COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Appellant, v. ALFREDO PEREZ, JR., Defendant and Respondent.	S238354

SUPREME COURT
FILED
MAR 21 2017
Jorge Navarrete Clerk
Deputy

Court of Appeal, Fifth Appellate District, No. F069020
Fresno County Superior Court No. CF94509578

Hon. Jonathan Conklin, Judge

RESPONDENT'S OPENING BRIEF ON THE MERITS

ELIZABETH CAMPBELL
Attorney at Law
State Bar No. 166960
PMB 334
3104 O Street
Sacramento, CA 95816
(530) 786-4108
campbell166960@gmail.com
Attorney for Respondent

TABLE OF CONTENTS

Page

RESPONDENT'S OPENING BRIEF ON THE MERITS 1

INTRODUCTION 1

STATEMENT OF THE CASE AND FACTS 4

ARGUMENT 9

I. The Court of Appeal Erred in Finding That, as a Matter of Law, a Person Convicted of Aggravated Assaulted Who Uses a Vehicle in the Commission of That Offense Has Necessarily Used a Deadly Weapon 9

A. The Three Strikes Reform Act 10

B. A Conviction for Aggravated Assault under Former Section 245, subdivision (a)(1), Does Not Render an Inmate Facially Ineligible for Resentencing under the Three Strikes Reform Act 12

C. The Court of Appeal Erred in Holding That the Jury Verdict Necessarily Encompassed a Finding That Respondent Used the Car as a Deadly Weapon 16

TABLE OF CONTENTS

Page

II. THE COURT OF APPEAL INCORRECTLY APPLIED THE STANDARD OF REVIEW AND FAILED TO ACCORD PROPER DEFERENCE TO THE FINDINGS OF THE TRIAL COURT 29

A. A Reviewing Court Should Uphold the Factual Findings of a Court Determining a Petitioner's Eligibility under Penal Code Section 1170.126 if Those Findings Are Supported by Substantial Evidence 30

B. The Trial Court's Finding That Mr. Perez Was Not Armed Was Supported by Substantial Evidence. 37

III. HAD THE COURT FOUND MR. PEREZ INELIGIBLE FOR RELIEF BASED ON FACTS NOT FOUND TRUE BY THE JURY, IT WOULD HAVE DEPRIVED HIM OF HIS RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION 41

CONCLUSION 47

CERTIFICATE OF WORD COUNT 47

DECLARATION OF SERVICE 48

TABLE OF AUTHORITIES

Page

Cases

Alleyne v. United States 133 S.Ct. 2151 41
Apprendi v. New Jersey (2000) 530 U.S. 466 .... 42, 43, 46
Descamps v. United States (2013) 133 S.Ct. 2276 45
Dillon v. United States (2010) 560 U.S. 817 .... 44, 45
Harris v. United States (2002) 536 U.S. 466 .... passim
In re D.T. (2015) 237 Cal.App.4th 693 .... 24, 25, 26
People v. Aguilar (1997) 16 Cal.4th 1023 .... 16, 22
People v. Arevalo (2016) 244 Cal.App.4th 836 17
People v. Aznavoleh (2012) 210 Cal.App.4th 1181 .... passim
People v. Banuelos (2005) 130 Cal.App.4th 601 14
People v. Blakely (2014) 225 Cal.App.4th 1042 31
People v. Bradford (2014) 227 Cal.App.4th 1322 .... passim
People v. Brookins (1989) 215 Cal. App. 3d 1297 22
People v. Cervantes (2014) 225 Cal.App.4th 1007 36
People v. Delgado (2008) 43 Cal.4th 1059 14
People v. Elder (2014) 227 Cal.App.4th 1308 31
People v. Feyrer (2010) 48 Cal.4th 426 13
People v. Fox (2014) 224 Cal.App.4th 424 13
People v. Gaitan (2001) 92 Cal.App.4th 540 22
People v. Graham (1969) 71 Cal. 2d 303 .... passim
People v. Guerrero (1988) 44 Cal.3d 343 .... 17, 34, 45
People v. Haykel (2002) 96 Cal.App.4th 146 .... 13, 15
People v. Hazelton (1996) 14 Cal.4th 101 15
People v. Hicks (2014) 231 Cal.App.4th 275 .... passim
People v. Hughes (2012) 202 Cal.App.4th 1473 30
People v. Kaulick (2013) 215 Cal.App.4th 1279 44
People v. Lochtefeld (2000) 77 Cal.App.4th 533 22
People v. Luna (2003) 113 Cal.App.4th 395 14
People v. Martinez (2014) 225 Cal.App.4th 979 36
People v. McCoy (1944) 25 Cal.2d 177 22
People v. Moran (1973) 33 Cal.App.3d 724 22
People v. Nguyen (2009) 46 Cal.4th 1007 13
People v. Oehmigen (2014) 232 Cal.App.4th 1 .... 17, 18
People v. Osuna (2014) 225 Cal.App.4th 1020. 17

TABLE OF AUTHORITIES

Page

Cases

People v. Page (2004) 123 Cal.App.4th 1466 .... 22, 25, 26
People v. Raleigh (1932) 128 Cal.App. 105. .... 9, 21, 25
People v. Ray (1975) 14 Cal.3d 20 .... 9, 21
People v. White (2014) 228 Cal.App.4th 1040 30
People v. Williams (2001) 26 Cal.4th 779 .... passim
People v. Winters (2001) 93 Cal.App.4th 273 13
People v. Woodell (1998) 17 Cal.4th 448 .... 17, 45
People v. Wright (2002) 100 Cal.App.4th 703 .... 18, 19
People v. Wyatt (2010) 48 Cal.4th 776 20
People v. Yearwood (2013) 213 Cal.App.4th 161 10
Rossi v. Brown (1995) 9 Cal.4th 688 15
Williams v. Superior Court (2001) 92 Cal.App.4th 612 ... passim

Codes

18 U.S.C. § 924(c)(1)(A) 43
18 U.S.C. § 3582, subd. (2) 45

Pen. Code, § 211 22
Pen. Code, § 245 .... passim
Pen. Code, § 667 .... passim
Pen. Code, § 667.5 7
Pen. Code § 1170.12 .... passim
Pen. Code § 1170.126 .... passim
Pen. Code, § 1197.2 13

Constitutional Provisions

United States Constitution, Sixth Amendment 2, 41, 42, 43
United States Constitution, Fourteenth Amendment 2, 41, 42, 43

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

<table>
<tr><td>PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Appellant,

v.

ALFREDO PEREZ, JR.,

Defendant and Respondent.</td><td>S238354

F069020

Fresno County
Superior Court
No. CF94509578</td></tr>
</table>

RESPONDENT'S OPENING BRIEF ON THE MERITS

INTRODUCTION

On January 11, 2017, this court granted review on the following issues:

1. Is a petitioner ineligible for recall of his sentence under Penal Code section 1170.126 where he personally and intentionally used a vehicle in a manner likely to result in great bodily injury, even if the evidence in the record of conviction did not demonstrate an intent to use the vehicle as a deadly weapon?

2. Where a trial court makes a factual determination regarding a petitioner's eligibility for resentencing under Penal Code section 1170.126, and that factual determination is supported by substantial evidence in

the record of conviction, should a Court of Appeal defer to those factual findings?

3. Did the Court of Appeal, in reversing the order granting the recall petition based on facts not found true by a jury, deprive respondent of his right to jury trial as guaranteed by the Sixth Amendment to the United States Constitution?

After serving approximately 19 years in state prison for a 1995 conviction for assault by means likely to result in great bodily injury (Pen. Code, § 245, subd. (a)(1)), respondent Alfredo Perez successfully petitioned the Fresno County Superior Court to recall his sentence under Penal Code section 1170.126. In granting the petition, the court found that, based on the facts contained in the record of conviction, Mr. Perez had not used a deadly weapon in the commission of the offense. (RT 26.)[1] A sharply divided Court of Appeal for the Fifth Appellate District reversed the holding of the trial court, and remanded with directions to the lower court to reverse the finding of eligibility and reinstate the life sentence. (*People v. Perez* (2016) 3 Cal.App.5th 812, 828-829.) The majority held that, although Mr. Perez was neither charged with nor convicted of assault with a deadly weapon, as a matter of law, where an automobile is used as the "sole means" by which the defendant applied force likely to result in a great bodily injury, the defendant is ineligible for relief under Penal Code section

---

[1]"CT" refers to the clerk's transcript on appeal; "RT" refers to the reporter's transcript.

1170.126, under the exclusionary language of Penal Code section 667, subdivision (e)(2)(C)(iii) and section 1170.12, subdivision (c)(2)(C)(iii) (hereinafter "clause (iii)"). (*People v. Perez, supra*, 3 Cal.App.5th at p. 825.)

The majority opinion ignores the thoughtful fact-finding of the superior court, and draws an unjustifiably rigid legal line around what is ultimately a fact-based inquiry. Respondent respectfully requests that this court reverse the holding of the Court of Appeal and reinstate the order recalling his life sentence.

STATEMENT OF THE CASE AND FACTS[2]

On Marcy 17, 1994, the day before the incident that formed the basis of the charges in this case, Fred Sanchez was working as a sales clerk in an auto parts store when he saw a man he later identified as Alfredo Perez, along with a man referred to in the court's opinion as "the passenger," enter the store. (CT 52.) The passenger was wearing a wool jacket and had his back to Mr. Sanchez, and Mr. Sanchez saw him raise a Club, an anti-theft device, above his head and then lower it. (CT 52.) Mr. Perez spoke briefly to the passenger and then spoke to Mr. Sanchez about some tires. While the conversation was taking place, the passenger left the store, and Mr. Sanchez saw him go to the parking lot and wait in a Blazer-type truck. (CT 52.) Mr. Perez went to the driver's side of the truck and drove away. (CT 52.)

Mr. Sanchez suspected that the passenger had stolen the club while Mr. Perez had attempted to divert Mr. Sanchez's attention. (CT 52.) Mr. Sanchez did not, however, notify police or check the store"s inventory to see if a Club had been stolen. (CT 53.)

The next day, March 18, Mr. Sanchez saw the same passenger enter the store. He was wearing the same wool jacket, even though the day was hot. (CT 53.) The passenger appeared nervous and kept turning his back toward Mr. Sanchez. Mr.

---

[2]The statement of facts is summarized from the Court of Appeal opinion in case number F023703, filed on November 5, 1996. (CT 50.)

Sanchez asked him if he needed help, and then followed the passenger out of the rear of the store after alerting another employee. (CT 53.) Mr. Sanchez heard rustling in the passenger's clothes. (CT 53.) The passenger had not paid for any items from the store. (CT 53.)

The passenger entered the same Blazer, again with Mr. Perez in the driver's seat; the passenger side window was rolled down. (CT 53.) Mr. Sanchez was wearing a red smock shirt with the store insignia and his name tag. (CT 53.) The passenger had been in the car for less than a minute when Mr. Sanchez came up to his window. Mr. Sanchez saw a bulge in the passenger's clothing, and told the passenger to please give the merchandise back and then he could leave. (CT 53.)

Mr. Sanchez reached into the car and grabbed at the package in the passenger's jacket. Mr. Sanchez identified it as a Club with a retail value of $59.55. Mr. Sanchez said, "Give it up." Mr. Perez then looked toward Mr. Sanchez and said, "Give it up." (CT 53.)

Mr. Perez then drove the vehicle in reverse. The passenger grabbed Mr. Sanchez's arm and pushed it down, preventing Mr. Sanchez from pulling his arm out of the window. Mr. Sanchez yelled, "Stop the vehicle," three times as the vehicle was moving in reverse. (CT 53.) He was dragged and had to run to keep his balance. (CT 53.) Mr. Perez then drove the vehicle forward; Mr. Sanchez was able to pull his arm free at that point, but feared that if he fell he would be run over. (CT 53.)

Mr. Sanchez variously estimated the speed of the Blazer between 10 and 20 miles per hour, but admitted that at the preliminary hearing he had testified that the vehicle started at 10 miles an hour and was doing 15 when he pulled his arm free. (CT 53.) He estimated that the entire incident took a minute and that his arm was in the moving vehicle for about 15 seconds, and that the vehicle traveled about 50 feet forward. (CT 53-54.)

Mr. Sanchez was able to provide a license plate for the vehicle; it was registered to Mr. Perez and his wife. (CT 54.) Another store employee witnessed the events and characterized it as Mr. Sanchez being dragged and "running for his life." (CT 54.) Both store employees identified photographs of Mr. Perez. (CT 54.)

Mr. Perez testified and denied being in the store on March 17; he and his father both testified that he had been elsewhere at the time. (CT 54.) Mr. Perez testified that on March 18, he was looking for a tire store when he met a friend named Elizabeth Ornelas, who offered him five dollars to give her acquaintance, "Don," a ride to an auto parts store to get a part to fix her vehicle. (CT 54.) Mr. Perez testified that he drove to the store and waited in the car while Don went inside. When Don returned to the car, he was angry with another man; Mr. Perez was not aware that the man was a store employee. (CT 54.) When Mr. Perez said "give it up," he was talking to his passenger, not to Mr. Sanchez, and that he meant for the passenger to quit fighting. (CT 54.)

Mr. Perez testified that he had been afraid; he admitted driving one or two miles an hour in reverse and two to three miles

an hour in drive, and stated that at no time did Mr. Sanchez have to run. (CT 54.) He admitted that Mr. Sanchez's arm had been inside the vehicle when he put the car into reverse and when he drove forward. (CT 54.) Mr. Perez testified that after leaving the parking lot, he told the passenger to get out and returned the gas money. (CT 54.)

Mr. Perez told the investigating officer that the passenger had told him to leave because the man was trying to rob him. (CT 55.)

Ms. Ornelas testified that she had asked Mr. Perez to give a ride to man she had recently met in order to buy a part for the disabled vehicle they had been driving. At trial she testified that she had made this request at a red light; prior to trial she had stated that it took place in a parking lot. (CT 55.)

On April 4, 1995, Mr. Perez was convicted of one violation of Penal Code section 245, subdivision (a)(1), assault by means of force likely to produce great bodily injury. (CT 6.) Due to his two prior serious felony convictions, Mr. Perez was sentence to a term of 25 years to life, with two one-year enhancements under Penal Code section 667.5, subdivision (b). (CT 6.)

On August 16, 2013, Mr. Perez filed a petition to recall his sentence under Penal Code section 1170.126. (CT 8.) Following a hearing, the court found Mr. Perez eligible for resentencing on February 5, 2014. (CT 967, RT 26.) On March 7, 2014, the court further found that Mr. Perez's release would not pose an unreasonable risk to public safety. (CT 1016, RT 40.) The court

accordingly denied probation and sentenced Mr. Perez to the upper term of four years in state prison, doubled to eight years, with two additional years for the prior prison term enhancements. (CT 1017, RT 43.)

On March 7, 2014, the People filed timely notice of appeal. (CT 1020.) In a published opinion issued on September 29, 2016, the Court of Appeal reversed the order finding him eligible for release. (See *People v. Perez* (2016) 3 Cal.App.5th 812.) This court granted Mr. Perez's petition for review on January 11, 2017.

ARGUMENT

I.

THE COURT OF APPEAL ERRED IN FINDING THAT, AS A MATTER OF LAW, A PERSON CONVICTED OF AGGRAVATED ASSAULTED WHO USES A VEHICLE IN THE COMMISSION OF THAT OFFENSE HAS NECESSARILY USED A DEADLY WEAPON

Before finding that Mr. Perez did not pose an unreasonable risk to public safety and resentencing him to a determinate term pursuant to Penal Code section 1170.126 (CT 1016), the trial court found that he was not ineligible for resentencing "based on the method in which the motor vehicle was used." (CT 967.) A majority of the Court of Appeal panel rejected this finding, holding that, as a matter of law, when a person uses an automobile in the commission of an assault by means of force likely to result in great bodily injury, he has necessarily also been armed with a deadly weapon within the meaning of Penal Code sections 667, subdivision (e)(2)(iii), and 1170.12, subdivision (c)(2)(C)(iii). (*People v. Perez* (2016) 3 Cal.App.5th 812, 820, 825.)

This holding is contrary to settled law. Where the People seek to prove that a defendant was armed with an instrument that is not inherently dangerous, they must prove that, under the facts of the case, the instrument was employed or intended to be employed as a deadly weapon. (See *People v. Graham* (1969) 71 Cal. 2d 303, 327-328, disapproved on other grounds in *People v. Ray* (1975) 14 Cal.3d 20, 30; see also *People v. Raleigh* (1932) 128 Cal.App. 105.) This is a fact-based inquiry and not one subject to

rigid legal line-drawing. Respondent respectfully requests that this court reverse the holding of the Court of Appeal and reinstate the order recalling his life sentence.

A. The Three Strikes Reform Act

In 2012, the Three Strikes Reform Act was enacted by the voters with the adoption of Proposition 36. (Pen. Code, § 1170.126 et seq.) The Reform Act created a post-conviction release proceeding for life prisoners sentenced under the Three Strikes Law for nonserious and nonviolent felonies. A person serving a three strikes sentence who meets the criteria set out 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. (Pen. Code, § 1170.126, subd. (f); *People v. Yearwood* (2013) 213 Cal.App.4th 161, 168.)

A person serving a life sentence under the Three Strikes Law is ineligible for resentencing under the Reform Act if his or her current sentence is for an offense listed in Penal Code section 667, subdivision (e)(2)(C)(i)-(iii), or Penal Code section 1170.12, subdivision (c)(2)(C)(i)-(iii). The disqualifying factor at issue in this case is listed in clause (iii) of these identical provisions:

> During the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person.

(Pen. Code, § 667, subd. (e)(2)(iii); Pen. Code § 1170.12, subd. (c)(2)(C)(iii).)[3]

Under section 1170.126, the trial court only has the authority to determine whether a third strike offender is eligible for resentencing if the inmate satisfies the criteria set out in subdivision (e) of section 1170.126. As relevant here, those criteria are: (1) the petitioner is serving a life term under the three strikes law for a conviction of a felony or felonies not defined as serious or violent under section 1170.126; (2) the petitioner's current sentence was not imposed for an offense in which the defendant used or was armed with a firearm or deadly weapon (see Pen. Code, § 667, subd. (e)(2)(iii); Pen. Code § 1170.12, subd. (c)(2)(C)(iii)); and (3) the petitioner 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. (Pen. Code, § 1170.126, subd. (e); *People v. Perez, supra*, 3 Cal.App.5th at pp. 831-832, dis. opn. of Franson, J.) As the dissenting justice noted below, respondent satisfied the first and third requirement, and this appeal thus relates to the second requirement. (*Ibid.*)

---

[3]These identical provisions will be referred to as "clause (iii)."

B. A Conviction for Aggravated Assault under Former Section 245, subdivision (a)(1), Does Not Render an Inmate Facially Ineligible for Resentencing under the Three Strikes Reform Act

The Court of Appeal correctly noted that respondent's current offense is not a serious or violent offense. (*People v. Perez, supra,* 3 Cal.App.5th at p. 816.) At the time of the instant offense, Penal Code section 245, subdivision (a)(1), applied to any person who committed an assault with a deadly weapon "or by means of force likely to produce great bodily injury." (Pen. Code, § 245, subd. (a)(1).)[4] The abstract of judgment lists the offense of which respondent was convicted as "assault by means of force likely to produce GBI." (CT 6.) Moreover, the instructions provided to the jury defined only "by means of force likely to produce great bodily injury;" the jury was not instructed on use of a deadly weapon.[5] Thus, there is no question in this case as to whether Mr. Perez was convicted under the deadly weapon theory of Penal Code

---

[4]For ease of reference, respondent will refer to this offense as "aggravated assault." A violation of section 240, "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another," is a simple assault. The additional element of "use of force likely to create great bodily injury" under former section 245, subdivision (a)(1) defines the felony of aggravated assault. (*Williams v. Superior Court* (2001) 92 Cal. App. 4th 612, 615, fn 2.) The alternate theory of liability under Penal Code section 245, subdivision (a)(1), will be referred to as "assault with a deadly weapon."

[5]The Court of Appeal granted the People's request to take judicial notice of selected jury instructions provided to the jury. (*People v. Perez, supra*, 3 Cal.App.5th at p. 819, fn. 4.)

section 245, subdivision (a)(1), or the "use of force by means likely to result in great bodily injury" theory, i.e., aggravated assault. (*Williams v. Superior Court* (2001) 92 Cal.App.4th 612, 624.) The record here is clear that he was convicted only of the latter.

Prior to its amendment in 2011, Penal Code section 245, subdivision (a)(1), could be proven in two distinct ways: either by committing an assault with a deadly weapon, or by committing an assault by means of force likely to result in great bodily injury. (Pen. Code, § 245, subd. (a)(1)[6]; *People v. Winters* (2001) 93 Cal.App.4th 273, 275.) A conviction under the former theory is a serious felony within the meaning of the Three Strikes Law; a conviction under the latter is not. (Pen. Code, § 1197.2, subd. (c)(31); *People v. Fox* (2014) 224 Cal.App.4th 424, 434, fn. 8; *People v. Haykel* (2002) 96 Cal.App.4th 146, 148–149; *People v. Winters* (2001) 93 Cal.App.4th 273, 280; *Williams v. Superior Court, supra*, 92 Cal.App.4th at pp. 622–624.) Similarly, a conviction for assault with a deadly weapon is an excludable offense under the Three Strikes Reform Act, and a conviction for aggravated assault, standing alone, is not. (*People v. Feyrer* (2010) 48 Cal.4th 426, 442, fn. 8; *People v. Nguyen* (2009) 46 Cal.4th 1007, 1029, fn. 1; *People*

---

[6]As noted, Penal Code section 245 has been amended since the time of respondent's conviction. Subdivision (a)(1) of that provision now applies only to an assault with a deadly weapon other than a firearm. Subdivision (a)(4) now applies to an assault by means of force likely to produce great bodily injury. Both subdivisions carry the same punishment. For ease of reference, respondent will refer to the statute as it existed at the time of his conviction.

v. Learnard (2016) 4 Cal App.5th 1117, 1121-1122, rev. gr. 2/22/2017.)[7]

Section 1192.7, subdivision (c)(31), provides that "assault with a deadly weapon, firearm, machinegun, assault weapon, or semiautomatic firearm or assault on a peace officer or firefighter, in violation of Section 245," is a serious felony. Under this statutory language, any conviction for assault with a deadly weapon under Penal Code section 245 counts as a serious felony for this purpose, without regard to whether the defendant personally used the deadly weapon. (§ 1192.7, subd. (c)(31); see also *People v. Luna* (2003) 113 Cal.App.4th 395, 398, disapproved on other grounds in *People v. Delgado* (2008) 43 Cal.4th 1059, 1070, fn. 4.) Assault "by any means of force likely to produce great bodily injury," by contrast, does not count as a serious felony unless it also involves the personal use of a deadly weapon or personal infliction of great bodily injury. (*People v. Banuelos* (2005) 130 Cal.App.4th 601, 605.) In sum, an aggravated assault, without more, is not a strike, but any assault with a deadly weapon is a strike. (*People v. Delgado, supra*, 43 Cal.4th at p. 1067, fn. 3.)[8]

---

[7]Briefing has been deferred in this case pending resolution of *People v. Gallardo*, S231260, rev. gr. 2/17/16.

[8] In the trial court, the People made light of the differences between assault with a deadly weapon and aggravated assault, claiming that the prosecutorial decision to proceed with a prosecution on only a "by means of force likely to result in great bodily injury" was insignificant, as it would not have affected the

When construing an initiative measure, and in the absence of evidence to the contrary, courts generally presume that the drafters' intent and understanding of the measure was shared by the electorate. (*Rossi v. Brown* (1995) 9 Cal.4th 688, 700, fn. 7; see also *People v. Hazelton* (1996) 14 Cal.4th 101, 123; *People v. Goodliffe, supra,* 177 Cal.App.4th at p. 731.) The drafters of Proposition 36 could have expressly included the crime of assault by means likely to produce great bodily injury as a disqualifying offense in the Reform Act. Instead, the electorate excluded only those defendants who were found to have been armed with or used a firearm or deadly weapon during the commission of another offense. The Court of Appeal thus correctly found from this clear statutory language an aggravated assault does not automatically disqualify an inmate from resentencing under the Reform Act. (*People v. Perez,* supra, 3 Cal.App.4th at p. 824; see also *People v. Haykel* (2002) 96 Cal.App.4th 146, 149; *Williams v. Superior Court, supra*, 92 Cal.App.4th 612.)

---

ultimate sentence. (RT 15.) This is, of course, incorrect, because personal use of a deadly weapon would have made the current conviction a serious felony, subjecting Mr. Perez to a five-year enhancement under Penal Code section 667, subdivision (a). Although the prosecution in this case occurred before the Three Strikes Law was amended to make any assault with a deadly weapon a strike, personal use of a deadly weapon was a serious felony at the time of the offense.

C. The Court of Appeal Erred in Holding That the Jury Verdict Necessarily Encompassed a Finding That Respondent Used the Car as a Deadly Weapon

Although the Court of Appeal was correct in concluding that a conviction for aggravated assault does not render a petitioner automatically ineligible for resentencing under the Reform Act, the court went further and held that, as a matter of law, when a defendant is convicted of using a vehicle as a means of force likely to produce great bodily injury, that defendant was "armed with a deadly weapon" within the meaning of clause (iii). (*People v. Perez, supra,* 3 Cal.App.5th at pp. 820-821.) In essence, the Court of Appeal here held that the aggravated assault of which the jury convicted Mr. Perez *necessarily* involved the use of a deadly weapon, i.e., the car, because by committing an assault by means of force likely to result in great bodily injury, he necessarily used deadly force. (*People v. Perez, supra,* 3 Cal.App.5th at pp. 820-821.)

This is not the law of assault, and it is not the law concerning use of a deadly weapon. If it were, then the crimes of aggravated assault and assault with a deadly weapon would merge, and the longstanding distinction between the two offenses would be meaningless. (See *People v. Aguilar* (1997) 16 Cal.4th 1023, 1030-1031 [noting that "force likely" language was added to section 245 in 1874 in order to encompass those aggravated assaults that did not involve a weapon extrinsic to the body, such as hands and feet].)

More importantly, the majority opinion's analysis diminishes the importance of the factual inquiry necessary to

determine whether an assault such as the one at issue in this case amounts to a disqualifying offense under clause (iii). While this factual determination does not involve the taking of new evidence and is limited to the record of conviction, the appellate courts of this state have held that a superior court considering the question of eligibility under Penal Code section 1170.126 must undertake a record-bound factual inquiry, as described by this court in *People v. Guerrero* (1988) 44 Cal.3d 343 and *People v. Woodell* (1998) 17 Cal.4th 448. (See *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1337-1339.)[9]

Respondent does not disagree, of course, that under some circumstances an automobile may be used as a deadly weapon and may thus disqualify a petitioner from resentencing under Penal Code section 1170.126. But because a car can also be used – even in the commission of a crime – in ways that do not render it a "deadly weapon" under the law, the question of whether a car so qualifies is always dependent upon the circumstances of the individual case. (Cf. *People v. Perez, supra,* 3 Cal.App.5th at pp. 834-836, dis. opn. of Franson, J.)

For instance, in *People v. Oehmigen* (2014) 232 Cal.App.4th 1, the Third District found that a petitioner was not eligible for resentencing because the factual recitation at the time he entered

---

[9]This court is currently considering the question of the standard of proof to be applied at such a hearing. (*People v. Frierson* (2016) 1 Cal.App.5th 788, review granted 10/19/2016 (S236728/B260774); see *People v. Arevalo* (2016) 244 Cal.App.4th 836; cf. *People v. Osuna* (2014) 225 Cal.App.4th 1020.)

his 1998 plea established that he was armed with a deadly weapon when he purposefully drove a car at a police vehicle. (*People v. Oehmigen, supra,* 232 Cal.App.4th at p. 11.) *Oehmigen* is both factually and legally indistinguishable from the instant case. There, the defendant pleaded guilty to assault by means likely to result in great bodily injury, and the factual basis agreed upon at the time of the plea stated that he had stolen a car, driven it in a reckless manner for several miles with police in pursuit, and at the end of the pursuit, he turned the car around and intentionally drove it at one of the police cars, which had to make an evasive maneuver to avoid a collision. The defendant then crashed into a house, and police found a small-bore pistol in the vicinity of the car, and three pipe bombs in the car. (*Id.* at p. 5.)

The trial court found the defendant ineligible for resentencing because he was armed with multiple deadly weapons (the car, pistol, and the pipe bombs) and further because he had the intent to inflict great bodily injury on his pursuers. (*People v. Oehmigen, supra,* 232 Cal.App.4th at p. 6.) The Court of Appeal found that, at minimum, the record of conviction supported the trial court's finding in regard to the use of a car as a deadly weapon. (*Id.* at p. 11.) Notably, in *Oemigen* there was no question of the defendant's intent to use the car as a deadly weapon.

Oehmigen relied in part on the Third District's earlier holding in *People v. Wright* (2002) 100 Cal.App.4th 703, in which the court held that "any operation of a vehicle by a person knowing facts that would lead a reasonable person to realize a

battery will probably and directly result may be charged as an assault with a deadly weapon." (*People v. Wright, supra,* 100 Cal.App.4th at p. 706.) The court in *Wright* based this holding on this court's decision in *People v. Williams* (2001) 26 Cal.4th 779 permitting a conviction of assault where the defendant's conduct is merely negligent rather than purposeful. (*People v. Williams, supra,* 26 Cal.4th at p. 790.) The defendant in *Wright* had argued that because his intent was only to use the car to intimidate the victim, rather than to actually use the car as a deadly weapon, his conduct amounted to no more than reckless driving. (*People v. Wright, supra,* 100 Cal.App.4th at p. 705.) The court rejected this argument. (*Ibid.*) The question before the court in *Wright*, however, was the necessary mental state for *assault*; the court did not consider the question of whether the car was employed as a deadly weapon. (*Id.* at pp. 711-717.)

The court in *People v. Aznavoleh* (2012) 210 Cal.App.4th 1181 likewise relied on *Williams* in finding that a defendant was properly convicted of assault with a deadly weapon where he deliberately ran a red light while racing another vehicle on a busy city street, was repeatedly told to slow down by his passengers, and saw another vehicle in the intersection as he approached the but made no effort to stop, slow down, or otherwise avoid a collision. (*People v. Aznavoleh, supra,* 210 Cal.App.4th at pp. 1183-1184.) The court found that, based on this evidence and the negligence standard adopted by this court in *Williams*, the jury could properly find that the defendant was guilty of assault with a

deadly weapon. (*People v. Aznavoleh, supra,* 210 Cal.App.4th at p. 1189.) The court noted that, under California law, "assault does *not* require intent to commit a battery." (*Id.* at p. 1188, italics in original.)

This court has held that "a defendant may commit an assault without realizing he is harming the victim, but the prosecution must prove the defendant was aware of facts that would lead a reasonable person to realize that a battery would directly, naturally, and probably result from the defendant's conduct." (*People v. Wyatt* (2010) 48 Cal.4th 776, 779.) A defendant "who honestly believes that his act was not likely to result in a battery is still guilty of assault if a reasonable person, viewing the facts known to defendant, would find that the act would directly, naturally and probably result in a battery." (*People v. Williams, supra,* 26 Cal.4th at p. 788, fn. 3.)

In order to prove that a defendant is armed with a deadly weapon, however, the People must either prove that the weapon was one that was inherently dangerous or deadly, or prove that the defendant intended to or in fact did use the instrument as a deadly or dangerous weapon. This requires a proof of intent that is not required, and here was not pleaded or proven or otherwise established by the evidence, in a case of aggravated assault.

Two categories of instruments have been found to be "deadly weapons." The first includes any object that is inherently dangerous or deadly, such as a firearm, a dirk, or a dagger. These instruments are considered to be weapons as a matter of law. The

instrumentalities falling into the second class, such as pocket knives, canes, hammers, hatchets and other sharp or heavy objects, "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.'" (*People v. Graham, supra*, 71 Cal. 2d at pp. 327-328, disapproved on other grounds in *People v. Ray* (1975) 14 Cal.3d 20, 30; see also *People v. Brown, supra*, 210 Cal.App.4th at p. 10; *People v. Raleigh, supra, 128* Cal.App. 105, 108-109.)

For the latter type of weapon, the question of whether the item is a deadly or dangerous weapon turns upon the perpetrator's intent. "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." (*People v. Graham, supra*, 71 Cal.2d at p. 327.) "When it appears [...] that an instrumentality other than one falling within the first 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." (*People v. Raleigh, supra,* 128 Cal.App. at pp. 108-109.)

Thus, in order to prove that a defendant is "armed with" an instrument that is not inherently dangerous or deadly, the People

must prove that the defendant intended to use it as a weapon. The evidence must demonstrate that the defendant intended to use the instrument as a weapon and not for some other purpose. (*People v. McCoy* (1944) 25 Cal.2d 177, 188-189; *People v. Moran* (1973) 33 Cal.App.3d 724, 730.) The defendant must know that the object is a weapon and must possess it as a weapon. (Cf. *People v. Gaitan* (2001) 92 Cal.App.4th 540, 547.)[10] Consequently, objects such as hammers, screwdrivers, or trucks are not deadly weapons unless the evidence establishes that the possessor intended to use them as such. (*People v. Brown, supra*, 210 Cal.App.4th at p. 7.) The question of whether an instrument that is not inherently dangerous is possessed as a deadly weapon is a mixed question of law and fact. (*People v. McCoy, supra,* 25 Cal.2d at p. 188.)

Aggravated assault, by contrast, may be proven without any requirement that the defendant intended to cause harm, i.e., to use an instrument as a deadly weapon. (*People v. Williams, supra,* 26 Cal.4th at p. 788, fn. 3.) Because this element of arming was not presented to or found true by the jury, the court could not find

---

[10]Cases discussing the definition of a deadly weapon routinely rely on other cases dealing with different statutes. (E.g., *People v. Aguilar, supra*, 16 Cal.4th at p. 1029 [addressing Pen. Code, § 245], citing *People v. Graham, supra*, 71 Cal.2d at p. 327 [dealing with former Pen. Code, § 211a].) Absent a specific statutory definition, "no sound reason appears to define a 'deadly weapon' for purposes of section 245 differently than it is defined in other contexts under other statutes." (*People v. Page* (2004) 123 Cal.App.4th 1466, 1472, citing *People v. Lochtefeld* (2000) 77 Cal.App.4th 533, 540; see also *People v. Brookins* (1989) 215 Cal. App. 3d 1297, 1305–1307.)

respondent ineligible unless the record of conviction established that he intended to or in fact did use the car as a deadly weapon. Code section 1170.126.

Respondent has found no published authority that conclusively answers the difficult question presented by the facts of this case: whether a defendant may be said to have been "armed" with a deadly weapon where the weapon in question is a vehicle, and the evidence on the record supports a conclusion that the defendant did not intend to use that vehicle as a weapon. Moreover, respondent has found no cases in which an assault with a deadly weapon was established in a case involving a noninherently dangerous object *and* a negligent, as opposed to intentional, assault. (Cf. *People v. Williams, supra*, 26 Cal.4th at p. 790.) In spite of the Court of Appeal's conclusion that no proof of intent to use an object as a deadly weapon is required in order to show that a petitioner was "armed with" a deadly weapon, this conclusion flies in the face of simple logic, as it leads to the absurd result that any person who drives a car is armed with a deadly weapon. Moreover, a review of other cases addressing what proof is needed for an object that is not inherently dangerous to be considered a deadly weapon reveals that, in virtually every case, the defendant's intent – whether to commit a battery, or to use the object as a deadly weapon – was clearly established.

In *People v. Bradford, supra*, 227 Cal.App.4th 1322, the Court of Appeal reversed an order denying a petition to recall a sentence under Penal Code section 1170.126 because the record of

conviction did not establish that the petitioner had been armed with a deadly weapon. Specifically, the reviewing court found that the petitioner's possession of wire cutters was insufficient where the record failed to show his *purpose* in carrying the wire cutters, i.e., whether he intended to use them as a deadly weapon. (*People v. Bradford, supra,* 227 Cal.App.4th at pp. 1331-1332.) Although the court did not use the word "intent" in describing the insufficiency, it was clearly the petitioner's mental state – his intent – that was the missing element in that case.

The majority opinion below declined to follow *Bradford* and instead held that intent to use the vehicle as a deadly weapon is not necessary. (*People v. Perez, supra,* 3 Cal.App.5th at pp. 826-827.) The majority cited the holding in *In re D.T.* (2015) 237 Cal.App.4th 693, where the court found that the People did not need to prove that a minor intended to use a knife as a deadly weapon in order to obtain show that the minor had committed assault with a deadly weapon. (*In re. D.T., supra,* 237 Cal.App.4th at p. 702.) *In re D.T.* is both legally and factually distinguishable, however, in that the facts there involved an intentional battery, not a negligent assault.

The minor in *D.T.* grabbed another minor who was trying to avoid him, and while still restraining her, displayed an open pocketknife, and poked the other minor several times in the back with the open knife, causing pain. (*In re. D.T., supra,* 237 Cal.App.4th at p. 696.) The blade of the knife was more than two and a half inches long, with a sharp edge and a pointed tip. (*Id.* at

p. 697.) The juvenile court sustained a wardship petition after finding true an allegation that the minor had committed an assault with a deadly weapon. (*Id.* at p. 696.)

The appellate court affirmed, rejecting the minor's argument that the evidence did not support the adjudication for assault with a deadly weapon, because the knife was unlikely to cause death or great bodily injury as he used it, and because he did not intend to use it as a deadly weapon. (*In re D.T., supra,* 237 Cal.App.4th at p. 698.) At the outset, the court discounted the arguments that the minor had only intended to annoy or tease the victim, or that the knife was not capable of causing great bodily injury or dath. (*Id.* at p. 699-701.) The court went on to reject the minor's claim that the prosecution had failed to prove that he *intended* to use the knife as a deadly weapon, holding that such intent is not a necessary element of assault with a deadly weapon. (*Id.* at p. 702.)

The minor in *D.T.* relied on language from *People v. Page* (2004) 123 Cal.App.4th 1466, another case from the same court, which cited *Graham* and *Raleigh* for the proposition that an object that is not inherently dangerous or deadly may nonetheless be a deadly weapon depending on the perpetrator's intent. (*People v. Page, supra*, 123 Cal.App.4th at p. 1471.) In *Page,* an accomplice held a pencil to the victim's neck and threatened to stab him with it. The appellate court upheld the conviction for assault with a deadly weapon on the ground that the accomplice had used the pencil as a deadly weapon: "Certainly she was not threatening to

write a note with it! She was not threatening that, if the victim involved the police, she would break his pencil; she was threatening to stab him with it. She viewed it, at that moment, as an instrument of great bodily injury or death." (*Id.* at p. 1473.)

The court in *In re D.T.* clarified its prior holding in *Page* by noting that, while the perpetrator's intent was one method of showing that an object qualified as a deadly weapon, the prosecution was not required to prove such intent in every case. (*In re D.T., supra,* 237 Cal.App.4th at p. 702.) Notably, however, the minor in *D.T.* did not deny that he had harbored the intent to commit a *battery*. (*Ibid.*) Nor was there any real question that the minor had intended to use the knife as a weapon, regardless of its dangerous or deadly character. (*In re D.T., supra,* 237 Cal.App.4th at p. 700.)

The inquiry in the instant case is complicated by the fact that the car was not the "sole instrumentality" involved in the assault. It was the movement of the car *in combination with* the passenger's grabbing of the store clerk's arm that resulted in the assault. Petitioner's driving of the vehicle alone, at a low speed and not aiming to strike the store clerk, would not have resulted in an assault. The attempted escape only became an assault due to the action of the passenger.

As noted, this court has held that assault does not require a specific intent to cause injury or even a subjective awareness of the risk that an injury might occur. (*People v. Williams, supra,* 26 Cal.4th at p. 790.) Assault requires only "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." (*Ibid.*) Under this standard, the facts of the case could be sufficient to establish respondent's guilt for aggravated assault so long as he knew or should have known that the passenger was holding onto the clerk's arm when respondent made his attempt to escape. (RT 17.) But absent an intent to use of the car as a deadly or dangerous weapon, he was not ineligible for recall of his sentence.

To borrow an analogy employed by the prosecutor during arguments in the trial court, the Club anti-theft device stolen from the store was, like the vehicle, an object that was not an inherently dangerous weapon, but one that certainly could have been employed in that fashion. (See *People v. Perez, supra*, 3 Cal.App.5th at pp. 834-835, dis. opn. of Franson, J.) Had petitioner intentionally struck the store clerk with the Club, clearly he would have been guilty with assault with a deadly weapon. On the other hand, had petitioner been running away while holding onto the Club, and had the pursuing store clerk tripped and struck his head on the Club in petitioner's hand, respondent might still have been guilty of aggravated assault under the negligence theory articulated in *People v. Williams.* (See RT 12.) He would not, however, have been guilty of assault with a deadly weapon, absent an established intent to use the Club as a weapon.

The question of whether Mr. Perez used a deadly weapon in the commission of the offense was one that was not found true by the jury and not established as a matter of law by his conviction. Thus, the appellate court erred in reversing the order granting his petition to recall his sentence.

II.

THE COURT OF APPEAL INCORRECTLY APPLIED THE STANDARD OF REVIEW AND FAILED TO ACCORD PROPER DEFERENCE TO THE FINDINGS OF THE TRIAL COURT

Following extensive argument and discussion, the trial court found Mr. Perez eligible for relief under Penal Code section 1170.126 "based on the method in which the motor vehicle was used." (CT 967.) As noted, in reversing this holding, the majority framed the question as an issue of law, rather than an issue involving findings of fact, and accordingly failed to defer to the trial court's factual determinations. (See *People v. Perez* (2016) 3 Cal.App.5th 812, 835-836, dis. opn. of Franson, J.) Respondent respectfully requests that this court reverse the majority opinion below and reinstate the order granting his petition to recall his sentence.

As has already been discussed, in order for Mr. Perez to have been "armed with" the vehicle so as to render him ineligible for relief under Penal Code section 1170.126, the record of conviction would have to have shown that he *intended to use* the vehicle in that fashion. The trial court, however, made express findings that this was not Mr. Perez's intent. The court instead found that Mr. Perez's use of the vehicle was "incidental" and that his intent in driving the car was simply to escape. (RT 12, 17, 22.)

Contrary to the holding in the majority opinion, then, the intent element was not necessarily established by the jury verdict on the underlying offense, and the trial court, upon reviewing the

facts, simply found as a factual matter that Mr. Perez was not so armed. The reviewing court should have deferred to those factual findings and affirmed the judgment.

A. A Reviewing Court Should Uphold the Factual Findings of a Court Determining a Petitioner's Eligibility under Penal Code Section 1170.126 if Those Findings Are Supported by Substantial Evidence.

As Justice Franson emphasized in his dissenting opinion, "The trial court's underlying factual determination that Mr. Perez was eligible for resentencing is reviewed on appeal for substantial evidence." (*People v. Perez, supra*, 3 Cal.App.5th at p. 833, dis. opn. of Franson, J.; see also *People v. Bradford, supra*, 227 Cal.App.4th at p. 1331; 3 Witkin & Epstein, Cal. Criminal Law (4th ed. 2016 supp.) Punishment, § 421C, p. 128.) The appellate court's role is to review the correctness of the challenged ruling, not the propriety of the analysis used to reach that ruling. If the trial court's ruling was correct 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. (*People v. Perez, supra*, 3 Cal.App.5th at p. 833, dis. opn. of Franson, J.; see also *People v. Hughes* (2012) 202 Cal.App.4th 1473, 1481.)

Thus far, the intermediate appellate courts considering eligibility determinations under Penal Code section 1170.126 have uniformly held that the determination of whether a petitioner is excludable due to the nature of the current conviction must be determined by the trial court from the record of conviction. (*People*

v. White (2014) 228 Cal.App.4th 1040, 1044; *People v. Bradford, supra,* 227 Cal.App.4th at pp. 1331-1332; *People v. Elder* (2014) 227 Cal.App.4th 1308, 1314-1316; *People v. Hicks* (2014) 231 Cal.App.4th 275, 285; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1063.) An appellate court reviews those findings for substantial evidence. (*People v. Hicks, supra,* 231 Cal.App.4th at p. 286.)

This case is noteworthy because all three justices on the Court of Appeal panel wrote separate opinions, and each of those opinions, explicitly or implicitly, apply a different standard of review. The majority opinion, authored by Justice Detjen, identifies the central issue as a question of law, and accordingly applies a de novo standard to evaluating the trial court's reasoning. (*People v. Perez, supra*, 3 Cal.App.5th at pp. 821-825.) The central holding of the majority opinion is that, in convicting Mr. Perez of assault by means of force likely to produce great bodily injury, the jury necessarily found that the force used by respondent in assaulting the store clerk, was likely to produce great bodily injury, and that since "[t]he sole means by which defendant applied this force was the vehicle he was driving," the record of conviction therefore established that he used the vehicle in a manner capable of producing, and likely to produce, great bodily injury – that is, as a deadly weapon. (*People v. Perez, supra*, 3 Cal.App.5th at p. 825.)

The majority opinion purports to review the factual findings of the trial court, holding that even under the deferential

substantial evidence standard of review, the record of conviction did not support the trial court's finding that the use of the vehicle was "incidental." (*Ibid.*) However, the court's analysis begins with the assumption that the trial judge's findings actually contradicted the findings of the jury. (*People v. Perez, supra,* 3 Cal.App.5th at p. 825, fn. 14.) In other words, the majority opinion's deferential review of the trial court's fact finding is circumscribed by the majority's conclusion that, as a matter of law, the jury verdict necessarily included a finding that Mr. Perez had used or been armed with a deadly weapon in the commission of the offense. (*Id.* at p. 825.)

Justice Franson's dissenting opinion rejects the majority's conclusion that the lower court's factual findings had contradicted the jury verdict. (*People v. Perez, supra*, 3 Cal.App.5th at p. 835, dis. opn. of Franson, J.) Instead, the dissent emphasizes the lower court's careful examination of the evidence and clear knowledge of the dictates of the Reform Act. (*Ibid.*) Justice Franson accordingly applies a deferential standard of review, and concludes that substantial evidence supported the trial court's determination that Mr. Perez's use of the vehicle was not a deadly weapon within the meaning of clause (iii). (*Id.* at p. 837.)

The concurring opinion, by Justice Poochigian, does not address the standard of review. Instead, the concurrence focuses entirely on a review of the facts, particularly the available facts regarding the speed of the car. Justice Poochigian prefaces his review of the factual record by noting that, in the instant 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." (*People v. Perez, supra*, 3 Cal.App.5th at p. 829, conc. opn. of Poochigian, J.) The concurring opinion then presents a thorough review of the discussion of the speed of the vehicle, noting that under the circumstances, "the speed suggested by the victim's testimony seems questionable." (*Ibid.*) Nonetheless, the concurring opinion concludes that, in spite of the author's misgivings about the accuracy of the testimony, "I am satisfied with the conclusion that the vehicle was employed as a deadly weapon – thus rendering the defendant ineligible for resentencing." (*Id.* at p. 830, conc. opn. of Poochigian, J.)

Of the three analyses, only Justice Franson's applies the proper standard. The majority opinion is premised upon an incorrect analysis of the law, an analysis that circumscribed its deference to the lower court's fact finding, since in the view of the majority that fact finding contradicted the jury verdict. (*People v. Perez, supra*, 3 Cal.App.5th at p. 825.) Justice Poochigian, while clearly troubled by the facts of the case, undertook what amounted to a de novo review of those facts rather than deferring to the trial court's findings. (*People v. Perez, supra*, 3 Cal.App.5th at p. 829, conc. opn. of Poochigian, J.) Only Justice Franson applied to the correct standard of review: to uphold the factual findings of the lower court so long as those findings were supported by

substantial evidence. (*People v. Perez, supra*, 3 Cal.App.5th at p. 837, dis. opn. of Franson, J.)

The factual determination of whether a petitioner's current offense was committed under circumstances that disqualify him or her from resentencing under the Reform Act has been found to be analogous to the factual determination of whether a prior conviction was for a serious or violent felony under the three strikes law. Such factual determinations about prior convictions are made by the court based on the record of conviction. (*People v. Hicks, supra*, 231 Cal.App.4th at p. 286; see also *People v. Guerrero, supra*, 44 Cal.3d at p. 355 [in determining facts underlying prior convictions, court may look to entire record of conviction].)

In *People v. Bradford*, as previously discussed, the court reversed a trial court's finding that a petitioner was ineligible for resentencing under Penal Code section 1170.126, concluding that the lower court's finding was not supported by sufficient evidence. (*People v. Bradford, supra*, 227 Cal.App.4th at p. 1331.) The court held that the statute requires a factual determination by the trial court as to whether the petitioner was armed with a deadly weapon during the commission of the offense. (*Id.* at pp. 1331-1332.) The petitioner in *Bradford* had been convicted of three counts of second degree burglary and four counts of petty theft with a prior. (*Id.* at p. 1327.) The jury had acquitted him of robbery, and no deadly weapon allegation was found true. (*Ibid.*) The facts on the record of conviction indicated that the petitioner

had been found with a pair of wire cutters in his pocket and had threatened a store employee during one of the incidents, but he did not display any weapon and did not actually attack the employee. (*Ibid.*)

The court found that the factual determination contemplated by section 1170.126 must be made solely on the basis of the record of conviction. (*People v. Bradford, supra*, 227 Cal.App.4th at p. 1331.) Further, the court found that the evidence was insufficient to support the trial court's conclusion. (*Ibid.*) Rather than reversing the issue outright, however, the court remanded the matter to permit the parties to brief the issue of whether petitioner's possession of wire cutters constituted being armed with a deadly weapon. (*Id.* at p. 1341.)

Here, as noted, the abstract of judgment lists the offense of which respondent was convicted as "assault by means of force likely to produce GBI." (CT 6.) Moreover, the jury was instructed only on the theory of "by means of force likely to produce great bodily injury." (*People v. Perez, supra,* 3 Cal.App.5th at p. 819, fn. 4.) In considering the petition, the court reviewed the facts and circumstances of the case (RT 11-12) and found that they did not support a finding of ineligibility. (RT 12.) The court described the use of the motor vehicle as "incidental." (RT 12.) The court opined that, as Mr. Perez sat in his car outside of the auto parts store, he was not "armed" simply because an automobile can be used as a deadly weapon. (RT 22.) The court ultimately found that Mr.

Perez was not ineligible "due to the method in which the motor vehicle was used in this case." (RT 26.)

Unlike the scenarios confronted by the court in *People v. Martinez* (2014) 225 Cal.App.4th 979 and *People v. Cervantes* (2014) 225 Cal.App.4th 1007, the trial court here did not purport to make its finding as a matter of law, but rather as one of fact. A reviewing court should not disturb the trial court's factual findings unless they are not supported by substantial evidence. (See *People v. Hicks, supra,* 231 Cal.App.4th at p. 286.)

In *Martinez* and *Cervantes,* the judge found that a defendant who only constructively possesses a firearm, rather than actually possessing a firearm, is not excluded from relief under the Three Strikes Reform Act. (*People v. Cervantes, supra,* 225 Cal.App.4th at p. 1012; *People v. Martinez, supra,* 225 Cal.App.4th at p. 986.) In each of those cases, the court found that the trial court exceeded its statutory power in finding the defendant eligible for resentencing. (*People v. Martinez, supra,* 225 Cal.App.4th at p. 989; cf. *People v. Cervantes, supra,* 225 Cal.App.4th at p. 1018.)

Here, by contrast, the trial court found that Mr. Perez's "incidental" use of the car to effect a getaway from the auto store did not amount to being "armed with a deadly weapon" within the meaning of Penal Code section 1170.12, subdivision (c)(2)(C)(iii). As the dissenting justice emphasized, "The trial court reviewed and weighed the facts, including the credibility of the estimated speeds and length of time for the incident and determined, based on *its review and interpretation* of the facts, that the method used

by Mr. Perez in maneuvering his car to depart the scene did not convert an object otherwise not inherently a deadly weapon, into one." (*People v. Perez, supra*, 3 Cal.App.5th at p. 835, dis. opn. of Franson, J, emphasis in original.) Based on this *factual determination*, the superior court reached the *legal conclusion* that Mr. Perez was neither armed with nor used a deadly weapon, and was therefore eligible for resentencing. (*Ibid.*) Justice Franson concluded: "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." (*Ibid.*) In other words, the trial court's finding necessarily involved a factual finding, and the Court of Appeal should have deferred to that finding to the extent that it was supported by substantial evidence.

B. The Trial Court's Finding That Mr. Perez Was Not Armed Was Supported by Substantial Evidence.

As noted, because Mr. Perez was not charged with use of a deadly weapon, the question of his intent was not settled by the jury. The trial court made a factual finding that his use of the car was "incidental" and that, as he sat in the parking lot, Mr. Perez was not "armed with" a deadly weapon. (RT 12, 22.) The evidence, as summarized in the opinion from his prior appeal, supports this conclusion: Mr. Perez's intent was to get away from the store, and while he may have acted with recklessness or negligence that would support an aggravated assault charge (*People v. Williams, supra,* 26 Cal.4th at p. 788, fn. 3), no evidence suggested that he

harbored the necessary intent to use the car as a deadly weapon should the need arise. (*People v. Brown, supra*, 210 Cal.App.4th at p. 7.) The court ultimately found that Mr. Perez was not ineligible "due to the method in which the motor vehicle was used in this case." (RT 26.)

In other words, the court found that he did not possess the car with the intent to use it as a deadly weapon, and was thus not armed with a deadly weapon within the meaning of the Reform Act. In sum, the question of whether Mr. Perez was armed with a deadly weapon was never presented to the first trier of fact, the jury. The second trier of fact, the court reviewing the petition to recall the sentence, conclusively found that Mr. Perez was not so armed.

The Court of Appeal should have deferred to this ruling, as even the concurring justice noted that the evidence supported an inference that Mr. Perez did not intentionally use the vehicle to inflict injury, but rather simply to escape. (*People v. Perez, supra*, 3 Cal.App.5th at p. 829, conc. opn. of Poochigian, J.) Justice Franson, writing in dissent, unequivocally found that the record supported the findings of the trial judge. (*People v. Perez, supra*, 3 Cal.App.5th at p. 835, dis. opn. of Franson, J.)

Both of these justices focused particularly on the summation of the testimony regarding the vehicle's speed. Justice Poochigian addressed this issue at length, noting the distances and times at issue and noting that, given that the store clerk was able to run alongside the car, "the speed suggested by the victim's testimony

seems questionable." (*People v. Perez, supra*, 3 Cal.App.5th at p. 829, conc. opn. of Poochigian, J.) Justice Poochigian suggested that this inherent unreliability that may have affected the trial court's conclusion that the victim was "dragged slightly." (*Ibid.*)

Justice Franson likewise found the testimony regarding the vehicle's speed to be not credible, noting the victim's lack of injuries and his ability to run alongside the car: "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." (*People v. Perez, supra*, 3 Cal.App.5th at p. 836, dis. opn. of Franson, J.)

The dissent went through the facts from the record of conviction that supported the lower court's findings: "Here, the record does not show Mr. 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." (*People v. Perez, supra*, 3 Cal.App.5th at p. 836, dis. opn. of Franson, J.) Instead, the dissent concluded that, based on the evidence showing that Mr. Perez attempted to make a low speed escape while the passenger hung on to the store clerk's arm, substantial evidence supported the trial court's determination that Mr. Perez's use of the vehicle was not a deadly weapon within the meaning of the use of a deadly weapon exclusions. (*Id.* at p. 837.)

Respondent does not dispute that this is a scenario in which reasonable minds could differ. Indeed, reasonable minds *did* differ: three appellate justices reviewed the same record of

conviction and reached three separate conclusions. But the finder of fact, as dictated by the procedures of the Three Strikes Reform Act, was the superior court judge. Neither the Reform Act nor established principles of appellate review provide for de novo review of findings of fact. The Court of Appeal should have deferred to the lower court's findings, as those findings were supported by substantial evidence.

Respondent thus respectfully requests that this court reverse the holding of the Court of Appeal, and reinstate the order granting his petition to reccall his sentence.

III.

Had the Court Found Mr. Perez Ineligible for Relief Based on Facts Not Found True by the Jury, It Would Have Deprived Him of His Right to a Jury Trial under the Sixth and Fourteenth Amendments to the United States Constitution

As explained above, when a previously sentenced third-strike defendant applies for relief, the Reform Act vests the trial court with the responsibility to determine whether he or she met the criteria for sentencing as a second-strike offender. (Pen. Code § 1170.126, subd. (f).) This includes a determination of whether the defendant's current offense is serious or violent. (Pen. Code § 1170.126, subd. (e).) If the defendant meets the criteria for relief, the defendant is to be resentenced, unless the trial court finds he poses an unreasonable risk for public safety. (Pen. Code § 1170.126, subd. (f).)

The Court of Appeal's reweighing of the evidence here and consideration of "extra facts" outside the fact of conviction effectively deprive Mr. Perez of liberty without trial by jury. Because the jury in this case did not find Mr. Perez guilty of assault with a deadly weapon, or return a true finding on any weapon or arming allegation, the court did not have the power to find him ineligible for relief under the Reform Act.

On June 17, 2013, the United States Supreme Court decided *Alleyne v. United States* (2013) 570 U.S.___ [133 S.Ct. 2151; 186 L. Ed. 2d 314), overruling *Harris v. United States* (2002) 536 U.S. 466 [122 S.Ct. 2406; 153 L. Ed. 2d 524] and holding that a fact

which triggers a mandatory minimum in federal sentencing and increased the floor of a proscribed sentence is tantamount to an element of an offense and must be submitted to the jury and proven beyond a reasonable doubt. (*Alleyne v. United States, supra*, 133 S.Ct. at p. 2164.)

The principles outlined in *Alleyne* govern the proceedings in the present case. Once the electorate approved Proposition 36 and evinced an intent for those who petition within a two-year period to be sentenced as second-strikers if their third strike was not violent or dangerous, as defined, the Court of Appeal could not make an extra facts determination and deny Mr. Perez that opportunity without violating his right to a jury trial under the Sixth and Fourteenth Amendments to the United States Constitution.

In the instant case, the Court of Appeal opinion reverses the determinate term of ten years imposed by the trial court, and requires reimposition of the term of 27 years to life. Thus, the court's ruling deprives Mr. Perez of a vast liberty interest. The United States Supreme Court has consistently held that facts which subject a defendant to an increased term must be pleaded and proved to a jury beyond a reasonable doubt. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348; 147 L.Ed.2d 435].)

In *Harris v. United States, supra*, 536 U.S. 545, the court held that the Sixth Amendment permitted judicial fact-finding that triggered a mandatory minimum sentence. The *Harris* court

determined that the statute authorized the trial court to imposed the higher minimum term because it fell within the statutory range permitted by the jury verdict and accordingly, judicial fact-finding did not offend the Constitution. (*Harris v. United States, supra*, 536 U.S. at p. 567.)

In *Alleyne*, the court reconsidered and overruled *Harris*. The defendant in that case was convicted of robbery and using or carrying a firearm in relation to a crime of violence, but the jury did not indicate on the verdict form whether the firearm was "brandished." (*Alleyne v. United States, supra*, 133 S.Ct. at p. 2156.) The federal firearm statute carried a five year minimum term for "use" and a seven year minimum term for "brandishing". (18 U.S.C. § 924(c)(1)(A).) The presentence report recommended the seven year minimum term for brandishing, and overruling the defendant's *Apprendi* objection, the trial court imposed the seven year term. Holding that *Harris* had been wrongly decided, the United States Supreme Court held that an extra fact was an element of the crime if it either increased the floor or ceiling of the sentence to which the defendant was subjected: "Both kinds of facts alter the prescribed range of sentences to which a defendant is exposed and so in a manner that aggravates the punishment. [Citations.]" (*Alleyne v. United States, supra*, 133 S.Ct. at p. 2158.)

In *Alleyne*, brandishing was an element because it aggravated the legally prescribed range of allowable sentences and had to be "found by a jury, regardless of what sentence the defendant might have received, if a different range had been

applicable." (*Alleyne v. United States, supra,* 133 S.Ct. at pp. 2162-2163.) The high court vacated Alleyne's sentence and remanded the matter for resentencing consistent with the jury verdict. (*Ibid.*)

In the present case, Mr. Perez was entitled to resentencing as a second-strike offender because there was no jury finding beyond a reasonable doubt that he was armed with a deadly weapon at the time of the offense. Had the trial court made such a finding, it would have violated Mr. Perez's Sixth and Fourteenth Amendment rights. In substituting its own extra facts determination for the judgment of the jury, the Court of Appeal in its turn deprived Mr. Perez of his rights under the Sixth and Fourteenth Amendments.

Respondent acknowledges that numerous cases have disagreed with this argument, following *People v. Kaulick* (2013) 215 Cal.App.4th 1279. The analysis in *Kaulick* relies on a United States Supreme Court case interpreting a statute that is fundamentally different from the Reform Act. The *Kaulick* court relied on *Dillon v. United States* (2010) 560 U.S. 817 [130 S.Ct. 2683; 177 L.Ed.2d 271], which considered whether a reduction in the federal sentencing guidelines should benefit previously sentenced prisoners. The *Dillon* court held that a statute that vests a court with discretion to make only limited sentencing modifications does not necessarily implicate Sixth Amendment restrictions on judicial fact-finding. (*Dillon v. United States, supra,* 560 U.S. at p. 828.)

Unlike the Reform Act, the statute at issue in *Dillon* did not establish a presumption for resentencing. Instead, it provided for resentencing at the court's discretion. (*Dillon v. United States, supra*, 560 U.S. at pp. 820-821; see also 18 U.S.C. § 3582, subd. (2) [court "may" resentence].) By contrast, Penal Code section 1170.126 creates a mandatory reduction in sentence when certain criteria are met. Thus the Reform Act, unlike the statute at issue in *Dillon*, does not provide the court with limited discretion to modify an existing sentence; it requires that the sentence be reduced absent additional findings.

The decision in *People v. Hicks, supra*, 231 Cal.App.4th 275 is distinguishable. In *Hicks*, the court found that the factual determination of whether the felon-in-possession offense was committed under circumstances that disqualify a defendant from resentencing under the Act is analogous to the factual determination of whether a prior conviction was for a serious or violent felony under the three strikes law. Such factual determinations about prior convictions are made by the court based on the record of conviction. (*People v. Hicks, supra*, 231 Cal.App.4th at p. 286, citing *People v. Guerrero, supra,* 44 Cal.3d at p. 355; *People v. Woodell, supra,* 17 Cal.4th at p. 456.)[11] The

---

[11]This court is currently considering whether, under *Descamps v. United States* (2013) 570 U.S. __ [133 S.Ct. 2276; 186 L.Ed.2d 438], a court may engage in judicial fact-finding beyond the elements of the offense in determining a prior conviction constitutes a strike. (*People v. Gallardo* (Nov. 16, 2015, B257357) [nonpub. opn.], review granted 2/17/2016 (S231260).)

record of conviction in the instant case, however, does not exclude Mr. Perez from eligibility under Penal Code section 1170.126. He was not convicted of an excludable offense. Only by finding extra facts outside of the jury verdict could the court have found Mr. Perez ineligible at the outset.

The appellate courts have uniformly erred in misconstruing the intent of the voters and depriving petitioners of their rights under *Apprendi* and its progeny. That collective judicial error has led inexorably to the instant case, where the judicial fact finding took place at the appellate level after the trial court had granted relief. In sum, Mr. Perez's conviction did not render him ineligible for relief under Penal Code section 1170.126. Under this circumstance, the Court of Appeal's ruling was prejudicial and deprived him of his right to relief under the Reform Act. Respondent respectfully requests that this court reverse the Court of Appeal opinion and reinstate the order granting his request to recall his sentence.

CONCLUSION

For the foregoing reasons, respondent requests that this court reverse the Court of Appeal's holding and affirm the order recalling his sentence.

Dated: March 9, 2017 Respectfully submitted,

____

ELIZABETH CAMPBELL
Attorney at Law
State Bar No. 166960
PMB 334
3104 O Street
Sacramento, CA 95816
(530) 786-4108

Attorney for Respondent

CERTIFICATE OF WORD COUNT

As required by California Rules of Court, Rule 8.504(d)(1), I certify that this petition contains 11,781 words, as determined by the word processing program used to create it.

____

Elizabeth Campbell
Attorney at Law

DECLARATION OF SERVICE

I, the undersigned, declare as follows:

I am a member of the State Bar of California and a citizen of the United States. I am over the age of 18 years and not a party to the within-entitled cause; my business address is PMB 334, 3104 O Street, Sacramento, California, 95816.

On March 9, 2017, I served the attached

RESPONDENT'S OPENING BRIEF ON THE MERITS

(by mail) - by placing a true copy thereof in an envelope addressed to the person(s) named below at the address(es) shown, and by sealing and depositing said envelope in the United States Mail at Sacramento, California, with postage thereon fully prepaid. There is delivery service by United States Mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed.

Alfredo Perez, Jr. Respondent 843 12th Street Sanger, CA 93657	Fresno County Superior Court 1100 Van Ness Avenue Fresno, CA 93724

(by electronic transmission) - I am personally and readily familiar with the preparation of and process of documents in portable document format (PDF) for e-mailing, and I caused said document(s) to be prepared in PDF and then served by electronic mail to the party listed below, by close of business on the date listed above:

Central California Appellate Program 2150 River Plaza Dr., Ste. 300 Sacramento, CA 95833 eservice@capcentral.org Douglas O. Treisman Office of the District Attorney Juv. Div. 3333 E. American Ave, Bldg 701, Suite F Fresno, CA 93725 dtreisman@co.fresno.ca.us	Office of the Attorney General P.O. Box 944255 Sacramento, CA 94244-2550 SacAWTTrueFiling@doj.ca.gov California Court of Appeal Fifth Appellate District 2424 Ventura Street Fresno, CA 93721 served via Truefiling.com

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

Executed on March 9, 2017, in Sacramento, California.

DECLARANT