

# SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Appellant,

v.

ALFREDO PEREZ, JR.,

Defendant and Respondent.

S238354

SUPREME COURT  
**FILED**

JAN 26 2018

Jorge Navarrete Clerk

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Deputy

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

Hon. Jonathan Conklin, Judge

## **RESPONDENT'S SUPPLEMENTAL AUTHORITIES**

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Superior Court  
No. CF94509578

RESPONDENT'S SUPPLEMENTAL AUTHORITIES

TO THE HONORABLE TANI CANTIL-SAKAUYE, PRESIDING JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to Rule 8.520(d) of the California Rules of Court, respondent Alfredo Perez submits the following supplemental authorities for this court's consideration.

Within approximately the past thirty days, this court issued two opinions relevant to the issues presented in this case. In *People v. Gallardo* (2017) 4 Cal.5th 120, this court held that the trial court violated a defendant's Sixth Amendment right to a jury trial when it found a disputed fact about the conduct underlying a prior conviction allegation that had not been established by virtue of the conviction itself. In *People v. Frierson* (2017) 4 Cal.5th 225, this court held that the State must prove a petitioner's ineligibility

under the Three Strikes Reform Act beyond a reasonable doubt. Finally, earlier in 2017 but subsequent to the conclusion of briefing in this case, this court held in *People v. Estrada* (2017) 3 Cal.5th 661 that, in considering a recall petition, the trial court is not limited to considering only facts encompassed by the prior judgment when determining whether a prisoner was eligible under the Act. (*People v. Estrada, supra*, 3 Cal.5th at p. 672.) Each of these cases has relevance to the issues currently before the court.

The Court of Appeal here held that a court determining eligibility for Proposition 36 relief has the authority 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 trier of fact in convicting a defendant of the current offense. (*People v. Perez* (2016) 3 Cal.App.5th 812, 832.) This court specifically disapproved this portion of the Court of Appeal opinion in *Frierson*. (See *People v. Frierson, supra*, 4 Cal.5th at p. 240, fn. 8.) Moreover, while the portion of this holding permitting the judge to make findings that go beyond the jury verdict would appear to have been endorsed by the holding in *People v. Estrada*, that case did not involve a consideration of the constitutional right to trial by jury, nor did it consider the federal authorities followed by this court in *People v. Gallardo*. (See *People v. Estrada, supra*, 3 Cal.5th at p. 668.)

In *Frierson*, this court held that proof beyond a reasonable doubt is required to discharge the People of the burden of

establishing that a petitioner is ineligible for resentencing under the Three Strikes Reform Act. (*People v. Frierson, supra*, 4 Cal.5th at p. 230.) The court held that applying a reasonable doubt standard to proof of ineligibility for resentencing preserves the parallel structure between the prospective and retroactive application of the Act. (*Id.* at pp. 238-239.) At the same time, preserving the exercise of broad judicial discretion in determining whether a prisoner’s release would pose an unreasonable risk to the public, effectuates the dual intent of the Act, that is, to protect the public while reducing excessive sentences. (*Id.* at p. 239.)

Quoting this court’s prior opinion in *People v. Johnson* (2015) 61 Cal.4th 674, this court concluded that the “parallel structure” of the Act as well as Penal Code section 1170.126’s “wholesale incorporation” of the ineligibility criteria from Penal Code section 1170.12, subdivision (c)(2)(C), reflect an intent to apply the same burden of proof regardless of whether the Act is being applied prospectively to new sentences, or retrospectively through the recall procedure. (*People v. Frierson, supra*, 4 Cal.5th at p. 236.)

The holding in *Frierson* is relevant not only as it affects the People’s burden of proof below, but also in terms of how the analysis in that case affects the overall proceedings. In addition to arguing that the trial court’s conclusion in this case was legally correct and factually supported by substantial evidence, respondent has also argued that, had the court proceeded as the People urged and denied his petition based on facts beyond those

necessitated by his conviction, the court would have thereby deprived him of his Sixth Amendment right to a jury trial as well as his right to due process. The interplay between the holdings in *Gallardo* and *Frierson* bears upon this contention.

In *Gallardo*, this court addressed the application of the Sixth Amendment to the determination of whether a defendant's prior serious felony allegation constitutes a strike. In that case, the trial court had relied on judicial fact-finding beyond the elements of the prior conviction in order to establish that the conduct underlying the defendant's conviction for assault by means likely to result in great bodily injury was in fact assault with a deadly weapon. (*People v. Gallardo, supra*, 4 Cal.5th at p. 123.) Disapproving *People v. McGee* (2006) 38 Cal.4th 682, this court held that this procedure ran afoul of *Descamps v. United States* (2013) 570 U.S. \_\_ [133 S.Ct. 2276]. By finding true a disputed fact about the conduct underlying the defendant's conviction, the trial court violated the defendant's Sixth Amendment right to a jury trial. (*People v. Gallardo, supra*, 4 Cal.5th at pp. 124-125.) This court held that, under those procedural circumstances, the judge's role was "limited to identifying those facts that were established by virtue of the conviction itself—that is, facts the jury was necessarily required to find to render a guilty verdict." (*Id.* at p. 136.)

The *Gallardo* decision, of course, occurred in a very different procedural context than the instant case. *Gallardo* concerned the application of a defendant's Sixth Amendment rights in the

context of a prior conviction allegation affecting a current prosecution. (*People v. Gallardo, supra*, 4 Cal.5th at pp. 125-126.) Here, as in *Estrada*, the question is whether the current conviction precludes relief under the Reform Act. (See *People v. Estrada, supra*, 3 Cal.5th at p. 665.)

Nonetheless, this court's holding in *Gallardo* is relevant to the issues presented in the instant appeal. The court in *Gallardo* disapproved the earlier decision in *People v. McGee*, in which this court had found no federal right to have a jury determine whether prior convictions constitute strikes under California law. (*People v. McGee, supra*, 38 Cal.4th 682, disapproved in *People v. Gallardo, supra*, 4 Cal.5th 120.) Although thus far California courts have held that, under *Dillon v. United States* (2010) 560 U.S. 817 [130 S. Ct. 2683; 177 L.Ed.2d 271], prisoners have no Sixth Amendment right to a jury determination of factors rendering them ineligible for relief under the Reform Act (see, e.g., *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1347), this court's adoption of the reasonable doubt standard in *Frierson*, together with the disapproval of *McGee* in *Gallardo*, would seem to call into question the underpinnings of *Bradford* and other cases.

This court emphasized in *People v. Johnson* and again in *People v. Frierson* that the structure and language of the Act make clear the "intent that sentences imposed on individuals with the same criminal history be the same, regardless of whether they are being sentenced or resentenced." (*People v. Frierson, supra*, 4 Cal.5th at p. 236, quoting *People v. Johnson, supra*, 6 Cal.5th at

686, italics added in *Frierson*.) On the other hand, this court in *Estrada* rejected the defendants' argument that *Johnson's* emphasis on the parallel schemes demanded that a court determining eligibility for resentencing should be limited to considering only those facts encompassed by the prior conviction. (*People v. Estrada, supra*, 3 Cal.5th at p. 672.) Not only did the *Estrada* decision not encompass a Sixth Amendment argument, however, that decision arose in a precise procedural context: where the defendant had entered a plea agreement in exchange for dismissal of related counts. This court's narrow holding was that a court determining a prisoner's eligibility under the Act may consider facts connected to dismissed counts, but only if those facts also underlie a count to which the defendant pleaded guilty. (*People v. Estrada, supra*, 3 Cal.5th at p. 674.)

In *Estrada*, this court was unpersuaded by an argument similar to that later embraced in *Frierson* – that the clear intent for treating offenders in a “nearly identical” manner demanded that “a court determining eligibility for resentencing should be limited to considering only those facts encompassed by the prior conviction.” (*People v. Estrada, supra*, 3 Cal.5th at p. 672.) This court stated that the language in *Johnson* did not compel identical treatment, but merely set forth the same substantive eligibility criteria. (*People v. Estrada, supra*, 3 Cal.5th at pp. 672-673.)

With respect, it is difficult to reconcile this declaration with the language in *Frierson*. It is similarly difficult to reconcile the protection of Sixth Amendment rights in *Gallardo* with a recall

procedure that embraces judicial fact-finding beyond the facts encompassed by the disqualifying conviction, when the result is that one procedural context may lead to a life sentence while the other may not.

Accordingly, respondent respectfully requests that this court reverse the holding of the Court of Appeal and reinstate the order granting his recall petition.

CONCLUSION

Respondent respectfully requests that this court reverse the Court of Appeal and reinstate the order recalling his sentence.

Dated: January 25, 2018

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

As required by California Rules of Court, Rule 8.520(c), I certify that this petition contains 1,936 words, as determined by the word processing program used to create it.

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Elizabeth Campbell  
Attorney at Law

DECLARATION OF SERVICE

I, the undersigned, declare as follows:

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

On January 25, 2018, I served the attached

RESPONDENT'S SUPPLEMENTAL AUTHORITIES

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

Alfredo Perez, Jr. Respondent 843 12th Street Sanger, CA 93657	Fresno County Superior Court 1100 Van Ness Avenue Fresno, CA 93724
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**(by electronic transmission)** - I am personally and readily familiar with the preparation of and process of documents in portable document format (PDF) for e-mailing, and I caused said document(s) to be prepared in PDF and then served by electronic mail to the party listed below, by close of business on the date listed above:

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

Executed on January 25, 2018, in Sacramento, California.

\_\_\_\_\_  
DECLARANT

