In the Supreme Court of the State of California

In re **JOHN MANUEL GUIOMAR,** On Habeas Corpus.	Case No. S238888

Sixth Appellate District, Case No. H043114
Monterey County Superior Court, Case Nos. SS131590A, SS131650A
The Hon. Lydia M. Villareal, Judge

ANSWER BRIEF ON THE MERITS

XAVIER BECERRA
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
JEFFREY M. LAURENCE
Senior Assistant Attorney General
DONNA M. PROVENZANO
Supervising Deputy Attorney General
AMIT KURLEKAR
Deputy Attorney General
State Bar No. 244230
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5559
Fax: (415) 703-1234
Email: Amit.Kurlekar@doj.ca.gov
Attorneys for Respondent

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ISSUE PRESENTED

Whether a Penal Code section 1320.5 conviction must be vacated 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 John Manuel Guiomar failed to make a required court appearance, in violation of Penal Code section 1320.5, after being charged with felony drug possession.[1] Petitioner was convicted of both of those felony charges. After his drug possession conviction was reduced to a misdemeanor under Proposition 47, petitioner filed a habeas petition arguing that, inter alia, his section 1320.5 conviction should be vacated because it related to a drug possession conviction that is no longer a felony.

The Court of Appeal correctly rejected that argument on two grounds. First, 1320.5 criminalizes the act of "jumping bail" after being *charged* with a felony, whether or not that charge ended in a conviction. As a result, the subsequent reduction of petitioner's drug possession conviction to a misdemeanor did not address the "gravamen" of the failure to appear offense. (Typed Opn. at p. 13, internal quotation marks omitted.) Second, even if the reduction of a felony conviction could somehow prospectively diminish a defendant's liability under section 1320.5, it would not do so in the retrospective manner contemplated by petitioner's argument. The Court of Appeal's ruling should therefore be affirmed.

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[1] Unless otherwise designated, further statutory references are to the Penal Code.

STATEMENT OF THE CASE

A. Trial Court Proceedings

On January 22, 2014, petitioner pleaded guilty to (1) felony robbery (§ 211) with a prior strike conviction in Case No. SS131590A, and (2) felony failure to appear while on bail for a felony (§ 1320.5) in Case No. SS131650A. (Petn. Exh. F [attachments to trial court's Dec. 16, 2015 order].) As part of his plea bargain, petitioner agreed to an aggregate sentence of six years in prison, based on his robbery conviction in Case No. SS131590A, his section 1320.5 conviction in Case No. SS131650A, a felony burglary conviction (§ 459) in Case No. SS131649A, and a felony drug possession conviction (Health & Saf. Code, § 11350, subd. (a)) in Case No. SS130616A. (Petn. Exh. A [Legal Status Summary]; see also Petn. Exh. F [plea agreements reflecting agreement to six-year aggregate sentence].) The 6-year prison term, which was imposed on March 24, 2014, was calculated by imposing a 4-year term for the robbery conviction, a consecutive 16-month term for the burglary conviction, a consecutive 8-month term for the section 1320.5 conviction, and a 2-year term for the drug possession conviction to run concurrently with the robbery term. (Petn. Exh. A [Legal Status Summary].)

On December 15, 2014, petitioner sought resentencing under Proposition 47 for his drug possession conviction. (See Petn. Exh. B [Feb. 25, 2015 minute order in Case No. SS130616A, noting filing of a petition for recall of sentence on December 15, 2014].) On February 25, 2015, the trial court recalled the sentence for that conviction and resentenced petitioner for a misdemeanor, which the court deemed served. (Petn. Exh. B.)

On March 31, 2015, petitioner applied under Proposition 47 to have the trial court redesignate his burglary conviction as a misdemeanor. (Petn.

Exh. C.) On May 6, 2015, the trial court granted the application. (Petn. Exh. D [minute order in Case No. SS131649A].) On that same day, the trial court recalled the sentences for the robbery and section 1320.5 convictions. (Petn. Exh. E [minute order in Case No. SS131590A]; Petn. Exh. F [minute order in Case No. SS131650A].) The trial court resentenced petitioner to a six-year prison term on the robbery conviction and a concurrent four-year prison term on the section 1320.5 conviction. (Petn. Exh. A [abstract of judgment dated June 4, 2015]; Petn. Exh. E; Petn. Exh. F.) The sentence was "imposed pursuant to stipulation." (Petn. Exh. E; Petn. Exh. F.)

On December 16, 2015, the trial court denied a petition for writ of habeas corpus challenging petitioner's new aggregate sentence with respect to Case Nos. SS131590A and SS131650A. (Petn. Exh. F [Dec. 16, 2015 order].) The trial court did not reach the merits of petitioner's challenges, instead finding that his agreement to his aggregate sentence waived his right to writ review of that sentence. (Petn. Exh. F [Dec. 16, 2015 order].)

B. The Court of Appeal's Ruling

Petitioner sought habeas relief in the Sixth District Court of Appeal. Of particular relevance here, petitioner "argue[d] 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." (Typed Opn. at p. 11.)

The Court of Appeal rejected that argument. The court observed that "[t]here 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." (Typed Opn. at p. 12.) "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." (Typed Opn. at p. 12.) The court noted, however, that the initiative "did not . . . establish a procedure for redesignation of any other convictions, including convictions that are ancillary or collateral to a redesignated conviction." (Typed Opn. at p. 12.)

The Court of Appeal further recognized that "the gravamen of a violation of section 1320.5 is 'the defendant's act of jumping bail,' . . . not the nature of the crime for which the defendant is ultimately convicted." (Typed Opn. at p. 13, quoting *People v. Walker* (2002) 29 Cal.4th 577, 585.) "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." (Typed Opn. at p. 13.)

The Court of Appeal also rejected petitioner's reliance on section 1170.18, subdivision (k), which states that a conviction reclassified as a misdemeanor under Proposition 47 "shall be considered a misdemeanor for all purposes." Specifically, the court noted that the drug possession felony charge underlying petitioner's section 1320.5 conviction "had not yet been reclassified as a misdemeanor" when "petitioner failed to appear on [that] felony charge." (Typed Opn. at p. 13.) Applying this court's opinion in *People v. Park* (2013) 56 Cal.4th 782, the Court of Appeal held that the redesignation of petitioner's drug possession conviction did not operate retroactively to undermine the conviction for failure to appear. (Typed Opn. at pp. 12-13.) Thus, the Court of Appeal concluded, "[d]espite 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." (Typed Opn. at p. 13.)[2]

This court granted review limiting review to the issue of the validity of petitioner's section 1320.5 conviction in light of the redesignation of his drug conviction under Proposition 47." (Order dated Feb. 3, 2017.)

SUMMARY OF ARGUMENT

For two independent reasons, the reduction of petitioner's felony drug possession conviction to a misdemeanor did not undermine his conviction for failure to appear on a felony charge.

First, the holding below best serves both the legislative intent underlying section 1320.5 and the intent of the electorate in passing Proposition 47. While the plain language of section 1320.5 criminalizes petitioner's failure to appear on a felony *charge*—independent of whether that charge resulted in a conviction—the plain language of Proposition 47 only reduces the felony status of *convictions*. Section 1320.5's legislative history confirms that the Legislature intended to punish failure to appear as a felony in order to deter bail jumping on felony charges, a goal that is not affected by the final status of the convictions on those charges. And petitioner's reading of Proposition 47 and section 1320.5 would violate numerous canons of construction as to both statutes.

Second, even if a change in conviction status could prospectively affect a defendant's liability for violating section 1320.5, it could not do so in the retroactive manner desired by petitioner in this case. The parties agree that reductions effectuated by Proposition 47 track those effectuated by the wobbler statute, subdivision (b) of section 17. As this court noted in

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[2] The Court of Appeal granted the habeas petition as to one claim of sentencing error conceded by respondent. (Typed Opn. at pp. 16-17.) All of petitioner's other claims for habeas relief, which are not at issue here, were rejected. (Typed Opn. at pp. 5-10, 13-16.)

Park, *supra*, 56 Cal.4th 782, the wobbler statute does not operate retroactively to undermine the already imposed collateral consequences of felonies that were subsequently reduced pursuant to that statute. That conclusion comports with a more general judicial policy of refusing to negate the collateral consequences of convictions that were validly imposed but later reduced or expunged. Proposition 47 should similarly not be construed to retroactively disturb the felony section 1320.5 conviction here, and the Court of Appeal's ruling should be affirmed.

ARGUMENT

THE REDESIGNATION OF PETITIONER'S PRIOR FELONY CONVICTION AS A MISDEMEANOR DID NOT AFFECT HIS CONVICTION FOR FAILING TO APPEAR

A. Proposition 47

"On November 4, 2014, the voters enacted Proposition 47, the Safe Neighborhoods and Schools Act." (*People v. Morales* (2016) 63 Cal.4th 399, 404.) "Proposition 47 makes certain drug- and theft-related offenses misdemeanors." (*Ibid.*; see also Ballot Pamp., Gen. Elec. (Nov. 4, 2014) text of Prop. 47, §§ 5-13, pp. 71-73 [listing reduced offenses].) "These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors)." (*Morales*, at p. 404.) Included among the reduced offenses are possession of a controlled substance in violation of Health and Safety Code section 11350, subdivision (a), and certain acts of second-degree burglary in violation of section 459. (Ballot Pamp., *supra*, text of Prop. 47, §§ 5, 11, pp. 71-73.)

Proposition 47 accompanied its substantive amendments with certain procedural changes to sentencing, codified in section 1170.18. (Ballot Pamp., *supra*, text of Prop. 47, § 14, pp. 73-74.) Two of those procedural changes have retroactive effect on individuals who, at the time of

Proposition 47's enactment, were already convicted of crimes amended by the proposition. First, "[a] person currently serving a sentence for a conviction . . . of a felony or felonies who would have been guilty of a misdemeanor under [Proposition 47] had [Proposition 47] 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" as a misdemeanor. (§ 1170.18, subd. (a).) Second, "[a] person who has completed his or her sentence for a conviction . . . of a felony or felonies who would have been guilty of a misdemeanor under [Proposition 47] had [Proposition 47] been in effect at the time of the offense[] may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors." (§ 1170.18, subd. (f).) Following a resentencing under subdivision (a) or redesignation under subdivision (f), the affected conviction "shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction" for firearm possession by a felon. (§ 1170.18, subd. (k).)

Proposition 47's stated purpose and intent behind implementing its retroactive resentencing provisions was to "[a]uthorize consideration of resentencing for anyone who is currently serving a sentence for any of the offenses listed herein that are now misdemeanors," while still "[r]equir[ing] a thorough review of criminal history and risk assessment of any individuals before resentencing to ensure that they do not pose a risk to public safety." (Ballot Pamp., *supra*, text of Prop. 47, § 3, p. 70; see also *id.*, rebuttal to argument against Prop. 47, p. 39 ["*Proposition 47 does not require automatic release of anyone.* There is no automatic release. It

includes strict protections to protect public safety and make sure . . . the most dangerous criminals cannot benefit"].)

B. The Court of Appeal's Ruling Best Serves the Intent Behind Both Section 1320.5 and Proposition 47

A reviewing court's construction of a statute is "guided by the overarching principle that [the] task is to determine the intent of the enacting body so that the law may receive the interpretation that best effectuates that intent." (*In re R.V.* (2015) 61 Cal.4th 181, 192, internal quotation marks omitted.) In deciding the electorate's intent in approving Proposition 47 and the Legislature's intent in enacting section 1320.5, this court looks to "the same principles [of] statutory construction." (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900, internal quotations omitted.) First among those principles is honoring "the language of the statute," as "construed in the context of the statute as a whole and the overall statutory scheme." (*Id.* at p. 901, internal quotations omitted.) If the language of either section 1320.5 or Proposition 47 is ambiguous, this court "can look to legislative history . . . and to rules or maxims of construction" to resolve the ambiguity. (*People v. Smith* (2004) 32 Cal.4th 792, 798; see also *Robert L.*, at p. 901 [where language of initiative is not dispositive, court may "refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet" to determine intent].)

1. The plain language of the statutes, taken together, supports the Court of Appeal's ruling

Section 1320.5 punishes any "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." (*Ibid.*, italics added.) By its express terms, then, the statute punishes both (1) defendants who, like petitioner (OBM 2), fail to

appear while only charged with, but not yet convicted of, the underlying felony; and (2) convicted defendants who fail to appear while awaiting sentencing or appeal on post-conviction bail. With the first category of defendants in mind, this court has held that section 1320.5 "requires punishment whether or not the defendant ultimately is convicted of the charge for which he or she was out on bail when failing to appear in court as ordered." (*Walker*, *supra*, 29 Cal.4th at p. 583, internal quotation marks omitted.)

Proposition 47, on the other hand, only alters the status of certain defendants' sentences or convictions. (§ 1170.18, subds. (a), (f).) As petitioner acknowledges, he violated section 1320.5 by failing to appear after being charged with felony drug possession, but before he was convicted of that offense. (OBM 2.) By its plain language, Proposition 47's amelioration of petitioner's drug possession conviction's status therefore did not disturb the actual predicate for his section 1320.5 conviction—the felony *charge*—leaving the conviction itself undisturbed.

2. Section 1320.5's legislative history confirms that a defendant's liability turns on the status of the offense at the time of the failure to appear

Section 1320.5 was added to the Penal Code in 1983. (Sen. Bill No. 395 (1983-1984 Reg. Sess.) § 1.) When the bill was initially introduced, it imposed felony punishment only on defendants who failed to appear after being "charged with the commission of a felony"—as opposed to those convicted of a felony—and "released from custody on bail." (*Ibid.*) The focus on a defendant having being charged with a felony served the bill's stated purpose of "'deter[ring] bail jumping.'" (*Walker*, *supra*, 29 Cal.4th at p. 583, quoting Sen. Com. on Judiciary, Analysis of Sen. Bill No.

395 (1983-1984 Reg. Sess.).)[3] In particular, Senate Bill No. 395 sought to place bail jumpers on an equal footing with defendants who absconded while released on their own recognizance, who were already subject to felony punishment for such abscondment. (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 395 (1983-1984 Reg. Sess.); Assem. Com. on Crim. Law & Public Safety, Analysis of Sen. Bill No. 395 (1983-1984 Reg. Sess.) May 17, 1983.) The Legislature intended that a defendant would be liable for failure to appear on a felony charge "'even if the defendant was the victim of misidentification or was acquitted of the underlying charge.'" (*Walker*, at p. 583, quoting Assem. Com. on Crim. Law & Public Safety, Analysis of Sen. Bill No. 395 (1983-1984 Reg. Sess.) May 25, 1983.)

Some legislative concern existed, however, as to whether felony punishment was too draconian a deterrent against failure to appear while on bail, given that defendants on bail were already presumably incentivized to some degree to appear by the desire not to forfeit their bail. (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 395 (1983-1984 Reg. Sess.); Assem. Com. on Crim. Law & Public Safety, Analysis of Sen. Bill No. 395 (1983-1984 Reg. Sess.) May 25, 1983.) In an evident compromise, Senate Bill No. 395 was amended to punish failure to appear on a felony as only a misdemeanor, and was enacted in that form. (Assem. Amend. to Sen. Bill No. 395 (1983-1984 Reg. Sess.) June 16, 1983; former § 1320.5, added by Stats. 1983, ch. 404, § 1, pp. 1669-1670.)

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[3] "To determine the purpose of legislation, a court may consult contemporary legislative committee analyses of that legislation, which are subject to judicial notice." (*In re J.W.* (2002) 29 Cal.4th 200, 211; see also *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 717 ["a legislative committee staff analysis . . . may be considered in determining legislative intent"].)

That compromise was short-lived. Only two years later, Senate Bill No. 1393 was introduced to impose felony punishment on defendants failing to appear in a felony prosecution. (Sen. Bill No. 1393 (1985-1986 Reg. Sess.).) The initial draft of that bill established that the prison sentence for failing to appear would be "equal to the term of imprisonment which the court" could impose on the defendant for the underlying felony. (*Ibid.*) Senate Bill No. 1393 was motivated by the observation that misdemeanor punishment for failure to appear was an insufficient deterrent—felony defendants who jumped bail and were caught would face no additional time for the misdemeanor as a practical matter, and such defendants therefore had ample incentive to obstruct the case by absconding. (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1393 (1985-1986 Reg. Sess.).)

Legislators expressed reservations, however, as to whether the bill's sentencing provisions would lead to widely disparate outcomes for the same crime. (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1393 (1985-1986 Reg. Sess.).) For example, if one defendant failed to appear on a felony punishable by two years in prison and another failed to appear on a felony punishable by eight years in prison, the latter defendant would receive a sentence four times as severe as the first for the same crime of failing to appear. (*Ibid.*) The Legislature addressed these reservations by amending Senate Bill No. 1393 to set a fixed sentence for a violation of section 1320.5 that no longer depended on the sentence for the underlying felony. (Sen. Amend. to Sen. Bill No. 1393 (1985-1986 Reg. Sess.) May 6, 1985.) That amendment "remove[d] the opposition" to the bill. (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1393 (1985-1986 Reg. Sess.) as amended May 6, 1985.) The bill retained its original purpose of increasing the deterrent against failure to appear by felony defendants. (*Ibid.*; Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of Sen. Bill

No. 1393 (1985-1986 Reg. Sess.) as amended May 6, 1985; Assem. Com. on Public Safety, Analysis of Sen. Bill No. 1393 (1985-1986 Reg. Sess.) as amended May 6, 1985; Sen. Bill No. 1393, 3d reading (1985-1986 Reg. Sess.) Aug. 29, 1985; Cal. Dept. Finance, Enrolled Bill Rep. on Sen. Bill No. 1393 (1985-1986 Reg. Sess.) prepared for Governor Deukmejian (Sept. 5, 1985); Youth & Adult Correctional Agency, Enrolled Bill Rep. on Sen. Bill No. 1393 (1985-1986 Reg. Sess.) prepared for Governor Deukmejian (Sept. 6, 1985).)[4]

Not until 1996—23 years after section 1320.5 was originally enacted—did the Legislature extend section 1320.5 to cover defendants who jump bail *after being convicted of* a felony. (Former § 1320.5, amended by Stats. 1996, ch. 354, § 3.) The legislative materials accompanying the underlying bill did not disclose any specific concern about respecting the felony nature of the conviction. (See generally Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 1571 (1995-1996 Reg. Sess.) as amended Mar. 19, 1996; Sen. Com. on Crim. Procedure, Analysis of Sen. Bill No. 1571 (1995-1996 Reg. Sess.) as amended Mar. 19, 1996; Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of Sen. Bill No. 1571 (1995-1996 Reg. Sess.) as amended July 8, 1996.) Rather, those materials clarified that Senate Bill No. 1571 aimed to (1) simply bring uniformity to the punishment scheme for felony bail jumpers; and (2) provide trial courts security for granting felony defendants post-conviction bail, without which those courts might categorically deny such bail for fear that the defendants would abscond. (*Ibid.*)

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[4] This court has recognized that both floor analyses and enrolled bill reports are proper resources for determining legislative intent. (See *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 715 [floor analyses]; *In re Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1218, fn. 3 [enrolled bill reports].)

For several reasons, this history decisively confirms that a section 1320.5 conviction is unaffected by the reduction of an underlying felony to a misdemeanor. First, section 1320.5 has always been focused on the status of the charge pending against a defendant, while its reference to the status of a defendant's conviction is a recent addition that was included only for sake of completeness. Second, Senate Bill No. 1393 illustrated both an affirmative legislative intent to punish felony bail jumping as a felony and an affirmative rejection of lesser punishment as an insufficient deterrent against such bail jumping. And third, by fixing the sentence for a section 1320.5 violation to be independent of the underlying felony, the amendment to Senate Bill No. 1393 reinforced the Legislature's desire to treat a section 1320.5 violation as a standalone violation untethered from the ultimate disposition of the underlying felony.

3. Petitioner's arguments with respect to the intent behind section 1320.5 are meritless

Petitioner asserts that because his drug possession *conviction* was reduced to a misdemeanor "'for all purposes,'" "the felony failure to appear on a felony was no longer valid." (OBM 9, quoting § 1170.18, subd. (k).) As illustrated *ante*, that assertion mistakes the effects of Proposition 47 on felony convictions to be effects on the underlying charges. By reducing determination of liability under section 1320.5 to the felonious nature of his conviction, petitioner's interpretation of section 1320.5 also effectively reads the words "charged with or" out of the statute, violating the canon that "significance must be given to every word in a statute in pursuing the legislative purpose, and the court should avoid a construction that makes some words surplusage." (*People v. Leiva* (2013) 56 Cal.4th 498, 506.)

Petitioner also contends that in passing Proposition 47, the electorate has deemed his conduct of drug possession "not so serious as to warrant a felony," and that a section 1320.5 violation requires that the underlying

charge be based on felonious conduct. (OBM 8-9.) This contention confuses the seriousness of the felony *charge*—on which section 1320.5 *does* focus—with the seriousness of the defendant's underlying conduct. Section 1320.5 is manifestly unconcerned with the latter. As *Walker* recognized, the Legislature intended for section 1320.5 to apply to a defendant jumping felony bail even if the defendant did nothing illegal in the first place. (*Walker*, *supra*, 29 Cal.4th at p. 583 [section 1320.5 "would subject a defendant who failed to appear on an underlying felony charge to conviction and sanctions, 'even if the defendant was the victim of misidentification or was acquitted of the underlying charge'"], quoting Assem. Com. on Crim. Law & Public Safety, Analysis of Sen. Bill No. 395 (1983-1984 Reg. Sess.).) Further refuting petitioner's contention is the Legislature's decision not to link sentencing for a section 1320.5 violation to the potential sentence of the underlying felony. If the Legislature *had* intended to tie a section 1320.5 conviction to the seriousness of a defendant's conduct, then it presumably would have maintained a sentencing structure in which more serious felonious conduct would trigger a more severe sentence under section 1320.5.

Finally, petitioner's reading of section 1320.5 would have absurd consequences, which must be avoided. (See, e.g., *In re Greg F.* (2012) 55 Cal.4th 393, 406 ["'We must . . . avoid a construction that would produce absurd consequences, which we presume the Legislature did not intend'"]; *People v. Montes* (2003) 31 Cal.4th 350, 356 ["'We will avoid any interpretation that would lead to absurd consequences'"].) As explained *ante*, a defendant who jumps felony bail but was found not guilty of the underlying felony would nonetheless remain guilty of violating section 1320.5, with no prospect for relief under Proposition 47. Under petitioner's reading of the statute, a defendant who was found *guilty* of an underlying felony that was later reduced to a misdemeanor would be

entitled to have any section 1320.5 conviction expunged. This court should not abide the presumption—suggested by petitioner—that the Legislature intended to bestow such differential treatment favoring the more culpable defendant over the one found not culpable at all. (Cf. *People v. Lasko* (2000) 23 Cal.4th 101, 108-109 [it "cannot be . . . the law" that "one who shoots and kills another in the heat of passion and with the intent to kill is guilty only of voluntary manslaughter, yet one who shoots and kills another in the heat of passion and with conscious disregard for life but with the intent merely to injure, a less culpable mental state than intent to kill, is guilty of murder"].)

In sum, the reasonable reading of section 1320.5 is the one reflected in its plain language and legislative history—namely, that when a defendant is charged with a felony, jumping bail imposed in connection with that felony violates section 1320.5 regardless of either the seriousness of the defendant's conduct or the eventual disposition of the underlying felony. Because petitioner undisputedly jumped bail while being prosecuted on a felony charge, his section 1320.5 conviction remains valid.

4. Petitioner's reading of Proposition 47 violates numerous canons of statutory construction

Proposition 47 lists specific offenses that are subject to reduction. (Ballot Pamp., *supra*, text of Prop. 47, §§ 5-13, pp. 71-73 [listing reduced offenses].) As the Court of Appeal observed, failure to appear is not one of those offenses. And Proposition 47 only "[a]uthorized consideration of resentencing for anyone who is currently serving a sentence for any of the offenses *listed herein* that are now misdemeanors." (Ballot Pamp., *supra*, text of Prop. 47, § 3, p. 70, italics added.)

Petitioner effectively asks that this court add failure to appear to the list of reducible offenses, but "'inserting additional language into a statute violates the cardinal rule of statutory construction that courts must not add

provisions to statutes." (*People v. Guzman* (2005) 35 Cal.4th 577, 587, internal quotation marks omitted.) "This rule has been codified in California as Code of Civil Procedure section 1858, which provides that a court must not insert what has been omitted from a statute." (*Ibid.*) A court should therefore not rewrite a statute unless it is "compelled by necessity and supported by firm evidence of the drafters' true intent." (*Ibid.*)

Petitioner falls far short of presenting such evidence. His only argument for constructively adding section 1320.5 violations to the list of reducible offenses is that such an addition would serve "the purpose of the initiative" to "no longer incarcerat[e] *certain* non-violent offenders unnecessarily." (OBM 11-12, italics added.) Petitioner's qualification of his argument points to the argument's flaw—Proposition 47 did not reduce punishment for *all* non-violent offenses, but rather only for a specific handful of those offenses. Failure to appear is not one of those offenses, and that omission must be presumed a deliberate one. (See *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1105 ["The expression of some things in a statute necessarily means the exclusion of other things not expressed"].)

Indeed, failure to appear does not even resemble the general category of offenses affected by Proposition 47, which this court has described as "certain drug-related and property crimes." (*Morales*, *supra*, 63 Cal.4th at p. 403; see also *id.* at p. 404 [same]; Ballot Pamp., *supra*, text of Prop. 47, §§ 5-13, pp. 71-73 [listing reduced offenses].) Even assuming that Proposition 47 has a penumbra that encompasses unlisted offenses—an assumption that petitioner has not justified—the canon of *ejusdem generis* weighs against those unlisted offenses including an offense that is of an entirely different character than the listed offenses. (See, e.g., *People v. Arias* (2008) 45 Cal.4th 169, 180 ["when a particular class of things

modifies general words, those general words are construed as applying only to things of the same nature or class as those enumerated"].)

Citing *People v. Davis* (2003) 104 Cal.App.4th 1443, petitioner suggests that his failure to appear *was* drug-related. (OBM 12.) Even assuming that *Davis* was correctly decided, however, it is easily distinguishable from this case. *Davis* held that a defendant could not have his probation revoked under section 1210.1 based on his failure to make a scheduled appearance in *drug court* because "reporting to drug court was part of defendant's drug treatment regimen" and the defendant's failure to report therefore violated a "drug-related" probation condition. (*Davis*, at pp. 1446-1447.) Unlike section 1210.1, Proposition 47 does not make any allowance for reduction of unlisted "drug-related" offenses (such as failure to appear) based on their connections to drug-related activities. Even if Proposition 47 did implicitly encompass some class of "drug-related" offenses other than those it explicitly reduces, failure to appear in a court of general jurisdiction—as opposed to drug court—would not belong in that class. (See *People v. Johnson* (2003) 114 Cal.App.4th 284, 299 [distinguishing *Davis* and holding that failure to report to a probation officer is not drug-related unless particular occasion of reporting was part of defendant's drug treatment regimen].)

Alternatively, petitioner suggests that he is effectively being given felony punishment for his drug offense despite its reduction to a misdemeanor under Proposition 47. (OBM 13-15.) But petitioner's failure to appear was a separate offense for which he was separately punished. Even if he had been acquitted of drug possession, he still would have been sentenced for failing to appear. And if petitioner had not failed to appear, he would not have received a concurrent prison sentence at resentencing because his only remaining felony conviction would have been for robbery. In short, petitioner received felony punishment not for his drug conviction,

but rather for his independent violation of section 1320.5. (See Argument A.2, *ante*.) Nothing in Proposition 47 undermines the validity of that punishment.

Finally, petitioner's reference to the rule of lenity (OBM 15-16) is unavailing because that rule aids defendants only when "two reasonable interpretations of [a] statute stand in relative equipoise." (*People v. Nuckles* (2013) 56 Cal.4th 601, 611.) It therefore has no impact where, as here, the language and history of the relevant statutes firmly contradict petitioner's reading. Furthermore, the rule of lenity exists to ensure that people have adequate notice of the law's requirements" so that they can conform their conduct to the law and know in advance the consequences of failing to do so. (*People ex rel. Green v. Grewal* (2015) 61 Cal.4th 544, 565; see also *People v. Story* (2009) 45 Cal.4th 1282, 1294 [rule of lenity guarantees that "criminal statutes provide fair warning of what behavior is considered criminal and what the punishment for that behavior will be"].) That purpose has no application here, where petitioner committed and pled guilty to the section 1320.5 violation with fair warning of the then-applicable potential consequences of his actions.

C. Petitioner's Argument Incorrectly Attributes Retroactive Effect to Section 1170.18, Subdivision (k)

Petitioner argues that his drug possession conviction is now a "misdemeanor for all purposes" under section 1170.18, subdivision (k), and that one of those "purposes" is to remove the predicate for his section 1320.5 conviction. (OBM 9-11.) As an initial matter, that argument founders on subdivision (k)'s specific instruction that only a "felony conviction" reduced by Proposition 47 becomes a "misdemeanor for all purposes." Petitioner's argument thus perpetuates the error discussed at length in Argument B, *ante*—namely, that he is seeking to use a change in his conviction status to attack a criminal sanction that is not dependent on

that conviction. And, as set forth *post*, even if petitioner could somehow explain how a change in his drug possession conviction status was relevant to his section 1320.5 conviction, his "for all purposes" argument fails for the independent reason that subdivision (k) operates prospectively only, not retroactively.

1. Section 1170.18, subdivision (k) has only prospective effect

Petitioner asserts that the "for all purposes" language in subdivision (k) should be interpreted to mirror the identical phrase in the wobbler statute (§ 17, subd. (b)). (OBM 9-10.) Respondent agrees. (See *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1094-1100 [analogizing section 1170.18, subdivision (k) to section 17, subdivision (b)].) Petitioner also asserts that this court's opinion in *Park* guides whether section 17, subdivision (b)—and by extension, section 1170.18, subdivision (k)—is interpreted prospectively or retroactively. (OBM 9-10, citing *Park*, *supra*, 56 Cal.4th at p. 793.) Again, respondent agrees. Contrary to petitioner's argument, however, these points defeat rather than support his claim.

The defendant in *Park* committed a felony assault that was subsequently reduced to a misdemeanor under section 17, subdivision (b). (*Park*, *supra*, 56 Cal.4th at p. 787.) The defendant was subsequently convicted of two new felonies, and his sentence for those new felonies was enhanced under section 667, subdivision (a) on the ground that his assault conviction constituted a serious felony conviction despite its reduction to a misdemeanor. (*Park*, at p. 788.) This court struck the enhancement, holding that because the assault conviction was reduced to a misdemeanor "for all purposes" *before* sentencing on the new felonies, the assault conviction could not serve as the "serious felony" predicate of an enhancement under section 667, subdivision (a). (*Park*, at pp. 795-803.)

In doing so, however, *Park* explicitly cabined its holding to prospective application of the wobbler statute, recognizing that "when a wobbler is reduced to a misdemeanor . . . , the offense *thereafter* is deemed a misdemeanor for all purposes." (*Park*, *supra*, 56 Cal.4th at p. 795; see also *id.* at pp. 788-789 [considering whether reduction would preclude felony-based enhancement "in a subsequent criminal proceeding"].) *Park* cited the long-standing rule that "if a court exercised its discretion by imposing a sentence other than commitment to state prison" under the wobbler statute, "the defendant stood convicted of a misdemeanor, but only from that point forward; classification of the offense as a misdemeanor did not operate retroactively to the time of the crime's commission, the charge, or the adjudication of guilt." (*Id.* at p. 791 & fn. 6.) In language that squarely refutes petitioner's argument here, *Park* explicitly recognized that "there [was] no dispute that . . . defendant would be 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, italics added.) This scenario, of course, is exactly what occurred in petitioner's case—he committed and was convicted of his failure to appear *before* his felony drug possession was reduced to a misdemeanor. By *Park*'s reasoning, he is therefore "subject to the" section 1320.5 conviction notwithstanding the reduction of the drug possession conviction. (*Ibid.*)

This outcome is also consistent with this court's previous rulings that when wobbler crimes result in misdemeanor sentences, "the offense is a misdemeanor from that point on, but not retroactively." (*People v. Feyrer* (2010) 48 Cal.4th 426, 438-439.)[5] In the face of those rulings, petitioner

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[5] The Sixth District Court of Appeal relied on *Feyrer* in considering whether Proposition 47 applies retroactively to deprive the court of

(continued...)

claims that he is not trying to use subdivision (k) retroactively because his drug possession conviction was reduced before he was resentenced for the section 1320.5 violation. (OBM 10.) But that claim uses the wrong reference point for assessing retroactivity—assuming for sake of argument that reduction of the drug possession conviction was in any way relevant to petitioner's liability under section 1320.5, it would have been relevant only if the reduction occurred before petitioner committed his failure to appear, not by the time he was sentenced for it. (See *People v. Sandoval* (2007) 41 Cal.4th 825, 845 ["A change in substantive criminal law is retroactive if applied to cases in which the crime occurred before its enactment"].)[6] As petitioner himself admits, "Proposition 47 did not retroactively change what had already procedurally happened." (OBM 11.) The procedural history of this case includes petitioner's decision to jump bail while a felony charge

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(...continued)
appellate jurisdiction over a defendant who had been convicted of a felony prior to Proposition 47's enactment, but had appealed after successfully petitioning for misdemeanor resentencing under the initiative. (See generally *Rivera*, *supra*, 233 Cal.App.4th 1085.) Given that it would have had appellate jurisdiction over a felony appeal absent Proposition 47's enactment, *Rivera* followed the quoted language from *Feyrer* to conclude that it had appellate jurisdiction because Proposition 47 did not retroactively change the crime into a misdemeanor. (*Id.* at pp. 1095-1096, 1099-1100.) While petitioner observes that *Rivera* did not reach the particular issue in this case (OBM 11), its general recognition that the "for all purposes" language is not retroactive directly applies here and is faithful to this court's decisions in *Feyrer* and *Park*.

[6] Even if the reduction of petitioner's drug possession conviction were deemed a procedural change, its application to his preexisting section 1320.5 conviction—the criminal sanction that petitioner is actually challenging—would still be deemed retroactive. (See *Sandoval*, *supra*, 41 Cal.4th at p. 845 ["a change in procedural law is not retroactive when applied to proceedings that take place after its enactment"].)

was pending. Proposition 47's reduction of the conviction flowing from that charge cannot retroactively (and counterfactually) change that history.

Park provides a second illustrative contrast to petitioner's case (i.e., in addition to repudiating his retroactive interpretation of subdivision (k)). Specifically, the enhancement stricken in *Park* was directly based on the commission of a felony, so reclassification of that felony as a misdemeanor completely negated the basis for the enhancement. (*Park, supra*, 56 Cal.4th at p. 787 [felony reduced to misdemeanor under the wobbler statute cannot serve as "a prior serious felony within the meaning of section 667, subdivision (a), and [can]not be used, under that provision, to enhance defendant's sentence"], italics omitted.) Here, in contrast, petitioner's failure to appear conviction was based on his conduct while on bail—conduct that was punishable whether or not he was eventually convicted of the felony and therefore conduct that was not affected by redesignation of the felony as a misdemeanor.

2. According retroactive effect to subdivision (k) would conflict with longstanding judicial treatment of the collateral consequences of acts of leniency

Where a conviction or sentence is voided by judicial or executive action, the effect on subsequent proceedings or sentencings in other matters depends on whether the voiding was based on a deficiency in the original conviction. More specifically, this court has held that a sentencing enhancement based on a prior conviction is not barred merely because the prior conviction was subsequently reduced or voided as a matter of "forgiveness or remission of penalty" such as a pardon. (*People v. Biggs* (1937) 9 Cal.2d 508, 514, internal quotation marks omitted.) This is because "a pardon of a convicted felon . . . does not restore his character, and does not obliterate the act itself." (*Ibid.* ["We are unable to see how the pardon, relieving the offender from the effects or disabilities of his first

crime, can in addition prevent the normal application of the statute punishing him for a subsequent offense"].)

Where an enhancement or crime punishes a defendant's decision to engage in particular conduct while subject to a particular legal status, the defendant cannot attack the conviction or enhancement because of a later change in that status. For example, "the possible invalidity of an underlying prior felony conviction provides no defense to possession of a concealable weapon by a felon" because the offense is based on that person's status at the time of the possession. (*People v. Harty* (1985) 173 Cal.App.3d 493, 499-500.) And a person convicted of an out-of-state sex offense who fails to register as a sex offender in California will not have his California failure-to-register conviction set aside merely because the out-of-state conviction was eventually set aside. (See *In re Watford* (2010) 186 Cal.App.4th 684, 694.) Allowing petitioner to challenge his status post hoc would undercut the purpose of status-based prohibitions—namely, punishing a defendant's intentional decision to engage in prohibited conduct at a time when the defendant knew it was prohibited.

Both of these principles require maintaining petitioner's section 1320.5 conviction. Petitioner makes no claim that his convictions or sentences were improper when imposed, either because of factual innocence or because of procedural defects. Rather, his only claim is that the voters subsequently decided to reduce the punishment for various offenses (though not, notably, for failure to appear). Like the pardon in *Biggs*, this was a change that was not based on factual innocence, did not "obliterate the act" for which those sentences were imposed, and did not "restore [petitioner's] character." (*Biggs*, *supra*, 9 Cal.2d at p. 514, internal quotations omitted.) And like other status-based sentencing enhancements, section 1320.5 targets a defendant's decision to engage in particular conduct while subject to a particular legal status (being on bail for a

felony). Subsequent adjustments to the classification and status of the primary offense did nothing to alter petitioner's status when he committed the crime. Nor did they reduce his culpability for consciously abusing the privilege of having been released on bail while being prosecuted for a felony. Under these principles, the Court of Appeal properly rejected petitioner's request to retroactively benefit from the subsequent reclassification of his drug possession conviction.

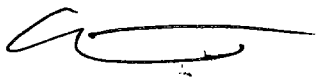
CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: March 3, 2017

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
JEFFREY M. LAURENCE
Senior Assistant Attorney General
DONNA M. PROVENZANO
Supervising Deputy Attorney General



AMIT KURLEKAR
Deputy Attorney General
Attorneys for Respondent

CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 7,100 words.

Dated: March 3, 2017

XAVIER BECERRA
Attorney General of California

AMIT KURLEKAR
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **In re John Manuel Guiomar on Habeas Corpus** Case No.: **S238888**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On March 3, 2017, I served the attached **Answer Brief on the Merits and Request for Judicial Notice** by placing a true copy enclosed in sealed envelopes in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Attn: Executive Director
Sixth District Appellate Program
95 South Market Street, Suite 570
San Jose, CA 95113

Jonathan Grossman
Staff Attorney
Sixth District Appellate Program
95 South Market Street, Suite 570
San Jose, CA 95113

The Honorable Dean D. Flippo
District Attorney
Monterey District Attorney's Office
Post Office Box 1131
Salinas, CA 93902

Sixth Appellate District
Court of Appeal of the State of California
333 West Santa Clara Street, Suite 1060
San Jose, CA 95113

Monterey Superior Court
Salinas Division
240 Church Street, Suite 318
Salinas, CA 93901

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 3, 2017, at San Francisco, California.

J. Espinosa
Declarant

Signature

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