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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

CHARLES JOINER,

Defendant and Appellant.

D056622

(Super. Ct. No. MH101115)

APPEAL from a judgment of the Superior Court of San Diego County, Leo Valentine, Jr., Judge. Reversed and remanded.

In this case appellant Charles Joiner was found to be a sexually violent predator (SVP) within the meaning of the Sexually Violent Predators Act (Welf. & Inst. Code, § 6600 et seq. (SVPA or the Act)). Joiner appealed, attacking the trial court's rulings and the jury's verdict on a number of grounds.

In an unpublished opinion filed on September 21, 2012, we reversed the judgment and remanded the matter to the trial court for further proceedings because it was not clear from the record that the trial court understood it had the power to enter a verdict in favor of Joiner in the event the trial court determined that following the first trial of the People's petition the People failed to present sufficient evidence of Joiner's status as an SVP.

By order dated October 19, 2012, we granted the People's petition for rehearing in which the People argued that rehearing should be granted (1) to follow California's constitutional mandate that a court determine whether a state law error resulted in prejudice before setting aside a judgment; and (2) to consider two published cases that the People assert support their proposition that a trial court does not have authority to dismiss an SVP petition beyond the probable cause hearing.

For reasons we shall explain, *post*, we again reverse the judgment and remand the matter to the trial court for further proceedings because it is not clear from the record that the trial court understood it had the power to enter a verdict in favor of Joiner in the event the trial court determined that following the first trial of the People's petition the People failed to present sufficient evidence of Joiner's status as an SVP. We further reject Joiner's argument that his indefinite commitment under the SVPA violates his equal protection rights.

## FACTUAL AND PROCEDURAL BACKGROUND

### 1. *Sexual Assault History*

#### a. *Frances B.*

On December 31, 1979, Joiner raped an acquaintance, Frances B. Joiner drove Frances to a dark and secluded place, where he made sexual advances on her and she resisted. In response, Joiner slapped Frances three times, threw her against his car, threw her to the ground, and choked her. After threatening her, Joiner then raped Frances. After being raped, Frances tried to escape from Joiner by jumping over a fence. In doing so she severed a finger and Joiner was able to recapture her and take her back to his car.

As a result of his assault on Frances, Joiner was charged with kidnapping, forcible rape and forcible oral copulation. Joiner was allowed to plead guilty to kidnapping in exchange for the prosecutor's agreement to dismiss the other charges.

#### b. *Jill H.*

Prior to December 12, 1980, Joiner raped another acquaintance, Jill H. On December 12, 1980, Joiner went to Jill's home, knocked on her front door and told her "[Y]ou are out telling people I raped you. We are going to make it happen." Joiner then entered Jill's home, knocked her to the floor, raped her and attempted to force her to orally copulate him. Jill resisted and Joiner raped her a second time. Joiner's assault was interrupted when another man entered the home and stopped Joiner.

Joiner pled guilty to felony assault on Jill.

*c. Patricia D.*

On July 4, 1984, less than a year after being released on parole, Joiner attempted to rape a neighbor, Patricia D., and force her to orally copulate him. Joiner went to Patricia's house, made sexual advances toward her, which she rejected. In response, Joiner grabbed Patricia by the wrists, dragged her to her bedroom, choked her and threatened to kill her and burn her house down if she resisted. After removing Patricia's panty hose and panties, he discovered she was menstruating. Patricia then informed Joiner she had herpes. When Joiner tried to force her to orally copulate him, Patricia told him she had oral herpes as well. Joiner then told her to call her doctor to confirm she had herpes; while Joiner listened on a second telephone line, Patricia was able to escape.

As a result of the attack on Patricia, Joiner was convicted of assault with intent to commit rape and assault with intent to commit oral copulation and sentenced to 11 years in prison.

On March 18, 1997, following his release from prison for the assault on Patricia, Joiner was convicted of second degree burglary and again sentenced to prison.

*2. Trial Court Proceedings*

On May 2, 2007, while Joiner was still incarcerated on the burglary conviction, the district attorney filed a petition alleging Joiner is an SVP. On August 17, 2007, the trial court found probable cause to believe Joiner is an SVP. (Welf. & Inst. Code, § 6602.)<sup>1</sup>

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code unless otherwise specified.

The district attorney's petition was initially tried between February 25, 2009 and March 10, 2009. After three days of deliberation the jury advised the trial court that it was hopelessly deadlocked and the trial court declared a mistrial. Thereafter Joiner's counsel learned the jury voted eight to four in Joiner's favor.

Following the mistrial, Joiner moved to dismiss the petition on the grounds there was insufficient evidence to support it. In particular, he vigorously attacked the testimony of the two expert witnesses offered by the district attorney, Shoba Sreenivasan and Christopher Matosich. Joiner argued that although the experts concluded that he suffered from paraphilia, their conclusions were admittedly incomplete because Joiner had declined to be interviewed. Joiner also pointed out the experts' opinions were inconsistent in many respects with his behavior in prison and some aspects of the manner in which the predicate sex offenses were committed, in particular his ability to control himself when confronted with Patricia's claim she had herpes.

At the time the trial court ruled on Joiner's motion, it made the following statement: "So let me state, based upon the status of this case before this Court, the evidence that was received, that the trier of fact, the jurors, hung, and I understand it was [] eight-to-four of the petition not being true. It appears that the evidence that was before the jurors as related to the experts in the case, the jurors questioned the value and the credibility of the expert opinion given that they were prepared to, at least eight of them, dismiss this particular petition as not being true.

"It must also be stated that subsequent to the jury not being able to resolve the matter, that there has been communication to this Court from third parties indicating that

they have additional information which, if in fact is true, appears to this Court to be material and relevant on the issue of whether or not this petition is true. That evidence seems to provide perspectives and relevant material as relates to whether or not Mr. Joiner would be a threat to the community if he was released.

"It appears to the Court it's germane on one prong of the question that's before the trier of fact, and the Court believes that if it's admitted and brought before the trier of fact, it very well may result in a unanimous verdict of the petition not being true.

"Now, having said that, I would indicate for the record that given what this Court has heard, given the split in the jury not being able to reach a decision, given the new information that's been provided the Court, but for this Court believing it is without authority under Penal Code section 1385 to dismiss this matter, the Court would strongly consider granting respondent's motion.

"I don't see that I have legal authority to do so. So if, in fact, the Court's in error, I certainly would like the opportunity to reconsider that motion, but I don't believe there's any authority that provides for this Court to dismiss this matter on the basis of what has been brought to the Court. So for that reason the Court denies the motion."

Joiner filed a petition for a writ of mandate challenging the trial court's order, which we summarily denied on the grounds Joiner had an adequate remedy by way of appeal. Thereafter the district attorney's petition was tried a second time.

Sreenivasan and Matosich again testified Joiner suffers from paraphilia, a sexual deviancy which manifests itself in intense and recurrent fantasies, urges, and behaviors

involving sexual acts with nonconsenting partners. Both experts found traits of sexual sadism in the brutality, domination, containment and choking Joiner used in his assaults.

Both psychologists also again concluded Joiner was likely to reoffend. They based their respective opinions on actuarial assessments which showed a moderate-to-high risk Joiner would reoffend, the dynamic between Joiner's personality disorder and his paraphilia, his criminal history, including his poor performance on parole, and the continuous nature of his criminality. At the second trial the jury unanimously determined Joiner is an SVP. Following the jury's verdict, the trial court then entered an order committing Joiner to the Department of Mental Health for an indeterminate life term.

Joiner filed a timely notice of appeal.

## DISCUSSION

The first issue Joiner raises on appeal is his contention that following the mistrial the trial court erred in failing to grant his motion to dismiss. We asked the parties for additional briefing with respect to whether, in light of the fact the second jury eventually determined Joiner is an SVP, any failure to dismiss the petition earlier is now moot. We conclude that in light of our summary dismissal of Joiner's petition for a writ of mandate, the interests of justice require that we reach the merits of Joiner's procedural claim.

### I

#### *The Power To Terminate SVP Proceedings*

The SVP statute does not itself provide for dismissal of a petition following a finding of probable cause. (See *Bagratiun v. Superior Court* (2003) 110 Cal.App.4th 1677, 1683-1684.) However, the Supreme Court has recognized the inherent power of

courts to review and determine questions of law when they arise under the SVP statute, even when a mechanism for such review is not expressly set forth in the statute. (See *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 909-915 (*Ghilotti*).

In *Ghilotti* a district attorney filed an SVP petition which alleged that two expert evaluators had erroneously concluded the inmate was not likely to reoffend. The district attorney alleged the evaluators had erroneously interpreted the level of risk required by the statute. The trial court dismissed the petition as failing to meet the requirements of section 6601, subdivisions (d) and (e) that it be supported by two expert evaluations. The Court of Appeal denied the People's petition for a writ of mandate and the Supreme Court granted review. The Supreme Court agreed that the People could not avoid the requirement that its petition be supported by two expert evaluations, but found the People could challenge the evaluators' conclusions as to the level of risk required by the statute. Although the statute provided no specific means of making such a challenge, the court found inherent power in the trial court to make such a legal determination. "[T]he requirement that SVPA evaluators apply *criteria set forth in the statute* invokes the inherent judicial power to determine whether an evaluator's recommendation stems, on its face, from an inaccurate understanding of those criteria, and thus constitutes legal error." (*Ghilotti, supra*, 27 Cal.4th at p. 912.) Thus, the court concluded the director of the Department of Corrections "cannot be powerless to take action for the public safety when he disagrees, on legal grounds, with evaluators' conclusions that a person does not meet the criteria for commitment or recommitment." (*Ibid.*) The Supreme Court found the People could file an SVP petition even though the evaluators did not support it, the

alleged SVP could challenge the petition by way of a motion to dismiss, and in response the People could then assert the evaluators' legal error. (*Id.* at pp. 912-913.)

When the People fail to present sufficient evidence of one or more of the elements required for commitment as an SVP, plainly a question of law is presented. (See *People v. Mendoza* (2011) 52 Cal.4th 1056, 1079 [sufficiency of the evidence is a question of law].) It is axiomatic that on appeal we have the power to determine, as a question of law, whether an SVP commitment is supported by sufficient evidence. (See *People v. Mercer* (1999) 70 Cal.App.4th 463, 466.) We believe that when, following presentation of the People's case at trial, the record does not provide sufficient evidence of the elements required by the statute, the trial court also has inherent power to act on such a question of law and terminate proceedings on the People's petition in favor of the inmate.

Our willingness to recognize such inherent power in the trial court is borne out of both practical as well as analytical considerations. In the unusual case where, notwithstanding a finding of probable cause, it later turns out the case presented by the People at trial is legally insufficient, it makes little sense to require that a jury decide the issue and potentially leave the inmate with only an appellate remedy as the means of correcting a legal error. We do not believe the Legislature intended that the trial court be unable to confront and determine pure questions of law in an expeditious manner.

We recognize that in *Bagration v. Superior Court, supra*, 110 Cal.App.4th at pages 1687-1689, the court held that pretrial determination of the legal sufficiency of a petition by way of a motion for summary judgment is not permissible in an SVP proceeding because the reciprocal pretrial discovery which is the predicate for summary

judgment motions in civil cases is not available under the SVPA. We agree with the holding and reasoning of *Bagrations*. Here, however, once the People have presented their case at trial, it is ripe for review of its legal sufficiency without the need for any discovery or further proceedings.

With regard to the People's petition for rehearing, we conclude that nothing in the petition requires us to change our original holding.

First, the cases cited by the People in support of its petition for rehearing are inapposite. Neither *People v. Turner* (2000) 78 Cal.App.4th 1131 (*Turner*), nor *Gray v. Superior Court* (2002) 95 Cal.App.4th 322 (*Gray*), stand for the proposition that courts are powerless to dismiss SVP petitions for insufficient proof after a trial. In *Turner*, *supra*, 78 Cal.App.4th 1131, we concluded the trial court properly denied a motion to dismiss an SVP petition after a mistrial was declared in the first trial because the jury was deadlocked. (*Id.* at p. 1133.) We rejected the appellant's argument that section 6604 was ambiguous and should be construed as *barring* successive trials where the trier of fact could not make a finding beyond a reasonable doubt that a person is an SVP. (*Turner*, at p. 1140.) In this regard we stated: "When the unanimity and finality requirements of section 6603 are read together with the burden set forth in section 6604, they provide, as the trial court correctly noted, that *only if a jury makes a final unanimous finding, verdict, outcome or decision that the People failed to meet the required burden beyond a reasonable doubt, is the alleged SVP to be released.* We therefore believe the only reasonable construction of section 6604 is that it requires the jury or court to make a 'finding,' or render a verdict or decision, it is satisfied beyond a reasonable doubt the

alleged person is either an SVP or there are doubts whether he is an SVP. To hold such section to bar retrial if no finding or verdict can be made either way . . . would thwart the purpose of the Act to protect the public from 'a small but extremely dangerous group of [SVP's] that have diagnosable mental disorders . . . identified while they are incarcerated.' [Citations.] By enacting the Act, the Legislature intended to confine and treat such identified individuals 'until such time that it can be determined that they no longer present a threat to society.' " (*Turner*, at p. 1142, italics added.)

We further stated: "Although the Act does not specifically provide for retrial if there is a hung or deadlocked jury, as the trial court properly found, such is implied when all sentences of section 6604 are considered with the Act's 'finality' requirement that the jury finding be unanimously determined beyond a reasonable doubt. As the People note, if there is not a final determination, true finding or verdict in a civil case under the appropriate burden of proof, the action may be tried again as the court may direct. (Code Civ. Proc., § 616.) We presume the Legislature was well aware of both this long-standing civil statutory provision permitting retrial where a jury deadlock results in a mistrial and the application of the unanimity requirement of the beyond a reasonable doubt standard for civil jury trial commitments when it enacted the Act." (*Turner, supra*, 78 Cal.App.4th at pp. 1142–1143, fn. omitted.) Accordingly, we held: "Because we hold that section 6604 does not bar retrial if there is no unanimous jury 'finding' beyond a reasonable doubt, we conclude the trial court properly granted a mistrial and denied [appellant's] motion to dismiss." (*Turner, supra*, at p. 1143.)

Thus, the court in *Turner* only held that a retrial was *proper* following a hung jury in the first trial, not whether a trial court has the *power* to dismiss an SVP petition following such a hung jury.

*Gray* is also inapposite. In *Gray*, the court held that when an SVP petition is delayed for years and the state's evaluators develop a split opinion on the defendant's status as an SVP, the defendant is not entitled to summary judgment based upon that split of opinion. (*Gray, supra*, 95 Cal.App.4th at p. 328.) In *Gray*, the petition for SVP commitment was supported by two concurring evaluations, but later evaluations performed pursuant to section 6603, subdivision (c), resulted in splits of opinion among a number of different evaluators. The alleged SVP therefore argued the subsequent splits of opinion had undermined the "foundational underpinnings" of the petition. (*Gray, supra*, 95 Cal.App.4th at p. 324.) When the trial court disagreed and allowed the case to proceed, the alleged SVP filed a writ petition in the Court of Appeal. (*Id.* at p. 325.)

The Court of Appeal concluded it was unlikely the Legislature intended for dismissal when post-petition SVP evaluations resulted in a split of opinion. (*Gray, supra*, 95 Cal.App.4th at p. 328.) "[W]e think it more likely that the required new evaluations are intended for informational and evidentiary purposes." (*Ibid.*) The appellate court agreed the case should proceed: "Once a petition under the Act has been filed, and the trial court (as here) has found probable cause to exist, the matter should proceed to trial. In other words, once a petition has been properly filed and the court has obtained jurisdiction, the question of whether a person is a sexually violent predator should be left

to the trier of fact unless the prosecuting attorney is satisfied that proceedings should be abandoned." (*Id.* at p. 329.)

Again, *Gray* did not address the issue we are presented with here: whether the court has the power to dismiss an SVP petition following a first trial that resulted in a hung jury. We conclude that trial courts have such power.

Moreover, we reject the People's contention that rather than remanding this matter to the trial court for a reconsideration of the motion to dismiss, we should conduct a harmless error review under *People v. Watson* (1956) 46 Cal.2d 818 because the court's failure to understand its authority to dismiss the petition was an error of state law. The People reason that a *Watson* analysis here should entail *this* court reviewing the evidence from the trial court and determining whether there was sufficient evidence sustain the petition. This contention is unavailing.

If the record affirmatively shows that a trial court misunderstood the proper scope of its discretion, remand to the trial court is *required* to permit the court to exercise its informed discretion, with an awareness of the full scope of its discretion and applicable law. (*People v. Rodriguez* (1998) 17 Cal.4th 253, 257; *People v. Fuhrman* (1997) 16 Cal.4th 930, 944.) Thus, the appropriate remedy is to remand to the trial court to exercise its discretion in accordance with the principles set forth in this opinion.

Moreover, had the court known it had the discretion to dismiss the SVP petition it could have found certain evidence or testimony presented at the first trial not to be credible and could have found insufficient evidence to sustain the petition based upon such a review of the record of the first trial. If it had, we would not be in a position to

reach a different conclusion based upon our own review of the record in the first trial. Accordingly, the appropriate remedy is for us to remand this matter to allow the court to exercise its discretion in the first instance based upon its review of the record in the first trial.

## II

### *Equal Protection Claim*

Like the appellant in *People v. McKee* (2010) 47 Cal.4th 1172 (*McKee I*), Joiner contends his indefinite commitment under the Act violates equal protection principles because he is subject to a greater burden to obtain release than persons committed under the Mentally Disordered Offenders Act (Pen. Code, § 2960 et seq.) or after being found not guilty by reason of insanity (Pen. Code, § 1026.5, subd. (a)). The California Supreme Court did not decide this issue in *McKee I*. Instead, it remanded the matter to us and directed us to remand the matter to the trial court for an evidentiary hearing to determine whether the People could demonstrate a constitutionally sufficient basis for the disparate treatment of people committed as sexually violent predators. (*McKee I, supra*, 47 Cal.4th at pp. 1208-1209.)

The trial court conducted the required hearing and determined the People met their burden of justifying the disparate treatment. We recently affirmed the trial court's decision on appeal. (*People v. McKee* (2012) 207 Cal.App.4th 1325, 1330-1331 (*McKee*

*II.*)<sup>2</sup> Specifically, we stated "the disparate treatment of [sexually violent predators] under the Act is reasonable and factually based and was adequately justified by the People at the evidentiary hearing on remand. Accordingly, we conclude the Act does not violate McKee's constitutional equal protection rights." (*Id.* at p. 1348.) We based our conclusion on the People's evidence showing: (1) sexually violent predators bear a substantially greater risk to society than mentally disordered offenders and people found not guilty by reason of insanity; (2) sexually violent predators are significantly more likely to recidivate; (3) sexually violent predators pose a greater risk and unique dangers to particularly vulnerable victims, such as children; and (4) the diagnoses and treatment needs of sexually violent predators differ from mentally disordered offenders and people found not guilty by reason of insanity. (*Id.* at p. 1347.)

Our holding and reasoning in *McKee II, supra*, 207 Cal.App.4th 1325 applies to this case as well. We, therefore, conclude Joiner's indeterminate commitment under the Act does not violate equal protection principles.<sup>3</sup>

### III

#### *Remand*

In denying Joiner's motion to dismiss, it does not appear the trial court believed it had such inherent authority to dismiss the petition if it were to conclude that the evidence

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<sup>2</sup> As our decision in *McKee II, supra*, 207 Cal.App.4th 1325, postdated the parties' briefs, we provided the parties an opportunity to submit supplemental letter briefs addressing the application of our decision to this case.

<sup>3</sup> In light of our disposition of Joiner's appeal, we need not and do not consider the additional issues he has raised.

that the People presented at trial was insufficient. We believe the interests of justice will best be served by giving the trial court an opportunity to fully consider Joiner's argument in light of our conclusion that the trial court had the power to review the sufficiency of the evidence presented at the first trial. Thus, we will reverse the judgment of commitment and remand so that the trial court can consider the merits of Joiner's motion to dismiss.

In the event the trial court determines there was sufficient evidence presented at the first trial and that it properly denied Joiner's motion in the first instance, the trial court is directed to enter judgment on the second verdict. In that instance, Joiner may seek review of the trial court's ruling on the motion as well as challenge errors he believes occurred during the second trial.

In the event the trial court determines there was insufficient evidence presented at the first trial, the trial court should enter a verdict determining Joiner is not an SVP and a judgment in his favor on the verdict. The People may then challenge that judgment on appeal; on such an appeal by the People, Joiner may challenge errors which occurred in the second trial by way of a prophylactic cross-appeal.

We offer the following observations for the guidance of the trial court and parties on remand. The inherent power we have recognized here is quite limited and does not give the trial court the power to weigh the evidence presented by the People. In determining the sufficiency of evidence, the trial court must review the whole record in the light most favorable to the People "and decide 'whether it discloses substantial evidence . . . such that a reasonable trier of fact could find the defendant guilty beyond a

reasonable doubt.' [Citation.] Under this standard, the court does not ' "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt."

[Citation.] Instead, the relevant question is whether, after reviewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (*People v. Hatch* (2000) 22 Cal.4th 260, 272.)

#### DISPOSITION

The judgment of commitment is reversed and remanded for further proceedings consistent with the views we have expressed.

NARES, J.

I CONCUR:

AARON, J.

BENKE, Acting P. J., Concurring and Dissenting.

I concur in the majority opinion insofar as it determines that in light of our summary denial of Joiner's petition for a writ of mandate, the interests of justice require that we dispose of Joiner's procedural argument on the merits. I also agree the trial court has the power to terminate proceedings under the Sexually Violent Predators Act (SVPA), if the trial court determines there is insufficient evidence to support commitment. (See *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 909-915.)

However, I respectfully dissent from the majority's disposition. The inherent power to terminate SVPA proceedings, which both the majority and I now recognize,<sup>1</sup> is not in any sense discretionary. The unanimity and finality requirements of section 6603, read in light of the proof beyond a reasonable doubt burden set forth in section 6604, make it plain that a trial court, once it has determined there is probable cause to believe an inmate is a sexually violent predator (SVP), has no *discretionary* power to dismiss an SVPA petition. (See *People v. Turner* (2000) 78 Cal.App.4th 1131, 1142; *Gray v. Superior Court* (2002) 95 Cal.App.4th 322, 329.)

The inherent power to act provided by *Ghilotti*, arises only with respect to a question of law. Thus, as the majority recognizes, where there is insufficient evidence of the elements required by the statute, the trial court is presented with a question of law and must act. (Maj. opn., *ante*, at p. 9; see also *People v. Mendoza* (2011) 52 Cal.4th 1056,

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<sup>1</sup> I am unaware of any case which has recognized this power. Thus, I suspect the majority will be asked by one or more of the parties to publish their opinion.

1079.) This is simply not an instance where an appellant is entitled to remand so that the trial court may exercise its discretion.<sup>2</sup>

The fact that the power we recognize is an inherent power to act as a matter of law governs our disposition. Because that power only arises as a question of law, even if the trial court was unaware of that power, we are as well-equipped as the trial court to determine whether there was sufficient evidence of the statutory elements. More importantly, we are not only equipped to do so, we are required to do so. This case comes to us by way of appeal from a final judgment and we are therefore constrained by article VI, section 13 of the California Constitution. Under article VI, section 13, we may not disturb the judgment in the absence of prejudicial error. (*People v. Steele* (2000) 83 Cal.App.4th 212, 224.) If there was, as I think the record plainly shows, sufficient evidence presented at the first trial to show that Joiner is an SVP, he was not prejudiced by any failure by the trial court to recognize its inherent power to terminate proceedings.

I would affirm the judgment.

BENKE, Acting P. J.

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<sup>2</sup> I note *People v. Rodriguez* (1998) 17 Cal. 4th 253, 257 and *People v. Fuhrman* (1997) 16 Cal.4th 930, 944, upon which the majority rely, involved the remedy available when the record affirmatively shows a trial court has misunderstood its discretionary power under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.