No. S270907

In the Supreme Court of the State of California

IN RE F.M., A PERSON COMING UNDER THE JUVENILE COURT LAW

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

F.M.,
Defendant and Appellant.

Sixth Appellate District, Case No. H048693
Santa Cruz County Superior Court, Case No. 19JU00191
The Honorable Denine J. Guy, Judge

ANSWER BRIEF ON THE MERITS

ROB BONTA (SBN 202668)
Attorney General of California
LANCE E. WINTERS (SBN 162357)
Chief Assistant Attorney General
JEFFREY M. LAURENCE (SBN 183595)
Senior Assistant Attorney General
SETH K. SCHALIT (SBN 150578)
Supervising Deputy Attorney General
*DONNA M. PROVENZANO (SBN 215302)
Supervising Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 510-3844
Fax: (415) 703-1234
Donna.Provenzano@doj.ca.gov
Attorneys for Plaintiff and Respondent

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COURT RULES

ISSUE PRESENTED

Did the Court of Appeal err in holding that the record as a whole established the juvenile court was aware of its discretion to treat the juvenile's offenses as misdemeanors as required by Welfare and Institutions Code section 702 and *In re Manzy W.* (1997) 14 Cal.4th 1199?

INTRODUCTION

If a minor violates a law defining a crime, the minor may be adjudged a ward of the court. (Welf. & Inst. Code, § 602.)[1] Some crimes are punishable either as a felony or a misdemeanor. Because of the possibility of alternative punishment, related present or future maximum periods of confinement, and to ensure the juvenile court is aware of and exercises its discretion, section 702 states that "the court shall declare the offense to be a misdemeanor or felony."

In *In re Manzy W.*, *supra*, 14 Cal.4th 1199, the Court explained that section 702 requires an explicit declaration by the juvenile court whether the offense is a felony or misdemeanor; the requirement ensures the court's exercise of discretion and is "obligatory." (*Id.* at p. 1204.) Yet, remand is not "'automatic'" when the juvenile court fails to make "a formal declaration." (*Id.* at p. 1209.) The Court recognized that "the record in a given case may show the juvenile court . . . was aware of, and exercised its discretion" under section 702. (*Ibid.*) In those instances,

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[1] Further undesignated statutory references are to the Welfare and Institutions Code.

"remand would be merely redundant" and the juvenile court's failure to make the necessary declaration "would amount to harmless error." (*Ibid.*)

In the juvenile court, F.M. admitted having committed the wobbler offenses that were alleged as felonies. On appeal, he claimed the court had erred by not expressly declaring his offenses to be felonies or misdemeanors, as required by section 702. The People did not dispute that the court had erred under *Manzy W.* Instead, the People maintained that F.M. had forfeited his claim pursuant to this Court's decision in *In re G.C.* (2020) 8 Cal.5th 1119. The People argued in the alternative that the error under *Manzy W.* was harmless, because the record as a whole demonstrated a knowing exercise of judicial discretion.

The Court of Appeal determined that F.M.'s claim of error was cognizable despite the lack of a contemporaneous objection and that the juvenile court had indeed failed to "strictly comply" with the declaration requirement of section 702 as construed in *Manzy W.* (Opinion 6-8 (Opn.).) However, the error was harmless because the record as a whole showed that the juvenile court was aware of—and exercised—its discretion to treat the offenses as felonies. (Opn. 8-9.)

F.M. asks this Court to "reaffirm" the rule announced in *Manzy W.* and imbue it with "renewed vitality." (OBM 12, 13.) The People agree with F.M. that the rule in *Manzy W.* need not be dismantled, including its sensible provision for harmless error review. The Court's jurisprudence before and after *Manzy W.* endorses the commonsense principle underlying harmless error

analysis that redundant acts are to be avoided. Reviewing courts have been adequately guided by *Manzy W.* in assessing section 702 compliance and applying harmless error analysis. Further, proper application of the rule in *Manzy W.*, aided by the rehabilitative aims of the juvenile law and recent juvenile justice reforms, constitute an adequate safeguard against any speculative harm ensuing from a juvenile court's noncompliance with the statutory mandate.

The People disagree, however, with F.M.'s assessment that the record in this case does not establish the juvenile court was aware of its discretion to treat the wobbler offenses as misdemeanors. (OBM 24-27.) On the contrary, as the Court of Appeal correctly concluded, the record as whole establishes that the juvenile court understood its discretion to treat appellant's offenses as misdemeanors or felonies and that it exercised its discretion in finding them to be felonies. Even if the record were inadequate to demonstrate the court's exercise of discretion under section 702, it nonetheless establishes that remand is unwarranted as it is not reasonably probable the juvenile court would exercise its discretion to find the offenses to be misdemeanors.

Regardless of whether there might have been harmless error, F.M. forfeited his right to raise the error on direct appeal. The Court of Appeal erred by not applying the longstanding forfeiture rule that prohibits appellate review of a trial court's discretionary sentencing choices absent a timely and specific objection. However, application of sentencing-choice forfeiture principles

does not leave juvenile offenders like F.M. without a remedy. Collateral review is available to assert a claim of ineffective assistance of counsel for failing to object.

Because the Court of Appeal correctly rejected F.M.'s claim on the merits, its judgment should be affirmed.

LEGAL BACKGROUND

If a minor violates a law "defining crime," the minor is "within the jurisdiction of the juvenile court, which may adjudge the minor to be a ward of the court." (§ 602, subd. (a).) In the context of wobbler offenses—those "chargeable or, in the discretion of the court, punishable as either a felony or a misdemeanor" (*People v. Park* (2013) 56 Cal.4th 782, 789)—section 702 provides: "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."

In *Manzy W.*, the Court made plain the statute is obligatory; it requires the juvenile court to make an affirmative, on the record declaration whether a wobbler offense is a felony or a misdemeanor. (*Manzy W.*, *supra*, 14 Cal.4th at p. 1204; accord, *In re Eddie M.* (2003) 31 Cal.4th 480, 487.) "The statutory language, in context, makes clear that this declaration should be made before or at the time of disposition." (*G.C.*, *supra*, 8 Cal.5th at p. 1126.)

Manzy W. was founded on the Court's decisions in *In re Kenneth H.* (1983) 33 Cal.3d 616 and *In re Ricky H.* (1981) 30 Cal.3d 176. Those cases had delineated what aspects of the

juvenile court record were insufficient to demonstrate compliance with section 702, such as specifying the offense in the wardship petition as a felony or setting the maximum period of confinement at a felony level. (*Kenneth H.*, at pp. 619-620; *Ricky H.*, at pp. 191-192.)

Manzy W. built on this foundation and, importantly, held that remand was not "'automatic'" whenever the juvenile court failed to make an express declaration. (*Manzy W.*, *supra*, 14 Cal.4th at p. 1209.) "[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*. We reiterate, however, that setting of a felony-length maximum term period of confinement, by itself, does not eliminate the need for remand when the statute has been violated. *The key issue is whether the record as a whole establishes that the juvenile court was aware of its discretion to treat the offense as a misdemeanor and to state a misdemeanor-length confinement limit*." (*Ibid.*, italics added.)

Most recently, the Court characterized section 702 error as involving "'the [juvenile] court's failure to properly make or articulate its discretionary sentencing choices.' [Citation.] 'Included in this category are cases in which . . . the court purportedly erred because it . . . failed to state any reasons or give a sufficient number of valid reasons.'" (*G.C.*, *supra*, 8 Cal.5th at p. 1130.)

STATEMENT OF THE CASE

A. F.M.'s 2019 misdemeanor battery

F.M. approached J.J., a classmate who was on his way home from school, and asked him, "'You talking shit?'" (CT 75.) J.J. walked away from F.M. toward a nearby gas station. F.M. grabbed J.J. and punched him in the face. (CT 76.) J.J. ran to the gas station as F.M. gave chase. J.J. asked the clerk inside for help, and the clerk prevented F.M. from entering the store. (CT 76.) Outside, F.M. yelled and threw things before a truck driver who was refueling chased F.M. away. (CT 76.) F.M. told the responding officer that J.J. started the fight and he punched him back. (CT 76.) J.J. had an abrasion on his right cheek. (CT 75.)

In October 2019, the Santa Cruz County Juvenile Court sustained an allegation that F.M. had committed simple battery (Pen. Code, § 242; case No. 19JU00191A (Petn. A)). He was placed on non-wardship probation with various terms and conditions. (Opn. 2; CT 15.)

B. F.M.'s first felony assault, felony reckless evasion, and gang participation

In early March 2020, F.M., along with a companion, got out of a vehicle and approached another youth. F.M. and his cohort were holding knives as they approached the victim. They called out, "City Hall!" and one of them said, "What's up? Where you from?" The victim did not know why F.M. and the other individual asked him that because "[t]hey know I don't bang." The victim ran away because he was afraid that he would be stabbed. (Opn. 4, internal quotation marks omitted.)

A week later, F.M. drove past a different male. F.M. parked in a nearby lot. He and a passenger got out and approached the subject. F.M.'s cohort pointed a gun at the victim, who ran in the opposite direction toward a nearby gas station. F.M. and the gunman returned to the car. (Opn. 4.)

Shortly thereafter, a Milpitas police officer saw a vehicle matching the description the victim had reported to the police. The officer activated his lights and siren, but F.M. fled, "reaching speeds of over 80 miles per hour. The pursuit ended when F.M. tried to make a sharp turn at approximately 50 miles per hour and drove over a median. The vehicle was launched into the air and crashed into a light pole and fence. Five occupants, including F.M., were taken into custody at the scene." (Opn. 4-5.)

F.M. later told officers he saw the patrol vehicle's lights but fled because he did not have a valid license and there was alcohol in the vehicle. He "'didn't remember' anything about pointing a gun at anyone. During the interview, the officer noticed that F.M. had a tattoo of four dots on his left elbow, which the officer believed indicated affiliation with a Norteño gang." (Opn. 5.)

Six days after the chase, "Watsonville Police Department officers responded to a report of a stabbing. The male victim said that he was walking along a train trestle when he was approached by two males, later identified as F.M. and A.G. F.M. and A.G. asked the victim about his gang affiliation. The victim stated he had no gang affiliation and began to walk in the opposite direction. F.M. and A.G. came up behind him and

stabbed him. The victim had stab wounds on his right forearm and lower back." (Opn. 5.)

"Two witnesses reported they were driving by and saw two males chasing another male. One of the witnesses saw A.G. swing a knife at the victim's back, but could not recall if F.M. was holding anything. Based on the witnesses' statements, police located and apprehended F.M. and A.G. under the Pajaro Bridge. In an infield show up, one of the witnesses positively identified A.G. as the person who stabbed the victim and F.M. as the other person who chased after the victim. Video surveillance footage from near the scene showed F.M. holding a gray/light colored slim object consistent with a knife. The footage also showed F.M. and A.G. chasing the victim, with A.G. armed with a knife. Police did not find a knife on either F.M. or A.G. and did not recover any knives in the area. F.M. denied any involvement in the incident." (Opn. 5, internal quotation marks omitted.)

In May 2020, the Santa Cruz County District Attorney filed an amended juvenile wardship petition (§ 602, subd. (a)) alleging that F.M., age 17, committed felony assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1); count 1), felony assault with force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(4); count 2), two felony counts of participation in a criminal street gang (Pen. Code, § 186.22, subd. (a); counts 3 & 4), misdemeanor brandishing of a deadly weapon (Pen. Code, § 417, subd. (a)(1); count 5), felony assault with a firearm (Pen. Code, § 245, subd. (a)(2); count 6), felony reckless evasion of a peace officer (Veh. Code, § 2800.2, subd. (a); count 7), and misdemeanor

driving without a license (Veh. Code, § 12500, subd. (a); count 8). (Opn. 2-3; case No. 19JU00191B (Petn. B).) The petition alleged that F.M. committed the assault with a deadly weapon and the assault with force likely to produce great bodily injury for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members (Pen. Code, § 186.22, subd. (b)(1)(A)). (Opn. 3.) The district attorney also alleged pursuant to section 777 that these offenses violated the probation granted on petition A. (CT 6-7.)

In June 2020, F.M. admitted the allegations of felony assault with force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(4); count 2); being an active participant in a criminal street gang, amended as a misdemeanor (Pen. Code, § 186.22, subd. (a); count 3); and felony reckless evasion of a police officer (Veh. Code, § 2800.2, subd. (a); count 7). The juvenile court dismissed the remaining allegations with the understanding they could be considered with respect to disposition. (CT 65-66.) Based on these admissions, the court found F.M. had violated the probation granted on petition A. The minute order for the jurisdictional proceeding states: "The Court has considered whether the above offense(s) should be felonies or misdemeanors." (Opn. 3 & fn. 2.)[2]

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[2] The admitted assault and reckless evasion are wobblers. (Pen. Code, §§ 17, subd. (a) [defining felony and misdemeanor], 245, subd. (a)(4) [assault punishable by "imprisonment in the state prison for two, three, or four years, or in a county jail for not (continued…)

C. F.M.'s second felony assault

In July 2020, while awaiting the dispositional hearing on the petition B offenses and the petition A probation violation, F.M. "was involved in an altercation at the Santa Cruz County Juvenile Hall, which was captured by surveillance cameras. After two minors attacked the victim in a classroom, F.M. and a fourth minor joined in the attack. In the video, F.M. is seen kicking the victim after he falls to the ground. After the assault, staff observed that the victim sustained a black eye and scratches on his face, and also had blood on the side of his head. When interviewed by a Santa Cruz County Sheriff's deputy after the incident, F.M. would not acknowledge there was a fight and refused to answer any questions posed by the deputy." (Opn. 6.)

The district attorney filed a new wardship petition alleging felony assault with force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(4); count 1) with a gang enhancement allegation (Pen. Code, § 186.22, subd. (b)(1)(A)), and felony active participation in a criminal street gang (Pen. Code, § 186.22, subd. (a); count 2). (Opn. 3; case No. 19JU00191C (Petn. C).) The district attorney also alleged the conduct violated the probation granted on petition A (§ 777). (Opn. 3.)

(…continued)

exceeding one year"]; Veh. Code, § 2800.2, subd. (a) [evasion punishable by "imprisonment in the state prison, or by confinement in the county jail for not less than six months nor more than one year"].)

In October 2020, F.M. admitted the assault with force likely to produce great bodily injury as a felony, and the court found F.M. had violated probation. (Opn. 3.) The remaining allegation was dismissed. (CT 184.)

D. F.M.'s dispositional hearing

In early November 2020, the juvenile court held a dispositional hearing on petitions B and C and on the probation violation petitions with respect to petition A. The juvenile court continued F.M. as a ward of the court under the care, custody, and control of the probation department and found him suitable for placement at a ranch camp, with various terms and conditions. The court stated that F.M.'s maximum time of confinement was six years two months. (Opn. 4.)

E. The Court of Appeal's opinion

Before addressing the merits of F.M.'s claim of section 702 error, the Court of Appeal rejected respondent's contention that F.M. had forfeited the claim by failing to raise it in the juvenile court. The court stated that respondent had misread this Court's opinion in *G.C.*, *supra*, 8 Cal.5th 1119. (Opn. 6.) The Court of Appeal held that because F.M. had timely appealed from the judgment, *G.C.*'s forfeiture analysis was inapplicable. (Opn. 6-8.)

As to the merits, the Court of Appeal concluded that although the juvenile court did not "strictly comply with the declarative requirement established in *Manzy W.*," the record as a whole demonstrated "the juvenile court was both aware of and exercised its discretion to treat the [admitted] and sustained allegations as felonies." (Opn. 8-9.)

Relying on *Manzy W.*, the court observed the declarative rule established in section 702 "is not ironclad" and noted "there is no ""automatic"" right to remand 'whenever the juvenile court fails to make a formal declaration under section 702.' (*In re Manzy W.*, *supra*, 14 Cal.4th at p. 1209.)" (Opn. 8.) The Court of Appeal reiterated *Manzy W.*'s holding that "'when remand would be merely redundant, failure to comply with the statute would amount to harmless error.'" (Opn. 8.) "'The key issue is whether the record as a whole establishes that the juvenile court was aware of its discretion to treat the offense as a misdemeanor and to state a misdemeanor-length confinement limit.'" (Opn. 8.)

The Court of Appeal scrutinized the record. It noted F.M. admitted the three wobbler offenses in petitions B and C as felonies. (Opn. 9.) When F.M. admitted the offenses in petition B as felonies, the juvenile court stated that the assault charge "'is considered a serious violent felony'" and "'could be counted as a strike'" offense in a future adult prosecution. (Opn. 9.)

The Court of Appeal also observed that in rejecting the probation department's initial recommendation to return F.M. to his parents' custody and reinstate probation, the juvenile court had asked the probation officer to consider F.M. for either a ranch camp placement or commitment to the Department of Juvenile Justice (DJJ). (Opn. 9.) This latter option was significant because when the juvenile court identified that option, Welfare and Institutions Code section 733, subdivision (c), precluded a DJJ commitment unless F.M.'s most recent offense fell within Welfare and Institutions Code section 707, subdivision (b), a

statute that enumerates certain *felony* offenses, including—as relevant here—certain assault offenses deemed to be felonies. (Opn. 9.)

"Given these recitations on the record," the Court of Appeal concluded "that the juvenile court elected to designate the offenses as felonies. The minor's admission of the offenses as felonies, as well as the court's statements about the offenses, provided notice to defense counsel that the court was addressing the admitted charges as felonies. Under these circumstances, remanding the matter to the juvenile court for an explicit declaration of the felony status of the offenses F.M. admitted would be redundant." (Opn. 9.)

The Court of Appeal modified the judgment and affirmed.[3]

ARGUMENT

I. WELFARE AND INSTITUTIONS CODE SECTION 702 ERROR SHOULD BE SUBJECT TO ESTABLISHED FORFEITURE PRINCIPLES INVOLVING SENTENCING DISCRETION

A claim of error arising from the judicial exercise of discretion embodied in the juvenile court's mandatory duty under section 702 to declare a wobbler a misdemeanor or a felony is no different than any other claim of error in the exercise of sentencing discretion that is subject to forfeiture. Applying a

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[3] The Court of Appeal, with the agreement of the parties, modified F.M.'s maximum time of confinement to five years two months based on a recent amendment of Welfare and Institutions Code section 726, subdivision (d)(1) (Stats. 2021, ch. 18, § 7), which now limits a minor's maximum time of confinement to the middle term of imprisonment that could be imposed upon an adult. (Opn. 10.)

clear forfeiture rule in this context comports with longstanding principles underlying the purpose of timely notice so as to facilitate correction of any sentencing infirmities.[4]

Manzy W. did not resolve whether a claim of error under section 702 was forfeitable on appeal because forfeiture was not before the Court. (*G.C.*, *supra*, 8 Cal.5th at p. 1131.) But the Court has since held that a claim of error under section 702 does not fall into the "'narrow'" category of nonforfeitable error. (*Id.* at p. 1130). Or, phrased differently, "failure to make an express declaration . . . was a forfeitable legal error." (*Id.* at p. 1131.)

The Court's analysis in *People v. Scott* (1994) 9 Cal.4th 334 of the types of sentencing errors that are forfeited by failing to timely and specifically object squarely covers noncompliance with the declaration mandate of section 702. A claim of error associated with a discretionary sentencing choice is forfeited on appeal absent an objection in the trial court. (*Scott*, at pp. 353-354.) The principle underpinning the *Scott* forfeiture rule is that asserting in the trial court error as to a sentencing choice provides the trial court the opportunity to address the claimed error. In *Scott*, the Court reasoned, "Although the court is

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[4] In accord with California Rules of Court, rule 8.516(b)(2), even if the issue of forfeiture is not fairly included in the question presented, "[t]he court may decide an issue that is neither raised nor fairly included in the petition or answer if the case presents the issue and the court has given the parties reasonable notice and opportunity to brief and argue it." The parties briefed the issue below, including the import of this Court's decision in *G.C.*, *supra*, 8 Cal.5th 1119, and the Court of Appeal decided the issue adversely to the People based on its interpretation of *G.C.*

required to impose sentence in a lawful manner, counsel is charged with understanding, advocating, and clarifying permissible sentencing choices at the hearing. Routine defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention." (*Scott*, *supra*, 9 Cal.4th at p. 353; accord, *People v. Welch* (1993) 5 Cal.4th 228, 236 ["[forfeiture] principles encourage development of the record and a proper exercise of discretion in the trial court"].) But there is an exception to this forfeiture principle. A defendant who fails to object is not precluded from challenging an unauthorized sentence, namely, a sentence that "could not lawfully be imposed under any circumstance in the particular case." (*Scott*, at p. 354; see also *Welch*, at p. 235 [exceptions to forfeiture doctrine "generally involve pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court"].) In short, forfeited challenges are those that "involve sentences which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner." (*Scott*, at p. 354.) Failing to designate a wobbler a misdemeanor or a felony as required by section 702 fits the description of a forfeitable error.

Applying *Scott*, the Court stated in *G.C.*, "While the failure to properly designate an offense can affect the maximum term of confinement, [the minor] has not shown that this omission results in a disposition that 'could not lawfully be imposed under any circumstance in the particular case.' Rather, the error here involves 'the [juvenile] court's failure to properly *make* or

articulate its discretionary sentencing choices.' 'Included in this category are cases in which . . . the court purportedly erred because it . . . failed to state any reasons or give a sufficient number of valid reasons.'" (*G.C.*, *supra*, 8 Cal.5th at p. 1130, citations omitted, italics added by *G.C.*)

As explained *ante*, the Court has made clear that the juvenile court should make its affirmative declaration pursuant to section 702 "before or at the time of disposition." (*G.C.*, *supra*, 8 Cal.5th at p. 1126.) The court's classification of the offense is integral to its determination of the maximum time of confinement, a matter that is the subject of much interest to the parties and is typically discussed in the probation report. (§ 726, subd. (d) [setting maximum time of confinement]; Cal. Rules. of Court, rule 5.785(a) ["The probation officer must prepare a social study of the child, which must contain all matters relevant to disposition, including any parole status information, and a recommendation for disposition"]; cf. *Scott*, *supra*, 9 Cal.4th at pp. 350-351 ["As a practical matter, both sides often know before the hearing what sentence is likely to be imposed and the reasons therefor. Such information is contained in the probation report, which is required in every felony case and generally provided to the court and parties before sentencing"].) Presumably then, the declaration is to be made when the parties are present and capable of discerning, objecting to, and obtaining correction of a juvenile court's failure to make the necessary declaration. Enforcing forfeiture should create an incentive for the parties to object, thereby reducing errors, including errors that become

uncorrectable, as in *G.C.*, because the judgment has become final. (Cf. *Scott*, *supra*, 9 Cal.4th at p. 353 ["we hope to reduce the number of errors committed in the first instance and preserve the judicial resources otherwise used to correct them"].)

Application of the ordinary forfeiture rule would create an incentive not only for the minor to object to a juvenile court's failure to declare under section 702 (e.g., to ensure proper calculation of the maximum time of confinement and to preserve the issue on appeal) but also for the prosecutor to object. For example, a district attorney who wants to ensure that a juvenile adjudication of a wobbler can be used under the "Three Strikes" law if the minor reoffends as an adult (Pen. Code, §§ 667, subd. (d)(3), 1170.12, subd. (b)(3)), has an incentive to have the court declare the offense a felony. Doing so will facilitate satisfaction of the People's burden to plead and prove that the juvenile adjudication was a serious or violent felony. (Pen. Code, §§ 667, subds. (f) & (g), 1170.12, subds. (d) & (e).) In short, both parties have an incentive to call any omission to the juvenile court's attention. Applying a clear forfeiture rule would incentivize the parties to ensure the juvenile court corrects any oversight. The likely end result would be fewer such claims of error.

One can, of course, readily imagine that applying the forfeiture doctrine in this context would spawn claims of ineffective assistance of counsel, as it has with other forfeitable sentencing errors. To be sure, "[a]n ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial," and, therefore, undermine the

finality of the judgment that forfeiture rules are meant to buttress. (*Harrington v. Richter* (2011) 562 U.S. 86, 105.) However, because of that possibility, the law governing claims of ineffective assistance of counsel "must be applied with scrupulous care." (*Premo v. Moore* (2011) 562 U.S. 115, 122.) As this Court has recognized, an appellant "cannot automatically obtain merit review of a noncognizable issue by talismanically asserting ineffective assistance of counsel." (*People v. Riel* (2000) 22 Cal.4th 1153, 1202.) The tail of ineffective assistance does not wag the dog of forfeiture or other well-understood and long-applied rules of claim preservation. Additionally, there exists a judicial preference for bringing an ineffective assistance of counsel claim in a habeas corpus petition. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267 [habeas corpus proceeding more appropriate vehicle where appellate record sheds no light on the motivations for counsel's acts or omissions unless no satisfactory explanation exists].)

The Court of Appeal erroneously rejected the People's assertion of forfeiture. The court read *G.C.*'s invocation of forfeiture principles as being limited to challenges that were untimely because they were brought in an appeal from a later dispositional order. (Opn. 7-8.) According to the Court of Appeal, *G.C.*'s forfeiture analysis did not apply because "[t]here is no suggestion here that F.M.'s appeal from the dispositional order on Petitions B and C is not timely." (Opn. 8.)

The Court of Appeal conflated two concepts that this Court had largely discussed separately. In *G.C.*, the question was

"whether G.C. may challenge the court's neglect of this mandatory duty [under section 702] in an appeal from a later dispositional order after the time to appeal the original disposition expired." (*G.C.*, *supra*, 8 Cal.5th at p. 1122.) In a portion of the opinion under the heading "A. Timeliness of Appeal" (*id.* at p. 1126, style altered), the Court applied the usual rule that "[a] timely notice of appeal, as a general matter, is 'essential to appellate jurisdiction'" and concluded that because G.C. had not appealed the original disposition of the wardship petitions, her latter appeal from a disposition made pursuant to section 777 did not confer appellate jurisdiction over the already final dispositions (*id.* at p. 1127). In a portion of the opinion under the heading "B. Unauthorized Sentence" (*id.* at p. 1129, style altered), the Court explained that the unauthorized sentence doctrine is an exception to the general rule of forfeiture, not to the requirement that the appellate court have jurisdiction over the judgment (*id.* at pp. 1129-1130). The Court also explained why the unauthorized sentence doctrine did not apply—because the failure to declare under section 702 "does not fall within this 'narrow' category of nonforfeitable error." (*Id.* at p. 1130.) Or, stated otherwise, "failure to make an express declaration . . . was a forfeitable legal error." (*Id.* at p. 1131.)

The Court of Appeal focused on one sentence in *G.C.*: "[U]pon timely appeal the proper course would have been to remand the case for the Alameda court to exercise its discretion." (8 Cal.5th at p. 1131.) The Court of Appeal believed that sentence meant that F.M.'s claim was not forfeited because he

had timely appealed. There are three flaws in that conclusion. First, as *G.C.* explained, timely appeal is a predicate to jurisdiction, a concept that is different than forfeiture. *G.C.* had simply applied the rule from part II.A. of the opinion in part II.B. Second, forfeiture acts as a bar to considering a claim in an otherwise proper forum. Filing a timely notice of appeal after judgment does not remedy the unfairness to the trial court and the opposing party from not timely asserting the right in the trial court. (Cf. *People v. Saunders* (1993) 5 Cal.4th 580, 590-591 & fn. 6.) A forfeiture doctrine that is satisfied not by making a timely objection to a court's sentencing discretion but simply by timely invoking the jurisdiction of the forum is not a forfeiture doctrine at all. Third, the very next sentence in *G.C.* after the sentence quoted by the Court of Appeal states, "To achieve that result, however, the error must be timely asserted." (*G.C.* at p. 1131.) Timely assertion in the context of part II.B. of *G.C.* is timely assertion as required by *Scott* to preserve claims of discretionary sentencing error—that is, a timely objection in the trial court.

Here, F.M. forfeited the asserted legal error, and the Court of Appeal should have so held.

II. HARMLESS ERROR ANALYSIS SENSIBLY PERMITS A REVIEWING COURT TO EXAMINE THE RECORD TO ASSESS WHETHER THE JUVENILE COURT WAS AWARE OF AND EXERCISED ITS DISCRETION

While F.M. asks the Court to reaffirm the rule set forth in *Manzy W.*, he also suggests the Court provide further guidance to juvenile courts in carrying out their statutory mandate to exercise discretion under section 702 given the consequences of felony adjudications for juvenile offenders. (OBM 20-24.)

Contending the record in this case is inadequate to establish the error was harmless, he asks the Court to remand so the juvenile court can exercise its discretion. (OBM 24-27.)

Contrary to F.M.'s contentions, the framework established in *Manzy W.* for assessing section 702 error and prejudice adequately addresses F.M.'s concerns. The Court's jurisprudence before and after *Manzy W.* establishes the propriety of permitting reviewing courts to assess sentencing-choice error for harmlessness. Reviewing courts have routinely applied the rule in *Manzy W.* without apparent difficulty.

Section 702's purpose is twofold. First, it helps determine the length of any present or future confinement for a wobbler offense. (*Manzy W.*, *supra*, 14 Cal. 4th at p. 1206.) Second, it "ensur[es] that the juvenile court is aware of, and actually exercises, its discretion under . . . section 702." (*Id.* at p. 1207.) The language of the statute makes clear the duty to make an express declaration is "mandatory." (*Id.* at pp. 1204, 1207.)

However, as the Court noted, a violation of a "mandatory" duty does not always make reversal and remand "automatic." (*Manzy W.*, *supra*, 14 Cal.4th at pp. 1204-1207 & fn. 2.) Therefore, even a lack of strict compliance with a mandatory duty may be "harmless error," provided the record affirmatively reflects the dual goals intended by section 702. (*Id.* at p. 1209.)

Manzy W.'s application of harmless error doctrine to section 702 error is firmly grounded. A judgment may not be "set aside" for state law error—including "any error as to any matter of procedure"—unless "the error complained of has resulted in a

miscarriage of justice." (Cal. Const., art. VI, § 13; see, e.g., *People v. Cahill* (1993) 5 Cal.4th 478, 487-493.)

Although the Court did not elucidate the harmless error standard in *Manzy W.*, given that the error is nonstructural and one of state law, it is assessed under *People v. Watson* (1956) 46 Cal.2d 818. "Whether an error proves harmless or not depends on the kind of error at issue. In particular, it depends on whether the error constitutes a lapse under the federal Constitution or state law, and whether it is structural in nature. We evaluate nonstructural state law error under the harmlessness standard set forth in *Watson*, *supra*, 46 Cal.2d at pages 836-837. That standard requires us to evaluate whether the defendant has demonstrated that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Gonzalez* (2018) 5 Cal.5th 186, 195, internal quotation marks omitted.)

Application of the state standard of harmlessness adheres in other instances where reviewing courts are called upon to assess a lower court's noncompliance with a mandatory duty—statutory or otherwise. The most obvious example is in the case of instructional error whereby the trial court has a duty to properly instruct jurors on the principles of law that govern a particular case. (See, e.g., *People v. Breverman* (1998) 19 Cal.4th 142, 176 [failure to sua sponte instruct on lesser included offense subject to *Watson* harmless error test].) More recently, the Court held that a defendant's right to counsel in petitioning for resentencing pursuant to Penal Code section 1170.95 is a purely statutory

right and, therefore, a trial court's failure to appoint counsel is one of state law error only and the *Watson* harmless error test applies. (*People v. Lewis* (2021) 11 Cal.5th 952, 973.) Certainly matters involving the correct instruction of juries and the appointment of counsel are no less important than the mandatory duty at issue here.

More specifically, and as explained *ante* with respect to forfeiture principles, a juvenile court's failure to expressly designate a wobbler offense as a felony or a misdemeanor is akin to error in the selection of a term and statement of reasons for a trial court's sentencing choices in a noncapital case. (See *G.C.*, *supra*, 8 Cal.5th at p. 1130 [section 702 error "involves 'the [juvenile] court's failure to properly make or articulate its discretionary sentencing choices.' [Citation.] 'Included in this category are cases in which . . . the court purportedly erred because it . . . failed to state any reasons or give a sufficient number of valid reasons'"].)

In instances where a trial court has failed to properly make or articulate sentencing choices, the Court has held that a reviewing court need not remand for resentencing unless it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of error. (See, e.g., *People v. Champion* (1995) 9 Cal.4th 879, 933-934 [trial court's failure to state reason for imposing consecutive sentences was harmless and remand unnecessary because multiple circumstances in aggravation existed and it was "inconceivable that the trial court would impose a different sentence" upon

remand], overruled on another ground in *People v. Combs* (2004) 34 Cal.4th 821, 860; *People v. Price* (1991) 1 Cal.4th 324, 492 ["When a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper"]; *People v. Avalos* (1984) 37 Cal.3d 216, 233 [applying *Watson* test to error in relying upon improper factors in aggravation].) Where, as in this case, it is not reasonably probable that the juvenile court's discretionary choice finding the assault and evasion offenses to be felonies would have been different if it had been reminded to make an affirmative declaration, the state constitutional provision prohibiting reversal for insubstantial errors is applicable.

Adequately guided by the rule set forth in *Manzy W.*, reviewing courts have, as necessary, remanded cases to the juvenile courts for compliance with section 702 when the record as a whole was insufficient to find the error harmless. (See, e.g., *In re Cesar V.* (2011) 192 Cal.App.4th 989, 1000; *In re Ramon M.* (2009) 178 Cal.App.4th 665, 675-676; *In re Eduardo D.* (2000) 81 Cal.App.4th 545, 548-549; *In re Jorge Q.* (1997) 54 Cal.App.4th 223, 238.) On the other hand, remand has been found unnecessary when the record failed to establish section 702 error in the first instance (see, e.g., *In re Raymundo M.* (2020) 52 Cal.App.5th 78, 90-93) or where the omission was determined to have no deleterious effect on subsequent dispositions (see, e.g., *G.C.*, *supra*, 8 Cal.5th at pp. 1128-1129 ["no showing that the

status of the offenses as misdemeanors or felonies affected custodial time or the terms of probation ultimately imposed in the current proceeding"]).

Despite acknowledging his affinity for the current rule of *Manzy W.*, F.M. suggests the Court should "specifically articulate[] what a juvenile court's discretionary exercise under section 702 should include." (OBM 20.) As examples, he points to California Rules of Court, rule 4.410, which guides sentencing discretion in adult cases, and to the factors considered in deciding whether to reduce a felony to a misdemeanor under Penal Code section 17, subdivision (b). (OBM 20-21.) However, F.M. acknowledges that neither construct "is precisely the same as the analysis the juvenile court must go through under section 702." (OBM 21.)

Indeed, there is no need to impose any additional dispositional considerations on the juvenile courts. In making its dispositional order, a juvenile court must "consider 'the broadest range of information' in determining how best to rehabilitate a minor and afford [the minor] adequate care." (*In re Robert H.* (2002) 96 Cal.App.4th 1317, 1329.) In addition to any other relevant and material evidence offered (§ 202, subd. (d)), the juvenile court should also consider "(1) the age of the minor, (2) the circumstances and gravity of the offense committed by the minor, and (3) the minor's previous delinquent history." (§ 725.5; accord, *In re Jonathan T.* (2008) 166 Cal.App.4th 474, 485.) The court is not required to discuss specifically each of these factors in making its decision, and it is sufficient if the record reflects that

they were, in fact, considered. (*In re John F.* (1983) 150 Cal.App.3d 182, 185.)

F.M.'s observation that "meaningful consideration of the disposition is especially important in juvenile cases" given that "the decision to treat an offense as a felony has weighty consequences" (OBM 22) is correct. And F.M.'s concern over racial disparities within the juvenile justice system (OBM 23) is shared by many, including the People. As explained, however, inherent in the singular nature of the juvenile law is the safeguard that the disposition be in the best interests of the minor, among other considerations. (§ 202, subds. (a), (b) & (d).) "Significant differences between the juvenile and adult offender laws underscore their different goals: The former seeks to rehabilitate, while the latter seeks to punish." (*In re Julian R.* (2009) 47 Cal.4th 487, 496.)

Further, numerous juvenile justice reforms have been enacted in recent years, including some that address concerns F.M. raises here. For example, F.M. warns that "a felony adjudication in juvenile court can follow the minor well into adulthood," including when "applying to college or trying to get certain jobs or professional licenses." (OBM 22.) However, juvenile records are now sealed in all but a small number of law enforcement-related circumstances. Welfare and Institutions Code section 786 requires the juvenile court to automatically and immediately dismiss a qualifying person's juvenile court petition and seal the person's juvenile court records and related records as soon as the person "satisfactorily completes" his or her juvenile

supervision or probation. (§ 786, subds. (a) & (c); Cal. Rules of Court, rule 5.840.) F.M. also cites the specter of sex offender registration when a minor is sent to DJJ. (OBM 22.) Yet, a commitment to DJJ has largely been abolished. The Legislature ended most commitments to the DJJ effective July 1, 2021, and directed all DJJ facilities close by June 30, 2023. (Stats. 2021 ch. 18, § 10; § 736.5, subds. (b) & (e).)

This is not to say that compliance with section 702 is unimportant in light of these reforms. The point is that some of the concerns F.M. raises in support of imposing enhanced discretionary findings on the juvenile court have been addressed by these reforms. Compliance with section 702 is mandatory and serves important purposes. However, as Justice Mosk recognized in *Kenneth H.*—and the Court confirmed in *Manzy W.*—there is little to be gained from a "redundant exercise." (*Kenneth H.*, *supra*, 33 Cal.3d 616, 622 (dis. opn. of Mosk, J.); *Manzy W.*, *supra*, 14 Cal.4th at p. 1209.) Indeed, the Court's jurisprudence has sensibly recognized that such exercises are to be avoided. F.M. fails to demonstrate a persuasive need to bolster, or depart from, the common sense inherent in the present rule provided by *Manzy W.*

III. THE RECORD ESTABLISHES THE JUVENILE COURT WAS AWARE OF ITS DISCRETION AND EXERCISED IT IN FAVOR OF SUSTAINING THE CHALLENGED OFFENSES AS FELONIES

Applying *Manzy W.*'s harmless error rule, the Court of Appeal correctly held the record as a whole established the juvenile court was aware of and exercised its discretion to treat

the sustained wobbler allegations as either felonies or misdemeanors. (Opn. 8-9.)

F.M. disagrees, citing the lack of an "affirmative declaration" as to whether the court deemed the assault and evading offenses as felonies or misdemeanors. (OBM 25.) In fact, he contends that the Court of Appeal's purportedly erroneous application of the rule in *Manzy W.* creates "a presumption that everything undeclared is a de-facto felony." (OBM 13.)

The Court of Appeal did no such thing. The record as a whole demonstrates the juvenile court was aware of its discretion to sustain the assault and evasion charges as felonies or misdemeanors. The record likewise provides adequate guidance with respect to use of these sustained allegations in future adjudications, as *Manzy W.* requires.

Before the same judge (CT 64, 183), F.M. admitted a felony assault and felony reckless evasion alleged in petition B and a few months later a felony assault alleged in petition C (CT 64-66, 183-185). As noted above, those offenses are wobblers. Notably, the minute order for the petition B jurisdictional proceeding, states: "'The Court has considered whether the above offense(s) should be felonies or misdemeanors.'" (Opn. 3; CT 65; see also Cal. Rules of Court, rule 5.795 ["the court must find and note in the minutes the degree of the offense committed by the youth, and whether it would be a felony or a misdemeanor had it been committed by an adult"].) At the dispositional hearing on both petitions, the juvenile court, again the same judge as at the

jurisdictional hearings, set F.M.'s maximum time of confinement at six years two months. (CT 234.)

Further, in rejecting the probation department's initial recommendation, related to petition B, to return F.M. to his parents' custody and reinstate probation, the court directed the probation department to "'go back and reevaluate the situation, both for ranch camp and [Department of Juvenile Justice].'" (Opn. 9; CT 181.) Importantly, a DJJ commitment could only be imposed if the minor's most recent offense came within Welfare and Institutions Code section 707, subdivision (b), listing certain qualifying *felony* offenses. (§ 733, subd. (c); Opn. 9.) Section 707, subdivision (b)(14) specifies assault with force likely to produce great bodily injury as a qualifying offense.

That the assault and evasion offenses were alleged as felonies and the court stated a felony-level maximum time of confinement is consistent with the court having understood its discretion to designate the wobbler offenses as misdemeanors or felonies. Although this Court has clearly stated that these latter two circumstances—singularly or in combination—do not suffice to demonstrate compliance with the requisite declaration (*Kenneth H.*, *supra*, 33 Cal.3d at pp. 619-620; *Ricky H.*, *supra*, 30 Cal.3d at pp. 191-192), it has never said that these aspects of the record could not be considered *in conjunction with other evidence in the record* to demonstrate compliance with section 702.

Logic and common sense have a role to play here, as well. It stands to reason that since the minutes of the first jurisdictional proceeding state that the judge had considered whether the

petition B offenses, including the first assault allegation, were misdemeanors or felonies, the very same judge presiding over the second jurisdictional proceeding—a mere few months later—regarding petition C, which included the identical type of assault, would likewise have understood its discretion under section 702 as to the assault alleged in that petition.

Even if the Court were to credit F.M.'s argument that the record pertaining to petition B, including the minute order notation stating that the court had considered whether to treat the wobbler offenses as felonies or misdemeanors, was insufficient to show an exercise of discretion, it is reasonable to infer that any deficiency in that portion of the record was cured by the petition C and dispositional proceedings, which necessitated the court's review of its earlier actions with respect to the petition B wobbler offenses, thereby reminding the court of its discretion under section 702.

It also seems somewhat anomalous that the parties would have remained silent in the face of a purported oversight by the court of this nature. The record thus indicates the juvenile court implicitly understood its discretion to designate the offenses as felonies or misdemeanors and purposefully sustained the allegations as felonies and that the parties shared this understanding and were aware that the court had determined the conduct was felonious.

F.M. takes a divide-and-conquer approach in characterizing this record maintaining that these circumstances—individually—are insufficiently compliant with *Manzy W.* and its antecedents.

(OBM 26-27.) If F.M.'s approach were the rule, he would be correct, but it is not. The Court made clear in *Manzy W.*: "*The key issue* is whether *the record as a whole* establishes that the juvenile court was aware of its discretion to treat the offense as a misdemeanor and to state a misdemeanor-length confinement limit." (*Manzy W.*, *supra*, 14 Cal.4th at p. 1209, italics added.)

The oral and written record of the relevant proceedings, considered together, demonstrates the juvenile court was aware of its discretion and exercised it in favor of sustaining the challenged offenses as felonies. Further, with respect to F.M.'s present commitment, as well as any future commitment or confinement, it is sufficiently clear the juvenile court sustained the assault and evasion allegations as felonies. (*Manzy W.*, *supra*, 14 Cal.4th at p. 1206.) Even if more were required of the juvenile court, the record establishes any error is harmless under *Manzy W.* For these reasons, remand to the juvenile court "for an explicit declaration of the felony status of the offenses [F.M.] admitted would be redundant." (Opn. 9.)

Even were the Court to conclude the record is insufficient under the harmless error standard provided in *Manzy W.*, remand is nonetheless unwarranted under traditional state law harmless error analysis as it is not reasonably probable the juvenile court would have exercised its discretion to find the offenses to be misdemeanors absent the error. (*Watson*, *supra*, 46 Cal.2d at pp. 836-837.)

F.M.'s offenses gained in seriousness over time, including the use of weapons in certain instances. One of his victims

sustained multiple stab wounds. Additionally, nearly all of the offenses were either directly gang related or had a gang-related subtext. F.M. took no responsibility for his crimes. On the contrary, he denied involvement in the first assault despite being identified as one of the assailants by a witness. During another incident, F.M. fled from the police and crashed the vehicle he was driving, endangering numerous lives, including those of his occupants. Nor was F.M.'s apparent penchant for violence stymied by his detention in juvenile hall. He participated in a group attack on another youth, causing a blackened eye and bloodied head. Given the escalating nature of the offenses, along with F.M.'s demonstrated recalcitrance, it is not reasonably probable the juvenile court would have exercised its discretion to lessen F.M.'s culpability by finding the assault and evasion offenses to be misdemeanors.

CONCLUSION

Accordingly, the judgment of the Court of Appeal should be affirmed.

Respectfully submitted,

ROB BONTA
Attorney General of California
LANCE E. WINTERS
Chief Assistant Attorney General
JEFFREY M. LAURENCE
Senior Assistant Attorney General
SETH K. SCHALIT
Supervising Deputy Attorney General

/Donna M. Provenzano/

DONNA M. PROVENZANO
Supervising Deputy Attorney General
Attorneys for Plaintiff and Respondent

March 4, 2022

CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF ON THE MERITS uses a 13 point Century Schoolbook font and contains 8,328 words.

ROB BONTA
Attorney General of California

/Donna M. Provenzano/

DONNA M. PROVENZANO
Supervising Deputy Attorney General
Attorneys for Plaintiff and Respondent

March 4, 2022

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No.: **S270907**

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On March 4, 2022, I electronically served the attached **ANSWER BRIEF ON THE MERITS** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on March 4, 2022, I placed a true copy thereof enclosed in a sealed envelope 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:

Michael Reed Attorney at Law mike@reedmlaw.com California Court of Appeal Sixth Appellate District sixth.district@jud.ca.gov	The Honorable Jeffrey Rosell District Attorney Santa Cruz County District Attorney's Office DATFelonyTeam@santacruzcounty.us

County of Santa Cruz Main Courthouse Superior Court of California 701 Ocean Street Santa Cruz, CA 95060-4086 Served by U.S. Mail	Sixth District Appellate Program 95 South Market Street, Suite 570 San Jose, CA 95113 servesdap@sdap.org

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on March 4, 2022, at San Francisco, California.

Nelly Guerrero	/Nelly Guerrero/
Declarant	Signature

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STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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/s/Nelly Guerrero

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PROVENZANO, DONNA (215302)

Last Name, First Name (PNum)

California Dept of Justice, Office of the Attorney General

Law Firm