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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. MARIO R. ESTRADA, Defendant and Appellant.	No. _____ (Court of Appeal No. B260573) (Los Angeles County Superior Court No. GA025008)

PETITION FOR REVIEW

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	
Plaintiff and Respondent,	)	No. _____
	)	
v.	)	(Court of Appeal No.
	)	B260573)
MARIO R. ESTRADA,	)	
	)	(Los Angeles County Superior
Defendant and Appellant.	)	Court No. GA025008)
_____	)	

PETITION FOR REVIEW

TO: THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA

Pursuant to rule 8.500 (a)(1) of the California Rules of Court, appellant, Mario Estrada, requests that this Court review the published opinion of the Court of Appeal, Second Appellate District, Division Eight, which affirmed the trial court's denial of his post-judgment, Proposition 36 petition, seeking recall of his third "strike" sentence and resentencing to a second "strike" sentence. A copy of the Court of Appeal's opinion, filed December 23, 2015, is attached hereto as "Opinion." No petition for rehearing was filed.

QUESTION PRESENTED FOR REVIEW

Under Proposition 36 which provides for the possibility of re-sentencing for defendants not convicted of a current serious offense, can a court review the transcripts of the defendant's preliminary hearing, and make findings of fact that the defendant engaged in conduct which disqualifies him from Proposition 36, even though those findings were not made at the time by the trier of fact, nor were those findings necessary to explain the conviction?

STATEMENT OF THE CASE

In 1996, appellant was convicted on his plea of grand theft person (Pen. Code, § 487, subd (c).) Based on his admission that he had two qualifying "strike" prior convictions (Pen. Code, §§ 667, 1170.12), he was sentenced under the Three Strikes Law to an indeterminate term of twenty-five-years-to-life. (CT[1] 7, 21)

Following the November, 2012, enactment of Proposition 36 by the voters, appellant filed a petition for recall of the third "strike" sentence. (CT 1-2) Following its review of the transcript of defendant's preliminary hearing, the court denied the petition on the basis of its factual finding that appellant was armed with a firearm in the commission of the offense, an excluding factor under Proposition 36. (Pen. Code, §§ 667, subd. (c)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii), 1170.126, subd. (e)(2).) (CT 159-175)

Appellant timely filed a Notice of Appeal from the denial of his post-judgment, statutory motion. (CT 176) The appeal lies. (Pen. Code, § 1237; *Teal* v. *Superior Court* (2014) 60 Cal.4th 595.)

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[1]/ The record on appeal consists of a single volume of a Clerk's Transcript, which will hereinafter be referred to as "CT," and a single volume of an Augmented Reporter's Transcript, which will hereinafter be referred to as "ART."

STATEMENT OF FACTS

Appellant entered a Radio Shack store, was shown a car stereo by a salesman, and offered to buy it. When the salesman started to "ring up" the purchase, appellant instead ordered the salesman to give appellant the cash that was in the register. After the salesman did so, appellant left the store. (CT 64-70)

NECESSITY FOR REVIEW AND ARGUMENT

Review is necessary in this case both to settle an important question of law which affects large numbers of cases and to address a split in the opinions of the lower appellate courts.

Proposition 36, passed by the voters in the election held November 6, 2012, amended the Three Strikes Law to provide for second "strike," i.e., doubled sentencing, for defendants whose current offense is neither violent nor serious and who are not otherwise excluded from benefitting from the statute under specific statutory criteria.

The initiative amended Penal Code sections 667, subdivision (e)(2) and 1170.12, subdivision (c)(2), by adding subdivision (C) to provide that a defendant with two or more prior "strikes" must be sentenced as a second "striker" under subdivisions (c)(1) and (e)(1), rather than subdivisions (c)(2) and (e)(2), unless the current offense is a violent or serious offense or an enumerated excluded offense or unless the prior strike offense is an enumerated excluded offense. Among the excluded current offenses is one in which the defendant was armed with a weapon during the commission of the offense.[2]

The initiative also added section 1170.126 to provide that defendants previously sentenced under the Three Strikes Law to a life sentence, who would have qualified under

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[2]/ Penal Code section 667, subd. (e)(2)(C)(iii) provides: "During the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person." (See also section 1170.12, subd. (c)(2)(C) (iii) [containing substantively identical language].)

the initiative for a second "strike" sentence, can file a motion to recall that sentence with the court that sentenced him, be appointed counsel, and obtain a re-sentencing.

In the instant case, appellant had been charged with a number of offenses occurring on three separate days in 1995. Concerning the incident at the Radio Shack store, he was charged with armed robbery, grand theft person, false imprisonment and burglary, all alleged to have been accompanied by appellant's use of a gun. (CT 123-132, 148-157) However, appellant pled guilty only to the grand theft charge and the other charges as well as the arming and use allegations were dismissed. (*Ibid.*)

Nevertheless, the court here, after reviewing the reporter's transcript of testimony presented at appellant's preliminary hearing, made the finding that appellant was armed, which precluded him from recall and resentencing under section 1170.126 because his crime fell within Penal Code sections 667, subdivision (e)(2)(C)(iii), and 1170.12, subdivision (c)(2)(C)(iii) (hereinafter referred to as "subdivision (iii)"), which exclude a defendant from eligibility if, "[d]uring the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person."

On appeal, appellant argued that, instead of determining the "nature" of defendant's actual conviction, the court improperly reviewed the trial record looking for evidence of arming, and made its own factual finding that appellant was armed during the commission of the offense. The Court of Appeal rejected this argument, ruling that the

lower court could review anything that fell within the "record of conviction" to make a factual finding that was not pled or proven below and that was wholly unnecessary to the conviction. (Slip. Opn., at p. 6.) And, in doing so, the Court "distinguished" another Court of Appeal opinion that held otherwise, finding that that opinion was applicable only if the factual finding was "wholly unrelated" to the conviction, which the finding here was not. (Slip. Opn., at p. 7.)

For the reasons that follow, appellant urges this Court to grant review of this decision, and hold that a proper review of the record of conviction does not support a finding that defendant's *conviction* was for an offense during the commission of which appellant was armed.

A. A Proper Review of the Record of Conviction Does Not Support the Trial Court's Finding That Appellant Was Armed with a Firearm During Commission of His Current Offense of Possession of a Firearm by a Felon

1. The Nature of the Inquiry

Prior to its amendment by Proposition 36, the Three Strikes Law provided that a third strike sentence could be imposed if the defendant had suffered at least two prior convictions for crimes that qualified as serious felonies. It further designated some specific crimes as serious felonies and provided that some conduct could make other, unlisted crimes, serious felonies, and therefore, "strikes." These conduct-based factors that rendered otherwise non-serious offenses "strikes" included such things as whether the building burglarized was a residence (which at the time was not an element of any

crime) or whether the defendant personally inflicted great bodily injury on a non-accomplice. Because these facts were not required for the conviction itself, the question arose as to how a trier of fact could find that a prior conviction factually qualified as a serious felony, "strike," when the judgment of conviction itself did not establish that fact.

In *People v. Guerrero* (1988) 44 Cal.3d 343, this Court held that the trier of fact could look behind the judgment of conviction to determine whether the crime was a serious felony based upon a non-elemental fact. *Guerrero* limited the inquiry to review of only the record of conviction (no new evidence may be presented) to determine the narrow issue of whether the *conviction* was for qualifying conduct. (*Id.* at p. 345; *People v. McGee* (2006) 38 Cal.4th 682, 691 [relevant inquiry is what is the nature or basis of the crime of conviction]; *People v. Woodell* (1998) 17 Cal.4th 448, 459 ["the ultimate question is, of what crime was the defendant convicted"].)[3]

With the passage of Proposition 36, for the most part, a third strike sentence may only be imposed if the current felony being sentenced is itself serious. (See *People v. Johnson and Machado* (2015) 61 Cal.4th 674, 680-681.) Proposition 36, however, also

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[3]/ An extensive body of case law developed concerning what documents and materials were properly included in the "entire record" of a prior conviction (See e.g., *People v. Bartow* (1996) 46 Cal.App.4th 1573 [transcripts of testimony]; *People v. Goodner* (1991) 226 Cal.App.3d 609 [admissions]; *People v. Garcia* (1989) 216 Cal.App.3d 233 [probation report]; *People v. Blackburn* (1999) 72 Cal.App.4th 1520 [preliminary hearing transcript where prior conviction was by plea]; *People v. Castellanos* (1990) 219 Cal.App.3d 1163; *People v. Reed* (1996) 13 Cal.4th 217 [witnesses barred]; *People v. Dill* (1990) 218 Cal.App.3d 372 [out-of-state records]; *People v. Woodell, supra*, 17 Cal.4th 448 [appellate opinion].)

added subdivision (iii) with new conduct-based factors that could render a non-serious offense subject to a third strike sentence. And, it further provided that prisoners serving third strike sentences for non-serious offenses may petition to have their sentences recalled and reduced. (*Id.* at pp. 679-680; Pen. Code, § 1170.126, subd. (b).)

The first decision that a trial court must make upon receiving a Proposition 36 recall petition is whether the petitioner is eligible for resentencing. (Pen. Code, § 1170.126, subd. (f); see also *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1336-1337.) This includes finding that the sentence is not imposed for any offense excluded by subdivision (iii). (Pen. Code, § 1170.126, subd. (e).)

Because the exclusionary language of subdivision (iii) refers, not to statutory violations or enhancements, but to specific facts that render an otherwise eligible crime ineligible, the finding under subdivision (iii) "is not limited by a review of the particular statutory offenses and enhancements of which petitioner was convicted." (*People v. Bradford*, *supra*, 227 Cal.App.4th at p. 1332.) Rather, it is a determination analogous to that made in the *Guerrero* circumstance, and thus, the same rules are apt. (*Id.* at pp. 1337-1338; see also *People v. Berry* (2015) 235 Cal.App.4th 1417, 1427; *People v. Oehmigen* (2015) 232 Cal.App.4th 1; *People v. Hicks* (2015) 231 Cal.App.4th 275.)

Many appellate courts reviewing section 1170.126 eligibility determinations have used the rules in the *Guerrero* line of cases. Several, including the court here, applied only that part of the *Guerrero* rule limiting the evidence to be considered to that found in

the record of conviction without also limiting the nature of the inquiry to discerning the significance of the conviction and what conduct the conviction represents. (See e.g. *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1048-1049.) This partial application of the *Guerrero* rule inappropriately grants the trial court powers not included in the recall statute and does not apply Proposition 36 as written. Both the language of the statute and basic rules of statutory construction lead to the conclusion that the full *Guerrero* rule that limits both the records that may be considered *and* the nature of the inquiry being made must be applied in making the eligibility finding.

a. Statutory Construction Demonstrates that the Eligibility Finding Is Meant to be Determined Under the Full *Guerrero* Test

Penal Code section 1170.126 creates a multi-step process for reduction of sentences for qualified defendants. The first of these is a determination of eligibility, the second is the determination of suitability, and the last is the determination of the appropriate determinate term if the defendant is both eligible and suitable for a reduction of his or her sentence. (See Pen. Code, § 1170.126, subd. (f); *People v. Bradford*, *supra*, 227 Cal.App.4th at pp.1336-1337; *People v. Berry*, *supra*, 235 Cal.App.4th at pp. 1420-1421, 1424-1425.)

As to the first inquiry, the court has no discretion; eligibility is a question of law. (See *People v. Berry*, *supra*, 235 Cal.App.4th at pp. 1420-1421; *People v. Oehmigen*, *supra*, 232 Cal.App.4th at p. 7 [eligibility is not a question of fact; it is a question of law based upon properly considered facts in the record of conviction]; see also *People v.*

Bradford, *supra*, 227 Cal.App.4th 1322, 1336-1340 [similarly noting that Prop. 36 eligibility determination does not involve a discretionary determination by the trial court or an "evidentiary hearing," but rather a *Guerrero*-type inquiry based on the set trial record].)

Section 1170.126 does not give much guidance on how the eligibility determination is to be made. It merely states that the determination is to be made on the basis of the petition, and that the petition shall state all the current felonies upon which the third strike sentences are being served and all of the prior felonies that were alleged and proved as "strikes." (Pen. Code, § 1170.126, subds. (d) & (f).) It additionally provides that a defendant is eligible if his "current sentence was not imposed for any of the offenses appearing in" Penal Code sections 667 subdivision (e)(2)(C)(i) to (iii), and 1170.12, subdivision (c)(2)(C)(i) to (iii), and his priors are not listed in subdivision (iv) of those sections. (Pen. Code, § 1170.126, subd. (e).)

This summary treatment suggests that the eligibility determination was meant to be straight-forward and based upon established facts. (See *People v. Bradford*, *supra*, 227 Cal.App.4th at p. 1337 [contrast between the brief outline for eligibility determination and the extended discussion of suitability procedures demonstrates no hearing on eligibility was anticipated by the statute]; *People v. Berry*, *supra*, 235 Cal.App.4th at p. 1420 [an inmate is eligible if his "convictions and related factual findings" warrant it; thereafter, court may expand inquiry and make factual findings to exercise discretion

based on dangerousness]; see also *People v. Johnson and Machado*, *supra*, 61 Cal.4th at p. 692, ["reasonable explanation for the information required to be set forth in the petition is found by considering *what has been proved and what remains to be proved. . .* There are other facts and circumstances relevant to the decision whether to resentence the inmate, but these other facts and circumstances must be established in the resentencing proceeding; they are *not established based on the petition for resentencing*." [emphasis added].) It further suggests an expectation that existing law would be used to make the determination. (See *People v. Scott* (2014) 58 Cal. 4th 1415, 1425 [body enacting statute is deemed to be aware of existing law and to have enacted a statute in light thereof]; *People v. Weidert* (1985) 39 Cal.3d 836, 844 ["The enacting body is deemed to be aware of existing laws and judicial constructions in effect at the time legislation is enacted. [Citations] This principle applies to legislation enacted by initiative. [Citations]"].)

Proposition 36 was not written in a vacuum. At the time of its enactment in 2012, *Guerrero* had been the law for 24 years. Thus, for nearly a quarter of a century, California law had provided a mechanism for determination of conduct-based factors as they applied to the Three Strikes Law. (See *People v. Guerrero*, *supra*, 44 Cal.3d 343.) Thus, when Proposition 36 included conduct-based exclusionary factors and provided that those factors would apply retrospectively as well as prospectively, and further provided that the retrospective application would be based upon the offense underlying the current sentence, it must be deemed to have intended that the long-standing *Guerrero* rule apply

to the retrospective determination of conduct-based disqualifying factors. (See *People v. Scott*, *supra*, 58 Cal.4th at p. 1425; *People v. Weidert*, *supra*, 39 Cal.3d at p. 844; see also *People v. Johnson and Machado*, *supra*, 61 Cal.4th at pp. 690-694 [interpreting the statute based upon the historical operation of the Three Strikes Law].)

That rule encompasses more than simply a limitation of the evidence to be reviewed. It includes a limitation of the nature of the inquiry. The inquiry is not a new factfinding endeavor. Rather, it is a determination of what facts underlay the already established conviction. (See *People v. McGee*, *supra*, 38 Cal.4th at 706; *People v. Wilson* (2013) 219 Cal.App.4th 500, 510.) The *Guerrero* rule does not permit a court to look to the entire record of conviction and find new facts based upon the evidence there. (*Ibid.*)

As this Court stated in *Guerrero*, a review of the record of the prior conviction does not allow a "relitigation" of the circumstances of the crime. (*People v. Guerrero, supra*, 44 Cal.3d at p. 355.) What is relevant from the record of conviction is that evidence which shows the nature of defendant's conduct underlying the *conviction.* (*People v. Woodell, supra*, 17 Cal.4th at p. 459.) Thus, to determine whether a conviction encompasses relevant conduct, the court's inquiry is limited to identifying the "basis of the crime of which the defendant was *convicted"* (*People v. McGee*, *supra*, 38 Cal.4th at p. 691 [emphasis added]), and that determination must be made by examining only the record of the prior proceedings. (*Ibid.* [relevant inquiry is what is the nature or basis of the conviction]; see also *People v. Woodell, supra*, 17 Cal.4th at pp. 454–461; *People v.*

Myers (1993) 5 Cal.4th 1193, 1198–1201; *People v. Guerrero, supra*, 44 Cal.3d at p. 355. [We "allow the trier [of fact] to look to the record of the conviction—but no further—. . .: it effectively bars the prosecution from relitigating the circumstances of a crime committed years ago . . . "].)

This Court reiterated this view in *People v. Trujillo* (2006) 40 Cal.4th 165, 179-180. There, the defendant had prior convictions for inflicting corporal injury and assault. At issue was whether he used a weapon in committing the former offense such that the offense would qualify as a "strike." In the prior case, the defendant had pled guilty to the charge and an allegation that he had used a weapon was stricken. However, the defendant had told the probation officer in a post-plea interview that he had stabbed the victim with a knife. The prosecutor sought to use this admission as proof that the defendant had used a deadly weapon. (*People v. Trujillo*, *supra*, 40 Cal.4th at pp. 179-180.) This Court held that the statement could not be used because the statement did not reflect "the facts of the offense for which [the defendant] was convicted." (*Id.* at p. 180.)

This Court further explained:

> "A statement by the defendant recounted in a postconviction probation officer's report does not *necessarily* reflect the *nature of the crime of which the defendant was convicted.* In the present case, for example, the prosecution did not attempt to prove that defendant used a knife and, instead, entered into a plea bargain in which it dismissed the allegation that defendant used a deadly or dangerous weapon and committed an assault with a deadly weapon. The prosecution could not have compelled defendant to testify, and thus could not have used defendant's subsequent admission that he stabbed the victim to convict him. Once the court accepted his plea, defendant could admit to the probation officer having

> stabbed the victim without fear of prosecution, because he was clothed with the protection of the double jeopardy clause from successive prosecution for the same offense. [Citation omitted] *Defendant's admission recounted in the probation officer's report, therefore, does not describe the nature of the crime of which he was convicted and cannot be used to prove that the prior conviction was for a serious felony.*" (*Ibid.*; emphasis added.)

Therefore, under *Guerrero*, the record of conviction is not "evidence" from which the court can make new findings of unadjudicated facts. Rather, the record is used as "evidence" of what facts were already found as reflected by the conviction. That is, the inquiry is not as to what *additional* factual findings the evidence may have supported, but rather, what factual findings were made to support the conviction. (See *People v. Berry*, *supra*, 235 Cal.App.4th at p. 1427 [court's inquiry must focus on the evidence underlying the offense of conviction, "not on assessing what *other* offenses might also have been supported by the evidentiary record" (emphasis original)].)

Thus, where a case involves factual disputes that the trier of fact did not have to resolve to reach its verdict, a court cannot later make findings of such disputed facts to determine that the crime involved conduct making it a serious felony. (See *People v. McGee*, *supra*, 38 Cal.4th at 706; *People v. Wilson* (2013) 219 Cal.App.4th 500, 510.) Rather, the court must determine the nature of the *conviction* - whether the conduct on which the *conviction* was based clearly satisfied the requirements of a serious felony. (*People v. McGee*, *supra*, 38 Cal.4th at 706.) Therefore, the court is not making a factual finding "based upon disputed facts about prior conduct not admitted by the defendant or implied by the elements of the offense." (*People v. Wilson*, *supra*, 219 Cal.App.4th at p.

516 [explaining why the *Guerrero* rule does not operate in a manner that could offend the federal constitution].)

Use of this complete *Guerrero* rule that limits the inquiry to the nature of the *conviction,* and nothing more, best comports with the language of Penal Code section 1170.126, subdivision (e). Subdivision (e) provides that an inmate "is eligible for resentencing if: . . . (2) The inmate's *current sentence was not imposed for any offenses appearing in* . . . [subdivision (iii)]." (Emphasis added).[4] As the court in *Berry* put it, subdivision (e) "details which inmates are "eligible" for resentencing, based upon *what they were sentenced for originally.*" (*People v. Berry, supra*, 235 Cal.App.4th at p. 1424 [emphasis original].)

A sentence is only imposed upon a *conviction.* Thus, based upon the plain language of Penal Code section 1170.126, the conviction must control the inquiry. (See *People v. Park* (2013) 56 Cal.4th 782, 796 [look first to the language of the statute itself to determine its meaning; *People v. Weidert, supra*, 39 Cal.3d at p. 843 [if statutory language is clear rely on it]; *People v. Berry, supra*, 235 Cal.App.4th at pp. 1424-1427 ["inquiry must focus on the evidence underlying the offense for which the defendant was previously convicted" not "what *other* offenses might also have been supported." at p.

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[4] / Although this structure is odd in the context of subdivision (iii), which starts off with "during the commission of the current offense," it is most reasonably read to require that "an inmates current sentence was not imposed for any offenses, [during the commission of which]" the defendant engaged in disqualifying conduct.

1427, emphasis original].)

Furthermore, this interpretation that limits the inquiry to finding what conduct the conviction reflects rather than permitting a finding of new additional facts comports more closely with the statute's apparent intent to apply identical rules prospectively and retrospectively, except that retrospective application can be denied upon a finding of dangerousness. (See *People v. Johnson and Machado*, *supra*, 61 Cal.4th at p. 691.) As this Court noted in *Johnson and Machado*, "except for the resentencing statute's provision granting the trial court authority to deny resentencing if reducing the sentence would pose a danger to the public, the resentencing statute's exceptions to the new sentencing rules are the same factors that exclude a defendant from being sentenced pursuant to Proposition 36's more lenient provisions. [Citation] This parallel scheme suggests that the sentencing rules are intended to be identical except in that one respect." (*Ibid.*)

For prospective applications, the conduct-based exclusionary factors must be pleaded and proved beyond a reasonable doubt. (Pen. Code, §§ 667, subd. (e)(2)(C), 1170.12, (c)(2)(C).) Practical and fairness concerns require that retrospective application not involve new mini-trials on the previously uncharged conduct-based exclusions, and Penal Code section 1170.126 does not state a *new* pleading and proof requirement while still applying the conduct-based exclusions to recall eligibility. (See *People v. Bradford*, *supra*, 227 Cal.App.4th at pp. 1332-1334, 1336-1339.) But, the absence of a new pleading and proof requirement does not mean that the statute anticipates that *new* facts

may be found based upon the old record. In fact, as noted above, the contrary conclusion is suggested by the fact that eligibility is to be based upon the crime of *conviction*, which in turn, is based upon only that which was previously pleaded and proved.

Application of the full *Guerrero* rule provides parity between prospective and retrospective applications by requiring the retrospective application to be based only upon conduct that was implicitly pleaded and proved beyond a reasonable doubt, rather than upon additional findings made on a limited record under a lesser standard of proof. The court determining eligibility may look beyond the mere elements of the offense to find that the conviction reflects disqualifying conduct, and thereby keep the conduct-based exceptions applicable retrospectively, but must do so based only upon conduct that is demonstrated by the *conviction* in light of the charges, the evidence, and the findings of the trier of fact at the initial proceedings. The court should look for what can be said to have already been pleaded and proved. (*People v. McGee*, *supra*, 38 Cal.4th at p. 706 [the court does not make "an independent determination regarding a disputed issue of fact relating to the defendant's prior conduct"; the determination is not directed at the conduct itself, it is "a determination of the nature or basis of the prior conviction."].)

Therefore, considering the language of the statute, the historical context of the Three Strikes Law and its approach to findings of non-elemental, conduct-based factors in past convictions, and the goal of having retrospective application parallel prospective application, except where unreasonable dangerousness is found, the statute must be read

to anticipate the application of the complete *Guerrero* rule. Therefore, the court considering the Penal Code section 1170.126 petition is not free to make new findings of fact not reflected by the prior conviction, but rather must make the factual finding of what facts the actual conviction reasonably reflect based upon the state of the record in the underlying trial.

b. Appellate Applications of *Guerrero* to Eligibility Determinations

In *People v. Berry*, *supra*, 235 Cal.App.4th 1417, the court applied the *Guerrero* rules in an appeal from a Proposition 36 eligibility determination and demonstrated the scope and nature of the inquiry in this context. In *Berry*, the defendant had pleaded guilty to one count of possession of a fraudulent check. The evidence at the preliminary hearing and in the Probation Officer's Report included evidence that the defendant had a firearm in the trunk of his car and that he had gone to the trunk while he was in possession of the fraudulent check. Based upon this evidence, the defendant had been additionally charged with a weapon possession count, which was dismissed when he pleaded guilty. (*Id.* at pp. 1421-1423.)

In ruling on the defendant's Proposition 36 petition, the trial court had looked at the "record of conviction" including the preliminary hearing transcript and the Probation Officer's Report and based upon this "evidence" independently found that the defendant had been armed with a weapon during the commission of the check possession offense. (*Id.* at p. 1423.) The appellate court reversed, holding that the trial court had improperly

made findings of fact and relitigated the circumstances of the offense instead of determining the nature of the conviction. (*Id.* at pp. 1425-1428.)

In so doing, the *Berry* court noted the difference between the Proposition 36 eligibility and discretionary resentencing determinations. For *eligibility*, the court looks only to the offenses on which sentence was imposed. (*Id.* at pp. 1424-1425.) And, the "inquiry must focus on the evidence underlying the offense for which the defendant was previously convicted" not "what *other* offenses might also have been supported." (*Id.* at p. 1427 [emphasis original]; see also *People v. Bradford, supra*, 227 Cal.App.4th at pp. 1337-1340 [similarly noting that Prop. 36 eligibility determination does not involve an "evidentiary hearing," but rather a *Guerrero*-type inquiry based on the set trial record]; *People v. Oehmigen, supra*, 232 Cal.App.4th at p. 7 [eligibility is not a question of fact; it is a question of law based upon properly considered facts in the record of conviction].)

In line with this rule, the court in the instant case should not have made a factual finding that appellant was armed with a firearm when he committed the grand theft crime to which he pled. Appellant had been charged with robbery and false imprisonment by violence but those charges had been dismissed when he pled to a single charge of grand theft, as had been the allegations of arming and gun use. Arming is not an element of grand theft. Moreover, although the Court of Appeal here opined that one could be armed and commit a grand theft without therein also committing a robbery (slip opn., at pp. 6-7), it is hard to see how one can be armed in the commission of a grand theft without that

arming being the cause of the force or fear that would elevate the crime to a robbery.

Other courts, like the one in the instant case, assessing Proposition 36 eligibility under subdivision (iii), have relied on the *Guerrero* rules requiring the trial court to make the decision based only upon the record of conviction and no additional evidence. (See *Ibid.*; *People v. Oehmigen*, *supra*, 232 Cal.App.4th 1; *People v. Hicks*, *supra*, 231 Cal.App.4th 275; *People v. Brimmer* (2014) 230 Cal.App.4th 782; *People v. Guilford* (2014) 228 Cal.App.4th 651; *People v. Elder* (2014) 227 Cal.App.4th 1308; *People v. Bradford* , *supra*, 227 Cal.App.4th at p. 1332; *People v. Superior Court (Martinez)* (2014) 225 Cal.App.4th 979; *People v. Cervantes* (2014) 225 Cal.App.4th 1007; *People v. Osuna* (2014) 225 Cal.App. 4th 1020; *People v. White* (2014) 223 Cal.App.4th 512.) But, many have been vague as to whether the other limitations of the *Guerrero* line of cases apply, and the court here simply held that the lower court can make any factual determination as long as it is not "wholly unrelated" to the crime for which the defendant was convicted. (Slip opn at p. 7.)

In *People v. Blakely*, *supra*, 225 Cal.App.4th 1042, the court affirmatively stated that only the record limitation aspect of the *Guerrero* rule applied in the Proposition 36 context. There, the court reversed the trial court's finding that the defendant was armed with a firearm during the commission of his offense of felon in possession of a weapon. The reversal was required by the appellate court's inability to determine whether the finding had been made on the basis of admissible portions of the record of conviction.

(*Id.* at pp. 1048-1049.)

In the course of resolving the appeal, the *Blakely* court reached several additional issues. It first held that not all violations of Penal Code section 29800 (former section 12021) are ineligible for a Proposition 36 recall. The court found that a felon in constructive possession of the weapon could be eligible if the weapon was not on his person or available for use. (*Id.* at pp. 1051-1057.) The court further found that the determination of whether the defendant was armed had to be made based upon reliable and admissible portions of the record of conviction as defined by the *Guerrero* line of cases. (*Id.* at pp. 1062-1063.) The *Blakely* court, however, rejected the argument that the determination the trial court must make based upon the record of conviction be limited to a finding of the nature of the conviction without independently finding additional disputed facts based upon the established record. (*Id.* at pp. 1062-1063.) It seemingly did so based upon its conclusion that the *Apprendi* line of cases was not applicable to the recall situation.

Appellant does not here challenge the conclusion that *Apprendi* does not require pleading and proof of the eligibility factors. But, it does not follow therefrom that the *Guerrero* rule should not be applied in full, or that the court ruling on eligibility should be able to make new findings of fact unrelated to the basis of the conviction. The *Guerrero* rule is *not* based upon *Apprendi*. It is the California rule and was developed before *Apprendi*. Moreover, attempts to make *Apprendi* and the federal constitution applicable

to it have been repeatedly rejected based upon the fact that the rules were being applied to *priors*, which are excepted from the *Apprendi* rule. (See *People v. McGee*, *supra*, 38 Cal.4th at pp. 695-702.) The California *Guerrero* rule has its own genesis and independently precludes new litigation of facts related to a prior conviction. In addition to rejecting the notion that the federal constitution required California to change its rule on how priors were determined to be "strikes," this Court in *McGee* explained that the nature of the inquiry under the *Guerrero* rule does not in any way implicate the jury's factfinding process because what the trial court determines under *Guerrero* is only "the nature or basis" of the prior conviction and the conduct upon which that conviction was based. (*Id.* at p. 706; see also *People v. Wilson*, *supra*, 219 Cal.App.4th at p. 516 [*Guerrero* rule does not offend the federal constitution because the court does not make findings of disputed facts].) Thus, this Court has made clear that *California*'s rule, not the federal constitution, requires the limited nature of the inquiry.

The requirements that the inquiry be limited to a determination of the nature or basis of the crime of which the defendant was convicted and that it be based only upon the record of the proceedings of the conviction were adopted as a practical and fair means of assessing whether a *conviction* reflects an offense that encompasses conduct not required by the elements of the crime itself.

> "Such a rule is both fair and reasonable. To allow the trier of fact to look to the entire record of the conviction is certainly reasonable: it promotes the efficient administration of justice and, specifically, furthers the evident intent of the people in establishing an enhancement for 'burglary of a

> residence' -- a term that refers to *conduct*, not a specific *crime*. To allow the trier to look to the record of the conviction -- *but no further* -- is also fair: **it effectively bars the prosecution from relitigating the circumstances of a crime committed years ago** and thereby threatening the defendant with harm akin to double jeopardy and denial of speedy trial." (*People v. Guerrero*, *supra*, 44 Cal.3d at p. 355 [original emphasis in italics; additional emphasis in bold].)

Thus, by applying only half of the California, *Guerrero*, rule and permitting the lower court to make new findings of fact, the *Blakely* court, and others like the court in the instant case allowing the same, not only grants the court discretionary power that the statute does not anticipate, but violates California's own concepts of fairness. (See *Ibid.*; *People v. McGee*, *supra*, 38 Cal.4th at p. 691.) It does violence to the statutory scheme created by Proposition 36 to read it to incorporate only part of the *Guerrero* rule.

The analysis of the court here overlooks the numerous cases from this Court that explain the limitations on what constitutes the "record of conviction." This Court has clarified that what may be considered in proving a prior was for a serious felony is in part determined by understanding the relevant inquiry. That inquiry is only the "nature of the conviction." And, this limitation on the *inquiry* is based upon the proscription of "relitigation." (See *People v. Woodell*, *supra*, 17 Cal.4th at p. 459; *People v. Trujillo*, *supra*, 40 Cal.4th at 179-181.)

In *Woodell*, this Court held that the appellate opinion could be considered a part of the record of conviction for purposes of deciding whether a prior felony conviction was for conduct that would render it serious. In so doing, this Court made very clear that

expanding the record of conviction to include the opinion was permissible and did not allow relitigation of facts. It explained that the issue was the nature of the prior conviction and that opinions, while potentially available for resolution of the issue, were not necessarily sufficient or *relevant* to resolve it. Rather they were but one relevant resource. (*People v. Woodell*, *supra*, 17 Cal.4th at p. 457.) The court further clarified that, "**[b]ecause the nature of the *conviction* is at issue**, the prosecution is not allowed to go outside the record of conviction to 'relitigate the circumstances of a crime committed years ago. . .'[Citation]" (*Id.* at p. 459 [italics original emphasis; bold added emphasis].) Thus, the limited nature of the inquiry as well as the limitation on the records used to resolve it combine to preclude relitigation of the old offense.

Similarly in *Trujillo*, this Court ruled that even a defendant's admissions in a probation report, which would be an exception to the hearsay rule, were not part of the record of conviction for purposes of deciding whether the crime to which the defendant had pleaded guilty was a "strike" because they did not *reflect the nature of the conviction.* (*People v. Trujillo*, *supra*, 40 Cal.4th at pp. 179-180.) Because the *inquiry* is the nature of the *conviction*, statements made *after* it could not "reflect the facts upon which [the defendant] was convicted." (*Id.* at p. 180.)

The *Trujillo* court further noted that this holding was consistent with *Guerrero*'s limitation to the record of conviction. "The reason for this limitation was to 'effectively bar the prosecution from *relitigating* the circumstances of a crime committed years ago

and thereby threatening the defendant with harm akin to double jeopardy and denial of speedy trial.' [Citation to *Guerrero*] Permitting a defendant's statement made in a postconviction probation officer's report to be used against him to establish the nature of the conviction *would present similar problems*, creating harm akin to double jeopardy and *forcing the defendant to relitigate* the circumstances of the crime." (*People v. Trujillo*, *supra*, 40 Cal.4th at p. 180 [emphasis added].)

Thus, the comment by the appellate court here that, when a trial court determining Proposition 36 eligibility makes new findings of fact that were not part of the prior conviction, such factfinding is not *relitigation* within the meaning of the *Guerrero* line of cases, is an improper interpretation of *Guerrero* and its progeny. Moreover, it is factually incorrect.

Litigation is a contest as to facts. If the judge determining eligibility finds new facts that were never before at issue, based upon a different standard of proof, he is relitigating the matter. The relitigation is just being done based upon limited evidence - the record of conviction, but it is relitigation nonetheless. And, relitigation at the eligibility phase is not what Penal Code section 1170.126 can reasonably read to permit. (See *People v. Berry*, *supra*, 235 Cal.App.4th pp. 1424-1427; *People v. Bradford*, *supra*, 227 Cal.App.4th at pp. 1337-1340; *People v. Oehmigen*, *supra*, 232 Cal.App.4th at p. 7.)

A trial judge using the record of conviction as evidence from which it can make an

independent finding of fact, that may even be contrary to the verdict,[5] is relitigating the conviction in violation of California's notions of fairness. (See *People v. Guerrero*, *supra*, 44 Cal.3d at p. 355; *People v. Trujillo*, *supra*, 40 Cal.4th at p. 180.) Penal Code section 1170.126 anticipates such factfinding for the second phase of ruling on the recall petition where the court is exercising *discretion*. (See *People v. Berry*, *supra*, 235 Cal.App.4th pp. 1424-1427; *People v. Bradford*, *supra*, 227 Cal.App.4th at pp. 1337-1340; see also *People v. Johnson and Machado*, *supra*, 61 Cal.4th at p. 692.) Penal Code section 1170.126 only grants the court discretion with respect to a finding of a defendant's suitability for resentencing based upon his risk of dangerousness. Written as it is with reference to a defendant's conviction and sentence as the basis for determining eligibility, and in light of the history of the "Three Strikes Law" and retrospective determinations of "strikes" based upon non-elemental conduct, it is clear that the complete *Guerrero* rule should apply to the eligibility determination.

Yet, so far, only the *Berry* court appears to have adopted this interpretation most completely. Thus this Court should now, based upon a complete statutory construction analysis, hold that the statute intends the use of the entire *Guerrero* rule, and that, under such an interpretation, appellant here could not be found to have been armed.

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[5] In *Blakely* and *Osuna*, the same court noted in footnotes that such a problem might arise, but because those facts were not presented in those cases, the court declined to give an advisory opinion thereon. (See *People v. Blakely*, *supra*, 225 Cal.App.4th at p. 1063, fn. 9; *People v. Osuna*, *supra*, 225 Cal.App.4th at p. 1038, fn. 6.)

2. Under a Complete Application of the *Guerrero* Rule, The Record of Conviction Does Not Support a Finding that Appellant's Conviction Was Based on Facts Establishing "Arming," and the Trial Court Improperly Made Independent Factual Findings to Conclude that It Did

The trial court here engaged in judicial fact-finding to resolve factual questions not required by the verdict. They were factual questions that required legal findings of existence and "availability" of a weapon that were not a part of the elements of the offense, which required only that appellant have taken property from another without any force or fear.

While there was testimony at the preliminary hearing that appellant committed an armed robbery (CT 64-70), appellant's plea was solely to grand theft, a crime that does not include any element of force or fear or arming or use of a gun. Thus, his plea did not admit anything that could have supported a finding of arming or use of a gun. Hence, nothing in the record that supports the "conviction" provides any evidence that appellant had a gun available for offensive or defensive use.

The eligibility question is a question of law, not fact. (*People v. Oehmigen*, *supra*, 232 Cal.App.4th at p. 7.) Only those facts that must have been found by the trier of fact or established by appellant's plea in order to support the conviction, not merely those that could have been found, can be assumed. Therefore, arming was not shown in this case, and both the trial court and the appellate court erred in reading the preliminary hearing transcript and finding that appellant had a gun that was available for his immediate use.

CONCLUSION

This Court should therefore grant review in this matter to settle the important question of law concerning whether a trial court can make factual findings that do not explain or support the limited conviction established by appellant's plea. This Court should hold that these courts erred in making their own factual findings that appellant was armed with a firearm and thus ineligible for relief under Penal Code section 1170.126. As a result, this Court should reverse the finding that appellant was ineligible for a recalls of his sentence pursuant to Penal Code section 1170.126 and the denial of appellant's Proposition 36 recall petition.

Dated: January 25, 2016

Respectfully submitted,
CALIFORNIA APPELLATE PROJECT

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WORD COUNT CERTIFICATION
People v. Mario R. Estrada

I certify that this document was prepared on a computer using Corel Wordperfect, and that, according to that program, this document contains 7,249 words.

Richard B Lenn (only)
RICHARD B. LENNON

OPINION

Filed 12/23/15

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

MARIO R. ESTRADA,

Defendant and Appellant.

B260573

(Los Angeles County
Super. Ct. No. GA025008)

APPEAL from a judgment of the Superior Court of Los Angeles County. William C. Ryan, Judge. Affirmed.

Richard B. Lennon, 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, Margaret E. Maxwell and Nathan Guttman, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Mario Estrada appeals from a post conviction order denying his petition for resentencing as a second-strike offender under Proposition 36, the Three Strikes Reform Act of 2012. (Pen. Code, § 1170.126.)[1] The trial court denied the petition on the ground that defendant was armed with a firearm during the commission of his crime, an enumerated exclusion under Proposition 36, and thus he is not entitled to resentencing relief. (§§ 1170.126, subd. (e)(2), 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).) Defendant argues that he pled guilty only to grand theft person and that all firearm related charges were dismissed; thus the court erred in reviewing the reporter's transcript of his preliminary hearing to make the finding that he was armed. We disagree and affirm.

FACTS

The critical facts occurred on three days over 20 years ago. Since defendant pled guilty, we take our facts primarily from the preliminary hearing. On April 9, 1995, defendant entered a Radio Shack store and approached the employee at the sales counter. As the employee began to ring up defendant's purchase, defendant pulled out a gun and told the employee to hand over all of the money in the register. The employee handed defendant approximately $400 in a plastic bag and defendant left the store.

On April 16, 1995, defendant entered the same Radio Shack and waited until all of the customers were gone. Then he approached the employee behind the counter and took out a gun. Defendant told the employee to open the register, and once it was open, defendant removed approximately $200. The employee also gave defendant some car speakers and a small television from the back room. After tying up the two employees in the store, defendant left through the back exit.

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1 Undesignated statutory references will be to the Penal Code.

On July 27, 1995, defendant returned to the Radio Shack a third time. Defendant approached the employee behind the counter and took out a gun. Defendant told the employee to give him the cell phones in the display and the money from the cash register, about $200-$300; the employee complied. Then, defendant took the employee to the back room and demanded a car stereo. Defendant again left through the back door. After defendant fled, the employee called the police and a short time later police arrested defendant.

PROCEDURAL HISTORY

Defendant was charged with fifteen counts, including four counts of robbery (§ 211), three counts of grand theft person (§ 487, subd. (c)), four counts of false imprisonment by violence (§ 236), three counts of commercial burglary (§ 459) and one count of felony evading with willful disregard. It was alleged with respect to all but the evading count, that defendant personally used a firearm within the meaning of section 12022.5, subdivision (a).

Before trial defendant pled guilty to one count of grand theft person in connection with the events that took place on April 9, 1995. All other charges and enhancements were dismissed. He was found, by his own admission, to have sustained two prior strikes for robbery. Defendant was sentenced to an indeterminate term of 25 years to life pursuant to the Three Strikes law.

In November 2012, California voters approved Proposition 36, which amended the Three Strikes law so that a defendant convicted of two prior strikes is subject to the indeterminate term only if the current third felony offense is defined as serious or violent. (§ 1170.126 subd. (b).) Proposition 36 also allowed those serving indeterminate life sentences for a third felony that is neither serious nor violent to seek court review of their indeterminate sentences and, subject to certain disqualifying exclusions or exceptions, obtain resentencing as if the defendant had only one prior serious or violent felony conviction. (*People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1286, 1293.)

In November 2012, defendant filed a petition for resentencing as a second-strike offender under Proposition 36. (§ 1170.126, subd. (b).) He argued that because his third felony conviction for grand theft person is neither serious nor violent he is eligible for resentencing. (§ 1170.126, subd. (e)(1).) The trial court found that he had made a prima facie showing of eligibility, and issued an order to show cause as to why the requested relief should not be granted.

The prosecution argued in opposition that the petition should be denied because defendant was armed at the time of his commitment offense and thus was ineligible for resentencing. (§§ 1170.126, subd. (e)(2), 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).) The prosecutor also argued that even if defendant was eligible, he was unsuitable because he posed an unreasonable risk of danger to public safety. (§ 1170.126, subd. (f).) The prosecution submitted eight exhibits, including transcripts of some of the testimony, including that of Alfred Valladolid, that had been presented at defendant's October 19, 1995 preliminary hearing. Valladolid was the victim of the April 9, 1995 grand theft at the Radio Shack store to which defendant had pled. Valladolid testified in the preliminary hearing that defendant had used a gun.

In his reply, defendant argued that Proposition 36 requires a court to determine a petitioner's eligibility based on crimes for which the petitioner was convicted and any special allegations found to be true. Defendant argued further that any disqualifying factor under section 1170.126 must be pled and proven, which was not the case here. Nor did defendant admit any facts which would make him ineligible for Proposition 36 resentencing.

After a hearing, the trial court concluded it could consider the preliminary hearing transcript in denying Proposition 36 eligibility. Because evidence at the preliminary hearing showed that defendant used a gun in the commission of the grand theft, the court found defendant was ineligible under section 1170.12, subdivision (c)(2)(C)(iii), and denied defendant's petition.

DISCUSSION

1. *Standard of Review*

As we are tasked with interpreting a statute, the issue before us presents a question of law, and we apply the de novo standard of review. (*People v. Bradford* (2014) 227 Cal.App.4th 1322, 1332.)

2. *The Court Properly Found That Defendant Was Ineligible For Resentencing Based on Preliminary Hearing Testimony*

According to the plain language of Proposition 36, "[u]pon receiving a petition for recall of sentence under this section, the court shall determine whether the petitioner satisfies the criteria in subdivision (e)." (§ 1170.126, subd. (f).) There is no requirement that the disqualifying factors in subdivision (e) be pled and proved; rather it is the court that makes the determination. (*People v. White* (2014) 223 Cal.App.4th 512, 527.) A trial court "determining whether an inmate is eligible for resentencing under section 1170.126 may examine [all] relevant, reliable, admissible portions of the record of conviction to determine the existence of a disqualifying factor." (*People v. Blakely* (2014) 225 Cal.App.4th 1042, 1048-1049.) Preliminary hearing transcripts are properly considered part of the record of conviction. (*People v. Reed* (1996) 13 Cal.4th 217, 223, cert. den. 519 U.S. 873; see *White,* at p. 519, fn. 4 [facts were derived from the preliminary hearing transcript].)

Defendant contends that there is no support in the record for the finding that he was armed with a firearm during the commission of his commitment offense, relying on the California Supreme Court's decision in *People v. Guerrero* (1988) 44 Cal.3d 343. In *Guerrero*, the court held that the trier of fact may look to the entire record of conviction in order to determine the truth of a prior conviction allegation in the context of the Three Strikes law. (*Id.* at p. 355.) Defendant concedes that this is the rule, but argues that this rule does not permit the court to

review a transcript and find the fact based on testimony because *Guerrero* does not permit a "relitigation" of the circumstances of the crime. (*Ibid.*) In our view, defendant mischaracterizes *Guerrero*, which states that the trier may look to the record of conviction, but no further, effectively barring the prosecution from relitigating the circumstances of a prior crime. (*Ibid.*)

In this case, the trial court properly looked at the circumstances of this crime; it did not draw conclusions based on other offenses. The issue is whether or not defendant was armed when he committed grand theft person. The trial court considered the preliminary hearing transcripts, not going beyond the record of conviction, and found it true that defendant was armed with a firearm during the commission of the crime. This type of review is exactly what *Guerrero* and *White* allow, and in no way resembles relitigation of the case.

We reject defendant's argument that a court may not rely on a resentencing disqualification if it was not pled or proven at trial. A similar claim was rejected in *People v. Hicks* (2014) 231 Cal.App.4th 275. In *Hicks*, the defendant was convicted of being a felon in possession of a firearm. The trial court denied his petition for resentencing because the appellate court opinion from his conviction reported that he was armed with a firearm when he committed the offense, even though the arming enhancement had never been pled or proven. (*Id.* at p. 279.) The Court of Appeal affirmed, holding that "the express statutory language requires the trial court to make a factual determination that is not limited by a review of the particular statutory offenses and enhancements for which a petitioner's sentence was imposed." (*Id.* at p. 285.)

Defendant tries to distinguish these cases by the fact that the robbery charges and firearm use enhancements were dismissed as part of plea negotiations. He argues that somehow this means he was not armed. It does not. Under Proposition 36, the disqualifying factor, "armed with a firearm," means having a firearm available for offensive or defensive use during the offense. (*People v. Burnes* (Dec. 14, 2015, H040102) ___ Cal.App.4th __ [2015 WL 8734099, *3];

People *v. Osuna* (2014) 225 Cal.App.4th 1020, 1029.) One can have a firearm *available for use* during a grand theft without elevating the offense to a robbery. Similarly, one can be armed with a firearm without personally using it within the meaning of section 12022.5, subdivision (a). Thus, a finding that defendant was armed with a firearm is not a relitigation of the dismissed robbery counts or firearm use enhancement allegations.

Finally, defendant relies on *People v. Berry* (2015) 235 Cal.App.4th 1417. In *Berry*, the defendant originally pled guilty to possession of a fraudulent check and a forged driver's license. Other counts, including firearm charges, were dismissed. (*Id.* at p. 1421.) The trial court denied his petition for resentencing because it found that he was armed during the commission of his crime. (*Id.* at p. 1426.) But the firearms defendant possessed were found in a different location than the fraudulent documents; he was not armed with them when arrested in possession of the fraudulent documents. (*Id.* at p. 1421.) On appeal, the court reversed, holding that "the trial court went outside defendant's 'record of conviction' when it based its assessment of defendant's eligibility for resentencing on evidence of firearm possession that was wholly unrelated to the counts on which defendant was *convicted*." (*Id.* at p. 1427.) *Berry* is distinguishable from this case because the evidence of arming is not "wholly unrelated" to the grand theft person which defendant committed. In fact, the evidence shows that he was armed with a firearm *during* the commission of his offense. The dismissal of some of the charges against defendant does not bar the trial court from looking at the facts underlying the charges of which he was convicted. The trial court properly considered all of the facts in the preliminary hearing transcript as circumstances of the grand theft person.

DISPOSITION

The decision denying defendant's petition and declaring him ineligible for resentencing is affirmed.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.

PROOF OF SERVICE

I am a citizen of the United States, over the age of 18 years, employed in the County of Los Angeles, and not a party to the within action; my business address is 520 S. Grand Avenue, 4th Floor, Los Angeles, California 90071. I am employed by a member of the bar of this court.

On January 25, 2016, I served the within

PETITION FOR REVIEW

in said action, by emailing a true copy thereof to:

Kamala D. Harris, Attorney General
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and by placing a true copy thereof enclosed in a sealed envelope, addressed as follows, and deposited the same in the United States Mail at Los Angeles, California.

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For Delivery to Hon. William C. Ryan

I declare under penalty of perjury that the foregoing is true and correct.

Executed January 25, 2016 at Los Angeles, California.

Jacqueline Gomez
JACQUELINE GOMEZ