S236728

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JAMES BELTON FRIERSON, Defendant and Appellant.	)	No. _____ (Court of Appeal No. B260774) (Los Angeles County Superior Court No. GA043389)

PETITION FOR REVIEW

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TABLE OF AUTHORITIES

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Rule:

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.
	)	B260774)
JAMES BELTON FRIERSON,	)	
	)	(Los Angeles County Superior
Defendant and Appellant.	)	Court No. GA043389)
_____	)	

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to rule 8.500 (a)(1) of the California Rules of Court, appellant, James Frierson, requests that this Court review the unpublished opinion of the Court of Appeal, Second Appellate District, Division Four, which affirmed the trial court's denial of his post-judgment, Proposition 36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 July 20, 2016, is attached hereto as "Opinion." A petition for rehearing was filed. In response the court, on August 5, 2016, filed a modification of its opinion. That modification is attached hereto as "Modification."

QUESTIONS PRESENTED FOR REVIEW

1. 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 trial, 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, the jury could not reach a verdict on the charges that would have supported such findings, and those findings were completely unnecessary to explain the conviction?

2. Does the finding of ineligibility made by the court have to be based on a beyond a reasonable doubt standard or is a preponderance standard enough?

NECESSITY FOR REVIEW AND ARGUMENT

INTRODUCTION

This is a case in which appellant was found ineligible for recall under Proposition 36 based on a finding that he intended to do harm to the victim of his stalking crime. He had been charged with stalking based on a series of letters that he sent his wife from prison where he was serving a sentence on an earlier case involving the two of them. While the crime of stalking requires that the defendant make a credible threat against the victim, it does not require that he have any real or actual intent to carry out that threat or cause actual harm. Nevertheless, the recall court here, instead of determining the nature of appellant's actual conviction, improperly reviewed the trial record looking for evidence that apellant intended to actually inflict great bodily injury on his wife during the commission of the crime, and made its own factual finding that appellant did so intend. The appellate court found that the recall court acted properly and affirmed the recall court's decision.

Moreover, the appellate court, disagreed with the opinion filed by the appellate court in *People* v. *Arevalo* (2016) 244 Cal.App.4th 846, regarding the burden of proof that applies to Proposition 36 recall determinations. Whereas the *Arevalo* court held the burden to be beyond a reasonable doubt, the instant court held that the burden should only be preponderance of the evidence. Thus, the Court in the instant case has created a direct conflict with the decision of an earlier court regarding the burden of proof.

The issue of limitations on the use of evidence in a trial court record to make a factual determination in the Proposition 36 recall area, is one question before this Court in

People v. Estrada (S232114). In *Estrada*, the defendant had entered a plea and counts were dismissed as a result. The Proposition 36 recall court nevertheless used the evidence of the dismissed counts to find facts that rendered the defendant ineligible for recall. The instant case presents the same issue albeit in a different context, namely where the factual finding is based on non-elemental conduct, where the issue was contested in the court below, and there was no verdict by the trier of fact resolving the factual issue.

Furthermore, on the issue regarding limitations on the ability of a Proposition 36 recall court to make factual findings based on evidence that was not presented to support conviction on the only charge of which the defendant was convicted, the appellate courts have split on what limits should apply. (See e.g., *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1048-1049 [court can make factual findings based on review of the entire record]; *People v. Berry* (2015) 235 Cal.App.4th 1417, 1426-1427 [the recall 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."])

Given the conflict in decisions, and the presence of an important question of law regarding both the burden of proof and limitations on evidence in fact-finding determinations made by Proposition 36 recall courts, this Court should grant review in this case on both questions.

PROPOSITION 36 RECALL AND RESENTENCING AND EXCLUSIONS

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.[1]

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 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. The defendant is "eligible for resentencing if: . . . (2) The inmate's *current sentence was not*

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[1]/ 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].)

imposed for any offenses appearing in . . . [subdivision (iii)]." (Emphasis added).[2]

Some of the exclusionary factors in subdivision iii involve non-elemental conduct. As this Court recently recognized in *People* v. *Conley* (2016) _Cal.4th _ (2016 Cal. LEXIS 4578), because exclusion can be based on facts that were never pleaded nor proved in a defendant's underlying trial, Proposition 36 recall courts need to be able to make findings regarding these exclusionary factors, like arming on intent, based on review of records from the defendant's trial.

However, the inquiry is not simply a new factfinding endeavor that can be based on a review of whatever evidence the recall court deems appropriate. 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 recall court's 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* (1985) 39 Cal.3d 836, 843 [if statutory language is clear rely on it]; *People v. Berry* (2015) 235 Cal.App.4th 1417, 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. 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

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[2]/ 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.

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* (2015) 61 Cal.4th 674, 691.) As this Court noted in *Johnson*, "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* (2014) 227 Cal.App.4th 1322,1332-1334, 1336-1339.)

From the outset, to make determinations as to whether conduct underlying a prior conviction rendered it a "strike" for purposes of the Three Strikes Law, the rules set forth in *People v. Guerrero* (1984) 44 Cal.3d 343 and its progeny have been employed. Because the retrospective determination of whether the current offense is a serious felony for purposes of Proposition 36 is a nearly identical endeavor, these rules are apt for the eligibility determination here (see *People v. Bradford* (2014) 227 Cal.App.4th 1322,

1336-1339) and were presumably considered and relied upon in enacting Proposition 36 which requires that new conduct-based criteria be retroactively applied. (See *People v. Weidert* (1985) 39 Cal.3d 836, 844 [enacting body deemed aware of existing law]; *People v. Scott* (2014) 58 Cal.4th 1415, 1425 [new laws deemed enacted in light of existing law].)

Under *Guerrero* and its progeny, the trier of fact deciding whether a prior conviction was for a serious felony based upon non-elemental conduct considers relevant portions of the entire record of conviction to determine what conduct the verdict reflects. (See *People v. McGee* (2006) 38 Cal.4th 682, 691, 706.) The inquiry is limited and does *not* include resolving conflicts in evidence and making additional findings of fact. (*Id.* at p. 706.) Thus, both what may be considered *and* the inquiry being made are limited.

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), which 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). 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].)

The courts of appeal, however, have struggled with the limitations that apply to such reviews. While all have agreed, as did appellant's court here, that review is limited to the "record of conviction," they have disagreed on whether that review is further

limited to reviewing only that portion of the record that explains the conviction, or whether such review can be of the entire record, including evidence of charges of which the defendant was not convicted, or even which were dismissed as part of a plea, or because the jury could not reach a verdict on them.

The courts have also disagreed on the burden of proof applicable to the decision making, splitting between preponderance, as in the instant case, and beyond a reasonable doubt. (*People* v. *Arevalo, supra.*)

In the instant case, appellant was tried on charges of stalking (Pen. Code, § 646.9, subd. (a)) based solely on letters that he sent to his wife from prison. While stalking requires that the defendant threaten the victim, it does not require that the defendant intend to actually harm her; rather, the statute specifically excludes from a proof requirement any intent to carry out the threat.[3] while the testimony considered by the court here clearly showed that appellant made threats that caused his wife to be afraid, the letters also demonstrated conflicting evidence where at times appellant wrote that he would hurt her while at other times he wrote that he would not actually do her harm

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[3] Section 646.9, subdivision (a), provides: "Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking ...." "Credible threat" is defined as "a verbal or written threat . . . or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct, made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety or the safety of his or her family, and made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her family. It is not necessary to prove that the defendant had the intent to actually carry out the threat." (§ 646.9, subd. (g).)

because he still loved her. The jury never had to resolve whether he intended to actually harm her because that was never an issue and was irrelevant to the question of whether he made a credible threat. Although the trial court here concluded that one always intends to do that which one threatens (CT 21), that is simply not the case where the crime is simply to cause one to be afraid, and it could easily be enough to cause one to fear if what the defendant wants is either to reconcile with the victim, or to "pay her back" by causing her fear. Making her afraid might easily be enough for a stalking defendant, and is certainly enough to be convicted of the crime. Intending to actually harm someone goes well beyond the elements of the crime, and well beyond any showing of what appellant here actually did or intended to do.

Thus, appellant's jury was never asked to resolve whether appellant had any intent other than to cause his wife to be afraid. The only things that the verdict and evidence reflect are that the appellant wrote letters that included threats that intended to cause and did cause the victim to be afraid for her safety. That is all that can be gleaned as to the nature of the conviction and conduct underlying it in this case. (See *People v. McGee*, *supra*, 38 Cal.4th at 706; see also *People v. Wilson* (2013) 219 Cal.App.4th 500, 510.)

On appeal, appellant argued that, under *Guerrero, supra*, the recall court was limited to considering only that evidence which set forth the nature of the crime of which appellant was actually convicted. (*Id.* 44 Cal.3d at p. 345; see also *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"].) The inquiry is limited and does *not* include

resolving conflicts in evidence and making additional findings of fact. (*Id.* at p. 706.) Thus, both what may be considered *and* the inquiry being made are limited.

The recall court here, and the appellate decision affirming it, applied only half of the *Guerrero* rule - the part that limits the evidence considered to only the record of conviction without consideration of new evidence. But instead of limiting the inquiry to a determination of what conduct the *conviction* reflects the substance of the offense, the recall court used the limited evidence to make new findings of fact that were not encompassed by the conviction.

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. At issue in the case was whether Trujillo 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. 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 ["Defendant's admission recounted in the probation officer's report. . . 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."]

The appellate court in the instant case rejected the application of *Guerrero* because the court here was not increasing appellant's sentence but was only determining whether his sentence should be decreased. (See Modification, p. 2.) In such a circumstance, said the court, there are no limitations other than that the recall court is limited to using the record of conviction. Appellant contends otherwise.

Where a case involves factual disputes that the trier of fact did not have to resolve to reach its verdict, a recall court cannot later make findings of such disputed facts to determine that the crime involved conduct making it a serious felony. Rather, the court must determine only 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.)

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.

The modified *Guerrero* approach by the instant court retains little of the fairness that the rule was designed to provide and does not preclude "relitigation" of offenses as was this Court's goal in *Guerrero*. Moreover, it further results in disparate application of the rules prospectively and retrospectively because, unlike with prospective application, the retrospective findings are made by a mere preponderance of the evidence with the evidence supporting it having been developed when the now-critical issue was not even relevant. Nothing in Proposition 36 suggests that this result was intended.

Moreover, while it may technically be true that the recall court is not increasing appellant's punishment by its decision making, the reality is that appellant is being denied the benefit of the voters' change to the Three Strikes Law that would apply to him but for the fact that he is seeking retroactive application of the change and the court here is finding him ineligible for such application. Thus, for all practical purposes appellant is facing an increased sentence over that to which he would otherwise be entitled. That the recall court should be able to deprive appellant of the sentence mandated by the voters by ignoring the constraints of *Guerrero*, and making fact findings on the basis of disputed evidence, and doing sao on a preponderance standard simply because technically the court is not increasing the defendant's sentence strains credulity.

Finally, this Court needs to resolve the issue regarding the burden of proof. In *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1040, the court held that the recall judge ruling on eligibility need only find the disqualifying factors by a preponderance of the evidence. In *People v. Arevalo* (2016) 244 Cal.App.4th 836, 852, the court held that *Osuna* was incorrect, and the standard must be beyond a reasonable doubt. Most recently,

the court in the instant case published its decision to hold that *Arevalo* was incorrect. The court did so simply by stating that this court was not convinced that a beyond reasonable doubt standard was appropriate given that preponderance is the general standard and there has been "no showing that trial courts will be unable to apply [the Proposition 36 rules]fairly and with due consideration." (Slip opn. p. 5)

The *Arevalo* court explained that the application of the beyond a reasonable doubt standard is necessary in part to satisfy federal due process concerns arising from the fact that the procedure relates to the defendant's liberty interests, even though those interests are diminished in the context of a recall and reduction of sentence. (*People v. Arevalo*, *supra*, 244 Cal.App.4th at pp. 849-852.) The court concluded that these interests require a higher standard of proof than a preponderance. It then held that the heightened standard had to be beyond a reasonable doubt in order to ensure that the retrospective operation of Proposition 36 reforms result in the same sentences as their prospective application as this Court in *People v. Johnson* (2015) 61 Cal.4th 674, 687 indicated was intended. (*People v. Arevalo*, *supra*, 244 Cal.App.4th at p. 853.)

Arevalo did not hold that the constitution required the beyond a reasonable doubt standard. It held that the constitution required a higher standard than a preponderance, but that the need for parity between the prospective and retrospective application of the new rules required that the standard be beyond a reasonable doubt. (See *People v. Arevalo*, *supra*, 244 Cal.App.4th at p. 853)

As the *Arevalo* analysis is more complete and compelling than either that of *Osuna* or the instant court, this Court should grant review to resolve this split of authority and

adopt the *Arevalo* requirement that eligibility be based upon a finding of proof be beyond a reasonable doubt.

Dated: August 19, 2016

Respectfully submitted,

CALIFORNIA APPELLATE PROJECT

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WORD COUNT CERTIFICATION

People v. James Belton Frierson

I certify that this document was prepared on a computer using Corel Wordperfect, and that, according to that program, this document contains 4,182 words.

RICHARD B. LENNON

OPINION

Filed 7/20/16

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JAMES BELTON FRIERSON, Defendant and Appellant.	B260774 (Los Angeles County Super. Ct. No. GA043389)

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

Richard B. Lennon and Suzan E. Hier, by appointment of 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, Steven D. Matthews and Robert C. Schneider, Deputy Attorneys General.

This is a defendant's appeal from the trial court decision rejecting his petition for resentencing under Penal Code section 1170.126, enacted by Proposition 36, the Three Strikes Reform Act of 2012. (All further code citations are to the Penal Code unless otherwise indicated.) That initiative measure allows inmates serving an indefinite life term under the Three Strikes law (§§ 667, subds. (b)-(i) & 1170.12) to petition the court for resentencing where the third strike conviction was for a felony not classified as a serious or dangerous crime. The initiative also disqualifies inmates serving a sentence imposed pursuant to section 667, subdivisions (e)(2)(C)(i) through (iii). The last of these, subdivision (iii), applies where "[d]uring the commission of the current offense, the defendant . . . intended to cause great bodily injury to another person."

FACTUAL AND PROCEDURAL SUMMARY

The current offense in this case was for stalking, a violation of section 646.9. Under the Three Strikes law, that offense along with defendant's two prior "strikes" resulted in a term of 25 years to life. Pursuant to Proposition 36, defendant petitioned for recall of his sentence and resentencing. Following a hearing, the petition was denied. The trial court ruled that defendant was ineligible because the third strike offense was committed with intent to inflict great bodily injury to the victim.

The stalking conviction was based on letters from defendant, sent to his wife from prison after she had informed him that she intended to end their relationship. In these letters defendant said he would "track her down," that she should not and that he would not allow her to have another man, that because she had hurt him he would "hurt" her and that he would kill her for causing him so much pain. Later, after receiving divorce papers, defendant wrote her stating that he would do something bad to her because he could not live without her, that she was his wife and he would "get" her for hurting him so badly. He wrote that he was not going to hit her but only talk to her about restarting the relationship, but he also wrote that he could not let her leave and let someone else take her and that he was going to fight for her; and do something "real bad" to her.

He called her attention to a news story about a woman who killed her husband and then herself, and said that he would "get [her] for hurting [him] like this. Mark my word . . . "

Following a hearing, based on these statements, the court ruled that defendant was ineligible for recall of the sentence he was serving or for resentencing because of his expressed intent to inflict great bodily injury on his wife. This appeal followed.

DISCUSSION

Section 1170.126, enacted by Proposition 36, provides in subdivision (e)(2), that an inmate is eligible for resentencing if his or her current sentence was not imposed for an offense appearing in (among other provisions) section 667, subdivision (e)(2)(C)(ii); where, during commission of the offense, defendant "intended to cause great bodily injury to another person." On appeal defendant argues that while he wrote the letters we have discussed, they do not show he intended to inflict great bodily injury on his wife. He reasons that the basis of the trial court's ruling was the fact of defendant's conviction for stalking, a crime that does not require intent to carry out the threatened acts. It is true that the conviction was based on defendant's threats.

In determining an inmate's eligibility for recall and resentencing under Proposition 36, the trial court may examine all relevant, reliable and admissible material in the record to determine the existence of a disqualifying factor. (*People v. Blakely* (2014) 225 Cal.App.4th 1042, 1048, 1051; and see *People v. Guererro* (1988) 44 Cal.3d 343, 355.) That is what the trial court did in this case. It is reasonable to infer, as the trial court did, that when defendant told his wife that he was going to get her, hit her, hurt her, and do something "real bad" to her to avenge what he perceived she had done to him, he meant what he said. (6 Wigmore (Chadbourn rev. ed. 1976) § 1715 and generally 1 Witkin, Cal. Evidence (5th ed. 2012), Hearsay, § 40, p. 833.) Put plainly, the trial court was entitled to infer, as it did, that defendant meant to do what he said he would do.

In a supplemental brief defendant cites to a recent case, *People v. Arevalo* (2016) 244 Cal.App.4th 846 (*Arevalo*) to argue that the burden of proof in ruling on an application for recall under Proposition 36 is with the prosecution, and that burden is proof beyond a reasonable doubt.

The initiative provides that the trial court shall determine eligibility of the defendant for relief under its provisions. We understand the correct allocation of the burden to be that it is for the defendant, as petitioner, to make a prima facie showing that the third strike conviction in his or her case was for a felony that qualifies under the initiative. But where the prosecutor claims that strike or some other circumstance disqualifies the defendant for such relief, it is the prosecutor's burden to prove that disqualification. (See *People v. Superior Court* (*Kaulick*) (2013) 215 Cal.App.4th 1279, 1301.) The issue then becomes: what is the applicable standard for that proof? *Kaulick* holds that it is proof by a preponderance of the evidence. (*Ibid.*) And this appears to be the generally accepted rule. (See *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1040.) Relying on a concurring opinion in *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1344 (by the author of the court's opinion in that case), the *Arevalo* court concludes that the standard must be greater than preponderance. The concurring opinion in *Bradford* suggested that the clear and convincing evidence standard be used. (*Id.* at 1350.)

Arevalo, supra, 244 Cal.App.4th 846 finds this insufficient and concludes the prosecution must prove ineligibility beyond a reasonable doubt. (*Id.* at p. 852.) It does so in light of the substantial amount of prison time at stake for the defendant, the risk of error because of the "summary and retrospective nature of the adjudication," and the "slight countervailing governmental interest given the People's opportunity to provide new evidence" at the hearing. (*Ibid.*) And, concern that with a lesser standard "nothing would prevent the trial court from disqualifying a defendant from resentencing eligibility consideration by completely revisiting an earlier trial, and turning acquittals into their opposites." (*Id.*, at p. 853.)

We are not convinced. Preponderance is the general standard under California law, and there is no showing that trial courts will be unable to apply it fairly and with due consideration. Nor is there a showing that they have failed to do so. We do not believe that a higher standard, let alone proof beyond a reasonable doubt, the highest standard possible, is constitutionally required.

DISPOSITION

The judgment (order denying relief) is affirmed.

CERTIFIED FOR PUBLICATION

EPSTEIN, P. J.

We concur:

WILLHITE, J.

COLLINS, J.

MODIFICATION

Filed 8/5/16

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JAMES BELTON FRIERSON, Defendant and Appellant.	B260774 (Los Angeles County Super. Ct. No. GA043389) ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT]

THE COURT*:

It is ordered that the published opinion, filed July 20, 2016, be modified as follows:

1. In the fourth line of the first paragraph of the Discussion section, the code section subdivision citation is changed from "(e)(2)(C)(ii)" to "(e)(2)(C)(iii)";

2. The Roman Numeral "I" is inserted between the first and second paragraph of the Discussion portion of the opinion;

3. In the second paragraph of the Discussion section following the citation to *People v. Guerrero*, insert "(*Guerrero*)";

4. After the first paragraph of section I of the Discussion section, insert the following:

> Citing *Guerrero* and other cases, defendant argues that in ruling on a motion for resentencing under Proposition 36, the trial court is limited to a determination of "the narrow issue of whether the *conviction* was for qualifying conduct," and that in ruling on the motion the trial court is not permitted "to simply review a transcript and, based on testimony, find the fact." Instead, defendant argues, "to determine whether a conviction encompasses relevant conduct, the court inquiry is limited to identifying 'the basis of the crime of which defendant was *convicted.*'" (Citing *People v. McGee* (2006) 38 Cal.4th 682, 691.) He argues, essentially, that the trial court must restrict its decision to those facts and circumstances necessarily decided in the underlying conviction.
>
> We do not agree that the trial court is so restricted. *Guerrero* itself involved a determination that went beyond what necessarily had been decided in the prior conviction. The issue in that case was whether a prior conviction qualified as a "serious felony" under the residential burglary provisions of Sections 667 and 1192.7, subd. (c), since the burglary statute in force when that crime was committed did not differentiate between residential and other burglary. (*Guerrero,* at p. 346.) A previous decision, *People v. Alfaro* (1986) 42 Cal.3d 627, had held the trial court could not decide that issue because the residential character of the burglary was not an element of the underlying crime. Overruling *Alfaro* on this issue, the Supreme Court held that in deciding whether the prior burglary was of a residence, the court could "look to the record of the conviction—*but no further*" in making its decision. (*Guerrero,* at p. 355.)
>
> Later decisions clarified that the "record of conviction" did not extend to such matters as the defendant's post-conviction admission to a probation officer

that he had used a knife in committing the underlying crime (*People v. Trujillo* (2006) 40 Cal.4th 165, 179), or to factual allegations in charges dismissed in a plea bargain (*People v. Berry* (2015) 235 Cal.App.4th 1417, 1425). But the term does include material which is part of the record, such as excerpts from preliminary hearing transcripts. (*People v. Reed* (1996) 13 Cal.4th 217, 223.)

If anything, *Guerrero* is a fortiori to this case, since it deals with evidence bearing on an *increase* in punishment, such as whether a prior conviction was for a "serious felony." In a Proposition 36 proceeding, the court does not consider an increase in punishment, but only whether the convicted defendant is entitled to the reduction in punishment afforded by that law. If he or she is ineligible, the result is that punishment is not reduced; it cannot be increased. That is why there is no right to a jury trial on issues going to the defendant's entitlement to a sentence reduction, or, as we next discuss, to the enhanced burden of proof required to prove facts that would increase punishment.

5. The Roman Numeral "II" is inserted following the above four paragraphs.

Appellant's petition for rehearing is denied.

This modification does not change the judgment.

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*EPSTEIN, P. J., WILLHITE, J. COLLINS, 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 August 19, 2016, I served the within

PETITION FOR REVIEW

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

Kamala D. Harris, Attorney General
docketingLAawt@doj.ca.gov

in said action, 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

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Court of Appeal
Second Appellate District
Division Four
300 S. Spring Street
Los Angeles, CA 90013 (E-filed)

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

Executed August 19, 2016, at Los Angeles, California.

JACQUELINE GOMEZ