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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Appellant, v. CESAR RAMOS, Petitioner and Respondent.	B265543 (Los Angeles County Super. Ct. No. NA093937)

APPEAL from an order of the Superior Court of Los Angeles County, Tomson T. Ong, Judge. Affirmed.

Jackie Lacy, District Attorney for Los Angeles County, Steven A. Katz, Head Deputy District Attorney and Matthew Brown, Deputy District Attorney, for Plaintiff and Appellant.

Melissa L. Camacho-Cheung, under appointment by the Court of Appeal, for Defendant and Respondent.

A jury convicted defendant Cesar Ramos of robbery and other crimes. At sentencing, the trial court found Ramos had previously been convicted of one serious felony conviction within the meaning of Penal Code section 667, subdivision (a), and six additional felonies that resulted in prison terms. (See Pen. Code, § 667.5, subd. (b) (section 667.5(b)).) In a prior appeal (*People v. Ramos* (Sept. 10, 2014, B250000 [nonpub. opn.]), we reversed the trial court's finding that Ramos had previously been convicted of a serious felony, vacated the sentence and affirmed the judgment in all other respects.

Before remittitur issued, voters enacted Proposition 47, "the Safe Neighborhoods and Schools Act" (Proposition 47). Using the procedures set forth in Proposition 47, Ramos successfully petitioned to have the six felony convictions underlying his section 667.5(b) enhancements designated as misdemeanors. (See Pen. Code, § 1170.18, subds. (f) & (g).) At the resentencing on Ramos's robbery conviction, the defendant argued that the trial court should strike his section 667.5(b) enhancements because the underlying offenses had now been designated misdemeanors. The trial court, however, concluded that our disposition in the prior appeal precluded it from providing such relief at resentencing, and advised Ramos to raise the issue through a writ petition. Ramos thereafter filed a writ of coram nobis requesting that the court strike the six section 667.5(b) enhancements. The court granted the petition.

The district attorney now appeals the order, arguing that: (1) Ramos was not eligible for coram nobis relief; (2) the trial court erred in concluding that a prior felony conviction that has been designated a misdemeanor under Proposition 47 cannot support a section 667.5(b) enhancement; and (3) even if a section 667.5(b) enhancement cannot be predicated on a prior felony that has been designated a misdemeanor, that rule does not apply here based on principles of retroactivity. We affirm.

FACTUAL BACKGROUND

A. Ramos's Conviction and Prior Appeal

In December of 2012, the District Attorney for the County of Los Angeles filed an information alleging defendant Cesar Ramos robbed a convenience store. The information included a "prior serious felony" allegation that was based on a 1979 robbery conviction that had occurred in Illinois. It also alleged Ramos had suffered eight additional prior felony convictions that resulted in a term of imprisonment. The jury found Ramos guilty of robbery.

In a bifurcated proceeding, the trial court found that the records pertaining to Ramos's Illinois robbery conviction proved he had suffered a prior "serious felony" conviction under both the three strikes law (see Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)),[1] and the prior serious felony enhancement set forth in section 667, subdivision (a)(1). The court also found the prosecution had proven Ramos suffered six additional "prison priors under Penal Code section 667.5[b]." Based on these findings, the court sentenced Ramos to an aggregate term of 21 years in prison: (1) the high term of five years in prison on the robbery conviction, doubled to ten years based on his prior strike; (2) a five-year enhancement for his prior "serious felony" conviction (§ 667, subd. (a)(1)); and (3) six one-year terms for each of his prior prison term convictions. (§ 667.5, subd. (b).)

Ramos appealed his conviction, arguing that (1) "[an] investigating officer's identification testimony was improperly admitted" at trial; and (2) "the evidence was insufficient that [his] prior Illinois robbery conviction qualified as a serious felony under California law." On the first issue, we concluded that the court had erred in permitting the identification testimony, but found the error harmless. On the second issue, we found that the records of Ramos's Illinois conviction were insufficient to "prove it constituted a serious felony under the three strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and section 667, subdivision (a)(1)." We clarified, however, that on remand, the People

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[1] Unless otherwise noted, all further statutory citations are to the Penal Code.

were permitted to present additional evidence establishing the Illinois conviction was in fact a serious felony under California law. Our disposition directed as follows: "The true findings as to the allegations that Ramos's 1979 Illinois robbery conviction is a conviction for a serious felony within the meaning of the three strikes law and section 667, subdivision (a)(1), are reversed, and Ramos's sentence is vacated. In all other respects the judgment is affirmed. The matter is remanded for future proceedings not inconsistent with this opinion."

B. Remand Proceedings

Before our remittitur issued, voters enacted Proposition 47, which became effective November 5, 2014. (See *People v. Riviera* (2015) 233 Cal.App.4th 1085, 1089 (*Riviera*).) Pursuant to Proposition 47's newly-added sentencing procedures, Ramos filed petitions requesting that the trial court designate each of the prior felony convictions underlying the six section 667.5(b) enhancements at issue in his robbery case as misdemeanors. (See § 1170.18, subs. (f), (g).) On February 27, 2015 and March 9, 2015, the trial court issued orders granting the petitions.

On April 15, 2015, the trial court held a resentencing hearing on Ramos's robbery conviction. The district attorney informed the court that it did not intend to submit any further evidence demonstrating that Ramos's 1979 Illinois robbery conviction qualified as a serious felony under California law. In light of the district attorney's decision, the court announced that it intended to strike the prior strike allegation and the prior serious felony conviction enhancement (§ 667(a)), thereby reducing Ramos's sentence from "21 years to 11 years."

Defense counsel, however, argued that the trial court should also strike Ramos's six section 667.5(b) enhancements because each of the underlying felony convictions had now been designated as misdemeanors pursuant to Proposition 47. As articulated by defense counsel: "Ramos's position is this: In order to qualify as a 667.5(b) prior, the conviction must be a felony. As a result of the granting of the petitions [under

Proposition 47], the convictions now are misdemeanors . . . 'for all purposes.' And there is no felony conviction . . . that 667.5 could rest upon."

The trial court agreed that defense counsel was "probably absolutely right on the issue." The court concluded, however, that the language of our disposition in Case No. B250000 only permitted the court to address the portion of Ramos's sentence that was predicated on the prior serious felony finding. Defense counsel disagreed, arguing that our disposition had vacated Ramos's sentence in its entirety, thereby enabling the court to revisit every aspect of his sentence, including the imposition of the section 667.5(b) enhancements.

The court rejected the argument, ruling that our disposition indicated "the sentence [had been] affirmed in its entirety except . . . on those . . . issues [related to] the Illinois robbery conviction." The court instructed Ramos that the appropriate "procedure for [challenging the section 667.5(b) enhancements] . . . would be some sort of a writ. . . . You are most likely right on th[e merits of the] issue. But at this point . . . the court of appeal affirmed. You file a writ, and then I will consider it." The court then resentenced the defendant to five years in prison for the robbery conviction, and six additional years for the six section 667.5(b) enhancements.[2]

Approximately one month after the resentencing, Ramos filed a petition for "writ of error coram nobis" that sought an order "correct[ing] the true findings as to the six prior terms within the meaning of Penal Code section 667.5(b) and resentenc[ing] [Ramos] to an aggregate state prison sentence of 5 years." The district attorney opposed the motion, arguing there were two reasons the "reduction" of a felony to a misdemeanor under Proposition 47 did not "affect [the application of a section 667.5(b)] enhancement." First, the district attorney argued that a section 667.5(b) enhancement is primarily

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[2] As discussed in more detail below (*post* at pp. 20-21), the trial court erred in concluding that our disposition, which vacated Ramos's sentence in its entirety, precluded the court from considering the applicability of the section 667.5(b) enhancements at resentencing. (See, e.g., *People v. Nesbitt* (2010) 191 Cal.App.4th 227, 244, fn.18 (*Nesbitt*) [when case is remanded for resentencing, the trial court is authorized to reconsider all aspects of the sentence].)

intended to punish "the offender's [prior] prison term, not . . . the nature of the prior offense." The district attorney contended that in light of this intent, a section 667.5(b) enhancement should be applied whenever a defendant has completed a prison term on a prior offense. Second, the district attorney argued that the language of section 667.5(b) did not require that the underlying offense "remain [a] felony . . . for all time"; the statute only required proof that the defendant had previously been convicted of a felony that resulted in a term of imprisonment. The district attorney reasoned that because Ramos had in fact been convicted of six prior felonies that resulted in terms of imprisonment, it was immaterial that the offenses were subsequently designated misdemeanors.

The court granted the writ, concluding that a section 667.5(b) enhancement could not be predicated on a felony conviction that had been designated as a misdemeanor under Proposition 47. The court ordered "the prison prior enhancements under Penal Code section 667.5(b) . . . stricken," and ordered the "defendant's sentence reduced . . . accord[ingly]."

The district attorney filed a motion for reconsideration arguing for the first time that the defendant had failed to satisfy the elements necessary to obtain relief under the "writ of error coram nobis." Specifically, the district attorney argued Ramos had failed to show that a "'fact existed . . . which, without any fault . . . on his part, was not presented to the court at the trial on the merits, and which if presented would have prevented the rendition of the judgment.' [Citation.]" According to the district attorney, because "proposition 47 was not in existence at the time of the defendant's jury and court trial in 2013, the defendant did not . . . qualify for the coram nobis remedy."

The trial court denied the motion for reconsideration, explaining: "Normally, when we analyze a writ of error coram nobis . . ., we do not have a constitutional fix while the case is on appeal. . . . There is no way to re-appeal that particular issue and so the only vehicle – and the court did invite it because we were trying to find out what the vehicle is and I think that is the appropriate vehicle because there is no other vehicle available."

The district attorney filed an appeal of the order granting the petition. (See *People v. Ibanez* (1999) 76 Cal.App.4th 537, 544 (*Ibanez*) [order granting a defendant's petition for a writ of coram nobis after imposition of sentence is appealable as an "order after judgment" under § 1238, subd. (a)(5)].)

DISCUSSION

A. We Construe Ramos's Petition as a Petition for Writ of Habeas Corpus

The district attorney initially argues we should reverse the trial court's order without addressing the merits of the underlying sentencing issue because the claim Ramos raised in his petition is not a valid ground for coram nobis relief.

"The writ of error coram nobis is a nonstatutory, common law remedy" (*People v. Kim* (2009) 45 Cal.4th 1078, 1096 (*Kim*) that is "generally used to bring factual errors or omissions to the court's attention. [Citation.] 'The writ will properly issue only when the petitioner can establish three elements: (1) that some fact existed which, without his fault or negligence, was not represented to the court at the trial and which would have prevented the rendition of the judgment; (2) that the new evidence does not go to the merits of the issues of fact determined at trial; and (3) that he did not know nor could he have, with due diligence, discovered the facts upon which he relies any sooner than the point at which he petitions for the writ. [Citations.]' [Citations.] 'The writ lies to correct only errors of fact as distinguished from errors of law.' [Citation.]" (*Ibanez, supra,* 76 Cal.App.4th at p. 544; see also *Kim*, *supra*, 45 Cal.4th at p. 1096 [summarizing the elements of the writ and clarifying that the "[t]he remedy does not lie to enable the court to correct errors of law"].) "Moreover, the allegedly new fact [on which the petition is based] must have been unknown and must have been in existence at the time of the judgment." (*Kim*, *supra*, 45 Cal.4th at p. 1093.)

Those principles demonstrate that a petition for a writ of coram nobis was not the appropriate mechanism to obtain the relief Ramos was seeking. Rather, the issue raised in Ramos's writ involves a question of law: whether the trial court was required to strike his section 667.5(b) enhancements based on the Proposition 47 orders designating the

underlying prior felony offenses as misdemeanors. Moreover, the only "fact" at issue —the redesignation of his underlying prior offenses—was not unknown to the trial court at the time of the resentencing. Indeed, the parties discussed that fact at length during the sentencing hearing.

Ramos, however, argues that if coram nobis is not an appropriate remedy for the type of claim he raised in his petition (which it is not), we should construe the petition as one seeking a writ of habeas corpus. "A court has authority to treat one type of writ petition as another type when it is procedurally appropriate to do so." (*Cox v. Superior Court of Amador County* (2016) 1 Cal.App.5th 855, 859; see also *People v. Picklesimer* (2010) 48 Cal.4th 330, 340-341 (*Picklesimer*) ["'The label given a petition, action or other pleading is not determinative'"].) "[T]he true nature of a petition or cause of action is based on the facts alleged and remedy sought in that pleading. [Citations.]" (*Picklesimer, supra*, 48 Cal.4th at p. 340.) As stated above, Ramos's petition challenges the legality of his sentence, arguing that the court erred in imposing the six section 667.5(b) enhancements. Habeas corpus is available "to review claims that a criminal defendant was sentenced to serve an illegal sentence" (see *In re Harris* (1993) 5 Cal.4th 813, 839 (*Harris*)), which includes claims that "challenge . . . the imposition of section 667.5(b) enhancements." (*In re Preston* (2009) 176 Cal.App.4th 1109, 1114 (*Preston*); see also *Harris, supra,* 5 Cal.4th at p. 839 ["writ [of habeas corpus is] available to review a claim that the sentencing court acted in excess of its jurisdiction by imposing a sentence on the petitioner that was longer than that permitted by law"]; *In re Harris* (1989) 49 Cal.3d 131, 134, fn. 2 (*In re Harris*) [a "[p]etitioner may properly attack . . . sentence enhancements on habeas corpus"].)

As a general rule, however, "absent strong justification," habeas corpus relief is not available "where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment.'" (*Harris, supra,* 5 Cal.4th at p. 829 ["Proper appellate procedure . . . demands that, absent strong justification, issues that could be raised on appeal must initially be so presented, and not on habeas corpus in the first instance"].) "Accordingly, an unjustified failure to present an issue on appeal will generally preclude

its consideration in a postconviction petition for a writ of habeas corpus." (*Ibid*.) Some courts have recognized "an exception to [this] general rule . . . . when [h]abeas corpus relief [has been] sought to resolve whether 'the trial court "exceeded its jurisdiction by sentencing a defendant 'to a term in excess of the maximum provided by law' [citation], or to correct a misinterpretation of [a] statute resulting in confinement 'in excess of the time allowed by law' [citation]. . . ." [Citation.]' [Citation.]" (*Preston, supra,* 176 Cal.App.4th at p. 1114; see also *In re Crockett* (2008) 159 Cal.App.4th 751, 758-759; cf. *In re Harris, supra,* 49 Cal.3d at p. 134, fn. 2 [habeas corpus available to review legality of sentence "despite the fact that the underlying claim was raised and rejected on appeal"].)

The overriding consideration in this case is that, at the time of the resentencing, the trial court specifically indicated it would consider the issue without requiring an appeal: the trial court directed Ramos that a writ petition was the appropriate mechanism to raise the sentencing issue. At the resentencing hearing, the court informed Ramos that although he was "probably . . . right" about the section 667.5(b) enhancements, it did not believe it had the authority to address the issue at resentencing based on the language of our disposition in Case No. B250000. In the court's view, our disposition only permitted the trial court to revisit whether Ramos had suffered a prior serious felony conviction; it did not permit the court to reassess the prior prison term enhancements. The court then instructed Ramos that the appropriate "procedure for [challenging the section 667.5(b) enhancements] . . . would be some sort of a writ. . . . You file a writ, and then I will consider it." In light of the court's statements, the defendant was justified in raising the sentencing issue at the trial court by way of a writ.

B. The Court Did Not Err in Striking the Section 667.5(b) Enhancements

The district attorney argues that the trial court erred in concluding that a prior felony conviction that has been designated a misdemeanor under Proposition 47 cannot be used to support a section 667.5, subdivision (b) enhancement. The district attorney further contends that even if section 667.5(b) does not apply to a prior felony conviction

that has been designated a misdemeanor, that rule is inapplicable here based on principles of retroactivity.

1. Summary of relevant statutory and case law

a. Summary of relevant statutes

This case involves the interpretation and application of two statutes: the prior prison term enhancement provision set forth in Penal Code section 667.5, subdivision (b), and Proposition 47's sentencing provision, set forth in Penal Code section 1170.18.

"[S]ection 667.5(b) . . . provides a special sentence enhancement for [a] particular subset of 'prior felony convictions' that were deemed serious enough by earlier sentencing courts to warrant actual imprisonment. . . ." (*People v. Jones* (1993) 5 Cal.4th 1142, 1148 (*Jones*).) It is intended to "'"to punish individuals" who have shown that they are "hardened criminal[s] who [are] undeterred by the fear of prison."' [Citation.]" (*People v. Abdallah* (2016) 246 Cal.App.4th 736, 742 (*Abdallah*).) Imposition of the enhancement "requires proof that the defendant '"(1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction; (3) completed that term of imprisonment; and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction."' [Citation.]"[3] (*Ibid.*; see also *People v. Tenner* (1993) 6 Cal.4th 559, 563 (*Tenner*).) "Courts sometimes refer to the fourth requirement, which exempts from the enhancement defendants who have not reoffended for five years, as '"washing out."' [Citations.] . . . . 'According to the "washout" rule, if a defendant is free from both prison custody and the commission of a new felony for any five-year period following discharge from custody or release on

[3] Section 667.5, subdivision (b) states, in relevant part: "[W]here the new offense is any felony for which a prison sentence . . . is imposed[,] . . . the court shall impose a one-year term for each prior separate prison term . . . for any felony; provided that no additional term shall be imposed under this subdivision for any prison term . . . prior to a period of five years in which the defendant remained free of both the commission of an offense which results in a felony conviction, and prison custody. . . ."

parole, the enhancement does not apply.' [Citation.]" (*Abdallah, supra,* 246 Cal.App.4th at p. 742)

Proposition 47, which went into effect on November 5, 2014, "makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors). . . ." (*Riviera, supra,* 233 Cal.App.4th at p. 1089.) Proposition 47 also created section 1170.18, which establishes a mechanism for resentencing and reclassifying felony convictions for offenses that are now misdemeanors under the initiative.

Under section 1170.18, subdivision (a), a person "currently serving" a felony sentence for an offense that is now a misdemeanor under Proposition 47, may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47. A person who satisfies the criteria in section 1170.18 shall have his or her sentence recalled and be "resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).)

Section 1170.18, subdivisions (f) and (g) provide that persons who have completed felony sentences for offenses that would now be misdemeanors under Proposition 47 may file an application with the trial court to have their felony convictions "designated as misdemeanors." (§ 1170.18, subd. (f).) Subdivision (k), in turn, provides that "[a]ny 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 or prevent his or her conviction [for various firearm prohibitions]."

b. Summary of People v. Abdallah (2016) 246 Cal.App.4th 736

In *Abdallah, supra,* 6 Cal.App.4th 736, this court considered a similar issue regarding the effect of a Proposition 47 reclassification on a prior prison term

enhancement. The defendant in *Abdallah* was charged with several felony counts, including possession of methamphetamine while armed with a firearm (Health & Saf. Code, § 11370.1) The information included a special allegation under section 667.5(b) asserting that the defendant had served a term of imprisonment for a prior felony conviction in 2002, and was then convicted of a second felony in 2011 (resulting in a suspended sentence) that he had committed within five years of completing his term on the 2002 conviction.

In June of 2014, a jury convicted the defendant of the offenses charged in the information. Prior to sentencing, he obtained an order under Proposition 47 recalling his 2011 felony conviction, and reclassifying it as a misdemeanor. At sentencing, the trial court imposed a one-year enhancement under section 667.5(b), concluding that the prosecution had established the defendant had served a prior prison term for a felony conviction (the 2002 conviction), and then committed a second felony within five years of his completion of that prison term (the 2011 conviction).

On appeal, the defendant argued that the section 667.5(b) enhancement was invalid based on the "washout rule." More specifically, he argued that because his 2011 felony conviction had been reclassified as a misdemeanor under Proposition 47, he had not committed a felony conviction within five years of completing his prison term for the 2002 felony conviction. The Attorney General, however, argued that the Proposition 47 reclassification had no effect on the section 667.5(b) enhancement because the defendant's 2011 conviction was a felony at the time he had committed the offense. As stated by the Attorney General, the reclassification did not alter the "fact [that the defendant] committed a felony offense less than five years after his release from custody for a prior felony." (*Abdallah, supra,* 246 Cal.App.4th at p. 743.)

In our analysis, we explained that "Proposition 47 borrowed the 'for all purposes' language of section 1170.18, subdivision (k), from section 17, subdivision (b), which describes the effect of a judicial declaration that a wobbler offense is a misdemeanor. (See § 17, subd. (b) [where a crime is a wobbler, 'it is a misdemeanor for all purposes . . . [w]hen . . . the court declares the offense to be a misdemeanor']."

(*Abdallah, supra,* 246 Cal.App.4th at p. 745.) We further explained that in *People v. Park* (2013) 56 Cal.4th 782 (*Park*), the Supreme Court had relied on this "for all purposes" language in reversing a "prior serious felony conviction" enhancement (see § 667, subd. (a)) that the trial court had imposed based on an offense that another court had previously declared to be a misdemeanor under section 17(b). "The Supreme Court held that 'when the court in the prior proceeding properly exercised its discretion by reducing the [felony] conviction to a misdemeanor, that offense no longer qualified as a prior serious felony within the meaning of section 667, subdivision (a), and could not be used, under that provision, to enhance defendant's sentence.' [Citation.] The court observed that . . . 'reduction of a wobbler to a misdemeanor under . . . section 17(b) generally precludes its use as a prior felony conviction in a subsequent prosecution.' [Citation.]" (*Abdallah, supra,* 246 Cal.App.4th at pp. 745-746 [citing and quoting *Park, supra,* 56 Cal.4th at p. 794].)

We concluded that "the same logic applies to sections 667.5, subdivision (b), and 1170.18, subdivision (k). [The fourth requirement of] [s]ection 667.5, subdivision (b) excludes from the prior prison term enhancement a defendant who has neither committed 'an offense which results in a felony conviction' nor been subject to [a prison term] within five years of release on parole or official discharge from another felony conviction resulting in the defendant's incarceration. Once the trial court recalled [the defendant's] 2011 felony sentence and resentenced him to a misdemeanor, section 1170.18, subdivision (k), reclassified that conviction as a misdemeanor 'for all purposes.' [Citation.] Therefore, at the time of sentencing in this case, [the defendant] was not a person who had committed 'an offense which result[ed] in a felony conviction' within five years after his release on parole for his prior conviction. [Citations.] Thus, the trial court erred by imposing the one-year sentence enhancement under section 667.5, subdivision (b)." (*Abdallah, supra,* 246 Cal.App.4th at p. 746.)

Our decision also addressed several arguments the Attorney General had raised in support of its assertion that the reclassification of the defendant's offense had no effect on his prior prison term enhancement. First, the Attorney General contended that

"Proposition 47 [was] not intend[ed] to 'go back in time' and apply retroactively to every affected offense in every context." (*Abdallah, supra,* 246 Cal.App.4th at p. 746.) According to the Attorney General, because the defendant had committed a felony offense "within five years' of his release on . . . the 2002 conviction, . . . the fact that the subsequent offense [wa]s no longer a felony [wa]s inconsequential." (*Ibid*.) We rejected the argument, explaining that the case did involve a retroactive application of Proposition 47: "The trial court did not use [the defendant's] 2011 conviction as if it were a felony conviction for purposes of imposing the prior prison term enhancement until after the court had recalled [the defendant's] 2011 sentence and resentenced him under Proposition 47. The court did not reach back in time to resentence [the defendant] in the current case based on the redesignation of a predicate offense under section 1170.18, subdivision (f), for the prior prison term enhancement." (*Id.* at p. 747.)[4]

The Attorney General also argued that *Park* contained language indicating that an enhancement predicated on a prior felony conviction does apply when (as in Abdallah's case) the prior offense was reduced to a misdemeanor after the defendant's conviction on the current offense, but before his sentencing. In support, it cited the following passage from *Park*: "There is no dispute that . . . defendant would be subject to the [section 667, subdivision (a)] enhancement [for a prior serious felony conviction] had he committed and been convicted of the present crimes before the court reduced the earlier offense to a

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4 We further explained that the fact Abdallah's 2011 conviction had been reclassified as a misdemeanor prior to his sentencing on his current offense distinguished the case from other recent decisions "holding that Proposition 47 does not apply retroactively to redesignate predicate offenses as misdemeanors for purposes of imposing sentencing enhancements where the original sentence was imposed before the enactment of Proposition 47." (*Abdallah, supra,* 246 Cal.App.4th at p. 746.) Since we decided *Abdallah*, the Supreme Court has granted review in all of the "retroactivity" cases we referred to in our opinion. (See *People v. Carrea*, review granted April 27, 2016, S233011; *People v. Williams*, review granted May 11, 2016, S233559, *People v. Ruff*, review granted May 11, 2016, S233201; see also *People v. Valenzuela*, review granted March 30, 2016, S232900 (lead case).) The Court has also granted review in at least one additional case involving retroactivity that was decided after *Abdallah.* (See *People v. Jones* (2016) 1 Cal.App.5th 221, 229, review granted Sept. 14, 2016, S235901.)

misdemeanor." (*Park, supra,* 56 Cal.4th at p. 802.) In rejecting the argument, we explained that the Attorney General "fail[ed] to recognize that the applicability of the section 667[a] enhancement in *Park* turns on the status of the prior offense at the time of conviction; it imposes a five-year enhancement when a person 'convicted of a serious felony' has previously suffered a serious felony conviction. In contrast, the enhancement in this case, section 667.5, subdivision (b), depends on the status of the prior offense at the time of sentencing; it imposes a one-year enhancement when 'the new offense is any felony for which a prison sentence . . . is imposed. . . .'" (*Abdallah, supra,* 246 Cal.App.4th at p. 748, fn. 8.)

Finally, the Attorney General argued "that the one-year prior prison term sentence enhancement applie[d] [to the defendant] because the enhancement is based on a defendant's recidivist status, and not on the specific underlying conduct." (*Abdallah, supra,* 246 Cal.App.4th at p. 748.) We concluded, however, that "*Park* [had] rejected a similar argument in the context of wobblers and section 667, subdivision (a)." (*Ibid.*) In *Park*, the Attorney General had argued that a section 667(a) enhancement should apply even when the prior offense was subsequently reduced to a misdemeanor because the enhancement was intended to increase punishment on "'"recidivist offenders."' [Citation.]" (*Park, supra*, 56 Cal.4th at p. 802.) The Supreme Court disagreed, explaining that "'[w]hen the court properly exercises its discretion to reduce a wobbler to a misdemeanor, it has found that the felony punishment, and its consequences, are not appropriate for that particular defendant.' [Citation.] Indeed, 'one of the "chief" reasons for reducing a wobbler to a misdemeanor "is that under such circumstances the offense is not considered to be serious enough to entitle the court to resort to it as a prior conviction of a felony for the purpose of increasing the penalty for a subsequent crime."' [Citation.]" (*Abdallah, supra,* 246 Cal.App.4th at p. 748 [citing and quoting *Park, supra*, 56 Cal.4th at pp. 801, 794].) We concluded that the same reasoning applied to prior felonies that had subsequently been reclassified as misdemeanors under Proposition 47.

2. Section 667.5(b) does not apply to a prior felony conviction that has been designated a misdemeanor under Proposition 47 prior to sentencing on the current offense

The primary issue in this case is closely related to the question we addressed in *Abdallah*. As explained above, section 667.5(b) requires proof that the defendant: "'(1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction; (3) completed that term of imprisonment; and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction." (*Abdallah, supra,* 246 Cal.App.4th at p. 742.) *Abdallah* analyzed how the reclassification of a felony conviction that occurred within five years of a prior felony conviction affects the fourth requirement of a section 667.5(b) enhancement. This case, in contrast, requires us to determine how a Proposition 47 redesignation affects the first requirement. Specifically, we must determine whether a section 667.5(b) enhancement applies when a prior felony conviction that resulted in a prison term has been designated a misdemeanor under Proposition 47.

Our reasoning in *Abdallah* compels the conclusion that a prior felony conviction that resulted in a prison term does not support a section 667.5(b) enhancement when the offense has been designated a misdemeanor under Proposition 47 prior to sentencing on the current offense. As summarized above, *Abdallah* held that once a trial court has reclassified a prior felony offense to be a misdemeanor, section 1170.18, subdivision (k), requires that, from that point forward, the offense must be treated as a misdemeanor "for all purposes." *Abdallah* further held that this "for all purposes" language included determinations regarding the defendant's eligibility for a section 667.5(b) enhancement. Thus, under *Abdallah*, when a prior felony conviction that resulted in a prison term has been designated a misdemeanor prior to sentencing on the current offense, the defendant is not eligible for a section 667.5(b) because he is no longer a person who has been convicted of a prior felony.[5]

[5] Abdallah's prior felony conviction was recalled and he was resentenced under section 1170.18, subdivision (b), which applies to persons "currently serving" a felony

The district attorney disagrees, asserting that when a defendant has completed a prison term for a prior felony conviction, section 667.5(b) applies even if the offense is subsequently designated a misdemeanor. As discussed in more detail below, however, each of the arguments the district attorney raises in support of its position are foreclosed by our analysis in *Abdallah*.

First, the district attorney argues that because section 667.5(b) is primarily intended to punish "prison recidivism," rather than "felony recidivism," the enhancement should apply whenever a defendant has been convicted of an offense for which he served a prison term; the fact that the offense is later designated a misdemeanor is immaterial. In *People v. Prather* (1990) 50 Cal.3d 428 (*Prather*), our Supreme Court reached a contrary conclusion regarding the primary intent of section 667.5(b), explaining that "the underlying purpose[] of [the enhancement] . . . [is] to provide increased terms of imprisonment for recidivist felony offenders. [Citation.] [¶]. . . . We think it clear that 667.5(b) is aimed primarily at the underlying felony conviction, and only secondarily, and as an indicium of the felony's seriousness, at the prior prison term." (*Id*. at p. 440; see also *Jones, supra,* 5 Cal.4th at pp. 1148-1149 [quoting and applying language in *Prather*[6]].) We also considered and rejected this same argument in *Abdallah*. (See

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sentence for an offense that is now a misdemeanor under Proposition 47. Ramos's prior felony convictions, in contrast, were designated misdemeanors under section 1170.18 subdivision (g), which applies to persons who have completed felony sentences for offenses that would now be misdemeanors under Proposition 47. For purposes of our analysis, however, this distinction is immaterial because section 1170.18, subdivision (k) provides that "[a]ny 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. . . ."

6 The District Attorney contends that in *People v. Baird* (1995) 12 Cal.4th 126, the Court implicitly rejected its prior holding in *Prather*, and concluded that "section 667.5(b) punishes prison recidivism," rather than felony recidivism. In support, she cites the following language from *Baird*: "Section 667.5(b) does not permit the mere fact of a prior conviction to increase the sentence for [possession of a firearm after having been convicted of a felony]. Rather, section 667.5(b) authorizes additional punishment only if the additional factor of prison incarceration for the prior conviction is established. [¶]

Abdallah, *supra*, 246 Cal.App.4th at p. 748.) Moreover, whatever its intended purpose, the language of section 667.5(b) makes clear that the enhancement applies only when the defendant's prior offense was a felony. (*Tenner, supra*, 6 Cal.4th at p. 563 [section 667.5(b) "'requires proof that the defendant: (1) was previously convicted of a felony. . . ."]; *Abdallah, supra,* 246 Cal.App.4th at p. 742.) As explained by our Supreme Court, the section imposes an enhancement for a "particular subset of 'prior felony convictions' that were deemed serious enough . . . to warrant actual imprisonment." (*Prather, supra*, 50 Cal.3d at p. 440.) When a prior felony conviction has been designated a misdemeanor under Proposition 47, the prior offense no longer qualifies as a felony conviction, rendering section 667.5(b) inapplicable.

Second, the district attorney argues that the text of section 667.5(b) demonstrates that the enhancement applies whenever a defendant has previously been convicted of a felony for which he completed a prison term; it contains no language requiring that "the prior conviction *currently* remain a felony." In other words, the district attorney contends that redesignating a felony to a misdemeanor under Proposition 47 does not change the fact that the defendant was actually convicted of a felony for which he served a term of imprisonment. The Attorney General raised this same argument in *Abdallah*, contending that reclassifying a felony to a misdemeanor did not affect the fourth requirement of section 667.5(b) because the defendant had "in fact [still] committed a felony offense less than five years after his release from custody for a prior felony." (See *Abdallah*, *supra*, at p. 743.) As we determined in *Abdallah*, however, the "for all purposes" language of

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. . . . 'The distinction between a prior felony conviction and a separate prison term served for such felony is obvious. A prior felony conviction could well have resulted in something less than confinement in the state prison, in which event no enhancement would be called for under section 667.5, subdivision (b).' [Citation.]" (*Id.* at p. 132.) This language does not conflict with *Prather's* conclusion that section 667.5(b) is primarily intended to punish the underlying felony, rather than the prior prison term. Instead, the cited passage merely clarifies that the fact of a prior felony conviction is, standing alone, insufficient to warrant a section 667.5(b) enhancement.

section 1170.18, subdivision (k) requires that after a redesignation, the offense must be treated as a misdemeanor even if it was a felony at the time of the conviction.[7]

Third, the district attorney argues that we should construe "the trigger date" for determining whether a prior offense qualifies as a felony conviction within the meaning of section 667.5(b) as "the date . . . the new offense [was committed]," rather than the "sentencing date." Thus, according to the district attorney, because Ramos's prior offenses were still felonies at the time he committed his current offense for robbery, section 667.5(b) applies even though the prior offenses were designated misdemeanors prior to his resentencing on the current offense. In *Abdallah*, however, we rejected an essentially identical argument, concluding that "the enhancement in . . . section 667.5, subdivision (b), depends on the status of the prior offense at the time of sentencing [on the new offense]; it imposes a one-year enhancement when 'the new offense is any felony for which a prison sentence . . . is imposed. . . ." (*Abdallah, supra*, 246 Cal.App.4th at p. 748.)[8]

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[7] The Supreme Court also rejected an essentially identical argument in *Park*. In that case, the Attorney General argued that the language of section 667(a) made clear that a five-year enhancement was to be added to the sentence of any person "who previously has been convicted of a serious felony." The Attorney General argued that at the time the defendant had pleaded guilty to his prior offense, his conviction was a felony and remained so until the trial court reduced it to a misdemeanor three years later. Thus, according to the Attorney General, the enhancement applied because the defendant had actually been convicted of a serious felony; the fact that the offense was subsequently designated a misdemeanor was immaterial. The Supreme Court disagreed, explaining that "under the Attorney General's interpretation, section 667(a) would override section 17(b)'s command that a trial court's exercise of discretion in reducing a wobbler to a misdemeanor renders the offense a 'misdemeanor for all purposes.' [Citation.]" (*Park, supra*, 56 Cal.4th at p. 797.) The same is true here. Under the district attorney's interpretation of the relevant statues, section 667.5(b) would override section 1170.18(k)'s directive that a redesignated offense must be treated as a "misdemeanor for all purposes."

[8] The primary authority the District Attorney cites in support of her assertion that we must look to the nature of the prior offense "as it existed on the date of the new offense" is *People v. Weeks* (2014) 224 Cal.App.4th 1045. *Weeks*, however, was decided before the passage of Proposition 47, and addressed a significantly different issue:

Finally, the district attorney argues that even if a prior felony conviction that has been designated a misdemeanor under Proposition 47 cannot support a section 667.5(b) enhancement, that rule does not apply here based on principles of retroactivity. The district attorney contends that unlike in *Abdallah*, Ramos was originally sentenced on his current offense before the prior felony convictions underlying his section 667.5(b) enhancements were designated as misdemeanors. The district attorney argues that in light of this distinguishing fact, Ramos must show that Proposition 47 was intended to apply retroactively, allowing petitioners to challenge sentence enhancements that were imposed before the underlying offenses were designated misdemeanors.

The procedural history of this case demonstrates, however, that Ramos did in fact have his prior felony convictions designated as misdemeanors prior to the operative sentencing hearing on his current offense. Although it is true that Ramos was initially sentenced on the current offense before Proposition 47's passage, our prior decision in Case No. B250000 reversed a true finding that he had previously been convicted of a serious felony, vacated his sentence and remanded the matter for further proceedings. At the resentencing hearing, held after Ramos had obtained his Proposition 47 redesignation orders, the trial court concluded it had no authority to strike the section 667.5(b)

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whether a section 667.5(b) enhancement applies when the defendant was still serving his term of imprisonment on the prior felony offense at the time he committed the current offense. The Attorney General argued that the enhancement was appropriate because the "defendant had completed his term of imprisonment at the time the trial court found the prison prior to be true and imposed sentence[.]" (*Id*. at pp. 1049-1050.) The appellate court disagreed, concluding that the "'trigger date'" for determining whether a previously imposed prison sentence qualified as a "completed period of . . . incarceration" within the meaning of section 667.5, subdivision (g) (defining a "prior separate prison term" to mean a "completed period of prison incarceration") was "the date the new offense was committed," rather than the date of sentencing. The court explained that language set forth in section 667.5, subdivision (k) implied that the "Legislature [was] concerned with" the defendant's "incarceration situation" "on the date the new crime is committed." (*Id*. at p. 1051.) *Weeks* does not address the "trigger date" for determining whether a prior offense qualifies as a "felony" within the meaning of section 667.5(b), nor does it address the effect of Proposition 47's newly-imposed requirement that a re-designated offense must be treated as a misdemeanor "for all purposes." (§ 1170.18 , subd. (k).)

enhancements because our opinion had not specifically addressed them. It further concluded that in light of the limited nature of our remand, the section 667.5(b) issue could only be raised by way of a writ. Contrary to the trial court's findings, however, our disposition contained no language indicating that the only sentencing issue the court could consider on remand was the true finding on the prior serious felony conviction. Instead, the disposition "vacated" Ramos's sentence in its entirety, and remanded the matter for further proceedings.

It is well-established that "[w]hen a case is remanded for resentencing by an appellate court, the trial court is entitled to consider the entire sentencing scheme. Not limited to merely striking illegal portions, the trial court may reconsider all sentencing choices. [Citations.]" (*People v. Hill* (1986) 185 Cal.App.3d 831, 834; *Nesbitt, supra,* 191 Cal.App.4th at p. 244, fn.18; *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1258-1259; *People v. Smith* (1985) 166 Cal.App.3d 1003, 1008 [where matter was remanded for resentencing based on failure to give reasons for imposing consecutive sentences, the trial court had authority to revisit any issues regarding sentencing].) Our Supreme Court has further clarified that "when a case is remanded for resentencing after an appeal, the defendant is entitled to 'all the normal rights and procedures available at his original sentencing' [citations], including consideration of any pertinent circumstances which have arisen since the prior sentence was imposed [citation]." (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 460.)

These authorities demonstrate that the trial court erred in concluding it had no authority to reconsider the applicability of the section 667.5(b) enhancements at the time of resentencing. They also demonstrate that the resentencing hearing effectively operated as an original sentencing. Because Ramos's prior felony convictions had been designated misdemeanors prior to his resentencing, the case does not implicate any question of retroactivity. (See *Abdallah, supra,* 246 Cal.App.4th at p. 746.)

DISPOSITION

The order is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

SEGAL, J.