APPENDIX A

Filed 5/7/18

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Plaintiff and Appellant, v. ALFREDO PEREZ, JR., Defendant and Respondent.	)	S238354 Ct.App. 5 F069020 Fresno County Super. Ct. No. CF94509578

Under the Three Strikes Reform Act of 2012 (Proposition 36), an inmate who has been sentenced under the "Three Strikes" law for a nonserious, nonviolent felony may petition the trial court for resentencing. (Pen. Code, § 1170.126, subd. (f), added by Prop. 36, as approved by voters, Gen. Elec. (Nov. 6, 2012); all statutory references are to the Penal Code.) Upon receiving such a petition, the trial court "shall determine whether the petitioner satisfies the criteria" as listed in the statute. (*Ibid.*) If the criteria are met, "the petitioner shall be resentenced . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (*Ibid.*) This case involves one of the criteria for resentencing eligibility: the inmate must not have been "armed with a . . . deadly weapon" during "the commission of the current offense." (§ 1170.12, subd. (c)(2)(C)(iii) (hereafter § 1170.12(c)(2)(C)(iii).)

The trial court determined that defendant Alfredo Perez, Jr., was eligible for resentencing. The Court of Appeal reversed, finding that Perez was armed with a deadly weapon during the commission of his current offense. Here we consider the nature of the inquiry that trial courts and Courts of Appeal should apply when determining whether a defendant is ineligible to be resentenced on the ground that he or she was armed with a deadly weapon during the commission of his or her current offense.

We hold, consistent with our decision in *People v. Frierson* (2017) 4 Cal.5th 225 (*Frierson*), that Proposition 36 permits a trial court to find a defendant was armed with a deadly weapon and is therefore ineligible for resentencing only if the prosecutor proves this basis for ineligibility beyond a reasonable doubt. In addition, we hold that the trial court's eligibility determination may rely on facts not found by a jury; such reliance does not violate the right to a jury trial under the Sixth Amendment to the United States Constitution. A reviewing court, in turn, must defer to the trial court's determination if it is supported by substantial evidence.

In this case, the Court of Appeal was correct to conclude that the trial court's determination of Perez's eligibility for resentencing was not supported by substantial evidence. The evidence in support of Perez's conviction does not reasonably support any inference but that Perez was armed with a deadly weapon during the commission of his current offense.

I.

On March 17, 1994, Perez and an unidentified person wearing a Pendleton wool-type jacket entered an automotive store in Fresno. Fred Sanchez, a sales clerk in the store, saw the other person pick up a car anti-theft device called a "Club." Perez spoke briefly with Sanchez as the other person left the store and waited by a truck. Perez subsequently left the store, entered the driver's side of

the truck, and drove away. Sanchez suspected that the person had stolen the anti-theft device while Perez was attempting to divert his attention, but Sanchez did not call the police or check whether any items were missing from the store. On the next day, March 18, 1994, Sanchez noticed the person enter the store again. He was wearing the same jacket even though the day was very hot, and he appeared nervous. The person did not purchase anything, and Sanchez followed him as he exited the store and entered the passenger side of the same truck as the day before. Perez was in the driver's seat. Sanchez went to the window of the truck, observed a bulge protruding from the person's clothing, and told the person that he could leave if he returned the stolen merchandise. Sanchez then reached into the truck and grabbed a package from the person's jacket; Sanchez identified the object as the anti-theft device. Sanchez said, "Give it up," and Perez looked toward Sanchez and said, "Give it up."

Perez then drove the truck in reverse while the other person grabbed Sanchez's left arm and pushed it down, preventing Sanchez from pulling his arm out of the truck. Sanchez yelled, "Stop the vehicle," three times as he was dragged, and he tried to run to maintain balance as the truck moved in reverse. Perez then drove the truck forward, at which point Sanchez pulled his arm free; Sanchez thought he was going to be rolled under the tires and killed. Sanchez suffered a few scrapes but no injury warranting serious medical attention. Perez and the other person left the scene. A witness, Sanchez's co-worker, told the police that he saw Sanchez being dragged and "running for his life." Sanchez originally testified at a preliminary hearing that the truck started at 10 miles per hour and accelerated to around 15 miles per hour when he pulled his arm free, but he later estimated at trial that the speed was 20 miles per hour. Perez estimated the speed was one mile per hour in reverse and two or three miles per hour forward. Perez testified that he had not been at the store on the first day and that

on the second day, he had been asked by a friend to give the unidentified person a ride to the store. Perez said that in moving the truck while Sanchez's arm was inside, he was only trying to escape because he thought Sanchez, whom he did not know was a store employee, was trying to rob the person. The parties do not dispute that Perez's movement of the truck backward and forward had the potential to seriously injure Sanchez.

Perez was charged with assault by means of force likely to produce great bodily injury under former section 245 and for robbery under section 211; he was not charged with assault with a deadly weapon. On April 4, 1995, a jury convicted Perez under former section 245, subdivision (a)(1) for the crime of "[a]ssault by means of [f]orce likely to produce [great bodily injury]." Because Perez had two prior strike offenses, he was sentenced to an indeterminate term of 25 years to life plus two one-year enhancements under section 667.5, subdivision (b).

On August 16, 2013, after passage of Proposition 36, Perez petitioned the trial court for a recall of sentence and a new sentencing hearing pursuant to section 1170.126. The district attorney opposed the petition on the ground that Perez had been armed with a deadly weapon during the commission of his current offense. The trial court found that Perez was not statutorily ineligible for resentencing on that ground. The court found it "significant[]" that "the case was not charged or convicted as assault with a motor vehicle. It was charged as force likely [to produce great bodily injury]." "The incidental use of the motor vehicle during the offense," the court said, did not make Perez statutorily ineligible for resentencing. Moreover, the trial court opined that the voters who enacted Proposition 36 were "informed that an individual would not be eligible [for resentencing] if the offense involved use of a firearm" but were not told that " 'if an individual uses something that is not in and of itself a deadly -- for that purpose a deadly weapon, that they would not be eligible.' "

The Court of Appeal reversed. (*People v. Perez* (2016) 3 Cal.App.5th 812, 816 (*Perez*).) The court observed that a deadly weapon under section 245, subdivision (a) is " ' "any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury." ' " (*Perez*, at p. 824, quoting *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 (*Aguilar*).) The court then reasoned that because the jury, by its verdict, necessarily found that Perez used force likely to produce great bodily injury when he assaulted Sanchez, and because the vehicle was the sole means by which Perez applied this force, the record of conviction establishes that Perez used the vehicle as a deadly weapon. (*Perez*, at p. 825.) Justice Franson dissented on the ground that the trial court's finding that Perez did not use the vehicle as a deadly weapon was supported by substantial evidence and did not contradict the jury's verdict. (*Id.* at pp. 835–837 (dis. opn. of Franson, J.).)

We granted review.

II.

The Three Strikes law was enacted in 1994 "to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses." (Former § 667, subd. (b), as amended by Stats. 1994, ch. 12, § 1, p. 72.) Under the law, defendants who commit a felony after two or more prior convictions for serious or violent felonies were sentenced to "an indeterminate term of life imprisonment with a minimum term of" at least 25 years. (Former § 1170.12, subd. (c)(2)(A), added by Prop. 184, § 1, as approved by voters, Gen. Elec. (Nov. 8, 1994).) In 2012, Proposition 36 narrowed the class of third-strike felonies for which an indeterminate sentence could be imposed. Now a defendant convicted of a felony outside of that class can receive at most a sentence enhancement of twice the term otherwise provided as punishment for that felony. (§ 1170.12, subd. (c)(2)(C); see

People v. Conley (2016) 63 Cal.4th 646, 652.) But Proposition 36 makes a defendant ineligible for this limitation on third-strike sentencing if one of various grounds for ineligibility applies. (§ 1170.12, subd. (c)(2)(C).) One of those grounds is that "[d]uring the commission of the current offense, the defendant . . . was armed with a . . . deadly weapon . . . ." (§ 1170.12(c)(2)(C)(iii).)

Proposition 36 also authorizes an inmate currently serving an indeterminate term under the original Three Strikes law to petition the trial court for resentencing. (§ 1170.126, subds. (a), (b).) Upon receiving such a petition, the trial court "shall determine whether the petitioner satisfies the criteria" for resentencing eligibility, including whether the petitioner's third-strike offense was neither serious nor violent. (§ 1170.126, subds. (e), (f).) If the petitioner is found eligible for resentencing, he or she "shall be resentenced pursuant to [Proposition 36] unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).) As with defendants to be prospectively sentenced for a third-strike offense, an already sentenced inmate whose third strike was a nonserious, nonviolent felony and who otherwise satisfies the criteria for resentencing is nonetheless ineligible for resentencing if his or her current sentence was imposed for an offense during which he or she "was armed with a . . . deadly weapon." (§§ 1170.12(c)(2)(C)(iii), 1170.126, subd. (e)(2).)

Proposition 36 does not specify how the trial court is to determine whether a given criterion for resentencing ineligibility, such as whether the inmate was armed with a deadly weapon during his or her current offense, has been satisfied. We recently clarified that once an inmate has made an initial showing of eligibility for resentencing, the burden is on the prosecution to prove beyond a reasonable doubt that one of the grounds for ineligibility applies. (*Frierson*, *supra*, 4 Cal.5th at p. 230.) In this case, it was the prosecution's burden to prove beyond a

reasonable doubt that Perez was "armed with a . . . deadly weapon" within the meaning of section 1170.12(c)(2)(C)(iii) during the commission of his aggravated assault against Sanchez.

At the time of Perez's offense, a defendant could be convicted of aggravated assault for "an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury." (Former § 245, subd. (a)(1), as amended by Stats. 1993, ch. 369, § 1, p. 2168.) A judgment of conviction specifying that a defendant was convicted for "an assault upon the person of another with a deadly weapon" is undoubtedly sufficient to show that the defendant was armed with a deadly weapon during the commission of the offense and is therefore ineligible for resentencing. But Perez was convicted of aggravated assault upon proof that he committed "an assault . . . by means of force likely to produce great bodily injury." The jury was not asked to explicitly find that Perez was armed with a deadly weapon.

Perez contends that the Sixth Amendment to the United States Constitution prohibits a trial court from determining that an inmate is ineligible for resentencing based on a fact not found by a jury beyond a reasonable doubt. In *People v. Estrada* (2017) 3 Cal.5th 661, 672, we held that Proposition 36 permits a trial court to examine facts beyond the judgment of conviction in determining whether a resentencing ineligibility criterion applies. In reaching that statutory holding, we did not address any Sixth Amendment concern. (See *Estrada*, at p. 668.) We now hold that the Sixth Amendment does not bar a trial court from considering facts not found by a jury beyond a reasonable doubt when determining the applicability of a resentencing ineligibility criterion under Proposition 36.

Under the Sixth Amendment, any fact other than the fact of a prior conviction that increases the penalty for a crime beyond the statutory maximum

must be submitted to a jury and proved beyond a reasonable doubt. (*Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348]; see *Alleyne v. United States* (2013) 570 U.S. 99 [133 S.Ct. 2151] [same rule for any fact that increases the mandatory minimum penalty for a crime].) In *Dillon v. United States* (2010) 560 U.S. 817 (*Dillon*), the high court held that this rule, as interpreted in *United States v. Booker* (2005) 543 U.S. 200, does not apply to a federal sentence modification scheme that authorizes district courts to reduce otherwise final sentences when the United States Sentencing Commission has revised sentencing guidelines downward and has made those revisions retroactive. (18 U.S.C. § 3582(c)(2); see *Dillon*, at pp. 820–822 [describing the scheme].) *Dillon* explained: "We are aware of no constitutional requirement of retroactivity that entitles defendants sentenced to a term of imprisonment to the benefit of subsequent Guidelines amendments. Rather, § 3582(c)(2) represents a congressional act of lenity intended to give prisoners the benefit of later enacted adjustments to the judgments reflected in the Guidelines. [¶] Viewed that way, proceedings under § 3582(c)(2) do not implicate the Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt. Taking the original sentence as given, any facts found by a judge at a § 3582(c)(2) proceeding do not serve to increase the prescribed range of punishment; instead, they affect only the judge's exercise of discretion within that range. . . . Because § 3582(c)(2) proceedings give judges no more than this circumscribed discretion, '[t]here is no encroachment here by the judge upon facts historically found by the jury, nor any threat to the jury's domain as a bulwark at trial between the State and the accused.' [Citation.]" (*Dillon*, at pp. 828–829.)

Proposition 36's resentencing scheme, though different in various ways from the sentence modification scheme at issue in *Dillon*, is also an enactment intended to give inmates serving otherwise final sentences the benefit of

ameliorative changes to applicable sentencing laws. Perez contends that the Proposition 36 scheme is materially different because it *requires* trial courts to resentence a petitioner when the statutory criteria are met. In his view, any factual finding that makes an inmate ineligible for resentencing is a factual finding that deprives him of a statutory entitlement to a reduced sentence and thus effectively increases his minimum sentence. But this contention fails at the outset because it misreads Proposition 36.

Proposition 36 provides that if a petitioner satisfies the resentencing eligibility criteria, then "the petitioner shall be resentenced . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).) By its terms, the statute does not create an entitlement to resentencing; the finding of a fact that renders a petitioner ineligible for resentencing deprives him or her of an opportunity to have the trial court make a discretionary determination as to whether he or she should be resentenced. Moreover, Proposition 36 does not automatically reduce, recall, or vacate any sentence by operation of law. It is up to the inmate to petition for recall of the sentence, and at all times prior to the trial court's resentencing determination, the petitioner's original third-strike sentence remains in effect. Under this scheme, a factual finding that results in resentencing ineligibility does not increase the petitioner's sentence; it simply leaves the original sentence intact. We hold that the Sixth Amendment does not prohibit trial courts from relying on facts not found by a jury in determining the applicability of Proposition 36's resentencing ineligibility criteria. (Accord, *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1059–1062; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 805; *People v. Guilford* (2014) 228 Cal.App.4th 651, 662–663; *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1334–1336 (*Bradford*).)

III.

In this case, the Court of Appeal reversed the trial court's determination that the evidence at trial did not show Perez was "armed with a . . . deadly weapon" within the meaning of section 1170.12(c)(2)(C)(iii). Perez contends that the trial court's determination was supported by substantial evidence and that the Court of Appeal erred by substituting its own view of the facts.

The parties do not dispute that the term "armed" means having a "weapon available for use, either offensively or defensively." (*People v. Bland* (1995) 10 Cal.4th 991, 997, italics omitted.) In addition, our precedent makes clear that a "deadly weapon" under section 245, subdivision (a)(1) is " 'any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.' [Citation.] Some few objects, such as dirks and blackjacks, have been held to be deadly weapons as a matter of law; the ordinary use for which they are designed establishes their character as such. [Citation.] Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury. In determining whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue. [Citations.]" (*Aguilar, supra*, 16 Cal.4th at pp. 1028–1029.) A similar definition of "deadly weapon" long predated *Aguilar*. (See, e.g., *People v. Leyba* (1887) 74 Cal. 407, 408; *People v. Fuqua* (1881) 58 Cal. 245, 247 [defining a "deadly weapon" as "one likely to produce death or great bodily injury"].) We see no reason why the term "deadly weapon" would mean anything different in section 1170.12(c)(2)(C)(iii) than what it means in section 245, subdivision (a). (See *Bradford, supra,* 227 Cal.App.4th at pp. 1341–1342.)

In *Aguilar*, we held that only objects "extrinsic to the body" can qualify as deadly weapons; a defendant's hands, feet, or other body parts cannot be deadly weapons within the meaning of section 245. (*Aguilar*, *supra*, 16 Cal.4th at p. 1027; *id.* at p. 1026.) Several cases have recognized a vehicle as a deadly weapon based on the manner it was used. (See, e.g., *People v. Oehmigen* (2014) 232 Cal.App.4th 1, 6 [defendant drove a car at two police officers]; *People v. Aznavoleh* (2012) 210 Cal.App.4th 1181, 1183 [defendant raced through a red light at a busy intersection and collided with another vehicle]; *People v. Russell* (2005) 129 Cal.App.4th 776, 787 [defendant pushed the victim into the path of an approaching car].)

Perez argues that an object cannot be a deadly weapon unless the defendant intended to use the instrument as a weapon and not for some other purpose. But assault with a deadly weapon is a general intent crime; the required mens rea is "an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." (*People v. Williams* (2001) 26 Cal.4th 779, 790 (*Williams*).) Whether an object is a deadly weapon under section 245 does not turn on whether the defendant intended it to be used as a deadly weapon; a finding that he or she willfully used the object in a manner that he or she knew would probably and directly result in physical force against another is sufficient to establish the required mens rea.

The Court of Appeal correctly observed that the trial court's eligibility determination, to the extent it was "based on the evidence found in the record of conviction," is a factual determination reviewed on appeal for substantial evidence. (*Perez*, *supra*, 3 Cal.App.5th at pp. 821–822.) That is, the reviewing court must determine if there was sufficient evidence for the trial court to conclude that the prosecutor did not prove that the petitioner is ineligible for resentencing

beyond a reasonable doubt. Under this standard, the burden remains on the prosecutor to demonstrate the petitioner's ineligibility (*Frierson*, *supra*, 4 Cal.5th at p. 230); the burden never shifts to the petitioner, either in the trial court or on appeal, to provide any evidence once he or she has made an initial showing of eligibility. Further, the reviewing court does not reweigh the evidence; appellate review is limited to considering whether the trial court's finding of a reasonable doubt is supportable in light of the evidence. The district attorney argues that de novo review is more appropriate because trial courts do not have an advantage over appellate courts in determining eligibility based on the record of conviction. But even if the trial court is bound by and relies solely on the record of conviction to determine eligibility, the question whether a defendant was armed with a deadly weapon during his or her current offense remains a question of fact, and we see no reason to withhold the deference generally afforded to such factual findings.

Applying this deferential standard, the Court of Appeal also correctly concluded that the trial court's determination of Perez's eligibility for resentencing is not supported by substantial evidence. As the Court of Appeal explained: "When the jury convicted [Perez] of assault by means of force likely to produce great bodily injury, they necessarily found the force used by [Perez] in assaulting Sanchez, the victim, was likely to produce great bodily injury. [Citation.] The sole means by which [Perez] applied this force was the vehicle he was driving. Thus, the record of conviction establishes [Perez] used the vehicle in a manner capable of producing, and likely to produce, at a minimum great bodily injury—i.e., as a deadly weapon. [Citations.]" (*Perez*, *supra*, 3 Cal.App.5th at p. 825.)

Perez argues that the jury instruction in this case preceded *Williams* and allowed the jury to convict him of assault with a deadly weapon without finding that he was aware that his use of the truck would probably and directly result in physical force against Sanchez. But as in *Williams*, although the instruction

conceivably could have permitted a conviction of aggravated assault without actual knowledge, it was undisputed that Perez did have such knowledge. The evidence indicates that Sanchez's arm was inside the truck when Perez said, "Give it up," Sanchez shouted, "Stop the vehicle," and Perez continued to drive despite Sanchez's entreaty. Perez therefore had actual knowledge of facts establishing that driving the truck would probably and directly result in applying force against Sanchez. Any ambiguity in the instruction was harmless beyond a reasonable doubt. (See *Williams*, *supra*, 26 Cal.4th at p. 790.) That the jury found that the force was likely to produce great bodily injury was in turn sufficient for a conviction of aggravated assault.

The trial court noted that Perez was charged with aggravated assault based on his use of force likely to produce great bodily injury and not on his use of a deadly weapon, and it was in this context that the trial court said Perez's use of the vehicle during the offense was "incidental." To be sure, there is room to question Sanchez's testimony as to the speed of the truck, and one could reasonably view the evidence as showing that Perez moved the truck "not to inflict injury but to provide a means of escape." (*Perez*, *supra*, 3 Cal.App.5th at p. 829 (conc. opn. of Poochigian, Acting P. J.); *id.* at p. 829, fn. 1; see *id.* at pp. 835–836 & fn. 5 (dis. opn. of Franson, J.).) But Perez's specific intent when he moved the car is immaterial, and there is no dispute that Perez willfully continued to move the car even as Sanchez three times yelled, "Stop the vehicle," as his arm was stuck inside the car. Most importantly, the record contains no evidence of any force employed by Perez *other than the force of the moving vehicle* that could account for the jury's verdict that Perez committed an assault by "means of force likely to produce great bodily injury." (Former § 245, subd. (a)(1), as amended by Stats. 1993, ch. 369, § 1, p. 2168.) The evidence does not reasonably support any inference but that Perez used the vehicle " 'in such a manner as to be capable of producing

and likely to produce . . . great bodily injury' " — i.e., that Perez used the vehicle as a deadly weapon. (*Aguilar*, *supra*, 16 Cal.4th at pp. 1028–1029.)

The trial court also expressed doubt as to whether the voters who enacted Proposition 36 intended the term "deadly weapon" in section 1170.12(c)(2)(C)(iii) to include objects that, unlike firearms, are not inherently deadly weapons. To the extent that the trial court was interpreting the meaning of the statute, we independently review the trial court's determination and reject its interpretation of section 1170.12(c)(2)(C)(iii). We presume the electorate, when it enacts an initiative, is " 'aware of existing laws and judicial construction thereof.' " (*People v. Gonzales* (2017) 2 Cal.5th 858, 869.) Our decision in *Aguilar*, which defined "deadly weapon" to include objects used in a manner capable of producing and likely to produce great bodily injury, was filed in 1997, long before the enactment of Proposition 36.

We caution that our reasoning in light of the facts here does not establish a categorical rule that a defendant is armed with a deadly weapon within the meaning of section 1170.12(c)(2)(C)(iii) whenever he or she uses an object in the course of committing an assault by means of force likely to produce great bodily injury. Factors such as the application of multiple forces or the use of multiple objects could raise a reasonable doubt about whether the defendant was armed with a deadly weapon during the commission of an aggravated assault. In this case, the record shows beyond a reasonable doubt that Perez used the vehicle as a deadly weapon; there is no substantial evidence to the contrary.

CONCLUSION

We affirm the judgment of the Court of Appeal.

LIU, J.

WE CONCUR:

CANTIL-SAKAUYE, C. J.
CHIN, J.
CUÉLLAR, J.
KRUGER, J.
STREETER, J.[*]

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[*] Associate Justice of the Court of Appeal, First Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

CONCURRING OPINION BY CORRIGAN, J.

I concur in the majority's holding that "the Sixth Amendment does not bar a trial court from considering facts not found by a jury beyond a reasonable doubt when determining the applicability of a resentencing ineligibility criterion under Proposition 36." (Maj. opn., *ante*, at p. 7.) I also concur in the majority's holding that defendant was ineligible for resentencing because he was "armed with a . . . deadly weapon" during "the commission of the current offense." (Pen. Code,[1] § 1170.12, subd. (c)(2)(C)(iii); maj. opn., *ante*, at pp. 6, 10–14.) I write separately to urge that a different analytical approach is appropriate to resolve the second holding. Specifically, on the record before us, the trial court's finding of eligibility is a question of law subject to de novo review.

The relevant facts here are undisputed. (See maj. opn., *ante*, at pp. 2–4.) The trial court found that defendant had not used his vehicle in a dangerous manner as to constitute a deadly weapon, and therefore could not be said to have been armed with such a weapon, because his vehicle use was only " 'incidental' " to the offense. (Maj. opn., *ante*, at p. 4.) The Court of Appeal rejected that reasoning.[2] It is true that the Court of Appeal characterized the question as a

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1 Statutory references are to the Penal Code.

2 The Court of Appeal observed: "It has long been the law that '[a] person is "armed" with a deadly weapon when he simply carries a weapon or has it available for use in either offense or defense. [Citation.]' [Citations.] Here, because defendant personally used the vehicle as a deadly weapon, he necessarily

factual one and applied the substantial evidence test. (*Perez*, *supra*, 3 Cal.App.5th at p. 825.) Defendant treats review in the same way. But closer examination indicates the question, on this record, is one of law, not fact.

We clarified in *People v. Frierson* (2017) 4 Cal.5th 225 that, once a defendant meets his initial burden to show he is facially eligible for resentencing under section 1170.126, he shall be resentenced unless the prosecution proves beyond a reasonable doubt that he is *ineligible*. (*Frierson*, at pp. 235–240.) If the trial court concludes the prosecution has failed to meet its burden, an eligible defendant must be resentenced.[3]

This case is complicated by the fact that neither the trial court nor the Court of Appeal had the benefit of our *Frierson* decision. The Court of Appeal reversed the trial court's finding of eligibility, concluding no substantial evidence supported this finding: "Even under the deferential substantial evidence standard of review, the record of conviction does not support the trial court's contrary findings that defendant's use of the vehicle during the offense was merely 'incidental,' or that Sanchez was 'dragged slightly, though the dragging wasn't anything more than keeping pace with the car.' The vehicle was the instrumentality by which defendant committed the offense, and whatever speed defendant was driving, Sanchez was dragged and had to run to keep his balance to such an extent that a witness characterized Sanchez as ' "running for his life" ' and expressed surprise Sanchez was able to run that fast." (*Perez*, *supra*, 3 Cal.App.5th at p. 825.) The majority endorses the Court of Appeal's reasoning (see maj. opn., *ante*, at pp. 11–

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had it available for use and so was armed with it during the commission of his current offense, since 'use' subsumes 'arming.' [Citations.]" (*People v. Perez* (2016) 3 Cal.App.5th 812, 827 (*Perez*).)

3 An eligible defendant may be denied resentencing if the court, "in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).)

12) and concludes that "the record shows beyond a reasonable doubt that Perez used the vehicle as a deadly weapon; there is no substantial evidence to the contrary" (*id*. at p. 14).

The substantial evidence standard of review asks whether an affirmative factual finding is supported by " ' "evidence which is reasonable, credible, and of solid value." ' " (*People v. Clark* (2011) 52 Cal.4th 856, 942.) If the trial court had found the People's evidence satisfied their burden because it found an ineligibility factor proven beyond a reasonable doubt, a defendant could challenge that affirmative finding on appeal and the substantial evidence standard would apply.

By contrast, when the trial court concludes the prosecution has *failed* to meet its burden to prove ineligibility, the People may argue on appeal that the trial court made an error of law. Here, the People claim that a *legal* error required reversal of the court's eligibility finding because the trial court reconsidered a factual question already resolved by the jury. This appears to be an assertion of issue preclusion, the existence of which constitutes a legal question. (*Mills v. U.S. Bank* (2008) 166 Cal.App.4th 871, 895, fn. 24; see *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341 [requirements for collateral estoppel].)

Although the majority couches its review in terms of "substantial evidence" (maj. opn., *ante*, at p. 2), its ultimate conclusion appears to be that the undisputed facts show *as a matter of law* that defendant was armed with a deadly weapon during the commission of the offense (*id*. at p. 12). The majority embraces the Court of Appeal's reasoning that the jury necessarily found the force used by defendant in assaulting the victim was likely to produce great bodily injury, and that force was solely applied by the vehicle defendant was driving. (*Id*. at p. 12) Thus, " 'the record of conviction establishes [Perez] used the vehicle in a manner capable of producing, and likely to produce, at a minimum great bodily injury—

i.e., as a deadly weapon. [Citations.]' " (*Ibid*., quoting *Perez*, *supra*, 3 Cal.App.5th at p. 825.)

With this clarification, I join the majority's affirmance of the Court of Appeal's judgment.

CORRIGAN, J.

See next page for addresses and telephone numbers for counsel who argued in Supreme Court.

Name of Opinion People v. Perez

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APPENDIX B

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Appellant, v. ALFREDO PEREZ, JR., Defendant and Respondent.	F069020 (Super. Ct. No. CF94509578) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Jonathan B. Conklin, Judge.

Elizabeth A. Egan and Lisa A. Smittcamp, District Attorneys, Rudy Carillo and Traci Fritzler, Chief Deputy District Attorneys, and Douglas O. Treisman, Deputy District Attorney, for Plaintiff and Appellant.

Elizabeth Campbell, under appointment by the Court of Appeal, for Defendant and Respondent.

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SEE CONCURRING AND DISSENTING OPINIONS

Alfredo Perez, Jr., (defendant) was convicted by jury of assault with force likely to produce great bodily harm, a violation of Penal Code section 245, former subdivision (a)(1).[1] The jury further found he suffered two prior strike convictions (§ 667, subds. (b)-(i)) and served two prior prison terms (§ 667.5, subd. (b)). On May 4, 1995, he was sentenced to a total of two years plus 25 years to life in prison.

In 2012, the Three Strikes Reform Act (hereafter the Act) created a postconviction release proceeding for third strike offenders serving indeterminate life sentences for nonserious and nonviolent felonies. An inmate who meets the criteria enumerated in section 1170.126, subdivision (e), is to be resentenced as a second strike offender unless the court determines such resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.126, subd. (f); *People v. Yearwood* (2013) 213 Cal.App.4th 161, 168.) Defendant's conviction was for a crime that was neither a serious nor a violent felony.

An inmate is ineligible for resentencing under the Act, however, if his or her current sentence is "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." (§ 1170.126, subd. (e)(2).) Thus, an inmate is disqualified from resentencing if, inter alia, "[d]uring the commission of the current offense, [he or she] . . . was armed with a . . . 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).)

After the Act went into effect, defendant filed a petition for recall of sentence and request for resentencing under the Act. The People opposed the petition on the ground, inter alia, defendant was armed with (and actually used) a deadly weapon during the commission of his offense. Following a hearing, the trial court found defendant eligible

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1 All statutory references are to the Penal Code unless otherwise stated.

for resentencing, and that resentencing defendant would not pose an unreasonable risk of danger to public safety. The court granted the petition and resentenced defendant as a second strike offender.

The People appeal, challenging the trial court's eligibility determination.

We hold an inmate is armed with a deadly weapon within the meaning of clause (iii) of subparagraph (C) of paragraph (2) of subdivision (e) of section 667 and clause (iii) of subparagraph (C) of paragraph (2) of subdivision (c) of section 1170.12 (hereafter referred to collectively as "clause (iii)") when he or she personally and intentionally uses a vehicle in a manner likely to produce great bodily injury. On the evidence found in the record of conviction, defendant used a vehicle as a deadly weapon. He is, therefore, ineligible for resentencing pursuant to section 1170.126, subdivision (c)(2). Accordingly, we reverse the trial court's order granting defendant's petition.

FACTS AND PROCEDURAL HISTORY[2]

> "On March 17, 1994, at approximately 2 p.m., Fred Sanchez was working as a sales clerk at Grand Auto in Fresno. He observed [defendant] and a man, who hereinafter will be referred to as the 'passenger,' enter the store. The passenger raised a Club, an auto anti-car theft device, a couple of feet above the aisle and then lowered it. The passenger was wearing a Pendleton wool-type jacket and had his back to Sanchez. [Defendant] spoke briefly to the passenger and then went up to Sanchez and spoke to him about some tires. While this conversation was taking place, the passenger left the store. Sanchez could see the passenger go out into the parking lot of the store and wait at the passenger side of a Blazer-type truck. [Defendant] went to the driver's side and drove away. Sanchez suspected that the passenger had stolen the Club from the store and [defendant] had attempted to divert his attention away from the theft. However, he did not call the police over the incident nor did he check the store inventory to determine if any items were missing.

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[2] We quote the facts of defendant's commitment offense as they are stated in our nonpublished opinion in *People v. Perez* (Nov. 5, 1996, F023703), which was submitted by the People in their initial response to defendant's petition, and is contained in the clerk's transcript of the present appeal.

"The next day, March 18, 1994, around noon, Sanchez saw the same passenger from the day before enter the store. He was wearing the same jacket, even though the day was 'incredibly' hot. He appeared nervous and kept turning his back toward Sanchez. Sanchez asked the passenger if he needed assistance and then followed the passenger out of the rear of the store after alerting the other store employee that he needed assistance. He heard rustling in the passenger's clothing. The passenger had not paid for any item from the store.

"The passenger entered the passenger side of the same Blazer as the day before. The passenger side window was rolled down. Sanchez was wearing a red smock shirt with the insignia of Grand Auto and his name tag. The passenger was in the Blazer less than a minute when Sanchez came up to its window. [Defendant] was the driver. Sanchez observed a bulge protruding from the passenger's clothing. Sanchez told the passenger to please give the merchandise back and he could leave. Sanchez then reached into the vehicle and grabbed at the package in the passenger's jacket. Sanchez identified the package as an Ultra Club which had a retail value of $59.55. Sanchez said, 'Give it up.' [Defendant] then looked toward Sanchez and said, 'Give it up.'

"[Defendant] then drove the vehicle in reverse. The passenger grabbed Sanchez's left arm and pushed it down, which prevented Sanchez from pulling his arm out of the vehicle. Sanchez yelled, 'Stop the vehicle' three times as the vehicle was moving in reverse. He was dragged when the vehicle went into reverse. He had to run to keep his balance. [Defendant] then drove the vehicle forward. Sanchez was able to pull his arm free once the vehicle moved forward, but he was afraid if he fell he could be run over.

"Sanchez estimated the speed of the Blazer to be 20 miles per hour, but admitted that at the preliminary hearing he had testified that the vehicle started at 10 miles per hour and was doing 15 when he pulled his arm free. He estimated the entire incident took a minute, his arm was in the vehicle after it was put in drive for 15 seconds, and that the vehicle traveled approximately 50 feet forward.

"After he broke free, Sanchez saw the vehicle leave the scene. Sanchez never recovered the merchandise from the passenger. The police arrived and Sanchez provided them with a description of the vehicle and the license plate number. The vehicle was registered to [defendant] and his wife. Sanchez's co-worker, Don Tatum, testified to seeing Sanchez run alongside the truck. He characterized the incident as Sanchez being

dragged and 'running for his life.'[3] Both Sanchez and Tatum picked out [defendant] from various photographs.

"[Defendant] testified that he was not in the store on March 17. On that day he had gone with his father to the Sanger cemetery to visit the grave of his grandmother and then went to the father's house until 3:30 p.m. His father testified similarly. [Defendant] testified that on March 18, he was looking for a Universal Tire store when he met a woman friend, Elizabeth Ornelas. Ornelas offered [defendant] $5 to give her male acquaintance, Dan, a ride to an auto parts store to get a part to fix her vehicle which had broken down. [Defendant] testified he drove to the Grand Auto store but stayed in his vehicle and the passenger Dan went into the store. When Dan returned to the vehicle he was angry with another man. [Defendant] was not aware the man was a store employee. When [defendant] said, 'Give it up,' he was talking to his passenger and meant quit fighting.

"[Defendant] stated he was afraid and admitted driving one mile an hour in reverse and two-to-three miles an hour in drive. He stated at no time did Sanchez have to run. He admitted that Sanchez had his arm in the passenger side of his vehicle when he put his vehicle in reverse and forward. After he left the parking lot, he told his passenger to get out and returned the gas money to him.

"[Defendant] admitted telling the investigating officer that the man outside the vehicle was dressed 'like you and me.' [Defendant] just wanted to leave. He admitted not telling the investigating officer about Ornelas and never mentioned to the officer he had a witness that the police could contact. [Defendant] admitted he told the investigating officer that his passenger had told him to leave since the man outside the vehicle was trying to rob him.

"Elizabeth Ornelas testified that she asked [defendant] to give a man she had recently met a ride to an auto parts store to help buy a part for the disabled vehicle they had been driving. Her trial testimony, that she made this request of [defendant] as he was stopped at a red light, differed from her pretrial statement that this conversation took place in a parking lot."

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3 In our discussion of one of defendant's claims on appeal, we expounded that Tatum testified "he saw Sanchez running for his life and was surprised that Sanchez was able to run that fast."

The jury was instructed pursuant to CALJIC No. 9.00 (1994 rev.), in pertinent part, that an assault required proof "1. A person willfully committed an act that by its nature would probably and directly result in the application of physical force on another person; and [¶] 2. At the time the act was committed, such person had the present ability to apply physical force to the person of another." Pursuant to CALJIC No. 9.02, they were told assault by means of force required proof of an assault committed by means of force likely to produce great bodily injury. They were further told great bodily injury referred to significant or substantial bodily injury or damage and not to trivial or insignificant injury or moderate harm, and that while actual bodily injury was not a necessary element of the crime, if such bodily injury was inflicted, its nature and extent were to be considered in connection with all the evidence in determining whether the means used and the manner in which it was used were such that they were likely to produce great bodily injury.[4] The jury convicted defendant of assault by means of force likely to produce great bodily injury (§ 245, former subd. (a)(1)).

On August 16, 2013, defendant petitioned the trial court for a recall of sentence pursuant to section 1170.126. Defendant represented he was eligible for such relief, in that neither his current conviction nor his prior serious or violent felony convictions (both of which were for first degree burglary) disqualified him. As previously stated, the People opposed the petition on the ground, inter alia, defendant was armed with (and actually used) a deadly weapon during the commission of his current offense and was, therefore, ineligible for resentencing. Defendant countered that the People's position was supported by neither the law nor the facts of the case. In pertinent part, he argued the fact

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[4] On December 2, 2014, by separate order and in compliance with Evidence Code section 459, this court granted the People's request for judicial notice of these selected jury instructions given by the trial court to the jury in the trial of defendant's commitment offense. We do not take judicial notice beyond that order. (See *Haworth v. Superior Court* (2010) 50 Cal.4th 372, 379, fn. 2.)

that virtually any object could be used in a harmful way did not mean possession constituted arming or qualified the item as a deadly weapon.

On February 5, 2014, a hearing was held on defendant's petition.[5] The trial court characterized defendant's use of the vehicle during the offense as "incidental," and found defendant "not ineligible to be resentenced, due to the method in which the motor vehicle was used . . . ." It continued the hearing on the question whether defendant posed an unreasonable risk to public safety if resentenced and likely released.

On February 21, 2014, the People filed further opposition to defendant's resentencing, again claiming defendant was ineligible therefor, and arguing he posed an unreasonable danger if released. Specifically, on the eligibility question, the People asserted defendant necessarily was armed with a deadly weapon during the commission of the aggravated assault of which he was convicted, having employed an automobile as the instrumentality of the assault. Defendant filed a response in which he focused on the dangerousness issue. At the March 7, 2014, hearing, the trial court reiterated its finding of eligibility. It further found defendant did not pose an unreasonable risk to public safety, recalled the previously imposed sentence, and resentenced defendant to the upper term of four years, doubled to eight years due to the prior strike offenses, plus two years for the prior prison term enhancements. Defendant was awarded custody credits and ordered to report to parole for placement on postrelease community supervision.

DISCUSSION

The People contend the trial court erred in finding defendant eligible for resentencing, because defendant was "armed with a . . . deadly weapon" — to wit, a vehicle — in the commission of the current offense within the meaning of clause (iii).[6]

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[5] As the judge who originally sentenced defendant was no longer on the bench, the matter was heard by a different judge. (See § 1170.126, subd. (j).)

[6] Although the People's notice of appeal stated they were appealing the finding of eligibility as well as the "orders, judgment and resentencing," on appeal they contest only

While we depart somewhat from the People's line of reasoning, we reach the same conclusion. The record of conviction reflects defendant committed assault by means of force likely to produce great bodily injury. The facts show defendant personally and intentionally used a vehicle in the commission of that assault. When a vehicle is used as a means of force likely to produce great bodily injury, it is a deadly weapon. Defendant was, therefore, "armed with a . . . deadly weapon" within the meaning of clause (iii). Accordingly, defendant is ineligible for resentencing pursuant to section 1170.126, subdivision (e)(2).[7]

I. BECAUSE THE TRIAL COURT MADE BOTH FACTUAL AND LEGAL DETERMINATIONS, MULTIPLE STANDARDS OF REVIEW APPLY.

The standard of review applicable to an eligibility determination depends on the nature of the finding or findings a trial court is called upon to make in a given resentencing proceeding. In the present case, the trial court necessarily made both factual and legal determinations.

The eligibility criteria contained in clause (iii) refer to the "facts attendant to commission of the actual offense . . . ." (*People v. Bradford* (2014) 227 Cal.App.4th 1322, 1332.) In deciding whether a defendant's current offense falls within those criteria, a trial court "make[s] a factual determination that is not limited by a review of the particular statutory offenses and enhancements of which [the] petitioner was convicted."

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the eligibility finding. The People have the right to appeal such a finding pursuant to section 1238, subdivision (a)(5). (*People v. Superior Court (Martinez)* (2014) 225 Cal.App.4th 979, 987-988.)

[7] In light of our conclusion, we need not reach the People's claim defendant also "personally used a dangerous or deadly weapon" within the meaning of section 1192.7, subdivision (c)(23), so as to render him ineligible pursuant to section 1170.126, subdivision (e)(1). (See generally *People v. Banuelos* (2005) 130 Cal.App.4th 601, 604-605.)

(*Ibid.*).[8] The trial court makes this factual determination based on the evidence found in the record of conviction. (*People v. Hicks* (2014) 231 Cal.App.4th 275, 285-286; *People v. Bradford, supra,* at p. 1331; *People v. Blake* (2004) 117 Cal.App.4th 543, 559.)[9] It is

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[8] In its discussion of whether a defendant is entitled to an evidentiary hearing on the issue of eligibility for resentencing, the appellate court in *People v. Oehmigen* (2014) 232 Cal.App.4th 1 states eligibility is not a question of fact requiring the resolution of disputed issues; rather, "[w]hat the trial court decides is a question of *law*: whether the facts in the record of conviction are the proper subject of consideration, and whether they establish eligibility." (*Id*. at p. 7.) Whatever the validity of this statement with respect to a petitioner's right to an *evidentiary* hearing, we believe it overstates the legal nature of our review.

[9] The term "record of conviction" has been "used technically, as equivalent to the record on appeal [citation], or more narrowly, as referring only to those record documents reliably reflecting the facts of the offense for which the defendant was convicted." (*People v. Reed* (1996) 13 Cal.4th 217, 223; see *People v. Houck* (1998) 66 Cal.App.4th 350, 356.) Police reports are not part of the record of conviction (see *Shepard v. United States* (2005) 544 U.S. 13, 16; *Draeger v. Reed* (1999) 69 Cal.App.4th 1511, 1521), nor are a defendant's statements made after conviction and recounted in a postconviction report of the probation officer (*People v. Trujillo* (2006) 40 Cal.4th 165, 179). The record of conviction does include, however, the preliminary hearing transcript (*People v. Reed, supra,* 13 Cal.4th at p. 223), transcript of the jury trial (*People v. Bartow* (1996) 46 Cal.App.4th 1573, 1579-1580), and the appellate record, including the appellate opinion (*People v. Woodell* (1998) 17 Cal.4th 448, 456). Portions of the probation officer's report may or may not be part of the record of conviction. (See *People v. Reed, supra,* 13 Cal.4th at p. 230; *People v. Burnes* (2015) 242 Cal.App.4th 1452, 1459.)

Even when an item is part of the record of conviction, it is not automatically relevant or admissible for a particular purpose. (See *People v. Trujillo, supra,* 40 Cal.4th at pp. 179-181; *People v. Woodell, supra,* 17 Cal.4th at p. 457; *People v. Guerrero* (1988) 44 Cal.3d 343, 356, fn. 1.) Its admission must comport with the rules of evidence, particularly the hearsay rule and exceptions thereto. (See *People v. Woodell, supra,* 17 Cal.4th at pp. 457-460; *People v. Reed, supra,* 13 Cal.4th at pp. 220, 224-228, 230-231; *People v. Bartow, supra,* 46 Cal.App.4th at pp. 1579-1580.) Thus, although part of the record of conviction, the appellate opinion will not necessarily be relevant or admissible in its entirety. This may be especially true where the facts recited therein have their source in the probation officer's report rather than the trial evidence. (See *People v. Trujillo, supra,* 40 Cal.4th at pp. 180-181; *People v. Reed, supra,* 13 Cal.4th at pp. 220, 230-231.) In the present case, the facts in the appellate opinion were derived from the evidence presented at trial.

subject to review for substantial evidence under the familiar sufficiency of the evidence standard. (*People v. Guilford* (2014) 228 Cal.App.4th 651, 661; see, e.g., *People v. Maciel* (2013) 57 Cal.4th 482, 514-515.)[10]

When the issue is one of the interpretation of a statute and its applicability to a given situation, however, it is a question of law we review independently. (*People v. Superior Court (Cervantes)* (2014) 225 Cal.App.4th 1007, 1013; accord, *People v. Tran* (2015) 61 Cal.4th 1160, 1166; *People v. Christman* (2014) 229 Cal.App.4th 810, 815; see *Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach* (2001) 86 Cal.App.4th 534, 549.) " ' " In interpreting a voter initiative" ' . . . , ' "we apply the same principles that

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10 Defendant contends allowing a trial court to find a petitioner ineligible for resentencing based on facts not found true by a jury deprives the petitioner of his or her right to a jury trial under the Sixth and Fourteenth Amendments to the United States Constitution. In *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1059-1062 (*Blakely*), we rejected the claim an inmate seeking resentencing pursuant to section 1170.126 had a Sixth Amendment right to have disqualifying factors pled or proven to a trier of fact beyond a reasonable doubt. We found *Apprendi v. New Jersey* (2000) 530 U.S. 466 and its progeny (e.g., *Alleyne v. United States* (2013) 570 U.S. ___ [133 S.Ct. 2151]; *Cunningham v. California* (2007) 549 U.S. 270; *Blakely v. Washington* (2004) 542 U.S. 296) "do not apply to a determination of eligibility for resentencing under the Act." (*Blakely, supra*, 225 Cal.App.4th at p. 1060.) We and other courts have adhered to this conclusion, since "[a] finding an inmate is not eligible for resentencing under section 1170.126 does not increase or aggravate that individual's sentence; rather, it leaves him or her subject to the sentence originally imposed. The trial court's determination . . . [does] not increase the penalty to which defendant [is] already subject, but instead disqualifie[s] defendant from an act of lenity on the part of the electorate to which defendant [is] not constitutionally entitled." (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1040; accord, *People v. Chubbuck* (2014) 231 Cal.App.4th 737, 748; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 805; *People v. Guilford*, *supra*, 228 Cal.App.4th at pp. 662-663; *People v. Bradford*, *supra*, 227 Cal.App.4th at pp. 1334-1336; but see *People v. Arevalo* (2016) 244 Cal.App.4th 836, 852-853.) Whatever implications recent pronouncements may have with respect to the determination whether, for purposes of imposing an *initial* sentence, a prior conviction constitutes a strike (see, e.g., *Descamps v. United States* (2013) 570 U.S. ___, ___-___, ___ [133 S.Ct. 2276, 2281-2286, 2293]; *People v. Saez* (2015) 237 Cal.App.4th 1177, 1198-1208), defendant fails to convince us his constitutional rights are violated by judicial factfinding on the question of eligibility for resentencing under the Act. (See *Blakely, supra*, 225 Cal.App.4th at p. 1063.)

govern statutory construction. [Citation.] Thus, [1] 'we turn first to the language of the statute, giving the words their ordinary meaning.' [Citation.] [2] The statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme [in light of the electorate's intent]. [Citation.] [3] When the language is ambiguous, 'we refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet.' " ' [Citation.] 'In other words, our "task is simply to interpret and apply the initiative's language so as to effectuate the electorate's intent." ' [Citation.]" (*People v. Arroyo* (2016) 62 Cal.4th 589, 593.)

II. DEFENDANT USED HIS VEHICLE AS A DEADLY WEAPON IN COMMISSION OF THE ASSAULT.

At the time defendant committed his current offense, section 245, subdivision (a)(1) prescribed the punishment for "[a]ny person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury . . . ."[11]

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[11] "[S]ection 245, [former] subdivision (a)(1) . . . 'defines only one offense, to wit, "assault upon the person of another with a deadly weapon or instrument [other than a firearm] or by any means of force likely to produce great bodily injury . . . ." The offense of assault by means of force likely to produce great bodily injury is not an offense separate from . . . the offense of assault with a deadly weapon.' [Citation.]" (*People v. McGee* (1993) 15 Cal.App.4th 107, 114-115 (*McGee*).)

At issue in *McGee* was whether a deadly weapon use enhancement had to be stricken given that section 12022, former subdivision (b) by its terms precluded imposition of such an enhancement where use of a deadly weapon was an element of the underlying offense. (*McGee, supra,* 15 Cal.App.4th at p. 110.) In concluding the enhancement was improper, the appellate court reasoned: "[I]n determining whether use of a deadly weapon other than a firearm is an element of a section 245, [former] subdivision (a)(1) conviction, the question is not simply whether, in the abstract, the section can be violated without using such a weapon. Rather, the conduct of the accused, i.e., the means by which he or she violated the statute, must be considered. [¶] . . . [¶] Here, defendant's use of a deadly weapon other than a firearm was the sole means by which he violated section 245, [former] subdivision (a)(1). The assault by means of force likely to produce great bodily injury was defendant's stabbing of the victim with a knife. Hence, his use of this deadly weapon was an element of the offense, within the meaning

It is apparent assault by means of force can be committed without the involvement of any sort of weapon or the intent to cause great bodily injury. Accordingly, it does not automatically disqualify an inmate from resentencing under clause (iii).

Nevertheless, the use of a deadly weapon does not preclude a conviction for assault by means of force. (*McGee, supra,* 15 Cal.App.4th at p. 109 [the defendant convicted of assault by means of force after he stabbed the victim with a knife].)

"As used in section 245, subdivision (a)(1), a 'deadly weapon' is 'any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.' [Citation.] Some few objects, such as dirks and blackjacks, have been held to be deadly weapons as a matter of law; the ordinary use for which they are designed establishes their character as such. [Citations.] Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury. In determining whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue. [Citations.]" (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029 (*Aguilar*).)[12]

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of section 12022, [former] subdivision (b), even though the crime was pleaded as an assault by means of force likely to produce great bodily injury rather than as an assault with a deadly weapon other than a firearm." (*Id.* at p. 115.)

Under section 245 as it currently reads, assault with a deadly weapon is addressed in subdivision (a)(1), while assault by means of force is addressed in subdivision (a)(4).

[12] At issue in *Aguilar* was whether hands and feet could constitute deadly weapons, or whether a deadly weapon within the meaning of the statute had to be an object extrinsic to the human body. (*Aguilar, supra,* 16 Cal.4th at pp. 1026-1027, 1034.) Within that context, *Aguilar* found "sound" the inference, based on inclusion of both the deadly weapon and the assault by means of force clauses in former subdivision (a)(1) of section 245, that the Legislature intended a meaningful difference to exist between the two clauses. (*Aguilar, supra,* 16 Cal.4th at p. 1030.) We do not read *Aguilar* as undermining *McGee* or *In re Mosley* (1970) 1 Cal.3d 913, 919, footnote 5, on which *McGee* relied. (*McGee, supra,* 15 Cal.App.4th at pp. 110, 114.)

Although a vehicle is not a deadly weapon per se, it can become one, depending on how it is used. (See, e.g., *People v. Oehmigen*, *supra*, 232 Cal.App.4th at pp. 5, 11 [the defendant purposefully drove his car at police vehicle]; *People v. Aznavoleh* (2012) 210 Cal.App.4th 1181, 1183 [the defendant deliberately raced vehicle through red light at busy intersection and collided with another vehicle, causing injury to another]; *People v. Golde* (2008) 163 Cal.App.4th 101, 109 [the defendant accelerated toward victim at about 15 miles per hour three or four times as victim ran back and forth to avoid vehicle]; *People v. Russell* (2005) 129 Cal.App.4th 776, 779, 781-782 [the defendant knowingly and intentionally pushed victim into path of oncoming vehicle]; *People v. Wright* (2002) 100 Cal.App.4th 703, 705, 707-709 [the defendant intentionally drove pickup truck close to persons with whom he had contentious relations].)[13]

In the present case, the jury was instructed that assault by means of force required proof of an assault committed by means of force likely to produce great bodily injury. They were told great bodily referred to significant or substantial bodily injury or damage, not trivial or insignificant injury or moderate harm. "Jurors are presumed to understand and follow the court's instructions. [Citation.]" (*People v. Holt* (1997) 15 Cal.4th 619, 662.) That is " '[t]he crucial assumption underlying our constitutional system of trial by jury.' [Citations.]" (*People v. Yeoman* (2003) 31 Cal.4th 93, 139; see, e.g., *Francis v. Franklin* (1985) 471 U.S. 307, 324, fn. 9.) When the jury convicted defendant of assault by means of force likely to produce great bodily injury, they necessarily found the force used by defendant in assaulting Sanchez, the victim, was likely to produce great bodily

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13 Other objects that, while not deadly weapons as a matter of law, have been found to have been used as such for purposes of convictions of assault with a deadly weapon, include a " 'sharp' and 'pointy' " knife (*In re D.T.* (2015) 237 Cal.App.4th 693, 697, 699 (*D.T.*)); a sharp pencil (*People v. Page* (2004) 123 Cal.App.4th 1466, 1468, 1472); an apple with a straight pin embedded in it (*In re Jose R.* (1982) 137 Cal.App.3d 269, 276); a fingernail file (*People v. Russell* (1943) 59 Cal.App.2d 660, 665); and even a pillow (*People v. Helms* (1966) 242 Cal.App.2d 476, 486-487).

injury. (See *People v. Armstrong* (1992) 8 Cal.App.4th 1060, 1065-1066.) The sole means by which defendant applied this force was the vehicle he was driving. Thus, the record of conviction establishes defendant used the vehicle in a manner capable of producing, and likely to produce, at a minimum great bodily injury — i.e., as a deadly weapon. (See *McGee, supra,* 15 Cal.App.4th at pp. 110, 115; cf. *People v. Bradford, supra,* 227 Cal.App.4th at pp. 1342-1343.) Even under the deferential substantial evidence standard of review, the record of conviction does not support the trial court's contrary findings that defendant's use of the vehicle during the offense was merely "incidental," or that Sanchez was "dragged slightly, though the dragging wasn't anything more than keeping pace with the car." The vehicle was the instrumentality by which defendant committed the offense, and whatever speed defendant was driving, Sanchez was dragged and had to run to keep his balance to such an extent that a witness characterized Sanchez as " 'running for his life' " and expressed surprise Sanchez was able to run that fast.[14]

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14 The dissent quotes the statement in *People v. Newman* (2016) 2 Cal.App.5th 718, 721 (*Newman*), that "[i]n determining eligibility for Proposition 36 relief, a court is empowered to consider the record of conviction and to make factual findings by a preponderance of the evidence, even if those findings were not made by the jury or the trial court in convicting a defendant of the current offense." We agree the resentencing court may do so, at least where eligibility under clause (iii) is concerned. Thus, for example, a resentencing court could properly find a defendant disqualified from resentencing based on the defendant's intent to cause great bodily injury to another person, even though the jury in the defendant's case was never asked to make such a finding or found the defendant did not actually inflict great bodily injury — the situation in *Newman*. To hold otherwise would be to render nugatory a portion of clause (iii).

Contrary to the apparent positions of the resentencing court and dissent in this case, however, this does not mean the jury's verdict can be disregarded altogether, or that the resentencing court can decline to find, by the applicable standard of preponderance of the evidence, a fact the jury necessarily found beyond a reasonable doubt. We do not read *Newman* as countenancing such a result; despite its occasionally sweeping statements, "we must remember ' " ' "the language of an opinion must be construed with reference to the facts presented by the case, and the positive authority of a decision is coextensive only with such facts." ' " [Citations.]' [Citation.]" (*Moon v. Superior Court*

Defendant argues the record of conviction must establish he intended to use the vehicle as a deadly weapon. In part, he relies on *People v. Graham* (1969) 71 Cal.2d 303, disapproved on another ground in *People v. Ray* (1975) 14 Cal.3d 20, 32, wherein the California Supreme Court stated:

> "Although the manner of the use of an object does not automatically determine whether a defendant was 'armed with a dangerous or deadly weapon,' the method of use may be evidence of the intent of its possessor. In *People v. Raleigh* (1932) 128 Cal.App. 105, the District Court of Appeal . . . adopted a position appropriate to the present case, 'that a distinction should be made between two classes of "dangerous or deadly weapons". There are, first, those instrumentalities which are weapons in the strict sense of the word, and, second, those instrumentalities which are not weapons in the strict sense of the word, but which may be used as such. . . . The instrumentalities falling into the second class, . . . which are not weapons in the strict sense of the word and are not "dangerous or deadly" to others in the ordinary use for which they are designed, may not be said as a matter of law to be "dangerous or deadly weapons." When it appears, however, that an instrumentality . . . falling within the [second] class is capable of being used in a "dangerous or deadly" manner, and it may be fairly inferred from the evidence that its possessor intended on a particular occasion to use it as a weapon should the circumstances require, we believe that its character as a "dangerous or deadly weapon" may be thus established, at least for the purposes of that occasion.' (128 Cal.App. at pp. 108-109.)" (*People v. Graham*, *supra*, 71 Cal.2d at pp. 327-328; see *People v. McCoy* (1944) 25 Cal.2d 177, 188-189; *People v. Page*, *supra*, 123 Cal.App.4th at p. 1471; *People v. Moran* (1973) 33 Cal.App.3d 724, 730.)

In *D.T.*, *supra*, 237 Cal.App.4th at page 702, the Court of Appeal explained the foregoing "does no more than establish that intent to use an item as a weapon can be sufficient, in some circumstances, to qualify the item as a deadly weapon. It in no way states that proof of such intent is necessary to this inquiry." The appellate court pointed to *People v. Colantuono* (1994) 7 Cal.4th 206, 214, in which the California Supreme

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(2005) 134 Cal.App.4th 1521, 1532, quoting *Trope v. Katz* (1995) 11 Cal.4th 274, 284.) *Newman* deals only with a situation in which the resentencing court made factual findings that went beyond those made by the jury, not that contradicted the jury's verdict.

Court held that " 'the intent for an assault with a deadly weapon is the intent to attempt to commit a battery, a battery being "any willful and unlawful use of force or violence upon the person of another." [Citation.]' "

We tend to agree with *D.T.* (See *People v. Aznavoleh*, *supra*, 210 Cal.App.4th at pp. 1183, 1186-1187 [setting out elements of assault and assault with a deadly weapon in case involving use of vehicle].) Even assuming such an intent must be shown, however, it is established by the record of conviction in the present case. Sanchez yelled " 'Stop the vehicle' " three times as the vehicle was moving in reverse, yet defendant then drove the vehicle forward "at a great speed." Sanchez only managed to pull his arm free shortly before defendant drove out of the store parking lot onto Blackstone without even stopping at the stop sign.

III. BECAUSE DEFENDANT PERSONALLY USED THE VEHICLE AS A DEADLY WEAPON IN COMMISSION OF THE ASSAULT, HE WAS ARMED WITH A DEADLY WEAPON DURING THE COMMISSION OF HIS CURRENT OFFENSE AND SO WAS INELIGIBLE FOR RESENTENCING UNDER SECTION 1170.126.

It has long been the law that "[a] person is 'armed' with a deadly weapon when he simply carries a weapon or has it available for use in either offense or defense. [Citation.]" (*People v. Stiltner* (1982) 132 Cal.App.3d 216, 230; see *Blakely*, *supra*, 225 Cal.App.4th at p. 1051.) Here, because defendant personally used the vehicle as a deadly weapon, he necessarily had it available for use and so was armed with it during the commission of his current offense, since "use" subsumes "arming." (See, e.g., *People v. Strickland* (1974) 11 Cal.3d 946, 961; *People v. Schaefer* (1993) 18 Cal.App.4th 950, 951; *People v. Turner* (1983) 145 Cal.App.3d 658, 684, disapproved on other grounds in *People v. Newman* (1999) 21 Cal.4th 413, 415, 422-423, fn. 6 & *People v. Majors* (1998) 18 Cal.4th 385, 411.)

The question, then, is whether voters intended clause (iii) to encompass arming based on personal use as a deadly weapon of an object that is not a deadly weapon per se. The trial court found defendant's use of the motor vehicle in the present case was "not the

anticipated use of a deadly weapon contemplated by [section] 1170.126." Reviewing this question of law independently, we disagree.

> " 'The enacting body is deemed to be aware of existing laws and judicial constructions in effect at the time legislation is enacted' [citation], 'and to have enacted or amended a statute in light thereof' [citation]. 'This principle applies to legislation enacted by initiative. [Citation.]' [Citation.]
>
> "Where, as here, 'the language of a statute uses terms that have been judicially construed, " 'the presumption is almost irresistible' " that the terms have been used " 'in the precise and technical sense which had been placed upon them by the courts.' " [Citations.] This principle . . . applies to legislation adopted through the initiative process. [Citation.]' [Citation.]" (*Blakely, supra,* 225 Cal.App.4th at p. 1052.)

In light of the foregoing, we conclude the electorate intended "armed with a . . . deadly weapon," as that phrase is used in clause (iii), to mean carrying a deadly weapon or having it available for offensive or defensive use. (See *Blakely, supra,* 225 Cal.App.4th at p. 1052.) When the object at issue is a deadly weapon per se, simply carrying the object or having it available for use is sufficient to render a defendant ineligible for resentencing under the Act. By contrast, where, as here, the object is *not* a deadly weapon per se, merely carrying the object or having it available for use will not, without more, be enough to bring a defendant within the scope of clause (iii).[15] Here, however, defendant actually and personally *used* the object *as a deadly weapon*. Because enhancing public safety was a key purpose of the Act, despite the fact the Act " 'diluted' " the three strikes law somewhat (*Blakely, supra,* 225 Cal.App.4th at p. 1054),

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15 For example, the driver of a getaway vehicle in a robbery who merely puts the vehicle to the ordinary use for which it was designed — transportation — technically has the vehicle available for offensive or defensive use as a weapon. Yet we have no doubt the electorate did not intend clause (iii) to reach that type of conduct, at least when unaccompanied by some sort of nefarious intent. (See *People v. Graham, supra,* 71 Cal.2d at pp. 327-328.) We are not presented with the question, and express no opinion, whether not actually using an object as a deadly weapon, but intending to do so should the need arise, falls within clause (iii).

we conclude the electorate did not intend to distinguish, under such circumstances, between objects that are deadly weapons per se and those whose characterization as such depends upon the use to which they are put. (See generally *People v. Osuna*, *supra*, 225 Cal.App.4th at pp. 1034-1038 [discussing Act's purpose and voters' intent].)

DISPOSITION

The order granting the petition for recall of sentence, recalling the previously imposed sentence pursuant to Penal Code section 1170.126, and resentencing defendant is reversed. The matter is remanded to the trial court with directions to find defendant ineligible for resentencing, deny the petition, and reinstate defendant's original sentence.

_____
DETJEN, J.

I CONCUR:

_____
POOCHIGIAN, Acting P.J.

POOCHIGIAN, J., Concurring

I concur to express my view concerning the significance of certain facts underlying the conviction below.

The majority opinion cites several cases whereby motor vehicles were deemed dangerous weapons as a result of demonstrably intentional and threatening conduct calculated to place others at risk of injury or with reckless disregard for such peril. Clearly, assault requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will likely and directly result in the application of physical force. In this case, the purpose of the use of the vehicle was arguably not to inflict injury but to provide a means of escape. Indeed, the court's conclusion at the hearing on the petition for resentencing that the use of the vehicle was "incidental" was presumably based on that understanding. It seems clear that any determination regarding whether the vehicle was employed as a deadly weapon under such circumstances should take into account the element of speed.

The evidence indicated that the path of the vehicle's movement involved a distance of roughly 50 feet. The passenger grabbed victim Sanchez's left arm and pushed it down, which prevented him from pulling his arm out of the vehicle as it was in motion. As the vehicle was moving in reverse, Sanchez yelled, "Stop the vehicle" three times. While the defendant contended that the vehicle moved at the rate of one to three miles per hour during the episode, the victim stated that the vehicle was traveling about 20 miles per hour as he ran alongside. During the preliminary hearing, he had stated that at the time he pulled his arm free, the vehicle was moving at a speed of about 15 miles per hour and that the ordeal lasted one minute. Under the circumstances in which the victim's arm was apparently held as he ran alongside the moving vehicle, the speed suggested by the victim's testimony seems questionable.[1] Indeed, that fact may have affected the trial

[1] It is noteworthy that the winner of the 100-meter sprint in the 2016 Olympic Games won with a time of 9.81 seconds – a rate of 22.8 miles per hour.

court's conclusion that the victim was "dragged slightly" – in contrast to a coworker's observation that Sanchez was "running for his life."

Despite any misgivings about the accuracy of lay testimony regarding the speed of the vehicle, the coworker's observation about the peril presented is certainly relevant in assessing whether the vehicle was operated as a deadly weapon. It is also instructive that the jury found appellant guilty of assault with force likely to produce great bodily injury. When coupled with testimony that the passenger held onto Sanchez's extended arm while the vehicle was in motion, that Sanchez yelled for the driver to stop, that he presumably struggled to be released from the passenger's hold, and that he was finally able to free himself when Perez put the vehicle in drive after moving in reverse, I am satisfied with the conclusion that the vehicle was employed as a deadly weapon – thus rendering the defendant ineligible for resentencing.

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POOCHIGIAN, Acting P.J.

FRANSON, J., Dissenting.

The People appeal the trial court's order granting Alfredo Perez, Jr.'s petition to recall his sentence, contending Perez was armed with and used a deadly weapon during the commission of an assault. The majority agrees and reverses the trial court's order granting defendant's petition. Based on the trial court's underlying factual findings and determination, I respectfully dissent and would affirm.

Factual and Procedural Background

The following factual summary of facts pertinent to this appeal come from the appellate opinion affirming Perez's current conviction, which is repeated verbatim in the majority opinion. At trial, Fred Sanchez testified he was working as a sales clerk at Grand Auto in Fresno on March 17, 1994, when Perez and another man (the passenger) entered the store midafternoon. The passenger, with his back to Sanchez, was seen holding a Club, an automobile anti-theft device. Perez spoke briefly to the passenger and then went up to Sanchez and spoke to him about tires. During this conversation, the passenger left the store and went to stand by the passenger side of a Blazer-type vehicle. Perez left the store, went to the driver's side of the vehicle, and the two drove away. Sanchez suspected the passenger had stolen the Club from the store and that Perez had tried to divert his attention away from the theft.

The following day, Sanchez saw the passenger again enter the store. Sanchez approached the passenger, asked if he needed assistance, and, after alerting other store employees that he needed assistance, followed him out of the rear of the store. While following the passenger, Sanchez heard rustling in the passenger's clothing, although he had not paid for any items from the store.

Once out of the store, the passenger entered the passenger side of the same Blazer as the day before. Perez was again driving. Sanchez approached the open passenger window and observed a bulge protruding from the passenger's clothing. Sanchez told the

passenger to give the merchandise back and he could leave. Sanchez then reached into the vehicle and grabbed the package under the passenger's jacket, which turned out to be an "Ultra Club." Sanchez said, "Give it up." Perez looked toward Sanchez and said the same.

Perez then drove the vehicle in reverse while the passenger held onto Sanchez's arm. Sanchez implored Perez to stop the vehicle as it continued to move in reverse. Sanchez was dragged by the movement of the vehicle and had to run to keep his balance. Perez then put the vehicle in drive and the vehicle moved forward approximately 50 feet, when Sanchez was able to pull his arm free.[1] Sanchez estimated the Blazer was going about 20 miles per hour, although he admitted that at the preliminary hearing he estimated the vehicle started at 10 miles per hour and was going about 15 miles per hour when he pulled his arm free. Sanchez estimated that the entire incident took about a minute, 15 seconds of that with his arm in the vehicle as it was moving forward.

After he broke free, Sanchez saw the vehicle leave. A coworker of Sanchez described Sanchez as "running for his life" alongside the Blazer.

A jury convicted Perez of assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1))[2] and found true the allegations that Perez had sustained two prior strike convictions and suffered two prior prison terms. The trial court sentenced Perez to an indeterminate term of 25 years to life, plus two one-year enhancements for the prison priors.

Resentencing Under Proposition 36

The trial court's consideration of a petition for resentencing under Proposition 36 is a two-step process. First, the court determines whether the petitioner is eligible for

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1 There is no indication Perez was injured as a result. At the subsequent hearing on the petition for resentencing, the parties described the injury as "not major" and "a few scrapes." The injury required no hospitalization or medical treatment.

2 All further statutory references are to the Penal Code unless otherwise stated.

resentencing. If the petitioner is eligible, the court proceeds to the second step, and resentences the petitioner under Proposition 36 unless it determines that doing so would pose "an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).)

At issue here is the first step of the process – the initial eligibility determination. Section 1170.126 grants the trial court the power to ultimately determine whether a third strike offender is eligible for resentencing *only* if, as an initial matter, the inmate satisfies the criteria set out in subdivision (e) of the statute. Generally, for purposes here, those criteria are: (1) the inmate is serving a life term under the three strikes law for a conviction of a felony or felonies not defined as serious and/or violent under section; (2) the inmate's current sentence was not imposed for an offense in which the defendant used or was armed with a firearm or deadly weapon; and (3) the inmate has no prior convictions for certain specified offenses. If the inmate does not satisfy each of the criteria, the trial court must deny the request for resentencing. Perez satisfies the first and third requirements. This appeal relates to the second criteria.

DISCUSSION

Eligibility Determination

The eligibility determination required by section 1170.126, subdivision (e) is not a discretionary determination by the trial court. (*People v. Bradford* (2014) 227 Cal.App.4th 1322, 1336.) The Three Strikes Reform Act of 2012 (the Act) provides that "the court shall determine whether the petitioner satisfies the criteria in subdivision (e) …." (§ 1170.126, subd. (f).) And because the Act fixes ineligibility not on statutory violations or enhancements, but on "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 petitioner is convicted." (*People v. Bradford, supra,* at p. 1332, italics added.)

Instead, "the trial court must make this *factual determination* based solely on evidence found in the record of conviction …." (*People v. Bradford, supra,* 227

Cal.App.4th at p. 1331, italics added.) As stated in *People v. Oehmigen* (2014) 232 Cal.App.4th 1, "[E]ligibility is *not* a question of fact that requires the resolution of disputed issues. The *facts* are limited to the record of conviction underlying a defendant's commitment offense; the statute neither contemplates an evidentiary hearing to establish these facts, nor any other procedure for receiving new evidence beyond the record of conviction. [Citation.] What the trial court decides is a question of *law*: whether the facts in the record of conviction are the proper subject of consideration, and whether they establish eligibility." (*Id.* at p. 7, original italics.) As stated recently in *People v. Newman* (2016) 2 Cal.App.5th 718, 721, "In determining eligibility for Proposition 36 relief, a court is empowered to consider the record of conviction and to *make factual findings* by a preponderance of the evidence, even if those findings were not made by the jury or the trial court in convicting a defendant of the current offense."[3] (Italics added.) Simply put, the trial court takes the facts from the record of conviction and determines, from its interpretation of those facts, whether a petitioner is eligible for resentencing.

"[D]isqualifying factors need not be pled and proved to a trier of fact beyond a reasonable doubt; hence, a trial court determining whether an inmate is eligible for resentencing under section 1170.126 may examine relevant, reliable, admissible portions of the record of conviction to determine the existence of a disqualifying factor." (*People v. Blakely* (2014) 225 Cal.App.4th 1042, 1048-1049.) For this purpose, the record of conviction includes pleadings, trial transcripts, pretrial motions, and any appellate

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3 In *People v. Newman* the defendant was convicted of assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)) but found not true the allegation that he inflicted great bodily injury on the victim during the assault (§ 12022.7). Defendant subsequently filed a Proposition 36 petition for recall and resentencing. In denying the petition, the court found the defendant, based on the facts of the case, intended to cause great bodily injury in the commission of the assault, disqualifying him from resentencing. (*People v. Newman*, *supra*, 2 Cal.App.5th at pp. 722-723.)

opinion. (See, e.g., *People v. Manning* (2014) 226 Cal.App.4th 1133, 1140-1141; *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1027, 1030; *People v. White* (2014) 223 Cal.App.4th 512.) "[A] trial court need only find the existence of a disqualifying factor by a preponderance of the evidence. (Evid. Code, § 115; [citation].)" (*People v. Osuna, supra,* at p. 1040.)

Standard of Review

The trial court's underlying factual determination that Perez was eligible for resentencing is reviewed on appeal for substantial evidence. (*People v. Bradford, supra,* 227 Cal.App.4th at p. 1331; 3 Witkin & Epstein, Cal. Criminal Law (4th ed. 2016 supp.) Punishment, § 421C.) Furthermore, "the task of an appellate court is to 'review the correctness of the challenged ruling, not of the analysis used to reach it.' [Citation.] '"'If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.' [Citation.]"'" (*People v. Hughes* (2012) 202 Cal.App.4th 1473, 1481.)

Trial Court Hearing and Order

At the hearing on the petition, the trial court reviewed the facts and circumstances of the prior conviction and made the preliminary determination that they did not support a finding of ineligibility. The court was provided with a copy of this court's 1996 opinion affirming Perez's conviction and the people's summary of the facts from that opinion. The court described its interpretation of the facts of the conviction, as the victim being "dragged slightly, though the dragging wasn't anything more than keeping pace with the car." It further described the use of the vehicle as "incidental."

The People argued that Perez became armed with the vehicle for purposes of the statute, "[t]he moment that Mr. Perez chose to use the vehicle as a weapon as a means of his assault …." The trial court stated, in reviewing Perez's file, that he was never

charged with assault with a deadly weapon.[4] The People explained that, at the time Perez committed his crime, "it would have had very little meaning to file an assault with a deadly weapon." The trial court acknowledged that it had previously ruled in earlier cases that, "if there are facts that support use of a deadly weapon, even though they are not charged, and there is not a conviction, the person is still excluded from [resentencing] reconsideration …."

The court then focused on the difference between a defendant who "used" a firearm or deadly weapon and a defendant who "was armed" with a firearm or deadly weapon. The People agreed with the trial court that, when Perez was sitting in his vehicle and the vehicle was not moving, the vehicle was not a weapon. The trial court explained that, had Perez had a knife in a sheath under his shirt at the time, he would find him ineligible.

The People continued, arguing that when Sanchez put his arm into the vehicle, Perez had an "election" to make: (1) to leave the vehicle as a vehicle by asking Sanchez to remove his arm from the vehicle, turn off the vehicle and resolve the issue; or (2) to use the vehicle as the mechanism of the assault, which would convert the vehicle into a weapon. According to the People, Perez chose the second option. As argued by the People, Perez was armed with a deadly weapon because "use" encompasses "armed," whereas "armed" does not encompass "use."

In response, the trial court read from an order it had issued in earlier resentencing hearings, explaining its understanding of the rationale behind Proposition 36, which stated that it did not think the voters of Proposition 36 "in any way were being told at that

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4 I note the jury was instructed only on the theory of "by means of force likely to produce great bodily injury." (CALJIC No. 9.02) I take judicial notice of the record in the appeal of the underlying offense (*People v. Perez*, case No. F023703) and also note that the prosecutor did not argue at trial that the use of the vehicle constituted use of a deadly weapon during the assault.

point, 'if an individual uses something that is not in and of itself a … deadly weapon, that they would not be eligible.'" Following that line of reasoning, the trial court posed a hypothetical, asking the People what their argument would be if the passenger had gotten into the vehicle with the anti-theft device, Sanchez approached the vehicle and said "[d]on't leave," Perez grabbed the anti-theft device, throws it at Sanchez and drove away. Under the People's argument, the trial court reasoned Perez would have converted the anti-theft device, which is not inherently a deadly weapon, into the use of a deadly weapon, making him ineligible for resentencing.

The People made the distinction between someone releasing a stolen item and giving it back, and throwing the item and hitting the victim in the skull or attempting to hit the victim with the item. The latter example, argued by the People, "convert[s] the Club into exactly that, a club, and it was being used then as an instrument for the assault and was a dangerous or deadly weapon."

With that, the trial court then issued its ruling, stating:

> "Okay. I understand your position. I understand your argument.… [I]t is … very well-reasoned.… I think your argument is clear, if you want to take this further, the fact [is] that the Court is going to deny it. I am going to finalize the order. For that purpose, … *I am finding that the defendant is not ineligible to be resentenced, due to the method in which the motor vehicle was used in this offense.* So I have tried to give you as clear language as I can." (Italics added.)

Analysis

The trial court reviewed and weighed the facts, including the credibility of the estimated speeds and length of time for the incident[5], and determined, based on *its review*

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5 As an aside, I take judicial notice of the fact that the world record for the 100-meter sprint is 9.58 seconds, a rate of 23.35 miles per hour. As such, the speed suggested by the victim's testimony seems implausible and provides additional support for the trial court's implied credibility findings. (Evid. Code, § 452, subd. (h); *In re Jessica C.* (2001) 93 Cal.App.4th 1027, 1043 ["A trier of fact is free to disbelieve a witness, even one uncontradicted, if there is any rational ground for doing so."].)

and interpretation of the facts, that the method used by Perez in maneuvering his car to depart the scene did not convert an object otherwise not inherently a deadly weapon, into one. Utilizing this factual determination, Judge Conklin reached the legal conclusion that Perez was not armed with, or use, a deadly weapon and was therefore eligible for resentencing. This determination was not made because of any misunderstanding of Proposition 36. Based on the record, and the trial court's comments, he clearly understood the mandates of Proposition 36 and properly applied them to the facts, as he interpreted them, to reach his decision. The record supports the trial court's determination of eligibility, based on the method the vehicle was used in the offense Perez was convicted of. The trial court did not, contrary to the majority's assertion (maj. opn. *ante*, at pp. 14-15, fn. 14), contradict the jury's verdict. It simply made factual findings that went beyond those made by the jury.

While I agree that an object not inherently deadly may be made deadly by its use and all other factors relevant to the issue, the factual determinations made by the trial court in this case fail to support this legal conclusion. Examples of vehicles used as deadly weapons are cited by the majority in section II of the Discussion, but are clearly much more egregious than the facts of this case, especially as interpreted by the trial court.

As a further example, in *People v. Claborn* (1964) 224 Cal.App.2d 38, a vehicle was found to be a deadly weapon within the meaning of a section 245 assault when the defendant, upset by a family dispute, got into his vehicle and, upon seeing an approaching police car, swerved and aimed his vehicle directly at the officer's car, causing a head-on collision. The defendant then got out of his vehicle and shouted, "'You son-of-a bitch, I didn't kill you this way, but I will kill you now,'" and physically attacked the officer. (*People v. Claborn, supra,* at p. 41.)

In determining whether a defendant is ineligible for resentencing under the Act, a trial court examines the "conduct that occurs during the commission of an offense."

(*People v. Bradford, supra,* 227 Cal.App.4th at p. 1333.) Here, the record does not show Perez sped away with Sanchez's arm trapped in the car; he did not ram him with his vehicle, nor did he aim for him while driving. Instead, the facts contained in the record, as interpreted and cited by the trial court, were that Perez assaulted Sanchez when, while he was in the driver's seat of the vehicle, Sanchez reached into the passenger window in an attempt to retrieve the anti-theft device, the passenger grabbed Sanchez's arm and Perez then drove the vehicle slowly in reverse, to effect a getaway, while the passenger held onto Sanchez. Sanchez implored Perez to stop the vehicle as it continued to move in reverse. Sanchez was dragged by the movement of the vehicle and had to run to keep his balance. Perez then put the vehicle in drive and the vehicle moved forward. Sanchez was able to pull his arm free. Sanchez received no injuries other than a few scrapes. While Sanchez estimated the Blazer was going between 10 and 20 miles per hour and that the entire incident took about a minute, common sense dictates otherwise.

Perez's section 245, subdivision (a)(1) conviction was based on an assault by any means of force likely to produce great bodily injury, and does not come within section 1192.7, subdivision (c)(23) use of a deadly weapon exclusion making him ineligible for resentencing. (*People v. Williams* (1990) 222 Cal.App.3d 911, 914.) Nor does it come within the "armed with a deadly weapon" exclusions pursuant to section 667, subdivision (e)(2)(C)(iii) and section 1170.12, subdivision (c)(2)(C)(iii), as referenced in section 1170.126, subdivision (e)(2).

Substantial evidence supports the trial court's determination that Perez's use of the vehicle was not a deadly weapon within the meaning of the use of a deadly weapon exclusions and, thus, he was eligible for a recall of his life sentence and for resentencing under the Act.

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FRANSON, J.

APPENDIX C

1-6033
RMY

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ALFREDO PEREZ, JR.,

Defendant and Appellant.

F023703

(Super. Ct. No. 509578-1)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County, Dwayne Keyes, Judge.

Martin James Elmer, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Robert R. Andeson, Senior Assistant Attorney General, W. Scott Thorpe and Clayton S. Tanaka, Deputy Attorneys General, for Plaintiff and Respondent.

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STATEMENT OF THE CASE

On September 2, 1994, a first amended information was filed in Fresno County Superior Court against appellant Alfredo Perez, Jr. Appellant was charged with robbery (Pen. Code §§ 211 & 212.5, subd. (b)),[1] (count I); petty theft with a prior 1987 burglary conviction (§ 666), (count II); assault with force likely to produce great bodily harm (§ 245, subd. (a)(1), (count III); burglary (§ 459), (count IV); and petty theft with a prior alleged to have occurred on March 17, 1994, (§ 666) (count V). Count V was dismissed by the People on September 21, 1994, prior to trial. The remaining four counts were alleged to have been committed on March 18, 1994.

It was further alleged that appellant had been previously convicted of a total of two separate serious felonies within the meaning of section 667, subdivisions (b) through (i) inclusive. It was also alleged that appellant had suffered three prior felony convictions resulting in prison commitments within the meaning of section 667.5, subdivision (b), and two prior serious felony convictions within the meaning of section 667, subdivision (a). A motion to dismiss the priors was denied on September 21, 1994.

Jury trial commenced March 28, 1995, at which time appellant admitted the underlying prior 1987 burglary conviction alleged in the count II section 666 charge. The jury found appellant guilty of assault with force likely to produce great bodily injury, but was unable to reach a verdict as to the remaining counts. The court declared a mistrial as to counts I, II and IV, and these counts were subsequently dismissed. On April 6, 1995, the jury found the allegations that appellant had suffered three prior felony convictions to be true (the 1987 residential burglary, a 1988 escape, and a 1991 residential burglary), two of which (the 1987 & 1991 residential burglaries) constituted strikes under the three

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1 All further statutory references are to the Penal Code unless otherwise indicated.

strikes law. The jury also found that two of the priors (the 1987 burglary and the 1988 escape) resulted in prison terms.[2]

Appellant made a motion to have the felony conviction reduced to a misdemeanor pursuant to section 17, subdivision (b). The motion was denied. On May 4, 1995, the court denied probation and sentenced appellant to an indeterminate term of twenty-five years to life plus two one-year enhancements for the prison priors pursuant to section 667.5, subdivision (b). Appellant was given presentence time credits totaling 409 days (273 actual, 136 conduct).

Appellant filed a timely notice of appeal on May 8, 1995.

STATEMENT OF FACTS

On March 17, 1994, at approximately 2 p.m., Fred Sanchez was working as a sales clerk at Grand Auto in Fresno. He observed appellant and a man, who hereinafter will be referred to as the "passenger," enter the store. The passenger raised a Club, an auto anti-car theft device, a couple of feet above the aisle and then lowered it. The passenger was wearing a Pendleton wool-type jacket and had his back to Sanchez. Appellant spoke briefly to the passenger and then went up to Sanchez and spoke to him about some tires. While this conversation was taking place, the passenger left the store. Sanchez could see the passenger go out into the parking lot of the store and wait at the passenger side of a Blazer-type truck. Appellant went to the driver's side and drove away. Sanchez suspected that the passenger had stolen the Club from the store and appellant had attempted to divert his attention away from the theft. However, he did not call the police

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2 Appellant was convicted of section 245, subdivision (a)(1), which is not a serious felony under section 667, subdivision (a) as defined in section 1192.7, subdivision (c)(1). Therefore, the five-year enhancements alleged under section 667, subdivision (a) were not applicable. Thus, the jury was not asked to return verdicts on the section 667, subdivision (a) allegations. Further, the jury was not asked to return a finding on the prison term allegation for the 1991 burglary. Appellant apparently was given probation after his 1991 burglary conviction, and he was not sentenced to a prison term. He returned to prison for violation of parole on an earlier crime.

over the incident nor did he check the store inventory to determine if any items were missing.

The next day, March 18, 1994, around noon, Sanchez saw the same passenger from the day before enter the store. He was wearing the same jacket, even though the day was "incredibly" hot. He appeared nervous and kept turning his back toward Sanchez. Sanchez asked the passenger if he needed assistance and then followed the passenger out of the rear of the store after alerting the other store employee that he needed assistance. He heard rustling in the passenger's clothing. The passenger had not paid for any item from the store.

The passenger entered the passenger side of the same Blazer as the day before. The passenger side window was rolled down. Sanchez was wearing a red smock shirt with the insignia of Grand Auto and his name tag. The passenger was in the Blazer less than a minute when Sanchez came up to its window. Appellant was the driver. Sanchez observed a bulge protruding from the passenger's clothing. Sanchez told the passenger to please give the merchandise back and he could leave. Sanchez then reached into the vehicle and grabbed at the package in the passenger's jacket. Sanchez identified the package as an Ultra Club which had a retail value of $59.55. Sanchez said, "Give it up." Appellant then looked toward Sanchez and said, "Give it up."

Appellant then drove the vehicle in reverse. The passenger grabbed Sanchez's left arm and pushed it down, which prevented Sanchez from pulling his arm out of the vehicle. Sanchez yelled, "Stop the vehicle" three times as the vehicle was moving in reverse. He was dragged when the vehicle went into reverse. He had to run to keep his balance. Appellant then drove the vehicle forward. Sanchez was able to pull his arm free once the vehicle moved forward, but he was afraid if he fell he could be run over.

Sanchez estimated the speed of the Blazer to be 20 miles per hour, but admitted that at the preliminary hearing he had testified that the vehicle started at 10 miles per hour and was doing 15 when he pulled his arm free. He estimated the entire incident took a

minute, his arm was in the vehicle after it was put in drive for 15 seconds, and that the vehicle traveled approximately 50 feet forward.

After he broke free, Sanchez saw the vehicle leave the scene. Sanchez never recovered the merchandise from the passenger. The police arrived and Sanchez provided them with a description of the vehicle and the license plate number. The vehicle was registered to appellant and his wife. Sanchez's co-worker, Don Tatum, testified to seeing Sanchez run alongside the truck. He characterized the incident as Sanchez being dragged and "running for his life." Both Sanchez and Tatum picked out appellant from various photographs.

Appellant testified that he was not in the store on March 17. On that day he had gone with his father to the Sanger cemetery to visit the grave of his grandmother and then went to the father's house until 3:30 p.m. His father testified similarly. Appellant testified that on March 18, he was looking for a Universal Tire store when he met a woman friend, Elizabeth Ornelas. Ornelas offered appellant $5 to give her male acquaintance, Dan, a ride to an auto parts store to get a part to fix her vehicle which had broken down. Appellant testified he drove to the Grand Auto store but stayed in his vehicle and the passenger Dan went into the store. When Dan returned to the vehicle he was angry with another man. Appellant was not aware the man was a store employee. When appellant said, "Give it up," he was talking to his passenger and meant quit fighting.

Appellant stated he was afraid and admitted driving one mile an hour in reverse and two-to-three miles an hour in drive. He stated at no time did Sanchez have to run. He admitted that Sanchez had his arm in the passenger side of his vehicle when he put his vehicle in reverse and forward. After he left the parking lot, he told his passenger to get out and returned the gas money to him.

Appellant admitted telling the investigating officer that the man outside the vehicle was dressed "like you and me." Appellant just wanted to leave. He admitted not telling

the investigating officer about Ornelas and never mentioned to the officer he had a witness that the police could contact. Appellant admitted he told the investigating officer that his passenger had told him to leave since the man outside the vehicle was trying to rob him.

Elizabeth Ornelas testified that she asked appellant to give a man she had recently met a ride to an auto parts store to help buy a part for the disabled vehicle they had been driving. Her trial testimony, that she made this request of appellant as he was stopped at a red light, differed from her pretrial statement that this conversation took place in a parking lot.

On appeal appellant contends the trial court improperly limited his trial counsel's closing argument, claims instructional error, and attacks certain aspects of the three strikes law. We will affirm.

DISCUSSION

I.

THE COURT PROPERLY LIMITED CLOSING ARGUMENT

Appellant contends that the trial court erred by precluding defense counsel's use of a chart to illustrate his argument concerning the rate of speed and distance traveled by appellant's vehicle. Appellant argues this error was compounded by the trial court's ruling that defense counsel was also precluded from arguing his mathematical calculations as to speed and distance to the jury. Appellant claims the error affected his constitutional right to have his counsel present closing argument to the jury, and it must be reviewed under the *Chapman* standard of review. (*Chapman* v. *California* (1967) 386 U.S. 18, 24.)

During closing argument, defense counsel attempted to use a chart to illustrate his argument that appellant could not have intended to cause any harm to Mr. Sanchez, much

less great bodily injury, when he drove in reverse and then forward.[3] Defense counsel's chart was based upon the testimony of Mr. Sanchez, the store clerk, as to the rate of speed of the vehicle, the distance traveled, and the period of time his arm was kept in the vehicle by the passenger. The chart was to help illustrate that Mr. Sanchez's claims of speeds up to 20 miles per hour, being dragged, and having to run to keep his balance were not credible.

The chart converted miles per hour to feet per minute and feet per second. These figures were then used to compute the feet traveled based upon the estimates given by Mr. Sanchez that the vehicle traveled 50 feet forward, that his arm was held for 15 seconds while the vehicle was going forward, and the vehicle was traveling either 10, 15 or 20 miles per hour. The chart also included feet per minute and feet per second as to a vehicle driven one mile an hour and an equation of 50 divided by 15 equals 3.3 seconds equals 2.27 miles per hour.

Defense counsel argued that his mathematical computations derived from these figures were matters of common knowledge. The prosecutor objected that the chart required expert testimony. The prosecutor objected that defense counsel was not qualified as an expert witness on this subject, and that the subject matter was not a matter of common knowledge. The court sustained the prosecution's objection and ruled that defense counsel could only bring in the mathematical computations through an expert witness. The court advised counsel that he could argue the credibility of traveling a certain number of feet per second based upon the witness's testimony, but he could not verbally use the equations shown on the chart.

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3 Appellant was convicted of section 245, subdivision (a)(1) which makes illegal an assault upon the person of another with an instrument other than a firearm or by any means of force likely to produce great bodily injury. An assault is defined in section 240 as an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.

Appellant relies upon *People* v. *Farmer* (1989) 47 Cal.3d 888, 922, which held that a counsel's summation may be based on matters in evidence or subject to judicial notice. It may also refer to matters of common knowledge or illustrations drawn from experience, history or literature. In support of his argument that his mathematical calculations were based upon common knowledge, and not the type of facts which require the testimony of an expert witness, appellant cites to *People* v. *Bradley* (1982) 132 Cal.App.3d 737. In that case, the appellate court judicially noticed the mathematical truth of a 12-inch by 12-inch opening having a 17-inch diagonal. (*Bradley, supra*, 132 Cal.App.3d at 743, fn 6.) Appellant cites to *Hickambottom* v. *Cooper Transp. Co.* (1958) 163 Cal.App.2d 489, 492, wherein the court made calculations based upon the speed of the defendant's vehicle, and the distance defendant was from the decedent's vehicle when he first noticed it, to conclude that defendant had only seconds to attempt to avoid the accident and such was not a sufficient time to require the application of the legal doctrine of last clear chance. Appellant also refers to *Arnone* v. *Hess* (1987 Mo. App.) 722 S.W.2d 355, 356, wherein the trial court took judicial notice of conversion of speeds of 35 and 30 miles per hour to 51 and 44 feet per second respectively.[4]

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[4] The other cases cited by appellant are distinguishable. *People* v. *Wharton* (1991) 53 Cal.3d 522, 567, raised the issue of whether defense counsel was incompetent for not having objected to the prosecutor's closing argument on several occasions. The prosecutor made several "brief, mild and noninflammatory" comments which could have been seen as suggesting defendant had committed the same crime in the past, that the normal person being interrogated by the police would be tense, that a response "'[t]o the best of my knowledge'" was reminiscent of "'the Watergate cases'"and a reference to a local case of an abused spouse who killed her husband. (*Id.* at pp. 569, 568.) *People* v. *Love* (1961) 56 Cal.2d 720, 729 concerned the issue if the prosecutor had committed misconduct by arguing the deterrent effect of the death penalty to the jury. *People* v. *Farmer* (1989) 47 Cal.3d 888, 921 concerned the denial of defense counsel's request to read from a Scientific American article on eyewitness identification. *People* v. *Sassounian* (1986) 182 Cal.App.3d 361, 396, concerned whether the prosecutor committed misconduct by saying that a guilty verdict in the case would signal that the country does not tolerate assignations and by suggesting that the defense fabricated evidence. *People* v. *Johnson* (1992) 3 Cal.4th 1183, 1226, footnote 10, concerned the

What matters must be judicially noticed are set forth in Evidence Code section 451, subdivision (f) as "Facts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute." Evidence Code section 452 sets forth those matters which may be judicially noticed. They include Evidence Code section 452, subdivision (h) which reads, "Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy."

Judicial notice under Evidence Code section 452 is required if the moving party complies with the request requirements of Evidence Code section 453. Evidence Code section 453 requires that the party seeking judicial notice give the adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request and that the moving party furnishes the court with sufficient information to enable it to take judicial notice of the matter.

Here, unlike *Bradley*, *Arnone* and *Hickambottom*, the chart contains multiple conversions. The chart was not shown to the prosecution before defense counsel attempted to use it. Although a conversion equation may be viewed by some as "simple math," the prosecution did not have an opportunity to verify the accuracy of the math prior to its attempted presentation to the jury. The trial court appeared concerned with the accuracy of the math in the various computations, and whether this could be characterized as common knowledge. The court in *Barreiro* v. *State Bar* (1970) 2 Cal.3d 912, 925, held that if there is any doubt whatever either as to the fact itself or as to its being a matter of common knowledge, evidence should be required. Here, defense counsel did not ask the court to take judicial notice of how many feet there are in a mile or how many seconds in a minute or minutes in an hour at the time the court was

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issue of whether the prosecutor had committed misconduct by estimating from the position of the body on the floor, the height of the victim.

receiving evidence. Nor did defense counsel give the adverse party notice of his computations and his intent to argue from them, as required by Evidence Code section 453. The trial court had the discretion to exclude the chart and equations for failure to comply with the requirements of Evidence Code section 453.

Furthermore, even if counsel had timely asked for judicial notice, the court would still have had discretion to limit his closing argument. Defense counsel was attempting to use the chart to impeach the testimony of Mr. Sanchez that he was afraid he would be run over by the vehicle, that he was dragged, and that he had to run to keep his balance. The conversion equations on the chart set forth how many feet per minute and feet per second a vehicle could travel at a steady rate of 10, 15 and 20 miles per hour. The chart does not attempt to address the effect of a vehicle rapidly accelerating while a person is being held by the arm at its side. An acceleration chart would have given the jury a more accurate picture of whether a passenger would be dragged or would have to run when a vehicle is driven 50 feet in 15 seconds and whether the speed of the vehicle could have approached a speed of 20 miles per hour. In addition, the chart did not even attempt to address Mr. Sanchez's testimony that he was dragged when the vehicle was put in reverse. Sanchez's estimate of 15 seconds, 50 feet and 20 miles per hour were all estimates made in response to questions about the forward motion of the vehicle.

As stated in *Mangini* v. *R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063, although a court may judicially notice a variety of matters, only relevant material may be noticed. What may be judicially noticed is also qualified by Evidence Code section 352. (*Mangini, supra,* 7 Cal.4th at p. 1063.) In addition, section 1044 states that, "It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved."

Apart from having only limited relevance to Sanchez's testimony that he was dragged, the chart contains multiple calculations. The chart concerns a subject that is sufficiently beyond common experience that the opinion of an expert would have assisted the trier of fact. When this is the case, expert testimony is authorized pursuant to Evidence Code section 801, subdivision (a).

Because we conclude the content of the chart goes beyond common experience, the chart had only limited relevance to the impeachment of Sanchez's testimony, and the fact that the prosecution had not been given a prior opportunity to verify the accuracy of the equations, we cannot find its exclusion, or the exclusion of the mathematical equations, error. We recognize appellant has cited some cases which suggest that conversion mathematics are matters subject to judicial notice. However, here, appellant did not ask that these facts or the conversion formula be judicially noticed, and had the evidence been presented to the jury through an expert, the prosecution would have been provided the opportunity to cross-examine the expert as to the relevance of the calculations to the facts of the case. For all of these reasons, we conclude the trial court's ruling that the calculations defense counsel attempted to present to the jury should have been brought through an expert witness was not erroneous.

Additionally, we conclude the exclusion of the chart and the math did not deprive appellant of his right to effective assistance of trial counsel. Appellant's counsel was still able to argue to the jury that they needed to reach their own determination as to the credibility of Sanchez's testimony that the Blazer reached a speed of 20 miles per hour in the space of 15 seconds and fifty feet. Counsel was able to argue to the jury that Sanchez's estimate of 20 miles per hour was not credible, given the fact that Sanchez was able to pull his arm free at 20 miles per hour and was still able to avoid injury.

In order to find that appellant has been denied effective assistance of trial counsel, it must be concluded that the resulting representation was deficient and that it is reasonably probable a determination more favorable to the defendant would have resulted

in the absence of the deficiency. (*Strickland* v. *Washington* (1984) 466 U.S. 668, 687; *People* v. *Fosselman* (1983) 33 Cal.3d 572, 584.) A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*In re Jones* (1996) 13 Cal.4th 552, 561.)

Here, as more fully discussed below, even if trial counsel had been able to present his chart and/or the math calculations to the jury, the evidence of guilt was so overwhelming that it is not reasonably probable a different result would have been reached. Appellant admitted he was aware, both when he put his vehicle in reverse and forward, that Sanchez's arm was inside the vehicle. Sanchez said he was dragged when the car was in reverse. Sanchez was not asked to give an estimate of the speed or distance the vehicle traveled in reverse, so the chart would not have been relevant to a finding of assault based upon appellant having first driven in reverse. Furthermore, Sanchez's testimony that he believed the vehicle reached a speed of up to 20 miles per hour was admittedly an estimate on Sanchez's part. When he admitted that his estimate was lower at the preliminary hearing, his response was that he was not in a position to look at the speedometer.

The jury heard evidence that Sanchez was wearing a red shirt which clearly identified him as a store employee. They heard evidence that Sanchez followed the passenger out of the store and was at the vehicle less than a minute after the passenger got into the vehicle. They heard evidence that Sanchez asked for the merchandise to be returned, and appellant heard Sanchez ask the passenger to "Give it up." Sanchez testified that he yelled "Stop the vehicle" three times when the vehicle was in reverse, that appellant at no time asked Sanchez what the problem was, but instead, at a great speed, drove forward out of the parking lot, failing to stop at the stop sign before entering Blackstone. In addition, the jury heard the testimony of the other store employee, Don Tatum, that he saw Sanchez running for his life and was surprised that Sanchez was able to run that fast.

The record contains substantial evidence that appellant drove his vehicle at such speed as to put the store clerk in danger of great bodily injury. Beyond a reasonable doubt, the claimed error in excluding the chart and math did not contribute to the verdict. The jury could have found an assault with intent to commit great bodily injury even if they believed Sanchez's estimate of a speed up to 20 miles per hour was incorrect and that the vehicle had been driven at a much slower speed. Any error was not of a constitutional dimension.

II.

THE COURT DID NOT ERR IN GIVING CALJIC No. 2.03

The trial court instructed the jury pursuant to CALJIC No. 2.03 as follows:

> "If you find that before this trial the defendant made a willfully false or deliberately misleading statement concerning the crimes for which he is now being tried, you may consider such statement as a circumstance tending to prove a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your determination."

Appellant objected to the instruction at trial on the grounds that it suggested to the jury that the differences between the pretrial statements and the trial statements were due to fabrication, as opposed to normal difficulty in recalling events. Appellant argued that this prejudice was especially harmful in this case since Sanchez, the complaining witness, also had numerous discrepancies between his trial testimony and his out-of-court statements to the investigating officers and his testimony at the preliminary hearing.

The court overruled the objection. The court noted that the instruction was to be given because there was evidence to support such an inference by the jury; however it was up to the jury whether they would draw that inference and conclusion. In terms of a similar instruction for witnesses, the court noted that there is an instruction on consistent and inconsistent statements.

Appellant argues the court erred because appellant's trial testimony was consistent with his pretrial statement and the only inconsistency was with the prosecution's theory

of the case. Appellant relies upon *People* v. *Rubio* (1977) 71 Cal.App.3d 757, 769, that CALJIC No. 2.03 should only be given when the falsity of the defendant's prior statement can be demonstrated through defendant's own testimony. The court in *Rubio* stated that the instruction is not applicable when defendant's statements to the police are consistent with his self-serving testimony at trial that conflicts with the prosecution's evidence before the jury. If the instruction is given in that circumstance; it casts specific doubt on defendant's credibility as a witness and singles out defendant's testimony as subject to more particular scrutiny than that attached to prosecution witnesses. (*Rubio, supra*, 71 Cal.App.3d 757, 769.) In *Rubio*, the investigating officer was not asked about the defendant's prior statements to him. The only evidence of a prior statement before the court was defendant's "yes" reply to the question if he had given a similar story to the investigator as he did at trial as to how he happened to be where he was on the night he was arrested. (*Rubio, supra*, 71 Cal.App.3d 757, 769.)

As noted in *People* v. *Edwards* (1992) 8 Cal.App.4th 1092, 1103, the *Rubio* decision is no longer a correct statement of the law. The giving of CALJIC No 2.03 is justified when there is evidence that a defendant prefabricated a story to explain his conduct. (*People* v. *Edwards*, *supra*, 8 Cal.App.4th 1092, 1103.) The falsity of a defendant's pretrial statement may be shown by evidence that the pretrial statement is inconsistent with his testimony at trial. (*Id* at p. 1102.) It may also be shown by other evidence -- physical evidence like fingerprints, or the testimony of trustworthy witnesses, -- which is equally, if not more, reliable than defendant's in-court testimony. (*Edwards*, *supra*, 8 Cal.App.4th at p. 1103.) In reaching this conclusion, the *Edwards* court relied upon *People* v. *Kimble* (1988) 44 Cal.3d 480, 498, which distinguished a case with a similar rationale to *Rubio*.[5]

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[5] The California Supreme Court expressly disapproved the reasoning in *People* v. *Morgan* (1978) 87 Cal.App.3d 59 which, according to *People* v. *Benson* (1989) 210

Appellant attempts to distinguish *Edwards* by arguing that in that case there was evidence independent from defendant's trial testimony that showed the pretrial statements were false. For example, in *Edwards*, numerous witnesses testified to facts which contradicted defendant's statement to the investigator that he received the money and property from the 79-year-old victim as gifts. Appellant argues that independent proof of falsity also existed in *People* v. *Benson, supra*, 210 Cal.App.3d 1223. In that case, the falsity of the prior statement was demonstrated by the testimony of three witnesses that the gun did not discharge in the manner described by the defendant therein. The falsity was also shown by the fact that the defendant therein gave various inconsistent statements as to how the gun discharged. (*Benson, supra*, 210 Cal.App.3d at p. 1233.)

The discrepancies noted by the People in this case are: (1) Appellant did not mention Elizabeth Ornelas when police first interviewed him. At trial, appellant testified extensively as to the role Ornelas played in appellant ending up with his passenger in the parking lot of the store. (2) Appellant did not mention to police an argument outside the vehicle. At trial, appellant testified to the argument being what caused him to be scared and leave the parking lot. (3) Appellant told police his passenger told him to leave because the person outside the vehicle was going to rob him. At trial, on cross-examination appellant admitted saying this, but on direct examination his explanation for his behavior was that he was scared due to the argument. This testimony is at odds with the trial testimony that Sanchez was wearing a red shirt which identified him as an employee of the store, he asked for the merchandise to be returned to him, and appellant looked directly at him and said "[g]ive it up." (4) Appellant did not tell police he saw someone's arm go inside the vehicle. (5) Appellant did not offer any information about the speed in which he drove his vehicle while he was in the parking lot, never indicating

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Cal.App.3d 1223, 1233, utilized a rationale similar to *Rubio*. (*People* v. *Kimble* (1988) 44 Cal.3d 480, 498.)

he was going fast or slow. (6) The distance from the number two lane on Blackstone and the corner of Blackstone and Shaw is 25 feet. Appellant testified to his friend Ornelas having called to him from the corner. He denied ever pulling into the parking lot to talk to her. Ornelas told the investigating officer that he pulled into the parking lot. Then at trial, she testified the conversation took place on the corner. (7) In the pretrial statement, appellant only gave a minimal description of his passenger. Sanchez testified that appellant and his passenger had been in the day before and an item was stolen from the store.

We find that the totality of the above discrepancies raises the possibility that appellant had prefabricated his story, which justified giving the jury instruction. The prosecution's theory of the case was that appellant aided and abetted the theft of the merchandise because when he drove the passenger to the store, he knew the passenger would be stealing merchandise from the store. Sanchez's testimony that he saw appellant and his passenger the day before suggested appellant prefabricated his story of how he ran into his friend Elizabeth and was just giving a person he did not know a ride to the auto parts store for $5. The jury was asked to find if his failure to name his alibi witness and to give Officer Mange the full details of how he ended up with his passenger was deliberately false or misleading.

As noted in *People* v. *Cartwright* (1980) 107 Cal.App.3d 402, 417-418, a consciousness of guilt may be inferred from a defendant's failure to tell the police investigating the crime who his alibi witness is, and the circumstances surrounding his alibi. As the court noted, if the defendant told the police a little bit, why not the rest? (*Cartwright, supra,* 107 Cal.App.3d at p. 417.) A witness may be impeached by evidence of a prior inconsistent statement. (Evid. Code, § 780, subd. (h).) Silence can be an inconsistent statement where the failure to assert a fact, when it would have been natural to assert it, amounts in effect to an assertion of the nonexistence of the fact. (*People* v.

Lewis (1986) 180 Cal.App.3d 816, 824; 3 Witkin, Cal. Evidence (3d. ed. 1986), Introduction of Evidence at Trial, § 1975, p. 1932.)

Not all of the discrepancies noted by the People would support a CALJIC No. 2.03 instruction. The court in *Brooks* v. *Willig Truck Transp.Co.* (1953) 40 Cal.2d 669, 675, stated that a witness cannot be impeached through omissions unless his attention was called at that time and he was then asked to testify concerning the very facts embraced in the questions propounded at trial. This principle applies to the inconsistency noted by the prosecution that appellant only minimally described his passenger. The record was not at all clear that Officer Mange asked for a more detailed description, so appellant's omission does not infer a consciousness of guilt. However appellant's failure to name his alibi witness and to give details surrounding the circumstances of how he ended up with a passenger who had just stolen merchandise from a store, supports the giving of CALJIC No. 2.03, since this evidence suggests a prefabrication.

When testimony is properly admitted from which an inference of a consciousness of guilt may be drawn, the court has a duty to instruct on the proper method to analyze the testimony. CALJIC No. 2.03 is a correct statement of the law; that it may single out defendant is not a determinative factor. (*People* v. *Edwards*, *supra*, 8 Cal.App.4th at p. 1104.) The instruction is not improper because it focuses on the testimony of the defendant. The court in *People* v. *Kelly* (1992) 1 Cal.4th 495 rejected defendant's argument that CALJIC No. 2.03 is a pinpoint instruction favorable to the prosecution. *Kelly* held the instruction "does not merely pinpoint evidence the jury may consider. It tells the jury it may consider the evidence *but it is not sufficient by itself to prove guilt.* . . . If the court tells the jury that certain evidence is not alone sufficient to convict, it must necessarily inform the jury, either expressly or impliedly, that it may at least consider the evidence." (*People* v. *Kelly*, *supra*, 1 Cal.4th at pp. 531-532, italics in original.)

The giving of the jury instruction was not error.

III.

CRUEL AND UNUSUAL PUNISHMENT

Appellant contends that the imposition of a 27-years-to-life sentence constitutes cruel and unusual punishment under the federal and state Constitutions.

A. Federal Claim

Appellant argues that his sentence violates the Eighth Amendment's proscription against cruel and unusual punishment. Appellant's contention that his sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment of the federal Constitution is unavailing. In *Rummel* v. *Estelle* (1980) 445 U.S. 263, defendant was sentenced to life in prison under a recidivist statute because he had obtained $120.75 by false pretenses after having previously been convicted of fraudulently using a credit card to obtain $80 worth of goods or services and passing a forged check. The United States Supreme Court held that the sentence did not violate the Eighth Amendment: "Its primary goals [of a recidivist statute] are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes. Like the line dividing felony theft from petty larceny, the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction." (*Rummel* v. *Estelle*, *supra*, 445 U.S. 263, 284-285.)

Appellant cites *Solem* v. *Helm* (1983) 463 U.S. 277 in support of the proposition that imposing the same punishment under a statute that prohibits crimes with a disparate degree of culpability is suspect under the ban against cruel and unusual punishment. In

that case, the United States Supreme Court found that a sentence of life imprisonment for conviction of issuing a "no account" check for $100 with priors for six nonviolent felonies violated the Eighth Amendment ban against cruel and unusual punishments. The court distinguished *Solem* from the *Rummel* case on the grounds that in *Rummel*, the defendant therein would be eligible for parole in 12 years, whereas in *Solem* the sentence was for life without the possibility of parole.

The court in *People* v. *Cartwright* (1995) 39 Cal.App.4th 1123, 1135, responded to a defendant's reliance upon the *Solem* case by pointing out that *Solem* is weakened by *Harmelin* v. *Michigan* (1991) 501 U.S. 957.[6] In *Harmelin*, defendant was sentenced to life without possibility of parole for possessing 672 grams of cocaine. In a plurality opinion, two justices concluded that the Eighth Amendment does not require that a sentence for a noncapital crime be proportionate to the crime committed. (*Harmelin* v. *Michigan*, *supra*, 501 U.S. at pp. 985-995, [opinion of Scalia, J., joined by Rehnquist, C.J.].) Three other justices concluded that the Eighth Amendment forbids only those sentences that are "'grossly disproportionate'" to the crime. (*Id.* at p. 1001, [opinion of Kennedy, J., joined by O'Connor, J., and Souter, J.].) Even those justices, recognizing a guarantee of proportionality review, stressed that outside the context of capital punishment, successful challenges to a particular sentence are "exceedingly rare" because of the "'relative lack of objective standards concerning terms of imprisonment.'" (*Id.* at p. 1001.) Justice Kennedy concluded that defendant's sentence was not grossly disproportionate to his crime: "Petitioner's suggestion that his crime was nonviolent and victimless . . . is false . . . . To the contrary, petitioner's crime threatened to cause grave harm to society. [¶] Quite apart from the pernicious effects on the individual who consumes illegal drugs, such drugs relate to crime in at least three ways: (1) A drug user

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6 See also *People* v. *Cooper* (1996) 43 Cal.App.4th 815, 820-823, which also found *Solem* weakened by *Harmelin*.

may commit crime because of drug-induced changes in physiological functions, cognitive ability, and mood; (2) A drug user may commit crime in order to obtain money to buy drugs; and (3) A violent crime may occur as part of the drug business or culture. [Citation.]" (*Harmelin* v. *Michigan, supra*, 501 U.S. at pp. 1002-1003.)

Comparing appellant's current offense and prior felony convictions to the magnitude of the felonies at issue in *Rummel* and *Harmelin*, and in light of *Harmelin*'s holding that only extreme sentences that are "grossly disproportionate" to the crimes, as in the case of a recidivist, do not pass constitutional muster, a claim that appellant's life imprisonment violates the Eighth Amendment must necessarily fail.

B. State Claim

Appellant received the third strike sentence of 27 years to life for the felony conviction of assault with force likely to result in great bodily injury. Appellant argues that this sentence is unconstitutional since it is disproportionate to the crime which was committed and appellant's individual culpability. Appellant argues that his assault conviction is for an offense that is alternately chargeable as a felony or a misdemeanor. Appellant argues that the sentence of 27 years to life is a violation of the state Constitution.

Article I, section 17 of the California Constitution prohibits the infliction of "cruel or unusual punishment." The California Supreme Court has emphasized "the considerable burden a defendant must overcome in challenging a penalty as cruel or unusual. The doctrine of separation of powers is firmly entrenched in the law of California, and a court should not lightly encroach on matters which are uniquely in the domain of the Legislature. Perhaps foremost among these are the definition of crime and the determination of punishment. [Citations.] While these intrinsically legislative functions are circumscribed by the constitutional limits of article I, section 17, the validity of enactments will not be questioned 'unless their unconstitutionality clearly, positively, and unmistakably appears.'" (*People* v. *Wingo* (1975) 14 Cal.3d 169, 174, fn.

omitted.) Habitual offender statutes have long withstood the constitutional claim of cruel or unusual punishment. (*In re Rosencrantz* (1928) 205 Cal. 534, 535-536, 539-540; *People* v. *Weaver* (1984) 161 Cal.App.3d 119, 126.) Nevertheless, a sentence may violate article I, section 17, of the state Constitution if it is so disproportionate to the crime for which it is imposed that it "shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424.)

In applying the *Lynch* test, we must consider (1) the nature of the offense and/or the offender; (2) how the punishment compares with punishments for more serious crimes in the same jurisdiction; and (3) how the punishment compares with punishment for the same offense in other jurisdictions. (*In re Lynch, supra*, 8 Cal.3d at pp. 425-427.) Successful challenges to proportionality are an "exquisite rarity." (*People* v. *Weddle* (1991) 1 Cal.App.4th 1190, 1196.)

In considering appellant's age, criminal history, and other characteristics in light of the threat to public safety, the court may consider the underlying offenses, police reports, investigators' statements and, most importantly, the probation officer's report. (People v. *Young* (1992) 11 Cal.App.4th 1299, 1310; *People* v. *Hernandez* (1985) 169 Cal.App.3d 282, 290.)

1. Nature of the offense and offender.

Appellant argues that the offense involved no injury to person or property and that his prior criminal history does not justify imposition of the life term. Appellant argues that the nature of the offense here was not violent and he is being sentenced as if he had committed a second degree murder. The punishment for that is only 15 years to life under section 190, subdivision (a). In addition, the only habitual offender statute which applies if the current felony is any felony is section 667.5, subdivision (b), which only proscribes a one-year enhancement for the prior. Here, appellant was given a sentence of 27 years to life. Appellant notes that California is only one of three states to apply

habitual offender sentences to any felony, citing *People* v. *Superior Court (Romero)* 44 Cal.App.4th 1073, 1096.

Appellant argues that the current offense involved no injury to Sanchez's person or property. Although Sanchez claimed to be dragged, he was not injured. In addition, appellant's role in the incident was ambiguous. Appellant did not hold onto Sanchez and he may not have appreciated the danger to Sanchez. In terms of the nature of the offender, appellant argues that his strike priors are for nonviolent burglaries. He was granted probation for the last burglary, a theft of a radio from an open garage, and was five months short of completing probation. Due to the three strikes law, the lower court had a choice of punishing appellant with either a misdemeanor or 25 years to life. Appellant argues that something in between would have been appropriate, but a life sentence is cruel and unusual.

Respondent notes that two residential burglaries are the priors, one was committed in 1987, the other in 1991. Both are serious felonies under section 1192.7, subdivision (c)(18). In addition, appellant has a juvenile history starting at age 13. Respondent asserts that imposition of a life term for a nonviolent crime upon a third felony conviction does not violate the prohibition against cruel and unusual punishment. Respondent points out that many states allow enhanced sentences for habitual offenders where the defendant has at last one prior felony and the current offense need not be serious or violent.

Here, the probation report indicates that appellant's first offense was at age 13 for felony malicious mischief. Everything in the residence he broke into was spray-painted. A second offense for petty theft from a commercial establishment occurred three years later. Two of his adult priors were for burglary; the third was for escape. Appellant was on probation at the time he committed the current offense. He has admitted being involved in the use of drugs for a five-year period. He was 26 when the current offense was committed.

The two prior serious felonies were for burglary of an inhabited dwelling, found by the court in *People* v. *Ingram* (1995) 40 Cal.App.4th 1397, 1414-1415, to be an extremely serious crime presenting a high degree of danger to society. Appellant was given probation after his second burglary and he promised the judge he would not be seen in court again. The instant offense was committed while appellant was still on probation and involved a crime in which Sanchez could have been seriously injured had he not been able to "run for his life." The trial court was especially shocked that appellant would have committed this crime for a person he did not even know.

The particular facts of this case and the characteristics of appellant demonstrate a threat to society. Appellant is not subject to a life sentence merely on the basis of his current offense, but on the basis of his recidivist behavior. Recidivism in the commission of multiple felonies poses a manifest danger to society justifying the imposition of longer sentences for subsequent offenses. (*People* v. *Karsai* (1982) 131 Cal.App.3d 224, 242, overruled on other rounds in *People* v. *Jones* (1988) 46 Cal.3d 585, 600, fn. 8.) Recidivist statutes provide for harsher penalties that are in proportion to a defendant's persistence in committing crimes after previous punishments have proved ineffective. (*People* v. *Jameson* (1986) 177 Cal.App.3d 658, 662.)

Appellant argues that a third strike sentence of 27 years to life is disproportionate to his current offense and the three strikes legislation is not designed to apply to individuals such as himself. However, appellant is precisely the type of offender from whom society seeks protection by the use of recidivist statutes. There is no indication appellant desires to reform or to change his criminal behavior. (See *People* v. *Ingram*, *supra*, 40 Cal.App.4th 1397, 1415.) "By adding section 667, subdivisions (b)-(i), the Legislature clearly intended to segregate habitual serious felony offenders who, like defendant, have not been rehabilitated or deterred from further criminal conduct as a result of imprisonment. The law was passed as urgency legislation to take effect immediately in order 'to protect the public from the imminent threat' posed by repeat

felony offenders. (Stats. 1994, ch. 12, § 2.) It passed by overwhelming margins in both the Assembly and the Senate. The voters of the State of California affirmed this urgency when the initiative version of the law, Proposition 184, was approved by a margin of 72 percent to 28 percent. (Statement of Vote, Gen. Elec. (Nov. 8, 1994) p. ix.) [¶] Fundamental notions of human dignity are not offended by the prospect of exiling from society those individuals who have proved themselves to be threats to the public safety and security. Defendant's sentence is not shocking or inhumane in light of the nature of the offense and offender." (*People* v. *Ingram, supra*, 40 Cal.App.4th at pp. 1415-1416.) We agree with *Ingram*'s rationale as applied to this case, and conclude that appellant's sentence is not grossly disproportionate considering the nature of the offense and the offender.

2. Punishment for more serious crimes in California

Appellant argues that his sentence is disproportionate to the sentence for more serious crimes in this state. Proportionality assumes a basis for comparison. When the fundamental nature of the offense and the offender differ, comparison for proportionality is not possible. The seriousness of the threat a particular offense poses to society is not solely dependent upon whether it involves physical injury. (See *Rummel* v. *Estelle, supra*, 445 U.S. at p. 275.) Therefore, the commission of a single act of rape or arson causing bodily injury, while certainly heinous and severely punished, cannot be compared with the commission of multiple felonies. (See *People* v. *Ingram, supra*, 40 Cal.App.4th at p. 1416.)

A comparison of appellant's punishment for his current crime with punishment for other crimes in California is simply inapposite since it is his recidivism in combination with his current crime that places him under the three strikes law. As discussed above, imposition of greatly enhanced terms for recidivists in California has long been upheld. (*See In re Rosencrantz, supra*, 205 Cal. at pp. 535-536, 539-540; *People* v. *Weaver, supra*, 161 Cal.App.3d at pp. 125-126.) Because the Legislature may

constitutionally enact statutes imposing more severe punishment for habitual criminals, it is illogical to compare appellant's punishment for his "offense," which includes his recidivist behavior, to the punishment of others who have committed more serious crimes but are not qualified repeat felons. Such other offenders would likely receive similar or longer sentences under the new law if such were applicable to them because of recidivist conduct.

Nevertheless, the punishment prescribed under section 667, subdivision (e)(2) for third strike convictions is similar to the punishment in other California recidivist statutes. For example, section 667.7, subdivision (a)(1) mandates a life sentence with a minimum parole date of 20 years for the conviction of certain offenses involving great bodily injury with two prior prison terms for similar offenses. If the defendant has three prior prison terms for these types of crimes and is convicted of a fourth, then his sentence is life without possibility of parole. (§ 667, subd. (a)(2); see *People* v. *Decker* (1988) 199 Cal.App.3d 694, 697-699.) Also, a defendant can receive a life sentence, with a minimum parole date in 17 years, upon conviction of enumerated drug offenses involving minors if he has served two prior prison terms for certain drug offenses. (§ 667.75.) Section 667, subdivision, (e)(2) is not disproportionate to other punishment sections dealing with recidivists under California law.

3. <u>Punishment for similar offenses in other jurisdictions</u>

Appellant argues that his sentence is disproportionate when compared with recidivist punishments in other jurisdictions. We again note that appellant's sentence was imposed not for the instant conviction, but as a result of his recidivist record. Thus, his sentence must be compared with punishments meted out in other jurisdictions for recidivist behavior. We also note that California's three strikes scheme is consistent with the nationwide pattern of substantially increasing sentences for habitual offenders. (*People* v. *Ingram, supra*, 40 Cal.App.4th at p. 1416; see also *Rummel* v. *Estelle, supra*, 445 U.S. 263; cf. *Bordenkircher* v. *Hayes* (1978) 434 U.S. 357 [imposition of life

imprisonment under recidivist statute for uttering a forged instrument in the amount of $88.30 upheld against claim of vindictive prosecution].) Given appellant's lengthy criminal record and history of recidivism, it cannot be said that the sentence imposed in the instant case is disproportionate to and violative of appellant's state constitutional rights.

IV.

THE THREE STRIKES LEGISLATION IS NOT UNCONSTITUTIONALLY VAGUE

Appellant raises a blanket challenge to section 667, subdivisions (b) through (i) as being unconstitutionally vague. Appellant claims the three strikes law is so poorly drafted that no one can understand or implement it, and it is impossible for defense attorneys to render effective assistance of counsel because of the uncertainty of the meaning and effect of the law.

Appellant has suggested numerous hypothetical situations in which constitutional problems may arise in the application of the three strikes law as examples of its unconstitutional vagueness, such as: it does not clearly define the "term" that is to be doubled or tripled; it is not clear if three strikes application can be brought in a first offense with multiple counts; it is not clear if the same offense can be used as a strike and to elevate the offense from a misdemeanor to a felony; it is not clear whether sealed juvenile priors are strikes. Because the statute contains so many ambiguities, appellant argues a defendant's trial counsel will not know how to advise his client to proceed.

People v *Sipe* (1995) 36 Cal.App.4th 468, 480-481, rejected a similar "shotgun" approach to challenging the validity of the three strikes law through various hypothetical situations.

> "'Many, probably most, statutes are ambiguous in some respects and instances invariably arise under which the application of the statutory language may be unclear. So long as a statute does not threaten to infringe on the exercise of First Amendment or other constitutional rights, however,

> such ambiguities, even if numerous, do not justify the invalidation of a statute on its face. In order to succeed on a facial vagueness challenge to a legislative measure that does not threaten constitutionally protected conduct . . . a party must do more than identify some instances in which the application of the statute may be uncertain or ambiguous; he must demonstrate that 'the law is impermissibly vague *in all of its applications*.' [Citations.]' (*Evangelatos* v. *Superior Court* [1988] 44 Cal.3d at p. 1201.)" (*People* v. *Sipe, supra,* 36 Cal.App.4th at p. 481.)

By simply suggesting hypothetical situations in which constitutional problems may arise rather than showing the statute poses a present and fatal conflict with constitutional principles, appellant fails to mount a sufficient facial challenge to the law. (*Pacific Legal Foundation* v. *Brown* (1981) 29 Cal.3d 168, 180-181; *People* v. *Sipe, supra,* 36 Cal.App.4th at p. 481.)

Appellant also failed to demonstrate how the statute was unconstitutionally vague as applied to him. Appellant was sentenced to a term of 27 years to life as a "third strike" recidivist. (§ 667, subd. (e)(2)(a).) As applied to appellant, the statute is not unconstitutionally vague.

V.

THE PRIOR CONVICTIONS NEED NOT BE STRICKEN BECAUSE THEY OCCURRED PRIOR TO MARCH 7, 1994

Appellant contends he cannot be sentenced under the three strikes law because the two prior felony convictions, which constitute the strikes in this case, occurred prior to the March 7, 1994, enactment of section 667, subdivisions (b) through (i). Appellant contends that at the time his prior convictions were entered, the convictions were not found to be strikes and the determination of a strike is prospective only. Appellant argues that the plain language of section 667, subdivision (d)(1) provides that the determination of whether a prior conviction is a prior felony conviction under the statute shall be made "upon the date of that prior conviction." If the Legislature had meant that the determination is made "as of" the date of the prior it would have said so. Appellant also cites section 3 that no part of the Penal Code is retroactive unless expressly so declared.

Appellant argues that this statute plus the prospective language of three strikes results in a conclusion that priors are determined to be serious or violent when they are tried, which means that the statute can only operate prospectively. Finally appellant argues that if this court views the language in the statute ambiguous, the statute is to be construed favorably to the defendant. (*Keeler* v. *Superior Court* (1970) 2 Cal.3d 619, 631.)

This challenge to the application of the punishment provisions for recidivists under section 667, subdivisions (b) through (i) has been rejected by numerous courts. (*People* v. *Anderson* (1995) 35 Cal.App.4th 587, 600-601; *People* v. *Reed* (1995) 33 Cal.App.4th 1608, 1610-1612; *People* v. *Sipe, supra,* 36 Cal.App.4th 468, 477-478.) This court rejected the contention in *Gonzales* v. *Superior Court* (1995) 37 Cal.App.4th 1302 and *People* v. *Ingram, supra,* 40 Cal.App.4th 1397, 1404. We see no reason to repeat our reasoning here.

VI

THREE STRIKES WAS PROPERLY ENACTED AS URGENCY LEGISLATION

Appellant contends that the three strikes legislation could not be enacted as an urgency measure because it changes the duties of both judges and prosecutors. This argument has been rejected by several courts. (*People* v. *Cartwright, supra,* 39 Cal.App.4th 1123, 1133-1134; *People v. Spears* (1995) 40 Cal.App.4th 1683, 1689; *People* v. *Kinsey* (1995) 40 Cal.App.4th 1621, 1629.)

The three strikes legislation was enacted as an urgency measure "to protect the public from the imminent threat posed by those repeat offenders." (Stats. 1994, ch. 12, § 2.) Under the California Constitution, an urgency statute becomes effective immediately upon enactment. (Cal. Const., art. IV, § 8, subd. (c)(3); *People* v. *Cartwright, supra,* 39 Cal.App.4th 1123, 1133.) Urgency legislation is "a process that is part and parcel of this state's constitutionally sanctioned legislative process." (*People* v. *Robertson* (1982) 33 Cal.3d 21, 46; *People* v. *Kinsey, supra,* 40 Cal.App.4th at p. 1629.)

"The legislature has authority to determine when urgency measures are necessary ... [and] recitals of necessity and public interest in legislation must be given great weight and every presumption made in favor of their constitutionality." (*Azevedo* v. *Jordan* (1965) 237 Cal.App.2d 521, 525-526; *People* v. *Kinsey*, *supra*, 40 Cal.App.4th at p. 1629.)

"An urgency statute may not create or abolish any office or change the salary, term, or duties of any office...." (Cal. Const., art. IV, § 8, subd. (d).) In interpreting what is a "change of duties" within the meaning of the constitutional limitation on urgency legislation, the Supreme Court has explained, "[a]n addition or subtraction in relation to the volume of the duties required to be performed by an officer, which does not substantially affect the primary duties of his office, is not such a change of duties as would prevent immediate effectiveness of legislation properly declared to be urgent." (*Martin* v. *Riley* (1942) 20 Cal.2d 28, 37; *People* v. *Cartwright*, *supra*, 39 Cal.App.4th at p. 1133.) Only a change that "impose[s] undue or material and substantial additional burdens or duties upon the officers mentioned, different in nature from those already required of them by law ..." runs afoul of the Constitution. (*Davis* v. *County of Los Angeles* (1938) 12 Cal.2d 412, 424; *People* v. *Spears*, *supra*, 40 Cal.App.4th at p. 1689.)

"The primary duties of the office of trial judge and prosecutor have not been changed by the three strikes law. Their discretion in sentencing or prosecuting defendants has never been absolute. [Citations.] Since the new restrictions in the three strikes law are not unduly or materially and substantially different from those already imposed, they do not constitute a 'change' in duties. [Citation.]" (*People* v. *Cartwright*, *supra*, 39 Cal.App.4th at pp. 1133-1134.) We find nothing in section 667, subdivisions (b) through (i) which substantially affects the primary duties of either prosecutors or judges, and the urgency measure which enacted three strikes is not unconstitutional.

VII.

A PRIOR CONVICTION MAY BE USED AS A STRIKE AS WELL AS AN ENHANCEMENT

Appellant argues that the court improply imposed the two one-year enhancements pursuant to section 667.5, subdivision (b). Appellant argues that the trial court improperly used his prior convictions to impose both the third strike sentence and the two one-year enhancements for his prior prison terms. Appellant argues this constitutes impermissible dual use of the prior convictions and also violates section 654.

This argument has been rejected by several districts. (*People* v. *Ramirez, supra,* 33 Cal.App.4th 559, 562, 566-673; *People* v. *Anderson, supra,* 35 Cal.App.4th 587, 592-599; *People* v *Sipe, supra,* 36 Cal.App.4th 468.

In *People* v. *Ingram, supra,* 40 Cal.App.4th 1397, 1412, we held that when a third strike defendant is sentenced to 25 years to life, the court must also impose any applicable enhancements that have been found true. (*Id.* at pp. 1409-1412.) *Ingram* held that using the same prior serious felony convictions as strikes and enhancements does not violate section 654 or constitute an impermissible dual use of the prior convictions, since the three strikes law is an alternative sentencing scheme and not an enhancement. (*Id.* at pp. 1411-1412; see also *People* v. *Sipe, supra,* 36 Cal.App.4th at p. 488.)

The court properly relied on appellant's prior convictions as both strikes and to impose the prior prison term enhancements. This did not constitute an impermissible dual use and did not violate section 654.

VIII.

CONDUCT CREDITS

The People object to the trial court having granted appellant presentence conduct credit in the amount of 136 days. It is contended that the three strikes law limits conduct credit to no more than 20 per cent and this limitation applies to presentence conduct credit.

The award of presentence conduct credits has not been eliminated by section 667, subdivision (c)(5), or any other provision of the three strikes law. (*People* v. *Hill* (1995) 37 Cal.App.4th 220, 224.) Section 4019 provides conduct credits not only for determinate sentences but for any prisoner "confined in a county jail...following arrest and prior to the imposition of sentence for a felony conviction." In the absence of some authority adopting a more limited interpretation, that language seems broadly to include all persons convicted of a felony, whether sentenced under three strikes or not. Therefore, we reject respondent's request that we limit appellant's presentence conduct credits.

DISPOSITION

The judgment is affirmed.

Harris, J.

WE CONCUR:

Vartabedian, Acting P.J.

Wiseman, J.

APPENDIX D

FEBRUARY 5, 2014 -- MORNING SESSION

(The following proceedings were had in open court, in the presence of the Court and Counsel and Defendant, to wit):

THE COURT: Alfredo Perez, Case 578.

MR. TREISMAN: Douglas Treisman for the People.

MR. CHRISTIANSEN: Eric Christiansen on behalf of Mr. Perez. He is present. Also present are Alfred Perez, Sr.; his mother, Nora Varela; his sister, Crystale Perez. That is spelled C-R-Y-S-T-A-L-E; his daughter, his nephew and a perspective employer, Henry Garza. I have given letters to Mr. Treisman and provided copies to the Court.

THE COURT: I also have before me the People's opposition to defendant's petition for recall of the sentence, the defense response, a previously prepared probation report. People are opposed. The defense is in support. I have read and considered each of the petitions.

So there are two issues raised. The first issue raised by the People is that Mr. Perez is statutorily ineligible for reconsideration, given the language of the statute; specifically, People are of the position that the defendant was armed with a deadly weapon at the time of the offense, and, therefore, is ineligible for consideration of resentencing.

The facts and issues of this case as known to the Court, the strike that occurred, it is a 245(a)(1). It was a conviction of assault with force likely to produce great

bodily injury. It was not an element of the case itself of a deadly weapon, though, factually the case involved what is loosely described as a robbery. It was pled out as a 245 in the sense of it was a -- it started as a second degree burglary, shoplifting of a Lowe's or Home Depot, or that type, where a club -- that club being a security device that fits on the steering wheel of a car, was stolen from the store by the defendant's co-defendant.

The defendant was present in the lot in a vehicle. The co-defendant got into the car and was immediately approached by store personnel. There was a struggle in which store personnel reached into the car, the defendant was driving. The defendant apparently moved the car forward and backward, causing the store personnel person to not be able to extricate himself from the car for a matter of -- I'm not sure how long -- but ultimately did free himself from the car. There was no injury.

The facts state the person was dragged slightly, though the dragging wasn't anything more than keeping pace with the car. I am not trying to downplay the serious nature, but, factually, that is what occurred.

MR. TREISMAN: There was injury, but it was not major injury.

THE COURT: Okay.

MR. CHRISTIANSEN: The facts indicate a few scrapes.

THE COURT: Okay. Nothing. There was no

hospitalization?

MR. CHRISTIANSEN: No.

THE COURT: There was no medical treatment that we know of?

MR. CHRISTIANSEN: No.

MR. TREISMAN: I don't recall if there was, but it was not significant; that is true.

THE COURT: The Court has taken a somewhat black-and-white approach so to speak on finding individuals ineligible for resentencing due to use of a deadly or dangerous weapon, that being a firearm.

Given the language of Prop 36 and related statutes, candidly, I don't believe this is such a case. Here, the defendant himself -- it is an allegation of a vehicle -- though, significantly, the case was not charged or convicted as assault with a motor vehicle. It was charged as force likely. And while I completely understand the position of the People, that if the use of a deadly weapon occurs, and that is the position the Court has taken in the matters -- numerous cases are up in front of the Fifth right now on this issue. I am aware of a recent case, either out of the Second or the Third, I believe, essentially ruling in a more narrow sense that if an individual is in possession of a deadly weapon at the time of the offense, that that is an exclusion. But I believe that reading of the statute would not apply to this.

So my first ruling is tentative. I will allow for any

additional argument, though, if anybody feels they want to take further action they can. I am denying the People's opposition to the petition on the basis that the defendant is statutorily ineligible. Stated another way, I'm not finding that he is statutorily ineligible based upon the facts and circumstances of this case. The incidental use of the motor vehicle during the offense -- though, Mr. Treisman, obviously, any comments you would like to make on the record, go ahead.

MR. TREISMAN: Well, I'm not sure there is any. I do think that the Court -- the summary of the case that the Court gave is factually somewhat in error, but --

THE COURT: Go ahead. Anything -- I want the record to be clear, so if you would like to add.

MR. TREISMAN: Yeah. There are relatively minor. The type of auto part stores. It was a Club. The facts -- I will just simply suggest that they be interjected from our pleadings, which is a summary for the Court of Appeal summary. I certainly respect the Court's opinion to describe them as incidental to the offense. It seems to me misses the nature of the assault and of the nature of the jury finding. There was not a plea.

The Court stated it was a pled out. It was not a plea. It was a jury verdict, with the balance of the case hung. There was a mistrial. We chose not to pursue the balance of the charges to re-try the robbery.

So we end up with a situation where the vehicle was used,

which is the mechanism of the assault. There is simply -- I recognize Mr. Christiansen disagreed. I read his brief. It suggested that there been no vehicle, and he had simply pushed him. There would have been an assault. That might be true, but it certainly would not be a GBI. It is the vehicle that created the circumstance and that condition of the case that allowed the jury to make its finding. That is indisputable.

I heard Mr. Christiansen in his brief try to dispute the 245. But for lack of any other term, if it is assault by means of force, it is because the vehicle was used. As it happens, he was able to extricate himself from the vehicle, and as a result, only received very minor injuries, but he himself felt he was going to end up under the tires and was going to end up dead. So I don't want to diminish the nature of the assault. I don't -- I'm not able to reconcile the assault and the use of the vehicle as the mechanism of that assault with -- claiming that he is not armed. It seems to me by the nature of use, you have taken up an object, and you become armed. Armed does not have to precede the use of the weapon. It can be simultaneous.

The moment that Mr. Perez chose to use the vehicle as a weapon as a means of his assault, it seems to me, that is when he became armed with this vehicle for purposes of this statute. It is important to recognize that the purpose behind the statute is to differentiate those that might commit an offense that qualified and that committing an offense by its

nature, they were more violate characteristic; something that shows a greater readiness to do harm to others. And so it is true that he sat there and just being the get-away driver for the co-participant in this crime. No one would have said he would have been eligible; although, had there been a finding on the robbery, he would have been ineligible.

But that being said, no one would have had a problem based upon the findings that have been made to date, but, here, he made an election to assist the co-participant on this second day of criminal activity. He chose to get out of there. He was trying to get away, because he was concerned about the victim and his reaching into the vehicle. He claims to not know. It does seem to me that based on the verdict, the jury somewhat rejected that theory. This conduct was willful, and it was certainly willful violent conduct. He had to know that he was committing this assault and he accepted that. The jury accepted that. I don't see these two as reconcilable.

THE COURT: How do you -- I know you weren't the charging deputy --

MR. TREISMAN: I was not.

THE COURT: -- for this case. I am reviewing the file now. From its inception, it was never charged with assault with a deadly weapon.

MR. TREISMAN: Back at the time, it would have had very little meaning to file an assault with a deadly weapon; to

wit, a vehicle. It is correct, that the vehicle is not -- is the mechanism of the assault. It is not a case where he drove at somebody. This is a case where the vehicle is the instrumentality of this assault. It was not without in and of itself without driving at somebody. It is a benign object at its inception. As it sits there, had he drove away, as I said, it would not have been a deadly weapon. When he uses it as a deadly weapon dragging an individual, clearly, it is a deadly weapon force likely to cause great bodily injury and could easily be deadly force.

So it seems to me, that the election by the charging deputy -- I did cover this modestly in my pleadings. One has to recognize -- so if we had filed it that the vehicle was used as a dangerous or deadly weapon or that he was even armed at the time with his weapon or had used it in some way at the time, these would have merged. There would have been no enhancement.

You couldn't gain additional sentencing, because it is clearly part and parcel in the 245. You cannot sentence for something at that time that was not significant meaning to the 245, that obviously includes this as part of the nature of the assault. You can't do it, but for the use of the vehicle. So you cannot sentence for it separated from the 245. There would have been no advantage in the better theory realistically that the vehicle, rather than it being used as the weapon, rather is a piece of the assault. It is force

through the use of the vehicle applied to the victim.

I think that is a cogent theory. It is lightly broader to use the vehicle. It is easier to explain then that it is his use of the gas pedal that creates the motion of the vehicle that applies the force. So you end up with a theory that is explainable to a jury, but that does not mean that there was any acknowledgment that the vehicle wasn't used or wasn't part and parcel. It was the mechanism of this assault. So I don't believe that that is any form of a concession.

As to what happened with the balance of the case, obviously, it was pled out as a robbery. The 245 was the lesser of the charges. And with the jury's findings, based upon it being a three strikes case, it seems very evident that we made an election at that time. We cannot go back now many, many years later and re-try the robbery aspect of it, but we did, based upon the record that is before us, recognize that this vehicle was by any understanding used as a weapon.

THE COURT: Just so we have the precise nature of your argument, I want to make sure the record is clear, and I understand your argument. You put in bold in your motion, "During the commission of the current offense, the defendant used a firearm." There is no evidence of that -- "was armed with a firearm." There is no evidence of that -- "or deadly weapon." It read appropriately, "was warmed a deadly weapon; to wit, a motor vehicle."

MR. TREISMAN: That's correct.

THE COURT: All right. That is where the Court differs as to that. I understand your argument. It is well put, but the argument now being that when the defendant was driving the motor vehicle in an effort to escape that he was armed with a deadly weapon.

Mr. Christiansen?

MR. CHRISTIANSEN: Did the Court wish me to argue everything just said?

THE COURT: Only what you would feel you need to.

MR. CHRISTIANSEN: I will just very briefly argue. The Court notes from prior cases that, generally speaking, we are talking about arming during the commission of another offense, but since that at least at the time, they manage to separate it out. But at the time, the language of the specific statute was that you could commit it by either use of a deadly weapon or using force, GBI.

Now, I do disagree on one point. I have certainly seen cases where the People have proceeded under both theories; under single statute or in the case has been instructed as such. But in this particular case, I think they made a selection. I will have to say, "stuck with it." Essentially that person can suddenly be armed with a car is not necessarily an inherently deadly weapon. Mr. Perez, at the time, since we don't actually know what was going on or whether he knew what the gentleman who went into the store was doing, can't really be said to have been armed in the vehicle,

nor at the time when there is a confrontation between passenger and the store employee; that he knew what was going on, and that he was attempting to leave. The jury did find that that act -- that general intent of moving backwards and then forward, was enough to potentially put Mr. Sanchez at risk.

We are not disputing that at this point, but the People at that time, did the election of essentially getting another strike on him, by also proceeding under the assault with a deadly weapon. I am not sure the Court wants me to --

THE COURT: Let's just narrow on that. I understand Mr. Treisman's argument that this was one of election; that it was essentially, "We don't need to charge" -- I am just paraphrasing, but, "Why do we need to charge an assault with a deadly weapon, which would require us to prove the additional use of a deadly weapon, when we can simply charge assault with force likely?" And I think Mr. Treisman stated, "It is an election issue." But Mr. Treisman stated in his argument that there was no advantage to the People -- no sentencing advantage.

MR. CHRISTIANSEN: Not at the time, but, for the future, that you would have gotten another strike against him. It would be no skin off their nose to simply say, "We are proceeding under both theories of the statute."

MR. TREISMAN: We had two. How many do you need?

THE COURT: But do you disagree that -- while not at the

time, for future purpose, would have been a strike if convicted as a deadly weapon; to wit, a firearm?

MR. TREISMAN: "To wit, a vehicle"?

THE COURT: I'm sorry. Yes.

MR. CHRISTIANSEN: I agree that whether he had been charged -- well, he could have been found guilty by the jury under both theories. I am saying theoretically that that would have been an option. I do agree that it wouldn't change the four-year top, assuming, it was a regular case. It would have had no effect whatsoever on whether he received 25 to life. It was going to be that regardless.

MR. TREISMAN: At least at the time, recognizing that it was with another allegation that would have been a strike which was the 211.

MR. CHRISTIANSEN: Right.

MR. TREISMAN: As it turned out, the jury hung up on that particular charge, so you ended up with a 245. I don't think that anybody contemplated that it was going to be -- if they found the assault was occurring, it would have been participated; that it was on behalf of the passenger, and it would have consummated the robbery. It is interesting, because a 245 is a knowing crime. So what the jury did was it accepted a portion of what the defendant said and rejected a portion of what the defendant said. It sounds a bit like a compromise verdict, but said, "All right. You clearly assaulted this individual, but we don't know that he knew for

sure that there was a robbery." They accepted that explanation that he had been doing on behalf of another party and had taken some -- I think that that is -- they couldn't say beyond a reasonable doubt those charges were correct.

So what we ended up with -- what is viewed as the lesser charge, the 245; however, I wanted to switch, if I might, this idea of an election. I do think that it matters what you charge in terms of a conviction. The record, however, first of all, is a matter of findings. There is no question the 245 was found. So the question is whether the record by a preponderance of the evidence supports the use of this vehicle as a dangerous or deadly weapon? That it is -- it has nothing to do with our election in terms of charges. If you required a verdict, if you required a finding, because, in essence, by talking about the election, even though that it an appealing theory, what you are saying is that there must have been a finding or a charging --

THE COURT: Not to interrupt you, but I made clear that is not the Court's position.

MR. TREISMAN: I understand --

THE COURT: I previously ruled in earlier cases that if there are facts that support use of a deadly weapon, even though they are not charged, and there is not a conviction, the person is still excluded from reconsideration, which is the reason this argument itself -- we are splitting hairs so much, because I -- you are right. The defense has objected,

and that is what the Fifth is going to figure out.

MR. TREISMAN: Yes. I recognize that. That is why I bring it up. It wasn't to throw anything in the Court's face. I want to clarify if this were about elections, then it would matter what the verdict was and was what the findings were by a jury, rather, I am focusing entirely on the record.

THE COURT: I agree.

MR. TREISMAN: It does seem to me that the question is a very narrow one for this Court, and that is, "Can you use a vehicle as part of an assault, recognizing that that particular -- by the nature of its use, becomes a dangerous or deadly weapon; assuming that to be all true, can you use that in your assault and still be said not to be armed? Can you actually use a weapon and not be armed with it?" is the star question before this Court. I don't -- I'm not able rationally to reconcile those two to the conclusion that you are not, which is why I brought this eligibility issue before the Court. I do think that if I understand the Court, I speak English, so I recognize what the Court is saying. But what I am having difficulty with is -- and I guess I would ask the Court, and it is not to be disrespect you, but "How does the Court reconcile that a person used this weapon?" What I am hearing is -- I will throw out my impression -- and that is that the Court is saying, "That the statute distinguishes certain types of weapons." The Court has focused in the past on firearms in particular. I appreciate that argument. I

heard it. I know this Court to be extraordinary in firearms, but while saying that, I don't believe the statute distinguishes.

THE COURT: Let's -- we are splitting hairs and parsing the statute, but we need to discuss, "during commission of the current offense, the defendant used a firearm." He didn't do that. That is not applicable.

MR. TREISMAN: Right, not a deadly weapon.

THE COURT: "was armed with a firearm or deadly weapon." So your argument is he was armed with a deadly weapon, being the vehicle?

MR. TREISMAN: Yes.

THE COURT: That is where the Court is parting with your rationale. To explain it, there is a difference between "defendant used a firearm or deadly weapon," that is a different argument than, "Was armed with a firearm or deadly weapon."

MR. TREISMAN: May I respectfully address the Court?

THE COURT: Sure.

MR. TREISMAN: Let's assume that the -- I recognize the Court's argument. So what the Court is saying is, "As he sat there waiting for this gentleman, he really was not armed. The car was just idle. It was not a weapon."

THE COURT: I think we all agree to that.

MR. TREISMAN: I would be willing to concede that. I think that is true. There -- maybe it is not in the record,

so I am willing to concede to that, but at the time --

THE COURT: I'm sorry to interrupt you, but I am -- also, if at the time he was sitting there in the car, he would have had a knife in a sheath under his shirt, I would find he would be ineligible.

MR. TREISMAN: Yes. I understand.

THE COURT: Keep going.

MR. TREISMAN: Now, going a step further, because this is a knowing crime in particular, at some point when the victim reaches into the vehicle of that car, he has an election to make. He can leave it as a car, and he can say, "You must get out of this car," or he choose not to move the car at all. He could turn it off and resolve the issue, or he can, as the jury found, commit an assault with the vehicle. And having done so, and having made the election to use the vehicle as the mechanism of the assault, he then converts that vehicle into a weapon of this assault.

So I realize it is a narrow finding. He wasn't -- it is true. He was not armed with a gun. I don't know exactly what he was planning. The record can't tell us that. There is -- in fact, there are two theories. We don't even know which the jury accepted. The jury likely rejected, based on the verdict, and there is pieces that the jury must have accepted or at least gave consideration to, but we won't know.

So the question is, "Does the act of then using this weapon" -- the Court has acknowledged if "use" was stated, it

would find he is ineligible. But it was "armed," the Court was saying, "No." So at what is the distinction between an individual who uses a weapon, ipso facto, "Oh, you must be armed," because in the set of the set, "use" encompasses "armed." You have to have it readily available for offensive or defensive use, because you are using it. On the other hand, "armed" does not encompass "use."

THE COURT: I will answer your question, two-fold -- I don't know if you have seen me up here. I have been trying to find an order I issued originally in delineating these cases.

The order relied on rationale from the stated purpose of three strikes and three strikes proposition resentencing law, where the voters were informed that an individual would not be eligible if the offense involved use of a firearm.

The Court's rationale was, "The voters were basically being reassured that if certain factors came up, the person would not be eligible for resentencing." I don't think the voters in any way were being told at that point, "if an individual uses something that is not in and of itself a deadly -- for that purpose a deadly weapon, that they would not be eligible." That was part of the Court's rationale.

The second one is -- and there -- I understand that these are both very close arguments. I understand exactly what you are saying, but an analogy, I think I know what your answer would be, but instead of the vehicle here, what if the Club had been used? The co-defendant comes out to the car with the

Club, and we need to be careful a "Club" doesn't mean a weapon.

MR. TREISMAN: Locking device.

THE COURT: -- a car locking bar or device --

So if the person came out with the car locking item, the co-defendant jumps in the car, and they go to leave. The auto parts store employee is now standing next to the car and says, "Don't leave." And the defendant here grabs the car locking bar and throws it at him and drives away, your argument would be, that just converted it into an ineligible three strikes case, because he used what was not inherently a deadly weapon, but converted it to the use of a deadly weapon -- that would have to be your argument --

MR. TREISMAN: Well -- but -- and, I apologize -- only because we can fix it, but the way the Court has phased it, it is sounds as though he is releasing the item that was stolen; giving it back. It might have hit him. Under those circumstances, I suppose if it broke his skull, he ends up with a fractured skull, it would have to have been thrown with such force that it was not just giving it back. It is being used, so we might charge it. But if it was simply to discard the property and get the heck out the dodge, I would have to disagree. I can't -- so, unfortunately, it requires something more. But let's assume he takes this and swings it at him, he misses, swings, and then throws it, but it shows he clearly was attempting an assault. So, under those circumstances,

yes. I would agree that that does convert the Club into exactly that, a club, and it was being used then as an instrument for the assault and was a dangerous or deadly weapon.

Whether we would ultimately charge it under those circumstances because the ambiguities, I couldn't say. But I can say that there is certainly a very reasonable theory for going forward and saying that it was converted to a weapon.

THE COURT: Okay. I understand your position. I understand your argument. I am not saying -- it is a very well-reasoned. As you stated, Mr. Treisman, and I appreciate that, that certain points, we will defer to agree and disagree. And, therefore, for those reasons, we will allow the record to be supplemented. I think your argument is clear, if you want to take this further, the fact that the Court is going to deny it. I am going to finalize the order. For that purpose, that the defendant, I am finding that the defendant is not ineligible to be resentenced, due to the method in which the motor vehicle was used in this offense. So I have tried to give you as clear language as I can.

MR. TREISMAN: Oh, absolutely. I appreciate the indulgence. With that said, I --

THE COURT: Just comments -- by no means, this is important, this is going to have to be decided by a higher court. I know some people might look at this and say, "Why are they arguing for 45 minutes on this very minute point?"

but this is -- they will have to figure it out.

MR. TREISMAN: I agree with the Court. Those that may not have been as willing to allow conversation to go on as long, but in any case, that said, at this point, I recognize the Court is disposed to move forward. We have not briefed the criminal history issues concerning the inmate's behavior, and would ask to continue the hearing to another date to allow us to brief this substantive issue. I do take exception to the Court's ruling, and I may, in the interim, file a writ. I believe at this point, it is a writ rather than an appeal. If we went forward with resentencing, it would likely be an appeal.

THE COURT: I understand. I must say candidly, when I read your response, it was my interpretation that the response was much more focused on this issue, rather than the latter issue based upon the prior response. I want to give you time to do that.

On the other hand, Mr. Christiansen, you have witnesses here?

MR. CHRISTIANSEN: I do.

THE COURT: Okay.

MR. CHRISTIANSEN: I would also like to say that Mr. Treisman exactly detailed Mr. Perez's residence history. I am not sure what else we would be talking about.

THE COURT: I think -- candidly, I need more time to look at that too, but I want to give your witnesses that are here

and at prior hearings. I don't want to inconvenience them any more. So what I am saying is, if you want to put them on now, please, do.

MR. TREISMAN: I have no objection to that.

THE COURT: If they want to come back, they can come back, but I want to give them the opportunity to be heard.

MR. CHRISTIANSEN: Sure. I don't know what they prefer. Why don't we select the dates -- before I do that, I would like make to make a couple changes to the probation report.

THE COURT: All right.

MR. CHRISTIANSEN: Mr. Perez pointed out that there is a -- the second to last paragraph, the large paragraph at the bottom, on line 2, indicates "escape with force." That was actually a walk away from a halfway house.

THE COURT: That was my reading. He walked out from Turning Point, I believe.

MR. CHRISTIANSEN: Exactly, but I think the probation officer just left out a word, and I wanted to make sure that was clear with the Court.

THE COURT: Was there more?

MR. CHRISTIANSEN: There was also another one that was without force, but I just want to make sure that the Court had that in mind.

THE COURT: I am looking, actually, at the complaint violation of 4530(b), "The defendant on or about did willfully and unlawfully escape and attempt to escape from Turning

Point." So there is no allegation of force at all.

MR. CHRISTIANSEN: Just wanted to make sure that that was corrected. Your Honor, I would like the Court to hear from Mr. Garza, assuming that there is any other information Mr. Garza would like to share with the Court other than what was in his letter.

THE COURT: That's fine.

MR. CHRISTIANSEN: Mr. Garza, say what you would like to say Stand up and say your name.

AUDIENCE MEMBER: I'm Jamie Garza. I am a member of the same Catholic church, Knights of Columbus. I know Alfredo as my neighbor. Of course, it has been many, many years. But if asked, Your Honor, to look within ourselves and to be able to see that, of course, some wrong doings were done, and, of course, time has been served for the crime that he was given, 20 years, I believe. Then, I asked -- we sometimes think about some of the stuff that we do within our lives that mistakes are made -- not like saying that that -- we feel sometimes that we make some judgments or as far as things that we do within our lives, and then later on, we end up having to pay the consequences of what we do. We ask that we see that within rehabilitation and programs that we have out there to offer, that I believe someone could make some changes and have some kind of a chance for change. I just ask that -- I think in the letter that I had there for you, it pretty well states and says a lot of what we do, but what we do is I, myself,

work with the program called Victory Outreach. It is a place where men are sentenced or sentenced there for whatever probation they have in a one-year program. Then, I would say that Alfredo has a good chance of getting employment as far as working and being able to be a productive adult, and continue to go forward with his life.

THE COURT: All right. I appreciate your comments. I have read your letters as well.

AUDIENCE MEMBER: Thank you, Your Honor.

THE COURT: Mr. Christiansen?

MR. CHRISTIANSEN: Would either of you gentlemen wish to say anything?

AUDIENCE MEMBER: My name is Ray Perez, Jr.

THE COURT: Go ahead, Mr. Perez.

ATTORNEY 3: I haven't seen him in a very long time. I just hope that everything goes okay. I know he can get on his feet. He has paid his debt to society, and I think he deserves a chance.

THE COURT: Great, Mr. Perez. Thank you for your comments.

MR. CHRISTIANSEN: Would either of you want to say anything?

ATTORNEY 3: Nora Varela.

THE COURT: Thank you, Ms. Varela.

ATTORNEY 3: Judge, you know, my brother had been incarcerated for a very long time. I have taken my parents to

go see him, and they are sick now. He paid the price. You know, I just ask for leniency. I am hoping that you would allow him to have the opportunity to come out.

THE COURT: All right.

MR. CHRISTIANSEN: Anybody else want to say anything?

THE COURT: Again, they will have the opportunity later if they decide to appear. I just wanted it for their convenience to give them that opportunity to do so.

MR. CHRISTIANSEN: We appreciate that. That is why I wanted them speaking now. I suggest we pick a day. I may, obviously, have to respond to whatever he puts in writing as I did with this last series of motions.

And then, of course, the Court has the letter that Mr. Perez wrote, including his summary of some of the rule violations so the Court can get a better prospective of the situation in CDCR.

THE COURT: All right. So what date would you like?

MR. CHRISTIANSEN: I think Mr. Treisman has to -- I don't know how long he is going to need.

MR. TREISMAN: Do you want it on a Friday, Your Honor?

THE COURT: Probably would be most appropriate.

MR. TREISMAN: How about March 7?

THE COURT: From today's date, that takes us out about a month.

MR. CHRISTIANSEN: I hate to go out so far. Can we get a briefing schedule, because I don't want to get the motion

right before then, and then have to ask for additional time as I did last time?

THE COURT: Fair enough. There were -- the People's motion need to be in by February 21st, response by February 28, hearing March 7th.

MR. CHRISTIANSEN: That would work.

THE COURT: I would note, if I am reading the documents correctly, we are just about the 20 year anniversary date for Mr. Perez on this case.

MR. CHRISTIANSEN: That would be March.

THE COURT: Okay. February 21st for initial pleading; February 28 for the response. March 7th for the hearing. We will set it at 9:00 in this department on the 7th. Thank you, Folks.

(Off the record.)