IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. MARIO ESTRADA, Defendant and Appellant.	)	No. S232114 Court of Appeal No. B260573 (Los Angeles County Superior Court No. GA025008)

APPELLANT'S BRIEF ON THE MERITS

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THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	No. S232114
Plaintiff and Respondent,	)	
	)	
v.	)	Court of Appeal No. B260573
	)	
MARIO ESTRADA,	)	
	)	(Los Angeles County Superior
Defendant and Appellant.	)	Court No. GA025008)
	)	

APPELLANT'S BRIEF ON THE MERITS

QUESTION PRESENTED

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) After reviewing the transcript of the preliminary hearing held prior to appellant's plea, the recall 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 appealed. (CT 176) On December 23, 2015, the Court of Appeal issued its opinion affirming the recall court's order denying the petition. (See Court of Appeal, Second Appellate District, Docket in case B260573)

On January 28, 2016, appellant's Petition for Review was filed. Thereafter, on April 13, 2016, this Court granted review. (See California Supreme Court Docket in case S232114)

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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

On April 9, 1995, 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 stole the cash that was in the register and left the store. (CT 64-70)[2]

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[2]/ These are the facts that support the conviction of grand theft as obtained from the preliminary hearing transcript. At the Preliminary Hearing, the store clerk testified to additional facts that would support charges of robbery and gun use. These facts were that appellant pulled out a gun and demanded the money in the register, and the clerk then got the money out, put it in a plastic bag, and handed it to appellant. (CT 67-69)

ARGUMENT

THE TRIAL COURT IMPROPERLY RELIED ON THE FACTS OF COUNTS DISMISSED UNDER HIS PLEA AGREEMENT TO FIND DEFENDANT INELIGIBLE FOR RESENTENCING UNDER THE PROVISIONS OF PROPOSITION 36

A. Introduction

Proposition 36 amended the Three Strikes Law such that life sentences are reserved for "cases where the current crime is a serious or violent felony or the prosecution has pled and proved an enumerated disqualifying factor. In all other cases, the recidivist will be sentenced as a second strike offender." (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 167-168; see also *People v. Johnson* (2015) 61 Cal.4th 674, 681.) One of the "enumerated disqualifying factor[s]" is that "[d]uring the commission of the current offense, the defendant . . . was armed with a firearm . . . ." (Pen. Code, §§ 667.1 subd. (e)(2)(C)(iii); 1170.12, subd. (c)(2)(C)(iii)[3]; see also *People v. Johnson*, *supra*, 61 Cal.4th at p. 681.)

Proposition 36 further provided a procedure for prisoners already serving a third strike sentence to seek resentencing in accordance with the new rules. (*Id.* at p. 682.) Penal Code section 1170.126 provides the mechanism for defendants with qualifying offenses to obtain a reduction of their sentences. Section 1170.126 uses identical criteria for resentencing eligibility as the new law does for second strike sentences, referring

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[3]/ These two subdivisions are identical. For convenience, they will be jointly referred to hereafter as "subdivision (iii)."

expressly to the same statutes. (*Ibid.*) It contains, however, an additional provision granting the trial court discretionary authority to deny resentencing if resentencing would pose a danger to the public. (Pen. Code, § 1170.126, subd. (f); *People v. Johnson*, *supra*, 61 Cal.4th at p. 691.)

Thus, with the exception of the recall court's discretion to deny resentencing on the basis of dangerousness, the new provisions are intended to apply the same going backward and forward and provide identical sentences for the same offenses. (*Id.* at p. 687.) A stumbling block for recall courts in ruling on petitions filed under Proposition 36 has been how to determine retrospectively whether a conviction was based upon non-elemental conduct listed in subdivision (iii), and thus, is ineligible for recall.

In this case, defendant was convicted by guilty plea of grand theft person. (Pen. Code, § 487, subd. (c).) Grand theft person is not a violent or serious felony and is punished at most as a low level felony. (Pen. Code, §§ 18, 487, 490.2.)[4] The recall court found defendant ineligible in this case by reviewing the preliminary hearing transcript that included evidence of a robbery with a firearm use allegation, the charges for both of which were dropped as part of a plea agreement. The recall court used this evidence to find by a preponderance that defendant was armed during the grand theft. (CT 171)

The issue presented here is whether the recall court could properly make such new

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[4]/ The crime is now a misdemeanor unless the value of the property is greater than $950, provided that the offender does not have a "super strike" prior, and is alternatively punished as a "wobbler" or a low level felony. (Pen. Code, §§ 18, 487, 490.2.)

findings of facts that are not reflected by the conviction itself and are based upon evidence of the facts underlying counts that were dismissed as part of a plea agreement. This issue is readily resolved by resort to basic rules of statutory construction and consideration of "the historical approach" to such questions in the context of the Three Strikes Law. (See *People v. Johnson*, *supra*, 61 Cal.4th at pp. 690 [analyzing a different aspect of section 1170.126 in light of the historical application of the Three Strikes Law].)

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 those *Guerrero* rules, the recall court improperly relied on facts underlying dismissed counts.

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.

The recall court here, and the appellate decisions upon which it relied, 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.

This modified *Guerrero* approach 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. This Court should now hold that the full *Guerrero* rule should be applied to the Proposition 36 eligibility determination and reverse the finding that defendant was eligible for a sentence

recall in this case.

B. The Penal Code section 1170.126 Eligibility Finding Must be Made on the Basis of the Full Rule of *Guerrero* and Its Progeny

1. Basic Rules of Statutory Construction Establish that the Full *Guerrero* Rule Applies to the Eligibility Determination

In interpreting a statute, the courts consider the plain meaning of the language of the statute to effectuate the purpose of the law. "We begin with the language of the statute, to which we give its ordinary meaning and construe in the context of the statutory scheme. If the language is ambiguous, we look to other indicia of voter intent." (*People v. Johnson*, *supra*, 61 Cal.4th at p. 682.)

Penal Code section 1170.126 requires that a petition for recall of sentence shall specify the current felonies for which a third strike sentence was imposed and all of the prior convictions that were pleaded and proved as "strikes," and further states that, upon receiving the petition, the recall court shall determine whether the petitioner satisfies the recall criteria. (Pen. Code, § 1170.126, subd. (d) & (f).) It says little or nothing, however, about how the recall court will determine eligibility, providing only that the court must look at the eligibility criteria of subdivision (e), which puts the identical restrictions on a second strike sentence upon recall that are outlined for sentences on new crimes, including the conduct-based restrictions of subdivision (iii). It makes no

suggestion that the determination will require a hearing or entail the taking of evidence.[5]

In contrast to this, section 1170.126 specifies that, *after* eligibility has been determined, the recall judge has discretion to deny resentencing if it would pose and unreasonable danger to public safety and outlines additional proceedings for the exercise of that discretion.[6] Subdivision (f) provides for resentencing of the eligible petitioner unless the court in its discretion determines resentencing creates too great a risk. Then, subdivision (g) details what evidence the court may consider in making the dangerousness determination, subdivision (i) provides that the petitioner may waive his presence at resentencing, and subdivision (m) declares the "resentencing hearing" to be a proceeding

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[5]/ Subdivision (e) states: "An inmate is eligible for resentencing if:
(1) The inmate is serving an indeterminate term of life imprisonment imposed pursuant to paragraph (2) of subdivision (e) of Section 667 or subdivision (c) of Section 1170.12 for a conviction of a felony or felonies that are not defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.
(2) The inmate's current sentence was not imposed for any of the offenses appearing in clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12."
(3) The inmate has no prior convictions for any of the offenses appearing in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clause (iv) of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12.

[6]/ Subdivision (f) states: "Upon receiving a petition for recall of sentence under this section, the court shall determine whether the petitioner satisfies the criteria in subdivision (e). If the petitioner satisfies the criteria in subdivision (e), the petitioner shall be resentenced pursuant to paragraph (1) of subdivision (e) of Section 667 and paragraph (1) of subdivision (c) of Section 1170.12 unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety."

covered by Marcy's Law. All of this demonstrates that, unlike the resentencing, the eligibility determination was meant to be a straight-forward question of law not subject to any factual findings or discretionary determinations by the recall court. (*People v. Bradford*, *supra*, 227 Cal.App.4th at p. 1337; see also *People v. Johnson*, *supra*, 61 Cal.4th at p. 692; *People v. Oehmigen* (2014) 232 Cal.App.4th 1, 7; *Superior Court v. Kaulick* (2013) 215 Cal.App.4th 1279, 1297.)

Presumably, this eligibility determination is made on the basis of the petition which lists the crimes for which a third strike sentence had been imposed and the priors that the prosecution had pleaded and proved, facts that have already been established by the conviction. For the most part, the determination can be easily made by reference to the code to see whether the crime of conviction or the prior are among those listed as ineligible. Problems arise, however, when the crime of conviction is an offense, during the commission of which, the defendant used or was armed with a deadly weapon or intended to inflict great bodily injury. (Pen. Code, §§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).) While in some instances the offense or an attached enhancement will establish one of these factors, frequently such conduct will not be an element of either.

Section 1170.126 does not itself articulate upon what the recall court will decide whether such conduct is involved. But the problem presented is nearly identical to that presented 28 years ago in *People v. Guerrero*, *supra*, 44 Cal.3d 343. There, this Court

had to decide whether a trier of fact could look beyond the elements of the offense in a prior conviction to determine whether non-elemental conduct could render it a serious felony for purposes of a Penal Code section 667, subdivision (a), enhancement. (*Id.* at p. 348.) This Court determined that the trier of fact could look to the entire record of conviction to determine what conduct the conviction reflected. (*Id.* at p. 355; *People v. McGee*, *supra*, 38 Cal.4th at p. 691.)

In *Guerrero*, this Court left open which parts of the record would be relevant to the inquiry (*id.* at p. 356, fn. 1), and in the ensuing 25 years leading up to the passage of Proposition 36 and Penal Code section 1170.126, the rule was clarified through a series of cases decided by this Court. The rule by the time of Proposition 36 was that the inquiry is focused on the elements of the offense of which the defendant was convicted, and does not contemplate an independent determination of disputed facts or permit reliance on portions of the record that do not reflect on the nature of the crime of which the defendant was actually convicted, irrespective of any other crime the evidence may show was committed. (*People v. McGee*, *supra*, 38 Cal.4th at p. 706; *People v. Trujillo* (2006) 40 Cal.4th 165, 179; *People v. Woodell* (1998) 17 Cal.4th 448, 459 ["the ultimate question is, of what crime was the defendant convicted"].)

The electorate is deemed to have been aware of this case law at the time it passed Penal Code section 1170.126. Whether a statute is enacted by the Legislature or by initiative, "[t]he enacting body is deemed to be aware of existing laws and judicial

constructions in effect at the time legislation is enacted." (*People v. Weidert* (1985) 39 Cal.3d 836, 844 [analyzing a statute passed by proposition in light of what the law had been for "over 20 years"]; see also *People v. Johnson*, *supra*, 61 Cal.4th at pp. 690-694 [interpreting a different aspect of section 1170.126 based upon the historical operation of the Three Strikes Law].) And the new legislation is deemed to have been enacted in light of such existing law. (*People v. Scott* (2014) 58 Cal.4th 1415, 1425.) Therefore, presumably, the electorate intended the determination of the conduct-based criteria in subdivision (iii) to be made retroactively the same way conduct-based factors have always been determined in ascertaining whether prior convictions were for serious felonies within the meaning of the Three Strikes Law.[7]

Moreover, the *Guerrero* rule was adopted to address a nearly identical problem - finding a fair and practical way to implement the intent of the electorate that non-elemental conduct be available for consideration in determining *retrospectively* whether a conviction was for a serious felony for purposes of recidivist sentencing. This Court reasoned that the rule would be both "fair and reasonable," would promote "the efficient administration of justice," and would "specifically" further "the evident intent of the people in establishing an enhancement" using "a term that refers to *conduct*, not a specific

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[7]/ At the time of *Guerrero*, the issue related to whether a section 667, subdivision (a), prior was applicable; the Three Strikes Law had not yet been passed. The same rule, however, has always been applied to the same serious felony inquiry under the Three Strikes Law. (See e.g. *People v. Woodell* (1998) 17 Cal.4th 448, 450-454.)

crime." (*People v. Guerrero*, *supra*, 44 Cal.3d at p. 355 [emphasis original].) Additionally, the limitation to review of the record of conviction only was designed to bar the prosecution "from relitigating the circumstances of a crime committed years ago." (*Ibid.*)

This Court's reasoning in *Guerrero* applies equally here. Penal Code section 1170.126 should be interpreted so as to fairly, reasonably, and efficiently promote the intent of the electorate in making the ameliorative aspects of the new laws retrospective.

Prospectively the subdivision (iii) factors will be pleaded and proved beyond a reasonable doubt. To make retrospective application be nearly identical (see *People v. Johnson*, *supra*, 61 Cal.4th at p. 691 [intent to have same rules of eligibility apply prospectively and retrospectively]), retrospective application should turn on what was pleaded and proved when the petitioner sustained the current conviction. Moreover, section 1170.126 makes eligibility turn on the petitioner's serving a "sentence" for a "conviction." As a conviction is only obtained and a sentence only imposed for offenses that have been pleaded, proved, and found true beyond a reasonable doubt, the intent in drafting the statute must have been to have eligibility turn on any fact reflected by the conviction as having been pleaded, proved, and found true beyond a reasonable doubt. (*People v. Johnson*, *supra*, 61 Cal.4th at p. 682 [to interpret a statute, look first to the words of the statute themselves and give them ordinary meaning].)

That is what the full *Guerrero* test is designed to ascertain - the conduct that the

record demonstrates was found or admitted in support of the verdict of conviction. (See *People v. Guerrero*, *supra*, 44 Cal.3d at pp. 349-352 [describing the rule of *In re McVickers* (1946) 29 Cal.2d 264, which it was adopting and which permitted review of the entire record to determine such facts]; *People v. McGee*, *supra*, 38 Cal.4th at p. 706 [rule permits no independent determination of disputed facts].)

This Court should interpret section 1170.126 consistently with the way in which it has previously interpreted recidivist statutes requiring the same sort of determination as to prior convictions. Section 1170.126 requires a later court to determine whether a previous conviction was based upon non-elemental conduct that would render the petitioner ineligible for a sentence recall and reduction. This is the same question presented to the court determining whether a prior conviction is a serious felony based upon non-elemental conduct under section 667. The two statutes reflect the same legislative intent - to base the applicability of a sentence on the prior *conviction*, not limited to the elements of the offense of conviction but extended to conduct that was its "substance." (See *People v. Myers* (1993) 5 Cal.4th 1193, 1200-1201.) Both statutes reflect the intent to look beyond the bare elements of the offense, but *not* past the conviction. (See *People v. Woodell*, *supra*, 17 Cal.4th at p. 460 [only relevant inquiry basis of conviction, not what actually occurred during its commission].) Thus, section 1170.126, like section 667, should be interpreted to permit consideration of only the facts adjudicated and found in reaching the previous conviction to decide whether the relevant

conduct was reflected. The full rule of *Guerrero* and its progeny should be adopted.

2. The Rule Adopted by the Court of Appeal, Using Only Half of the *Guerrero* Rule Misconstrues This Court's Decisions, Is Unfair and Inconvenient, and Renders Absurd Results

"The 'consequences that will flow from a particular interpretation' is one of the factors which a court should consider in interpreting a statute [Citations]; '[the] interpretation should lean strongly to avoid absurd consequences, and even great inconvenience.' [Citation]" (*People v. Alfaro* (1986) 42 Cal.3d 627, 635 [overruled on other grounds in *People v. Guerrero*, *supra*, 44 Cal.3d at p. 356].)

The Court of Appeal here, relying on *Guerrero* and its progeny, held that section 1170.126 eligibility should be based upon only relevant portions of the record of conviction, but rejected the argument that application of the full *Guerrero* rule, with the limitation on the nature of the inquiry, would result in a finding that appellant was not armed here. The court concluded that the limitation of the scope of the items reviewed to only the record of conviction, but no further, itself effectively bars relitigation of the circumstances of the crime. (Slip opn. p. 6) Without limitation of the inquiry to the nature of the conviction, however, limiting the evidence to be considered generally to that which may be defined as being in the "record of conviction" does not itself preclude relitigation of the circumstances of the offense. And, it did not do so in this case. Using only the half of the *Guerrero* rule that limits what may be considered to only whether it could be deemed a part of the record of conviction, without also limiting the inquiry also

creates unfair results and absurd consequences.

In this case, the recall court reviewed the preliminary hearing testimony, and based on that, found by a preponderance of the evidence that appellant had been armed during the commission of the grand theft to which he had pleaded guilty. (CT 170-172) Appellant argued that this was improper because his conviction was the result of a guilty plea to grand theft, and the dropping of the alternative robbery charge and a gun use allegation. Relying on *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1048-1049, as had the trial court, the Court of Appeal found that the trial court's factfinding based upon its review of the preliminary hearing was not a relitigation of the issues and was "exactly what *Guerrero* . . . allow[s]" because the recall court considered only the transcripts of the preliminary hearing which were not beyond the record of conviction. (*Id.* at p. 6)

In *People v. Blakely*, *supra*, 225 Cal.App.4th 1042, the court 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. *Blakely* affirmatively stated, however, that only the record limitation aspect of the *Guerrero* rule applied in the Proposition 36 context and that the nature of the inquiry was not limited to determining what facts supported the conviction. Therefore, the recall court could make additional factual findings by a preponderance of the evidence found in the record of conviction. It reasoned that additional factual findings were permissible because the recall procedure was for purposes of a sentence reduction and not the initial

imposition of sentence. (*Id.* at pp. 1062-1063.)[8]

This analysis misconstrues the holdings of this Court that clarify what constitutes the relevant "record of conviction" within the meaning of the *Guerrero* rule. In fact, whether a part of a trial or appellate record is a relevant portion of the record of conviction that may be considered in making the *Guerrero* determination is controlled by the basic limitation on the scope of the inquiry. Because the inquiry is limited to the ascertainment of the conduct underlying the *conviction*, portions of the "record" that do not inform that inquiry are not considered the proper record of conviction under the rule. (See *People v. Woodell*, *supra*, 17 Cal.4th at p. 459; *People v. Trujillo*, *supra*, 40 Cal.4th

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[8]/ The *Blakely* court rejected arguments that the arming had to have been previously pleaded and proved at trial, or now pleaded and proved and found by a jury. It noted that Penal Code section 1170.126 does not require pleading and proof for the recall procedures and directs the trial court, not a jury, to determine eligibility. It further found that because the statute ameliorates the sentence, there was no federal constitutional jury trial right under the *Apprendi v. New Jersey* (2000) 530 U.S. 466 line of cases. (*People v. Blakely*, *supra*, 225 Cal.App.4th at pp. 1058-1062.)

Appellant does not here dispute that the statute does not require that the conduct-based disqualifying factors have been expressly pleaded and proved at the prior trial or the hearing on the recall petition. As noted above, however, the pleading and proof aspect of sections 667 and 1170.12 provisions for exclusionary conduct is encompassed retrospectively by the *Guerrero* limitation on the nature of the inquiry. Neither does appellant here argue that the federal constitution is implicated by the failure to require pleading and proof at the eligibility phase, but the *Guerrero* rule is *not* based upon *Apprendi*. It is the California rule and was developed before *Apprendi* was decided. 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.) Thus, the California *Guerrero* rule has its own genesis and independently precludes new litigation of facts related to a prior conviction.

at 179-181.)

In *Trujillo*, this Court held that even a defendant's admissions in a probation report, which would be an exception to the hearsay rule found in a document that was part of a normal trial and appellate record, 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.)

In *Trujillo*, this 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 . . . . 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, . . . forcing the defendant to relitigate* the circumstances of the crime." (*People v. Trujillo*, *supra*, 40 Cal.4th at p. 180 [emphasis added]; see also *People v. Woodell*, *supra*, 17 Cal.4th at p. 459 ["**[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]"[italics original emphasis; bold added emphasis].)

In *Woodell*, this Court held that an appellate opinion could be considered part of the "record of conviction" for purposes of *Guerrero* because it *may* reflect the nature of the conviction. This Court explained that the "ultimate question is, of what crime was the defendant *convicted*." (*People v. Woodell*, *supra*, 17 Cal.4th at p. 459, emphasis original.) Thus, the appellate opinion was relevant for a non-hearsay purpose of determining what was the basis of the *conviction*, but *not* of what happened during the crime. (*Id.* at pp. 459-460.)

Therefore, not all appellate opinions would be admissible as part of the relevant record of conviction. (*People v. Woodell*, *supra*, 17 Cal.4th at p. 457 ["We do not hold that all appellate opinions will . . . be relevant to the question [of whether a prior conviction qualifies as a serious felony under the Three Strikes law]."") Rather, the admissibility of an opinion for *Guerrero* purposes turns on "whether the opinion logically shows *what the original trial court found was the basis of the conviction*," and only factual statements relevant for this purpose should be admitted. (*Id.* at p. 460, emphasis added.) Accordingly, "if the opinion refers to facts in a fashion indicating *the evidence was disputed and the factual issue unresolved, that reference would have little, if any, tendency to show the basis of the conviction and would, alone, not justify admitting the opinion.*" (*Ibid.*; emphasis added.) Thus, what is part of the admissible relevant "record of conviction" under *Guerrero* depends on whether it addresses the *limited*

inquiry of what was the basis of the conviction. (*Ibid.*)[9]

The Court of Appeal here relied on this Court's opinion in *People v. Reed* (1996) 13 Cal.4th 217, as holding that the preliminary hearing transcript could be a part of the record on appeal for *Guerrero* purposes. (Slip opn. p. 5.)[10] In *Reed*, this Court concluded that the trial court properly relied on testimony in the preliminary hearing transcript to determine whether the defendant personally used a deadly weapon during the commission of the assault to which he had pleaded guilty. (*People v. Reed*, *supra*, 13 Cal.4th at pp. 223-230.)

The issue before this Court in *Reed* was whether the evidence should have been excluded as hearsay, and this Court held that the unavailability of the witnesses based upon the *Guerrero* rule that new testimony could not be taken rendered the preliminary hearing testimony admissible under the prior recorded testimony exception to the hearsay rule. (*People v. Reed*, *supra*, 13 Cal.4th at pp. 220, 224-230; Evid. Code, §§ 240, 1291.)

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[9]/ This Court went on in *Woodell* to note that the trial court should explain to the jury that the appellate opinion may only be considered for a limited purpose, that it "is not admitted to show exactly what the defendant did while committing the previous crime" but only whether he was convicted of the crime based upon the relevant conduct as that is the only *relevant* question. (*People v. Woodell*, *supra*, 17 Cal.4th at p. 460.)

[10]/ While *Reed* did find that the preliminary hearing transcript fit within the definition of the "record of conviction," the Court of Appeal's statement here that "[p]reliminary hearing transcripts are part of the record of conviction," (slip opn. p. 5) is too broad. As the Court of Appeal recognized in *People v. Houck* (1998) 66 Cal.App.4th 350, the preliminary hearing could not be deemed a part of the record of conviction after a jury verdict, because it was not necessarily a reflection of what occurred at trial. Thus, it did not "reliably reflect the facts of which the defendant was convicted." (*Id.* at pp. 355-357, quoting *Reed*.)

Before addressing the hearsay issue, despite the fact that the parties did not contest whether the preliminary hearing testimony was part of the record of conviction, this Court made the threshold determination that it was. (*Id.* at p. 224.) This Court reasoned that the transcript fit the broad definition of record of conviction because it was part of the appellate record, and also fit a narrow definition of "record documents reliably reflecting the facts of the offense for which the defendant was convicted." (*Ibid.*) The "reliability" was based upon the protections afforded the defendant in taking the testimony of cross-examination, confrontation, and that the witness testified under oath. (*Ibid.*)

Thus, in making the threshold determination in *Reed*, this Court was concerned with the reliability of the hearsay in terms of whether the statements were likely true as opposed to whether the statements reflected the facts of the conviction. As this Court was not asked to consider, nor addressing, whether the use of the preliminary hearing transcript in that case was in fact improperly extending the inquiry or resolving factual disputes that were not resolved at the time of the conviction, *Reed* should not be used to establish that in *all* guilty plea cases *all* of the preliminary hearing evidence may be considered to discern the conduct underlying the conviction.

Subsequent to *Reed*, this Court clarified in cases directly addressing the question of what constituted relevant parts of the record for purposes of the *Guerrero* rule that what actually happened during the course of the crime or the truthfulness of the source of the evidence showing what actually happened are irrelevant to the inquiry. (See *People v.*

Trujillo, *supra*, 40 Cal.4th at p. 179 [defendant's admissions in a post-plea probation report are not part of the record of conviction because they do not reflect the facts of the offense of which the defendant was convicted, which is the only relevant inquiry]; *People v. Woodell*, *supra*, 17 Cal.4th at p. 457 [appellate opinions only a *relevant* part of the record of conviction to the extent that it demonstrates the nature of the *conviction*.) In *Trujillo*, this Court noted that the prosecutor would not have had the evidence of the defendant's admission in order to prove the allegation because the admission was given *after* trial when Double Jeopardy would preclude resurrecting the allegation, and the prosecutor could not have forced the defendant to testify. (*People v. Trujillo*, *supra*, 40 Cal.4th at p. 179.)

Trujillo then distinguished *Reed*'s finding that the preliminary hearing transcript was a part of the record of conviction, noting that the preliminary hearing contained evidence actually admitted against the defendant and was available to the prosecution prior to the plea. Unlike the post-plea statements, then, the parties could consider it in reaching the bargain. "[T]herefore, [the transcript] *sheds light* on the basis for the conviction." (*Id.* at p. 180 [emphasis added].) The extent to which it "sheds light" on the nature of the conviction, however, is obviously limited by the inquiry itself. The evidence from the preliminary hearing only sheds light on the conduct underlying the offense to which the defendant pleaded guilty if it is clear that the defendant is admitting that

conduct by his plea.[11]

In addition to misinterpreting the *Guerrero* line of cases, the Court of Appeal's assertion that a recall court's new findings of facts that were not reflected by the conviction itself is not *relitigation* is factually incorrect. Litigation is a contest as to facts. If the recall court, using a lesser standard of proof, finds new facts that were never before at issue or reflected by the verdict, it *is* relitigating the matter. The relitigation is just being done based upon limited evidence - the "record of conviction," but it is relitigation nonetheless.

The finding here required the recall court to look at a limited universe of evidence - that previously developed in the trial court at the time of conviction and constituting the "record of conviction" - and apply a "burden of proof" of a preponderance of the evidence to make never before made findings of fact. The conviction here was attained by appellant's plea, his sentence was based upon only those facts that the plea proved. Those facts were later changed, relitigated, by additional finding made by the recall court.

Such a procedure completely undoes the fairness *Guerrero* attempted to preserve. It is neither fair nor reasonable. It permits the prosecution to litigate for the first time things that were removed from issue by virtue of a plea bargain in cases like this one.

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[11]/ Justice Baxter's dissent demonstrates why this distinction between the use of the probation report and the preliminary hearing makes no difference if the mere truth of the evidence is what makes it relevant and reliable for determining the conduct underlying the conviction. (*Id.* at pp. 182-186.)

And, would permit the recall court to make findings of fact about which a prior jury had potentially hung or even found untrue; this could easily occur because the recall court was using a lesser burden of proof. Thus, this procedure does not avoid "threatening the defendant with harm akin to double jeopardy and denial of speedy trial." (*People v. Guerrero*, *supra*, 44 Cal.3d at p. 355.)

The case of *People v. Arevalo* (2016) 244 Cal.App.4th 836 demonstrates this well. In *Arevalo*, the defendant had been charged with grand theft of a car, with an armed allegation attached to it, and felon in possession of a weapon. The crimes were based upon appellant having been arrested in the stolen car with an unloaded gun on the front seat. In a bench trial, the court found the defendant guilty of the theft, but acquitted the defendant of the gun possession count and found the arming allegation not true. (*Id.* at pp. 842-843.) The recall court, applying a preponderance of the evidence standard and limiting itself to the "record of conviction," made a contrary finding that the defendant had been armed with a firearm during the theft, and based upon that found him eneligible. (*Id.* at p. 844.)

This Court's decision in *In re Seeley* (1946) 29 Cal.2d 294 also demonstrates the problem in the context of a guilty plea. There, this Court declined to find that the Oregon larceny conviction in that case was the equivalent of a California burglary. The defendant had been arrested and held on burglary in Oregon, but the record showed that the burglary count was not pursued after an investigation had determined that the intent to steal was

formed after entry. (*Id.* at p. 301.) Based upon this, this Court rejected the state's argument that the Oregon crime could be used as a prior burglary conviction by finding that the intent required for burglary could be implied from the act of committing the theft after entering the building. Yet, if the trial court in *Seeley* had been permitted to make its own determination by a preponderance of the evidence, it could have itself inferred the intent as the prosecutor had suggested (see e.g., *People v. Moore* (1965) 234 Cal.App.2d 29, 31), even though such intent was previously determined to be lacking and so was intentionally deleted from the conviction.

Under no circumstances could this not be considered relitigation of the crime. It in fact changes the crime and the verdict, altering a judgment long-since final. Moreover, in the case of a guilty plea, such change is made on the basis of facts that the defendant had no motive to challenge. (*People v. Crowson* (1983) 33 Cal.3d 623, 634.) Applying only half of the *Guerrero* rule and permitting the lower court to make new findings of fact, not only grants the court discretionary power that Penal Code section 1170.126 does not provide, but violates California's own concepts of fairness. (See *People v. Guerrero*, *supra*, 44 Cal.3d at p. 355; *People v. McGee*, *supra*, 38 Cal.4th at p. 691.)

3. The Problem Is Particularly Acute in Plea Bargaining Cases

Plea bargains involve agreements whereby the plea may not reflect what actually occurred or the evidence shows, but the defendant admits the crimes and allegations agreed-upon. (See *People v. West* (1970) 3 Cal.3d 595, 612-613; see also *People v.*

Jackson (1985) 37 Cal.3d 826, 836 ["We permit a defendant in connection with a plea bargain to plead guilty to an offense with which he is not charged, and *which the prosecution cannot prove*, so long as it is reasonably related to defendant's conduct." (Emphasis added)][12].) Such agreements are designed to be to the benefit of both parties. (See e.g. *Brady v. United States* (1970) 397 U.S. 742, 751-752 [90 S. Ct. 1463; 25 L. Ed. 2d 747; both sides often find it advantageous to forgo the possibility of the maximum penalty].)

Thus, in cases of plea bargains, not all of the testimony at the preliminary hearing will necessarily "reliably reflect[] the facts of the offense for which the defendant was convicted." (*People v. Reed, supra*, 13 Cal.4th. at p. 223.) Rather, the preliminary hearing transcripts may shed light on the conduct covered by the conviction by showing that the prosecution made a conscious decision to forgo proving all of the conduct on which testimony was presented at the preliminary hearing, perhaps based upon a lack of confidence in the evidence developed there. (See Pen. Code, § 1192.7, subd. (a)(2) [a basis for permitting plea bargaining in a serious felony case is that there is insufficient evidence or a witness cannot be secured].) Usually, however, it will merely supply information as to the conduct that supports the elements of the crime actually admitted, but it may not even do that in the context of a *West* plea.

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[12]/ *Jackson* was affirming an admission of a serious felony enhancement despite the fact that the conduct rendering it serious could not have been proved by the elements-only test that was the rule pre-*Guerrero*.

In *Trujillo*, as in this case, the defendant's prior conviction was based on a guilty plea. At the time of the plea, a knife use allegation that had been attached to the count admitted was dismissed. In holding that the defendant's later statements in the probation report did not necessarily reflect the nature of the crime of conviction, this Court noted that the prosecution had not attempted to prove the use allegation and instead "entered into a plea bargain in which it dismissed the allegation." (*People v. Trujillo*, *supra*, 40 Cal.4th at p. 179.) Thus, whatever the truth of the allegation or whether the defendant actually used a weapon in committing the offense, it was not proved or even attempted to be proved.

Similarly in *In re Seeley*, *supra*, 29 Cal.2d 294, this Court declined to find that the Oregon larceny conviction was the equivalent of a California burglary because the burglary charge had been dropped by the Oregon prosecutor. The defendant had been arrested and held on burglary, but the record showed that the burglary count was not pursued after an investigation had determined that the intent to steal was formed after entry. (*Id.* at p. 301.)

So too here retrospective examination of the conviction obtained by the guilty plea should not resurrect facts underlying charges and allegations that were abandoned by the prosecution. By dismissing the robbery charges and use allegations, the only allegations requiring arming with or use of a weapon, in favor of a conviction for grand theft, the prosecution gave up any attempt to prove that a weapon was involved in the commission

of the offense or the truth of the victim's preliminary hearing testimony as to it being involved. Appellant's admission of guilt of grand theft did not admit anything beyond the elements of that crime. (See *People v. Reed, supra*, 13 Cal.4th at p. 224 [plea itself does not show any admission of more than the elements]; *In re McVickers, supra*, 29 Cal.2d at p. 279.)

Therefore, while the preliminary hearing transcript might shed light on the facts underlying a plea, in the context of a plea bargain where the very allegation being resurrected was dropped, it only sheds light as to the conduct underlying the elements admitted, and not that of the allegations that were dismissed. In fact, it demonstrates the prosecutor's abandonment of the intent to prove those facts, a decision which could have been based upon an assessment that they could not be established if tested at trial. (See Pen. Code, § 1192.7, subd. (a)(2).)

In the absence of a statement to the contrary during the plea, the implication is that the conviction was not meant to cover the uncharged facts that were the basis of other counts and allegations that were dropped and were not required to establish the elements of the offense admitted. (See *People v. Shelton* (2006) 37 Cal.4th 759, 767 ["A negotiated plea agreement is a form of contract, and it is interpreted according to general contract principles."]; Civ. Code, §§ 1636, 1649 [contracts interpreted to give effect to the mutual intent of the parties, so far as the intent is ascertainable and lawful; *People v. Toscano* (2004) 124 Cal.App.4th 340, 345 [generally ambiguities in plea agreements are

construed in favor of the defendant].) And, material terms of the agreement cannot be modified without consent of the parties. (See *People v. Segura* (2008) 44 Cal.4th 921, 935; *People v. Martin* (2010) 51 Cal.4th 75, 80-82.)[13]

The Court of Appeal here found that the plea bargain was of no moment. It did so by focusing on the preliminary hearing evidence of what occurred, rather than on what the plea admitted. Thus, the court noted that dismissal of the robbery and use allegations did not mean that appellant was not armed because one could be armed during a grand theft without committing a robbery. Based on this, the court concluded that the finding of arming was not a relitigation of the dismissed robbery counts. (Slip opn. pp. 6-7)

This misses the point. It was not a relitigation of the dismissed counts, but rather a relitigation of the grand theft count to find an arming that was never admitted or proved. In this case, the only "proof" of the "arming" during the grand theft was the testimony of the store clerk that, as he rang up appellant's purchase, appellant pulled a gun on him and

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[13]/ Even as to discretionary sentencing choices for which the sentencing court may look to factors beyond the commission of the offense, a plea bargain generally limits consideration of dismissed counts. (See *People v. Harvey* (1979) 25 Cal.3d 754, 758 [circumstances of dismissed counts may be used as aggravating factors only if the dismissed counts are transactionally related to the admitted offense].) While the arming in this case could be deemed "transactionally related," the inquiry here is not as to aggravating sentencing factors, but rather what conduct is the substance of the conviction. Discretionary sentencing choices are made *after* the range of punishment has been set by the conviction. Here, the issue is what is the substance of the conviction that will in turn establish the range of punishment. Modifying the substance of the conviction to include an additional arming allegation would be changing a material term of the bargain without the parties' consent, which is not permitted. (See *People v. Segura, supra*, 44 Cal.4th at p. 935; *People v. Martin, supra*, 51 Cal.4th at pp. 80-82.)

demanded money, which the clerk gave appellant. (Slip opn. p. 2) The admitted theft was originally charged with a use allegation attached to it, and an alternative robbery count was also alleged. (CT 135-136, 141) When appellant admitted the theft without the use allegation, he admitted only unlawfully taking the money from the till in the clerk's presence and not that he brandished a weapon at the clerk or took the money forcibly from him. There can be no doubt that appellant's plea pursuant to a bargain that dropped the other counts was not premised upon his admission that a gun was involved. The recall court's finding to the contrary was further litigation of intentionally unresolved facts, and the Court of Appeal's conclusion here was wrong.

The reasoning of *People v. Berry* (2015) 235 Cal.App.4th 1417 is more persuasive. In *Berry*, the Court of Appeal reversed the finding that the defendant was not eligible for a Penal Code section 1170.126 sentence reduction based upon his being armed with firearm during the commission of the possession of a fraudulent check and a forged driver's license to which he had pleaded guilty. The defendant had been charged with the counts admitted as well as drug and weapon possession counts. All of the counts arose from the same incident in which the police saw appellant go to the trunk of one car, open it and reach inside. The defendant then got into another car that had been stolen; thereafter, the police stopped and arrested him. Upon searching his person, the police found the fraudulent documents that were the bases of the admitted charges and keys to the trunk of the first car which they had seen appellant open. In the trunk, the police

found a loaded firearm and drugs. (*Id.* at p. 1421.) The recall court found that the defendant had been armed with a firearm during his possession counts because he went to the trunk of the car and had access to the weapon while he was in possession of the fraudulent documents. (*Id.* at pp. 1422-1423.)

On appeal, the *Berry* court relied on *Woodell* and its limitation on the scope of the inquiry in determining the facts underlying the conviction. The *Berry* court noted that "such inquiry must focus on the evidence underlying the offense for which the defendant was previously *convicted* in assessing whether that conviction appears to satisfy the required elements . . ., and not on assessing what *other* offenses might also have been supported by the evidentiary record." (*Id.* at p. 1427 [emphasis original].) The *Berry* court concluded that applying those parameters to the question before it, the trial court had gone outside the record of conviction by considering the evidence of the weapon possession counts that were wholly unrelated to the counts admitted. "Defendant's conviction was based solely upon his guilty plea, and that plea was limited to the counts alleging possession of a fraudulent check and a forged driver's license. Any evidence that the defendant also possessed a firearm played no part in his conviction." (*Ibid.*)

The Court of Appeal here distinguished *Berry* because the evidence of arming in this case was not "wholly unrelated" to the grand theft person that the defendant admitted here. It characterized consideration of the gun evidence in this case as being evidence of the charged offense, not just the dismissed offenses. (Slip opn. p. 7) But the gun use was

what distinguished the charged offense from the admitted offense and was as related to the admitted theft here, as the possession of the gun in *Berry*, which occurred at the same time the defendant was also possessing the forged documents, was related the crimes admitted there.

Moreover, given the nature of plea bargains, it is wholly unfair to permit a later court to find the conviction encompasses conduct the proof of which was bargained away. Federal due process requires that, when a plea bargain is entered, the promises made to the defendant be kept. (See *People v. Calloway* (1981) 29 Cal. 3d 666, 676-677; *Santobello v. United States* (1971) 404 U.S. 257, 260-262 [92 S. Ct. 495; 30 L. Ed. 2d 427; "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."] .) "Concomitant with recognition of the necessity and desirability of the [plea bargaining] process is the notion that the integrity of the process be maintained by insuring that the state keep its word when it offers inducements in exchange for a plea of guilty." (*People v. Mancheno* (1982) 32 Cal.3d 855, 860.)

As the United States Supreme Court noted in *Descamps*, to permit a later court to conclude that a crime involved conduct underlying allegations that were bargained away will "deprive some defendants of the benefits of their negotiated plea deals." (*Descamps v. United States* (2013) ___ U.S. ___ [133 S. Ct. 2276, 2289; 186 L. Ed. 2d 438].) The High Court then posited that it would be unfair, where a defendant had surrendered his

right to trial in exchange for an agreement that he plead guilty to a less serious crime, to permit a later sentencing court to treat him as though he had pleaded to the greater offense. The Court concluded that "on top of everything else, [it] would allow a later sentencing court to rewrite the parties' bargain." (*Ibid.*)

When appellant pleaded guilty in this case part of his bargain was that the robbery count and gun allegations would be dropped. Thus, part of his bargain was that the substance of his conviction would be a grand theft without a gun. The trial court's finding by a preponderance that the conviction was for a theft while armed with a firearm changed a material term of his bargain and permitted the state to renege on its promise to drop the gun allegations. This in turn violated state and federal concepts of fairness and the requirements of the plea bargaining process.

4. The Full *Guerrero* Test, with Its Limitation on the Inquiry, Fits the Intent of the Electorate in Passing Penal Code section 1170.126, and Should Be Adopted

Not only is the procedure adopted by the trial court in this case unfair, but it could not be what the voters intended when they enacted Penal Code section 1170.126 to make the new three strikes rules apply retrospectively so as to make defendants who would have received a second strike sentence under the new law eligible for a sentence reduction. (See *People v. Johnson*, *supra*, 61 Cal.4th at p. 691.) Rather, the full *Guerrero* test was likely intended and is better suited to the task.

In order have the new rules apply retrospectively to the same offenses as they will

apply prospectively, courts are called upon to determine whether the substance of convictions include the non-elemental conduct that will preclude application of the new reduced sentences going forward. As noted above, the *Guerrero* rule was created to address a nearly identical problem - to provide a fair means by which to determine which crimes should be treated as serious felonies for purposes of recidivist sentencing based upon non- elemental conduct. (See *People v. Guerrero*, *supra*, 44 Cal.3d at p. 355; *People v. Bradford*, *supra*, 227 Cal.App.4th 1322, 1336-1339.)

The full *Guerrero* test is not perfect. Some crimes that may have been proved to be ineligible had the trier of fact been asked to make the specific finding[14] will not qualify under *Guerrero*, but a finding of eligibility is not the end of the game. The prosecution in the recall context can still prevent the reduction of sentence for an eligible defendant if it can show that the defendant poses an unreasonable risk of danger to the public. (See *People v. Arevalo*, *supra*, 244 Cal.App.4th at p. 852; *People v. Johnson*, *supra*, 61 Cal.4th at p. 691.) Thus, only if the defendant is not a danger will his sentence be reduced irrespective of whether additional conduct might have been provable had it been at issue. This is completely consistent with the purpose of the statute - to reduce the sentence of the non-dangerous to leave room for the dangerous. (See *People v. Johnson*, *supra*, 61 Cal.4th at p. 691.)

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[14]/ As this Court noted in *People v. Conley* (2016) _Cal.4th _ (2016 Cal. LEXIS 4578. *18-*20, S211275) prior to Proposition 36, the prosecutor could not have pleaded the non- elemental disqualifying conduct.

Additionally, Penal Code section 1170.126 was "intended solely to provide inmates with an opportunity to have their sentences reduced." (*People v. Berry*, *supra*, 235 Cal.App.4th at p. 1425.) Therefore, the provisions defining the defendant's eligibility should not be universally construed *against* finding the inmate eligible. (*Ibid.*) Moreover, such liberal construction of the eligibility provisions against the inmate serves only to ensure that inmates who would be otherwise found to not pose an unreasonable risk to public safety will be forced to remain in prison. Thus, adopting a rule that expands ineligibility by permitting the trial court to find disqualifying conduct not reflected by the conviction based upon a mere preponderance of the evidence is inconsistent with the purpose of the statute.

Given the longevity of the well-established rules outlined in *Guerrero* and its progeny, it must be presumed that the drafters of Proposition 36 intended the recall court to employ the quarter-of-a-century-old California mechanism for determination of conduct-based factors as they applied to the Three Strikes Law. 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, *supra*, 61 Cal.4th at pp. 690-694 [interpreting the statute based upon the historical operation of the Three Strikes Law].)

C. Application of the Full *Guerrero* Test Requires a Finding that Appellant Is Eligible for a Recall of His Sentence Under Section 1170.126

As noted, appellant entered a plea bargain whereby he would admit the lesser version of the crime charged - grand theft, and the more serious charge and allegations - the robbery and the gun use attached to it and the grand theft, would be dropped. Thus, although all the parties were aware that testimony from the preliminary hearing provided evidence that appellant had used a gun and forcibly taken the money at gun point, it was agreed that appellant would not admit nor be convicted of the allegations relating to it. And, he did not, admit them; they were dropped and were not proved.

Therefore, the preliminary hearing testimony, when considered to inform the verdict and determine the nature of the conviction, established only that appellant took money from a store till in the immediate presence of the clerk. That grand theft is not a serious felony during the commission of which appellant was armed with or used a weapon. Accordingly, he was eligible for a sentence reduction under Penal Code section 1170.126, and the finding that he was not must be reversed.

CONCLUSION

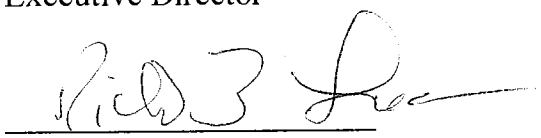
This Court should hold that trial courts determining eligibility may not make new factual findings that render the defendant ineligible for relief under Penal Code section 1170.126. As the recall court did so here, this Court should reverse the finding that appellant was ineligible for a recall of his sentence pursuant to Penal Code section 1170.126, and the denial of appellant's Proposition 36 recall petition.

Dated: July 27, 2016

Respectfully submitted,

CALIFORNIA APPELLATE PROJECT

JONATHAN B. STEINER
Executive Director



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WORD COUNT CERTIFICATION

People v. Mario Estrada

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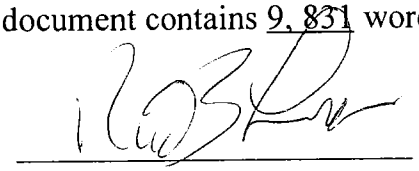

Richard B. Lennon

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 July 27, 2016, I served the within

BRIEF ON THE MERITS

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

Executed July 27, 2016 at Los Angeles, California.

Jacqueline Gomez