In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

MARIO R. ESTRADA,

Defendant and Appellant.

Case No. S232114

Second Appellate District, Case No. B260573
Los Angeles County Superior Court, Case No. GA025008
The Honorable William C. Ryan, Judge

ANSWER BRIEF ON THE MERITS

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ISSUE PRESENTED

Did the trial court improperly rely on the facts of counts dismissed under a plea agreement to find defendant ineligible for resentencing under the provisions of Proposition 36?

INTRODUCTION

The Three Strikes Reform Act of 2012 ("the Act"), approved by the voters as Proposition 36, permits inmates serving "third-strike" sentences for a commitment offense that is neither "serious" nor "violent" to petition for resentencing as "second-strike" offenders. The Act's provisions impose threshold eligibility rules that direct resentencing courts to determine whether petitioners satisfy enumerated criteria, including – as is relevant here – a requirement that the petitioner's third-strike sentence was not imposed for an offense during which he or she used a firearm. (Pen. Code, § 1170.126, subd. (e)(2),[1] incorporating §§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).) If the resentencing court determines that the petitioner satisfies all threshold eligibility criteria, recall of sentence is permitted only if the court exercises its discretion to find that resentencing would not pose an unreasonable risk of danger to public safety. (§ 1170.127, subd. (f).)

Under his 1996 plea agreement, appellant Mario Estrada pleaded guilty to grand theft person; in return, the prosecution dismissed a robbery count and firearm use allegation based on the same conduct as the grand theft person, and the court imposed a third-strike sentence of 25 years to life. When Estrada petitioned for resentencing under the Act (§ 1170.126), the resentencing court denied his petition after reviewing the record of conviction, including the preliminary hearing transcript, and determining

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[1] Undesignated statutory references are to the Penal Code.

that he was armed with a firearm during the grand theft person, which rendered him ineligible for resentencing.

On direct appeal from the resentencing denial, the Court of Appeal rejected Estrada's contention that *People v. Guerrero* (1988) 44 Cal.3d 343 prohibited the resentencing court from finding the firearm-related disqualifying conduct, which had not been "pled or proven" as an element of his original conviction. (*People v. Estrada* (2015) 196 Cal.Rptr.3d 418, 421-422.) The Court of Appeal reasoned that the Act's resentencing provisions contain no pleading and proof requirement (*id.* at p. 421) and that *Guerrero* permits consideration of the entire record of conviction to determine the truth of a prior-conviction allegation (*ibid.*, citing *Guerrero*, *supra,* at p. 335). The Court of Appeal also held that the negotiated dismissal of the firearm use allegation and robbery count did not foreclose the resentencing court's determination of the arming disqualifying conduct: the arming conduct occurred during the admitted offense, rather than during dismissed counts or allegations "wholly unrelated" to the admitted offense. Regardless, the finding of the disqualifying conduct was not tantamount to a finding of the dismissed count or allegation. The Court of Appeal concluded that the resentencing court properly found Estrada ineligible because the record of conviction showed that he was armed with a firearm during the commitment offense. (*Estrada*, *supra*, at pp. 422-423.)

The Court of Appeal was correct. The plain language of the Act, consistent with the electorate's general intent, neither requires prior pleading and proof of the disqualifying conduct nor limits the resentencing court's determination to conduct necessarily established by the elements of the conviction. On the contrary, when the Act was approved, this Court's precedent, including *Guerrero*, permitted sentencing courts to look beyond the elements of a prior conviction and consider the entire record of conviction to determine whether a defendant was subject to enhanced

punishment under the Three Strikes law and similar recidivist sentencing provisions. (See, e.g., *Guerrero*, *supra*, 44 Cal.3d at pp. 355-356; *People v. McGee* (2006) 38 Cal.4th 682, 693-694.) This Court has since discussed circumscribing the scope of a sentencing court's inquiry into the nature of a defendant's prior convictions in order to avoid constitutional violations, such as a Sixth Amendment violation under *Apprendi v. New Jersey* (2000) 530 U.S. 466. (See, e.g., *McGee*, *supra*, at pp. 706-709.) However, as Estrada apparently concedes (see ABOM 24, fn. 8), his Sixth Amendment rights are not implicated here because the Act functions solely to *reduce*, rather than to increase, his sentence. And, consistent with the rule established in *People v. Harvey* (1979) 25 Cal.3d 754, a sentencing court may consider conduct underlying an admitted count or allegation even if that conduct also underlies another count or allegation dismissed by plea agreement.

In sum, a trial court conducting the threshold eligibility determination for sentence reduction under the Act may generally consider facts from the record of conviction of the commitment offense to determine whether the petitioner's conduct disqualifies him or her from relief. Where the commitment offense was admitted pursuant to a negotiated plea, the resentencing court may consider conduct underlying admitted counts or allegations even if that conduct also underlies dismissed counts or allegations, unless the agreement includes a specific finding or provision that precludes such consideration. Where, as in this case, there was no such finding or agreement, and the record of conviction shows that the petitioner committed the commitment offense in a manner that disqualifies him or her from resentencing relief under the Act, the dismissal of other counts or allegations based on the same conduct as the commitment offense is immaterial.

PROCEDURAL AND FACTUAL SUMMARY

Pursuant to a 1996 plea agreement, Estrada pleaded guilty to grand theft person (§ 487, subd. (c)) and admitted two prior robbery convictions (§ 211). In return, the prosecution dismissed a personal firearm use allegation (§ 12022.5, subd. (a)) alleged as to the admitted grand theft person, a robbery count and a burglary count (§ 459) based on the same conduct as the admitted grand theft person,[2] and 12 additional counts (including 11 "strike" offenses) alleged to have occurred on dates other than that of the admitted grand theft person. The trial court sentenced Estrada to state prison for an indeterminate term of 25 years to life (former § 1170.12, subd. (c)(2)(A)(ii)). (CT 1, 7, 134, 148-157, 160-161.)

In 2012, Estrada filed a resentencing (or "recall") petition (§ 1170.126) (CT 1-2), which the resentencing court denied after reviewing the evidence presented at the preliminary hearing that preceded Estrada's guilty plea and finding it "more likely than not that [Estrada] was armed with a firearm during the commission of the commitment offense, thereby disqualifying him from relief . . . pursuant to section 1170.126, subdivision (e)(2)" (CT 159-175 [quotation from CT 163]). The resentencing court specifically noted that the dismissed section 12022.5, subdivision (a), firearm allegation was "not decided on [its] merits." (CT 163.)

The preliminary hearing transcript showed the following:[3]

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[2] The preliminary hearing evidence (summarized below) shows the conduct underlying the admitted grand theft person count and the dismissed firearm use allegation and robbery and burglary counts.

[3] Respondent limits this summary to the events that occurred on April 9, 1995. Evidence of crimes alleged to have occurred on other dates was also presented at the preliminary hearing. (CT 71-119; see also *People v. Estrada, supra,* 196 Cal.Rptr.3d at pp. 419-420.)

At about 2:00 p.m. or 3:00 p.m. on April 9, 1995, Alfred Valladolid[4] was working at a Radio Shack store when Estrada entered with another man. (CT 64-66.) Estrada told Valladolid he wanted to buy a particular car stereo. Valladolid got the stereo from a back room and returned to the counter to charge Estrada. (CT 67.) When he was three or four feet away from Valladolid, Estrada drew a small, dark .38-caliber pistol from his pocket, held the gun in his right hand, and said something like, "Just keep quiet and give me the money in the register." (CT 68, 80.) Valladolid knew it was a .38-caliber pistol because he had seen guns of the same caliber before; he had fired guns with his uncle, a gun collector. (CT 79.) Valladolid put the money from the register (about $400) in a plastic bag and gave it to Estrada. (CT 69, 74.) Estrada told Valladolid to go to the back room. As Valladolid was walking back, he saw Estrada and his companion exit the store. (CT 69-70.) Estrada also took the car stereo. (CT 74.)

On appeal from the denial of his resentencing petition, Estrada argued that the resentencing court's consideration was "limited" to the "elements" that "constituted theft from the person." (AOB 16.) More specifically, Estrada asserted that, because the firearm use allegation and robbery count based on the same conduct as the admitted grand theft person were dismissed pursuant to the plea agreement, the resentencing court was prohibited from considering evidence that went "beyond establishing [the] elements of the grand theft crime," and thus was permitted to consider only the evidence "that Estrada took money handed him by the salesman from the cash register and then left the store." (AOB 16-17 [quotations from AOB 17].) The Court of Appeal affirmed the denial of Estrada's

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[4] It appears the preliminary hearing transcript incorrectly spells the last name "Valladolie" rather than "Valladolid." (CT 67-68, 125-126.)

resentencing petition, reasoning that the resentencing court properly reviewed evidence of the circumstances of the admitted grand theft person from within the record of conviction to find the firearm-related disqualifying conduct – a finding that did not amount to relitigatation of the dismissed robbery count or firearm use allegation. (*Estrada, supra*, 196 Cal.Rptr.3d at pp. 421-423.)

ARGUMENT

I. THE RESENTENCING COURT COMPLIED WITH THE ACT'S THRESHOLD ELIGIBILITY DETERMINATION PROCEDURE FOR SENTENCE REDUCTION

With the passage of Proposition 36 in 2012, the electorate modified Three Strikes law sentencing prospectively and retrospectively. Before the Act was passed, third-strike sentences could be imposed for any felony. After the Act was passed, third-strike sentences could be imposed in the first instance (prospectively) only for serious or violent felonies, with certain exceptions. Retrospectively, the Act permitted inmates serving third-strike sentences for felonies that are neither serious nor violent to petition for resentencing as second-strike offenders, subject to categorical as well as discretionary limitations. (See *People v. Johnson* (2015) 61 Cal.4th 674, 679-682.) The established canons of statutory construction confirm that the requirement for qualifying conduct to be "pled and proved" (§§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C)) applies prospectively, not retrospectively. Contrary to Estrada's assertions, neither *People v. Johnson, supra,* 61 Cal.4th 674, nor *People v. Guerrero, supra* 44 Cal.3d 343, supports an interpretation that "retrospective application [of the Act] should turn on what was pleaded and proved when the petitioner sustained the current conviction." (ABOM 20.) Instead, the Act's plain language, consistent with the evidence of voter intent, forecloses Estrada's proposed interpretation. Properly interpreted, the Act directs resentencing courts to

conduct a threshold eligibility determination to find whether the record of conviction for the commitment offense shows any of the disqualifying conduct during the offense. The resentencing court in this case followed the procedure set forth in the Act when it determined Estrada was ineligible for resentencing because he was armed with a firearm while committing the grand theft person for which he received his third-strike sentence.

A. The Act Directs the Resentencing Court to Consider Disqualifying Conduct Based on the Record of Conviction without Any "Plead-and-Prove" Requirement

Courts use the same principles to interpret laws enacted by the electorate and by the Legislature: "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." Courts conduct this interpretive analysis in order to discern and effectuate the lawmaker's intent. (*Johnson*, *supra*, 61 Cal.4th at p. 682.) Issues of statutory interpretation present questions of law, which courts review de novo. (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1332.)

Under California's "three strikes" sentencing scheme as it existed before 2012, a defendant previously convicted of two or more serious or violent felonies was subject to a third-strike sentence (a minimum of 25 years to life) upon conviction of *any* subsequent felony. (Former §§ 667, subd. (e)(2)(A)(ii), 1170.12, subd. (c)(2)(A)(ii); *People v. Manning* (2014) 226 Cal.App.4th 1133, 1137.) However, under the 2012 Act, third-strike sentencing applies only when the commitment offense is serious or violent, unless the prosecution "pleads and proves" one of four enumerated circumstances that allow third-strike sentencing for a non-serious, non-violent felony. (Current §§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C);

id. at p. 1137.) This "prospective" part of the Act applies to defendants sentenced under current law. (*Id.* at p. 1138.)

The Act's procedure for reducing a previously-imposed sentence has been described as "retrospective." (*Manning*, *supra*, 223 Cal.App.4th at p. 1138.)

> The Act . . . created a postconviction release proceeding whereby a prisoner who is serving an indeterminate life sentence imposed pursuant to the three strikes law for a crime that is not a serious or violent felony *and who is not disqualified*, may have his or her sentence recalled and be sentenced as a second strike offender unless the court determines that resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.126.)

(*People v. Yearwood* (2013) 213 Cal.App.4th 131, 167-168, italics added.)

The text of the Act specifies a straightforward threshold eligibility determination procedure: the resentencing court examines the record of conviction to find whether the petitioner committed any of the disqualifying conduct during the commitment offense. (*People v. Bradford* (2014) 227 Cal.App.4th 1322,1336-1340.)

Under the Act's plain language, several criteria define inmates' eligibility for resentencing. The broadest criterion states that "any person" serving a third-strike sentence for a non-serious and non-violent commitment offense "may file a petition for recall of sentence." (§ 1170.126, subd. (b); see also § 1170.126, subd. (e)(1) [same criterion].) While any such inmate may file a petition, not all are eligible for relief; rather, other criteria further restrict eligibility. In relevant part, an inmate is eligible for resentencing under this section only if "[t]he inmate's current sentence was not imposed for any of the offenses appearing" in section 667, subdivisions (e)(2)(C)(i) through (iii), or section 1170.12, subdivisions (c)(2)(C)(i) through (iii). (§ 1170.126, subd. (e)(2).) Those disqualifying offenses are defined in two ways. Some are defined by existing statutory

offenses and allegations. (§§ 667, subds. (e)(2)(C)(i)-(ii), 1170.12, subd. (c)(2)(C)(i)-(ii).) Others are defined by "non-elemental" conduct showing the manner in which the offense was committed; namely, any offense "[d]uring the commission of [which] the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person." (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii); see *Bradford, supra,* 227 Cal.App.4th at p. 1333 ["the criteria at issue here do not describe a particular offense but apply to conduct relating to a weapon or intent to cause great bodily injury that occurred during the commission of an adjudicated offense"]; ABOM 17 [recognizing "non-elemental" disqualifying conduct].)

The disqualifying conduct at issue here is defined more broadly than the Penal Code's independent firearm-related sentence enhancements: it applies if, "[d]uring the commission of the current offense, the defendant . . . was armed with a firearm . . . ." (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).) The word "during" solely requires a "temporal nexus between the arming and the underlying felony, not a facilitative one." (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1032.) In other words, the disqualifying conduct requires only that the defendant have the firearm available for use at the time of the offense; the defendant need not have the firearm available to *further* the commission of the offense – a requirement of the more narrowly-defined allegation for being armed *in* the commission of a felony under section 12022, subdivision (a). (*Id.* at pp. 1031-1032.) And the allegation for personal *use* of a firearm dismissed in this case (§ 12022.5, subd. (a)) is defined even more narrowly (requiring, for example, displaying, brandishing, or firing) than the section 12022 allegation for being armed in the commission of the offense. (*People v. Arzate* (2003) 114 Cal.App.4th 390, 399-400.)

To be sure, constitutional requirements supersede statutory language; however, the Act does not implicate any such requirements. As a general matter, the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution combine to require that each element of a crime or sentence enhancement be proved to a jury beyond a reasonable doubt. (See, e.g., *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1059-1060, citing *United States v. Gaudin* (1995) 515 U.S. 506, 509-510; *In re Winship* (1970) 397 U.S. 358, 364; *People v. Jones* (1999) 75 Cal.App.4th 616, 631.) Additionally, under the *Apprendi* line of authority, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Blakely*, *supra*, at p. 1060, citing *Apprendi, supra,* 530 U.S. at p. 490.) However, the Act's retrospective provisions trigger no Sixth Amendment right because those provisions function solely to *reduce* rather than to increase the sentence. (See, e.g., *People v. Perez* (2016) 3 Cal.App.5th 812, 822, fn. 10 [summarizing case law]; see also *Dillon v. United States* (2010) 560 U.S. 817, 827-829 [a criminal defendant's Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt does not apply to downward sentencing modifications due to intervening laws].)

Thus, the Act accords with constitutional dictates by including the "plead and prove" requirement solely in the prospective part of the Act. In contrast, the retrospective part does not require the prosecution to "plead and prove" the existence of the disqualifying conduct; rather, the resentencing court "shall determine whether" any disqualifying conduct applies.[5] (*People v. Conley* (2016) 63 Cal.4th 646, 660-661 [concluding

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[5] The Courts of Appeal have disagreed about who bears the burden in the disqualifying conduct determination. (Compare *People v. Frierson* (continued...)

"that the Act does not address the complexities involved in applying the pleading-and-proof requirements to previously sentenced defendants precisely because the electorate did not contemplate that these provisions would apply. Rather, voters intended for previously sentenced defendants to seek relief under section 1170.126, which contains no comparable pleading-and-proof requirements"]; see also *People v. White* (2014) 223 Cal.App.4th 512, 527 [same]; *Bradford, supra*, 227 Cal.App.4th at p. 1332 ["The fact that the [prospective part of the Act] contains a plead-and-prove requirement evidences that the drafters knew how to impose such a requirement [retrospectively] had they chosen to do so"].) Because the disqualifying conduct at issue here refers to "those facts attendant to commission of the actual offense, the express statutory language requires the trial court to make a factual determination that is not limited by a review of the particular statutory offenses and enhancements of which a petitioner was convicted." (*Bradford, supra*, at p. 1332; see also *Osuna, supra*, 225 Cal.App.4th at p. 1034 ["the drafters of the initiative knew how to require a tethering offense/enhancement if desired. (See §§ 334, subd. (e)(2)(C)(i) [disqualifying inmate if current offense is controlled substance charge in which enumerated enhancement allegation was admitted or found true], 1170.12, subd. (c)(2)(C)(i) [same]"].)

(...continued)
(2016) 1 Cal.App.5th 788, 793 [review granted October 19, 2016, S236728] [prosecutor bears burden to prove disqualifying conduct] with *People v. Guilford* (2014) 228 Cal.App.4th 651, 657 [prosecution bears no burden of proof; rather, "the burden falls *on the trial court* to make the [threshold eligibility] determination"].) In *Frierson*, this Court granted review on the issue of the proper standard of proof for the threshold eligibility determination for resentencing under the Act: by a preponderance of the evidence or beyond a reasonable doubt.

Therefore, the constitutional avoidance doctrine has no application to the interpretation of this aspect of the Act. (Cf. *Descamps v. United States* (2013) 133 S.Ct. 2276, 2288 [Under the federal Armed Career Criminals Act, the sentencing court's "finding of a predicate offense indisputably increases the maximum penalty. Accordingly, that finding would (at the least) raise serious Sixth Amendment concerns if it went beyond merely identifying a prior conviction"].) It follows that "Proposition 36, on its face, does not dictate that any of the triad of disqualifying factors must be an element of the [commitment] offense or . . . sentence enhancement or that such disqualifying factors must be pled and proved as such to the trier of fact. Its plain and clear language reflects a contrary intent." (*People v. Newman* (2016) 2 Cal.App.5th 718, 724.)

The Act's threshold eligibility determination procedure for sentence reduction – based on petitioners' dangerous conduct during the commitment offense – emanates from practical and legal considerations unique to the resentencing context. Prosecutors handling pre-Act third-strike cases had no independent reason to obtain specific findings of the non-elemental disqualifying conduct that would later preclude resentencing under the Act. (See *Bradford*, *supra*, 227 Cal.App.4th at pp. 1333-1334.) As this Court recently explained, "Before the Reform Act, the prosecution ordinarily would have had no reason to plead and prove that the defendant [charged with the offense of felon in possession of a firearm] was actually armed with, not merely in possession of, the firearm; arming is not an element of the offense, and case law suggests that the armed-with-a-firearm enhancement (Pen.Code, § 12022, subd. (a)) does not apply to the offense of felon in possession of a firearm." (*Conley, supra*, 63 Cal.4th at p. 659, citation omitted.)

This procedure advances the purpose of the Act as a whole and of its retrospective provisions in particular. Although the Act somewhat

"diluted" the Three Strikes law's mechanism for protecting the public and punishing recidivism through longer sentences, the Act nevertheless maintained "enhancing public safety" as a "key purpose." (*Blakely*, *supra*, 225 Cal.App.4th at p. 1054, internal quotation marks and citations omitted.) After reviewing the ballot materials for Proposition 36, the *Blakely* court correctly concluded that, in enacting the retrospective portions of the Act,

> the electorate's intent was not to throw open the prison door for *all* third strike offenders whose current convictions were not for serious or violent felonies, but only for those who were perceived as nondangerous or posing little or no risk to the public. A felon who has been convicted of two or more serious and/or violent felonies in the past, and most recently had a firearm readily available to use, simply does not pose little or no risk to the public.

(*Id.* at p. 1057.)

The "plain purpose of these disqualifying factors is to serve as a prophylactic measure to further the goal of the Three Strikes law to protect society against recidivist criminals who commit violent and/or serious crimes." (*Newman*, *supra*, 2 Cal.App.5th at p. 724.) To achieve that goal, the "triad" of disqualifying conduct (using a firearm, being armed with a firearm or deadly weapon, and intending to cause great bodily injury during the commitment offense) excludes from resentencing "those defendants who committed the current nonviolent and nonserious crime *in a manner* that potentially could result in violent and/or serious consequences." (*Ibid.*, italics added.) The statutory text supports this conclusion:

> [The] voters rendered ineligible for resentencing not only narrowly drawn categories of third strike offenders who committed particular, specified offenses or types of offenses, but also broadly inclusive categories of offenders who, during commission of their crimes – and regardless of those crimes' basic statutory elements – used a firearm, were armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person. Significantly, however, those categories, while broad, are not unlimited. Voters easily could

> have expressly disqualified any defendant who committed a gun-related felony or who possessed a firearm, had they wanted to do so. This is not what voters did, however.

(*Id.* at pp. 1054-1055.) Thus, these disqualifying criteria properly exclude petitioners from resentencing based on the actual dangerousness of their commitment offenses, determined in reference to enumerated conduct defined more broadly than similar offenses and allegations.[6] In contrast, Estrada's proposed plead-and-prove requirement would render "nugatory" the Act's designation of non-elemental conduct rather than specific offenses and allegations as disqualifying criteria. (See *Perez*, *supra*, 3 Cal.App.5th at p. 825, fn. 14.)

B. Neither *Johnson* nor *Guerrero* Supports Limiting Consideration of Disqualifying Conduct to Previously "Pled and Proved" Statutory Elements

Estrada cites this Court's opinion in *Johnson, supra,* 61 Cal. 4th at page 691 to support his argument that the Act's "retrospective application should turn on what was pleaded and proved when the petitioner sustained the current conviction" in order to make the Act's retrospective provisions "nearly identical" to its prospective provisions. (ABOM 20; see also ABOM 12, citing *Johnson*, *supra*, at pp. 687, 691.) His reliance is misplaced.

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[6] Accordingly, the Court should reject as incorrect the holding in *People v. Berry* (2015) 235 Cal.App.4th 1417 that the threshold eligibility determination does not function to prevent dangerous criminals' release from prison. (See *id.* at p. 1425 ["While we acknowledge that an important goal of the [Act] is to prevent dangerous criminals from being released from prison early, that concern is not directly implicated in the initial determination of an inmate's *eligibility* for resentencing. It is only after an inmate is deemed eligible . . . that the trial court undertakes the required assessment of the inmate's *dangerousness*"].) As explained above, the threshold eligibility determination considers petitioners' dangerousness through findings of specified disqualifying conduct.

In *Johnson*, *supra*, 61 Cal.4th 674, the Court resolved issues of statutory interpretation regarding two matters for which the text of the Act specified no answer. Thus, the Court had to rely on "other indicia of voter intent" – including voter information materials and the overall structure of the Act – to resolve the ambiguities in the statutory text. In reaching its results, the Court noted the "parallel structure" of the prospective and retrospective provisions and concluded this structure "reflects an intent that sentences imposed on individuals with the same criminal history be the same" prospectively and retrospectively. (*Id.* at p. 687; see also *id.* at p. 691 [similar reasoning].) That kind of structural comparison is unwarranted here because the Act's text resolves the issue in this case. As shown above, the text of the Act does not impose any plead-and-prove requirement on the threshold eligibility determination for sentence reduction; rather, the text directs resentencing courts to determine disqualifying conduct that is defined more broadly than similar offenses or allegations. (See, e.g., *Conley*, *supra*, 63 Cal.4th at pp. 659-661.)

The existence of similarities between the Act's prospective and retrospective provisions does not justify judicial erasure of the explicit differences between those provisions. While the Act contemplates that the same definitions of serious and violent felonies and conduct-based exceptions will produce the same sentences under the prospective and retrospective provisions (notwithstanding the discretionary dangerousness determination at resentencing) (see *Johnson*, *supra*, 61 Cal.4th at pp. 687, 691), it imposes a unique *procedure* for resentencing, consistent with the legal and practical differences between the prospective and retrospective contexts. Indeed, judicially imposing a plead-and-proof requirement on the threshold eligibility determination for resentencing would impair the voter's intent for "parallel" prospective and retrospective sentencing: whereas prosecutors can address this conduct-based procedural requirement

in a principled manner prospectively, resentencing courts' retrospective determinations of the same conduct would arbitrarily depend on pre-Act verdicts and plea agreements that did not contemplate this procedural requirement.

Estrada's reliance on *People v. Guererro, supra,* 44 Cal. 3d 343, is similarly misplaced. In *Guerrero*, the Court *permitted* consideration of conduct beyond the adjudicated elements of a prior conviction of as a matter of statutory interpretation of the recidivist sentence enhancement at issue in that case (*Guerrero, supra*, 44 Cal.3d at pp. 346-355) and prohibited consideration of evidence beyond the record of the prior conviction as a *prophylactic protection* against "threatening the defendant with harm akin to double jeopardy and denial of speedy trial" (*id.* at p. 355, italics added). Thus, *Guerrero* rejects, rather than imposes, the "least adjudicated elements" limitation on which Estrada's argument relies. *Guerrero*'s limitation to the record of conviction is grounded on constitutional concerns absent from this case.[7]

In *Guerrero*, this Court articulated the proper procedure for determining whether a prior conviction constitutes a serious felony for the purpose of the five-year sentence enhancement under section 667, subdivision (a). At the time *Guerrero* was decided, the definition of serious felony included "burglary of a residence," but no statutory offense or allegation established that particular conduct. (*Guerrero, supra*, 44 Cal.3d at pp. 344-346.) The Court rejected the "least adjudicated elements" test under which a sentencing court's determination is limited to those "matters necessarily established by the prior judgment of conviction." (*Id.* at

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[7] The Act's text independently establishes a threshold eligibility determination procedure for resentencing that considers no new evidence outside the record of conviction. (*Bradford, supra*, 227 Cal.App.4th at pp. 1337, 1339.)

pp. 354-355.) Instead, the Court held that in order to accomplish the legislative intent to impose the serious felony enhancement based on past conduct rather than a specific past offense, courts determining the truth of that allegation may consider conduct beyond the least adjudicated elements by "look[ing] to the entire record of the conviction – *but no further*." (*Id.* at p. 355, italics original.) The Court reasoned that limiting consideration to the record of conviction is "fair" because "it effectively bars the prosecution from relitigating the circumstances of a crime committed years ago and thereby threatening the defendant with harm akin to double jeopardy and denial of speedy trial." (*Ibid.*)

The record of conviction includes only those materials that demonstrate the nature or basis of the conviction, which means the version of events that formed the legal foundation for the judgment. (See *People v. Reed* (1996) 13 Cal.4th 217, 220-221, 223 [preliminary hearing transcript is part of the record of a conviction by plea because it reliably reflects the facts of the offense of conviction]; *Trujillo*, *supra*, 40 Cal.4th at p. 179 [post-guilty-plea statements by defendant fall outside the record of conviction because they do not reflect nature or basis of conviction].) In this context, "relitigation" means consideration of evidence outside the record of conviction. (*Guerrero*, *supra*, 44 Cal.3d at p. 355; see also *Reed*, *supra*, at p. 226 [prosecution prohibited from relitigating facts "behind" the record by "introducing evidence outside the record"].) Avoiding relitigation is not a separate requirement; it is the purpose and effect of the rule limiting consideration to the record of conviction. (*Guerrero*, *supra*, at p. 355; see also *People v. Woodell* (1998) 17 Cal.4th 448, 456 ["we allow recourse to the record of conviction, but no further, to promote the efficient administration of justice and to preclude the relitigation of the circumstances of the crime"].)

Thus, there is no basis to constrain the threshold eligibility determination procedure for resentencing under the Act with *Guerrero*'s additional prophylactic limitation, as there is no suggestion the threshold eligibility determination could cause the double jeopardy or speedy trial violations that the *Guerrero* limitation seeks to avoid (see, e.g., ABOM 24, fn. 8 [clarifying that argument on review raises no constitutional issue]). Nor is there a basis to impose any other constitutional constraint from the same line of cases. For example, in order to avoid violation of the Sixth Amendment under *Apprendi*, *supra*, 530 U.S. 466, the Court has clarified that the *Guerrero* procedure "does not contemplate that the court will make an independent determination regarding a disputed issue of fact relating to the defendant's prior conduct." (*McGee*, *supra*, 38 Cal.4th at p. 706.) Similarly, the Court has explained that a defendant's post-plea but pre-sentencing statements in a probation report fall outside the record of conviction because that evidence was not available to the prosecution before conviction, so its use in a later case to prove a recidivist sentence enhancement would risk "harm akin to double jeopardy" and improperly "relitigate the circumstances of the crime." (*Trujillo*, *supra*, 40 Cal.4th at pp. 179-181 [quotations from p. 180].) These prophylactic constitutional limitations from the *Guerrero* line of cases have no application to resentencing under the Act, which implicates no such constitutional concerns. (See *Blakely*, *supra*, 225 Cal.App.4th at p. 1063.)

Regardless, these constitutional limitations do not demand imposition of a least adjudicated elements rule: the *Guerrero* procedure has always contemplated a "factual inquiry, limited to examining court documents," to determine conduct beyond that necessarily established by the elements of the prior conviction. (*McGee*, *supra*, 38 Cal.4th at pp. 691-694, 706-709 [quotation from p. 707, citing *People v. Kelii* (1999) 21 Cal.4th 452, 457]; see also *Kelii*, *supra*, at p. 456 ["Sometimes the determination does have a

factual content"] and p. 457 ["sometimes the trier of fact must draw inferences from transcripts of testimony or other parts of the prior conviction record"].) Therefore, the Court should reject Estrada's contrary argument that the resentencing court could consider only an artificially-tailored version of the evidence, limited to the minimum conduct necessary to establish the elements of grand theft person, as this argument ignores what the Court has actually done in the *Guerrero* line of cases. (See ABOM 10, 14, 23-30, 43-44; AOB 16-17.)

According to Estrada, the question presented on review is whether a resentencing court may "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?" (ABOM 8.) The legal authority summarized above shows the answer is "yes." The Act requires resentencing courts to determine disqualifying criteria that include enumerated non-elemental conduct during the commitment offense. Under *Guerrero*, courts determining non-elemental conduct underlying a conviction are not limited by the least adjudicated elements test but instead may draw inferences to make factual findings based on the entire record of conviction. (See *McGee*, *supra*, 38 Cal.4th at pp. 691-695 [summarizing *Guerrero* and progeny].)

Estrada complains that the resentencing court "used the limited evidence to make new findings of fact that were not encompassed by the conviction" (ABOM 14), to which respondent replies, "Of course" – finding non-elemental facts underlying but not determined by a conviction is "exactly what *Guerrero* and [*White*, *supra*, 223 Cal.App.4th 512] allow." (*Estrada*, *supra*, 243 Cal.App.4th at p. 422; see also *Manning*, *supra*, 226 Cal.App.4th at pp. 1140-1141 [citing *Guerrero* to refute

resentencing petitioner's argument that "[n]o case has ever" permitted using record of prior conviction to prove underlying conduct not established by least adjudicated elements].)

Estrada advocates a self-contradictory interpretation of the law that would render *Guerrero* meaningless and the Act's non-elemental disqualifying conduct impossible to apply unless proved by adjudicated elements. For example, he claims that the *Guerrero* procedure "is focused on the elements of the offense of which the defendant was convicted" (ABOM 18), and that the Act "should be interpreted to permit consideration of only the facts adjudicated and found in reaching the previous conviction" (ABOM 21). But in *Guerrero* and its progeny, this Court has repeatedly *rejected* the least adjudicated elements test Estrada now suggests *Guerrero* requires. And, as Estrada acknowledges, the Act requires the resentencing court to "look beyond the bare elements of the offense" of which the petitioner was convicted in order to determine "non-elemental conduct" (ABOM 21) that statutory offenses and enhancements "frequently" do not establish (ABOM 17).

As a matter of statutory interpretation, Estrada argues that in passing the Act, the voters presumably were aware of *Guerrero* and intended for the Act's non-elemental eligibility criteria to be determined using the same procedure as the analogous determination in *Guerrero*. (ABOM 13, 18-19.) Thus, he asks this Court to interpret the Act in accordance with his interpretation of *Guerrero* in order to limit the threshold eligibility determination to consideration of matters "admitted" or "adjudicated and found in reaching the . . . conviction." (AOB 21.) But Estrada's fundamental misinterpretation of the *Guerrero* procedure leads him to draw the wrong conclusion from the presumption that the electorate was aware of *Guerrero* when it passed the Act. As argued above, *Guerrero* permits consideration of non-elemental conduct underlying but not adjudicated by a

conviction, so any electoral intent to apply the *Guerrero* procedure to the Act could not require the least adjudicated elements limitation that *Guerrero* rejected.

Stated otherwise, the plain language of the disqualifying criteria shows the electoral intent for resentencing courts to consider non-elemental conduct in the same manner that the *Guerrero* procedure permits. There is no indication the electorate that passed the Act paradoxically intended both to *require* consideration of non-elemental conduct and to *prohibit* consideration of matters beyond the elements "admitted" or "adjudicated and found in reaching the conviction." (AOB 21.)

Accordingly, this Court should reject Estrada's argument that the resentencing court "improperly relied on facts underlying dismissed counts" (ABOM 13). The preliminary hearing evidence includes only one version of how Estrada committed the grand theft person: with a pistol in his hand. Both the Act and the *Guerrero* procedure authorize the resentencing court's determination that this version of events was the basis for his conviction by plea of grand theft person and that this version of events proved the non-elemental arming conduct that rendered him ineligible for resentencing under the Act.

C. Estrada Was Properly Disqualified from Resentencing Because He Was Armed with a Firearm During the Commitment Offense

The resentencing court found Estrada ineligible for resentencing in compliance with the procedure set forth in the Act: it reviewed the evidence presented at Estrada's preliminary hearing and found he was "armed with a firearm during the commission of the commitment offense, thereby disqualifying him from relief" under the Act's resentencing provisions. (CT 163.) Preliminary hearing transcripts fall within the record of a conviction by plea. (*Reed, supra*, 13 Cal.4th at pp. 220-221, 223.) Thus,

the resentencing court did not violate the threshold eligibility determination procedure set forth in Act. Estrada does not dispute that the preliminary hearing transcript shows he held a gun in his hand during the grand theft person for which he received his third-strike sentence. Accordingly, the Court of Appeal correctly affirmed the finding that he is disqualified from resentencing.

Nevertheless, Estrada argues that various policy considerations should constrain the electorate's intent as to the threshold eligibility determination procedure for sentence reduction under the Act. Estrada argues that determination of non-elemental disqualifying conduct not established by the elements of conviction is unfair because it depends on evidence "developed when the now-critical issue was not even relevant." (ABOM 14.) Given that *Guerrero* rejected the same argument in the context of a sentence *enhancement* (*Guerrero*, *supra*, 44 Cal.3d at pp. 355-356), the same argument should be rejected in this context, where the "now-critical" issue solely relates to a sentence *reduction*. In any event, Estrada fails to explain how the procedure under the Act would disadvantage resentencing petitioners any more than it would disadvantage the prosecution. For example, if Estrada had pleaded guilty under the instant agreement *before* his preliminary hearing, then the record of conviction probably would not have demonstrated his arming during the commitment offense – the consequences of which the prosecution could not have known at the time of the plea.

Estrada also argues that determination of non-elemental disqualifying conduct not established by the elements of conviction would improperly "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." (ABOM 31.) Assuming that a trial verdict has a preclusive effect on the threshold

eligibility determination (see Argument II, *post*), nothing prevents resentencing courts from determining whether a deadlock, not true finding, or not guilty verdict on a given count or allegation informs the nature or basis of the commitment offense in the same case. (See *People v. Santamaria* (1994) 8 Cal.4th 903, 907-922 [examining possible factual bases of not true finding on weapon allegation to determine whether finding precludes retrial on murder count]; see also *In re Coley* (2012) 55 Cal.4th 524, 557 [permitting a sentencing judge to consider evidence of conduct underlying counts of which the defendant was acquitted generally does not undermine the jury's role in establishing, by its verdict, the maximum authorized sentence].) In any event, Estrada's case did not involve a trial verdict, and none of those concerns apply.

Critically, the Act cannot cause the harm Estrada seeks to avoid – "*forcing the defendant to relitigate* the circumstances of the crime" based on evidence unfairly "used against him" (ABOM 25, quoting *People v. Trujillo* (2006) 40 Cal.4th 165, 180, italics added by Estrada) – because the Act gives defendants the unilateral choice whether to seek sentence reduction based on enumerated statutory criteria determined without considering new evidence. Estrada, not the prosecution, filed the resentencing petition that necessarily called into question whether the record of conviction shows he used a firearm during the commission of the grand theft person for which he received his third-strike sentence. (See *Bradford, supra*, 227 Cal.App.4th at p. 1340 ["Here, the People did not 'charge' or even raise the issue of petitioner's ineligibility for resentencing under the statutory criteria. Rather, the current matter concerns a unique postconviction proceeding that called upon the trial court to make a threshold eligibility determination"].) The Act provided Estrada with a fair opportunity for sentence reduction, which was properly denied based on his disqualifying conduct under the procedure set forth in the Act.

II. ESTRADA'S PLEA AGREEMENT DID NOT PRECLUDE THE RESENTENCING COURT FROM FINDING THAT HIS ARMING DURING THE COMMITMENT OFFENSE RENDERED HIM INELIGIBLE FOR RESENTENCING

Estrada argues that in the context of conviction by plea, determination of non-elemental disqualifying conduct outside the elements of conviction "permits the prosecution to litigate for the first time things that were removed from issue by virtue of a plea bargain," which would improperly change and relitigate "those facts that the plea proved." (ABOM 30.) Assuming that the plea agreement "removed" the dismissed robbery count and firearm use allegation "from issue" altogether, Estrada does not explain how finding the arming disqualifying conduct during the admitted offense in his case relitigated the dismissed robbery count and firearm use allegation.[8] On direct appeal, Estrada argued that in finding he was armed during the grand theft person, the resentencing court "essentially" found a robbery with personal firearm use. (AOB 16.) The Court of Appeal correctly rejected that argument:

> [Estrada] argues that somehow [the dismissal of the robbery count and firearm use allegation] means he was not armed. It does not. Under Proposition 36, the disqualifying factor, "armed with a firearm," means having a firearm available for offensive or defensive use during the offense. [Citations.] One can have a firearm *available* for use without elevating the offense to a robbery. Similarly, one can be armed with a firearm without personally using it within the meaning of section 12022.5, subdivision (a). Thus, a finding that [Estrada] was armed with a

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[8] Estrada at one point states that the resentencing court improperly relitigated the *admitted* grand theft person, rather than the *dismissed* robbery count and firearm use allegation (ABOM 36), but he also argues that the resentencing court improperly relied on facts underlying the *dismissed* count and allegation (see, e.g., ABOM 13, 46). The general thrust of his argument appears to concern the dismissed count and allegation, which is also the focus of the Issue Presented by the Court.

> firearm is not a relitigation of the dismissed robbery counts or firearm use enhancement allegations.

(*Estrada*, *supra*, 243 Cal.App.4th at p. 342.) Estrada fails to controvert the appellate court's reasoning.

Instead, Estrada acknowledges that the dismissal of the robbery count and firearm use allegation left "unresolved" the factual issue of whether he was armed during the admitted grand theft person (ABOM 37), and further acknowledges that his commitment offense was "transactionally related" to the robbery and firearm use allegation (ABOM 36, fn. 13). Nonetheless, he contends that the determination of the arming disqualifying conduct violated the terms of his plea agreement, under which "the prosecution gave up any attempt to prove that a weapon was involved in the commission" of the grand theft person (ABOM 34-35) and "bargained away" any "proof" of that conduct (ABOM 39). But Estrada cites no basis in the law or the record to show that the plea agreement included either (1) a stipulated factual basis that Estrada had no firearm in his hand during the grand theft person or (2) a commitment by the prosecution not to use the evidence of Estrada's arming during the grand theft person for a purpose such as the instant resentencing. Without either of those terms, Estrada's plea agreement does not limit the threshold eligibility determination to the elements of conviction.

On the contrary, this Court's precedent shows that when a plea agreement includes both the admission and the dismissal of counts or allegations based on the same underlying conduct (or "transaction"), the dismissal does not independently preclude subsequent consideration of that conduct as to the admitted counts and allegations. In *Harvey*, *supra*, 25 Cal.3d 754, this Court held that a plea agreement involving the dismissal of a given count includes an "[i]mplicit" agreement that the defendant "will suffer no adverse sentencing consequences by reason of the facts

underlying, *and solely pertaining to*, the dismissed count." (*Id.* at p. 758, italics added.) The Court approvingly cited *People v. Guevara* (1979) 88 Cal.App.3d 86 to clarify why a sentencing court may consider facts underlying a dismissed count or allegation that is "*transactionally related*" to an admitted count or allegation. (*Harvey*, *supra*, p. 758, italics original.) The court in *Guevara* held that a plea agreement dismissing a weapon allegation does not preclude a sentencing court from considering evidence of a defendant's arming during the underlying offense as an aggravating factor justifying imposition of an upper term sentence. (*Guevara*, *supra*, at pp. 92-94.) Contrary to the expansive interpretation that Estrada advocates, the court reasoned that the plea agreement to dismiss an allegation solely "prohibits the court from imposing" the sentence enhancement that the dismissed allegation would have authorized. (*Id.* at p. 94.) Absent a specific term of the agreement "requir[ing] the judge to ignore the facts relating to the dismissed [allegation]" (*id.* at p. 93), the "[negotiated dismissal] does not, expressly or by implication, preclude the sentencing court from reviewing all the circumstances relating to" the underlying admitted offense (*id.* at p. 94).

Indeed, because plea agreements are generally interpreted under the same principles as contracts, "mere silence by the parties and trial court concerning a statutorily mandated punishment does not make exclusion of the punishment a negotiated term of a plea agreement." (*People v. Villalobos* (2012) 54 Cal.4th 177, 183.) A defendant is entitled to only those benefits for which he or she has actually bargained. (*People v. Alvarez* (1982) 127 Cal.App.3d 629 [agreement to "strike" prior conviction allegation (which defendant never admitted) precluded only punishment for allegation and did not preclude sentencing consideration of conduct underlying allegation as aggravating factor for admitted offense].) Thus, the presumption that "ambiguities in plea agreements are construed in favor

of the defendant" (ABOM 35-36) does not independently justify inserting a term that was *completely absent* from Estrada's plea agreement.

No term in Estrada's plea agreement precludes a sentencing court from considering the circumstances of the grand theft person or precludes the prosecution from using that evidence for sentencing purposes. Rather, *Harvey* permits the instant use of the evidence of Estrada's arming during his commitment offense. Absent inclusion of a preclusive term, there is no basis for interpreting the agreement to have the limiting effect Estrada proposes, as the dismissed robbery count and firearm use allegation are transactionally related to (based on the same conduct as) the admitted grand theft person. If Estrada's plea agreement permits considering the evidence of his arming to *increase* his grand theft person sentence within the statutory range (*Harvey*, *supra*, 25 Cal.3d at p. 758), then it must permit considering that same evidence to evaluate his request to *reduce* his sentence under a procedure that requires considering arming as disqualifying conduct. Similarly, if mere silence does not make exclusion of statutorily mandated *punishment* a term of a plea agreement (*Villalobos*, *supra*, 54 Cal.4th at p. 183), then the same silence could not make exclusion of statutorily mandated disqualifying conduct for sentence *reduction* a term of the plea agreement.

The Court should reject Estrada's unsupported assertions about the prosecution's "intent" behind (but not memorialized in) the plea agreement. He argues that in dismissing the robbery count and firearm use allegation, "the prosecution gave up any attempt to prove that a weapon was involved in the commission" of the grand theft person (ABOM 34-35) and "bargained away" the "proof" of Estrada's arming (ABOM 39). But nothing in the record supports attributing to the prosecution an intent to preclude the consideration that *Harvey* permits. Estrada's contrary assertions rely on the baseless premise that the prosecutor in 1996 shared

Estrada's current misconception that sentencing consideration of a final conviction is limited to the conviction's least adjudicated elements (see, e.g., ABOM 18, 21) and meant for the dismissal to confine future consideration of the conviction accordingly. There is no evidence the prosecutor intended for Estrada's plea agreement to have that consequence. Indeed, absent inclusion of an affirmative limiting provision, the prosecution could not have intended that the dismissal of the robbery and firearm use allegation, by itself, would preclude future consideration of the evidence of Estrada's arming during the grand theft person. A dismissal pursuant to a plea agreement does not "litigate" the matter being dismissed, and a judgment based on a guilty plea has no preclusive effect between separate cases. (*People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1528; *Pease v. Pease* (1988) 201 Cal.App.3d 29, 33-34 [same]; see also *Santamaria, supra*, 8 Cal.4th at pp. 913-916 [expressing doubt, but not deciding, whether collateral estoppel has preclusive effect within a single case].)

Estrada's authorities do not support his position. First, he cites *Trujillo* for the proposition that a plea agreement dismissing a weapon allegation precludes later consideration of that conduct under *Guerrero*. (ABOM 34, quoting *Trujillo, supra*, 40 Cal.4th at p. 179.) But the Court in *Trujillo* solely reasoned that the defendant's post-plea statements about weapon use in the probation report fell *outside* the record of conviction; the Court never held that the plea agreement would have precluded proof of the weapon use based on material *within* the record of conviction. (*Id.* at pp. 179-181.) In fact, the trial court and the Court of Appeal in *Trujillo* disagreed on the same point Estrada now advocates – whether the dismissal of an allegation precludes consideration of that conduct under *Guerrero* – but this Court declined to resolve that dispute. (*Id.* at pp. 171, 175.)

Estrada cites *Berry*, *supra*, 235 Cal.App.4th 1417 for the proposition that his plea agreement precluded consideration of whether he was armed because his arming conduct was "wholly unrelated" to his grand theft person conviction. (ABOM 37-39.) Relying on *Harvey*, the court in *Berry* held that dismissal of weapon allegations pertaining to counts "wholly unrelated" to the commitment offenses precluded consideration of that arming conduct in the threshold eligibility determination. The court then incorrectly applied the reasoning of *Harvey* to the facts of the case by ignoring evidence that the defendant was briefly armed during the commitment offenses. (*Id.* at pp. 1423, 1425-1428 [defendant opened and reached inside car trunk containing firearm during fraudulent-document-possession commitment offenses].) But the validity of the factual conclusion in *Berry* is irrelevant here. The *reasoning* of *Berry* does not support Estrada's position because he concedes his arming conduct was transactionally related to the grand theft person he admitted: he had a firearm in his hand when he committed the theft. (See ABOM 36, fn. 13.)

Lastly, Estrada cites dictum from the United States Supreme Court's decision in *Descamps v. United States, supra,* 133 S.Ct. 2276, in which the Court reasoned that permitting a court applying a federal recidivist sentence enhancement to consider conduct underlying counts or allegations dismissed by negotiated plea in a prior conviction "would allow a later sentencing court to rewrite the parties' [plea] bargain." (*Id.* at p. 2289.) But Estrada's plea agreement contains no term that the instant resentencing denial would similarly violate or "rewrite." Whereas the federal recidivist sentence enhancement at issue in *Descamps* solely depends on the statutory offense of the prior conviction rather than its underlying conduct (*id.* at p. 2287), the Act's threshold eligibility determination procedure depends on conduct rather than specific statutory offenses or enhancements. Furthermore, under California law, sentencing courts can consider the facts

underlying a conviction by plea even if that conduct also underlies dismissed counts or allegations, unless the agreement includes a specific finding or provision that precludes such consideration. Thus, a defendant who enters into a negotiated plea might have a legitimate expectation that the conduct underlying the conviction will not be used to enhance future sentences under the federal recidivist scheme at issue in *Descamps*, as that scheme's application depends on statutory offenses rather than underlying conduct. In contrast, Estrada had no legitimate expectation that (without a limiting provision) his plea agreement would preclude consideration of the conduct underlying his conviction for the purpose of a sentence reduction procedure that depends on such conduct.

Thus, is Estrada who is seeking to "rewrite the parties' bargain" in this case. He pleaded guilty to an offense that properly subjected him to third-strike sentencing at the time of the plea but he now wishes to be resentenced as a second-strike offender on the basis that the record of conviction shows he was unarmed during the grand theft person – a contention refuted by the plea agreement and supporting facts contained in that record. (See *Bradford, supra*, 227 Cal.App.4th at p. 1340; *People v. Collin* (1978) 21 Cal.3d 208, 215 ["Defendant seeks to gain relief from the sentence imposed but otherwise leave the plea bargain intact. This is bounty in excess of that to which he is entitled"].)

CONCLUSION

Accordingly, respondent respectfully requests that the judgment of the Court of Appeal be affirmed.

Dated: November 14, 2016

Respectfully submitted,

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DECLARATION OF SERVICE

Case Name: **People v. Mario R. Estrada**

No.: **S232114**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On **November 14, 2016**, I served the attached **ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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On **November 14, 2016**, I caused **Original & eight (8)** copies of the **ANSWER BRIEF ON THE MERITS** in this case to be delivered to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, CA 94102-4797 by **FEDEX, # .8102 2453 7809**

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **November 14, 2016**, at Los Angeles, California.

Sylvia Sevilla-Farr
Declarant

Signature

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