trial court may resentence the defendant to increased terms for the remaining felony convictions, so long as the new aggregate sentence does not exceed the original aggregate sentence. Second, when a defendant is convicted of failure to appear on a felony charge, but the underlying felony charge is later reduced to a misdemeanor pursuant to Proposition 47, the trial court is not required to vacate the failure to appear conviction. Third, a defendant has the right to be present at a Proposition 47 resentencing hearing, but petitioner was not prejudiced in this case. Fourth, the trial court in this case imposed an unauthorized second-strike sentence for defendant's conviction of failure to appear on a felony charge. We will therefore grant habeas relief by modifying petitioner's sentence.

## II. BACKGROUND

In March of 2014, petitioner entered into a plea agreement that resolved four cases and resulted in four convictions (one in each case): (1) second degree robbery (Pen. Code, § 211;[1] case No. SS131590A), (2) burglary (§ 459; case No. SS131649A), (3) failure to appear on a felony charge (§ 1320.5; case No. SS131650A), and (4) possession of a controlled substance (Health & Saf. Code, § 11350; case No. SS130616A).

The trial court imposed a six-year aggregate sentence pursuant to the plea agreement. The aggregate sentence was comprised of a four-year term for the robbery (the two-year midterm, doubled due to a prior strike), a consecutive 16-month term for the burglary (one-third of the midterm, doubled due to a prior strike), a consecutive eight-month term for the failure to appear on a felony charge (one-third of the midterm), and a concurrent two-year term (the midterm) for the possession of a controlled substance.

In April of 2015, petitioner filed a petition for resentencing under Proposition 47, indicating he was seeking reduction of his burglary conviction in case No. SS131649A. (See § 1170.18, subd. (a).)

At a hearing on May 6, 2015, at which petitioner was not present but was represented by counsel, the trial court granted the petition as to both the burglary and the possession of a controlled substance convictions, designating those offenses as misdemeanors and dismissing the strike allegation as to the burglary. The clerk's minutes reflect that the trial court then resentenced petitioner "pursuant to stipulation," imposing a six-year term for the robbery and a concurrent four-year term for the failure to appear.

On October 21, 2015, petitioner filed a petition for writ of habeas in the trial court, raising sentencing issues. The trial court denied the petition, finding that petitioner had

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

"consented, as a condition of his plea agreements in both cases, to waive his right to an appeal or any post-conviction writ review."[2] Petitioner then filed a petition for writ of habeas corpus in this court in pro per, followed by a supplemental petition by counsel which raised additional issues, and we issued an order to show cause as to each petition.

## III. DISCUSSION

### *A. Jurisdiction to Resentence on Robbery and Failure to Appear Counts*

Petitioner argues that when his convictions of burglary and possession of a controlled substance were reduced to misdemeanors pursuant to Proposition 47, the trial court was required to delete those terms from his six-year aggregate sentence, which would have reduced his sentence by 16 months. Instead, the trial court resentenced petitioner to the same aggregate six-year term it had originally imposed, by imposing a six-year term for the robbery instead of the original four-year term. Petitioner contends the trial court had no jurisdiction to resentence him on counts unaffected by the section 1170.18 petition, and that its failure to reduce his aggregate term is inconsistent with the purpose of Proposition 47.

#### 1. Estoppel

The Attorney General argues that petitioner should be estopped from challenging his sentence because he stipulated to the six-year robbery term. However, petitioner was not present at the resentencing hearing, and he contends his counsel was ineffective for failing to object when the trial court resentenced petitioner without reducing his aggregate sentence. Thus, in addressing petitioner's ineffective assistance of counsel claim, we would need to reach the merits of his claim that the trial court lacked

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[2] Petitioner had signed a "Waiver of Rights" form in each case at the time of his pleas. The form included the following statement: "I hereby waive and give up all rights regarding state and federal writs and appeals. This includes, but is not limited to, the right to appeal my conviction, the judgment, and any other orders previously issued by this court. I agree not to file any collateral attacks on my conviction or sentence at any time in the future. . . ."

jurisdiction to increase the terms for convictions not affected by the granting of his petition for recall of sentence. (See *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1125-1126 [reaching merits of waived issue because of defendant's claim that trial counsel was ineffective for failing to object].)

Further, as petitioner points out in his traverse, it is unclear whether the phrase "pursuant to stipulation" referenced in the clerk's minutes referred to the original stipulated sentence or a new stipulation entered by petitioner's counsel at the resentencing hearing. If the phrase "pursuant to stipulation" referred to the original stipulated sentence, petitioner is not barred from seeking modification of that sentence, because "by its plain language section 1170.18 applies to convictions by trial or plea." (*T.W. v. Superior Court* (2015) 236 Cal.App.4th 646, 651; see *ibid.* ["the trial court erred by engrafting a plea agreement disqualifier into" section 1170.18]; *Doe v. Harris* (2013) 57 Cal.4th 64, 74 ["the terms of the plea agreement can be affected by changes in the law"].) We proceed to consider the merits of petitioner's claim.

**2. Analysis**

Two recent cases have held that a trial court has jurisdiction to resentence in a multiple felony count case following the granting of a section 1170.18 petition as to only some of the counts: *People v. Sellner* (2015) 240 Cal.App.4th 699, 701-702 (*Sellner*) and *People v. Roach* (2016) 247 Cal.App.4th 178, 183 (*Roach*). (See also *People v. Cortez* (2016) 3 Cal.App.5th 308, 317 [trial court may "revisit all of its misdemeanor sentencing decisions" after granting a section 1170.18 petition]; *People v. Rouse* (2016) 245 Cal.App.4th 292, 300.)

In *Sellner,* the defendant was originally sentenced on two counts in two separate cases. (*Sellner, supra,* 240 Cal.App.4th at p. 701.) Her sentence included a principal term of three years for the first count and a consecutive eight-month subordinate term (calculated at one-third of the two-year midterm) for the second count. (*Ibid.*) The trial court granted the defendant's Proposition 47 petition for resentencing as to the conviction

underlying the principal term, reduced that conviction to a misdemeanor, then resentenced the defendant for the second count, increasing the sentence on that count from an eight-month subordinate term to a two-year midterm. (*Sellner, supra,* at p. 701.) On appeal, the *Sellner* defendant argued that the trial court had no jurisdiction to resentence her on the second count, but the appellate court disagreed. The court explained that when consecutive terms are imposed, " 'the judgment or aggregate determinate term is to be viewed as interlocking pieces consisting of a principal term and one or more subordinate terms. [Citation.]' " (*Ibid.*) Further, because the Proposition 47 reduction resulted in a modification of the principal term, "the trial court not only was vested with jurisdiction to resentence in [the second case], it was required to do so. [Citations.]" (*Sellner, supra,* at pp. 701-702.)

In *Roach*, the defendant was originally sentenced on four felony counts in three separate cases. (*Roach, supra,* 247 Cal.App.4th at p. 182.) His aggregate four-year, four-month sentence was comprised of a three-year principal term for possession of methamphetamine, consecutive eight-month subordinate terms for unlawful possession of a firearm and receiving stolen property, and a concurrent three-year subordinate term for reckless driving. (*Ibid.*) The trial court granted the defendant's Proposition 47 petition for resentencing as to the possession of methamphetamine conviction and the receiving stolen property conviction. The trial court resentenced the defendant on all four counts, so that the defendant's aggregate sentence was still four years four months, by imposing a three-year principal term for the reckless driving conviction, a consecutive eight-month subordinate term for the unlawful possession of a firearm conviction, and a consecutive eight-month jail term for the two counts that had been reduced to misdemeanors. (*Roach, supra,* at p. 182.) On appeal, the *Roach* defendant argued that "the trial court erred in resentencing him to the same aggregate sentence originally imposed on his convictions in three cases" rather than imposing " 'an overall shorter sentence.' " (*Id.* at p. 183.) The *Roach* court disagreed, holding that "where a petition under section 1170.18 results in

reduction of the conviction underlying the principal term from a felony to a misdemeanor, the trial court must select a new principal term and calculate a new aggregate term of imprisonment, and in doing so it may reconsider its sentencing choices." (*Id.* at p. 185.)

Petitioner argues that *Sellner* and *Roach* erroneously concluded that a trial court may resentence a defendant on convictions in "other cases" after granting a Proposition 47 resentencing petition. Petitioner notes that subdivision (n) of section 1170.18 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." Petitioner contends that two of his cases were ones "not falling within the purview" of Proposition 47 (§ 1170.18, subd. (n)), since his petition for resentencing did not pertain to the convictions in those cases.

We do not agree that section 1170.18, subdivision (n) precludes a court from resentencing a defendant on convictions from separate cases when the terms for those convictions are part of the defendant's aggregate sentence. An aggregate sentence is comprised of the principal term and any subordinate terms, even if the convictions arose out of "different proceedings or courts." (§ 1170.1, subd. (a).) Thus, when a trial court is called upon to resentence the defendant, it retains jurisdiction over all component parts of the aggregate sentence. (See *Roach, supra,* 247 Cal.App.4th at p. 194 [nothing in section 1170.18 "can reasonably be read to restrict the trial court's discretion to impose the same aggregate term upon resentencing"].) In other words, when an aggregate sentence includes convictions "falling within the purview" of Proposition 47 (§ 1170.18, subd. (n)) as well as convictions not affected by Proposition 47, the trial court has jurisdiction to resentence on all of the convictions under section 1170.1, subdivision (a).

We also do not agree with petitioner that permitting a trial court to resentence him "in the manner in which it did" is inconsistent with the purpose of Proposition 47. A stated purpose of Proposition 47 was 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" (Prop. 47, § 3, as approved by voters, Gen. Elec. (Nov. 4, 2014), eff. Nov. 5, 2014), but none of the stated purposes was to decrease aggregate sentences in all cases in which Proposition 47 relief was granted.

We note that in *Sellner* and *Roach*, the defendants' Proposition 47 petitions pertained to the convictions underlying the principal terms. In the instant case, the granting of petitioner's Proposition 47 petition did *not* affect the principal term, i.e., the four-year term imposed for the robbery conviction. Nonetheless, the trial court had jurisdiction to resentence petitioner on both the robbery conviction and the failure to appear conviction.

A trial court has jurisdiction to reconsider its prior sentencing choices "on remand following the reversal of a felony count for which a subordinate term had been imposed," and the court may impose "a higher term for the principal, or base, term, so long as the total prison term for all affirmed counts does not exceed the original aggregate sentence." (*People v. Burbine* (2003) 106 Cal.App.4th 1250, 1253 (*Burbine*).) In *Burbine,* the defendant had originally been sentenced to the 12-year midterm for continuous sexual abuse of a child, with consecutive two-year terms (calculated at one-third of the midterm) for two counts of committing a lewd act on a child, for an aggregate 16-year sentence. (*Id.* at p. 1254.) One of the lewd act convictions was reversed on appeal and the matter was remanded for resentencing. (*Ibid.*) At the resentencing hearing, the trial court imposed the 16-year upper term for the continuous sexual abuse of a child conviction and a concurrent six-year term for the lewd act conviction. (*Id.* at p. 1255.) The appellate court upheld the recalculated sentence, rejecting "the proposition that a remand for resentencing vests the trial court with jurisdiction only over that portion of the original sentence pertaining to the count that was reversed, and not over his sentence for the affirmed counts" and concluding, instead, that "upon remand for resentencing after the

reversal of one or more subordinate counts of a felony conviction, the trial court has jurisdiction to modify every aspect of the defendant's sentence on the counts that were affirmed, including the term imposed as the principal term." (*Id.* at pp. 1257, 1259; see also *People v. Castaneda* (1999) 75 Cal.App.4th 611, 614 [permissible to increase sentence on principal term upon resentencing following remand for resentencing due to improper imposition of an enhancement].)

Similarly, "[w]hen a sentence is subject to 'recall' under section 1170, subdivision (d), the entire sentence may be reconsidered." (*People v. Garner* (2016) 244 Cal.App.4th 1113, 1118 (*Garner*).) In *Garner*, the court held that the same principle applied to a petition for "recall of sentence" under section 1170.126, subdivision (b), enacted as part of the Three Strikes Reform Act of 2012 (Proposition 36). (*Garner, supra,* at p. 1118.) In *Garner,* the defendant was convicted of receiving stolen property and had admitted three prior prison terms as well as four strikes. (*Id.* at p. 1115.) The trial court originally imposed a sentence of 25 years to life for the receiving stolen property conviction and struck the punishment for the prior prison terms. (*Id.* at p. 1116.) After Proposition 36 passed, the defendant successfully petitioned for recall of sentence. At the resentencing hearing, the trial court imposed a six-year term for the receiving stolen property conviction and imposed three consecutive one-year terms for the prior prison terms. (*Garner, supra,* at p. 1116.) The *Garner* court rejected the defendant's claim that "the trial court, in recalculating his sentence, was limited to resentencing on the base offense, and could not impose any sentence for the previously stricken prison term enhancements." (*Id.* at p. 1117.)

The instant case likewise involves a petition for "recall of sentence." (§ 1170.18, subd. (a).) Thus, when the trial court granted petitioner's petition and reduced two of his felony convictions to misdemeanors, it had jurisdiction to recalculate the terms for the two remaining felony convictions and could increase those terms, including the original

principal term, so long as the new aggregate sentence did not exceed the original aggregate sentence. (See § 1170.18, subd. (e).)

### 3. Ineffective Assistance of Counsel

Petitioner contends he received ineffective assistance of counsel at his resentencing hearing, because his counsel did not object to the increased terms for the robbery and failure to appear convictions, and in fact may have stipulated to the recalculated sentence.

"To prevail on a claim of ineffective assistance of counsel, the defendant must show counsel's performance fell below a standard of reasonable competence, and that prejudice resulted. [Citations.]" (*People v. Anderson* (2001) 25 Cal.4th 543, 569 (*Anderson*); see also *Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694.) Prejudice is shown where there is a reasonable probability that, " ' " 'but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " ' [Citations.]" (*Anderson, supra,* at p. 569.)

In this case, even assuming that reasonable counsel would have objected at the resentencing hearing when the trial court increased the terms for the robbery and failure to appear convictions, petitioner has not shown prejudice. As we have explained, the trial court had jurisdiction to increase the terms for those convictions so as to arrive at the same aggregate term that it had originally imposed. Petitioner does not argue that if his trial counsel had objected, the trial court would have exercised its discretion and imposed a lower aggregate term. Petitioner therefore cannot prevail on his ineffective assistance of counsel claim.

### *B. Failure to Appear on a Felony*

Petitioner next argues that his conviction of failure to appear on a felony charge (§ 1320.5) should be vacated because the underlying felony charge (possession of a controlled substance) was reduced to a misdemeanor pursuant to Proposition 47.[3]

Petitioner relies on section 1170.18, subdivision (k), which provides: "Any 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 under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6."

Petitioner points out that an element of section 1320.5 is that the person be "charged with or convicted of [the commission of] a felony," and he argues that the "predicate offense" was reduced to a misdemeanor and is now "a misdemeanor for all purposes" under section 1170.18, subdivision (k). Since there is no longer a felony on which he was required to appear, he claims his conviction cannot stand.

The Attorney General contends petitioner's claim is "foreclosed by the plain language" of section 1320.5, since at the time of petitioner's failure to appear, he was "*charged* with a felony." The Attorney General argues that it is "immaterial" that petitioner's ultimate conviction was for a felony.

The critical statutory language at issue is the phrase "shall be considered a misdemeanor for all purposes." (§ 1170.18, subd. (k).) "As in any case involving statutory interpretation, our fundamental task here is to determine the [legislative body's]

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[3] This issue is currently pending in the California Supreme Court. (See *People v. Perez* (2015) 239 Cal.App.4th 24, review granted Nov. 18, 2015, S229046 [briefing deferred pending decision in *People v. Buycks* (2015) 241 Cal.App.4th 519, review granted Jan. 20, 2016, S231765]; see also *People v. Eandi* (2015) 239 Cal.App.4th 801, review granted Nov. 18, 2015, S229305.)

intent so as to effectuate the law's purpose. [Citation.] We begin by examining the statute's words, giving them a plain and commonsense meaning. [Citation.] We do not, however, consider the statutory language 'in isolation.' [Citation.] Rather, we look to 'the entire substance of the statute . . . in order to determine the scope and purpose of the provision . . . . [Citation.]' [Citation.] That is, we construe the words in question ' "in context, keeping in mind the nature and obvious purpose of the statute . . . ." [Citation.]' [Citation.] We must harmonize 'the various parts of a statutory enactment . . . by considering the particular clause or section in the context of the statutory framework as a whole.' [Citations.]" (*People v. Murphy* (2001) 25 Cal.4th 136, 142.)

There is no specific language in Proposition 47 supporting petitioner's argument that the redesignation of the conviction underlying his failure to appear conviction automatically invalidates the failure to appear conviction, which was valid at the time of conviction. Proposition 47 created a specific procedure for persons who are currently serving a sentence for a felony that would have been a misdemeanor under Proposition 47, and it established criteria for resentencing and stated the effect of such resentencing. (§ 1170.18, subds.(a)-(d), (i)-(k).) Proposition 47 did not, however, establish a procedure for redesignation of any other convictions, including convictions that are ancillary or collateral to a redesignated conviction.

As petitioner points out, the phrase "shall be considered a misdemeanor for all purposes" (§ 1170.18, subd. (k)) is similar to a phrase found in section 17, subdivision (b), which states in part: "When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail, *it is a misdemeanor for all purposes* . . . ." (Italics added.) Section 17, subdivision (b) was construed in *People v. Park* (2013) 56 Cal.4th 782 (*Park*), which held that a felony conviction properly reduced to a misdemeanor under section 17, subdivision (b) could not subsequently be used to support an enhancement for a prior

serious felony conviction under section 667, subdivision (a). (*Park, supra,* at p. 798.) In *Park,* the underlying felony conviction had been reduced to a misdemeanor *prior to* the proceedings in which the defendant was alleged to have suffered a prior serious felony conviction. (*Id.* at pp. 787-788.) The court noted that this timing was significant: the defendant would have been "subject to the section 667(a) enhancement had he committed and been convicted of the present crimes before the court reduced the earlier offense to a misdemeanor." (*Id.* at p. 802.)

In contrast to *Park,* at the time petitioner failed to appear on a felony charge, the underlying felony charge had not yet been reclassified as a misdemeanor. Thus, at the time of his failure to appear, petitioner was "charged with . . . a felony." (§ 1320.5.) Moreover, the gravamen of a violation of section 1320.5 is "the defendant's act of jumping bail" (*People v. Walker* (2002) 29 Cal.4th 577, 585 (*Walker*)), not the nature of the crime for which the defendant is ultimately convicted. In fact, a defendant may be convicted of violating section 1320.5 even if he or she is not ultimately convicted of "the charge for which he or she was out on bail when failing to appear in court as ordered. [Citations.]" (*Walker, supra,* at p. 583.) Thus, even at the time of the resentencing hearing in this case, petitioner's conviction of failure to appear on a felony charge was still valid. Despite the fact that the underlying felony charge had been reduced to a misdemeanor pursuant to Proposition 47, the trial court was not required to vacate petitioner's failure to appear conviction.

### *C. Right to be Present at Resentencing Hearing*

In his supplemental petition for writ of habeas corpus, petitioner contends he had a constitutional and statutory right to be present at the May 6, 2015 resentencing hearing. As we shall explain, since the trial court had jurisdiction to reconsider the entire sentence at that proceeding, petitioner is correct.

### 1. Procedural Bar

The Attorney General asserts that petitioner's claim is procedurally barred because he could have raised the issue on direct appeal following the resentencing hearing. (See *In re Reno* (2012) 55 Cal.4th 428, 490; *In re Harris* (1993) 5 Cal.4th 813, 827 (*Harris*) [petition for a writ of habeas corpus " 'ordinarily may not be employed as a substitute for an appeal' "].) In response, petitioner argues that because he was denied the right to be present at the resentencing hearing, he was also effectively denied the right to file a timely appeal after that hearing. Petitioner points out that his trial counsel sent him a letter detailing the outcome of the resentencing hearing in September of 2015, which was well beyond the time in which petitioner could have filed a notice of appeal. As the Attorney General does not dispute that petitioner did not receive timely notice of the outcome of the resentencing hearing, we will proceed to consider the merits of petitioner's claim. (See *Harris, supra,* at p. 829 [court may consider a petition for writ of habeas corpus that is essentially a substitute for appeal where there are "special circumstances" excusing the petitioner's failure to appeal].)

### 2. Analysis

The Attorney General does not contest the merits of petitioner's claim that he had a right to be present at his resentencing hearing. It is well settled that sentencing is a critical stage of criminal proceedings. (See *People v. Doolin* (2009) 45 Cal.4th 390, 453.) "[T]he defendant's right to be present extends to the imposition of a new sentencing package after an original sentencing package is vacated in its entirety on appeal and the case is remanded for resentencing. [Citation.]" (*U.S. v. Jackson* (11th Cir. 1991) 923 F.2d 1494, 1496.) Further, section 977, subdivision (b) requires a defendant to be "personally present . . . at the time of the imposition of sentence," unless the defendant has executed a written waiver. (Cf. *People v. Fedalizo* (2016) 246 Cal.App.4th 98, 109 [defendant had right to be present at Proposition 47 resentencing on misdemeanor but could waive that right through counsel pursuant to section 977,

subdivision (a)]; *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1299 [defendant has the right to be personally present for resentencing after finding of eligibility under Proposition 36/Three Strikes Reform Act].) Thus, petitioner did have the right to be present at the May 6, 2015 sentencing hearing.

**3. Prejudice**

We next address petitioner's claim that a violation of the right to be present at a resentencing hearing is structural error, such that he is entitled to a new resentencing hearing without showing prejudice. Petitioner cites two cases in support of his claim: *People v. Mora* (2002) 99 Cal.App.4th 397 and *People v. Arbee* (1983) 143 Cal.App.3d 351. In both cases, the appellate courts reversed and remanded for new sentencing hearings after finding the defendants were denied their right to be present. However, neither case addressed the question of whether the error was structural or subject to harmless error analysis. Thus, those cases do not support petitioner's claim. As the California Supreme Court has held, "Under the federal Constitution, error pertaining to a defendant's presence is evaluated under the harmless-beyond-a-reasonable-doubt standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 23." (*People v. Davis* (2005) 36 Cal.4th 510, 532.)

Petitioner contends the results of the May 6, 2015 resentencing hearing would have been different if he had been present because he could have given "input" on his rehabilitation. However, petitioner has not shown that he has been making efforts at rehabilitation, nor has he provided authority for his claim that rehabilitation is relevant once the trial court has made the decision to resentence. (Cf. § 1170.18, subd. (b)(2) [rehabilitation is relevant to a trial court's decision to deny a petition for resentencing because the petitioner poses an unreasonable risk of danger to public safety].)

Petitioner also asserts that his presence would have affected the trial court's "mistaken view" that it was required to impose the original six-year sentence. Petitioner has not provided a reporter's transcript of the resentencing proceeding. Thus, it is unclear

whether the trial court believed it was required to reimpose the original stipulated six-year sentence or whether the phrase "pursuant to stipulation" referenced a new stipulation entered by petitioner's counsel at the resentencing hearing. Petitioner relies on comments by the same trial court in a different case (*People v. Dunn* (2016) 248 Cal.App.4th 518), but that case is inapposite, because it involved denial of a Proposition 47 petition rather than a resentencing.

In sum, the violation of petitioner's right to be present at the resentencing hearing was harmless beyond a reasonable doubt.

***D. Imposition of Second-Strike Sentence for Failure to Appear***

Petitioner contends he received an unauthorized second-strike sentence for the failure to appear conviction: a concurrent four-year term—i.e., the two-year midterm, doubled. The Attorney General concedes that the trial court erred in this respect.

When petitioner pleaded guilty to failure to appear on a felony charge, a strike allegation was dismissed as to that count. At the same time, petitioner pleaded guilty to the three other charges, and he admitted strike allegations as to two of those charges (robbery and burglary). In imposing the original six-year sentence, the trial court imposed doubled terms for the robbery and burglary convictions, but not for the failure to appear conviction.

At the Proposition 47 resentencing hearing held on May 6, 2015, the trial court imposed a concurrent doubled term of four years for petitioner's conviction of failure to appear on a felony charge. The clerk's minutes do not indicate that the People sought to reinstate the strike allegation as to the failure to appear conviction, and it does not appear that the People moved to withdraw from the original plea bargain. Thus, the trial court imposed an unauthorized sentence when it doubled the term for petitioner's failure to appear conviction.

## IV. DISPOSITION

As to the claims raised in the original petition for writ of habeas corpus, we deny relief. As to the claims raised in the supplemental petition for writ of habeas corpus, we find that petitioner is entitled to relief on his claim that the trial court erroneously imposed a second-strike sentence for his conviction of failure to appear on a felony charge.

We therefore order petitioner's sentence modified to reflect a two-year term for the conviction of failure to appear on a felony charge. The clerk of the superior court is directed to prepare an amended abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MIHARA, J.

*In re Guiomar*
**H043114**

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| Trial Court: | Monterey County Superior Court<br>Superior Court Nos.: SS131590A, SS131650A |
| Trial Judge: | Hon. Lydia M. Villarreal |
| Attorney for Petitioner:<br>Salvador Martinez, Jr. | Jonathan Grossman<br>Sixth District Appellate Program |
| Attorneys for Respondent:<br>The People | Kamala D. Harris<br>Attorney General of California<br>Gerald A. Engler<br>Chief Assistant Attorney General<br>Jeffrey M. Laurence<br>Senior Assistant Attorney General<br>Seth K. Schalit<br>Supervising Deputy Attorney General<br>Amit Arun Kurlekar<br>Deputy Attorney General |

***In re Guiomar***
**H043114**

EXHIBIT 2

OFFICE OF THE CLERK
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State of California
SIXTH APPELLATE DISTRICT

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November 17, 2016

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**Re: H043114** **In re John Manuel Guiomar on Habeas Corpus**
Monterey County Superior Court Nos. SS131590A, SS131650A
(HC8598)

Dear Counsel:

The court brings to the parties' attention the following correction:

There was a typographical/clerical error on the backing sheet of the opinion filed on November 7, 2016. The backing sheet (the last page of the opinion) lists petitioner as Salvador Martinez, Jr. Petitioner's correct name is John Manuel Guiomar.

Very truly yours,

DANIEL P. POTTER
Clerk of the Court

DPP:msf

**DECLARATION OF SERVICE BY E-MAIL AND U.S. MAIL**

**Case Name:** ***In re John Guiomar*** **Case No.:** **H043114**

I declare that I am over the age of 18, not a party to this action and my business address is 95 S. Market Street, Suite 570, San Jose, California 95113. On the date shown below, I served the within ***PETITION FOR REVIEW*** to the following parties hereinafter named by:

X **BY ELECTRONIC TRANSMISSION** - I transmitted a PDF version of this document by electronic mail to the party(s) identified on the attached service list using the e-mail address(es) indicated.

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Court of Appeal
333 W. Santa Clara Street
Suite 1060, 10th Floor
San Jose, CA 95113
Sixth.District@jud.ca.gov
**Served electronically via TrueFiling.com**

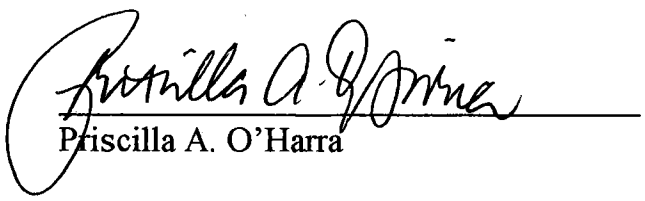
X **BY MAIL** - Placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Jose, California, addressed as follows:

District Attorney's Office
230 Church Street
Modular No. 3
Salinas, CA 93901

Superior Court, Appeals Clerk
Criminal Division
240 Church Street, Room 318
Salinas, CA 93902

John Manuel Guiomar, AS9562
CTF - North
P.O. Box 705
Soledad, CA 93960

I declare under penalty of perjury the foregoing is true and correct. Executed this 8th day of December, 2016, at San Jose, California.



Priscilla A. O'Harra