

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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)  
 )  
 \_\_\_\_\_ )

SUPREME COURT  
FILED

DEC 29 2016

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APPELLANT'S REPLY BRIEF ON THE MERITS

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**APPELLANT’S REPLY BRIEF ON THE MERITS**

**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**

The Proposition 36 recall court found appellant ineligible for a recall of his sentence based upon appellant’s having been armed during the commission of the theft of which he was convicted and for which he is serving a third strike sentence. In his Opening Brief, appellant argued that the recall court erred in finding appellant was armed during the commission of theft based upon evidence of other crimes with which appellant was charged, but of which he was not convicted. Respondent counters that, because there is no pleading and proof requirement applicable to the retroactive application of Proposition 36, the recall court is free to use any evidence in the “record of conviction” in

the underlying case to determine anew for itself whether appellant engaged in any conduct that would disqualify him from recall under the initiative. Thus, the court is free to use any evidence of conduct in the record which respondent can argue appellant committed, whether or not he was charge with or convicted of doing so. (ABOM 6-14) Appellant disagrees.

The issue in this case is one of statutory construction. The drafters of the initiative mandated eligibility for resentencing for any inmate serving a third strike sentence which “was not imposed for any [disqualifying]. . . offense[] . . . .” (Pen. Code, § 1170.126, subd. (e)(2).) The disqualifying language itself refers to arming or use of a weapon during the commission of the current offense. (Pen. Code, §§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).) Thus, by its language, the initiative is directed at rectifying a sentence based upon the offense for which it was imposed.<sup>1</sup> It is aimed at individual sentences for individual offenses; each offense and sentence is considered separately. (See *People v. Johnson* (2015) 61 Cal.4th 674, 694-695.) Therefore, disqualification is not based upon other crimes of which the defendant was convicted or of which he could have been convicted, much less some disqualifying offense for which a defendant may not even have been charged, and of which he was not convicted. Rather, eligibility is limited to consideration of the factors underlying the

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<sup>1</sup> Subdivision (vi) renders some defendants completely ineligible based upon certain prior convictions. Appellant has no such disqualifying priors.

crime of which the defendant was convicted and for which he is serving a third strike sentence sought to be recalled.

When the offense itself is disqualified, eligibility is readily determined, but when it is based on non-elemental conduct during the offense, the determination is more difficult. However, California has long had a rule for determining whether past convictions involved non-elemental conduct relevant to third strikes sentences. (See *People v. Guerrero* (1988) 44 Cal.3d 343; *People v. McGee* (2006) 38 Cal.4th 682, 691, 706.) Both appellant and respondent agree that the method of making this determination developed in the *Guerrero* line of cases is apt in the Proposition 36 context. Respondent urges that only the part of the *Guerrero* rule that limits the recall judge to consideration of only the record of conviction be applied, and argues that the recall court is not limited to finding what conduct can be said to have been found to support the conviction. (ABOM, pp. 17-18)

Appellant's position, based upon the clear intent that Proposition 36 eligibility be founded on the offense of conviction, the offense for which the third strike sentence is being served, is that the full *Guerrero* rule must apply and the recall court's focus must be on finding what conduct was the basis of the previous findings that the elements of the offense were satisfied.

Respondent appears to both misunderstand appellant's argument and the *Guerrero* rule. Respondent asserts that appellant in arguing that the full *Guerrero* rule apply is

urging a least adjudicated offense rule for determining eligibility under Penal Code section 1170.126 and a pleading and proof requirement for doing so as well. (ABOM, p. 16) This is not so. Appellant merely asserts that in determining eligibility, the recall court should apply the decades old California rule for determining whether non-elemental conduct involved in the commission of a prior conviction makes it fall into the category of convictions relevant to the application of the Three Strikes law.

This rule was first articulated in *People v. Guerrero*, clarified in intervening decisions of this Court, and summarized in *McGee*. It requires a court retrospectively determining whether a conviction reflects non-elemental conduct to review the entire record of conviction, and nothing else, to determine what conduct that conviction reflects. That is all that appellant proposes should be done in the context of Penal Code section 1170.126 eligibility determination.

Respondent appears to argue that the full *Guerrero* rule as described in *McGee* is inapplicable to Proposition 36 recall hearings because allowing some relitigation in the Proposition 36 area wouldn't threaten the defendant with harm akin to double jeopardy and denial of speedy trial. (ABOM, pp. 17-18) But, as this Court noted in *McGee, supra*, and other cases, the *Guerrero* rule is not based on federal constitutional requirements or mandates. Rather, the rule stems from the need for basic fairness and the need to promote the efficient administration of justice by precluding relitigation of facts long after the conclusion of the underlying criminal trial. (See e.g., *People v. Woodaell* (1998) 17

Cal.4th 448, 456.) This Court strove to avoid mini trials conducted years or decades after the initial criminal trial because that would both unduly burden the courts and would put the defendants in unfair positions of having to defend on issues that never were resolved at the original trial when they could not possibly amass the evidence needed to do so. This problem applies equally to the determination of the prior conviction as a “strike,” and the determination of conduct that would disqualify the defendant from Proposition 36 eligibility.

In asserting that the full *Guerrero* rule need not apply to the eligibility determination, respondent relies on the fact that the federal constitutional rules relating to double jeopardy and speedy trial might not be violated by allowing relitigation in the recall context. (ABOM, pp. 10-12) This misses the point. The *Guerrero* rule is not based upon the federal constitution. It is a wholly California rule, reflecting California’s concerns for fairness and avoiding problems “akin” to double jeopardy and lack of speedy trial. *Guerrero* never stated that the federal constitution mandated the rule being adopted. Therefore it is irrelevant that the federal constitution may not be implicated in the recall process.

What is significant is that Penal Code section 1170.126 makes no explicit provision for how conduct-based exceptions to eligibility should be determined when they are not elements of an offense, and treats eligibility as a question of law. (See *People v. Oehmigen* (2014) 232 Cal.App.4th 1, 7 [eligibility is a question of law].) Given this,



section 1170.126 must be construed in light of existing law and deemed to incorporate long-standing California rules for making such retrospective determinations (see *People v. Weidert* (1985) 39 Cal.3d 836 [the electorate is deemed aware of existing law in passing an initiative and the initiative is interpreted in light of existing law]) - in this case, the *Guerrero* rule.

Respondent and the recall court here did not apply this full *Guerrero* rule. Rather, they adopted only the portion of the rule that limited the court's consideration to the record of conviction alone. (ABOM, pp. 17, 19) They did not, however, limit the inquiry to finding only what conduct the record demonstrates the *conviction* reflects. As the *Guerrero* line of cases makes clear, the conviction reflects only that conduct - elemental or not - that must have been the basis of the findings that the elements of the offense were satisfied. (See *People v. McGee, supra*, 38 Cal.4th p. 691.) Contrary to the respondent's assertions this is not the same as a least adjudicated elements test. (ABOM 19-20)

Appellant is not arguing that the Proposition 36 court is limited to considering only the elements of the offense or the least adjudicated elements. Rather, appellant's argument is that the court is limited to considering conduct that underlay the crime of which the defendant was convicted and for which he was sentenced, which is exactly what the initiative proscribes. In the instant case, that would mean that the court is limited to considering appellant's behavior in committing the theft because it was theft for which he was convicted and theft for which he was sentenced. Respondent's argument is

essentially that, because there is evidence in the preliminary hearing part of the “record of conviction,” that appellant really committed a robbery, the recall court should be able to essentially determine that appellant committed a robbery when he committed his theft, because there is no way to get around the argument that, if appellant used a firearm to accomplish the theft, as the recall court here found, he essentially committed a robbery and not just a theft.

Respondent argues that evidence at appellant’s preliminary hearing establishes his being armed with a firearm during his theft conviction. (ABOM, pp. 20-21) Appellant disagrees; this finding by the recall court violates *Guerrero*. Appellant pled to theft. Because of this, he had no incentive to contest whether he was armed with a firearm, used it, or committed a robbery. He did not plead guilty to robbery. Yet, under respondent’s argument, because there was evidence of a firearm in the testimony at appellant’s preliminary hearing that included a robbery charge, and because that hearing is a normal part of the record of conviction, that evidence can now be used by the recall court to make a factual finding that he was armed in the commission of the theft, and thus ineligible for recall.

This modified *Guerrero* approach, allowing use of the entire record of conviction but not limiting the evidence under consideration to that which informs the actual conviction itself, 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*.

Respondent argues that defendants can avoid this harm by simply not seeking resentencing under Proposition 36. (ABOM p. 23) In other words, if defendants want to achieve the benefits that the electorate made available to them, they have to contend with relitigation of their originally-charged crimes, even if they are burdened unfairly in having to do so.

But, again, the issue is statutory intent. The underlying issue in this case is not what voters could constitutionally have done in limiting the retroactive application of this initiative. Rather, it is what they did intend by the language used and in light of the existing case law concerning relitigation of facts of old cases that they were aware of in using the language that they did. All that appellant here contends is that in light of these principles, the voters sought to allow recall eligibility to a broad group of defendants whose convictions did not themselves involve conduct that indicated inherent dangerousness from the nature of the crime for which they were convicted and sentenced. Appellant here was not convicted of a crime that in any way involved his being armed with or use of a gun, and he was not sentenced for such a crime. Without having a relitigation of acts and crimes for which appellant was not convicted, the recall court could not make a finding that appellant was armed with or used a gun in committing the theft for which he was convicted. It is solely that relitigation that appellant urges this Court to prevent because that was the intent of the voters in passing Proposition 36.

## 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: December 27, 2016

Respectfully submitted,

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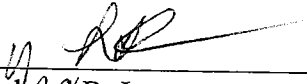
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**WORD COUNT CERTIFICATION**

*People v. Mario Estrada*

I certify that this document was prepared on a computer using Corel Wordperfect, and that, according to that program, this document contains 2,059 words.

  
\_\_\_\_\_  
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, 4<sup>th</sup> Floor, Los Angeles, California 90071. I am employed by a member of the bar of this court.

On December 27, 2016, I served the within

## BRIEF ON THE MERITS

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

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

Executed December 27, 2016 at Los Angeles, California.

  
Jacqueline Gomez