IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Appellant,

v.

MANUEL ALEX TRUJILLO,

Defendant and Appellant.

S130080

Sixth Appellate District, No. H026000
Santa Clara County Superior Court No. CC125830
The Honorable Hugh F. Mullin III, Judge

THE PEOPLE'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

Constitutional Provisions

Statutes

TABLE OF AUTHORITIES (continued)

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FURTHER STATEMENTS OF THE CASE AND FACTS

The information alleged that defendant had a prior conviction for inflicting corporal injury, and that the offense was a serious felony. (1CT 28.) In support of the allegation, the prosecutor introduced People's Exhibit 13, which contained records of the prior conviction. (Augmented CT 1-21.) The records included the abstract of judgment, felony complaint, minute order of the change-of-plea hearing, report of the probation officer, and transcript of the change-of-plea hearing. (Augmented CT 1-21.)

The felony complaint in People's Exhibit 13 indicated that defendant was charged in Count 1 with inflicting corporal injury (Pen. Code, § 273.5, subd. (a))[1/] and in Count 2 with assault with a deadly weapon (§ 245, subd. (a)(1)). (Augmented CT 3-4.) The complaint also alleged that during the infliction of corporal injury, defendant "personally used a deadly and dangerous weapon, to wit: A KNIFE, within the meaning of Section 12022(b) of the Penal Code." (Augmented CT 3.)

The transcript of the change-of-plea hearing in People's Exhibit 13 contained the following colloquy regarding the terms of defendant's plea

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1. All subsequent statutory citations are to the Penal Code unless otherwise indicated.

agreement:

> [THE COURT:] Mr. Trujillo, you've been accused in Count 1 of a felony, corporal injury to your spouse. . . . [¶] The maximum punishment of that crime is four years in prison. If you plead to the charge of either guilty or no contest, I'll sentence you to the mitigated term of two years in prison. You have parole of three years. One year in prison if you violate parole. [¶] Do you understand the offer presented to you at this time?
>
> THE WITNESS: Yes.
>
> THE COURT: Do you accept it?
>
> THE WITNESS: Yes.
>
> THE COURT: The D.A.'s office has agreed to dismiss Count 2, the assault with a deadly weapon. They've also agreed to strike the allegations that you used a knife in the commission of the felony. [¶] . . . [¶] Has anyone made you any other promises?
>
> THE WITNESS: No.

(Augmented CT 15-16.)

The probation officer's report ("probation report") in People's Exhibit 13 contained several statements attributed to defendant regarding the nature of the offense.

> On September 16, 1991, the defendant was interviewed at the Santa Clara County Jail where he admitted culpability. He explained that prior to the incident he had consumed an unknown number of "Cisco's," (a premixed drink similar to a wine cooler) and was somewhat intoxicated. He became very upset with the victim regarding the way she was supervising her children. A verbal argument ensued and escalated to the point where they were each pushing and shoving each other. He became angry and went down the stairs where he found a kitchen knife on a couch. When the victim came downstairs she told him she was leaving and, as she was going out the front door, "I stuck her with the knife."
>
> He explained that he did not really intend to hurt her and the whole incident would probably not have occurred had he not been drinking.

> He further stated that he and the victim are planning on marrying sometime in the future. He also stated that the victim wants the charges against him dropped so he can be released from jail. He thinks the two years prison he agreed to is fair, but thinks he would have gotten a better deal by going to jury trial.

(Augmented CT 9-10.)

The court admitted the entirety of People Exhibit 13 without objection. (1RT 26.) The defense rested without offering evidence of its own. (1RT 27.)

The prosecutor conceded that inflicting corporal injury "doesn't appear in either of the two lists of offenses which qualify as violent or serious offenses. However, those lists do include any felony conviction for a crime in which the defendant personally used a dangerous or deadly weapon." (1RT 28.) He argued that "a defendant's statements contained in the probation report have been found to be admissible to prove the serious nature of a prior felony" (1RT 28), and that the probation report "made clear that the defendant admitted to the probation officer words to the effect that he took a knife and stuck the victim. And based on that, the serious nature of the felony is established" (1RT 28-29).

Defense counsel argued that the prior conviction for inflicting corporal injury was "not a strike irregardless of whatever he said in the probation report. And the reason for that is that the People are not entitled to undermine the conviction. The conviction is for a 273.5. The allegation of a 12022(b) is stricken. [¶] The courts are entitled to go behind the conviction and to look at things that are part of the court record, like the defendant's statements in the probation report, like the allegations of whatever it was that he entered into or things like that, when there's an ambiguity on the face of the document. [¶] In this particular document, there is no ambiguity of what he's convicted of. He was convicted merely of 273.5, and the use allegation that would have elevated it into a strike or into a serious or violent crime at the time was stricken. [¶] Therefore, I think whatever he said in the probation report is not relevant and not something the Court can look at because it undermines the conviction

itself." (1RT 32-33.)

The prosecutor replied that "the law simply is that the probation report is an official record, that the statements of the defendant contained in that official record come within an exception to the hearsay rule. The declarations, therefore, are admissible. [¶] And to the extent that they describe conduct which satisfies the requirements of the statutes concerning what constitutes a violent or serious offense, they are part of the record for the Court to consider in determining whether or not the conviction involved conduct that brings it within one of the prescribed statutory definitions. And personal use of a dangerous or deadly weapon during the commission of any felony renders that felony a strike for future purposes." (1RT 34-35.)

The court ruled that defendant did suffer a prior conviction for violating section 273.5 (1RT 35-36), but that the conviction was not a strike (1RT 37-38). The court stated the latter part of its ruling as follows:

> [THE COURT:] Regarding the 273.5 conviction in Information 149886 as a strike, the defendant entered into a negotiated settlement in that case for a period of two years in state prison, which was the mitigated term. During the voir dire and also on the probation report and the abstract, the 12022(b) was stricken as part of the negotiated settlement of that case.
>
> Judge Lisk voir-dired the defendant indicating to him that the maximum time of this charge was four years in the state prison. At least at that time that offense was a two-, three-, four-year offense.
>
> It seems that a prior, to be a strike, has to be a prior conviction, and there was no conviction of the 12022(b) allegation. And the charging language of Count 1, the 273.5, mentions nothing about a weapon. [¶] . . . [¶]
>
> [PROSECUTOR]: There does not have to be a conviction for something which is alleged on its face to involve personal use of a weapon.
>
> THE COURT: But that was stricken, so it's no longer alleged on its face.
>
> [PROSECUTOR]: I know. It doesn't have to be is what I'm

saying.

THE COURT: It went away.

[PROSECUTOR]: The cases that we're relying on are those that say that where you look is to the entire record of the conviction. The purpose for doing that is because the charge itself, on its face, doesn't allege something that you can automatically and without fail --

THE COURT: No. Okay. But I'm not going on that. I'm going on the fact that [the prosecutor in the prior case], 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.

[PROSECUTOR]: Yes.

THE COURT: And I think this goes to the benefit of his bargain. Now, if you disagree with me, take me up on it. That's fine. But the Court finds that that is not a strike.

[PROSECUTOR]: Okay. And I do disagree with you, your Honor. And, hopefully, it's something that can be taken up.

THE COURT: But because there was never an admission of it -- it was stricken on the motion of the district attorney -- and there was no -- after that, there was no further language in the Information that remained as to involving a deadly and dangerous weapon, to wit, a knife, the Court finds that not to be a strike.

(1RT 37-38.)

In declining to dismiss one of defendant's other prior convictions in furtherance of justice, the trial court found that the prior conviction for inflicting corporal injury "involved the use of a knife, although you have to go back behind the conviction to show that." (1RT 45.)

The Sixth Appellate District held that the trial court erred as follows:

> In the instant case, the trial court refused to consider the admission of personal use of a knife defendant made to the probation officer in the prior case because of the dismissal of the section 12022, subdivision (b) enhancement. "Generally, however, when a plea bargain calls for striking an enhancement, that merely means the enhancement cannot be used to enhance the current conviction. The plea bargain does not bar the use of the facts underlying the stricken enhancement in sentencing on

> a subsequent conviction. [Citations.]" (*People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1527.) Details of prior conduct that resulted in dismissal pursuant to a plea bargain can be presented in a later proceeding on the separate issue of appropriate penalty for a subsequent offense. (*People v. Melton* (1988) 44 Cal.3d 713, 756, 244 Cal.Rptr. 867.) The plea bargain does not bar the use of the facts underlying the stricken enhancement in sentencing on a subsequent conviction. (*People v. Visciotti* (1992) 2 Cal.4th 1, 68, fn. 36.) Consequently, the trial court's refusal to consider defendant's statement constituted judicial error and deprived the prosecution of a full and fair opportunity to prove that the prior offense was a "serious" felony. [¶] . . . The matter must be remanded to the trial court for a retrial on the prior-conviction allegation.

(Opinion 16-17.)

Following defendant's petition for rehearing regarding the People's ability to appeal the trial court's ruling, the Sixth Appellate District modified the opinion to hold, "the sentence was unauthorized by law because, as we shall explain below, the court mistakenly refused to allow the People to prove the prior conviction was a serious or violent felony. . . . Here, the court . . . made a mistaken evidentiary ruling that eviscerated the prosecution's proof." (Order Modifying Opinion and Denying Petition for Rehearing, December 10, 2004.)

On April 26, 2006, following this Court's grant of review and the completion of briefing regarding the People's ability to appeal the trial court's ruling, this Court ordered supplemental briefing addressing "whether the trial court erred in ruling that defendant's alleged prior conviction for inflicting corporal injury in violation of Penal Code section 273.5, subdivision (a) is 'not a strike.'"

ARGUMENT

I.

THE TRIAL COURT ERRED IN RULING THAT THE PRIOR CONVICTION WAS "NOT A STRIKE"

Defendant's prior felony conviction for inflicting corporal injury qualifies as a strike if he personally used a dangerous or deadly weapon. (§ 1192.7, subd. (c)(23).) The trial court's comments demonstrate that it found the prior conviction not to be a strike for two erroneous reasons. First, the trial court appears to have believed that it could not consider defendant's personal use of a dangerous weapon because that circumstance was not one of the prior conviction's least adjudicated elements. Second, the trial court believed that it could not consider defendant's personal use of a dangerous weapon because his prior plea agreement included the striking of a section 12022, subdivision (b), enhancement allegation. The court's reasons for ruling that the prior conviction was not a strike were erroneous because a trial court may determine the serious nature of a prior conviction by consulting the entire record of the prior conviction, not just the least adjudicated elements, and the plea agreement did not include any express or implied understanding that a future court could not consider evidence that defendant personally used a dangerous weapon.

A. Trial Courts May Determine The Serious Nature Of A Prior Conviction By Considering The Entire Record Of The Prior Conviction, Not Just The Least Adjudicated Elements

In ruling that the prior conviction was not a strike, the court first stated its belief that it could not consider evidence that defendant personally used a dangerous weapon because his personal use of a weapon was not within the prior conviction's least adjudicated elements. Specifically, the court stated, "It seems that a prior, to be a strike, has to be a prior conviction, and there was no conviction of the 12022(b) allegation. And the charging language of Count 1,

the 273.5, mentions nothing about a weapon." (1RT 37.) The court similarly stated that the prior conviction was not a strike "because there was never an admission of [the section 12022, subdivision (b), allegation] -- it was stricken on the motion of the district attorney . . . after that, there was no further language in the Information that remained as to involving a deadly weapon." (1RT 38.)

The trial court's ruling was erroneous because a trial court may determine the serious nature of a prior conviction based on the entire record of the prior conviction, not just on the prior conviction's least adjudicated elements. In *People v. Guerrero* (1988) 44 Cal.3d 343, this Court held that "in determining the truth of a prior-conviction allegation, the trier of fact may look to the entire record of the conviction." (*Id*. at p. 355; see *People v. Kelii* (1999) 21 Cal.4th 452, 456-457.) In *People v. Myers* (1993) 5 Cal.4th 1193, this Court held that the rule for prior foreign convictions is the same as the rule for prior California convictions, i.e, the trial court "must be permitted to go beyond the least adjudicated elements of the offense and to consider, if not precluded by the rules of evidence or other statutory limitation, evidence found within the entire record of the foreign conviction." (*Id*. at p. 1201; see *id*. at p. 1195.) In *People v. Ramirez* (1998) 17 Cal.4th 253, 261-262, this Court specifically stated, "Certainly the prosecution was entitled to go beyond the least adjudicated elements of the [prior] conviction and use the entire record to prove that defendant had in fact . . . personally used a dangerous or deadly weapon (§ 1192.7, subd. (c)(23)). [Citation.]" As a result, the trial court erred in holding that the prosecution was not entitled to go beyond the least adjudicated elements of the prior conviction to use the entire record to prove that defendant had in fact personally used a dangerous or deadly weapon within the meaning of section 1192.7, subdivision (c)(23). Defendant does not argue otherwise.

Defendant instead argues 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. . . . 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." (Def. Supp. Brief 13.) This Court subsequently rejected an identical argument in *People v. McGee* (May 22, 2006, S123474) __ Cal.4th __ [2006 Cal. LEXIS 6173].) The defendant in *McGee* "was not entitled to have a jury decide whether his Nevada robbery convictions qualified as strikes under California law." (*Id*. at *62.) In ruling to the contrary, "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* [*v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435]] 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.' [Citation.]" (*Id*. at *61, original italics.) Since the task here similarly involves merely the examination of court records pertaining to defendant's prior conviction to determine the nature or basis of the conviction, defendant was not entitled to have a jury decide whether his prior conviction qualified as a strike. (*Id*. at *61-62.)

Moreover, defendant's argument confuses the procedural question of who should determine the serious nature of a prior conviction with the substantive question of whether the prior conviction was serious. If the trial court prejudicially violated defendant's right to have a jury determine the substantive question of whether he personally used a dangerous weapon during the prior offense, the appropriate remedy would be to impanel a jury on remand

to decide the substantive question instead of affirming the erroneous ruling without regard to the ultimate merits of the substantive question. (See § 1260.)

B. The Plea Agreement Did Not Prohibit The Court From Determining The Serious Nature Of The Prior Conviction By Considering Defendant's Personal Use Of A Dangerous Weapon

In ruling that the prior conviction was not a strike, the trial court stated its belief that it could not consider evidence that defendant personally used a dangerous weapon because his prior plea agreement included the striking of a section 12022, subdivision (b), enhancement allegation that he personally used a dangerous weapon. Specifically, the court stated, "I'm going on the fact that [the prosecutor in the prior case], 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. [¶] . . . [¶] And I think this goes to the benefit of his bargain." (1RT 38.) The trial court erred because the plea agreement did not expressly or implicitly prohibit a future court from determining the serious nature of the offense based on defendant's personal use of a dangerous weapon.

"A negotiated plea agreement is a form of contract, and it is interpreted according to general contract principles. [Citations.] 'The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. [Citation.] If contractual language is clear and explicit, it governs. [Citation.] On the other hand, "[i]f the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." [Citations.]' [Citation.] 'The mutual intention to which the courts give effect is determined by objective manifestations of the parties' intent, including the words used in the agreement, as well as extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract;

and the subsequent conduct of the parties. [Citations.]' [Citations.]" (*People v. Shelton* (2006) 37 Cal.4th 759, 767.) In reviewing the terms of a plea agreement, the court begins with "the language of the plea agreement . . . as the trial court recited it on the record." (*Id*. at p. 767.) To resolve any ambiguity regarding a term used by the trial court, the reviewing court considers "the circumstances under which this term of the plea agreement was made, and the matter to which it relates [citation] to determine the sense in which the prosecutor and the trial court (the promisors) believed, at the time of making it, that defendant (the promisee) understood it [citation]." (*Id*. at pp. 767-768.)

The language of the plea agreement as stated on the record by the prior court does not contain a mutual understanding prohibiting the current court from considering defendant's personal use of a dangerous weapon. The prior court recited the terms of the plea agreement to defendant as follows: "If you plead to the charge of either guilty or no contest, I'll sentence you to the mitigated term of two years in prison. . . . [¶] . . . [¶] The D.A.'s office has agreed to dismiss Count 2, the assault with a deadly weapon. They've also agreed to strike the allegations that you used a knife in the commission of the felony." (Augmented CT 15-16.) There were no other promises. (Augmented CT 16.) The language does not include an express understanding either that the remaining offense in Count 1 would not be treated as a serious felony in future cases, or that evidence of defendant's personal use of a dangerous weapon would not be used to prove the serious nature of the offense in future cases.

Nor can such a promise be inferred from the prosecutor's promise to "strike" the section 12022 allegation. In *People v. Blackburn*, *supra*, 72 Cal.App.4th 1520, defendant Jackson had a prior conviction that was the product of a plea agreement that included the striking of a section 12022.5 allegation that he personally used a firearm. (*Id*. at p. 1525.) Jackson argued that part of the plea agreement was an understanding "that the conviction did

not involve the personal use of a firearm; hence, the finding that the prior is a 'strike' based on personal firearm use violates the plea bargain." (*Id.* at p. 1527.) The Court of Appeal correctly held that there was no breach of the plea agreement because "when a plea bargain calls for striking an enhancement, that merely means the enhancement cannot be used to enhance the current conviction. The plea bargain does not bar the use of the facts underlying the stricken enhancement in sentencing on a subsequent conviction. [Citations.]" (*Ibid*.) Accordingly, the fact that the prosecutor agreed to "strike" the section 12022 enhancement did not prohibit the trial court from determining the serious nature of defendant's prior conviction based on facts underlying the stricken enhancement.

Moreover, neither the circumstances under which the plea agreement was made nor the matter to which it related evince a mutual understanding prohibiting the trial court from considering defendant's personal use of a dangerous weapon. The plea bargaining process typically focuses on the direct consequences of the defendant's plea, such as the length of the defendant's sentence for the current offense. (See *People v. Knox* (2004) 123 Cal.App.4th 1453, 1460.) Plea agreements rarely involve the collateral consequences of the plea, and almost never include an understanding that the defendant will not be subject to the full weight of a recidivism enchantment should he or she reoffend. The primacy of direct consequences over collateral consequences is further evinced by the fact that trial courts are required to advise defendants about a plea agreement's direct consequences but not collateral consequences such as the possibility that the resulting conviction will be treated as a strike in a future case. (*People v. Arnold* (2004) 33 Cal.4th 294, 309; *People v. Bernal* (1994) 22 Cal.App.4th 1455, 1457; *People v. Crosby* (1992) 3 Cal.App.4th 1352, 1354-1356.) As a result, the bargained-for striking of an enhancement allegation does not imply that the parties had reached a mutual understanding

regarding the collateral consequences of the defendant's plea.

The circumstances here similarly fail to demonstrate that the parties reached a mutual understanding regarding the collateral consequences of defendant's plea. The direct and immediate consequence of striking the section 12022 allegation was to reduce defendant's sentence by one year. This reduction was necessary in order to accomplish another express term of the plea agreement: the stipulated prison term of two years. The corporal injury conviction by itself carried a lower term of two years in prison. The enhancement allegation under section 12022 would have added an additional year to the sentence. It was therefore necessary to strike the enhancement allegation in order to authorize the expressly agreed-upon stipulated sentence. Accordingly, the striking of the section 12022 allegation does not evince any mutual understanding other than the desire to achieve the stipulated sentence of two years in prison.

Nor does the subject matter of the section 12022 allegation imply a mutual understanding prohibiting the prior court or a future court from considering the facts underlying the enhancement. In *People v. Harvey* (1979) 25 Cal.3d 754, this Court recognized that the dismissal of a transactionally-related enhancement allegation carries a different implication than the dismissal of an unrelated offense. The defendant in *Harvey* argued that the trial court erred by imposing the upper term on one of his robbery convictions based on facts underlying a separate robbery count dismissed pursuant to a plea agreement. (*Id*. at p. 757.) This court held, "Implicit in such a plea bargain, we think, is the understanding (in the absence of any contrary agreement) that defendant will suffer no adverse sentencing consequences by reason of the facts underlying, and solely pertaining to, the dismissed count." (*Id*. at p. 758.) This Court then distinguished *Harvey* from *People v. Guevara* (1979) 88 Cal.App.3d 86, 92-94, which held that a sentencing court may impose an upper term based

on facts related to a section 12022 enhancement allegation dismissed pursuant to a plea agreement. The distinguishing feature was that the sentencing court in *Guevara* considered facts that were "*transactionally related* to the offense to which defendant pleaded guilty." (*People v. Harvey*, *supra*, 25 Cal.3d at p. 758, original italics.) "As the *Guevara* court carefully explained, 'The plea bargain does not, expressly or by implication, preclude the sentencing court from reviewing all the circumstances relating to Guevara's *admitted* offenses to the legislatively mandated end that a term, lower, middle or upper, be imposed on Guevara commensurate with the gravity of his crime.' [Citation] In contrast, as we have noted, the present case involved a robbery alleged in dismissed count three which was unrelated to, and wholly separate from, the admitted robberies charged in counts one and two." (*People v. Harvey*, *supra*, 25 Cal.3d at pp. 758-759, original italics.)

The stricken section 12022 allegation here was transactionally related to the underlying offense as in *Guevara*. The section 12022 allegation related to the manner in which defendant inflicted the corporal injury, i.e., by personally using a dangerous or deadly weapon. Since both *Guevara* and *Harvey* pre-dated defendant's 1991 plea agreement, the parties would reasonably understand that striking the section 12022 allegation did not preclude the court from imposing an upper term for the corporal injury offense based on defendant's admission to the probation officer that he personally used a knife. The parties would also reasonably understand that striking the section 12022 allegation would not prohibit a trial court from considering evidence that defendant personally used a dangerous weapon in subsequent sentencing. As this Court noted in *People v. Visciotti*, *supra*, 2 Cal.4th 1, 68, footnote 36, "Nothing in *Harvey*, *supra*, 25 Cal.3d 754, precludes consideration of all incidents of assaultive conduct in sentencing for subsequent offenses . . . whether or not the defendant has been charged with those offenses, or had them

dismissed in a bargained-for disposition of other charges. [Citations.]" (See also *People v. Melton*, *supra*, 44 Cal.3d at pp. 755-756.) As a result, the transactionally-related subject matter of the stricken section 12022 allegation does not suggest a mutually understood agreement prohibiting the trial court from considering defendant's personal use of a dangerous weapon.

Moreover, the conduct of the parties subsequent to their negotiations does not evince a mutual understanding prohibiting the trial court from considering defendant's personal use of a dangerous weapon. (See *People v. Shelton*, *supra*, 37 Cal.4th at p. 767.) When the court recited the agreement that resulted from the parties' negotiation, there was no mention of a bargained-for limitation on a future court's ability to consider the facts underlying the stricken section 12022 allegation. Such an agreement would have been a significant departure from the rule in *Guerrero* that a future court could consider the entire record of the conviction. One would expect that, if the parties had agreed to such a significant departure, they would have memorialized the agreement by stating it on the record. Their collective silence suggests that there was no agreement prohibiting a future court from considering evidence in the record of the conviction that defendant personally used a knife. (See *In re Moser* (1993) 6 Cal.4th 342, 356.) Although the parties to a plea agreement might forget to mention all of the agreement's terms, defendant did not allege that there was such an oversight in the present case. (See *id*. at pp. 357-358.) In addition, while defendant argued that the prosecution was "not entitled to undermine the conviction" by introducing the probation report because "there is no ambiguity of what he's convicted of" (1RT 32-33), he did not specifically argue that the prosecutor had violated the parties' prior understanding by alleging that the prior conviction was a strike or by relying on defendant's admission to the probation officer that he personally stabbed the victim with a knife. His failure to raise such a claim further suggests that there was no mutual

understanding to be violated. (See *People v. Dickerson* (2004) 122 Cal.App.4th 1374, 1385.)

Defendant relies in part on *People v. Leslie* (1996) 47 Cal.App.4th 198, which briefly referred to a distinguishable situation involving the bargained-for dismissal of a section 969f allegation. (Def. Supp. Brief 21-22.) While an enhancement allegation is designed to increase the defendant's sentence for the current offense, section 969f "was enacted in order to prequalify a crime as a serious felony in the event of a defendant's future conviction of another serious felony. [Citation.]" (*People v. Leslie*, *supra*, 47 Cal.App.4th at p. 204.) Section 969f provides, in pertinent part, "Whenever a defendant has committed a serious felony . . . the facts that make the crime constitute a serious felony may be charged in the accusatory pleading. . . . If the defendant pleads guilty of the offense charged, the question whether or not the defendant committed a serious felony as alleged shall be separately admitted or denied by the defendant." (§ 969f, subd. (a).)

The defendant in *Leslie* argued that his prior conviction did not qualify as a serious felony because the trial court in the prior case did not address a section 969f allegation when accepting his guilty plea. (*People v. Leslie*, *supra*, 47 Cal.App.4th at pp. 203-204.) The Court of Appeal held that the trial court's failure to address the section 969f allegation did not preclude the prosecution from later alleging that the prior offense was a serious felony. (*Id*. at p. 204.) "As stated above, section 969f was introduced as a measure to aid the prosecution in not having to go through the time and expense to prove that a prior conviction was a serious felony. . . . If the court or counsel choose (or forget) to comply with section 969f, then in a subsequent case, the district attorney, instead of having a 'slam-dunk' admission by the defendant that the prior case was a serious felony, will be saddled with the burden of proving the same." (*Id*. at p. 205.) The court then stated, "The failure of the court and

counsel to adhere to section 969f in the case before us 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. Accordingly, appellant was not prejudiced by the failure to comply with section 969f." (*Id.* at p. 205.)

Defendant argues that if it would be prejudicial to treat a prior offense as a serious felony following the bargained-for dismissal of a section 969f allegation, then it would be unfair to treat a prior offense as a serious felony following the bargained-for striking of an enhancement allegation. His analogy between section 969f allegations and enhancement allegations is inapt. An enhancement allegation has the primary and direct consequence of imposing punishment in addition to the term for the current offense. The bargained-for striking of an enhancement allegation implies an agreement to avoid the primary and direct consequences of the allegation, but not necessarily an understanding regarding the secondary and collateral consequences of the defendant's conviction on the underlying offense. In contrast, the circumstances surrounding the bargained-for dismissal of a section 969f allegation as contemplated in *Leslie* may imply some sort of mutual understanding regarding the collateral consequences of the defendant's conviction on the underlying offense. Unlike an enhancement allegation, a section 696f allegation often has only collateral consequences. The allegation is designed to "prequalify a crime as a serious felony in the event of a defendant's *future* conviction of *another* serious felony." (*People v. Leslie*, *supra*, 47 Cal.App.4th at p. 204, italics added.) Since a section 969f allegation often affects only a conviction's collateral use in the future as a serious felony, the bargained-for dismissal of such an allegation may imply some sort of agreement regarding the use of the conviction as a serious felony in the future. Contrary to the suggestion in *Leslie*, however, the dismissal would not imply a

complete prohibition on using the prior conviction as a serious felony. Rather, the dismissal would imply an understanding that the parties would be in the same position as if the prosecution never made the allegation, i.e., "the district attorney, instead of having a 'slam-dunk' admission by the defendant that the prior case was a serious felony, will be saddled with the burden of proving the same." (See *id*. at p. 205.)

Defendant's primary argument, however, is that if the trial court found the prior conviction to be a strike based on his personal use of a dangerous weapon, then the court would violate his due process right to fundamental fairness. In *Santobello v. New York* (1971) 404 U.S. 257 [92 S.Ct. 495, 30 L.Ed.2d 427], the Court held that plea bargaining "must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." (*Id*. at p. 262.) Defendant cannot demonstrate a due process violation because, as discussed above, he cannot demonstrate that the prosecutor promised or agreed not to use defendant's personal use of a dangerous weapon to demonstrate the serious nature of his prior offense.

Nonetheless, defendant argues that the present situation is fundamentally unfair under language in *Taylor v. United States* (1990) 495 U.S. 575 [110 S.Ct. 2143, 109 L.Ed.2d 607] and *Shepard v. United States* (2005) 544 U.S. 13 [125 S.Ct. 1254, 161 L.Ed.2d 205]. *Taylor* addressed the meaning of the word "burglary" in 18 U.S.C. § 924(e), which provides a mandatory minimum sentence of 15 years for a defendant who illegally possesses a firearm and who has three prior convictions for predicate offenses including burglary. (*Id*. at p. 577.) The Court held that Congress did not intend the word "burglary" to mean "only a special subclass of burglaries, either those that would have been

burglaries at common law, or those that involve especially dangerous conduct." (*Id*. at p. 598.) Congress instead referred to "burglary" in "the generic sense in which the term is now used in the criminal codes of most States." (*Id*. at p. 598.) According, "a person has been convicted of burglary for purposes of a § 924(e) enhancement if he is convicted of any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." (*Id*. at p. 599.)

The Court observed, however, that some states "define burglary more broadly, e.g., by eliminating the requirement that the entry be unlawful, or by including places, such as automobiles and vending machines, other than buildings." (*Taylor v. United States*, *supra*, 495 U.S. at p. 599.) "We therefore must address whether, in the case of a defendant who has been convicted under a nongeneric-burglary statute, the Government may seek enhancement on the ground that he actually committed a generic burglary. [¶] This question requires us to address a more general issue -- whether the sentencing court in applying § 924(e) must look only to the statutory definitions of the prior offenses, or whether the court may consider other evidence concerning the defendant's prior crimes." (*Id*. at pp. 599-600, fn. omitted.)

The Court held that "§ 924(e) mandates a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." (*Taylor v. United States*, *supra*, 495 U.S. at p. 600.) The Court relied first on the statutory language, and second on the legislative history. (*Id*. at pp. 600-601.) The Court then stated that "the practical difficulties and potential unfairness of a factual approach are daunting." (*Id*. at p. 601.) "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." (*Id*. at pp. 601-602.)

The Court did not purport to resolve a constitutional issue in ruling that federal courts must use a categorical approach when applying 18 U.S.C. § 924(e). Although it stated that a particular scenario "would seem unfair," it did not rule that the scenario actually was unfair. Nor did it rule that the perceived unfairness was the sort that would deny the defendant his or her right to due process. The Court did not refer to the due process clause of either the Fifth or Fourteenth Amendment, or to any case applying those clauses. Nor did the Court purport to expand its plea bargaining jurisprudence beyond the rule in *Santobello v. New York*, *supra*, 404 U.S. 257, 262, that a prosecutor must fulfill his or her promises. Nor did it purport to establish a new or constitutionally-compelled method of ascertaining whether or not a prosecutor made a particular promise. As a result, the language in *Taylor* does not establish that determining the serious nature of defendant's prior conviction based on his personal use of a dangerous weapon would violate his constitutional right to due process.

Moreover, the present case does not necessarily present the seemingly unfair scenario mentioned in *Taylor*. The Court did not explain what it meant by "a lesser, nonburglary offense." (See *Taylor v. United States*, *supra*, 495 U.S. at pp. 601-602.) The Court could have been referring to a situation in which a state has a generic burglary statute applicable to structures and a non-generic statute applicable to other places such as vehicles. If a defendant were charged with burglarizing a structure but pleaded guilty to the lesser related offense of burglarizing a vehicle pursuant to a plea agreement, it may indeed seem unfair to subsequently impose a sentence enhancement as though the

defendant had actually burglarized a structure. Since a vehicle is not a structure, the facts admitted by the guilty plea would be inconsistent with the facts targeted by the sentence enhancement. However, there is no similar inconsistency in the present case. Defendant pleaded guilty to inflicting corporal injury. No element of the crime related to the manner in which defendant inflicted the corporal injury. (See § 273.5.) Accordingly, a finding that defendant inflicted the corporal injury by personally using a dangerous weapon would not be inconsistent with the facts admitted by his plea.

Defendant also relies on *Shepard*, in which the high court held that in determining whether a prior guilty plea was to a predicate offense under 18 U.S.C. § 924(e), a federal court "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 v. United States*, *supra*, 544 U.S. at p. 16.) The issue before the high court in *Shepard* was resolved as a matter of statutory interpretation, and the Court did not purport to decide whether a state is constitutionally precluded from permitting a court to determine the serious nature of a prior conviction by considering facts that were within the record of the prior conviction but related to an enhancement allegation that was stricken pursuant to a plea agreement. (See *People v. McGee*, *supra*, __ Cal.4th __ [2006 Cal. LEXIS 6173, *58-59].)

Defendant also relies on Justice O'Connor's dissenting opinion in *Shepard*. Although a dissenting opinion is entitled to no precedential value, Justice O'Connor's opinion in *Shepard* actually aids the People's argument. Justice O'Connor opined that there was neither constitutional error nor constitutional doubt in allowing federal courts to determine whether a prior offense qualifies for a sentencing enhancement by using "*any* uncontradicted, internally consistent parts of the record from the earlier conviction," including

"the applications by which the police had secured the criminal complaints and the police reports attached to these applications." (*Shepard v. United States*, *supra*, 544 U.S. at p. 31 (dis. opn. of O'Connor, J.), original italics.) Such documents reliably reflect the prosecution's theory of guilt and the factual basis for the defendant's plea. (*Id*. at pp. 31-35.)

Citing the language in *Taylor*, however, Justice O'Connor qualified her willingness to accept "*any* uncontradicted, internally consistent parts of the record" with the observation 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 his admission of guilt. [Citation.] But there is no claim of such circumstances here . . . . Given each police report's never-superseded allegation that Shepard had burglarized a building, it strains credulity beyond the breaking point to assert that, in each case, Shepard was actually prosecuted for and pleaded guilty to burglarizing a ship or a car. " (*Shepard v. United States*, *supra*, 544 U.S. at p. 35 (dis. opn. of O'Connor, J.).) Defendant's reliance on this language is misplaced because, as in *Shepard*, there is no suggestion that any part of the record of defendant's prior conviction contains factual details that are substantially different than those upon which defendant's plea was premised. (See *ibid*.) Given the consistent assertion that defendant personally used a knife in the police report (Augmented CT 8-9) and in defendant's own statement to the probation officer (Augmented CT 9), "it strains credulity beyond the breaking point" to assert that the corporal injury was inflicted by something other than defendant's personal use of the knife. (See *Shepard v. United States*, *supra*, 544 U.S. at p. 35 (dis. opn. of O'Connor, J.).)

As a result, it would not be a fundamentally unfair violation of the prior

plea agreement for the trial court to determine the serious nature of defendant's prior conviction by considering his personal use of a dangerous weapon, and the trial court's ruling to the contrary was erroneous.

II.

DEFENDANT'S ALTERNATIVE EXPLANATIONS FOR THE TRIAL COURT'S RULING ARE UNREASONABLE AND CONTRARY TO THE LAW

Defendant argues that the trial court based its ruling on an unarticulated finding that the record of the prior conviction, consisting primarily of defendant's pre-sentencing admission to the probation officer that he personally used a knife, failed to prove the serious nature of the prior conviction beyond a reasonable doubt. (Def. Supp. Brief 1-9.) He accordingly claims that the ruling should be affirmed if any rational trier of fact could entertain a reasonable doubt regarding the serious nature of the prior conviction. He further claims that there are three explanations for the court's alleged finding that defendant's admission lacked sufficient probative value. Defendant advanced none of these explanations in either the trial court or the appellate court. His arguments fail for two reasons. First, the court's comments disprove his premise that the ruling was based on an unstated finding that defendant's admission was insufficient to prove the serious nature of the prior conviction. Second, any doubt that the court might have secretly harbored regarding the admission's probative value would be unreasonable.

The court's comments disprove defendant's premise that the ruling was based on an unstated finding that defendant's admission was insufficient to prove the serious nature of the prior conviction, rather than on its erroneous understandings of the law discussed in the preceding section. Defendant relies on the general rule that "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 . . . .' [Citation.] That is the case

here." (*People v. Butcher* (1986) 185 Cal.App.3d 929, 936.)

The court never said that its ruling was based on the probative value of the records that the prosecutor offered to prove that defendant personally used a dangerous weapon. Instead, the court stated that it was "going on the fact that [the prosecutor in the prior case] 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." (1RT 38.) The court also stated that it ruled that the prior conviction was not a strike "because there was never an admission of it -- it was stricken on the motion of the district attorney -- and there was no -- after that, there was no further language in the Information that remained as to involving a deadly and dangerous weapon." (1RT 38.) Moreover, the court subsequently found that the prior conviction "involved the use of a knife, although you have to go back behind the conviction to show that." (1RT 45.) As a result, the court's statements as a whole disclose that its incorrect understanding of the law was embodied in its basic ruling and not merely in secondary remarks. (See *People v. Ortiz* (1964) 61 Cal.2d 249, 253.)

Moreover, defendant's explanations for the court's alleged finding that the prosecutor failed to prove the serious nature of the prior conviction are unreasonable. First, he claims that the court should have cautiously viewed the report of his admission because of the danger of false reporting. (Def. Supp. Brief 4-5.) However, defendant's admission was reported by a neutral public employee exercising his official duties. There was no incentive to report the admission falsely. Nor was there any suggestion that the report conveyed a false impression of defendant's admission. The salient details were simply that defendant found a kitchen knife and personally used it against the victim. The report quoted defendant as saying, "I stuck her with the knife." (Augmented CT 9.) Defendant did not dispute the report's accuracy during the present proceedings and offered no evidence that he disputed the report's accuracy

during the prior proceedings. As a result, any unstated doubt regarding the accuracy of the record of defendant's admission to the probation officer would have been unreasonable.

Defendant's second explanation is that there was evidence that he was intoxicated during the crime, thus calling "into question defendant's ability to perceive or remember the events he related to the probation officer." (Def. Supp. Brief 5.) The evidence that he was intoxicated consists exclusively of inadmissible hearsay from the victim and defendant himself. In addition, the report stated that defendant was merely "somewhat intoxicated." (Augmented CT 9.) It is unreasonable to believe that a person who is merely "somewhat intoxicated" would be so impaired as to be unable to accurately observe himself picking up a knife and stabbing someone with it, or unable to accurately remember committing such a crime. Furthermore, one would expect that if defendant truly could not to observe or recall his crime, he would have said so rather than describe a version of events involving increased culpability. As a result, any suspicion the trial court may have had that defendant was too impaired due to intoxication would have been unreasonable.

Defendant's third explanation is that "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." (Def. Supp. Brief 5-6.) There is nothing in the record affirmatively indicating that the prosecutor agreed to strike the

enhancement allegation due to insufficient evidence. Defendant's argument is accordingly speculative.

Moreover, defendant's premise is unsound because the restriction on plea barging in section 1192.7, subdivision (a), did not apply in the prior proceedings. By its own terms, the restriction applies to cases "in which the *indictment or information* charges any serious felony." (§ 1192.7, subd. (a), italics added.) "Section 1192.7 applies only to bargains concerning 'indictments or informations' and thus does not limit plea bargaining concerning charges contained in complaints before the municipal or justice court." (*People v. Brown* (1986) 177 Cal.App.3d 537, 547, fn. 11.) Defendant did not plead guilty to charges in an indictment or information. Instead, he pleaded guilty to charges in a complaint filed before a court sitting as a magistrate prior to the preliminary hearing. (Augmented CT 3, 17, 19.) As a result, defendant's argument that section 1192.7, subdivision (a), imposed a restriction on the People's ability to strike the enhancement allegation is without merit. If the trial court ruled that the prior conviction was not a strike based on the same mistaken belief shared by defendant, then its ruling was erroneous.

III.

DEFENDANT'S UNREFUTED STATEMENTS IN THE PROBATION REPORT WERE ADMISSIBLE AND PART OF THE RECORD OF THE PRIOR CONVICTION

Defendant argues that even if the trial court's reasoning was incorrect, its ruling should be affirmed because the statements attributed to him in the probation report regarding his personal use of a knife were inadmissible hearsay and not part of the record of the prior conviction. (Def. Supp. Brief 22-28.) Although the statements were admissible as statements of a party, he argues that the probation report containing those statements did not qualify for the public records exception to the hearsay rule. (See Evid. Code § 1280.) He also argues that statements attributed to him in the probation report were not part of "the record the prior conviction" because the statements did not reliably reflect the facts of the prior offense. (See *People v. Reed* (1996) 13 Cal.4th 217, 223.) Defendant raised none of these issues in either the trial court or the appellate court, and his arguments are without merit in all respects.

A. The Probation Report Was Admissible Under The Hearsay Exception For Public Records

The trial court did not abuse its discretion in admitting the probation report as a public record under Evidence Code section 1280.

> Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies:
>
> (a) The writing was made by and within the scope of duty of a public employee.
>
> (b) The writing was made at or near the time of the act, condition, or event.
>
> (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

(Evid. Code, § 1280.) "A trial court has broad discretion in determining whether a party has established these foundational requirements. [Citation.] Its ruling on admissibility 'implies whatever finding of fact is prerequisite thereto; a separate or formal finding is, with exceptions not applicable here, unnecessary. [Citation.]' [Citation.] A reviewing court may overturn the trial court's exercise of discretion '"only upon a clear showing of abuse."' [Citations.]" (*People v. Martinez* (2000) 22 Cal.4th 106, 120.)

Defendant does not dispute that the report was made as a record of his interview with the probation officer. Nor does he dispute that the report was made by and within the scope of duty of a public employee. (See §§ 1203, subd. (b)(2)(A), 1203.5.) Defendant instead claims that the probation officer did not write the report "at or near the time" of the interview. (See Evid. Code, § 1280, subd. (b).) In *People v. Monreal* (1997) 52 Cal.App.4th 670, the court held that a probation 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; see §§ 1203, subd. (b)(2)(A) [officer must "immediately investigate and make a written report"], 1203, subd. (b)(2)(D) [report must be available "at least five days, or upon request of the defendant or prosecuting attorney, nine days" before scheduled sentencing], 1191 [sentencing must be scheduled "within 20 judicial days after the verdict"].) Defendant claims the probation officer did not timely record the interview because "the date of the probation interview was stated to be September 16, while the report was dated October 1, a period of fifteen days." (Def. Supp. Brief 25.) The date on the report does not necessarily reveal the date that the probation officer recorded the statement and included it in the report. Indeed, the fact that a document bears a particular date does not necessarily mean that the entire document was written on that date. Since defendant did not object to the probation report as being inadmissible hearsay,

the prosecutor did not need to create a record specifying the precise date that the probation officer recorded defendant's statements. As a result, defendant's reliance on the report's date is unavailing.

Even if the probation officer truly did not record defendant's statements until 15 days after the interview, the court did not abuse its discretion in finding the record to be sufficiently timely. In *People v. Martinez*, *supra*, 22 Cal.4th 106, this Court observed that "the timeliness requirement 'is not to be judged . . . by arbitrary or artificial time limits, measured by hours or days or even weeks.' [Citation.] Rather, 'account must be taken of practical considerations,' including 'the nature of the information recorded' and 'the immutable reliability of the sources from which [the information was] drawn.' [Citation.] 'Whether an entry made subsequent to the transaction has been made within a sufficient time to render it within the [hearsay] exception depends upon whether the time span between the transaction and the entry was so great as to suggest a danger of inaccuracy by lapse of memory.' [Citation.]" (*Id*. at p. 128.) "'How soon a writing must be made after the act or event is a matter of degree and calls for the exercise of reasonable judgment *on the part of the trial judge*.' [Citation.] Thus, the question before us is whether, under the circumstances, the trial court here reasonably concluded (i.e., did not abuse its discretion in finding) that the record was made at or near the time of the event. [Citation.]" (*Id*. at p. 128, fn. 7, original italics.) The trial court in *Martinez* did not abuse its discretion in finding that data from the California Law Enforcement Telecommunications System (CLETS) maintained by the Department of Justice (DOJ) "was made at or near the time of the act, condition, or event" because local agencies presumably complied with various statutes requiring information to be reported to DOJ "'within 30 days,'" and DOJ presumably recorded the information in CLETS "'within a short period of its receipt from the reporting agency.'" (*Id*. at pp. 126-127.)

Here, the passage of even 15 days as alleged by defendant was not "so great as to suggest a danger of inaccuracy by lapse of memory." (See *People v. Martinez*, *supra*, 22 Cal.4th at p. 128.) The salient details of the report were that defendant told the probation officer that he found a knife and used it against the victim. (Augmented CT 9.) It is not reasonable to suspect that the probation officer suffered a memory lapse so severe that he reported these details in a materially inaccurate manner. Defendant did not allege any inaccuracy in the present proceedings, and offered no evidence that he refuted the report's accuracy in the prior proceedings. Moreover, the probation officer had enough confidence in his memory that he provided an exact quote of defendant's admission, "I stuck her with the knife," when a mere paraphrase would have sufficed. (Augmented CT 9.) As a result, the trial court did not abuse its discretion in finding that the report was made sufficiently near the time of the interview.

Defendant does not appear to dispute that the probation report's "sources of information and method and time of preparation were such as to indicate its trustworthiness" under Evidence Code section 1280, subdivision (c). There is no suggestion that the probation officer was derelict in the performance of his official duties, or that the statements attributed to defendant were merely the conclusions or opinions of the probation officer. (See *People v. Martinez*, *supra*, 22 Cal.4th at pp. 129-130.) As in *Monreal*, the "source of the information was defendant himself. His statements were apparently promptly recorded in the probation officer's paraphrase [and quotation]. Nothing about the preparation of this part of the probation report suggests untrustworthiness. [¶] Further ensuring the trustworthiness of this report was defendant's opportunity at the original sentencing hearing to present rebuttal evidence and challenge any statements in the probation report. [Citations.] We recognize that defendant had no right to cross-examine the probation officer at the

sentencing hearing. . . . But defendant had the opportunity to present evidence that he was misquoted by the probation officer. In view of defendant's opportunity to correct any errors in the probation report, we conclude that the probation officer's written report of defendant's admissions to her qualifies under Evidence Code section 1280." (*Id*. at pp. 678-679.)

To the same overall effect is *People v. Goodner* (1990) 226 Cal.App.3d 609, in which the trial court erred by not considering the prior conviction's probation report. (*Id*. at p. 614.) "We are convinced that where the nature of the proceeding is 'to determine whether a defendant has suffered a prior serious felony conviction (not to determine whether he is guilty of that earlier offense)' [citation], the defendant's statements contained in the probation report and the entire preliminary hearing transcript, albeit hearsay, are each admissible as an exception to the hearsay rule to explain his admissions. They both contained evidence which should have been considered by the trial court to determine the nature of defendant's earlier burglaries." (*Id*. at p. 616.) As a result, the trial court did not abuse its discretion in admitting the probation report under the public records exception to the hearsay rule.

B. Defendant's Statements In The Probation Report Are Part Of The Record Of The Prior Conviction

This Court has "never defined exactly what comprises the record of conviction to which the trier of fact may look to determine whether a prior conviction qualifies as a serious felony." (*People v. Woodell* (1998) 17 Cal.4th 448, 454.) However, in *People v. Myers*, *supra*, 5 Cal.4th 1193, this Court held that trial courts may determine the serious nature of a prior conviction, regardless of the state of origin, by considering "the entire record of the proceedings leading to imposition of judgment on the prior conviction." (*Id*. at p. 1195.) In *People v. Reed*, *supra*, 13 Cal.4th 217, this Court held that a preliminary hearing transcript "was part of the record of the prior conviction,

whether that term is used technically, as equivalent to the record on appeal [citation], or more narrowly, as referring only to those record documents reliably reflecting the facts of the offense for which the defendant was convicted." (*Id*. at p. 223.)

As this Court observed in *Reed*, the Court of Appeal in *People v. Abarca* (1991) 233 Cal.App.3d 1347, 1350, adopted the technical definition that "'the record of the prior conviction' means all items that could have been used on appeal of that prior conviction." A probation report meets this technical definition because it is part of the normal record on appeal. (*People v. Monreal*, *supra*, 52 Cal.App.4th at p. 675; Cal. Rules of Court, rules 31(b)(13)(D), 31.1(a).) In addition, a probation report is part of the proceedings leading to the imposition of judgment under this Court's language in *Myers*. (§ 1203, subds. (b), (g); see *People v. Garrett* (2001) 92 Cal.App.4th 1417, 1433 [citing *Myers* for the proposition that a defendant's admissions in a probation report may be considered to determine the nature of a prior burglary].) Defendant does not claim otherwise. He instead argues that a probation report does not meet the narrower definition mentioned in *Reed* because it does not reliably reflect the facts of the offense for which the defendant was convicted. (Def. Supp. Brief 23.)

This court should hold that defendant's reliance on the narrower definition mentioned in *Reed* is unavailing because *Abarca*'s technical definition states the proper scope of the record of the prior conviction. Just as this Court has never defined exactly what comprises the record of conviction, so too has it has never adopted the narrow definition over the technical definition. Instead, this Court has subsequently discussed *Abarca*'s technical definition approvingly, and expanded the record beyond the language in either *Myers* or *Abarca*'s technical definition. In *People v. Woodell*, *supra*, 17 Cal.4th 448, 455, this Court held, "Describing the record of conviction as including

documents that may be part of the record on appeal (*People v. Abarca, supra,* 233 Cal.App.3d at p. 1350) might be useful to help define the trial court documents that the trier of fact may consider, but we do not believe the record of conviction is limited to trial court documents. It also includes appellate court documents at least up to finality of the judgment."

The technical definition in *Abarca* promotes several interests by providing an easily-discernable list of documents constituting the record of the conviction. Its easily-discernable nature both promotes uniformity of judicial decisions and increases notice to defendants. This increased notice promotes full adjudication of factual disputes during the prior proceedings, rather than at the subsequent proceedings after the defendant realizes the relevance of a particular document. This increased notice also promotes the deterrent power of the Three Strikes law by ensuring that defendants with prior strikes are fully aware of their status. As a result, this Court should hold that a probation report is part of the record of the prior conviction because it is part of the normal record on appeal.

Nonetheless, a statement attributed to the defendant in a probation report meets the narrower definition mentioned in *Reed* by reliably reflecting the facts of the offense for which the defendant was convicted. The preliminary hearing transcript in *Reed* fell within "even the narrower 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 court reporter's verbatim reporting of the proceedings." (*People v. Reed, supra,* 13 Cal.4th at p. 223.) In other words, "whether a broad or narrow definition of 'record of conviction' is used, the preliminary hearing transcript is part of the record because the procedural protections afforded the defendant, and the accuracy of

a reporter's transcript, make such evidence relatively reliable." (*Id*. at p. 230.) Several cases have held that statements attributed to a defendant in a probation report are part of the record of conviction because the procedural protections afforded defendants make the statements similarly reliable.

In *People v. Garcia* (1989) 216 Cal.App.3d 233, the defendant argued that the trial court erred in finding his prior burglary to be a serious felony based on statements attributed to him in the prior offense's probation report. (*Id*. at p. 236.) The court held that the defendant's "statements contained in the probation report were properly used to determine the nature of the burglary." (*Id*. at p. 235.) "We recognize a probation report often contains hearsay matter. Indeed section 1203 contemplates and allows hearsay information within probation reports. [Citation.] If a defendant contends the hearsay information is unfair or untrue he is given an opportunity to refute it. [Citation.] Here the trial court specifically focused on Garcia's statements related by the probation officer, finding the statements constituted an admission. Garcia had an opportunity to dispute his purported admission in the prior proceeding. He was also entitled to present rebuttal evidence before the trial court and did not. Garcia was given adequate opportunity to challenge the evidence presented against him. We are satisfied, therefore, the trial court in this case was entitled to review admissions of a defendant in the probation report of his prior conviction." (*Id*. at p. 237; cf. *People v. Williams* (1990) 222 Cal.App.3d 911, 917-918 [distinguishing *Garcia* where the probation report's statements are not attributed to the defendant].)

In *People v. Monreal*, *supra*, 52 Cal.App.4th 670, the trial court found that the defendant's prior conviction was a strike based on a statement attributed to the defendant in the prior probation report that he personally stabbed the victim with a knife. (*Id*. at p. 674.) The defendant argued that "the probation report is inadmissible hearsay and also is not part of the 'record of

conviction' to which trial courts may look to determine the nature of a prior conviction. [Citation.]" (*Id*. at p. 675.) The court acknowledged "that the procedural protections which support the reliability of a preliminary hearing transcript are not applicable to a probation officer's report of a defendant's admissions. Defendants are not ordinarily under oath when they speak with a probation officer. 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.) The court held, however, "While a probation report, as here, may not be written under penalty of perjury, a probation report which makes a timely record of a defendant's statements to the probation officer bears strong earmarks of reliability. Such 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. The probation report's purpose is to provide the sentencing court with accurate information regarding the defendant and the offense. Given this purpose, there is little reason to doubt the accuracy of the probation officer's report of defendant's admissions regarding the facts of his offense. The reliability of the report is further ensured by 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 of a defendant's statement. [¶] As these facts strongly support the reliability of the probation officer's report of defendant's admissions regarding the facts of his offense, we conclude that this part of the report qualifies as reliable within the 'more narrowly' defined meaning of 'record of conviction.'" (*Id*. at pp. 679-680.)

In *People v. Mobley* (1999) 72 Cal.App.4th 761, 796, the defendant argued that "the only way the trial court could have found his Oregon attempted sodomy conviction to be a serious felony would have been by reviewing the

statements in the presentence report in that case. He claims such report is neither a part of the 'record of conviction' nor cognizable evidence as it contains inadmissible hearsay." (*Id*. at pp. 795-796.) The court held, "We have read and considered *Monreal* and find its reasoning and holdings dispositive of Mobley's claims. [Citation.] Mobley's statements made to the police officers at the time of his arrest and during interviews pursuant to that arrest were admissions that fall within the hearsay exception for party admissions. [Citations.] His statement to the probation officer was an adopted admission of his previous admissions to the police and also falls within an exception to the hearsay rule. [Citations.]" (*Id*. at p. 796.) "Moreover, Mobley's claim the use of his statements in the probation report constitutes a violation of his Sixth Amendment procedural safeguards of representation of counsel is in essence another way of complaining he was not advised of his right against self-incrimination before making his various admissions to the probation officer. We believe this issue has been fully discussed in *Monreal* and find the rejection of such claim dispositive here. [Citation.]" (*Ibid*.)

As the preceding cases demonstrate, defendant's belief that *Monreal* stands alone and has not been cited or relied upon is without merit. (See Def. Supp. Brief 24, 27.) Moreover, the court in *Gill v. Ayers* (9th Cir. 2003) 342 F.3d 911, observed that it was "[c]onsistent with California case law" for the state trial court to admit the defendant's "own statements as paraphrased in a probation department report" to determine whether the prior conviction was a strike. (*Id*. at pp. 914-915.) As a result, defendant's statements to the probation officer were part of the record of the conviction under the narrower possible definition mentioned in *Reed* because they reliably reflected the facts of the offense for which he was convicted.

Defendant claims that his statements to the probation officer were unreliable because counsel was not present during the interview. (Def. Supp.

Brief 23-24.) He does not explain, however, how the presence of counsel could have made his statement more reliable. "Admonitions pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694] are not required as part of a routine, postconviction, presentence interview, even though the interviewee is in custody. [Citations.] A defendant is usually advised by counsel before such an interview and is aware of the privilege against self-incrimination. [Citation.] There is no evidence here that the interview was an interrogation or that defendant's admissions were not voluntary." (*People v. Monreal*, *supra*, 52 Cal.App.4th at p. 682.) Moreover, defendant had the right to counsel in refuting the contents of the probation report. (See *Mempa v. Rhay* (1967) 389 U.S. 128, 134 [88 S.Ct. 254, 19 L.Ed.2d 336].) As a result, the fact that counsel was not present during the probation interview itself did not make the probation officer's report of that interview unreliable under the narrower possible definition of the record of the conviction mentioned in *Reed*.

Defendant claims that his failure to refute the probation report did not increase the report's reliability because he had no incentive to make such a refutation. (Def. Supp. Brief 26-27.) He specifically claims that "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." (Def. Supp. Brief 26-27.)

Defendant's claim overlooks the fact that a trial court may withdraw its approval of a plea agreement at the sentencing hearing "in the light of further consideration of the matter." (§ 1192.5.) "The potential for reflection and a change of the judicial position is obvious and statutorily sanctioned. . . . A

change of the court's mind is thus always a possibility." (*People v. Stringham* (1988) 206 Cal.App.3d 184, 194.) "The court's approval of a proposed plea bargain must necessarily be an informed decision. The court can be expected to consult the probation report that will almost always be prepared." (*Ibid.*; see *People v. Tung* (1994) 30 Cal.App.4th 1607, 1611 [A trial court may withdraw approval "if, after further consideration, it concludes that the bargain is not in the best interests of society, or upon becoming more fully informed about the case"].) Accordingly, a trial court may reject a plea agreement if the defendant's statements to the probation officer make the offense appear more serious than the court had previously believed it to be. Defendant presumably accepted the plea agreement out of self-interest, and accordingly had an incentive to preserve the agreement by refuting any inaccurate statements that made the offense appear more serious. This incentive was particularly strong in defendant's case because the probation officer stated that he "in all good conscientiousness cannot submit a recommendation of less than the aggravated term," despite the fact that the plea agreement included a stipulated lower term. (Augmented CT 12.) Defendant accordingly had an incentive to preserve the stipulated lower term by refuting the statement attributed to him that he stabbed the victim with a knife. The fact that he did not refute the statement makes the statement reliable. (Cf. Evid. Code, § 1221 ["Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth"].) As a result, defendant's statements to the probation officer were part of the record of the conviction under the narrower possible definition mentioned in *Reed* because they reliably reflected the facts of the offense for which he was convicted.

Defendant appears to argue that this Court should limit the record of the prior conviction to the documents that would be admissible in a federal trial

court under *Taylor* and *Shepard*., i.e., "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." (*Shepard v. United States*, *supra*, 544 U.S. at p. 26; Def. Supp. Brief 27.) He argues that the records admissible in federal court are "highly reliable" because they "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." (Def. Supp. Brief 27.)

However, a defendant's unrefuted admissions in anticipation of sentencing do not necessarily fall outside the scope of the records in *Taylor* and *Shepard*. For example, in *United States v. Mastera* (1st Cir. 2006) 435 F.3d 56, 62, the court held, "It may be debatable whether the defendant's admission, which was not made during the plea colloquy for the original conviction, falls within the evidence permitted by *Taylor* and *Shepard*. But it was not a 'clear' or 'obvious' transgression of the *Shepard* rule for the sentencing court to consider the admission (which was sufficient to justify a conclusion by the court that the conviction was for generic burglary)." Moreover, a record of an event may be reliable without a verbatim transcript of the event, a probation report may contain a verbatim record of a defendant's admission, a defendant may both examine and refute the contents of a probation report with the assistance of counsel, and the records allowed under *Taylor* and *Shepard* necessarily include a defendant's hearsay statements outside of the current proceedings, such as the defendant's prior allocution. As a result, defendant fails to demonstrate either that there is a compelling reason for this court to limit the

record of the prior conviction to the types of documents that would be admissible in federal court, or even that a defendant's unrefuted admissions to a probation officer in anticipation of sentencing would not be admissible in federal court. Accordingly, the trial court's ruling that the prior conviction was not a strike cannot be affirmed on the grounds that the evidence proving the serious nature of the offense was outside the record of the prior conviction.

CONCLUSION

Accordingly, the People respectfully requests that this Court reverse the trial court's ruling that the prior conviction was not a strike.

Dated: September 14, 2006

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached SUPPLEMENTAL BRIEF uses a 13 point Times New Roman font and contains 12,777 words.

Dated: September 14, 2006

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