COPY

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 REPLY BRIEF ON THE MERITS

SIXTH DISTRICT APPELLATE PROGRAM
JONATHAN GROSSMAN 154452
Staff Attorney
95 S. Market Street, Suite 570
San Jose, CA 95113
(408) 241-6171
fax: (408) 241-2877
jonathan@sdap.org

Attorney for Petitioner
John Manuel Guiomar

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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.

Proposition 47 was enacted to save money by redirecting funds from long-term incarceration to local probation programs, victim services, and education. (Prop. 47, § 2.) Proposition 47 reclassified relatively minor theft and drug offenses as misdemeanors, and it provided that a defendant could have felony convictions reduced to misdemeanors if they could not be charged as felonies today. (Pen. Code, § 1170.18.)[1] To ensure savings by redirecting defendants who commit minor theft and drug offenses away from felony treatment, the initiative attempted to prevent alternative methods of charging a felony for the same conduct. Thus, for example, the voters not only changed

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

the punishment for theft (§ 490.2), but also the punishment for commercial burglary by creating a new crime of shoplifting (§ 459.5), for forgery (§§ 473, 476a), for receiving stolen property (§ 496), and for petty theft with a prior theft conviction (§ 666). (Prop. 47, §§ 5-10.) The voters insisted that the initiative "be broadly construed to accomplish its purposes." (Prop. 47, § 15.)

A charge of a failure to appear cannot exist in isolation. The defendant must fail to appear for another offense. The Legislature has determined that a failure to appear is a misdemeanor if the underlying offense is a misdemeanor. (§ 1320, subd. (a).) It is a felony if the underlying offense is a felony. (§ 1320.5.) Petitioner failed to appear for a minor drug offense, which has been reclassified under Proposition 47 to be a misdemeanor. Because petitioner's failure to appear can only be charged as a misdemeanor today, his felony conviction for failing to appear should be vacated. Leaving it as a felony is the type of alternative charging that the voters sought to prevent, as it thwarts the purpose of the initiative of redirecting funds from incarceration to other priorities.

Respondent contends that petitioner's argument violates canons of statutory construction. (ABM 23-26.) Not so. The most fundamental canon is that the unambiguous plain meaning of the statute controls. "As always, we begin with the canons of statutory construction. 'When interpreting a statute, "we turn first to the language of the statute, giving the words their ordinary

meaning." ' [Citation.] 'If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature. . . . ' [Citation.]" (*People v. Talidbeen* (2002) 27 Cal.4th 1151, 1154.)

The plain language of Proposition 47 directs the courts to treat a redesignated misdemeanor conviction as a misdemeanor for all purposes. Section 1170.18, subdivision (k) 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), emphasis added.) Thus, petitioner's possession of drugs is a misdemeanor "for all purposes," and a felony failure to appear cannot result from it.

Respondent does not point to any ambiguity in section 1170.18, subdivision (k). It instead argues points to judicial decisions that hold acts of leniency do not alter the collateral consequences of the conviction. Thus, for example, when the Governor pardons a defendant, it has no affect on using the prior conviction to enhance a sentence. (ABM 30, citing *People v. Biggs* (1937) 9 Cal.2d 514.) But judicial construction is not necessary when the statute is unambiguous. In any event, the comparison is inapt. Proposition 47 is not an act of grace by a judge or executive officer on an individual. It is a

reclassification of the offense for all offenders who are suitable for resentencing because the voters believed misdemeanor treatment better is a better fit for the crime. And, unlike a pardon, the reclassification requires that the conviction be treated as a misdemeanor "for all purposes." (§ 1170.18, subd. (k).)

Respondent also uses the examples of a felon in possession of a firearm and a sex offender's failure to register who are still guilty of the new crimes, even if the underlying offense is later vacated. (ABM 31, citing *People v. Harty* (1985) 173 Cal.App.3d 493, 499-500 and *In re Watford* (2010) 186 Cal.App.4th 684, 694.) But again, this is not a situation where a person was convicted of a felony and then had the conviction reduced or vacated out of grace or because of legal proceedings particular to the individual. The voters has reclassified petitioner's drug offense to be a misdemeanor for everyone who qualifies. It was a determination by the electorate that the case should not have been a felony at all.

Respondent's example of *Harty, supra,* 173 Cal.App.3d 493 supports petitioner's position. Proposition 47 expressly states that a person who has a felony conviction reduced to a misdemeanor cannot possess a firearm. (§1170.18, subd. (k).) But this was the *only* exception to the general rule that a conviction reduced under the initiative shall treated as a misdemeanor for all purposes. (*Ibid.*) Under respondent's narrow construction, the firearms

exception in subdivision (k) of section 1170.18 is mere surplusage because such a person would be prohibited from possessing a firearm even without this provision. This violates the canon to "avoid statutory constructions that render particular provisions superfluous or unnecessary." (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 459.) Further, under the canon of *expressio unius est exclusio alterius* ("[t]he expression of some things in a statute necessarily means the exclusion of other things not expressed") (*Gikas v. Zolin* (1993) 6 Cal.4th 841, 852), no other exceptions to the misdemeanor treatment of redesignated felonies should be read into the statute.

"[W]hen the Legislature wants to continue treating a felony reduced to a misdemeanor . . . as a felony, it expressly says so, and the court will treat the person as such only upon those occasions." (*Gebremicael v. California Com. on Teacher Credentialing* (2004) 118 Cal.App.4th 1477, 1486 [where statute barred persons convicted of a serious felony from receiving a teaching credential, plaintiff could not be barred from receiving the credential because his prior felony conviction had been reduced to a misdemeanor].) For example, a state statute requires the immediate suspension of an attorney from practicing law if the attorney is convicted of a felony (Bus. & Prof. Code, § 6102), and the Legislature expressly stated that a felony reduced to a misdemeanor under section 17, subdivision (b)(2), is still treated as a felony for purposes of that disciplinary rule. (*Gebremicael*, at p. 1486.) Similarly,

the "Three Strikes" sentencing scheme, unlike section 667.5, subdivision (b), expressly provides that a prior felony conviction proven by the prosecution as a prior strike retains its status as a felony even if it had been reduced after initial sentencing to a misdemeanor under section 17. (*Gebremicael*, at p. 1486, citing §§ 667, subd. (d)(1), 1170.12, subd. (b)(1).)

There is no indication in Proposition 47 that the electorate carved out a failure to appear exception in which a redesignated misdemeanor should be treated as a felony. Thus, because petitioner's underlying drug offense must "be considered a misdemeanor for all purposes" (§ 1170.18, subd. (k)), the felony conviction under section 1320.5 must be vacated.

Respondent does refer to the legislative history of Proposition 47, but the material it cites does not support its position. It mentions that the ballot pamphlet promised voters that no one would automatically be released from custody and the court would thoroughly review the criminal history and risk assessment of the offender. (ABM 15.) This is still so. When the court reduced petitioner's felony drug conviction to a misdemeanor, it was required to conduct the thorough screening. This was all that was contemplated by the initiative.

Respondent also mentions the list of crimes directly affected by Proposition 47. From this, it urges this Court to construe Proposition 47 narrowly by asserting the intent of the voters was not to affect a felony failure

to appear conviction based on a conviction that is reduced under Proposition 47. (ABM 23-24.) It is probably impossible to divine the subjective intent of millions of voters. The task of the court is "to effectuate the law's purpose" (*People v. Murphy* (2001) 25 Cal.4th 136, 142.) The obvious and express purpose of the initiative is "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.) It would frustrate the purpose of the initiative if offenders remained incarcerated for a felony failure to appear on an offense could not be charged as a felony under the initiative. (Cf. *People v. Davis* (2003) 104 Cal.App.4th 1443, 1448 [failure to appear for drug court under Prop. 36 (Gen. Elec. (Nov. 7, 2000)) should be treated as a drug-related violation of probation]; but see *People v. Johnson* (2003) 114 Cal.App.4th 284, 299 [refusing to follow *Davis* when the defendant failed to appear to the probation office].)

Respondent's argument really is not the intent of the voters in passing Proposition 47 but instead the intent of the Legislature in amending section 1320.5 to provide felony punishment for those who fail to appear on felony cases. (ABM 16-21 and Respondent's Request for Judicial Notice.) But the intent of the Legislature could not override the purpose of a subsequent voter

initiative. Nonetheless, even the Legislature did not intend to provide felony punishment for failing to appear when the underlying crime has been classified as a misdemeanor. (See § 1320, subd. (a).) Petitioner's underlying offense for drug possession is now a misdemeanor case.

Respondent attempts to distinguish *People v. Park* (2013) 56 Cal.4th 782 by stating the new felony was committed after the defendant's prior conviction was reduced to a misdemeanor under section 17, subdivision (b) and thus reducing a conviction to a misdemeanor only has prospective effect. (ABM 28.) While the issue before this court was whether a prior prison commitment for an offense that had been reduced to a misdemeanor can subsequently be used to enhance a new conviction (*id.* at p. 795), there was anything in section 17, subdivision (b) that limited the effect to only subsequent proceedings. Like section 1170.18, subdivision (k), it reduced the offense to a misdemeanor "for all purposes."

Respondent argues that one must focus on the petitioner's underlying charge, not his conduct. (ABM 22.) But the underlying offense is really a misdemeanor. This is why a felony conviction for failing to appear is unauthorized.

It is because petitioner's drug possession case has been reclassified as a misdemeanor "for all purposes" that the perceived absurd consequences described by respondent do not arise. (ABM 22-23.) The purpose of section

1320.5 is to provide felony punishment for those who fail to appear on a felony case, even if the underlying offense is later dismissed or if the court reduces the offense to a misdemeanor as a matter of grace. (*People v. Walker* (2002) 29 Cal.4th 577, 583.) Petitioner's underlying case, however, has been classified by the voters be a misdemeanor.

Proposition 47 provides that a defendant should not have a felony conviction if the offense cannot be charged as a felony today. Petitioner cannot been charged with a felony failure to appear because his underlying drug case is a misdemeanor "for all purposes." When the court resentenced petitioner on all of his cases upon granting his petition under the initiative, it should have vacated his conviction for violating section 1320.5.

CONCLUSION

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

DATED: March 9, 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 REPLY BRIEF ON THE MERITS contains 2145 words.

Executed under penalty of perjury at San Jose, California, on March 9, 2017.

Jonathan Grossman

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

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

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 ***PETITIONER'S REPLY BRIEF ON THE MERITS*** to the following parties hereinafter named by:

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Attorney General's Office
455 Golden Gate Avenue, Suite 11,000
San Francisco, CA 94102-7004
[attorney for respondent]
SFAGDocketing@doj.ca.gov

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

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 13th day of March, 2017, at San Jose, California.

Priscilla A. O'Harra