No. S238888

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re **JOHN MANUEL GUIOMAR,** On Habeas Corpus.	H043114 (Monterey County Superior Court Nos. SS131590A, SS131650A)

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

PETITIONER'S OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED

This court requested briefing "concerning whether a Penal Code section 1320.5 enhancement must be dismissed if the felony for which the defendant was on bail, and failed to appear, is later reduced to a misdemeanor under Proposition 47."

INTRODUCTION

Petitioner's felony conviction for failing to appear on a felony was 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 "for all purposes." Although the court also resentenced petitioner on the failure to appear conviction, it left the felony conviction undisturbed. 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.

STATEMENT OF THE CASE AND FACTS

The facts of the underlying cases are irrelevant to the claims raised. 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.)[1]

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 (Pen. Code, § 1320.5)[2] with a prior "strike" conviction (§§ 667, subds. (b)-(i), 1170.12). He pled no contest in both cases, but he did not admit the strike, which was dismissed as part of the bargain. The court imposed a consecutive term of 8 months for the failure to appear and two years for drug possession concurrent to case SS131590A. (See pet. exhs. A at p. 1, F at p. 8.)

In case no. SS131590A, petitioner was convicted of robbery (§ 211) with a prior strike conviction, and he was sentenced to serve 4 years in prison (the lower term doubled). In case no. SS131649A, petitioner was convicted

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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.

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

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. (See pet. exhs. A at p. 1, F at p. 5.)

After the passage of Proposition 47, enacting section 1170.18, Mr. Guiomar filed a petitions for resentencing in case 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.)

In case no. SS131649A, the petition was filed on March 31, 2015 to reduce the commercial burglary to a misdemeanor. The court appointed counsel. On May 6, 2015, the court granted the petition to reduce the conviction to a misdemeanor. However, it also resentenced petitioner in absentia in case 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 under the false assumption that petitioner admitted a strike in this case). (Pet. exhs. A at pp. 2-3 [abstract of judgment], D, E, F [minute orders of the resentencing hearing].)

Mr. Guiomar filed a pro se 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 pro se 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. On November 7, 2016, the court of appeal agreed the four year term was unauthorized because a strike did not attach to the conviction for failing to appear (opn. at p. 16), but it otherwise rejected petitioner's claims.

Mr. Guiomar petitioned for review. This court requested briefing concerning the validity of the felony failure to appear when the underlying conviction has been reduced to a misdemeanor under Proposition 47.[3]

ARGUMENT

THE COURT FAILED TO PROPERLY VACATE PETITIONER'S CONVICTION FOR FAILURE TO APPEAR ON A FELONY WHERE THE PREREQUISITE OFFENSE WAS REDUCED TO A MISDEMEANOR UNDER PROPOSITION 47.

This issue rests on statutory construction, which this court reviews independently. (*In re Corrine W.* (2009) 45 Cal.4th 522, 529.) " 'In construing statutes adopted by the voters, we apply the same principles of interpretation we apply to statutes enacted by the Legislature.' [Citation.]" (*People v. Morales* (2016) 63 Cal.4th 399, 406.) " 'The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. [Citations.]' " (*Horwich v. Superior Court*

[3] This issue is related to the one raised in *People v. Buycks*, S231765.

(1999) 21 Cal.4th 272, 276.) In the case of a provision adopted by the voters, 'their intent governs.' (*People v. Jones* (1993) 5 Cal.4th 1142, 1146.) [¶] 'In determining such intent, we begin with the language of the statute itself.' (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 192–193.) We look first to the words the voters used, giving them their usual and ordinary meaning. ' "If there is no ambiguity in the language of the statute, 'then ... the plain meaning of the language governs.' " "But when the statutory language is ambiguous, 'the court may examine the context in which the language appears, adopting the construction that best harmonizes the statute internally and with related statutes.' " [Citation.] [¶] In construing a statute, we must also consider " 'the object to be achieved and the evil to be prevented by the legislation.' " [Citation.]' (*Id.* at pp. 192–193.)" (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1099-1100.)

A. Proposition 47.

" 'On November 4, 2014, the voters enacted Proposition 47, the Safe Neighborhoods and Schools Act . . . .' (*People v. Rivera*[, *supra,*] 233 Cal.App.4th [at p.] 1089.) 'Proposition 47 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).' (*Id.* at p. 1091.)" (*Morales, supra,* 63 Cal.4th at p. 404.)

"As amended by Proposition 47, Health and Safety Code section 11350 now provides that a violation of that section is a misdemeanor," but for certain exceptions that do not apply here. (*Rivera, supra,* 233 Cal.App.4th at p. 1092.) The court further explained resentencing and reclassifying a conviction under the initiative:

> Proposition 47 also created a new resentencing provision: section 1170.18. Under section 1170.18, 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. (§ 1170.18, subd. (a).) 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 also provides 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); see *id.*, subds. (g)–(h).)

(*Id.* at pp. 1092-1093.)

> Proposition 47 also 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 . . . .

(§ 1170.18, subd. (k).)

Proposition 47 was passed during a period when the state experienced unprecedented budget restraints. Overcrowded prisons were found to constitute cruel and unusual punishment in some regards, and they were subjected to a federal court order to reduce the population. (*Brown v. Plata* (2011) 563 U.S. 493.) The money spent on the prison system was taking funds away from other state requirements, such as education and the criminal justice system itself. It was also recognized that incarceration for low-level offenders was counterproductive because it diverted resources from preventing and punishing violent offenders and the prisons' high recidivism rate made it more likely the low-level offender would commit new crimes.

Further, it was recognized that categorizing a low-level offense as a felony interfered with rehabilitation because it made it harder for the offender to obtain employment and other necessities of life. Proposition 47 thus permits a qualified defendant currently serving a felony sentence on another matter and a qualified defendant who has already completed the sentences to petition to reduce the conviction to a misdemeanor. (§ 1170, subds. (b) & (g).)

The express purpose of the initiative was "to ensure that prison spending is focused on violent and serious offenses, to maximize alternatives for nonserious, nonviolent crimes, and to invest the savings generated from this act into prevention and support programs in K-12 schools, victim services, and mental health and drug treatment." (Prop. 47, § 2.) Thus, "[i]n enacting

this act, it is the purpose and intent of the people of the State of California to: [¶] . . . [¶] (3) Require 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[;] [¶] Authorize consideration of resentencing for anyone who is currently serving a sentence for any of the offenses listed herein that are now misdemeanors." (Prop. 47, § 3.) Consistent with the initiative's directive to treat qualified defendants in local programs that could reduce recidivism, the Legislature has directed that local programs be developed that have empirically shown to reduce crime. (Pen. Code, §§ 17.5, 1229, 3450; see also Cal. Rules of Court, rule 4.410(a)(8) [one objective at sentencing is to reduce recidivism through community-based correction programs and evidence-based practices in appropriate cases].)

If implemented as envisioned by the voters, it was estimated Proposition 47 could save $150 to $250 million annually. (Prop. 47, § 3, subd. (6).) To properly implement Proposition 47, the initiative "shall be broadly construed to accomplish its purpose" (Prop. 47, § 15) and "shall be liberally construed to effectuate its purposes" (Prop. 47, § 18).

B. The Felony Failure to Appear on a Felony Drug Possession Charge was no Longer Valid Because the Drug Possession Charge Became a Misdemeanor "for all Purposes."

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." The statute reflects that when an offense is serious enough to be charged as a felony, the attempt to evade justice is itself so serious as to warrant a felony charge. (See *People v. Walker* (2002) 29 Cal.4th 577, 584 [holding that a failure to appear can be enhanced with an on bail enhancement (§ 12022.1)].) The court of appeal decided that since petitioner failed to appear when there was a pending felony charge, this settled the matter. (Opn. at p. 13.)

But a felony violation of failing to appear, as opposed to a misdemeanor violation (see § 1320, subd. (a)), can occur only if the underlying charge is so serious as to warrant a felony charge. In light of Proposition 47, petitioner's case of possessing drugs was not so serious as to warrant a felony. It would be anomalous to convict him of a felony for failing to appear on what is really misdemeanor conduct.

It would also be against the statutory scheme. When the court resentenced petitioner on May 6, 2015, the drug possession case was a misdemeanor "for all purposes." (§ 1170.18, subd. (k).) It follows that the felony failure to appear on a felony was no longer valid because the underlying conviction was a misdemeanor "for all purposes."

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 him on all his cases, it should not have imposed a felony sentence for the failure to appear.

Respondent has argued that such an interpretation would create a "retroactive" effect on the failure to appear conviction. (Ret. at p. 23.) First, there was not a retroactive effect. When the court resentenced petitioner, there was not a felony drug case to justify a conviction for felony failure to appear on a felony.

Second, the purpose of Proposition 47 is to retroactively reduce certain felony convictions to misdemeanors. While it is true that a conviction does not automatically become a misdemeanor, the purpose of petitioner filing a petition, as required by the initiative, was to authorize the court to re-

categorize certain final convictions as misdemeanors.

Rivera, supra, 233 Cal.App.4th 1085, cited by respondent (ret. at p. 24), does not hold otherwise. The issue in that case was whether the court of appeal or the appellate division of the superior court had appellate jurisdiction when a *pending charge* was reduced to a misdemeanor upon the passage of Proposition 47. The plain language of the statutes and rules of court stated the court of appeal had jurisdiction whenever a felony case is reduced to a misdemeanor after the defendant has been held to answer. (*Id.* at pp. 1099-1101.) For purposes of appellate jurisdiction, Proposition 47 did not retroactively change what had already procedurally happened. (*Id.* at p. 1100.) The court in *Rivera* did not have the opportunity to address the substantive effect of Proposition 47 on certain *convictions*. Of course, "[a]n opinion is not authority for propositions not considered." (*People v. Knoller* (2007) 41 Cal.4th 139, 154-155, internal quotation marks omitted.)

Penal Code section 1320.5 is not expressly mentioned in the text of Proposition 47. But the purpose of the initiative is to redirect money to education and local law enforcement efforts by no longer incarcerating certain non-violent offenders unnecessarily. (Prop. 47, §§ 2, 3.) The initiative is to be broadly construed to further this purpose. (Prop. 47, §§ 15, 18.) Section 1320.5 does not exist in isolation. It can be charged only if the defendant fails to appear on a felony matter. The voters have determined the underlying

matter is a misdemeanor "for all purposes." It would defeat the purpose of the initiative to make the failure to appear on the non-violent drug possession charge to be a felony.

A similar conclusion was reached in *People v. Davis* (2003) 104 Cal.App.4th 1443. The case concerned an interpretation of the Substance Abuse and Crime Prevention Act of 2000 (Prop. 36, Gen. Elec. (Nov. 7, 2000)), which required certain non-violent drug offenders to be placed on probation and drug programs without jail. (§§ 1210, 1210.1.) Recognizing that relapse and mistakes are part of recovery, the initiative stated that probationers were to remain on probation upon a first or second violation of a drug-related condition of probation unless they were not amenable to treatment. (§ 1210.1, subds. (d), (f) & (g).) Davis failed to appear for court while serving drug court probation. (*Davis,* at p. 1445.) The prosecution argued that his probation could be revoked because failing to appear was not a drug-related violation. (*Id.* at pp. 1446-1447.) The court concluded such a narrow reading of the statute would frustrate the purpose of the voters because it would disqualify thousands of people who otherwise qualified for treatment. The initiative was enacted to remove low-level drug offenders from incarceration and redirect resources toward more effective preventive programs. Failing to appear on a drug-related matter should be classified as a drug-related violation of probation. (*Id.* at p. 1448.)

The purpose of Proposition 47 was to reduce punishment for low-level offenders of drug and theft offenses. The intent of the voters would be frustrated if the defendant finds himself in prison for a failure to appear for the underlying offense.

For this reason, it does not necessarily follow that a felony failure to appear is invalid whenever the underlying felony charge is reduced to a misdemeanor or dismissed by the court due to insufficient evidence or in the interest of justice. The Legislature has determined that the act of failing to appear on a felony should be punished as a felony regardless of the outcome of the underlying felony case. (See *Walker, supra,* 29 Cal.4th at p. 583.) But it also determined that failing to appear on cases classified as misdemeanors do not warrant felony punishment. (§§ 1320, 1320.5.) Due to Proposition 47, petitioner's drug possession case was classified as a misdemeanor "for all purposes." Failing to appear thus does not warrant felony punishment.

To the extent there is still ambiguity in the statute, the rule of lenity applies. (*People v. Hernandez* (2003) 30 Cal.4th 835, 869-870, disapproved on other grounds in *People v. Riccardi* (2012) 54 Cal.4th 758, 817; see Code Civ. Proc, §§ 1864, 1866.) It is almost universally recognized that "it is appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of [a] statute's coverage. To the extent that the language or history of [a statute] is uncertain, this 'time-honored interpretive guideline' serves to ensure

both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability." (*Crandon v. United States* (1990) 494 U.S. 152, 158.)

Petitioner recognizes he would still be serving six years because the court resentenced him on all four cases, increasing the punishment for his robbery conviction to six years.[4] (Pet. exhs. A at pp. 2-3, E.) Nonetheless, even if he did not have the robbery conviction, he could be sentenced to serve up to three years in jail under section 1170, subdivision (h). (See *People v. Delgado* (2013) 214 Cal.App.4th 914, 918.) A possible three year sentence for a failure to appear on a matter that is really misdemeanor conduct would frustrate the intent of the voters to move such offenders out of custody and to provide them with more effective treatment in the community.

Further, the voters recognized that the number of prior felony convictions matters both in the community and in the criminal justice system. (See, e.g., § 1203(e)(4) [probation should not be given to those with at least two prior felony convictions]; Cal. Rules of Court, rules 4.414(b)(1) [prior record to be considered in whether to grant probation], 4.421(b)(2) [prior record as an aggravating factor]; 4.423(b)(1) [insignificant record as a mitigating factor].) This is why the voters permitted those with completed

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[4] This was another issue for which petitioner sought review.

sentences to petition for relief and did not disqualify most people serving other felony sentences or having suffered prior felony convictions. (Cf. § 1170.18, subd. (i).)

A felony conviction for failing to appear on what is a misdemeanor under Proposition 47 violates the statutory language and the intent of the voters. Accordingly, the conviction for violating section 1320.5 should be vacated.

CONCLUSION

For the foregoing reasons John Manuel Guiomar respectfully requests that this Court vacate the felony conviction for failing to appear.

DATED: February 16, 2017

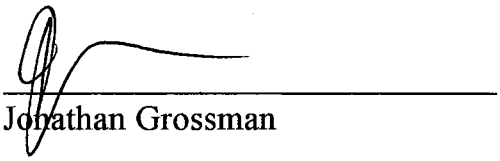
Respectfully submitted,
SIXTH DISTRICT APPELLATE PROGRAM

By: _____
Jonathan Grossman
Attorney for Petitioner
John Manuel Guiomar

CERTIFICATION OF WORD COUNT

I, Jonathan Grossman, certify that the attached PETITIONER'S OPENING BRIEF ON THE MERITS contains 3523 words.

Executed under penalty of perjury at San Jose, California, on February 16, 2017.



Jonathan Grossman

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Case Name: ***In re Guiomar*** **Case No.: S238888**

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I declare under penalty of perjury the foregoing is true and correct. Executed this 17th day of February, 2017, at San Jose, California.

Priscilla A. O'Harra