Supreme Court of California
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Supreme Court of California
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff and Respondent

v.

F.M.

Defendant and Appellant

No. S270907

Sixth District
Court of Appeal
Case No. H048693

Santa Cruz County
Superior Court
Nos. 19JU00191A, B, C

The Honorable
Denine Guy, Judge

APPELLANT'S OPENING BRIEF ON THE MERITS

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent v. F.M. Defendant and Appellant	No. S270907 Sixth District Court of Appeal Case No. H048693 Santa Cruz County Superior Court Nos. 19JU00191A, B, C The Honorable Denine Guy, Judge

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APPELLANT'S OPENING BRIEF ON THE MERITS

ISSUE PRESENTED

This Court granted review in the present case to consider the following issue:

I. Did the Court of Appeal err in ruling that the trial court adequately exercised its discretion to determine whether the juvenile's offenses were felonies or misdemeanors as required by Welfare and Institutions Code section 702 and *In re Manzy W.* (1997) 14 Cal.4th 1199?

STATEMENT OF APPEALABILITY

This appeal is from a final judgement entered pursuant to Welfare and Institutions Code section 602, and is authorized by Welfare and Institutions Code section 800, subdivision (a).

STATEMENT OF THE CASE

In the fall of 2019, appellant admitted to committing misdemeanor assault (Pen. Code, § 242)[1] and was placed on formal probation. (1CT 17.) In March 2020, appellant was charged in case 19JU00191B with three new incidents: brandishing a firearm in Santa Cruz County, evading law enforcement in Santa Clara County, and assault in Santa Cruz County. (1CT 39-43.) Appellant admitted to committing assault with force likely to cause great bodily injury (§ 245, subd. (a)(4)), being an active participant in a criminal street gang as a misdemeanor (§ 186.22, subd. (a)), and evading a police officer. (Veh. Code, § 2800.2, subd. (a).) (1RT 7-9; 1CT 64-65.)

In July 2020, while awaiting his dispositional hearing, appellant was charged with a subsequent assault in juvenile hall in case 19JU00191C. (1CT 128-130.) He admitted one count of assault with force likely to cause great bodily injury (§ 245, subd. (a)(4)). (1CT 183-185.) Following a dispositional hearing held jointly on both cases appellant was committed to a ranch camp. (5RT 1051.)

[1] Subsequent undesignated statutory references are to the Penal Code.

A notice of appeal was filed on December 17, 2020. (1CT 259-261.) The matter was submitted on the parties' briefing and the dispositional order was affirmed with a modification to the maximum term of confinement in an unpublished opinion on July 26, 2021. In that opinion the court held that the trial court's failure to declare whether appellant's offenses were misdemeanors or felonies as required by section 702 did not require remand since: (1) the offenses were alleged as felonies, (2) appellant admitted the offenses as felonies, (3) the court advised appellant as if the offenses were felonies, and (4) the court ultimately calculated the maximum term of confinement assuming the offenses were felonies. (Slip Op. at pp. 8-9.)

STATEMENT OF FACTS

On March 16, 2020, while on probation, appellant and another minor approached the victim on foot and asked him his gang affiliation. (1CT 15.) The victim denied being involved with gangs and attempted to walk away. (*Ibid*.) Appellant and his friend caught up to the victim and stabbed him in the arm and back. (*Ibid*.) A witness identified appellant's friend as the one who used the knife. (1CT 29-30.) The following day, Milpitas Police notified probation that appellant was involved in another incident. (1CT 16.) On March 10, 2020, appellant was driving when he stopped and confronted the victim on the side of the road. (1CT 47.) The front passenger in the vehicle pointed a gun at the victim. (*Ibid*.) The victim ran to a gas station and reported the incident to police. (1 CT 47.)

Officers located the vehicle and appellant led them on a high speed chase, eventually crossing a median and crashing into a light pole and fence. (1 CT 47.) There were five people in the vehicle when it came to a stop and it was determined that appellant was driving without a license. (*Ibid*.)

On July 15, 2020, while in juvenile hall awaiting his dispositional hearing in 19JU00191B, appellant participated in a group assault. (1CT 132.) Specifically, appellant and four other minors assaulted the victim in the middle of class. (1CT 133.)

SUMMARY OF ARGUMENT

This case focuses on whether remand is required under *Manzy W.*, *supra*, 14 Cal.4th 1199, ("*Manzy W.*") when the juvenile court fails to say it has exercised its discretion in treating wobbler offenses as felonies rather than misdemeanors. Here, appellant admitted committing assault with force likely to cause great bodily injury (§ 245, subd. (a)(4)), being an active participant in a criminal street gang (§ 186.22, subd. (a)), and evading a police officer (Veh. Code § 2800.2). (1RT 7-9; 1CT 64-65.) In taking the admission, the court said, "This is what is considered a serious violent felony that can be used against him in the future. So this could be counted as a strike, which means it would double his exposure or sentence in an adult court case." (1RT 6.)[2] Other than taking the admission, the

[2] Section 245(a)(4) is not a strike on its own. The 186.22(b)(1)(A) enhancement would have elevated it to a "serious" strike only (§ 1192.7(c)(28)) but the enhancement was dismissed and not pled to.

court did not say anything with respect to the evading charge. (1RT 11.) The minute order for the change-of-plea hearing said, "The Court has considered whether the above offense(s) should be felonies or misdemeanors." (1CT 65.) But the court never said anything on the record about exercising its discretion to find that the offenses were felonies or misdemeanors. (1RT 3-14.)

At a separate hearing, appellant admitted to one count of assault with force likely to cause great bodily injury (§ 245, subd. (a)(4)) in relation to the fight at juvenile hall. (1CT 183-185.) The court did not discuss its discretion on that occasion either, and the minute order from that hearing is silent on the issue. (1CT 183-185; 4RT 755-758.) At the joint dispositional hearing, the court rejected the probation department's recommendation that appellant be returned to his parents. (*Ibid*.)

From this record, it is clear that the court knew appellant's offenses were felonies. However, the court's clear treatment of the offenses as felonies does not show it was aware that they could have been anything different, or that a discretionary exercise to choose one over the other had taken place. This apparent failure of the court indicates that appellant was deprived of an important judicial exercise— a judge's weighing of factors which may have led to the imposition of misdemeanors.

The Court of Appeal failed to consider this distinction when reaching its conclusion. It simply held that remand was unnecessary under *Manzy W.* as the record clearly showed the court was treating the offenses as felonies. That the trial court said nothing about whether the offenses

could be misdemeanors is simply not addressed. The court's decision not to remand under these circumstances has the effect of making all wobbler offenses presumptive felonies unless they are otherwise addressed. Such a result cannot be aligned with section 702 or this Court's ruling in *Manzy W.*

To cure this problem, this Court should reaffirm the rule articulated in *Manzy W.*, *supra*, 14 Cal.4th 1199, by clarifying that simply treating an offense as a felony does not adequately evidence the required judicial exercise imposed by section 702. When the record shows only that offenses were treated as felonies— and nothing more— remand should be required for the trial court to perform its required duty.

ARGUMENT

When The Record Does Not Show The Juvenile Court Knew Wobbler Offenses Could Be Anything Other Than Felonies, Remand Is Required For Compliance With Section 702.

A. Introduction.

Since the enactment of Welfare and Institutions Code section 702 in 1976, juvenile courts have been required to expressly declare whether wobbler offenses should be treated as misdemeanors or felonies. Inherent in this judicial exercise is a recognition that a juvenile should receive the benefit of a court's particularized consideration of the facts of the incident and facts about the juvenile when deciding what is a just outcome

under the circumstances at hand. The question of what to do when the juvenile court failed to comply with section 702 followed shortly behind section 702's enactment. Was the failure to make its required express declaration grounds for remand? This Court issued parameters surrounding that question early on in *In re Ricky H.* (1981) 30 Cal.3d 176 and *In re Kenneth H.* (1983) 33 Cal.3d 616. Then in 1997 in *Manzy W.*, *supra*, 14 Cal.4th 1199, this Court articulated the rule that remains controlling today: while remand for a failure to specify whether an offense is a misdemeanor or a felony is not automatic, it is required when the record does not show that the court understood and in fact exercised its discretion under section 702. When there is no evidence in the record that the juvenile court knew a wobbler could be a misdemeanor or that it could treat it as such, remand is required for the court to exercise its discretion. To do what the Court of Appeal did here—that is, to affirm a disposition merely because the juvenile court treated the offense as a felony rather than a misdemeanor—is essentially to create a presumption that everything undeclared is a de-facto felony. Such a presumption— even if not expressly articulated as such— cannot be aligned with section 702. Appellant requests that this Court give renewed vitality to *Manzy W.*'s remand rule under such circumstances.

B. Applicable Legal Principles.

Welfare and Institutions code section 702 states in relevant part: "If the minor is found to have committed an offense which would in the case

of an adult be punishable alternatively as a felony or a misdemeanor, the court shall declare the offense to be a misdemeanor or felony." The statute, which was enacted in 1976, serves a dual purpose. The first purpose is administrative in nature and is meant to ensure that the maximum term of confinement for a wobbler offense is made plain for the record. (*Manzy W.*, *supra*, 14 Cal.4th at pp. 1205-1206.) The second purpose is more than administrative— it ensures that a juvenile court is aware of and exercises its discretion in determining whether a wobbler offense is ultimately a misdemeanor or felony. (*Id*. at pp. 1207.) Not long after its enactment the question arose, what should happen when the court fails to make section 702's required declaration? The answer came initially in two appellate court decisions from 1980: *In re Dennis C*. (1980) 104 Cal.App.3d 16, and *In re Jefferey M*. (1980) 110 Cal.App.3d 983.

1. *Dennis C*. and *Jefferey M*.

In *Dennis C*., the minor was sentenced for two wobbler offenses: forgery (§ 470) and battery against a peace officer (§ 243.) (*Dennis C*., *supra*, 104 Cal.App.3d at p. 19.) At sentencing the court failed to declare whether the offenses were misdemeanors or felonies and the minor argued for remand. (*Ibid*.) The Attorney General opposed remand with two arguments. First he argued that a notation on the clerk's transcript that the battery was a felony satisfied section 702's declaration requirement. (*Id*. at p. 23.) The court disagreed: "Although the minute order does reflect that the juvenile court found the battery to be a felony, the transcript of

the hearing does not support this notation. The court did not state at any of the hearings that it found the battery to be a felony." (*Dennis C.*, *supra*, 104 Cal.App.3d at p. 23.) Second, the Attorney General argued that the imposition of a felony length term for forgery "indirectly complied" with section 702's requirement. (*Ibid*.) The court rejected that argument: "As appellant has argued, it is entirely possible that the judge simply sentenced Dennis C. as a felon without considering the possibility of sentencing him as a misdemeanant. Because of this possible oversight, we have no alternative but to remand the matter to the juvenile court for clarification." (*Ibid*.)

In *Jeffery M.*, *supra*, 110 Cal.App.3d 983, decided a short time later, two minors were sentenced for threatening a public official (§ 71), a wobbler offense. At sentencing the court failed to declare whether the offenses were misdemeanors or felonies. Opposing remand, in addition to arguments identical to those in *Dennis C.,* the Attorney General argued that the minors' admissions to a felony petition adequately addressed whether the offense was a misdemeanor or felony under section 702. The court disagreed noting that "the pleadings are prepared by the prosecutor, not the court." (*Id*. at p. 985.) They held that remand was required for compliance with section 702: ". . . the statute means what it says, and requires the court to expressly consider the classification of the underlying offense and make a specific finding. Courts should do what the law requires. Nothing should be subject to surmise. To affirm these orders is to encourage sloppy performance of duty." (*Ibid*.)

Taken together, *Dennis C.* and *Jeffery M.* provided clear guidance on what was *not* enough to avoid remand for failure to make section 702's required declaration: the clerk's notations if not supported by the hearing transcripts, the length of the period of confinement imposed, and a felony petition. Compliance with section 702 required certainty and clarity. This Court affirmed that guidance soon after in two decisions: *Ricky H.*, *supra*, 30 Cal.3d 176, and *Kenneth H.*, *supra*, 33 Cal.3d 616.

2. *Ricky H.* and *Kenneth H.*

In *Ricky H.*, the minor was sentenced for assault with force likely to cause great bodily injury (§ 245(a))[3], a wobbler offense. At the dispositional hearing the court failed to declare whether the offense was a misdemeanor or felony. (*Ricky H.*, *supra*, 30 Cal.3d at p. 191.) Citing *Dennis C.* and *Jeffery M.*, this Court held that "[t]he mere specification in the petition of an alternative felony/misdemeanor offense as a felony has been held insufficient to show that the court made the decision and finding required by section 702." (*Ibid.*) This Court further held that "the setting of a felony-level maximum period of confinement has been held inadequate to comply with the mandate of section 702." (*Ibid.*) Finally this Court held that minute orders from the dispositional hearing which note an offense is a felony are inadequate to fulfill section 702 when not supported by what the court actually said at the dispositional hearing.

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[3] Assault with force likely to cause great bodily injury is now section 245, subdivision (a)(4). It is still a wobbler.

(*Ricky H.*, *supra*, 30 Cal.3d at p. 191.) Two years later this Court reaffirmed these holdings on "almost identical" arguments in *Kenneth H.* (*Kenneth H.*, supra, 33 Cal.3d at pp. 619-620.)

3. *Manzy W.'s* Current Rule.

In 1997, drawing from *Ricky H.* and *Kenneth H.*, this Court articulated what remains the current rule for failure to comply with section 702 in *Manzy W.*, *supra*, 14 Cal.4th 1199.[4] In *Manzy W.*, the minor was sentenced for possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)), a wobbler offense. (*Id*. at p. 1202.) The court imposed a felony level term of three years confined in the Youth Authority, but said nothing about whether the offense was finally a misdemeanor or a felony. (*Id*. at pp. 1202-1203.) Manzy appealed seeking remand, which was ordered by the Court of Appeal. (*Id*. at p. 1203.) The Attorney General sought and was granted review. (*Ibid*.)

As a starting point this Court clarified, "[w]hat is not at issue is what the juvenile court must do. The language of the provision is unambiguous. It requires an explicit declaration by the juvenile court whether an offense would be a felony or misdemeanor in the case of an adult." (*Id*. at p. 1204.) But what should be done when this doesn't take place? Is remand required? The Attorney General advanced three main

[4] This Court's most recent related decision in *In re G.C.* (2020) 8 Cal.5th 1119, does not disturb this rule and addresses a jurisdictional issue that is distinct from the issue raised by appellant in this case.

arguments why remand was not required for the court's failure to make section 702's required declaration.

It was first argued that section 702 serves a "merely administrative purpose" and is for that reason "directory" rather than "mandatory." (*Manzy W.*, *supra*, 14 Cal.4th at p. 1204.) This Court acknowledged that section 702 was in part administrative to ensure a clear record of the maximum permitted time of confinement. (*Id*. at p. 1205.) However, this Court continued that it was also more than that: "As *Kenneth H*. and *Ricky H*. acknowledge, the requirement that the juvenile court declare whether a so-called wobbler offense was a misdemeanor or felony also serves the purpose of ensuring that the juvenile court is aware of, and actually exercises its discretion[.]" (*Id*. at p. 1207, internal quotations omitted.)

Next it was argued that the imposition of a felony length term was an implied declaration under section 702. (*Ibid*.) Again, citing *Kenneth H*. and *Ricky H.,* this Court held that the length of the term imposed does nothing to show that the court knew an offense could be a misdemeanor but decided it to finally be a felony. (*Id*. at pp. 1208-1209.) This Court further affirmed that "neither the pleading, the minute order, nor the setting of a felony-level period of physical confinement may substitute for a declaration by the juvenile court as to whether an offense is a misdemeanor or felony." (*Id*. at p. 1208, internal citations omitted.) This Court further acknowledged the potential prejudicial impact of a felony on a minor. (*Id*. at p. 1209.) Thus a court's failure to engage in the

required discretionary judicial exercise is not without real world consequences. Under such circumstances, "[n]othing should be subject to surmise." (*Manzy W.*, *supra*, 14 Cal.4th at p. 1208.)

Finally it was argued that a court is presumed to have performed its official duty under Evidence Code, section 665, even if it was not expressly declared. (*Id*. at p. 1209.) This Court was "unpersuaded that such a presumption is appropriately applied when the juvenile court violated its clearly stated duty under Welfare and Institutions Code section 702[.]" (*Ibid*.)

This Court went on to state succinctly the rule which remains today: remand is not "automatic" whenever the court fails to make a formal declaration under section 702. (*Ibid*.) "[T]he record in a given case may show that the juvenile court, despite its failure to comply with the statute, was aware of, and exercised its discretion to determine the felony or misdemeanor nature of a wobbler. In such case, when remand would be merely redundant, failure to comply with the statute would amount to harmless error." (*Ibid*.) This determination is made by looking at the record as whole. (*Ibid*.) As applied to Manzy, remand was required because the record as a whole did not make the necessary showing that the court knew the offense could be a misdemeanor— it appeared to treat it only as a felony.

Manzy W. reaffirmed that section 702 means what it says. The sentencing court is required to declare whether a wobbler is a misdemeanor or a felony. This serves more than just an administrative

purpose and it directly impacts the future of the minor. If this declaration is not made, remand is required unless the record shows that the court knew the wobbler offense could be a misdemeanor but nevertheless chose to treat it as a felony. This showing requires more than the fact that the petition alleged a felony, that a felony term was imposed, or that the clerk checked indicated a felony disposition on a form when the judge's statements in the transcripts don't support that finding.

4. The Juvenile Court's Discretionary Exercise.

This Court has never specifically articulated what a juvenile court's discretionary exercise under section 702 should include, but looking at similar statutes can provide some guidance. For instance, in the criminal context, the California Rules of Court, Rule 4.410 lists the Legislature's general objectives for all sentencing decisions: "(1) protecting society; (2) punishment; (3) encouraging the defendant to lead a law-abiding life in the future and deterring him from future offenses; (4) deterring others from criminal conduct by demonstrating its consequences; (5) preventing the defendant from committing new crimes by isolation for a period of incarceration; (6) securing restitution for the victims of crime, and; (7) achieving uniformity in sentencing." Because each case and defendant is unique, it is ultimately left to the sentencing court's discretion to decide which sentencing objectives are most appropriate in a given case. This is expressed in subsection (b): "Because in some instances these objectives may suggest inconsistent dispositions, the sentencing judge must consider

which objectives are of primary importance in the particular case." This gives the sentencing court latitude in its ability to craft a sentence that balances the needs of the community and the defendant in a meaningful and effective way. A juvenile court must bear in mind that, unlike the adult justice system, which seeks to punish, ". . . the fundamental purpose of the juvenile justice system is to rehabilitate." (*In re J.M.* (2019) 35 Cal.App.5th 999, 1006.) But at the very least, the juvenile court's decision to impose a misdemeanor or felony needs to consider these factors— the nature of the offender and the nature of the offense.

Factors similar to those mentioned in Rule 4.410 are part of the analysis when reducing a felony to a misdemeanor at sentencing pursuant to Penal Code, section 17, subdivision (b). Those are the nature of the offender, the nature of the offense, and the public interest. (See *People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 978.) This section 17, subdivision (b) analysis was recently held by the the First District Court of Appeal to adequately address a sentencing court's discretionary exercise in a way that would make remand redundant after failing to comply with section 702. (See *In re E.G.* (2016) 6 Cal.App.5th 871.)

So while neither of these analyses is precisely the same as the analysis the juvenile court must go through under section 702, they at least approximate the level of consideration required when the court decides whether to treat an offense as a misdemeanor or a felony. Thus, for a remand under *Manzy W.* to be unnecessary, the record must reflect that the court actually considered the same sorts of factors at issue under

Rule 4.410 and section 17, subdivision, (b).

Further, meaningful consideration of the disposition is especially important in juvenile cases. There are three reasons for this. First, as this Court noted in *Kenneth H.*, supra, 33 Cal.3d 616, a felony adjudication in juvenile court can follow the minor well into adulthood. (*Kenneth H.*, *supra*, 33 Cal.3d at pp. 1208-1209.) A juvenile adjudication of a strike offense can be used to increase sentencing in an adult proceeding. (§§ 667, subd. (d)(3) and 1170.12, subd. (b)(3); *People v. Davis* (1997) 15 Cal.4th 1096, 1100.) A juvenile adjudication of a sex offense can lead to permanent registration requirements, at least when the minor is sent to the Division of Juvenile Justice. (§ 290.008, subd. (a).) A record of felony adjudications and dispositions is maintained by law enforcement and can be disseminated under certain circumstances. (Welf. & Inst. Code, §§ 827.2, subds. (a) and (c); 827.5.) DNA collection is required for any juvenile adjudicated for a felony under section 602. (§ 296, subd. (a)(1).) And felony juvenile adjudications can have lasting consequences for minors applying to college or trying to get certain jobs or professional licenses. (Burrell & Stacy, Collateral Consequences of Juvenile Delinquency Proceedings in California: A Handbook for Juvenile Law Professionals (2011), pp. 109-111, 113-114, created by the Pacific Juvenile Defender Center and available at https://www.courts.ca.gov/documents/BTB24-4D-9.pdf (last visited December 6, 2021).) So the decision to treat an offense as a felony has weighty consequences deserving of deliberate consideration. (See *Kenneth H.*, *supra*, 33 Cal.3d at pp. 1208-1209.)

Second, it's not obvious that treating an offense as a felony and encumbering a minor with more severe sanctions is a more effective way of rehabilitating the minor and deterring him from committing future crimes. In a recent dissent from a denial of review, Justice Liu cited a report detailing the adverse effect that juvenile court involvement can have on minors. (*In re J.E.*, S265077, rev. denied December 30, 2020, dis. opn. of Liu, J., citing Petrosino et al., Formal System Processing of Juveniles: Effects on Delinquency (2010), p. 36, available at http://www.njjn.org/uploads/digital-library/resource_1478.pdf (last visited December 6, 2021.) The report reviewed 29 controlled trials and found a net negative effect for juvenile court processing when compared either to diversion programs or even simply doing nothing. (Petrosino, *supra*, at p. 36.) That is, the report found that more involvement in the juvenile-justice system, even when controlled for other variables, resulted in more delinquency in the future. (*Ibid*.) The report was not able to determine why this was the case (*Id*. at pp. 36-39), but given that there is no clear rehabilitative benefit to juvenile-court involvement, courts should be careful when deciding to label an offense as a felony and to impose felony-level sanctions.

Third, racial disparities plague the juvenile-justice system. (Alex R. Piquero, Disproportionate Minority Contact (2008) 18 Future Child. 59, 62 (reporting racial disparity at "each decision point" in the juvenile justice system, from arrest to detention to post-adjudication placement).) These disparities exist from detention to disposition. (Michael J. Leiber, Race, Pre-and Post-detention, and Juvenile Justice Decision Making

(2013) 59 Crime & Delinquency 396, 399 ("Race has … indirect effects on decision making through detention … Being detained strongly predicts more severe treatment at judicial disposition."); Nancy Rodriguez, The Cumulative Effect of Race and Ethnicity in Juvenile Court Outcomes and Why Pre-Adjudication Detention Matters (2010) 47 J. Res. Crime & Delinq. 391, (reporting that youths who are detained preadjudication are more likely to have a petition filed, less likely to have a petition dismissed, and more likely to be removed from the home at disposition). Indeed, in passing Senate Bill 823, the Legislature closed the Division of Juvenile Justice to try to correct these disparities. (Stats. 2020, ch. 337, § 1, subd. (e), p. 3792 [noting it was the intent of the Legislature to "reduce and then eliminate racial and ethnic disparities" in the juvenile-justice system].) So requiring a remand unless the record truly shows the court exercised individual discretion in the minor's case, this Court can help ensure juvenile courts rely on the appropriate factors in making decisions under section 702.

C. Appellant's Matters Should Be Remanded For The Court To Fulfill Its Statutory Responsibility Under Section 702.

There is no argument about whether the sentencing court in this case fulfilled its statutory duty under section 702— it clearly did not and the Court of Appeal agreed. (Slip Op. at pp. 8-9.) Did the court treat the offenses as felonies? Clearly it did. (*Ibid*.) But is the record sufficient to render remand redundant? No.

In case 19JU00191B appellant admitted evasion and assault with force likely to cause great bodily injury. (1CT 64-65; 1RT 6-11.) Both of these offenses are wobblers. (See § 245, subd. (a)(4) ["Any person who commits an assault upon the person of another by means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail not exceeding one year[.]"]; see also Veh. Code, § 2800.2, subd. (a) ["If a person flees or attempts to elude a pursuing peace officer in violation of Section 2800.1 and the pursued vehicle is driven in a willful or wanton disregard for the safety of persons or property, the person driving the vehicle, upon conviction, shall be punished by imprisonment in the state prison, or by confinement in the county jail for not less than six months nor more than one year."].)

At the time of the plea the court stated only that the assault could be a strike and said nothing about the evasion. (1RT 6-11.) The only mention related to the court's discretion in 19JU00191B is found in the minute order for the change of plea, which states, "The Court has considered whether the above offense(s) should be felonies or misdemeanors." (1CT 65.) However, the reporter's transcript is silent on the court reaching any sort of conclusion on whether it was choosing one or the other. Here, the court's own words were taken down verbatim and at no point did it make an affirmative declaration about whether the evading and assault were felonies or misdemeanors. In fact, the court's statement that the assault was a strike arguably shows that the court *did*

not know it could be anything other that a felony. It cannot be inferred from that statement the court knew the assault could also be a misdemeanor, or that it was selecting between the two.

Pending the dispositional hearing in 19JU00191B, appellant admitted the subsequent assault in 19JU00191C. (1CT 183-185; 4RT 755-758.) Neither the reporter's transcript nor minute order reflect that the court exercised its discretion to determine whether the assault was a misdemeanor or felony. The dispositional hearings for both matters were held jointly on November 3, 2020. (1CT 183-185; 5RT 1001-1059.) At that hearing the court failed to affirmatively declare whether the true findings for the evasion and both assaults were felonies or misdemeanors and simply treated all the offenses as felonies.

The arguments raised against remand in these cases are the familiar ones from *Dennis C.*, *Jeffrey M.*, *Ricky H.*, *Kenneth H.*, and *Manzy W.*, all of which have been consistently rejected since 1980. Appellant's admissions were to felonies in the petitions, but that was in the hands of the prosecutor, not the court. (See *Jeffrey M.*, *supra*, 110 Cal.App.3d at p. 985; *Ricky H.*, *supra*, 30 Cal.3d at p. 191; *Kenneth H.*, *supra*, 33 Cal.3d at p. 619, and; *Manzy W.*, *supra*, 14 Cal.4th at p. 1208.) The minute order includes a checked box indicating that the court was exercising its discretion and sentencing the offenses as felonies, but the reporters transcripts do not contain anything upon which this can be founded. (See *Dennis C.*, *supra*, 104 Cal.App.3d at p. 23; *Ricky H.*, *supra*, 30 Cal.3d at p. 191, and; *Manzy W.*, *supra*, 14 Cal.4th at p. 1208.) The court stated that

the offenses were felonies and imposed felony level confinement, but in no way indicated the offenses could be anything else. (See *Dennis C.*, *supra*, 104 Cal.App.3d at p. 23; *Ricky H.*, *supra*, 30 Cal.3d at p. 191, and; *Manzy W.*, *supra*, 14 Cal.4th at p. 1208.) We know what the prosecution was thinking by way of the petition, and the clerk by way of the minute order, but there is no evidence that the court knew the offenses could be misdemeanors and that it was imposing felonies after its discretionary exercise. As the court stated in *Jefferey M.*, "[n]othing should be subject to surmise" (*In re Jefferey M.*, *supra*, 110 Cal.App.3d at p. 985), and remand on the present record is the only adequate course to ensure that is so.

CONCLUSION

Appellant respectfully requests that this Court reverse the Court of Appeal's decision and remand the matter for the court to fulfill its statutory duty under Welfare and Institutions Code section 702.

Dated: December 6, 2021

Michael Reed

Michael Reed, Esq.
Attorney for Defendant-Appellant

CERTIFICATE OF COMPLIANCE WITH WORD LIMITATIONS

I, Michael Reed, certify that the length of Appellant's Opening Brief On The Merits complies with the requirements of California Rules of Court, Rule 8.360, subdivision (b)(1), and that according to the word-processing program used to prepare it, the number of words, except for those portions excluded from the length limits, is 5,952.

Dated: December 6, 2021

Michael Reed

Michael Reed, Esq.
Attorney for Defendant-Appellant

DECLARATION OF SERVICE

I am a citizen of the United States and a resident of the county of Monterey, California. I am over the age of eighteen years and not a party to the above referenced action. On the below mentioned date I served Appellant's Opening Brief On The Merits on the parties below:

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2. Office of the Attorney General
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5. Santa Cruz District Attorney's Office
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   Santa Cruz, CA. 95060 (mail)

6. F.M.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Executed at Salinas, California, on December 6, 2021.

Michael Reed

Michael Reed

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 12/6/2021 by Tao Zhang, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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