IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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| PEOPLE OF THE STATE OF CALIFORNIA, | ] | S130080 |
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| Plaintiff and Appellant, | ] | H026000 |
| | ] | |
| vs. | ] | (SANTA CLARA CO. |
| | ] | SUPERIOR COURT |
| MANUEL ALEX TRUJILLO, | ] | NO. CC125830) |
| | ] | |
| Defendant and Respondent. | ] | |
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SUPPLEMENTAL BRIEF

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AN APPEAL BY THE PEOPLE FROM A FINDING
BY THE SANTA CLARA SUPERIOR COURT THAT A
PRIOR CONVICTION ALLEGATION WAS NOT TRUE
THE HONORABLE HUGH F. MULLIN III, JUDGE

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SIXTH DISTRICT APPELLATE PROGRAM

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In response to this court's order of April 26, 2006, directing him to file a Supplemental Brief addressing whether the trial court erred in ruling that defendant's alleged prior conviction for inflicting corporal injury is "not a strike," defendant submits the following supplemental brief.

## I. THE TRIAL COURT'S FINDING THAT THE ALLEGED PRIOR CONVICTION WAS "NOT A STRIKE" WAS A RESOLUTION OF A MIXED QUESTION OF FACT AND LAW WHICH, VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE JUDGMENT, A RATIONAL FACT FINDER COULD MAKE, AND WAS THUS NOT ERRONEOUS.

### A. Introduction

The court's finding that the alleged prior conviction was not a strike was the resolution of a mixed question of fact and law that should be subject to reversal only if no rational fact finder could entertain a doubt as to whether

defendant personally used a dangerous or deadly weapon in the commission of inflicting corporal injury. Because there were several bases on which a rational fact finder could entertain a doubt on this issue, no error occurred.

B. The Trial Court's Finding Was Based on Resolution of a Mixed Question of Fact and Law After Trial, and is Reviewable, if at all, Only for Whether Any Rational Fact Finder Could Entertain a Reasonable Doubt.

1. The Issue of Whether the Prior Conviction Was a Strike Was A Mixed Question of Fact and Law.

As argued in the Opening Brief on the Merits, the prosecution had a burden of proving that appellant personally used a dangerous or deadly weapon in the commission of his section 273.5 offense. (Opening Brief on the Merits [OBM], at pp. 2-6.) Personal use of such a weapon is not one of the elements of that offense.

This court has previously acknowledged that this type of issue has a "factual content." (*People v. Kelii* (1999) 21 Cal.4th 452, 456.) "It is true that sometimes the trier of fact must draw inferences from transcripts of testimony or other parts of the prior conviction record." (*Id.*, at p. 457.) In *People v. Epps* (2001) 25 Cal.4th 19, 28, this court referred to the type of issue involved in the present case as one in which "some *fact* needed to be proved regarding the circumstances of the prior conviction - - such as whether a prior burglary was residential - - in order to establish that the conviction is a serious felony."

(Emphasis added.)

### 2. Review of the Trial Court Finding Must be Deferential, With the Appropriate Test Being Whether Any Rational Fact Finder Could Entertain a Reasonable Doubt.

Assuming for purposes of argument that a power to review a not true finding exists, the question naturally arises as to what standard of review should be applied.

At the outset, it should be recalled that the prosecution's burden of proof in the trial of a prior conviction allegation is that it must prove the truth of the allegation beyond a reasonable doubt. (*People v. Monge* (1997) 16 Cal.4th 826, 834; *People v. Tenner* (1993) 6 Cal.4th 559, 566; *In re Yurko* (1974) 10 Cal.3d 559, 562.) As held in *People v. Walker* (2001) 89 Cal.App.4th 380, 386, "At a trial on the proof of alleged prior felony convictions it is necessary for the prosecution to prove the prior felony conviction as alleged. [Citations.] When the prior conviction is alleged to be for a serious felony, the prosecution must also show that the offense committed qualifies as a serious felony in California."

By analogy to the rules of review for sufficiency of the evidence applied to criminal convictions, the test would be, after reviewing the record in the light most favorable to the judgment, could any rational trier of fact entertain a reasonable doubt that the prior conviction alleged existed and

qualified as a serious felony? (Cf. *People v. Johnson* (1980) 26 Cal.3d 557, 575-577; *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319.)

C. Reasons Why A Rational Fact Finder Could Entertain a Reasonable Doubt That Defendant Used a Dangerous or Deadly Weapon in the Commission of the Prior Conviction.

The only piece of evidence submitted to support the allegation that defendant used a dangerous or deadly weapon in the commission of a prior felony was his purported admission to the probation officer that he had done so. There were several reasons which could prompt a rational fact finder to find a reasonable doubt on this issue.

First, it has long been a tenet of California law, on which juries must be instructed *sua sponte,* that "evidence of oral admissions must be viewed with caution." (*People v. Beagle* (1972) 6 Cal.3d 441, 455, citing *People v. Ford* (1964) 60 Cal.2d 772, 799; see also *People v. Slaughter* (2002) 27 Cal.4th 1187, 1200.) As stated by this court in *People v. Bemis* (1949) 33 Cal.2d 395, 398-399:

> "The dangers inherent in the use of such evidence [of alleged oral admissions of the defendant] are well recognized by courts and text writers. [Citations.] 'It is a familiar rule that verbal admissions should be received with *caution* and subjected to careful scrutiny, as no class of evidence is more subject to error or abuse. Witnesses having the best motives are generally unable to state the exact language of an admission, and are liable, by the omission or the changing of words, to convey a false impression of the language used. No other class of testimony affords such temptations or opportunities for

> unscrupulous witnesses to torture the facts or commit open perjury, as it is often impossible to contradict their testimony at all, or at least by any other witness than the party himself.' (2 Jones, Commentaries on the Law of Evidence, 620.)"

Second, there was evidence which called into question defendant's ability to perceive or remember the events he related to the probation officer. Defendant's statement in the probation report acknowledged that prior to the incident between him and his cohabitant he had consumed an "unknown number of 'Cisco's,' (a premixed drink similar to a wine cooler) and was somewhat intoxicated." (People's Exhibit 13, Probation Report of Oct. 1, 1991, at p. 3.) It is well established in California law that alcohol intoxication is relevant impeachment evidence. "[E]vidence of intoxication is relevant to the issue of a witness' capacity to observe, recollect and communicate. (*People v. Singh* (1937) 19 Cal.App.2d 128.)" (*In re D.L.* (1975) 46 Cal.App.3d 65, 74; cited in 4 Witkin, California Evidence (4th ed. 2000), § 265, at p. 336.)

Third, as was no doubt known by the trial judge in this case, plea bargaining of serious felony charges such as that originally brought against defendant was prohibited at the time of the defendant's plea in the earlier case "unless there is insufficient evidence to prove the people's case, or testimony of a material witness cannot be obtained, or a reduction or dismissal would not result in a substantial change in sentence." (Pen. Code, § 1192.7, subd. (a).)

The People's dismissal of the personal use allegation as to the section 273.5 violation, when they could do so only on limited grounds, one of which was insufficient evidence, could support a reasonable doubt on the issue.

Recognizing the very real possibility that the People dismissed the allegation because the evidence did not support it, exercising the caution about evidence of oral admissions required by California law, and recognizing defendant's state of intoxication at the time of the events, a rational fact finder could well have entertained a reasonable doubt as to whether the defendant personally used a dangerous or deadly weapon in the commission of the prior offense. Proper deference to the fact finder in the application of the reasonable doubt standard requires an affirmance. This court is not authorized to substitute its judgment even if it would decide the issue differently as a trier of fact.

Consequently, the trial court made no error in ruling that the alleged prior conviction was "not a strike."

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## II. NO OTHER LEGAL ERROR OCCURRED.

### A. Introduction.

From comments in previous briefing, defendant understands the People's claim of legal error to be that "the court felt legally precluded from

considering defendant's use of a weapon because the prior plea agreement dismissed the weapon-use allegation . . . The court's legal ruling precluding consideration of the evidence that defendant used a knife eviscerated the People's ability to prove for prior conviction with a strike." (Answer Brief on the Merits, at p. 14.) This claim fails for two reasons. First, the finding cannot be impeached by ambiguous statements by the trial judge which do not clearly indicate an erroneous understanding of the law. Second, if the finding was predicated on that basis, it was not legally erroneous.

B. The Trial Court Did Not Clearly State It Was Precluded From Considering Respondent's Admission, and The Verdict Cannot Be Impeached With Ambiguous Statements.

"Generally, on appeal, statements made by the trial court in the course of trial as to its reasoning are not reviewable [Citations.] However, there are exceptions to this general rule. In criminal cases an appellate court may take into consideration the '"judge's statements as a whole" [when they] disclose an incorrect rather than a correct concept of the relevant law, embodied not merely in "secondary remarks" but in his basic ruling . . .' (*People v. Butcher* (1986) 185 Cal.App. 3d 929, 936.)

Measured against this standard, the judge's comments do not provide a basis to reverse the finding. The trial judge admitted People's Exhibit 13, which included the abstract of judgment in action 149886, the complaint filed

in Municipal Court, the minutes of the hearing at which defendant pled guilty, the probation report, and the transcript of the plea. There was no ruling excluding the prosecution's evidence.

While the prosecution's dismissal of the personal use allegation at the time of the plea was obviously of great concern to the judge, he did not rule that that dismissal precluded consideration of the prosecution's evidence. As noted above, harboring a doubt that the evidence was sufficient to support the allegation in light of the prosecution's agreement to dismiss it was perfectly reasonable, given the limited grounds on which the People could plea bargain the charge they had made. The judge remarked that he was "not going on that," referring to defendant's purported admission to the probation officer, "I'm going on the fact that [the prosecutor at the plea], in all his wisdom, settled the case with the understanding the knife allegation would not be used. It went away. The defendant relied on that." (RT 38.) These remarks are consistent with the view that once the prosecutor agreed to the dismissal of the allegation, defendant's purported admission was no longer particularly against his interest, of lesser evidentiary weight than a judicial admission would have been, and insufficient to meet the exacting beyond a reasonable doubt standard of proof.

C. <u>If the Trial Court Ruled That He Could Not Consider Defendant's Purported Admission, the Ruling Was Correct.</u>

1. A contrary finding would have violated defendant's federal constitutional rights to jury trial and due process.

Assuming for the purpose of argument that the trial court ruled that he could not consider defendant's purported admission to the probation officer due to the plea bargained dismissal of the personal use allegation, his ruling was correct and conformed to limits placed on the permissible scope of inquiry set by the U.S. Supreme Court in *Taylor v. United States* (1990) 495 U.S. 575 and *Shepard v. United States* (2005) 544 U.S. 13 [161 LEd2d 205]. Although *Shepard* and *Taylor* involved the question of the proper construction of a federal criminal statute, each decision recognized that contrary rulings would raise substantial issues of federal constitutional law. Defendant contends that going beyond the parameters set by *Taylor* and *Shepard* would violate his federal constitutional rights to due process and jury trial. (U.S. Const., 6th & 14th Amends.)

In *Taylor v. United States, supra,* 495 U.S. 575, the high court considered what kind of burglary convictions qualified as a "violent felony" under 18 U.S.C. section 922(e), and what proof could be considered if the adjudicated elements of a prior conviction did not establish it as violent. This federal statute required that an ex felon possessing a firearm be punished with a mandatory minimum term of fifteen years of imprisonment if the person had

three previous convictions by any court for a violent felony or serious drug offense. The term violent felony was defined in the statute and included, among other things, burglary. (18 U.S.C. § 922 (e)(2)(B)(ii).) The district court found that two Missouri burglary convictions were violent felonies, which, when added to two other prior convictions which were concededly violent, triggered the mandatory minimum term.

The United States Supreme Court reversed. First, it determined that the term "burglary" in the statute was not limited to the common law definition of a breaking and entering of an inhabited dwelling at night time with the intent to commit a felony. It found that the term was intended to encompass "generic burglary," which it defined as "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." (*Taylor*, *supra*, 495 U.S. at p. 599.)

The court then confronted the "problem of applying this conclusion to cases in which the state statute under which a defendant was convicted varies from the generic definition of 'burglary.'. . . We therefore must address the question whether, in the case of a defendant who had been convicted under a non generic burglary statute, the Government may seek enhancement on the ground that he actually committed a generic burglary." (*Taylor, supra*, 495 U.S. at pp. 599-600.)

*Taylor* determined that the statute "generally requires the trial court to

look only to the fact of conviction and the statutory definition of the prior offense." (*Id.*, at p. 602.) However, the *Taylor* court did permit the "sentencing court to go beyond the mere fact of conviction in a narrow range of cases where a jury was actually required to find all the elements of a generic burglary." (*Ibid.*) The example given was when the charging document and jury instructions demonstrated that the jury necessarily had to find an entry of a building to convict. (*Taylor, supra*, 495 U.S. at p. 602.)

The *Taylor* court expressed its holding thusly: "We therefore hold that an offense constitutes a 'burglary' for purpose of a § 924(e) sentence enhancement if either its statutory definition substantially corresponds to 'generic' burglary, or the charging paper and jury instructions actually required the jury to find all the elements of generic burglary in order to convict the defendant." (*Taylor, supra*, 495 U.S. at p. 602.) Because Missouri's definitions of second degree burglary included some variations which did not include the elements of generic burglary, the district court's finding was reversed.

The unanimous *Taylor* court rested its decision in part on the language of the federal statute and legislative history materials it had reviewed. However, it also relied on potential constitutional violations that would occur if a wider scope of inquiry were permitted. (*Taylor, supra*, 495 U.S. at pp. 601-602.)

> Third, the practical difficulties and potential unfairness of a factual approach are daunting. In all cases where the Government alleges that the defendant's actual conduct would fit the generic definition of burglary, the trial court would have to determine what that conduct was. In some cases, the indictment or other charging paper might reveal the theory or theories of the case presented to the jury. In other cases, however, only the Government's actual proof at trial would indicate whether the defendant's conduct constituted generic burglary. Would the Government be permitted to introduce the trial transcript before the sentencing court, or if no transcript is available, present the testimony of witnesses? Could the defense present witnesses of its own and argue that the jury might have returned a guilty verdict on some theory that did not require a finding that the defendant committed generic burglary? If the sentencing court were to conclude, from its own review of the record, that the defendant actually committed a generic burglary, could the defendant challenge this conclusion as abridging his right to a jury trial? Also, in cases where the defendant pleaded guilty, there often is no record of the underlying facts. Even if the Government were able to prove those facts, if a guilty plea to a lesser, nonburglary offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to burglary.

In *Taylor,* the court recognized two potential constitutional violations in allowing an "elaborate fact finding process regarding the defendant's prior offenses." (*Taylor, supra*, 495 U.S. at p. 601.) The first was the possible abridgment of the right to jury trial if "the sentencing court were to conclude, from its own review of the record, that the defendant actually committed a generic burglary . . ." (*Ibid*.)

Defendant has previously argued that there is a federal constitutional right to trial by jury in the determination of a fact about a prior conviction not

within the elements of the offense. (OBM, at pp. 25-32, Reply Brief on the Merits [RBM] at pages 21-22.) Defendant incorporates those arguments. The refusal of the trial judge to go beyond the elements of the offense of conviction was thus justified by the fact that were he to do so, he would be violating defendant's federal constitutional right to jury trial. Although defendant waived his right to a jury for trial of the prior conviction allegations, he did so at a time when the controlling decisional law from this court was that there was no federal or state constitutional or state statutory right to have the jury determine whether the alleged prior conviction was a strike. (*People v. Kelii*, supra, 21 Cal.4th 452, 495-459.) As this court stated in *Kelii*, its holding "le[ft] the jury little to do except to determine whether those documents are authentic and if so, are sufficient to establish that the convictions the defendant suffered are indeed the ones alleged." (*Id.*, at pp. 458-459.) It was only this limited role for the jury that defendant knowingly waived.

Second, the *Taylor* court referred to the precise situation involved in the present case, and saw a problem with fundamental fairness. "Even if the Government were able to prove these facts, if a guilty plea to a lesser, nonburglary offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to burglary." (*Taylor, supra*, 495 U.S. at pp. 601-602.)

In the present case, defendant was originally charged in the 1991 case

with a serious felony, a violation of section 273.5 with an allegation of personal use of a dangerous or deadly weapon. He accepted the prosecution's offer to plead to the section 273.5 violation, in exchange for dismissal of the allegation that would have rendered the felony a serious one within the meaning of section 1192.7, subdivision (c). As recognized by the U.S. Supreme Court, it would be unfair to impose a sentence enhancement as if he had pleaded guilty to a serious felony, when he pleaded guilty to a lesser offense.

This amounts to a "bait and switch" tactic by the government, in which a defendant is induced to give up valuable rights in exchange for conviction of a lesser offense consisting of certain defined factual elements. A plea of guilty admits all the elements of the charged offense, but no more. Then, when seeking to increase punishment for a later offense, the government seeks to treat the prior conviction as including an additional element, even, as in this case, an additional element which it had alleged but agreed to dismiss in exchange for the plea.

The principles of *Taylor* were applied more specifically to prior convictions resulting from guilty pleas in *Shepard v. United States, supra,* 544 U.S. 13. In *Shepard,* the state burglary statute under which the defendant had suffered four prior convictions included several types of structures which could be burglarized, including boats and motor vehicles. The offenses as

charged in state court were broader than generic burglary, and the defendant pleaded guilty. The Government sought to prove that the convictions necessarily were based on burglary of a building by introducing police reports submitted with applications for issuance of the complaints, which described burglaries of buildings. The *Shepard* court held that such documents were not admissible.

*Shepard* framed the issue as "whether a sentencing court can look to police reports or complaint applications to determine whether an earlier guilty plea necessarily admitted, and supported a conviction for, generic burglary. We hold that it may not, and that a later court determining the character of an admitted burglary is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." (*Shepard*, *supra*, 544 U.S. at p. ____ [161 LEd2d at p. 211].) *Shepard* explained that where the statute requires no finding of facts constituting generic burglary and the charging document does not narrow the charge, "the only certainty of a generic finding lies . . . (in a pleaded case) in the defendant's own admissions or accepted findings of fact confirming the factual basis for a valid plea." (*Id*., at p. ____ [161 LEd2d at p. 217].)

Even the three dissenters in *Shepard* recognized there would be constitutional concerns in situations such as the present case. Justice

O'Connor's opinion, joined by Justices Kennedy and Breyer, framed the issue as whether "Shepard *understood* himself to be admitting the crime of breaking into a building." (*Shepard, supra*, 544 U.S. at p. ____.) Justice O'Connor also allowed that, "There may be some scenarios in which - - as the result of charge bargaining, for instance, or due to unexpected twists in an investigation - - a defendant's guilty plea is premised on substantially different facts than those that were the basis for the original police investigation. In such a case, a defendant might well be confused about the practical meaning of the admission of guilt. (Cf. *Taylor*, 495 U.S., at 601-602 ('[I]f a guilty plea to a lesser, non burglary offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to burglary')." (*Ibid*.)

The *Shepard* opinions, majority and dissenting, pose the issue as whether the record shows the defendant knew that his *plea* was admitting the fact that made the burglary a violent felony. In the circumstances of the present case, the record does not establish such fact. The fact that made the conviction a serious felony was alleged but then *dismissed* in view of defendant's plea to the offense which by itself was not a serious felony. Any reasonable person would understand that his plea did *not* admit that fact, because the specific factual allegation was being dismissed. While there was evidence that defendant later admitted that fact to the probation officer, that

purported admission did not indicate an understanding that that fact had been admitted by his plea.

The *Shepard* majority opinion reiterated the possible violation of the right to jury trial that would attend an acceptance of judicial fact finding which extended to the police reports and application for complaints at issue in *Shepard* (*Shepard, supra,* 544 U.S. at p. ____ [161 LEd2d at pp. 216-217].) Actually, that part of Justice Souter's opinion, part III, was a plurality opinion, because Justice Thomas stated in his concurrence in part and concurrence in the judgment that he could not join that part of the opinion because he was of the view such a holding would be constitutional error, and that even the limited fact finding permitted under *Taylor* violated the jury trial guarantee of the Sixth Amendment. (*Shepard, supra,* 544 U.S. at p. ____ [161 LEd2d at pp. 218-219].)

Even the three *Shepard* dissenters, while seeing no potential jury trial violation, recognized the fundamental unfairness of a situation in which a factual allegation that would have established the serious or violent nature of a conviction was bargained away, such that a defendant would not have understood that his plea admitted such fact.

The main case authority cited by the People in support of its claim of error is *People v. Blackburn* (1999) 72 Cal.App.4th 1520. However, the defendant in *Blackburn* apparently did not raise a federal due process claim in

that case. While the *Blackburn* court stated that neither Double Jeopardy or collateral estoppel prevented the prosecution from proving a fact about a prior conviction it had agreed to dismiss as part of a plea bargain, the Due Process Clause of the Fourteenth Amendment was not discussed. (*Blackburn, supra*, 74 Cal.App.4th at pp. 1527-1531.) The United States Supreme Court decision in *Taylor v. United States, supra*, 495 U.S. 575 was not mentioned in *Blackburn*. It is elementary that a case cannot be cited as authority on an issue not raised or decided.

In fact, defendant's research has disclosed no California case which has squarely considered the federal due process issue articulated in *Taylor*. This court has discussed *Taylor* on several occasions. However, virtually all of these were to reject claims of capital case defendants that *Taylor* prevented proof of details of prior convictions during the penalty phase of a capital prosecution. (See, e.g., *People v. Johnson* (1992) 3 Cal.4th 1183, 1242, fn. 14; *People v. Mayfield* (1993)) 5 Cal.4th 142, 190, fn. 7; *People v. Wader* (1993) 5 Cal.4th 610, 656, fn. 8; *People v. Stanley* (1995) 10 Cal.4th 764, 820; *People v. Barnett* (1998) 17 Cal.4th 1044, 1178; *People v. Lewis* (2001) 25 Cal.4th 610, 660.)

However, if this court finds the People have a right to appeal, it should then consider the due process issue posited by *Taylor*. If refusal to permit the proof of such a fact is the alleged error committed by the trial court, this court

should consider whether such refusal was required by the federal due process clause, and was therefore a correct ruling.

In deciding this issue, it is important to note that this court is not constrained by considerations of *stare decisis*. This court has not ruled on this issue in the present context. It has never considered the claim that allowing the prosecution to prove for purposes of later sentence enhancement an aggravating allegation it had dismissed as an inducement to obtain a plea to a lesser offense violates due process. In *People v. Guerrero* (1987) 44 Cal.3d 343, the court authorized an inquiry beyond the minimum statutory elements of the prior offense to which the defendant pled guilty, and permitted examination of the accusatory pleading in the case, which had alleged the fact necessary to establish the conviction as a serious felony. However, this court noted that: "In this case we are not called upon to resolve such questions as what items in the record of conviction are admissible and for what purpose or whether on the peculiar facts of an individual case the application of the rule set forth herein might violate the constitutional rights of a criminal defendant. Because we are not called on to resolve such questions, we decline to address them here." (*Id*., at p. 356, fn. 1.)

Thus, this court recognized that consideration of the "entire record of conviction" might in certain cases violate the constitutional rights of a defendant, but prudently declined to address such questions in the abstract, in

what would have been dictum. In *Guerrero*, it was necessary to decide only that the trier of fact could look to specific allegations in the information, and was not limited to the minimum elements defined by the statute. *Guerrero* is consistent with *Taylor* and *Shepard.* *Shepard* specifically permitted a later court determining the character of an admitted offense to "examin(e) the charging document." (*Shepard, supra,* 544 U.S. at p. ____ [161 LEd2d at p. 211].)

In fact, the sparse California authority that exists on the issue favors defendant. In *People v. Leslie* (1996) 47 Cal.App. 4th 198, an alleged prior conviction was a violation of Penal Code section 246.3, grossly negligent discharge of a firearm. In the proceedings leading to the alleged prior, the defendant had been charged with the section 246.3 violation, with a specific allegation under section 969f that the offense was a serious felony within the meaning of Penal Code section 1192.7. The defendant pled guilty to the charge, but did not admit the allegation that the offense was a serious felony. The court made no finding on the allegation. However, the defendant at the time of the plea admitted he had personally used a firearm.

The *Leslie* court held that it was error for the court at the time of the plea to fail either to obtain an admission of the serious felony allegation or to make a finding. However, it held that this failure "would only prejudice appellant if the dismissal of the serious felony allegation was part of the plea

bargain. Appellant does not make that contention nor does the record disclose such an agreement." (*Id*., at p. 205.) In the absence of such an agreement, the *Leslie* court held that the prosecution was free to prove the serious felony character of the conviction, and that defendant's admission at the time of the plea that he personally used a firearm supported the court's finding that the prior conviction was a serious felony.

*Leslie*, too, is consistent with *Taylor* in that *Taylor* permits admissions made at the time of the plea to be considered by a later court. However, *Leslie* strongly suggested a contrary approach should be taken if dismissal of the serious felony allegation had been part of the plea bargain.

Because a true finding would have violated defendant's federal constitutional rights to jury trial and due process, the finding that the prior conviction was not a strike was correct.

> 2. The trial court's decision was correct because the probation report was inadmissible hearsay and was not part of the "record of conviction" and therefore could not be considered.

In *People v. Reed* (1996) 13 Cal.4th 217, 230, this court stated: "whether the probation officer's report also falls within the more narrow definition of record of conviction presents a closer question. We decline to resolve that question because, as explained below, it is clear that the evidence

should be excluded as inadmissible hearsay." The probation report offered in the present case was also inadmissible hearsay and did not fall within the narrower definition of "record of conviction" because it was prepared with minimal procedural safeguards.

In *Reed*, this court referred to two potential descriptions of the "record of conviction." The first was "equivalent to the record on appeal (see *People v. Abarca* (1991) 233 Cal.App.3d 1347, 1350) . . ." (*Reed, supra*, 13 Cal.4th at p. 223.) The second approach would define the record of conviction "more narrowly, as referring only to those record documents reliably reflecting the facts of the offense for which the defendant was convicted." (*Ibid*.)

In *Reed*, this court determined that the preliminary examination transcript was part of the record of conviction under even the narrow definition, "because the procedural protections afforded the defendant during a preliminary hearing tend to ensure the reliability of such evidence. Those protections include the right to confront and cross-examine witnesses and the requirement those witnesses testify under oath, coupled with the accuracy afforded by the reporter's verbatim reporting of the proceedings." (*Reed, supra*, 12 Cal.4th at p. 223.) Applying that test, the probation report does not fall within the record of conviction.

Perhaps the most important right a defendant has at a preliminary hearing was not mentioned in *Reed*: the right to counsel. This is both a

statutory and federal constitutional right. (Pen. Code, § 859; *Bogart v. Superior Court* (1963) 60 Cal.2d 436, 438-440; *Coleman v. Alabama* (1970) 399 U.S. 1, 9-10.) There is no such right at a probation interview. (*Minnesota v. Murphy* (1984) 465 U.S. 420, 424, fn. 3.) There is no requirement that a probation officer warn a defendant about the right to remain silent or the potential adverse use of anything he may say. (*Id*., at pp. 429-431.) There are basically no procedural protections of any kind during a probation interview.

There is apparently only one case that has addressed the issues of whether a probation report itself comes within a hearsay exception and whether it is part of the "record of conviction." That case is *People v. Monreal* (1997) 52 Cal.App.4th 620. In that case, the court conceded "that the procedural protections which support the reliability of a preliminary hearing transcript were not applicable to a probation officer's report of a defendant's admissions. A probation officer's report is not made under penalty of perjury. It does not ordinarily purport to be a verbatim transcript of the defendant's statements." (*Id*., at p. 679.)

Despite these concessions, the Court of Appeal concluded that the probation officer's report "is reliable for the same reasons supporting our conclusion that the report is sufficiently trustworthy to qualify as an official record." (*Monreal, supra*, 52 Cal.App.4th at p. 679.) The Court of Appeal's reasoning in *Monreal* was faulty.

The Court of Appeal claimed that a probation report is admissible within the hearsay exception defined in Evidence Code section 1280, subdivision (b), a record by a public employee. Addressing one of the necessary foundational facts for this exception, the *Monreal* court stated that the probation officer appeared to have recorded defendant's statement "at or near the time" the defendant made the statement. (52 Cal.App. 4th at p. 678.) However, the opinion referred to no facts in the record indicating the timing of the recording of the defendant's statement. Instead, it stated that "a report usually is prepared during a short period of time between conviction and sentencing, thus ensuring that the probation officer has recorded the statements shortly after they were made." (*Id*. at p. 679.) However, even if a defendant does not waive time for sentencing, the period between conviction and sentencing may be as long as 20 judicial days, and if time is waived, it can be much longer. (Pen. Code, § 1191.) In the present case, the date of the probation interview was stated to be September 16, while the report was dated October 1, a period of fifteen days. (People's Exhibit 13.)

The official record exception requiring recordation "at or near the time of the act, condition or event" cannot be reasonably construed as allowing recording as much as 15 days after a statement is heard. A recent case considering this requirement referred to the fact that the record was made the *same day* as the event. (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1462,

fn. 5.) A recording on the same day as the observation supports a finding that it occurred "at or near the time" of the event. Allowing recording to occur up to 15 days later does not. "Prompt recording after an event is required to ensure accuracy of recollection and recording. There must be foundational proof, therefore, that the writing was made 'at or near the time of the act, condition, or event' recorded." (1 Jefferson, Cal. Evidence Benchbook (Cont. Ed. Bar 3d ed. 1997) § 4.8, p. 121.) Thus, a probation report does not necessarily satisfy the public record hearsay exception, as claimed by the *Monreal* opinion. Because satisfaction of that hearsay exception was the rationale for finding sufficient reliability for inclusion of the probation report in the "record of conviction," that finding also fails.

*Monreal* also claimed that the probation report was reliable because of the "fact that defendant had the opportunity to challenge the accuracy of the report at sentencing and to correct any misstatements. This fact obviates any need for a word-for-word transcription." (*Monreal, supra*, 52 Cal.App. 4th at p. 680.) With all respect, it is seldom in the defendant's interest to assert at sentencing that a purported admission which tracks a crime victim's statement was incorrect. If, as in defendant's prior conviction, the plea stipulated a prison sentence of a certain length, the sentencing will often be perfunctory, as the court is relieved of the burden it would otherwise have to find aggravating or mitigating factors, or to consider the numerous potential

grounds for or against grant of probation.

In contrast to the unpersuasive analysis and rationale of *Monreal*, apparently not followed by a single published decision in the nine years since it was issued, stands the analysis of the United States Supreme Court in *Taylor* and *Shepard.* These decisions strictly limit the record of conviction to highly reliable statements of the defendant made in a written plea agreement, or made and recorded during the plea colloquy, or by findings of the court to which the defendant expressly assented. These are the types of information in a record of conviction which are either recorded verbatim, or contained in a document which the defendant can examine with benefit of counsel. Hearsay statements of the defendant are not usable. The nature of the conviction is fixed with formalities during proceedings in which the defendant is represented by counsel. It is not based on materials of dubious reliability like a later alleged jail house admission by the defendant to the probation officer.

For these reasons, this Court should resolve the issue it left undecided in *Reed*, should disapprove *People v. Monreal*, and hold that a probation report is not admissible under the record by a public employee exception without a showing of prompt recording, nor sufficiently reliable to constitute part of the "record of conviction" which can be examined by the trier of fact in the trial of a prior conviction allegation.

## CONCLUSION

The trial court's finding that defendant's prior conviction was not a strike was not erroneous, for the reasons stated above.

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Respectfully submitted,

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