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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSE ARMANDO ZELAYA, Defendant and Appellant.	B270741 Los Angeles County Super. Ct. No. VA127216

APPEAL from a judgment of the Superior Court of Los Angeles County, Brian F. Gasdia, Judge. Affirmed.

Michael W. Flynn, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Jonathan J. Kline and Amanda V. Lopez, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Jose Armando Zelaya appeals from a judgment entered after we vacated his sentence and remanded to the trial court for resentencing. In our prior opinion, we held the trial court had erred by imposing a sentence based on a prior-conviction allegation that we found had been neither tried nor proven. (*People v. Zelaya* (Oct. 23, 2015, B256544) [nonpub. opn.] 2015 WL 6441462 (*Zelaya I*).) On remand, however, it was discovered that a key portion of the reporter's transcript—namely, the oral proceeding of the priors trial—had not been transcribed and therefore was not before us on appeal. The trial court therefore reviewed the transcript of the priors trial, corrected its erroneous minute order nunc pro tunc, and then re-imposed the vacated sentence based on defendant's prior conviction.

As discussed more fully herein, we conclude that the trial court acted well within its jurisdiction by correcting the record to reflect that a priors trial had occurred, and then imposing a sentence supported by the law and the record. We therefore affirm.

PROCEDURAL BACKGROUND[1]

I.

Zelaya I

Defendant was convicted by a jury of felony robbery (Pen. Code, § 211)[2] and possession of a firearm by a felon (§§ 12022.53, subd. (b), 12022, subd. (a)(1)) in connection with an October 2012 robbery of a liquor store. Defendant appealed, raising a single issue: whether the trial court erred in imposing a second-strike sentence and a five-year serious-felony enhancement based on defendant's prior felony conviction.

Defendant filed an appellant's opening brief on June 10, 2015, in which he urged that the sentence based on his prior conviction was erroneous because "the trial court failed to conduct a court trial on the priors, [and] Mr. Zelaya did not receive any advisement of his rights, nor did he admit to the priors." The People conceded that no priors trial had been held, but urged that the sentence could be affirmed because defendant had admitted his prior conviction. In the alternative, the People asked the court to remand the matter for the trial court to make a finding on the prior conviction allegation and to sentence defendant accordingly.[3]

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[1] We omit a detailed statement of the facts underlying the convictions because it is unnecessary to our determination of the legal issues on appeal.

[2] All subsequent undesignated statutory references are to the Penal Code.

[3] The People urged: "[I]f this Court finds that appellant did not voluntarily and intelligently admit his prior conviction, the appropriate remedy would be for the Court to vacate appellant's

In an unpublished opinion filed October 23, 2015, we explained that defendant "waived jury trial, but not a bench trial, on the [priors] allegations. The priors trial was continued at least seven times, but neither a bench trial nor any other proceeding was ever conducted regarding the truth of the allegations. Nevertheless, proceedings went forward as if a true finding on the allegations had been made. For example, the court held a contested hearing to determine whether to dismiss one or more strikes under *Romero*[4], then dismissed two of the prior strikes, and imposed a second-strike sentence and a five-year serious-felony enhancement based on the third." (*Zelaya I*, *supra*, at p. 5.) We concluded the trial court violated defendant's due process rights when it imposed a sentence based on prior-conviction allegations that had been neither tried nor admitted, and we therefore vacated defendant's sentence and remanded for resentencing. (*Id.* at p. 6.)

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sentence and remand the matter with directions that the trial court conduct a trial on the prior conviction allegation, make the section 1158 finding, and resentence appellant accordingly. (See § 1260 [on appeal 'the court . . . may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances']; see also *Monge v. California* (1998) 524 U.S. 721, 730 [double jeopardy does not bar retrial of prior conviction allegation reversed on appeal for insufficient evidence], affirming *People v. Monge* (1997) 16 Cal.4th 826, 845; see also *People v. Barragan* (2004) 32 Cal.4th 236, 239, 241, 243–258 [retrial of a prior conviction allegation in noncapital cases does not violate principles of due process, law of the case, or res judicata].)"

4 *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

Neither party petitioned for rehearing or review, and we issued a remittitur on December 28, 2015.

II.

The Missing April 3, 2014 Hearing Transcript

Nearly a year before we issued our opinion in *Zelaya I*, defendant's appellate counsel had notified this court that a portion of the record—namely, "trial on prior convictions, or pleas[] on prior convictions[,] [or] . . . a [section] 969(b)[5] packet"—appeared to be missing.[6] The superior court ordered the clerk and reporter to augment the appellate record, but

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5 Section 969b provides: "For the purpose of establishing prima facie evidence of the fact that a person being tried for a crime or public offense under the laws of this State has been convicted of an act punishable by imprisonment in a state prison, county jail or city jail of this State, and has served a term therefor in any penal institution . . . , the records or copies of records of any state penitentiary, reformatory, county jail, city jail, or federal penitentiary in which such person has been imprisoned, when such records or copies thereof have been certified by the official custodian of such records, may be introduced as such evidence."

6 Counsel's notice stated: "Defendant was convicted and sentenced on May 23, 2014. The clerk's transcript [and reporter's transcript] contain[] minutes [and proceedings] from that date, but sentencing reflects that other proceedings took place that the minute order [and oral transcripts] [do] not contain. (Cal. Rules of Court, rule 8.320(b)(3).) There may be other minute orders [or oral proceedings] from, or close to, May 23, 2014. These minute orders [and hearings] may reflect further sentencing hearings, trial on prior convictions, or pleas[] on prior convictions. There also may be a [section] 969(b) packet introduced that bore on this portion of sentencing."

although the clerk and reporter filed "augmented" transcripts, the transcripts contained no new hearing information. Instead, a clerk's certificate stated that "[a] thorough search of the Superior Court case file has failed to produce the records requested."

After our opinion in *Zelaya I* became final, it was discovered that an additional sentencing hearing *had* taken place, but that the transcript of that hearing had been omitted from the appellate record.[7] The transcript of the hearing has been provided to us in connection with the present appeal, and it demonstrates the following:

On April 3, 2014, the parties appeared in the trial court for a hearing on defendant's motion to strike defendant's priors and to impose sentence. Defendant waived a jury trial, but requested a court trial on priors. The prosecutor stated that he was ready to proceed and would rely on the "969b packet," which had been marked as People's Exhibit 18, and on defendant's admission during the jury trial that he had suffered prior convictions.[8] Exhibit 18 contained a certified copy of an abstract of judgment in case number YA026579, which demonstrated that on April 18, 1996, defendant had been convicted of two counts of home invasion robbery (§ 211) and one count of first degree residential

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[7] It appears that the transcript of the April 3, 2014 hearing was omitted from the record of the prior appeal because although the minute order from April 3, 2014, indicated that a priors trial was scheduled to take place that day, it did not indicate that a priors trial was actually held or that the court found the prior-conviction allegations true.

[8] During the jury trial, defendant testified that he had been convicted in 1995 of residential burglary and two theft-related offenses.

burglary (§ 459). Defense counsel submitted, stating that he had "nothing additional to present."

The court stated that it had reviewed the section 969b packet, including the certified copy of the abstract of judgment. On the basis of the record before it, "the court would find that the priors as alleged are true. . . ." At the subsequent *Romero* hearing, the trial court struck two of the three priors, explaining: "We'll strike two of the strikes, which would leave one, which means once we get to sentencing, this would be a second-strike sentence[e]."

III.
Further Proceedings on Remand

After our opinion in *Zelaya I* became final, the trial court held a hearing on February 8, 2016, to address this court's remand instructions. The prosecutor advised the court as follows:

"When the Court of Appeal sent the remittitur back, they were under the impression that there was never a priors trial. My D.A. file indicated that on April 3rd, 2014 . . . we in fact did a prior[s] trial. So . . . through the help of your judicial assistant, [we] ordered a transcript of the April 3rd, 2014 hearing. And the transcript does confirm that the Court, Your Honor, did hold a priors trial. Specifically, on Page 17 of the transcript that I have, Line 11, says: [¶] The Court would find that the priors as alleged are true . . . ."

The prosecutor therefore recommended that the court amend the April 3, 2014 minute order nunc pro tunc to reflect that a priors trial had already been conducted, and then reimpose the same sentence: "The Court sentenced the defendant to a term of 25 years, that being a high term of five years doubled for 10, there was a 10-year gun enhancement making it 20, and

there was a 667(a) five-year prior which would then make it 25 years.

"So the court was correct in its sentencing, and I think based on the nunc pro tunc of the April 3rd, 2014 order, the Court would just resentence to what it originally sentenced."

Defense counsel responded: "*I would agree and I would submit on* [*the district attorney's*] *recommendation*. I believe that's the correct process that we should go forward with. I have also provided a copy of the transcript which shows the priors trial to Mr. Zelaya." (Italics added.)

The trial court made a finding that "it did on April 3rd, 2014 conduct a court trial on the priors and found the priors to be true," and it directed the clerk to correct the minute order accordingly. The trial court then re-imposed the original sentence.

Defendant filed a timely notice of appeal.

CONTENTIONS

Defendant contends the trial court lacked jurisdiction to "alter previous fact finding, upon which the opinion in the prior appeal had been based, and then to re-impose the same sentence." Alternatively, defendant contends there was insufficient evidence to support the sentence based on defendant's prior conviction.

The People contend that the trial court had jurisdiction to re-impose the prior sentence because the trial court's order did not exceed the scope of the remittitur; alternatively, the People urge that if the trial court lacked jurisdiction, the remittitur should be recalled in light of the incomplete appellate record underlying this court's prior order. The People further contend

that the trial court's findings regarding defendant's prior convictions were supported by substantial evidence.

DISCUSSION

Our opinion in *Zelaya I* was premised on the mistaken belief—shared by the People, the defendant, and this court—that a priors trial had never been conducted. Based on this misunderstanding, we concluded in *Zelaya I* that "the [trial] court violated [defendant's] due process rights when it imposed a sentence based on prior-conviction allegations that were neither tried nor admitted."

As a result of events that occurred after our opinion in *Zelaya I* became final, we now know that the factual predicate for our prior opinion was erroneous—that is, a priors trial *did* take place, and based on the evidence presented, the trial court found the prior conviction allegation true.

The parties agree that had the record omission been brought to our attention prior to resentencing, it would have been appropriate for this court to have recalled the remittitur, ordered the appellate record supplemented with the April 3, 2014 hearing transcript, and decided the appeal anew.[9] We agree. (E.g., *People v. Sanchez* (1969) 70 Cal.2d 562, 564–565 (fn. omitted) [recalling remittitur "because the appellate record on which we had reviewed the trial proceedings was incomplete in a respect which is critical to our determination"]; *In re Rothrock* (1939) 14 Cal.2d 34 [recalling remittitur where "a mistake of facts

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[9] Indeed, although defendant urges that the trial court exceeded its jurisdiction by reimposing the same sentence on remand, he urges that at this juncture this court "should reverse and *recall the remittitur*."

on the part of an appellate court . . . result[ed] in prejudicial error."].) The question before us, however, is not whether this court could have recalled the remittitur had it been asked to do so prior to resentencing, but whether the trial court had jurisdiction to find that a priors trial had been held and to re-impose the sentence vacated by this court in *Zelaya I*.[10] As we now explain, given the unusual facts of this case, the trial court acted well within its jurisdiction.

I.
The Trial Court Did Not Act in Excess of Its Jurisdiction on Remand

A. Trial Court's Jurisdiction on Remand

A reviewing court has authority to "reverse, affirm, or modify a judgment or order appealed from, or reduce the degree of the offense or attempted offense or the punishment imposed, and may set aside, affirm, or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial and may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances." (§ 1260.)

" 'The order of the reviewing court is contained in its remittitur, which defines the scope of the jurisdiction of the court to which the matter is returned.' (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 701 (*Griset*); accord, *Snukal v. Flightways Manufacturing, Inc.* (2000) 23 Cal.4th 754, 774,

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[10] Because we find that the trial court acted within its jurisdiction on remand, we need not address the People's alternative argument that we should recall the remittitur in *Zelaya I*.

fn. 5 ['the terms of the remittitur define the trial court's jurisdiction to act'].)" (*Ayyad v. Sprint Spectrum, L.P.* (2012) 210 Cal.App.4th 851, 859–860 (*Ayyad*).) We review de novo whether the trial court correctly interpreted the directions contained in our remittitur. (*Id.* at p. 859.)

"As the language of the cited cases indicates, the rule requiring a trial court to follow the terms of the remittitur is jurisdictional in nature. (*People v. Dutra* (2006) 145 Cal.App.4th 1359, 1367 (*Dutra*).) The issues the trial court may address in the remand proceedings are therefore limited to those specified in the reviewing court's directions . . . . [¶] . . . In short, when an appellate court remands a matter with directions governing the proceedings on remand, 'those directions are binding on the trial court and *must* be followed. Any material variance from the directions is unauthorized and void.' (*Butler v. Superior Court* (2002) 104 Cal.App.4th 979, 982 (*Butler*).)" (*Ayyad*, *supra*, 210 Cal.App.4th at pp. 859–860.) If a remittitur is ambiguous, however, the trial court " 'can interpret it in light of the law and the appellate opinion to determine its duties.' " (*Ayyad*, *supra*, 210 Cal.App.4th at p. 863, fn. 7; see also *Dutra*, *supra*, 145 Cal.App.4th at p. 1368 [same].)

B. Our Remittitur in Zelaya I *Was Ambiguous*

Our disposition in *Zelaya I* was as follows: "We vacate the sentence and remand for resentencing. In all other respects, we affirm." In a footnote, we added the following: "We decline to direct the trial court to conduct a trial on the prior-conviction allegations as neither party has presented us with authority for the proposition that a belated trial is the appropriate remedy under the circumstances before us. In each case cited to us, the defendant appealed after a priors trial was held and prior-

conviction allegations were found true. (See *Monge v. California* (1998) 524 U.S. 721 [118 S.Ct. 2246] [double jeopardy does not bar retrial of priors allegation reversed for insufficient evidence]; *People v. Barragan* (2004) 32 Cal.4th 236 [retrial not barred by due process, law of the case, or res judicata].) Those cases did not have occasion to consider the proper remedy where sentence is imposed for enhancements that were neither admitted, nor proven, nor found true." (*Zelaya I*, *supra*, at p. 6, fn. 9.)

Thus, although our disposition plainly "vacate[d] the sentence and remand[ed] for resentencing" (*Zelaya I*, *supra*, at p. 6), it did not direct the court *how* it was to resentence defendant. Specifically, our disposition did not simply direct the trial court to impose a reduced sentence. Instead, by stating in the footnote to the disposition that we "*decline to direct* the trial court to conduct a trial on the prior-conviction allegations . . . [because the cited cases] did not have occasion to *consider the appropriate remedy* where sentence is imposed for enhancements that were neither admitted, nor proven, nor found true," we appeared to suggest that the trial court should determine the appropriate remedy.

In view of the ambiguity of our instructions, it was appropriate for the trial court to interpret the instructions "in light of the law and the appellate opinion[.]" (*Ayyad*, *supra*, 210 Cal.App.4th at p. 863, fn. 7.) We therefore turn to an analysis of our prior opinion and of the law governing reversal of prior conviction findings based on insufficiency of the evidence.

C. People v. Barragan

In *People v. Barragan* (2004) 32 Cal.4th 236 (*Barrigan*), our Supreme Court considered whether a retrial of a strike allegation is permissible after an appellate court reverses a true finding

based on insufficient evidence. There, a jury convicted the defendant of an offense and made a true finding that defendant had suffered a prior strike. The Court of Appeal affirmed defendant's conviction, but found insufficient evidence to support the jury's true finding on the strike allegation. Noting a split of authority regarding whether a retrial of a strike allegation is permissible after a reversal for insufficient evidence, the Court of Appeal held a retrial impermissible. (*Id.* at p. 240.)

The Supreme Court reversed. It began by noting that in *People v. Monge* (1997) 16 Cal.4th 826 (*Monge I*), it had held that retrial of a prior conviction allegation does not violate the double jeopardy protections of either the federal Constitution or the California Constitution. *Monge I* had rejected the analogy between a "failure of proof" on a prior conviction allegation and "an acquittal at the guilt phase of a criminal trial" (*Monge I*, at p. 837), reasoning that a trial of such a priors allegation "[o]ften . . . involves only the presentation of a certified copy of the prior conviction along with the defendant's photograph and fingerprints. In many cases, defendants offer no evidence at all, and the outcome is relatively predictable." (*Id.* at p. 838.) The United States Supreme Court affirmed, concluding in *Monge v. California* (1998) 524 U.S. 721, 734 (*Monge II*) that retrial of a prior conviction allegation does not violate the double jeopardy clause of the federal Constitution. (*Barragan*, *supra*, 32 Cal.4th at p. 241.)

The *Barragan* court then turned to defendant's specific contentions—namely, whether retrial of a prior conviction allegation violates principles of due process, law of the case, or res judicata. The court concluded that retrial of a prior conviction allegation does not violate due process, noting that defendant's

due process argument "essentially asks us to . . . 'use the Due Process Clause as a device for extending the double jeopardy protection to cases where it otherwise would not extend.' " (*Barragan*, *supra*, 32 Cal.4th at p. 244, quoting *Dowling v. United States* (1990) 493 U.S. 342, 354.) Moreover, the court said, retrial does not violate principles of fundamental fairness: "[R]etrial is 'proper' where 'the defects in the proof of the prior convictions [are] capable of correction on a retrial' " because " '[t]his procedure . . . carries out the policy of the statutes imposing "more severe punishment, proportionate to their persistence in crime, of those who have proved immune to lesser punishment" [citation], and prevents defendants from escaping the penalties imposed by those statutes through technical defects in . . . proof. It affords the defendant a fair hearing on the charge, and if it cannot be proved he will not have to suffer the more severe punishment.' " (*Id.* at p. 245.)

The court also concluded that retrial of a prior conviction allegation did not violate the law of the case doctrine. "As here relevant, the law of the case doctrine is subject to an important limitation: it 'applie[s] only to *the principles of law* laid down by the court as applicable to a retrial of fact,' and 'does not embrace the facts themselves. . . .' [Citation.] . . . Thus, during subsequent proceedings in the same case, an appellate court's binding legal determination 'controls the outcome only if the evidence on retrial or rehearing of an issue is substantially the same as that upon which the appellate ruling was based. [Citations.]' [Citation.] Where, on remand, 'there is a substantial difference in the evidence to which the [announced] principle of law is applied, . . . the [doctrine] may not be invoked.' [Citation.] Even where the appellate court reverses based on 'the

"sufficiency of the evidence", the rule of the law of the case may not be extended to be an estoppel when new material facts, or evidence, or explanation of previous evidence appears in the subsequent trial. [Citations.]' [Citation.] . . . [¶] [And our] decisions make clear that, contrary to defendant's assertion, nothing in the law of the case doctrine itself limits the additional evidence that a party may introduce on retrial to that which 'could not have been presented at the first trial through the exercise of due diligence.' " (*Barragan*, *supra*, 32 Cal.4th at pp. 246–247.)

The court concluded finally that retrial of a prior conviction allegation did not violate res judicata or collateral estoppel because "an appellate reversal, for insufficient evidence, of a true finding regarding an alleged prior conviction or juvenile adjudication does not generally constitute a final decision on the merits regarding the truth of the alleged prior conviction or juvenile adjudication." (*Barragan*, *supra*, 32 Cal.4th at pp. 253–254.) Further, "[d]eclining to apply res judicata principles after appellate reversal of a factfinder's true finding on a prior conviction allegation . . . would 'undermine public confidence in the judicial system' [citation], because the public has a substantial interest in the implementation of statutes imposing more severe punishment on ' "persisten[t]" ' offenders who ' "have proved immune to lesser punishment," ' and in 'prevent[ing]' such offenders 'from escaping the penalties imposed by those statutes through technical defects in . . . proof.' [Citation.] As the high court has explained, where 'a State adopts the policy of imposing heavier punishment for repeated offending, there is manifest propriety in guarding against the escape from this penalty those whose previous conviction was not suitably made known to the

court at the time of their trial.' [Citation.] 'Either a defendant has the requisite number of prior convictions, or he does not,' and '[s]ubjecting him to a second proceeding at which the State has the opportunity to show those convictions is not unfair and will enhance the accuracy of the proceeding by ensuring that the determination is made on the basis of competent evidence.' [Citation.] . . . Thus, the goal of preserving the integrity of the justice system weighs against applying the res judicata doctrine in this context." (*Barragan*, *supra*, 32 Cal.4th at pp. 256–257.)

The Courts of Appeal routinely have applied *Barragan* to conclude that the People are entitled to introduce new evidence of prior convictions following reversal and remand for insufficient evidence. (E.g., *People v. Golde* (2008) 163 Cal.App.4th 101, 113 [applying *Barragan*]; *People v. Jenkins* (2006) 140 Cal.App.4th 805, 813–814 [same]; *In re Jorge G.* (2004) 117 Cal.App.4th 931, 946–947 [same]; see also *People v. Cheatham* (1968) 263 Cal.App.2d 458, 464 [where Attorney General conceded that *no evidence* of defendant's prior felonies had been offered, proper course was to reverse "[t]hat part of the judgment finding defendant's prior convictions to be true" and "remand[] to the trial court with directions to resentence defendant after the conclusion of a limited new trial on the issue of the prior felonies"].)

D. The Trial Court Correctly Concluded It Had Jurisdiction to Correct the Record and Re-impose a Priors Sentence

In light of *Barragan* and its progeny, it would have been eminently reasonable for the trial court to have understood our disposition—"[w]e vacate the sentence and remand for resentencing"—to mean that, on remand, it could conduct a new

trial of the prior conviction allegations. Indeed, that was the remedy defendant had sought: In his first appeal, he urged this court to "reverse *and allow the trial court to conduct a trial on the priors*."

The incomplete appellate record in *Zelaya I*, however, created an unusual dilemma for the trial court on remand. In *Barragan*, the reviewing court had a complete transcript of the priors trial, and thus its reversal necessarily was based on its determination that the evidence presented at the first priors trial was insufficient as a matter of law. In the present case, in contrast, our opinion in *Zelaya I* made clear that the transcript of the priors trial had *not* been provided to us, and thus we had never found the evidence presented in the trial court to be insufficient to support defendant's sentence. To the contrary, our conclusion in *Zelaya I* expressly was based on our understanding that "*neither a bench trial nor any other proceeding was ever conducted* regarding the truth of the [priors] allegations." (*Zelaya I*, *supra*, at p. 3, italics added.)

In these unique circumstances, our prior appellate opinion revealed to the trial court that, because of the incomplete record we had been provided, we were unaware that a hearing *already* had been conducted at which the People had offered the very evidence our opinion said was required to support a priors finding. Accordingly, because the trial court reasonably could have concluded that it could hold a second priors trial, it acted well within its jurisdiction by instead doing what it did—i.e., supplementing the record with the transcript of the first priors trial, and then imposing the sentence the law required.

The trial court also acted reasonably in correcting the April 3, 2014 minute order. The law is well-established that a

trial court has the power to correct clerical errors in its own records at any time " 'on its own motion or upon the application of the parties.' " (*People v. Mitchell* (2001) 26 Cal.4th 181, 185, italics added.) "Clerical error . . . is to be distinguished from judicial error which cannot be corrected by amendment. The distinction between clerical error and judicial error is 'whether the error was made in rendering the judgment, or in recording the judgment rendered.' " (*In re Candelario* (1970) 3 Cal.3d 702, 705.) Here, the error in the April 3, 2014 minute order was clearly a clerical error, not a judicial error—that is, the error was not in failing to conduct a priors trial (the court did conduct one), but in failing to *record* that the priors trial had been conducted. Therefore, notwithstanding the passage of time and defendant's appeal, the trial court had both the right and the duty to correct the record.

II.
The Sentence Enhancement Based on Defendant's Priors Was Supported by Substantial Evidence

Defendant contends that even if the trial court had jurisdiction to rely on the April 3, 2014 proceedings, there was insufficient evidence to support a true finding on the prior conviction allegation.[11] In so contending, defendant does not

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[11] We are perplexed by the dissent's suggestion that defense counsel "properly did not attempt to raise" in this appeal purported legal errors in the priors trial. As this section discusses, defendant *did* raise such alleged legal errors in this appeal; indeed, approximately a third of the appellant's opening brief is devoted to such issues. Additional issues based on items not "in the record" can be raised in a habeas corpus petition.

challenge the sufficiency of the evidence included in the so-called "969b packet," but notes that the packet was never formally moved into evidence. He thus urges: "[T]here was, simply put, no evidence upon which the trial court determined the truth of the prior convictions." For the reasons that follow, we reject defendant's contention.

At the April 3, 2014 hearing, defense counsel offered "the 969b packet from the Department of Corrections," which previously had been marked as People's Exhibit 18. The packet contained a certified abstract of judgment in case number YA026579, which evidenced that on April 18, 1996, defendant had been convicted of two counts of home invasion robbery (§ 211) and one count of first degree residential burglary (§ 459), and had been sentenced to 11 years in state prison. The court asked defense counsel how he wanted to proceed; counsel responded: "I would just submit. I have nothing to present." Defendant then asked permission to address the court on a separate matter, and the court permitted him to do so.

After addressing defendant's issue, the court asked whether the parties were prepared to proceed on the adjudication of defendant's priors. Defense counsel responded, "Yes. I'm going to just submit on those, yes." The court then stated that it had looked at the certified copy of the conviction as alleged in case YA026579, and based thereon "would find that the priors as alleged are true . . . ."

We have reviewed the documents contained in the 969b packet, and we conclude that they amply support the trial court's finding that defendant was convicted of a prior serious felony within the meaning of section 667, subdivision (a)(1). "A common means of proving the fact and nature of a prior conviction is to

introduce certified documents from the record of the prior court proceeding and commitment to prison, including the abstract of judgment describing the prior offense. (Pen. Code, § 969b; Evid. Code, § 1280 [hearsay exception for contemporaneous official record]; see, e.g., *People v. Prieto* (2003) 30 Cal.4th 226, 258–259 (*Prieto*); *People v. Henley* (1999) 72 Cal.App.4th 555, 559–560 (*Henley*); *People v. Haney* (1994) 26 Cal.App.4th 472, 475 (*Haney*).) [¶] '[The] trier of fact is entitled to draw reasonable inferences from certified records offered to prove a defendant suffered a prior conviction. . . .' (*Henley*, *supra*, 72 Cal.App.4th 555, 561; see also *Haney*, *supra*, 26 Cal.App.4th 472, 475.) '[O]fficial government records clearly describing a prior conviction presumptively establish that the conviction in fact occurred, assuming those records meet the threshold standards of admissibility. (See Evid. Code, § 664 ["It is presumed that official duty has been regularly performed"].) Some evidence must rebut this presumption before the authenticity, accuracy, or sufficiency of the prior conviction records can be called into question.' (*People v. Epps* (2001) 25 Cal.4th 19, 27.)" (*People v. Delgado* (2008) 43 Cal.4th 1059, 1066.) Thus, if the prosecutor presents, by such records, prima facie evidence of a prior conviction that satisfies the elements of the recidivist enhancement at issue, and if there is no contrary evidence, the fact finder, utilizing the official duty presumption, may determine that a qualifying conviction occurred. (*Id.* at p. 1066; see also *People v. Tenner* (1993) 6 Cal.4th 559, 566–567 & fn. 3 [abstract of judgment and commitment form can satisfy People's burden to prove prior term of imprisonment beyond a reasonable doubt].)

Here, the 969b packet contained a certified abstract of judgment evidencing the prior strikes, as well as defendant's

fingerprints and a mug shot. Defendant did not introduce any evidence challenging the authenticity of the records, nor did he contend that the conviction was not of a prior serious felony. Accordingly, the trial court, acting as factfinder, properly determined that a qualifying conviction occurred.

Defendant does not contend that the 969b packet was not admissible or that, if admitted, it was not sufficient to prove he previously had been convicted of a serious felony. He argues merely that the prosecutor did not formally move the packet into evidence and, as such, there was no evidence to support the priors finding.

We disagree. Although best practices dictate that documents relied on by a party should be offered and received into evidence, "[i]t is well established that where the record shows that a document has been considered by the court and the parties as being in evidence, a reviewing court will not look for technical reasons to exclude [it] from consideration. . . ." (*Cohon v. Dept. Alcoholic Bev. Control* (1963) 218 Cal.App.2d 332, 335, fn. 10; accord, *Estate of Connolly* (1975) 48 Cal.App.3d 129, 132, fn. 4; *Reed v. Reed* (1954) 128 Cal.App.2d 786, 791.) "[T]he fact that no formal offer in evidence was made will not exclude it from consideration as part of the record on appeal. [Citations.] 'Where documents are not formally introduced, but it is apparent that the court and the offering party understood that they were in evidence, they must be so considered.' " (*Reed v. Reed*, *supra*, 128 Cal.App.2d at p. 791; see also *Miller v. Superior Court* (2002) 101 Cal.App.4th 728, 742 [applying *Reed*]; *People v. Mallory* (1967) 254 Cal.App.2d 151, 157 [court did not err in relying on hospital superintendent's report in denying defendant's application for release from state mental hospital: "It is true that

the report of the superintendent was not formally received in evidence. . . . The court, in announcing its order, quoted from the superintendent's letter, and no one objected to the letter at that time or at all. The court properly considered the letter."].)

In the present case, although the 969b packet appears not to have been formally received in evidence, the packet was marked as an exhibit without objection, and all parties treated the packet as if it were in evidence. Accordingly, we reject defendant's claim that there is insufficient evidence to support the trial court's findings on the priors allegation.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P.J.

I CONCUR:

BACHNER, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

LAVIN, J., Dissenting:

Defendant Jose Armando Zelaya appeals from a judgment entered after we vacated his sentence and remanded the matter to the trial court for the limited purpose of resentencing. In our prior opinion, we held that the court erred by increasing defendant's sentence by 10 years based on prior-conviction allegations that were neither admitted, nor tried, nor proven. Instead of resentencing defendant without regard to the prior-conviction allegations, however, the trial court concluded our opinion was based on a factual error and re-imposed defendant's original sentence. Defendant contends, and I agree, that the court exceeded its jurisdiction by altering the record, making new factual findings, and re-imposing the previously reversed sentence. As the re-imposed sentence is void, I would vacate defendant's sentence and remand with detailed instructions for resentencing. Accordingly, I respectfully dissent.

PROCEDURAL BACKGROUND

Defendant was convicted of various charges stemming from the October 2012 robbery of a Huntington Park liquor store. In an unpublished opinion filed October 23, 2015, we explained that the prosecution "alleged Zelaya had sustained three prior-felony convictions all stemming from the same 1996 case. Trial on these allegations was bifurcated. While the jury was deliberating on the substantive crimes, Zelaya waived jury trial, but not a bench trial, on the allegations. The priors trial was continued at least seven times, but neither a bench trial nor any other proceeding was ever conducted regarding the truth of the allegations. Nevertheless, proceedings went forward as if a true finding on the allegations had been made. For example, the court held

a contested hearing to determine whether to dismiss one or more strikes under *Romero*, then dismissed two of the prior strikes, and imposed a second-strike sentence and a five-year serious-felony enhancement based on the third. [¶] The People concede the record in this case does not contain a true finding on the prior convictions, but contend no finding was required because Zelaya 'voluntarily and intelligently waived his right to a trial and admitted his prior conviction[s].' " (*People v. Zelaya* (Oct. 23, 2015, B256544) [nonpub. opn.], p. 5 (*Zelaya I*).)

We rejected the People's argument and concluded the trial court violated defendant's due process rights when it imposed a sentence based on prior-conviction allegations that were neither tried nor admitted. We vacated defendant's sentence and remanded for resentencing. Our remand order specifically "decline[d] to direct the trial court to conduct a trial on the prior-conviction allegations ... ." (*Zelaya I*, *supra*, at p. 12.) Neither party petitioned for rehearing or review, and we issued a remittitur on December 28, 2015.

On February 8, 2016, the trial court held a hearing to address the remand order. The prosecutor "through the help of [the trial court's] judicial assistant, [had] ordered the transcript of the April 3rd, 2014 hearing."[1] Based on this transcript, the court concluded that our opinion was erroneous, and that a trial on the prior convictions had, in fact, taken place. The prosecutor

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[1] The original minute order from April 3, 2014 indicated that a priors trial was scheduled to take place that day and that defendant would not admit the prior convictions. It did not indicate that a priors trial was actually held or that the court found the prior-conviction allegations true. As such, the reporter's transcript for that date was not included in the record on appeal in *Zelaya I*.

urged the trial court to correct the minute order nunc pro tunc to correct the mistake and to re-impose the same sentence. Defense counsel submitted on the prosecutor's recommendation.

The trial court ultimately concluded that our order "just directed [it] to resentence in the event that the priors trial had not occurred. It did." Based on this interpretation, the court concluded "the state prison sentence of 25 years is correct and shall remain the same."

Defendant filed a timely notice of appeal.

DISCUSSION

Defendant contends that the trial court exceeded its jurisdiction when, instead of resentencing defendant as instructed, it altered the record in the prior appeal to indicate a priors trial took place, changed the minute order for that date to show that the court found the priors to be true, and re-imposed the original sentence. Accordingly, he argues, his sentence is void. The People appear to contend that the court correctly interpreted our instructions. The majority concludes that the remittitur was ambiguous, and that the ambiguity allowed for the possibility of a new priors trial. Since the court could have held a *new* trial, the majority reasons, it was similarly authorized to reimpose the findings from the *old* trial.

1. Law governing jurisdiction on remand

A reviewing court has authority to "reverse, affirm, or modify a judgment or order appealed from, or reduce the degree of the offense or attempted offense or the punishment imposed, and may set aside, affirm, or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial and may, if proper, remand the

cause to the trial court for such further proceedings as may be just under the circumstances." (Pen. Code, § 1260.)[2] Section "1262 provides in part that 'If a judgment against the defendant is reversed such reversal shall be deemed an order for a new trial, unless the appellate court shall otherwise direct.' Here we otherwise directed." (*People v. Dutra* (2006) 145 Cal.App.4th 1359, 1366 (*Dutra*).)

"The order of the reviewing court is contained in its remittitur, which defines the scope of the jurisdiction of the court to which the matter is returned. 'The order of the appellate court as stated in the remittitur, "is decisive of the character of the judgment to which the appellant is entitled. The lower court cannot reopen the case on the facts, allow the filing of amended or supplemental pleadings, nor retry the case, and if it should do so, the judgment rendered thereon would be void." ' [Citations.]" (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 701.) Put another way, after remittitur, "the trial court is revested with jurisdiction of the case, *but only to carry out the judgment as ordered by the appellate court*." (*Dutra*, *supra*, 145 Cal.App.4th at p. 1366, emphasis original.)

The remittitur directions are found in the "dispositional language of the opinion." (*Frankel v. Four Star International, Inc.* (1980) 104 Cal.App.3d 897, 902.) "The disposition constitutes the rendition of the judgment of appeal, and is the part of the opinion where we, in popular parlance, deliver the goods. 'The "judgment" on appeal must be distinguished from the appellate court's "opinion" in general. The body of the written opinion discusses the procedural history, the facts and the applicable law.

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[2] All undesignated statutory references are to the Penal Code.

The actual *judgment* is the one-paragraph *disposition* ... found at the end of the opinion." (*Ducoing Management, Inc. v. Superior Court* (2015) 234 Cal.App.4th 306, 312 (*Ducoing*).)

A "disposition is not intended to be a riddle, and the directions in the dispositional language, as conveyed by the remittitur, are to be followed by the trial court on remand. [Citations.]" (*Ducoing*, *supra*, 234 Cal.App.4th at p. 313.) "The issues the trial court may address in the remand proceedings are therefore limited to those specified in the reviewing court's directions, and if the reviewing court does not direct the trial court to take a particular action or make a particular determination, the trial court is not authorized to do so. [Citations.]" (*Ayyad v. Sprint Spectrum, L.P.* (2012) 210 Cal.App.4th 851, 859–860 (*Ayyad*); accord *Butler v. Superior Court* (2002) 104 Cal.App.4th 979, 982 ["When an appellate court's reversal is accompanied by directions requiring specific proceedings on remand, those directions are binding on the trial court and *must* be followed. Any material variance from the directions is unauthorized and void."].)

"Therefore, whether the trial court believed our decision was right or wrong, or had been impaired by subsequent decisions, it was bound to follow the remittitur." (*Dutra*, *supra*, 145 Cal.App.4th at p. 1367.) If the disposition was " 'imperfect, or impractical of execution, … the aggrieved party has his remedy in a petition for rehearing.' " (*Ducoing*, *supra*, 234 Cal.App.4th at p. 314.)[3]

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[3] The People, represented here by the same deputy attorney general who represented them in *Zelaya I*, did not petition for rehearing, clarifying modification, or review in that case.

"Whether the trial court correctly interpreted our opinion is an issue of law subject to de novo review." (*Ayyad*, *supra*, 210 Cal.App.4th at p. 859.)

2. *Zelaya I* and proceedings on remand

In *Zelaya I*, the only issue before us was whether the trial court erred in sentencing defendant to 10 additional years in state prison based on prior-conviction allegations that were not admitted, tried, or proven. In their brief in that appeal, the People conceded: "The prosecution did not present any evidence and the trial court did not make a formal finding regarding the prior convictions before doubling [defendant's] base sentence and adding a five-year enhancement for the prior strike." Notwithstanding this concession, the People argued that we should affirm the sentence because defendant impliedly admitted the prior-conviction allegations. Alternatively, the People argued, in passing, we should remand for a new trial on the allegations. We rejected the People's arguments and reversed.

The disposition in *Zelaya I* provided: "We vacate the sentence and remand for resentencing.[fn] In all other respects, we affirm. Upon resentencing, we direct the court to prepare a corrected minute order and an amended abstract of judgment, and to forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation." (*Zelaya I*, *supra*, at p. 12.)

The footnote to the first sentence of that disposition explained: "We decline to direct the trial court to conduct a trial on the prior-conviction allegations as neither party has presented us with authority for the proposition that a belated trial is the appropriate remedy under the circumstances before us. In each case cited to us, the defendant appealed after a priors trial was

held and prior-conviction allegations were found true. (See *Monge v. California* (1998) 524 U.S. 721 [double jeopardy does not bar retrial of priors allegation reversed for insufficient evidence]; *People v. Barragan* (2004) 32 Cal.4th 236 [retrial not barred by due process, law of the case, or res judicata].) Those cases did not have occasion to consider the proper remedy where sentence is imposed for enhancements that were neither admitted, nor proven, nor found true. (See *People v. Guevara* (2004) 121 Cal.App.4th 17, 27 ['cases may not be used for propositions not considered'].)" (*Zelaya I*, *supra*, at p. 12, brackets original.)

Upon remand, the trial court explained that it had "scheduled this matter for hearing due to—consistent with instructions from the appellate court. Appellate opinion was filed October 23rd of 2015 directing the Court to conduct a resentencing based on the matters that it noted in its opinion." The court acknowledged that "the appellate opinion said we are not asking that there be a trial on the priors[.]" Instead, "if I granted the request from the appellate court today, the directive from the appellate court today to reduce [defendant's] sentence ... just directed me to resentence." "This is the claim that got to the appellate court in directing me to reconsider, to modify the sentence that I imposed[.]" Rather than follow these clear instructions, however, the court added a caveat to our disposition, and concluded that we *actually* meant for the court "to resentence [defendant] **in the event that the priors trial had not occurred**." (Emphasis added.)

3. The remittitur was unambiguous.

The remittitur in *Zelaya I* explicitly directed the trial court to resentence defendant—directions the court apparently

understood. It did not instruct the court to do anything else. (See, e.g., *Coffee-Rich, Inc. v. Fielder* (1975) 48 Cal.App.3d 990, 998 [where remand order directed trial court to modify its findings and contained no direction for new findings, new finding inconsistent with the one previously approved by reviewing court exceeded scope of jurisdiction on remand].) Had we wanted the court to conduct additional fact-finding or record correction, we would have said so. (See, e.g., *Frankel v. Four Star International, Inc.*, *supra*, 104 Cal.App.3d 897 [remittitur directions, which remanded for clarification of factual findings supporting damages award, authorized trial court to re-determine amount of damages].) The majority nevertheless concludes these simple instructions were ambiguous. But how?

The majority explains: "although our disposition plainly 'vacate[d] the sentence and remand[ed] for resentencing' [citation], it did not direct the court *how* it was to resentence defendant. Specifically, our disposition did not simply direct the trial court to impose a reduced sentence. Instead, by stating in the footnote to the disposition that we "*decline to direct* the trial court to conduct a trial on the prior-conviction allegations ... [because the cited cases] did not have occasion to *consider the appropriate remedy* where sentence is imposed for the enhancements that were neither admitted, nor proven, nor found true," we appeared to suggest that the trial court should determine the appropriate remedy." (Maj. opn., p. 12.) That is, the majority concludes that our directions to resentence defendant *could* mean "resentence defendant," but could *also* mean "conduct a priors trial, *then* resentence the defendant." The majority is mistaken.

In criminal cases, the truth of a prior-conviction allegation is determined at *trial*—the part of a criminal case in which the government attempts to prove the charges beyond a reasonable doubt. (§ 1158 ["Whenever the fact of a previous conviction of another offense is charged in an accusatory pleading, and the defendant is found guilty of the offense with which he is charged, the jury, or the judge if a jury trial is waived, must ... find whether or not he has suffered such previous conviction."].) The trier of fact must render a *verdict* on all substantive charges and special allegations, and the clerk must record the verdict, before the trier of fact is discharged. (§ 1158 ["The verdict or finding upon the charge of previous conviction may be: 'We (or I) find the charge of previous conviction true,' or, 'We (or I) find the charge of previous conviction not true' ... . If more than one previous conviction is charged a separate finding must be made as to each."]; § 1164, subds. (a) ["When the verdict given is receivable by the court, the clerk shall record it in full upon the minutes"], (b) ["No jury shall be discharged until the court has verified on the record that the jury has ... reached a verdict ... including ... the truth of any alleged prior conviction whether in the same proceeding or in a bifurcated proceeding."].)

Once the clerk records the verdicts, the court orders a pre-judgment probation report (§ 1203) and sets a sentencing date (§ 1191). After resolving sentencing and new trial motions, the court *sentences* the defendant and enters judgment. (See § 1237, subd. (a) ["A sentence … shall be deemed to be a final judgment within the meaning of this section."]; *People v. Bauer* (1966) 241 Cal.App.2d 632 [judgment and sentence in criminal case are one in common parlance and contemplation]; Black's Law Dictionary (10th ed. 2014) [a *verdict* is a "jury's finding or

decision on the factual issues of a case."]; *ibid.* [a *sentence* is the "judgment that a court formally pronounces after finding a criminal defendant guilty; the punishment imposed on a criminal wrongdoer"].) Any appeal is taken from that sentence and judgment—not from a guilty verdict. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1094.) Absent a judgment, a defendant cannot appeal. (*People v. Mazurette* (2001) 24 Cal.4th 789, 792–793.)

Obviously, trial, verdict, and sentence are not synonymous; they are different stages of the criminal process. In light of the well-established principles discussed above, I cannot imagine how any trial judge directed to *resentence* a defendant could possibly conclude that his options included conducting a trial of the priors allegations. Indeed, it is plain from the transcripts that the court in this case did *not* read the remittitur that way.

Nor am I persuaded by the majority's assertion that the disposition's footnote, in which we declined to provide the People's requested relief "appeared to suggest that the trial court should determine the appropriate remedy" (maj. opn., p. 12)—or by the People's related argument that the court's actions were proper because we did not forbid them.[4] "The lower court has jurisdiction to consider *only* those issues specified in our disposition... . It is unnecessary and inappropriate for an

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[4] As the People devote a mere five paragraphs to this issue, their view isn't entirely clear. They seem to argue, however, that the remittitur *actually encompassed* the court's actions. Since the "remittitur did not explicitly order the trial court to strike the prior conviction findings," the People insist, the court reasonably interpreted our order to encompass any priors-related actions it might wish to take. Plainly, we did not order the court to strike the prior conviction findings because we concluded the court did not *make* any prior conviction findings.

appellate court to attempt to envision and to set forth in detail the entire universe of matters prohibited by its directions on remand. Acceptance of [plaintiff's] position would mean the lower court would be free to reopen any issue not specifically foreclosed by the reviewing court's remittitur directions. The case law is clear, however, that the trial court's jurisdiction on remand extends only to those issues on which the reviewing court *permits* further proceedings. [Citations.] The trial court may not expand the issues on remand to encompass matters outside the scope of the remittitur merely because the reviewing court has not expressly forbidden the trial court from doing so. [Citation.]" (*Ayyad*, *supra*, 210 Cal.App.4th at p. 863, fn. omitted.) Clearly, the footnote was meant to signal that we had not overlooked the People's requested remedy.

Because the plain language of the remittitur in *Zelaya I* did not explicitly permit post-remand fact-finding or record correction, "the superior court's later judgment was void … . [¶] When, as here, there is an appeal from a void judgment, [our] jurisdiction is limited to reversing the trial court's void acts." (*Griset v. Fair Political Practices Com.*, *supra*, 25 Cal.4th at p. 701.) Accordingly, I would reverse the judgment and the factual findings underlying that judgment and remand for additional resentencing.

4. Our opinion in *Zelaya I* does not support the court's interpretation of our order.

While this case can—and should—be decided under the simple, well-established rules discussed above, the case does not hinge on the clarity of the remittitur. "Where the directions to the trial court are ambiguous …, they must be interpreted in light of the reasoning and holdings found in the body of the

opinion." (*Lesny Development Co. v. Kendall* (1985) 164 Cal.App.3d 1010, 1021.) Even assuming some ambiguity in the remittitur, the court's actions were also unreasonable in light of the opinion as a whole.

At its core, *Zelaya I* was concerned with the State's failure to provide a criminal defendant with the due process he requested—and to which he was entitled. The opinion explained how and why the record in that case was "not a record of technical defect." (*Zelaya I*, *supra*, at p. 10.) The problems we addressed went beyond the court's failure to make explicit findings on some allegations. *Zelaya I* recognized that procedure matters, especially in matters of freedom and incarceration. We reversed because of the fundamental failure to provide defendant with any meaningful adversarial process to test the truth of the People's allegations. We reversed, in short, because defendant was entitled to a trial, demanded a trial, and did not get one.

To be sure, the opinion *also* reveals that we were missing an important transcript—but the majority cites no authority to support the proposition that such a discovery could vest the trial court with jurisdiction to correct the appellate record *and* draw legal conclusions about the effect of that record. Indeed, the majority's own authority proscribes such a view. (Maj. opn., p. 12, quoting *Ayyad*, *supra*, 210 Cal.App.4th at p. 863, fn. 7.)

Likewise, I have no quarrel with the proposition that the distinction between clerical errors (which can be corrected on remand) and judicial errors (which can't) rests on " ' "whether the error was made in rendering the judgment, or in recording the judgment rendered." ' [Citation.]" (Maj. opn., p. 18.) Certainly, the majority's cited cases hold that trial and appellate courts can correct errors in abstracts of judgment. I do not see, however,

how that proposition is relevant to this case. The trial court in this case accurately recorded the *judgment*—defendant's state prison sentence—entered on May 23, 2014. To the extent the April 3, 2014 minute order was inaccurate, any errors related to the *verdict* from the priors *trial*, not to the judgment. In any event, the trial court here plainly did more than correct a minute order.

5. Because *Zelaya I* only remanded for resentencing, defendant's current appeal was limited in scope.

Even assuming the remittitur was ambiguous, and assuming *Zelaya I* could be read to allow the trial court to conduct a new priors trial, *and* assuming the trial court actually interpreted the remittitur that way, which it plainly did not, the majority fails to overcome yet another roadblock—namely, that in an appeal following a limited remand for resentencing, the scope of the issues defendant could raise in this appeal were quite limited.

In California, every criminal defendant convicted on a plea of not guilty has a right to appeal the judgment of conviction. (§§ 1235, 1237; *Douglas v. California* (1963) 372 U.S. 353, 356–357.) As the transcript at issue was not produced in *Zelaya I*, defendant had no opportunity in his prior appeal to raise legal errors from that proceeding—and appellate counsel properly did not attempt to raise them here. (See *People v. Murphy* (2001) 88 Cal.App.4th 392, 396–397 [defendant could not attack conviction in second appeal after limited remand for resentencing].)

Even a cursory review of the transcript reveals plenty of potential issues. For example, defendant asserted his right to a trial on the priors allegations, but the subsequent proceeding

lacked any of the hallmarks of an adversarial process. Did that proceeding amount to a priors trial? Did trial counsel provide constitutionally ineffective assistance when he submitted on the allegations rather than putting the People to their proof? Does trial counsel's conduct during the priors proceeding buttress a claim for ineffective assistance during the trial on the substantive crimes? Further, during the purported priors trial, defendant gave the court a letter—that is not in the record—in which he apparently requested new counsel and asked to represent himself. Should the court have held a hearing under *People v. Marsden* (1970) 2 Cal.3d 118? Was defendant entitled to represent himself under *Faretta v. California* (1975) 422 U.S. 806?

In light of the limited nature of our remand in *Zelaya I*, however, defendant could not raise many of these issues in this appeal. To be sure, I don't know if defendant would have raised these issues or any others if he had been given the chance—but I am concerned that he has never had a meaningful opportunity to do so. (See, e.g., *People v. Henley* (1999) 72 Cal.App.4th 555, 565–566 [defendant had no opportunity to litigate issue in prior proceeding].) The majority's suggestion that defendant can raise any remaining issues in a habeas petition—without the benefit of the court-appointed counsel available to him in a direct appeal—is inadequate.[5] At minimum, the majority should grant any petition for rehearing seeking to raise issues arising from the new

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[5] For example, in California, the right to appellate counsel in criminal cases stems from the federal Constitution—but the federal Constitution does not require appointed counsel for habeas petitions or other collateral attacks to convictions. (*Pennsylvania v. Finley* (1987) 481 U.S. 551, 555.)

transcript or appoint counsel to prepare a habeas petition on his behalf.

In sum, I agree with the majority that *Zelaya I* was premised on the mistaken belief that a priors proceeding had never been conducted. The fact that a mistake was made, however, did not vest the trial court with jurisdiction to disregard the remittitur or circumvent our prior opinion. Therefore, I respectfully dissent.

LAVIN, J.