In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Appellant,** **v.** **ALFREDO PEREZ, JR.,** **Defendant and Respondent.**	Case No. S238354

SUPREME COURT
FILED
APR 14 2017
Jorge Navarrete Clerk
Deputy

Fifth Appellate District, Case No. F069020
Fresno County Superior Court, Case No. CF94509578
The Honorable Jonathan Conklin, Judge

APPELLANT'S ANSWER BRIEF ON THE MERITS

LISA A. SMITTCAMP
Fresno County District Attorney
TRACI FRITZLER
Chief Deputy District Attorney
DOUGLAS O. TREISMAN
Senior Deputy District Attorney
State Bar No. 131986
3333 E. American Ave., Ste. F
Fresno, CA 93725
Telephone: (559) 600-4923
FAX: (559) 600-4900
E-mail: dtreisman@co.fresno.ca.us
Attorneys for Plaintiff and Appellant

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Appellant, v. ALFREDO PEREZ, JR., Defendant and Respondent.	Case No. S238354

Fifth Appellate District, Case No. F069020
Fresno County Superior Court, Case No. CF94509578
The Honorable Jonathan Conklin, Judge

APPELLANT'S ANSWER BRIEF ON THE MERITS

LISA A. SMITTCAMP
Fresno County District Attorney
TRACI FRITZLER
Chief Deputy District Attorney
DOUGLAS O. TREISMAN
Senior Deputy District Attorney
State Bar No. 131986
3333 E. American Ave., Ste. F
Fresno, CA 93725
Telephone: (559) 600-4923
FAX: (559) 600-4900
E-mail: dtreisman@co.fresno.ca.us
Attorneys for Plaintiff and Appellant

TABLE OF CONTENTS

Page

Issues presented 8
Introduction 8
Statement of the case 11
Summary of argument 13
Argument 15
I. Specific intent is not an element of or prerequisite for a finding of arming or use of a deadly weapon 15
A. Specific intent is not an element in arming or use of a vehicle as a weapon. 16
B. The jury verdict and those findings necessary to the verdict along with the undisputed record of conviction establish that the defendant used and was armed with a deadly weapon when he committed a felony assault using an SUV. 26
II. Under either an abuse of discretion or an independent standard of review of a section 1170.126 eligibility determination, the majority reached the correct result. 36
A. The correct standard of review for an eligibility determination is the usual standard applied to mixed questions of law and fact that are predominantly record based and predominantly questions of law; independent, de novo review. 37
B. The trial court abused its discretion by rejecting jury findings and by applying an incorrect interpretation of proposition 36. 44
III. A defendant is not entitled to a jury trial in a proposition 36 eligibility proceeding 46
Conclusion 50
Certificate of compliance 51

TABLE OF AUTHORITIES

Page

CASES

Almendarez-Torres v. United States
(1998) 523 U.S. 224 42

Apprendi v. New Jersey
(2000) 530 U.S. 466 42

Dillon v. United States
(2010) 560 U.S. 817 49

In re Anthony M.
(2007) 156 Cal.App.4th 1010 46

In re D.T.
(2015) 237 Cal.App.4th 693 25

In re Rayan D.
(2002) 100 Cal.App.4th 854 39

Moon v. Superior Court
(2005) 134 Cal.App.4th 1521 32

People v. Aguilar
(1997) 16 Cal.4th 1023 .... 21, 22

People v. Aznavoleh
(2012) 210 Cal.App.4th 1181 .... 19, 25

People v. Banuelos
(2005) 130 Cal.App.4th 601 15

People v. Barns
(1986) 42 Cal.3d 284 39

People v. Blake
(2004) 117 Cal.App.4th 543 37

TABLE OF AUTHORITIES
(continued)

Page

People v. Bradford
(2014) 227 Cal.App.4th 1322 .... *passim*

People v. Burton
(2006) 143 Cal.App.4th 447 18

People v. Colantuono
(1994) 7 Cal.4th 206 16

People v. Eubanks
(1996) 14 Cal.4th 580 46

People v. Graham
(1969) 71 Cal.2d 303 .... 21, 22

People v. Guerrero
(1988) 44 Cal.3d 343 40

People v. Guilford
(2014) 228 Cal.App.4th 651 .... 37, 39

People v. Haykel
(2002) 96 Cal.App.4th 146 15

People v. Hicks
(2014) 231 Cal.App.4th 275 37

People v. Holt
(1997) 15 Cal.4th 619 26

People v. Kelii
(1999) 21 Cal.4th 452 .... 35, 41, 43

People v. Maciel
(2013) 57 Cal.4th 482 37

People v. McGee
(2006) 38 Cal.4th 682 .... *passim*

TABLE OF AUTHORITIES
(continued)

Page

People v. Neely
(1999) 70 Cal.App.4th 767 46

People v. Newman
(2016) 2 Cal.App.5th 718, 721 32

People v. Oehmigen
(2014) 232 Cal.App.4th 1 .... *passim*

People v. Perez
(2016) 3 Cal.App.5th 812 .... *passim*

People v. Raleigh
(1932) 128 Cal.App. 105 .... 22, 23, 24

People v. Ray
(1975) 14 Cal.3d 20 21

People v. Reed
(1996) 13 Cal.4th 217 41

People v. Russell
(2005) 129 Cal.App.4th 776 29

People v. Smith
(1997) 57 Cal.App.4th 1470 19

People v. Superior Court (*Humberto S.*)
(2008) 43 Cal.4th 737 .... 45, 46

People v. Superior Court (*Kaulick*)
(2013) 215 Cal.App.4th 1279 48

People v. Wiley
(1995) 9 Cal.4th 580 41

People v. Williams
(1990) 222 Cal.App.3d 911 35

TABLE OF AUTHORITIES
(continued)

Page

People v. Williams
(2001) 26 Cal.4th 779 .... 17, 19

People v. Woodell
(1998) 17 Cal.4th 448 .... 40, 42, 44

People v. Wright
(2002) 100 Cal.App.4th 703 .... 16, 18

People v. Yearwood
(2013) 213 Cal.App.4th 161 9

Trope v. Katz
(1995) 11 Cal.4th 274 32

Williams v. Superior Court
(2001) 92 Cal.App.4th 612 15

STATUTES

Penal Code
§ 211a 22
§ 245 8
§ 667 .... *passim*
§ 667.5 .... 8, 31
§ 1170.12 .... *passim*
§ 1170.126 .... *passim*
§ 1192.7 .... 10, 31, 35

Three Strikes Reform Act 9, 39

CONSTITUTIONAL PROVISIONS

United States Constitution
Sixth Amendment 49
Fourteenth Amendment 49

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

CALCRIM
No. 875 .... 21, 28, 30
No. 3130 .... 21, 27, 28, 30

CALJIC
No. 9.00 (1994 rev.) 16, 24, 26, 27, 28, 29, 35
No. 9.01 .... 26, 27, 35
No. 9.02 .... 26, 27, 35

ISSUES PRESENTED

Respondent (hereinafter "Perez") sought review by this Court of the Opinion issued by the Fifth District Court of Appeal, *People v. Perez* (2016) 3 Cal.App.5th 812. On January 11, 2017, this Court granted review. The following are the issues Appellant (hereinafter "the People") believes have been raised by Perez and answers herein:

> 1. Specific intent is not an element of or prerequisite for a finding of arming or use of a dangerous or deadly weapon in the commission of an assault by means of force likely to inflict great bodily injury.
>
> 2. Under either an independent or deferential standard of review the majority opinion reached the correct result in concluding that the record of conviction shows Perez was ineligible for resentencing under section 1170.126.
>
> 3. The determinations involved in a review of the record of conviction to asses eligibility under section 1170.126 is a limited inquiry that does not involve independent determination of disputed issues of fact relating to a defendant's prior conduct.
>
> 4. In concluding that Perez is ineligible for resentencing under section 1170.126 the majority opinion did not violate the Sixth or Fourteenth Amendment rights of Perez.

INTRODUCTION

The following summary is quoted from the majority's published opinion. "Alfredo Perez, Jr., (defendant) was convicted by jury [in Fresno Superior Court case number F509578-1] 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

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

years plus 25 years to life in prison." (*People v. Perez* (2016) 3 Cal.App.5th 812, 815.)

> 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.[2]

(*People v. Perez, supra,* 3 Cal.App.5th 812, 816.)

> 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, 'during the commission of the current offense, he or she . . . was armed with a . . . deadly weapon[.]' (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).)

(*People v. Perez, supra,* 3 Cal.App.5th at p. 816.)

> 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

---

[2] This determination is on the face of the charge alone. The determination of whether a defendant was armed with a dangerous or deadly weapon or used a dangerous or deadly weapon in the commission of the offense can alter the designation and statutorily qualify an offense as serious or violent or disqualify a petitioner from eligibility for resentencing under the Act. (See *People v. McGee* (2006) 38 Cal.4th 682; *People v. Oehmigen* (2014) 232 Cal.App.4th 1.)

during the commission of his offense.[3] Following a hearing, the trial court found defendant eligible 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.

(*People v. Perez, supra,* 3 Cal.App.5th at p. 816.)

The People timely appealed, and a divided court issued a majority, concurring, and a dissenting opinion. The majority held that, "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." (*People v. Perez, supra,* 3 Cal.App.5th at p. 816.)

The majority concluded that, "[o]n 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 (e)(2)." (*Id.*) The majority, therefore, "reverse[d] the trial court's order granting defendant's petition." (*People v. Perez, supra,* 3 Cal.App.5th at p. 816.)

---

[3] The People's appeal contended that petitioner was ineligible for relief under section 1170.126 because his use of a vehicle as the sole means of an assault by means of force likely to cause great bodily injury disqualified him because Perez was "'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)." The People also argued that Perez "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)." This theory was not reached by the Court of Appeal. (*People v. Perez, supra*, 3 Cal.App.5th at p. 821, FN7.)

STATEMENT OF THE CASE[4]

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.

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

---

[4] The Statement of The Case is taken from the Fifth District Court of Appeal opinion. (*People v. Perez, supra,* 3 Cal.App.5th at pp. 817-819.)

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.'[5] 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

---

[5] The opinion noted that, "[i]n 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.'" (*People v. Perez, supra,* 3 Cal.App.5th at p. 818, FN3.)

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.

SUMMARY OF ARGUMENT

The People maintain that the majority opinion was correct in its result and conclusions: The character of an object that is not inherently a weapon, can be transmuted into a weapon by how it is used in the commission of an offense. In this case, "the evidence found in the record of conviction" and specifically Perez's willful use of the vehicle, as determined by the jury verdict and undisputed facts, demonstrates that Perez personally and willfully used the vehicle in a manner likely to result in great bodily injury and any reasonable person would know that such use would likely result in great bodily injury to the victim.

In this case, the vehicle was the sole instrumentality of a felony assault. As such, Perez was armed, in that he had the vehicle available for offense or defense. Contrary to Perez's assertion, neither the assessment of one's manner of use of an object nor the elements of arming require any finding of specific intent.

Second, the trial court abused its discretion in making findings that were inconsistent with the jury findings and verdict in case F509578-1. The dissent concludes that the trial court's findings were supported by substantial evidence in the record. (*People v. Perez, supra,* 3 Cal.App.5th 812, 837, dis. opn. of Franson, J.) However, those findings were inconsistent with the findings and verdict rendered by the jury. The substantial evidence is drawn from an inconsistent reassessment of the same facts considered by the jury in reaching its determination. The People maintain that a trial court is bound by the findings of fact explicit and implicit in the jury's verdict. The People maintain that such a reassessment negates the verdict, is an error of law, and is an abuse of discretion.

Finally, Perez is not entitled to a jury trial on matters that do not increase his punishment. However, the undisputed facts of the case demonstrate only one act—driving a vehicle (hereinafter "SUV")—which was Perez's sole act and the basis of the conviction for assault by means likely to produce great bodily injury. The jury found Perez's willful use of the SUV, knowing it would likely result in death or great bodily injury to the victim, was the means and manner of an assault by means of force likely to produce great bodily injury (hereinafter "felony assault"). On these facts, his willful and knowing act (his use of the SUV) cannot be deemed merely "incidental" to the assault without contradicting the jury's verdict. But for his knowing and willful act of use of the SUV, a felony assault could not have occurred.

ARGUMENT

I. SPECIFIC INTENT IS NOT AN ELEMENT OF OR PREREQUISITE FOR A FINDING OF ARMING OR USE OF A DEADLY WEAPON

Perez argues that the majority opinion was mistaken. He argues that the majority held that "a person convicted of [felony assault] who uses a vehicle in the commission of that offense has necessarily used a deadly weapon." (Respondent's Opening Brief on the Merits, p. 9, hereinafter, "RB.") But that, alone, is not the holding of the majority and does not capture the majority's reasoning. Rather, the majority's opinion is wedded to "the evidence found in the record of conviction" in this case. (*People v. Perez, supra,* 3 Cal.App.5th at p. 816.)

Perez concedes that, "[t]he Court of Appeal . . . correctly found . . . [that] [felony assault] does not automatically disqualify an inmate from resentencing under the Reform Act." (RB,15, citing *People v. Perez, supra*, 3 Cal.App.5th at p. 824; see also *People v. Haykel* (2002) 96 Cal.App.4th 146, 149; *Williams v. Superior Court* [(2001)] 92 Cal.App.4th 612.) Perez also concedes that [a felony assault], can become a serious felony or disqualifying crime under section 1170.126. (RB,14, citing *People v. Banuelos* (2005) 130 Cal.App.4th 601, 605.)

As a result, Perez does not disagree "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." (RB, 17.) What Perez argues is that a car can be used "in the commission of a crime" "in ways that that do not render it a 'deadly weapon' under the law." (RB, 17.) And in explaining his concessions, citing the dissenting opinion, Perez observes that "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.)" (RB, 17.)

Perez makes two arguments as to why his undisputed SUV use and the jury's guilty verdict of the crime of felony assault do not, in his view, support the majority opinion: He argues that the law requires specific intent and that he did not have a specific intent to use the SUV as a weapon. (RB,19-27.)[6] And second, Perez argues that "the Court of Appeal erred in holding that the jury verdict necessarily encompassed a finding that [Perez] used the [SUV] as a deadly weapon." (RB, 16.)

Both of these assertions are incorrect and without support in the law.

A. Specific intent is not an element in arming or use of a vehicle as a weapon.

In rendering its verdict, the jury in the underlying case was instructed on the elements of a felony assault, including mental state. This Court, in addressing the question of whether felony assault requires a specific intent, both concluded that specific intent is not required but also clarified the mental state in a felony assault. Citing its earlier decision in *People v. Colantuono* (1994) 7 Cal.4th 206, 214, the Court explained that "the mens rea for assault is established upon proof the defendant willfully committed an act that by its nature will probably and directly result in injury to another, i.e., a battery." The Court went on to clarify, "we hold that assault does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur. Rather, assault only requires an <u>intentional act and actual knowledge of those facts sufficient to establish</u>

---

[6] Although Perez writes, "intent" to use the SUV as a deadly or dangerous weapon, because the jury specifically found Perez's "act" was willful, and willful is defined as intentional (*People v. Wright* (2002) 100 Cal.App.4th 703, 711, citing CALJIC No. 9.00 (1994 rev.) ["the person committing the act did so intentionally"]), the act of driving the SUV backward and forward (the only act that Perez did) was intentional. The People conclude that Perez is referring to a mental state of specific intent to use the SUV as weapon.

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, emphasis added.)[7]

Perez ignores this Court's precedent, instead setting forth a number of cases, insisting in each one that the determination of arming relies on the perpetrator's intent. (RB, 18-27.) Perez begins with *People v. Oehmigen* (2014) 232 Cal.App.4th 1, ("*Oehmigen*"). Perez concedes that "*Oehmigen* is both factually and legally indistinguishable from the instant case." (RB, 18, emphasis added.) However, Perez states that, "[n]otably, in *Oehmigen* there was no question of the defendant's intent to use the car as a deadly weapon." (*Id.*)

But that claim is wrong. In *Oehmigen,* the accused contested the use of the vehicle as a weapon and sought to exclude the prosecutor's recitation of facts as an adoptive admission and a part of the record of conviction. (*Oehmigen, supra,* 232 Cal.App.4th at p. 6 [a review of the probation report revealed that the "defendant had been actively contesting the legal conclusion that his conduct constituted an assault; this demonstrates that his silence at the time of the plea was not inadvertent or unconsidered"].)

Oehmigen concludes that the defendant's intent was not known and was not relevant to the determination of whether he was armed in the commission of the offense:

> Defendant fails to support his bald statements that he did not have any opportunity to contest the recited circumstances, that it is 'sheer speculation' that he personally used the car in a

---

[7] Although *People v. Williams* addressed assault with a deadly weapon, the elements and mental state for the purposes of this analysis are identical. The *mens rea* for assault "requires actual knowledge of the facts sufficient to establish that the defendant's act by its nature will probably and directly result in injury to another." (*People v. Williams, supra,* 26 Cal.4th at p. 782.)

> manner rendering it a deadly weapon, or that the facts recited do not establish an intent to inflict great bodily injury as opposed to reckless indifference to that outcome. Even if the latter argument may be a colorable claim in light of the difficulty in giving *retroactive* effect to a criterion based on a mental state (that is subject *prospectively* to pleading and proof), this does not detract from the disqualifying facts of being irrefutably armed with a car and using it purposefully in a dangerous fashion (with whatever intent defendant may have had).

(*Oehmigen, supra,* 232 Cal.App.4th at p. 6, citing *People v. Burton* (2006) 143 Cal.App.4th 447, 451-452.)

In determining eligibility under section 1170.126, based on whether assault involved use of the SUV as a deadly weapon, *Oehmigen* correctly found intent of the defendant, "whatever intent defendant may have had," was irrelevant to the conviction and the facts supporting the use of a weapon. (*Oehmigen, supra,* 232 Cal.App.4th at p. 6.) Perez's assertion that there was no question of the defendant's intent to use the car as a deadly weapon as well as his effort to parley intent into the central issue, is terribly misplaced. While there was no question of his intentional use of the SUV, his specific intent was never an issue and was not determined by the jury or court.

Perez explains that *People v. Wright* "did not consider the question of whether the car was employed as a deadly weapon." (RB, 19.) However, because the conviction in that case was assault with a deadly weapon and the court sustained the conviction, finding that the jury found defendant's "conduct would probably and directly result in the application of physical force upon Dircksen and McHenry and there is substantial evidence to support that finding," there was, in fact, a finding that a deadly weapon was used. (*People v. Wright, supra,* 100 Cal.App.4th at p. 725 ("*Wright*").)

The *Wright* court took issue with *Williams* because *Wright* concluded that *Williams* would support a conviction for felony assault on a negligence

theory, based on this Court's rejection of *People v. Smith* (1997) 57 Cal.App.4th 1470 and the lack of a subjective state required of a defendant.[8] (*People v. Wright*, *supra*, 100 Cal.App.4th at p. 712, quoting *Williams, supra,* 26 Cal.4th at pp. 787-788, fn. omitted ["In other words, a defendant guilty of assault must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct. He may not be convicted based on facts he did not know but should have known. He, however, need not be subjectively aware of the risk that a battery might occur."].)

Perez conducts a similar analysis of *People v. Aznavoleh* (2012) 210 Cal.App.4th 1181 ("*Aznavoleh*"). Aznavoleh "deliberately races through a red light at a busy intersection and collides with another vehicle, causing injury to another." (*Aznavoleh, supra,* at p. 1183.) The case involved an assertion that the facts were insufficient to support a conviction for assault with a deadly weapon. Although the trial court had improperly instructed the jury that to convict for assault with a deadly weapon, the "defendant could not be convicted of assault unless he actually knew that his reckless driving would cause injury to another," the error inured to the defendant's benefit and the evidence was found sufficient to sustain the verdict. (*Aznavoleh, supra,* at p. 1183.)

---

[8] The Third District Court of Appeal had opined that the mental state for assault is an intent to commit a battery. (*People v. Smith* (1997) 57 Cal. App.4th 1470, 1484.) However, based on this Court's opinion in *Williams,* the Third District reversed itself in *Wright.* The court wrote at length "that language similar to CALJIC No. 9.00 misdefined the mental state for assault because it encompassed a negligence standard." (*Wright, supra,* 100 Cal.App.4th at pp. 705-706.)

Perez argues that *People v. Bradford* (2014) 227 Cal.App.4th 1322, requires intent as an element of arming. (RB,24.) But *Bradford* addresses the denial of resentencing by the trial court based on eligibility where a petitioner was found armed because of his mere possession of a pair of wire cutters during the commission of an offense. The court of appeal looked to the record of conviction to determine the manner of use of the wire cutters and found nothing that would demonstrate that the wire cutters, certainly an object that is not inherently a weapon, were used as a weapon in the commission of the offense. (*Bradford, supra,* at pp. 1341-1343.)

While Perez concedes that *Bradford* never uses the word "intent" in the opinion (RB, 24), he maintains that it was Bradford's intent that the court found to be the missing element. (RB,24.) But any reading of the opinion makes clear that Perez is mistaken. Summarizing its conclusion, *Bradford* states, "[u]nder the circumstances, the trial court could not conclude that petitioner was armed with a deadly weapon. No facts establish that the wire cutters were designed for use as a weapon, they were not used as a weapon, and there is no evidence to clearly establish they were being carried for use as a weapon. In fact, the evidence in the trial court record [based on the defendant's statement] implies the wire cutters were being carried for the purpose of removing security tags from stolen merchandise." (*People v. Bradford, supra,* 227 Cal.App.4th at pp. 1342-1343.) *Bradford* does not address intent, specific or otherwise.

The reason for Perez's reliance on the above cases was explained with the following assertion:

> In order to prove that a defendant is armed with a deadly weapon, however, the People must 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 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.

(RB, 20.)

Perez provides no authority for this proposition. But more, he conflates the element in assault of a willful or intentional act with the "manner of use" inquiry in determining the character of an object. In so doing, Perez concludes that the eligibility inquiry requires a specific intent to use or actual use of the instrument as a deadly or dangerous weapon.

However, because Perez actually used the SUV as the instrumentality of the felony assault, his own syllogism would appear to concede that through its use, the SUV was a dangerous or deadly weapon. But, Perez continues this analysis by noting the distinction between inherently dangerous or deadly weapons and those "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." (RB, 21, citing *People v. Graham* (1969) 71 Cal.2d 303, 327-328, disapproved on other grounds in *People v. Ray* (1975) 14 Cal.3d 20, 30.)

The People agree that there are inherently dangerous or deadly weapons as one class and a second class of objects that are not inherently dangerous or deadly but which may be used as weapons. What determines whether items within this second class are being used as weapons is the manner of the item's use: In defining a deadly weapon, CALCRIM No. 3130 states that "[a] deadly weapon is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that it is capable and likely to cause death or great bodily injury." The determination of whether an item is a "deadly weapon" has turned on the nature of the item or the manner of use, not intent. (See, e.g., *People v. Aguilar* (1997) 16 Cal.4th 1023, 1029; CALCRIM No. 875.)

> 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.]

(*People v. Aguilar*, *supra*, 16 Cal.4th at pp. 1028-1029.)

Unlike *Aguilar, Graham* is an old case addressing no longer existing elements of first degree robbery; "[t]o convict defendants of robbery of the first degree, Penal Code, § 211a (*Deering*) require[d] that the robbery be perpetrated by a person 'armed with a dangerous or deadly weapon.'" (*People v. Graham, supra,* 71 Cal.2d 303, 327.) In *Graham* the court addressed whether a shod foot used to stomp a victim during a robbery was a dangerous or deadly weapon and whether the jury was properly instructed.

To correct an instructional error, the following portion of an instruction was required by the court where a weapon that was not inherently dangerous was involved: "Before you may find a defendant guilty of robbery of the first degree, you must find the following to be true beyond a reasonable doubt: (1) that the defendant is guilty of robbery as I have defined it; (2) that at least one of the perpetrators of the robbery possessed an instrumentality which was capable of being used by him in a dangerous or deadly manner; and (3) that its possessor intended to use the instrumentality in the robbery as a weapon of offense or defense should the circumstances require." (*People v. Graham, supra,* 71 Cal.2d 303, 328-30.)

Based on the third element, it might appear that *Graham* lends some support to Perez's argument. However, *Graham* relied entirely on *People v. Raleigh* for its reasoning and conclusion. (*People v. Raleigh* (1932) 128 Cal.App. 105 ("*Raleigh*").) *Raleigh* makes clear that it is the specific intent requirement of <u>robbery</u> rather than arming that brought about the language addressing intent used by *Graham*. *Raleigh,* in fact, explicitly contrasts the

requirements of arming in the old first degree robbery statute versus assault with a deadly weapon, and in reference to inherently dangerous weapons versus those that are dangerous based on their manner of use:

> When it appears, however, that an instrumentality other than one falling within the first class [those inherently dangerous] 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.

(*Raleigh, supra,* 128 Cal.App. at pp. 108-109.)

But the *Raleigh* court went on to contrast robbery with assault in the context of determining the character of a weapon. The court explained that in assault *the element of present ability takes the place of intent to use the object* in robbery:

> Reference is also made in the decisions to the 'present ability' of the possessor of the instrumentality. A showing of 'present ability' has been deemed essential in cases involving the charge of *assault* with a deadly weapon. [Citation] But such showing is not essential under such section 211a where the accused is armed with a gun. [Citation.] . . . Notwithstanding the fact that ordinarily and in and of itself the instrumentality may be in fact comparatively harmless, if, considering the attendant circumstances, <u>together with the present ability of its possessor,</u> the instrument is capable of being used in a deadly or dangerous manner, for the purpose of the particular occasion only, the character of the instrument may be so established.' But the 'present ability of its possessor' there referred to is of importance only for the purpose of determining whether an instrumentality, not falling within the first class above mentioned and not 'dangerous or deadly' to others in ordinary

> use for which it was designed, could be used in the hands of its possessor in a 'dangerous or deadly' manner.

(*Raleigh, supra,* 128 Cal.App. at pp. 109-110 (emphasis added).)

In the context of the old first degree robbery, having as an element that the perpetrator be armed with a dangerous or deadly weapon, that an element with regard to an object that was not inherently dangerous was that the perpetrator intend to use the object in a dangerous or deadly manner to satisfy the element of having the object for offense or defense in that specific intent crime. In contrast, as *Raleigh* states, assault with an object that is not inherently dangerous has no such intent requirement. Rather, to satisfy the elements of assault with a deadly weapon, where the object is not an inherently dangerous or deadly weapon, the law requires a finding of *present ability to use the object.*

In the present case, the jury was so instructed and, in returning its verdict, affirmatively found such present ability. (CALJIC No. 9.00.) In fact, the jury instructions specifically required a finding that Perez willfully committed an act "that by its nature would probably and directly result in the application of physical force on another person" and that Perez have "the present ability to apply physical force to the person of another." (*People v. Perez, supra,* 3 Cal.App.5th at p. 819, quoting CALJIC No. 9.00.) In rendering its verdict, the jury certainly found that the assault was committed by means of force likely to produce great bodily injury.[9]

In the context of felony assault and section 1170.126 eligibility, and contrary to the reasoning proffered by Perez, to the extent that any intent is

[9] Perez claims "the evidence on the record supports a conclusion that [he] did not intend to use the vehicle as a weapon." (RB, 23.) While it is true that no jury findings were made as to specific intent and the evidence could support multiple conclusions, the jury did find Perez willfully used the SUV knowing the likely result would be the infliction of great bodily injury and with the present ability to cause that injury.

required in order to find a subject armed with or used an object, that is not inherently dangerous or deadly as a weapon, it is the intent to act, as in volitional or willful action that is required. While intent might be useful in determining the "manner of use" of an object, it is not a legal element.

After summarizing and analyzing the authorities presented by Perez, the majority opinion observed that the line of cases "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." (*People v. Perez, supra,* 3 Cal.App.5th at pp. 826-827, quoting *In re D.T.* (2015) 237 Cal.App.4th 693, 702.)

The majority also observed that, "[e]ven 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." (*People v. Perez, supra,* at p. 827, finding agreement with *In re D.T.*, *supra*, at p. 702, and *People v. Aznavoleh, supra,* 210 Cal.App.4th at pp. 1183, 1186-1187.)

Perez's position, that the majority erred in concluding that use and arming do not require a finding of specific intent, is, itself, in error. The Court of Appeal correctly determined that the jury findings and record of conviction demonstrate that Perez was not eligible for resentencing.

B. The Jury Verdict And Those Findings Necessary To The Verdict Along With The Undisputed Record Of Conviction Establish That The Defendant Used And Was Armed With A Deadly Weapon When He Committed A Felony Assault Using An SUV.

The Defendant contends that "the Court of Appeal erred in holding that the jury verdict necessarily encompasses a finding that [Perez] used the [SUV] as a deadly weapon. (RB, 16.) Without the imposition of specific intent, however, Perez does not explain what element is missing from the verdict and those findings necessarily made by the jury in reaching that verdict.

The trial court's ruling, that the vehicle was not, as "used," a deadly weapon, is inconsistent with the record of conviction. Although the dissent looked to the raw facts presented in the case to conclude that substantial evidence supported the trial court's ruling, this overlooks the jury's previous assessment of those same raw facts and the findings it reached, necessarily, in rendering its verdict.

As the majority opinion observed, "Jurors are presumed to understand and follow the court's instructions. (*People v. Perez, supra,* 3 Cal.App.5th at p. 825, quoting *People v. Holt* (1997) 15 Cal.4th 619, 662.) In the present case, based on the instructions given, the jury was informed and made the following findings in returning a verdict of guilty of felony assault:[10] Perez "willfully committed an act that by its nature would

---

[10] "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." (*People v. Perez, supra,* 3 Cal.App.5th at p. 819, FN4.) This Order specifically included CALJIC Nos. 9.00, 9.01, and 9.02, as modified by the trial court and presented to the jury at pages 238, 242, and 244-245 of the original appellate record of the commitment offense.

probably and directly result in the application of physical force on another person; and [at] the time the act was committed, [Perez] had the present ability to apply physical force on the person of another." (CALJIC No. 9.00, original appellate record p. 238.) In the same instruction, the jury was informed that "Willfully means that the person committing the act did so intentionally." (*Ibid.*)

The jury also was instructed and concluded that Perez, in "committing the assault [had] the present ability to commit a violent injury upon the person of another." (CALJIC No. 9.01.) The jury was told that this "means that at the time of the attempt one must have the physical means to accomplish such an injury in the manner by which it is attempted. If there is such an ability this element exists even if the attempt to commit the injury fails for some reason." (*Ibid.*)

In addition, by its verdict, the jury concluded that Perez did "commit an assault upon the person of another by means of force likely to produce great bodily injury." (CALJIC No. 9.02, original appellate record p. 244.) The jury concluded that a person was assaulted, and "[t]he assault was committed by means of force likely to produce great bodily injury." (*Ibid.*) In the same instruction the jury was informed that "[g]reat bodily injury refers to significant or substantial bodily injury or damage; it does not refer to trivial or insignificant injury or moderate harm." (*Ibid.*)

As a matter of law, CALCRIM No. 3130 states that "[a] deadly weapon is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that it is capable and likely to cause death or great bodily injury." Because a "deadly weapon" is an object or instrument "used in such a way that it is capable of causing and likely to cause death or great bodily injury" then, if an object was used, as a matter of undisputed fact, by Perez in the commission of the felony assault

for which the jury found him guilty, then that object as used by Perez was, by definition, a deadly weapon. (See, CALCRIM Nos. 3130 and 875.)

In rendering its verdict, the jury was not asked to make a finding as to what "act" Perez "committed" to constitute the felony assault. Rather, in the present case, the factual record of the conviction makes clear that Perez did only one act, driving of the SUV in knowing disregard for the consequence to Fred Sanchez. That act of driving the SUV, the only act the record supports that Perez committed, constitutes "[t]he sole means by which [Perez] applied this force [being] the vehicle." (*People v. Perez, supra,* 3 Cal.App.5th at pp. 825.) It is undisputed, and there are no facts to support an alternative theory as to the "act" committed by Perez that constituted the basis for the assault.

Perez argues that the inquiry into the act is "complicated by the fact that the [SUV] was not the 'sole instrumentality' involved in the assault." (RB, 26.) Perez explains that "[i]t 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." (RB, 26.)

But this observation by Perez is almost entirely inaccurate. While it is undisputed that the "passenger grabbed Sanchez's left arm and pushed it down, which prevented Sanchez from pulling his arm out of the vehicle," this is not an act committed by Perez. (*People v. Perez, supra,* 3 Cal.App.5th at p. 817.) The passenger's act cannot be the basis for a guilty verdict as to Perez for felony assault. As the instruction states, the jury was required to find that "[Perez] willfully committed an act." (CALJIC No. 9.00.)

While the passenger's actions are a circumstance that could contribute to the danger posed to Mr. Sanchez in the event the car were driven, it is a circumstance known to the jury and considered in its determination that the "act" committed by Perez would "by its nature," "probably and directly result in the application of physical force on another person." (CALJIC No. 9.00.) In addition, the passenger's actions, while a circumstance Perez was aware of, need not be the entirety of what constituted Perez's "present ability to apply physical force on the person of another." Perez's act need only be a part of his present ability, that is, his willful movement of the SUV.[11]

It is simply a matter of law that, in the absence of Perez's willful movement of the SUV, the passenger's act of grabbing Sanchez's left arm and pushing it down, could not and would not support a verdict of felony assault. Without movement of the SUV, there is no theory under which grabbing an arm and holding it could, in any way, threaten death or great bodily injury.

This is not to say that the "act" committed by Perez was legally required to be life threatening. In *People v. Russell*, the defendant's act of pushing a victim in front of an oncoming car was found sufficient to sustain a conviction for both assault with a deadly weapon and assault by means of force likely to produce great bodily injury. (*People v. Russell* (2005) 129 Cal.App.4th 776, 781-786, 787-789.) The "use" of an oncoming car, not in the defendant's possession, presents an opposite scenario to the present

---

[11] While there was conflicting evidence regarding the speed of the SUV, and the possible intentions and purpose of Perez, Perez's assertion that he drove "at a low speed and not aiming to strike the store clerk," while one possible interpretation of the evidence is certainly not grounded in any verdict or finding returned by the jury, or any conclusion based on a finding of fact.

case. Here, Perez possessed the SUV and acted to use it, while Russell did not possess it but his act of pushing the victim made use of the car as a weapon.

Even though the ability to inflict death or great bodily injury is a question of fact, because the passenger's actions alone could not inflict any significant injury, it is known from the verdict that movement of the SUV was found to be that instrumentality that would likely cause death or great bodily injury. To the extent that the jury may have thought so, it is Perez's willful movement of the SUV that rendered the passenger's act as contributing to the danger posed by that movement. Perez's contention that 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," (RB,26) it was only the use of the SUV that applied force that threatened death or great bodily injury.

The jury concluded that Perez's act of driving the SUV, the only action he took, knowing that his act would "probably and directly result in the application of physical force on another person" and in apparent reckless disregard for that danger to the victim, rendered him guilty of felony assault. Whether that included the passenger's actions or not, it was Perez's act that posed the danger sufficient to threaten death or great bodily injury.

The actions of the passenger and the cries to stop by the victim, while supportive of the jury's verdict, do not in any way change the character of Perez's act. When he drove the SUV, knowing that great bodily injury was probable, because the SUV used by Perez posed the threat of great bodily injury under the circumstances, and the jury concluded that death or great bodily injury was likely, the manner of Perez's use becomes, by definition, with a "deadly weapon." (CALCRIM Nos. 3130 and 875.) This is so regardless of his purpose, motive or specific intent.

The People concede that the jury was not asked to determine whether driving the SUV was the only act committed by Perez. But, factually, and from the record of conviction, Perez committed no other act. As a result, when the trial court explained that the acknowledged "use" by Perez of the SUV was "incidental" to the felony assault, one is left to wonder what act by Perez was the basis of the felony assault, if not the use of the SUV? Apart from the willful use of the SUV, there was no other act sufficient to threaten death or great bodily injury.

Once determined that Perez used the vehicle as the sole instrumentality of his felony assault on the victim, then the conviction of Perez for felony assault becomes a "serious felony" under section 1192.7(c)(23); defining a "serious felony" as "any felony in which the defendant personally used a dangerous or deadly weapon." And, any "serious felony" is explicitly precluded from eligibility for resentencing under section 1170.126(e)(1).[12]

The majority's observation that "[t]he sole means by which [Perez] applied this force was the vehicle he was driving," is correct. (*People v. Perez, supra,* 3 Cal.App.5th at p. 825.) And, as a result, the majority's statement, "[t]hus, 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," (*ibid*) is also

---

[12] Section 1170.126(e) states, "[an] inmate is eligible for resentencing if: (1) The inmate is serving an indeterminate term of life imprisonment imposed pursuant to paragraph (2) of subdivision (e) of section 667 or subdivision (c) of section 1170.12 for a conviction of a felony or felonies that <u>are not defined as serious and/or violent felonies by subdivision (c) of section 667.5 or subdivision (c) of Section 1192.7</u>." (§1170.127(e).) This issue was not reached in by the majority based on its conclusion concerning arming. (*People v. Perez, supra,* 3 Cal.App.5th 812, 821, FN7.)

correct. Characterizing Perez's use as both the basis of the verdict and as merely "incidental" to the assault, is inconsistent. But the latter is without support in the record of conviction.

The majority notes at Footnote 14 the dissent's quotation from *People v. Newman,* that "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." (*People v. Perez, supra,* 3 Cal.App.5th at p. 825, FN14, quoting *People v. Newman* (2016) 2 Cal.App.5th 718, 721.) The majority agreed with this proposition and even expressed that to hold otherwise would negate clause (iii). (*People v. Perez, supra,* at p. 825, FN.14.)

However, the majority observed that, "[c]ontrary to the apparent positions of the resentencing court and dissent in this case, 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." (*People v. Perez, supra,* 3 Cal.App.5th at p. 825, FN14.) The majority quoted *Moon v. Superior Court* in explaining that "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 those facts.'" (*People v. Perez, supra,* 3 Cal.App.5th 812, 825, fn.14, quoting *Moon v. Superior Court* (2005) 134 Cal.App.4th 1521, 1532 and *Trope v. Katz* (1995) 11 Cal.4th 274, 284.)

The majority explained that "*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." (*People v. Perez, supra,* 3 Cal.App.5th at p. 825, fn.14.) The majority's point, with which the People fervently agree, is that a trial court, in considering

Proposition 36 eligibility, is bound by the jury verdict and those findings necessarily included in the return of that verdict. (See, *People v. McGee* (2006) 38 Cal.4th 682, 706 ["such an inquiry does not contemplate that the court will make an independent determination regarding a disputed issue of fact relating to the defendant's prior conduct."].)

Like those assertions concerning speed and purported intent (see footnote 11, *ante*), the majority recognized that the dissent as well as the trial court discussed conclusions of fact that contradict the jury's verdict and implicit findings. The trial court's characterization of the use of the SUV by Perez as "incidental" to the felony assault, discussed above, is one such example. But the dissent's observation that "[t]he 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 Perez in maneuvering his car to depart the scene did not convert an object otherwise not inherently a deadly weapon, into one," demonstrates this disregard for the jury's findings and verdict. (*People v. Perez, supra,* 3 Cal.App.5th at p. 835, dis. op.)

Given the factual inquiry outlined by the dissent, reweighing the very same evidence on which the jury reached its verdict, the dissent and the trial court were reconsidering the verdict itself. Where is the assault if not for the speed and length of time of the use of the SUV? The dissent concludes that the factual inquiry includes a reconsideration of all aspects of the case, even including the basis of the verdict. (*People v. Perez, supra,* 3 Cal.App.5th at p. 835, dis. op.)

Both the dissent and Perez argue that the trial court is free to reassess the evidence considered by the jury. The dissent looked to the facts presented to the jury at trial and explained that the "trial court examines the 'conduct that occurs during the commission of an offense'" in determining

ineligibility under the Act.[13] (*People v. Perez, supra,* 3 Cal.App.5th at p. 836, citing *People v. Bradford, supra,* 227 Cal.App.4th at p. 1333.) In that process, the dissent reweighed the very same evidence the jury considered in rendering its findings and verdict:

> 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.

(*People v. Perez, supra,* 3 Cal.App.5th at p. 836, dis. op.)

The dissent's description of the offense, above, does not consider in any way the findings the jury reached in rendering its guilty verdict. It appears to question the gravity of the felony assault. It even presents a theory by which Perez aids and abets the assault by the passenger. (*Id.*)

The record of conviction determines eligibility (whether a conviction is a serious felony and/or whether Perez was armed). The jury verdict, that Perez did knowingly apply force likely to produce great bodily injury by an

---

[13] The concurring opinion engaged in the same reexamination of the evidence, finding it "instructive that the jury found [Perez] guilty of [felony assault]." but reached the conclusion that Perez was ineligible because "the vehicle was employed as a deadly weapon." (*People v. Perez, supra,* 3 Cal.App.5th at p. 829-830, con. op.)

instrumentality capable of causing and likely to cause great bodily injury, is binding on the court. The determination is not one of discretion, it is a legal question left to the court. (*People v. Kelii* (1999) 21 Cal.4th 452, 456.) "[E]ligibility is not a question of fact requiring the resolution of disputed issues; rather, '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.'" (*Oehmigen, supra,* 232 Cal.App.4th at p. 7.)

The dissent's rationale stands for the proposition that the trial court, in determining eligibility, is free to reweigh evidence previously considered by the jury, and without regard for the jury instructions, the verdict's implicit findings, and the verdict itself, the trial court is free to disregard the jury's findings inherent in the verdict. This is how the dissent arrived at the factual discussion above. The gross record demonstrates that there was substantial evidence from which the jury could have arrived at various conclusions regarding speed, distance, time, and even motivation of Perez. But the verdict explains that the jury concluded that the constellation of facts supported an assault that threatened death or great bodily injury. (CALJIC No.s 9.00, 9.01, 9.02.)

By reconsidering the factual perception of the case and disregarding the jury's role and findings, the dissent concludes that the conviction of Perez for felony assault "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)." (*People v. Perez, supra*, 3 Cal.App.5th at p. 836, dis. op.)

The People submit that the majority correctly concluded that the jury verdict, and the findings necessarily included and as part of the record of conviction, lead to the following conclusion:

> [t]he record of conviction reflects [Perez] committed assault by means of force likely to produce great bodily injury. The facts show [Perez] 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. [Perez] 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).

(*People v. Perez, supra,* 3 Cal.App.5th at pp. 820-821.) For this reason, the People respectfully request that this Court affirm the Court of Appeal.

II. UNDER EITHER AN ABUSE OF DISCRETION OR AN INDEPENDENT STANDARD OF REVIEW OF A SECTION 1170.126 ELIGIBILITY DETERMINATION, THE MAJORITY REACHED THE CORRECT RESULT.

In considering the standard of review applied in the present case, the majority concluded that, "[*b*]*ecause the trial court made both factual and legal determinations, multiple standards of review apply*." (*People v. Perez, supra*, 3 Cal. App. 5th at p. 821, emphasis in the original.) The court concluded that, "[t]he 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." (*Id.*) The following quotes summarize the majority's conclusions concerning the applicable standard of review:

> "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 [174 Cal.Rptr.3d 499].) 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.'" (*Ibid.*)

(*People v. Perez, supra*, at p. 821.) The opinion went on to state,

> 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 [179 Cal.Rptr.3d 703]; *People v. Bradford, supra*, at p. 1331; *People v. Blake* (2004) 117 Cal.App.4th 543, 559 [11 Cal.Rptr.3d 678].) It is subject to review for substantial evidence under the familiar sufficiency of the evidence standard. (*People v. Guilford* (2014) 228 Cal.App.4th 651, 661 [175 Cal.Rptr.3d 640]; see, e.g., *People v. Maciel* (2013) 57 Cal.4th 482, 514-515 [160 Cal.Rptr.3d 305, 304 P.3d 983].)

(*People v. Perez, supra*, at pp. 821-822.)

In contrast, the majority explained that matters of statutory interpretation have a different standard of review. "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. Perez, supra*, at p. 822.)

A. The Correct Standard of Review for an Eligibility Determination Is The Usual Standard Applied to Mixed Questions of Law and Fact That Are Predominantly Record Based and Predominantly Questions of Law; Independent, *De Novo* review.

The understanding of the factual review conducted by a trial court is discussed in many cases, but is called into question by a reading of *Oehmigen* and *Bradford.* These cases raise a question regarding the nature of the factual inquiry and the standard of review in regard to eligibility determinations for resentencing under section 1170.126. Although noted in the majority's opinion, the majority overtly concluded that review of any factual inquiry in an eligibility determination under section 1170.126 is conducted by the deferential, substantial evidence standard.

Reaching this conclusion, it is noted at Footnote 8 in its discussion of whether a petitioner for resentencing has a right to a hearing concerning the eligibility determination, that *Oehmigen* describes a considerably different factual inquiry and, consequently, standard of review:

> 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 [181 Cal.Rptr.3d 569] states eligibility is not a question of fact requiring the resolution of disputed issues; rather, '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.) 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.

(*People v. Perez, supra*, 3 Cal.App.5th at p. 821, fn.8.)

Like *Oehmigen, Bradford,* as better understood through the contrast expressed in the concurring opinion, appears to apply an independent review, having also concluded that the determination of eligibility under the section 1170.126 is a legal determination:

> The eligibility determination at issue is not a discretionary determination by the trial court, in contrast to the ultimate determination of whether an otherwise eligible petitioner should be resentenced. Section 1170.126, subdivision (f), describing the eligibility determination, simply provides that 'the court shall determine whether the petitioner satisfies the criteria in subdivision (e) … .' Only after making that determination does the statute describe any exercise of discretion on the part of the trial court. The statute specifies: 'If the petitioner satisfies the criteria in subdivision (e), the petitioner shall be resentenced pursuant to paragraph (1) of subdivision (e) of section 667 and paragraph (1) of subdivision (c) of section 1170.12 unless the court, *in its discretion*, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.' (§ 1170.126, subd. (f), italics added.)

(*People v. Bradford, supra,* 227 Cal.App.4th 1322, 1336-1337.)

As mentioned, the concurrence in *Bradford* emphasizes that much of the opinion is surplusage and stresses application of the substantial evidence standard:

> Since there was no substantial evidence to support the trial court's finding that petitioner was armed with a deadly weapon when he committed the current offenses and there was no other aspect of the current offenses that disqualifies petitioner from resentencing under the Three Strikes Reform Act, it is unnecessary to consider petitioner's other arguments. This case must be remanded for the trial court to either resentence petitioner or find petitioner too dangerous to resentence under the Three Strikes Reform Act. Nothing stated in the majority opinion, except for the finding that there was no substantial evidence that petitioner was armed with a deadly weapon, is necessary to the disposition or helpful to the court or the parties on remand. Accordingly, I would simply find the evidence was insufficient to sustain the deadly weapon finding and remand for further proceedings."

(*People v. Bradford, supra,* 227 Cal.App.4th at pp. 1343-1344.)

The People raise this inconsistent language with the primary purpose of gaining clarity and guidance from this Court. As an example of another perspective, *People v. Guilford* clearly observes that the substantial evidence standard is the applicable standard of review for eligibility determinations:

> Defendant acknowledges we review the factual basis of the trial court's finding under the familiar sufficiency of the evidence standard. 'We review the whole record in a light most favorable to the order to determine whether it contains substantial evidence, i.e., evidence that is credible and of solid value, from which a rational trier of fact could find beyond a reasonable doubt that the accused committed the offense.' (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 859 [123 Cal.Rptr.2d 193]; see *People v. Barnes* (1986) 42 Cal.3d 284, 303-304 [228 Cal.Rptr. 228, 721 P.2d 110].)

(*People v. Guilford* (2014) 228 Cal.App.4th 651, 661.)

Of course, in *Guilford* there was no dispute as to what standard was applied. If the determination of eligibility under section 1170.126 is a question of law, as *Oehmigen* and *Bradford* suggest, or if it is a mixed question of law and fact dominated by the legal aspect of the determination, it would appear that the correct standard of review for the non-discretionary determination of eligibility would be independent or *de novo* review. (See, *People v. McGee*, *supra*, 38 Cal. 4th 682; *People v. Woodell* (1998) 17 Cal.4th 448.)

Perhaps the disparate thought comes from the idea of factual review or fact finding. But the nature of the factual inquiry is both limited in its scope to the record of conviction and not of the sort that a jury would engage in. In discussion of an analogous review this Court explained the following:

> Sometimes the determination does have a factual content, just as the question whether convictions were brought and tried separately has a factual content. As we explained in *People v. Woodell, supra*, 17 Cal.4th 448, 'Sometimes the definition of the qualifying prior conviction is not completely congruent with the definition of the crime of which the defendant has been convicted. For example, in *People v. Guerrero* [(1988)] 44 Cal.3d 343, the alleged prior conviction was for a " 'burglary of a residence.' (*People v. Guerrero*, *supra*, 44 Cal.3d at p. 346 [quoting Pen. Code, former § 1192.7, subd. (c)(18)].) The statutory use of the phrase, "burglary of a residence," posed a problem because "there is no offense specifically so defined in the Penal Code." (*Guerrero, supra*, at p. 346.) A particular burglary conviction might or might not have involved a residence.' (*People v. Woodell*, *supra*, 17 Cal.4th at p. 452.)
>
> But these factual questions are of limited scope. In determining whether a prior conviction is serious, 'the trier of fact may look to the entire record of the conviction' but '*no further*.' (*People v. Guerrero*, *supra*, Cal.3d at p. 355, original italics.) Thus, no witnesses testify about the facts of the prior crimes. The trier of fact considers only court documents. It is true that sometimes the trier of fact must draw inferences from transcripts of testimony or other parts of the prior conviction

> record. (See, e.g., *People v. Reed* (1996) 13 Cal.4th 217, 220.) But the factual inquiry, limited to examining court documents, is not significantly different from the one we considered in *Wiley*. '[S]uch facts generally are readily ascertainable upon an examination of court documents. This is the type of inquiry traditionally performed by judges as part of the sentencing function.' ([*People v.*] *Wiley* [(1995)] 9 Cal.4th [580], 590.) Accordingly, the statutory right to have a jury decide whether the defendant 'has suffered' (§§ 1025, 1158) the prior conviction does not include the inquiry whether the conviction qualifies as a strike." ([*People v.*]*Kelii, supra,* 21 Cal.4th [452], 456-457, first italics added.)

(*People v. McGee, supra,* 38 Cal.4th 682, 694.)

Following this reasoning, this Court concluded, in regard to the inquiry into whether a prior conviction qualifies as a strike and other recidivism enhancements, that the inquiry is legal in nature and does not implicate a right to a jury determination. In *McGee* this Court concluded, "we believe the Court of Appeal erred in framing the issue as one calling for a finding of fact regarding *defendant's conduct* at the time he committed the prior offense. Instead, we believe it is more accurate to characterize the inquiry that is required under California law as a legal determination of the nature of defendant's *prior convictions* as established by the record of the prior criminal proceedings." (*People v. McGee* (2006) 38 Cal. 4th 682, 702.)

The reasoning behind this conclusion is explained, as the People understand it, as a distinction between the role of the jury in making factual determinations based on credibility, and comparing various statements and weighing and considering various pieces of evidence, versus the review of the record of conviction undertaken by the trial court:

> California law specifies that in making ['a determination regarding the nature or basis of the defendant's prior convictions'], the inquiry is a limited one and must be based upon the record of the prior criminal proceeding, with a focus

> on the elements of the offense of which the defendant was convicted. If the enumeration of the elements of the offense does not resolve the issue, an examination of the record of the earlier criminal proceeding is required in order to ascertain whether that record reveals whether the conviction realistically may have been based on conduct that would not constitute a serious felony under California law. (See, e.g., *People v. Woodell, supra*, 17 Cal.4th 448, 452-461.) The need for such an inquiry does not contemplate that the court will make an independent determination regarding a disputed issue of fact relating to the defendant's prior conduct (see *id.* at p. 460), but instead that the court simply will examine the record of the prior proceeding to determine whether that record is sufficient to demonstrate that *the conviction* is of the type that subjects the defendant to increased punishment under California law. This is an inquiry that is quite different from the resolution of the issues submitted to a jury, and is one more typically and appropriately undertaken by a court.

(*People v. McGee, supra,* 38 Cal.4th at p. 706, emphasis added.)

This Court's rejection of an appellate ruling necessarily involved issues related to increase in punishment and the recidivist exception to *Apprendi v. New Jersey* (2000) 530 U.S. 466, as well as the *Almendarez-Torres* exception for recidivist conduct. *Almendarez-Torres v. United States* (1998) 523 U.S. 224. (*People v. McGee, supra,* 38 Cal. 4th at p. 698.) However, the reasoning expressed by this Court points out the fundamental distinction between the traditional role of the jury, in its broad role as a finder of fact, and the role of a trial court considering the dry paper record and making determinations of the legal sufficiency or presence of legal factors based on prior findings of conduct or conduct in the commission of an offense, upon which a conviction is based or related:

> [T]he Court of Appeal in the present case narrowly construed the *Almendarez-Torres* exception for recidivist conduct as preserved by *Apprendi*. In so holding, however, we believe the Court of Appeal improperly minimized the distinction between sentence enhancements that require factfinding related to the circumstance of the current offense,

> such as whether a defendant acted with the intent necessary to establish a "hate crime"—a task identified by *Apprendi* as one for the *jury*—and the examination of *court records* pertaining to a defendant's *prior conviction* to determine the nature or basis of the conviction—a task to which *Apprendi* did not speak and 'the type of inquiry that judges traditionally perform as part of the sentencing function.' (*Kelii*, *supra*, 21 Cal.4th 452, 456.)

(*People v. McGee, supra,* 38 Cal. 4th at pp. 708-709.)

The People submit that the eligibility inquiry of section 1170.126, based entirely on the record of conviction, is virtually identical to the inquiry into whether prior convictions qualify as serious or violent or strike convictions under the law. It appears that *Oehmigen* and *Bradford* concluded that eligibility is fundamentally a legal determination. As such, the People contend that the proper standard of review is that standard established for legal determinations or mixed factual and legal determinations that are primarily legal in nature, independent or *de novo* review.

Although this was not the standard employed by either the majority or dissenting opinions in the present case, based on the analysis of the record of conviction, above, the majority correctly set forth the result under either an abuse of discretion standard or a *de novo* analysis.

The record of conviction demonstrates the use of the SUV by Perez as the sole instrument of the felony assault, and by his act it constituted a weapon. Through actual use, the SUV was available to Perez for offense or defense. In fact, the record of conviction shows that it was used for offense or defense; either to assault Mr. Sanchez or to flee in reckless disregard for the life of Mr. Sanchez.

B. The Trial Court Abused Its Discretion by Rejecting Jury Findings and by Applying an Incorrect Interpretation of Proposition 36.

The People contend that even under the more deferential standard of an abuse of discretion, the standard applied by the majority, a trial court's factual inquiry is restrained by the record of conviction and the prior findings, explicit and implicit, returned by the trial jury. This appears to be what this Court expressed in *McGee* and *Woodell,* in discussing the limited inquiry based upon the record of prior criminal proceedings, with a focus on the elements of the offense of which a defendant was convicted. (*People v. McGee, supra,* 38 Cal.4th at p. 706.)

In its discussion, this Court expressed that, while a review of earlier criminal proceedings may be required where a review of the elements of the offense alone are not sufficient, "[t]he need for such an inquiry does not contemplate that the court will make an independent determination regarding a disputed issue of fact relating to the defendant's prior conduct. (*People v. McGee, supra,* 38 Cal.4th at p. 706, quoting *People v. Woodell, supra*, 17 Cal.4th at p. 460.)

It should be noted that such an inquiry and independent determination regarding disputed issues of fact is precisely what the dissenting and concurring opinions engaged in, and the inquiry urged by Perez in his brief. (RB, 23; see footnotes 9 and 11, *ante*.) Only the majority was constrained by the record of conviction and the findings previously returned by the jury in its verdict. This also appears to be what *Bradford* expressed, in explaining that the eligibility determination "is not a discretionary determination by the trial court." (*People v. Bradford, supra,* 227 Cal.App.4th at p. 1336.)

However, the trial court abused its discretion, as determined by the majority, in that it departed from the record of conviction or failed to

consider the record of conviction. That is, the conclusion that the SUV that was used in the felony assault was "incidental" to the conviction is inconsistent, as discussed above, with the findings and verdict returned by the jury.

Moreover, the discussion of speed, level of threat, relative seriousness of the felony assault in the present case as opposed to other cases involving convictions for felony assault—as set out in the dissenting and concurring opinions (*People v. Perez, supra,* 3 Cal.App.5th at pp. 835-836, dis. op.)—is immaterial to an eligibility determination based on the verdict, elements of the offense, and record of conviction.

While the majority found that the trial court abused its discretion by reaching conclusions inconsistent with the verdict and findings of the jury (*People v. Perez, supra,* 3 Cal.App.5th at p. 825), the majority also found that the trial court misinterpreted the voter initiative. (*Id.* at p. 827.) However, other than correcting this misinterpretation, the majority found no consequence to the trial court's conclusion that "an object that is not a deadly weapon per se" was not an object that if used would disqualify a petitioner from resentencing:

> 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.

(*People v. Perez, supra*, 3 Cal.App.5th at p. 827.)

Although the People agree with the majority's conclusion, the majority rejected the People's argument that an error in interpretation and application of the law is itself an abuse of discretion. Yet, it is well settled that, "when a trial court's decision rests on an error of law, that decision is an abuse of discretion." (*People v. Superior Court* (*Humberto S.*) (2008) 43

Cal.4th 737, 746; see also, *People v. Eubanks* (1996) 14 Cal.4th 580, 595; *People v. Neely* (1999) 70 Cal.App.4th 767, 775-776; *In re Anthony M.* (2007) 156 Cal.App.4th 1010, 1016.)

In the present case, by rejecting the possibility that an object that is not inherently a weapon might qualify as a weapon for purposes of ineligibility for resentencing under section 1170.126, the trial court abused its discretion. Unlike the dissent's analysis, the trial court failed to articulate what rationale it was relying on other than drawing a distinction between use of a weapon and being armed with a weapon. The trial court erred in concluding that objects that are not *per se* weapons can not disqualify a petitioner from eligibility under section 1170.126, and that error infected the decision of the court and constitutes an abuse of the trial court's discretion.

Consequently, assuming that an abuse of discretion is the correct standard of review, the majority correctly concluded that the trial court abused its discretion. The decision therefore should be upheld.

III. A DEFENDANT IS NOT ENTITLED TO A JURY TRIAL IN A PROPOSITION 36 ELIGIBILITY PROCEEDING

Perez argues that the trial court would have been precluded form finding him ineligible for resentencing under section 1170.126 because the jury did not return a verdict of guilty of assault with a deadly weapon or make an explicit finding as to any weapon or arming allegation. (RB, 41.)

Without repeating the argument above, the People, like the majority, believe that the jury's verdict and those findings necessary to that verdict, as determined by a review of the actual instructions provided to the jury, refute these claims. In fact, the jury did make implicit findings necessary to the verdict, which dictate Perez's ineligibility. The only factual

determination necessary, apart from those findings, explicit and implicit, is what was the "act" committed by Perez?

In the present case, it is undisputed that Perez's only act was driving the SUV. He did nothing else that could have, in any way, constituted an "act" supporting a conviction for felony assault. As discussed above, the jury made findings concerning Perez's general criminal intent and present ability. And it is from the record of conviction that the majority observed that, "[w]hen 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." (*People v. Perez, supra,* 3 Cal.App.5th at p. 825.) The majority goes on to reason that, "[t]he sole means by which [Perez] applied this force was the vehicle he was driving." (*Id.*) "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." (*Id.*)

In arguing that the foregoing conclusion of law violates the Sixth and Fourteenth Amendments, Perez argues that the majority substituted its "own extra facts determination for the judgment of the jury." (RB, 44.) Perez does not explain in what way use of the record of conviction and, particularly the findings of the jury necessary to the verdict, is violative of his rights. And, in fact, as discussed at length above, the findings relied upon by the majority were explicit or implicit findings necessarily returned by the jury with its verdict.

Perez appears to make two assumptions that are inconsistent with current law: Perez concludes that "Penal Code section 1170.126 creates a mandatory reduction in sentence when certain criterion are met." He describes this mandate as a presumption. (RB, 45.) And, "[t]he appellate courts have uniformly erred in misconstruing the intent of the voters and

depriving petitioners of their rights under *Apprendi* and its progeny." (RB, 45.)

However, Perez concedes "that numerous cases have disagreed with this argument, following *People v. Superior Court* (*Kaulick*) (2013) 215 Cal.App.4th 1279." (RB, 44.) In fact, the People have found no support for the assertion made by Perez that section 1170.126 establishes a presumption in favor of resentencing.

In *Kaulick* it was argued "that, once the trial court concluded that he was *eligible* for resentencing under the Act, he was subject *only* to a second strike sentence, *unless* the prosecution established dangerousness." (*People v. Superior Court* (*Kaulick*), *supra,* 215 Cal.App.4th at p. 1302, emphasis in the original, ("*Kaulick*").) This argument, like that of Perez in the present case, supposes a presumption in favor of resentencing. But the court rejected this construction of the law:

> [D]angerousness is not a factor which enhances the sentence imposed when a defendant is resentenced under the Act; instead, dangerousness is a hurdle which must be crossed in order for a defendant to be resentenced at all. If the court finds that resentencing a prisoner would pose an unreasonable risk of danger, the court does not resentence the prisoner, and the petitioner simply finishes out the term to which he or she was originally sentenced.

(*Kaulick, supra,* 215 Cal.App.4th 1279, 1302.)

As for the second broad assertion, that the courts of appeal have "uniformly erred" concerning petitioners under section 1170.126 and violation of rights under *Apprendi* and its progeny, the People would cite the discussion in *Bradford. Bradford* provides a thorough analysis specifically addressing that, "[*t*]*he type of factual determination called for by the statute does not violate the Apprendi line of cases*." (*People v. Bradford, supra,* 227 Cal.App.4th at pp. 1334-1336, emphasis added.)

The clear conclusion in *Bradford*, not unlike the similar analysis of this Court in *People v. McGee,* is that section 1170.126 does not increase the already imposed sentence. (See, *People v. McGee, supra,* 38 Cal.4th at pp. 688-709.) Rather, the factual inquiry, limited to the record of conviction, does not require findings by a jury. Discussing the analogous case of *Dillon v. United States* (2010) 560 U.S. 817, the court explained in *Bradford:*

> The United States Supreme Court characterized the statute permitting the sentencing reduction, 18 United States Code section 3582(c)(2), as 'a congressional act of lenity intended to give prisoners the benefit of later enacted adjustments to the judgments reflected in the Guidelines,' emphasizing that such sentencing modification proceedings were 'not constitutionally compelled.' (*Dillon, supra*, 560 U.S. at p. 828 [177 L.Ed.2d at p. 285].) The court then explained: Viewed that way, proceedings under 18 United States Code section 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 section 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. 'Judges in this country have long exercised discretion of this nature in imposing sentence *within established limits* in the individual case,' and the exercise of such discretion does not contravene the Sixth Amendment even if it is informed by judge-found facts.

(*People v. Bradford, supra,* 227 Cal.App.4th at p. 1335.)

Consequently, the court of appeal majority was correct. The trial court did not violate the Sixth or Fourteenth Amendments and its procedure was consistent with the law.

CONCLUSION

For the foregoing reasons, the People respectfully request that this Court affirm the court of appeal's decision.

Dated: April 11, 2017

Respectfully submitted,

LISA A. SMITTCAMP
Fresno County District Attorney

DOUGLAS O. TREISMAN
Senior Deputy District Attorney
Attorneys for Plaintiff and Appellant

Appellant's Brief Perez.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached **Appellant's Answer Brief On The Merits** uses a 13 point Times New Roman font and contains 13,885 words.

Dated: April 11, 2017

LISA A. SMITTCAMP
Fresno County District Attorney

DOUGLAS O. TREISMAN
Senior Deputy District Attorney
Attorneys for Plaintiff and Appellant

PROOF OF SERVICE

People v. Alfredo Perez, Jr.
Superior Court No. CF94509578
Appellate No. F069020
Supreme Ct. No. S238354

I, THE UNDERSIGNED, DECLARE AND SAY;

I am a citizen of the United States and a resident of the County of Fresno, State of California; I am over the age of 18 years and not a party to the within action; my business address is Fresno County District Attorney's Office, 3333 E. American Avenue, Ste. F, Fresno, CA 93725 and 2220 Tulare Street, Ste. 1000, Fresno, CA 93721.

On April 10, 2017, I served the attached, **APPELLANT'S ANSWER BRIEF ON THE MERITS** as follows:
I am familiar with the business' practice for collection and processing of correspondence for mailing, and that correspondence, with postage thereon fully prepaid, will be deposited with the United States Postal Service on the date noted below in the ordinary course of business, at Fresno, CA., addressed as follows:

Elizabeth Campbell
Attorney at Law
PMB 334
3104 O Street
Sacramento, CA

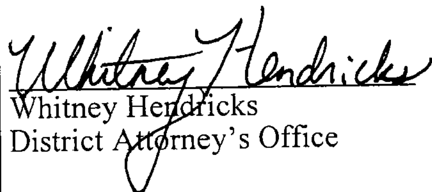
Central California Appellate Program
2150 River Plaza Dr., Ste. 300
Sacramento, CA 95833

Clerk of the **Fifth District Court of Appeal**
2424 Ventura Street
Fresno, CA 93721

Clerk of the **Fresno County Superior Court**
1100 Van Ness Avenue
Fresno, CA 93724-0002

Office of the Attorney General
Attn. Heather S. Gimle, Deputy Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.


Date: April 11, 2017
Whitney Hendricks
District Attorney's Office