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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH RONELL GARRISON, Defendant and Appellant.	B266904 (Los Angeles County Super. Ct. No. TA032915)

APPEAL from an order of the Superior Court of Los Angeles County, William C. Ryan, Judge. Affirmed.

California Appellate Project, Jonathan B. Steiner and Suzan E. Hier for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

In 1995, a jury convicted Joseph Ronell Garrison of possession of a firearm by a felon (former Pen. Code, § 12021, subd. (a)(1), now § 29800, subd. (a)(1)).[1] The trial court sentenced Garrison to 25 years to life under the three strikes law (§§ 667, subds. (b)-(i), 1170.12). Garrison petitioned for a recall of his sentence and resentencing under Proposition 36, the Three Strikes Reform Act of 2012 (§ 1170.126, subd. (b)). The court found that Garrison was ineligible for that relief because he was armed during the commission of his third strike offense. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On December 29, 1995, Garrison's neighbor called 911 and reported that Garrison had threatened her with a shotgun. When the police arrived at Garrison's house, he was in the yard and was not holding a shotgun. The police detained him and searched his house. There, the police recovered a loaded shotgun from under a sofa. Garrison admitted to the police that the shotgun was his but denied pointing it at his neighbor.

Garrison was convicted of possession of a firearm by a felon (former Pen. Code, § 12021, subd. (a)(1), now § 29800, subd. (a)(1)). The jury found true allegations Garrison had suffered felony convictions for which he served a prison term for robbery (§ 211), voluntary manslaughter (§ 192.1), and assault with a deadly weapon (§ 245, subd. (a)(1)). The court found these convictions were for serious or violent felonies within the

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[1] Unless otherwise specified, all further statutory references are to the Penal Code.

meaning of the three strikes law. It thus sentenced Garrison to an indeterminate life term as a three strikes offender.

In November 2012, California voters enacted Proposition 36, which revised the three strikes law to preclude indeterminate life sentences unless the current offense (i.e., the third strike) is a serious or violent felony or is a disqualifying offense. (§§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C).) Proposition 36 also authorized persons to file petitions for the recall of previously-imposed third strike sentences on the ground that they would not have been subject to an indeterminate life sentence had Proposition 36 been in effect at the time of their sentencing. (§ 1170.126, subd. (b).)

On March 20, 2013, Garrison filed a petition for recall of his sentence and resentencing under Proposition 36. Garrison claimed that he would not have been subject to an indeterminate life sentence had Proposition 36 been in effect at the time of his sentencing because his current offense was not a serious or violent felony and he was not otherwise disqualified from relief. The trial court issued an order to show cause why his sentence should not be recalled. In opposing the petition, the People argued that Garrison was ineligible for resentencing under section 1170.126, subdivision (e)(2), because during the commission of his current offense, Garrison was armed with a firearm or deadly weapon. (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).) In response, Garrison claimed it was never pleaded and proved at his trial on the charge of being a felon in possession of a firearm that he was armed with a firearm during the commission of that offense. The People replied that there was no requirement under Proposition 36 that factors

disqualifying a petitioner for relief be pleaded and proved at trial on the current offense.

At the August 31, 2015 hearing on Garrison's petition, the trial court stated that its tentative ruling was to deny the petition based on Garrison's admission to the police that he owned the loaded shotgun found under his sofa, which rendered him ineligible for Proposition 36 relief. The court stated that "[u]nlawful possession is [a] continuing offense. . . . Under case law, the fact [the shotgun] was available at some point in the time he had it in his possession—at any point, even if it was a nanograms second—it completes [the] crime." The court further stated that its ruling was not based on the neighbor's 911 call alleging that Garrison threatened her with a shotgun because the neighbor did not testify at trial. At the close of the hearing, the court stated, "I find [Garrison] ineligible due to being armed with a firearm. That's the order." Later that day, the court entered that order and denied Garrison's petition.

DISCUSSION

Proposition 36 amended sections 667 and 1170.12 and added section 1170.126. Through these statutory amendments and additions, Proposition 36 provides that where a defendant's current offense is not a serious or violent felony and the defendant is not otherwise disqualified from relief, the defendant will be sentenced as a second strike offender rather than receiving an indeterminate life sentence as a third strike offender. (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 167.) Proposition 36 also "created a postconviction release proceeding whereby a prisoner who is serving an indeterminate life sentence

imposed pursuant to the three strikes law for a crime that is not a serious or violent felony and who is not disqualified, may have his or her sentence recalled and be sentenced as a second strike offender unless the court determines that resentencing would pose an unreasonable risk of danger to public safety." (*Yearwood*, at p. 168; accord, *People v. Johnson* (2015) 61 Cal.4th 674, 680-681.) A defendant is ineligible for resentencing under section 1170.126 if his or her current sentence was "imposed for any of the offenses appearing in clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12." (*Id.*, subd. (e)(2).) The cross-referenced statutes state, in relevant part, that defendant is not to be treated as a second strike offender if "[d]uring the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person." (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).)

Garrison argues the trial court failed to adhere to two requirements that Proposition 36 imposes: first, determinations of ineligibility for resentencing must be based on the facts of the defendant's conviction for the current offense that were established at trial, not new facts found in connection with the resentencing petition; second, there must be a facilitative nexus between the defendant being armed and the current offense in order to find the defendant ineligible for relief on the ground that "[d]uring the commission of the current offense, the defendant . . . was armed with a firearm . . . ." Proposition 36 imposes neither of those requirements. Therefore, Garrison's asserted claim of error in the denial of his petition fails.

A. *Determinations of Ineligibility for Resentencing Under Proposition 36 May Rest on Factual Findings Regarding Defendant's Current Offense That Were Not Established at Defendant's Trial*

Garrison acknowledges, as he must, that Proposition 36 ineligibility determinations may be based on the entire record of the defendant's conviction. (*People v. Valdez* (Apr. 20, 2017, C077882) ___ Cal.App.5th ___, ___ [2017 WL 1406809 at p. *5] (*Valdez*).) He argues, however, that, in reviewing that record, trial courts are limited to considering whether ineligibility was proven at the defendant's trial on the current offense; they cannot make new factual findings of ineligibility in ruling on the defendant's Proposition 36 petition. The text of Proposition 36 is to the contrary.

Proposition 36 "addressed both prospective sentencing and retrospective resentencing." (*Valdez*, *supra*, ___ Cal.App.5th at p. ___ [2017 WL 1406809 at p. *4].) The prospective sentencing provisions of Proposition 36 state, in pertinent part, "If a defendant has two or more prior serious and/or violent felony convictions as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7 that have been pled and proved, and the current offense is not a [serious or violent felony as defined in the three strikes law], the defendant shall be sentenced [as a second strike offender] *unless the prosecution pleads and proves* any of the following: [¶] . . . [¶] (iii) During the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person." (§§ 667, subd. (e)(2)(C), italics added, 1170.12, subd. (c)(2)(C), italics added.) As this text

shows, "when an *initial* sentencing that occurs after [Proposition 36's] effective date is at issue, there is a clear statutory pleading and proof requirement with respect to factors that disqualify a defendant with two or more prior strike convictions from sentencing as a second strike offender." (*People v. Blakely* (2014) 225 Cal.App.4th 1042, 1058 (*Blakely*).) The pleading and proof requirement means that, for purposes of prospective sentencing, a finding of ineligibility for Proposition 36 relief must be based on the facts of the defendant's conviction on the current offense that were established at trial.

The pertinent provision governing retrospective resentencing under Proposition 36 is different. It "does not impose the same [pleading and proof] requirements in connection with the procedure for determining whether an inmate already sentenced as a third strike offender is eligible for *resentencing* as a second strike offender." (*Blakley*, *supra*, 225 Cal.App.4th at p. 1058.) That provision, section 1170.126, subdivision (e), states, "An inmate is eligible for resentencing if: [¶] . . . [¶] (2) The inmate's current sentence was not imposed for any of the offenses appearing in clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12." (*Id.*, subd. (e)(2).) The cross-referenced statutes in section 1170.126, subdivision (e), set forth the same disqualifying factors that appear in the provision governing prospective sentencing under Proposition 36. But absent from section 1170.126, subdivision (e), are "the pleading and proof requirements" applicable to prospective sentencing. (*Blakely*, *supra*, 225 Cal.App.4th at p. 1058; see also *People v. White* (2014) 223 Cal.App.4th 512, 527 ["the pleading and proof

requirement plainly is a part of only the *prospective* part of [Proposition 36, but] . . . is *not* a part of . . . the *retrospective* part"].)

Thus, under the plain language of the pertinent text, courts considering a Proposition 36 petition for resentencing on the current offense may determine that a defendant is ineligible for that relief even if the facts of ineligibility were not established at the defendant's trial on that offense. The finding of ineligibility may rest on additional facts found in connection with the court's ruling on the petition itself. (*Valdez*, *supra*, ___ Cal.App.5th at p. ___ [2017 WL 1406809 at p. *4].) "[U]nlike the determination of the defendant's guilt or innocence of the underlying charges, 'the existence of a disqualifying factor that would render a defendant ineligible for resentencing under Proposition 36 . . . is a determination solely within the province of the Proposition 36 court to make without regard to any factual finding by the trier of fact.' [Citation.] '[The] court may determine whether one or more of these disqualifying factors exist independent of the elements of the current offense and any attendant sentence enhancement allegation.' [Citation.]" (*Ibid.*)

In construing Proposition 36 in this manner, the court in *Valdez* observed that, in many cases, the facts relevant to the defendant's ineligibility for resentencing under Proposition 36 may not have been relevant at defendant's trial on the current offense, and thus would not have been established there. The court observed that limiting ineligibility determinations to the facts established at the trial thus would frustrate "one purpose of Proposition 36—to preclude dangerous persons from the recall provisions." (*Valdez*, *supra*, ___ Cal.App.5th at p. ___ [2017 WL 1406809 at p. *4].)

Garrison fails to grapple with the textual distinctions between the prospective sentencing and retrospective resentencing portions of Proposition 36. Citing *People v. Guerrero* (1988) 44 Cal.3d 343 and *People v. McGee* (2006) 38 Cal.4th 682, he argues that both portions should be read to limit determinations of ineligibility for Proposition 36 relief to the facts established at the trial on defendant's current offense. *Guerrero* and *McGee* do not support such a reading of Proposition 36. Both cases are sentence enhancement cases, not sentence reduction cases. *Guerrero* held that in determining whether a defendant's prior conviction qualifies as a serious felony for purposes of sentence enhancements, trial courts are limited to considering the record of conviction. (*People v. Guerrero*, *supra*, 44 Cal.3d at p. 355.) *McGee* stated that the enhancement "inquiry does not contemplate that the court will make an independent determination regarding a disputed issue of fact relating to the defendant's prior conduct [citation], but instead that the court simply will examine the record of the prior proceeding to determine whether that record is sufficient to demonstrate that *the conviction* is of the type that subjects the defendant to increased punishment under California law." (*People v. McGee*, *supra*, 38 Cal.4th at p. 706.) Neither *Guerrero* nor *McGee* has any bearing on the evidence that may be considered in determining eligibility for a reduction in punishment under Proposition 36. (See *People v. Frierson* (2016 1 Cal.App.5th 788, 793, review granted Oct. 19, 2016, S236728.)[2]

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[2] Garrison's reliance on *People v. Wilson* (2013) 219 Cal.App.4th 500, is also misplaced. The court there held that, under *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], trial courts may not impose a sentence

B. *Proposition 36's Exclusion for Being Armed with a Firearm During the Commission of the Current Offense Does Not Require a Facilitative Nexus Between the Firearm and the Offense*

Garrison claims that the trial court misinterpreted Proposition 36's exclusion for cases in which, "[d]uring the commission of the current offense, the defendant . . . was armed with a firearm . . . ." (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).) As Garrison reads the statute, it is not enough that the firearm was available for the defendant's use, which is what the trial court found in denying his petition. Rather, the exclusion applies only if the firearm was available for the defendant's use in furtherance of the commission of the offense. Garrison contends that this required facilitative nexus between the firearm and the offense was absent in his case because having the loaded shotgun available under the sofa of his house did not further the commission of the offense of being a

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enhancement based on their own independent resolution of a disputed factual regarding a defendant's prior conviction. (*Wilson*, at p. 516.) *Apprendi* has no bearing on sentence reduction. It held that, under the Sixth Amendment, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi*, at p. 490.) A defendant has no right to a jury trial on eligibility for a reduction in punishment under Proposition 36's resentencing provisions. (See *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1304 ["the United States Supreme Court has already concluded that its opinions regarding a defendant's Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt do not apply to limits on downward sentence modifications due to intervening laws"].)

felon in possession of a firearm. We disagree with Garrison's interpretation of the exclusion.

We are persuaded instead by the interpretation of the exclusion adopted in *People v. Osuna* (2014) 225 Cal.App.4th 1020 (*Osuna*). Like Garrison, the defendant in *Osuna* was convicted of being a felon in possession of a firearm and was sentenced as a third strike offender. Years later, the defendant petitioned for the recall of his sentence under Proposition 36. The court affirmed the denial of his petition on the ground that he was ineligible for resentencing because he was armed with a firearm during the commission of his current offense. (*Id*. at p. 1032.)

In reaching that conclusion, the court in *Osuna* noted that the phrase "'[a]rmed with a firearm' has been statutorily defined and judicially construed [in other contexts] to mean having a firearm available for use, either offensively or defensively," and either actually or constructively. (*Osuna*, *supra*, 225 Cal.App.4th at p. 1029-1030.) The evidence in the defendant's case in *Osuna* established conclusively that he was "'armed with a firearm'" when he illegally possessed the firearm; indeed, he "was actually holding a handgun." (*Id*. at p. 1030.) The defendant did not dispute this. He claimed, however, as Garrison does here, that the firearm exclusion does not apply unless there is "an underlying felony to which the firearm possession is 'tethered' or to which it has some 'facilitative nexus.' [The defendant argued] one cannot be armed with a firearm during the commission of possession of the same firearm." (*Ibid.*)

The court in *Osuna* rejected this argument. It said that the argument would be correct in cases involving "the imposition of an arming enhancement—an additional term of imprisonment

added to the base term, for which a defendant cannot be punished until and unless convicted of a related substantive offense. [Citations.]" (*Osuna*, *supra*, 225 Cal.App.4th at p. 1030, italics omitted.) An arming enhancement under section 12022, subdivision (a)(1), may be imposed where the defendant is armed "'"in the commission" of the felony . . . .'" (*Osuna*, at p. 1031.) This enhancement "'requires both that the "arming" take place during the underlying crime and that it have some "facilitative nexus" to that offense,'" meaning that the defendant "must have a firearm 'available for use to further the commission of the underlying felony.' [Citation.]" (*Ibid*., italics omitted.)

The court in *Osuna* distinguished arming enhancement determinations from Proposition 36 ineligibility determinations. It stated that, "unlike section 12022, which requires that a defendant be armed '*in* the commission of' a felony for additional punishment to be imposed . . . , [Proposition 36] disqualifies an inmate from eligibility for lesser punishment if he or she was armed with a firearm '*during* the commission of' the current offense . . . . 'During' is variously defined as 'throughout the continuance or course of' or 'at some point in the course of.' (Webster's 3d New Internat. Dict. (1986) p. 703.) In other words, it requires a temporal nexus between the arming and the underlying felony, not a facilitative one. The two are not the same. [Citation.]" (*Osuna*, *supra*, 225 Cal.App.4th at p. 1032.) In cases of constructive possession of a firearm by a felon, the temporal nexus is satisfied because the offense "is committed the instant the felon in any way has a firearm within his control," and constructive possession necessarily means that the defendant has "dominion and control" of the firearm even though it is not in the defendant's actual possession. (*Id.* at pp. 1029-1030; see

Valdez, *supra*, ___ Cal.App.5th at p. ___ [2017 WL 1406809 at p. *13] ["where . . . a defendant constructively possessed a weapon and simultaneously had it available for use offensively or defensively, he was armed at that point in time [for purposes of Proposition 36's firearms exclusion], and it does not matter that he was later detained in some place other than where the arming had previously taken place. He still had the weapon available for use at the earlier point in time"].)

Based on this analysis, the court in *Osuna* held the "defendant was armed with a firearm *during* his possession of the gun, but not 'in the commission' of his crime of possession [of a firearm by a felon]. There was no facilitative nexus; his having the firearm available for use did not further his illegal possession of it. There was, however, a temporal nexus. Since [Proposition 36] uses the phrase '[d]uring the commission of the current offense,' and not in the commission of the current offense (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii)), and since at issue is not the imposition of additional punishment but rather eligibility for reduced punishment, . . . the literal language of [Proposition 36] disqualifies an inmate from resentencing if he or she was armed with a firearm during the unlawful possession of that firearm." (*Osuna*, *supra*, 225 Cal.App.4th at p. 1032.)

Every other appellate court to address the meaning of the firearms exclusion in Proposition 36 has construed it just as the court in *Osuna* did. These courts have uniformly concluded the exclusion applies whenever the record shows the defendant had actual or constructive possession of the firearm during the commission of the offense of being a felon in possession of a firearm, and rejected the notion that a facilitative nexus between the arming and the offense is required. (See *Valdez*, *supra*, ___

Cal.App.5th at pp. ___ [2017 WL 1406809 at pp. *10-14]; *People v. White* (2016) 243 Cal.App.4th 1354, 1360-1364; *People v. Hicks* (2014) 231 Cal.App.4th 275, 283-284; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 799; *People v. Elder* (2014) 227 Cal.App.4th 1308, 1312-1314, 1317; *People v. White*, *supra*, 223 Cal.App.4th at p. 525.) Garrison offers no sound basis for us to depart from the reasoned analysis in this body of case law and adopt his reading of Proposition 36's firearms exclusion.

Garrison's fall-back argument in support of his reading of Proposition 36 is that being a felon in possession of a firearm (§ 29800) "is a low-level felony carrying one of the lesser range of sentences in the Penal Code," and that because the voter materials issued when Proposition 36 was on the ballot indicate that the measure "was meant to give lesser sentences to the less dangerous felons," it would contravene the intent of Proposition 36 to read the firearm exclusion to deny relief to defendants convicted of being a felon in possession of a firearm.

This argument is unconvincing. Yes, being a felon in possession of a firearm is considered a nonviolent and nonserious offense. (*Osuna*, *supra*, 225 Cal.App.4th at p. 1038.) But Garrison previously had been convicted of serious offenses. He thus falls squarely into the category of defendants whom the electorate intended to disqualify for relief under Proposition 36. (*Osuna*, at p. 1038 ["It is clear the electorate's intent was not to throw open the prison doors to *all* third strike offenders whose current conviction were not for serious or violent felonies, but only to those who were perceived as nondangerous or posing little or no risk to the public. A felon who has been convicted of two or more serious and/or violent felonies in the past, and most recently had a firearm readily available for use, simply does not

pose little or no risk to the public"].) Our reading of the firearm exclusion to bar relief to a defendant who, like Garrison, had a firearm available for his or her use (and, in Garrison's case, a loaded one at that) during the commission of the offense of being a felon in possession of a firearm is entirely consistent with the intent of Proposition 36.

Finally, relying on *People v. Arevalo* (2016) 244 Cal.App.4th 836, Garrison argues Proposition 36 ineligibility determinations must be proven beyond a reasonable doubt. And based on that supposition, he claims that the trial court erred in finding him ineligible for relief because, while the court did not "expressly state what standard it was applying," it presumably applied the preponderance of the evidence standard, which pre-*Arevalo* "case law . . . had set [as] the standard." Garrison is correct that *Arevalo*, which was decided after the trial court denied his petition, broke from previous case law on the standard of proof for Proposition 36 ineligibility determinations.[3] Post-*Arevalo*, however, courts have continued to apply the preponderance standard. (See, e.g, *Valdez*, *supra*, ___ Cal.App.5th ___ [2017 WL 1406809]; *People v. Newman* (2016) 2 Cal.App.5th 718, review granted Nov. 22, 2016, S237491; *People v. Frierson*, *supra*, 1 Cal.App.5th 788.) We need not take sides in this dispute because, even assuming the trial court applied the wrong

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[3] And for that reason, we conclude that Garrison's failure to argue below that ineligibility for Proposition 36 relief must be proven beyond a reasonable doubt did not forfeit for purposes of appeal his claim of error with respect to the standard of proof. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1215-1217 [failure to raise a claim in trial court is excusable when governing law at the time afforded no basis for the claim].)

standard of proof, the error was harmless. Under our interpretation of Proposition 36's firearm exclusion, the evidence conclusively showed that Garrison had a loaded firearm available for his use during his commission of the offense of being a felon in possession of a firearm. And based on that evidence, the finding that Garrison was ineligible for relief would satisfy either standard of proof.[4]

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[4] Garrison contends that harmless error analysis does not apply to asserted errors in the standard of proof. The cases he cites for that proposition are inapposite because they involved errors that affected the jury's finding at trial of a defendant's guilt or innocence (*Sullivan v. Louisiana* (1993) 508 U.S. 275 [113 S.Ct. 2078, 124 L.Ed.2d 182]), and the jury's findings after conviction of the applicability of a sentence enhancement. (*In re Francisco N.* (1986) 186 Cal.App.3d 175, disapproved on another ground in *In re Manuel L.* (1994) 7 Cal.4th 229, 239, fn. 5.) Such errors are structural and reversible per se because they reflect "'defects in the constitution of the trial mechanism'" that so erode core protections for the defendant that they cannot be quantified and thus defy harmless error analysis. (*Sullivan*, at pp. 281-282.) By contrast, asserted errors regarding the standard for evaluating whether a defendant is eligible for a sentence reduction are not structural; they are subject to harmless error analysis. (E.g, *People v. Johnson* (2016) 1 Cal.App.5th 953, 968 [applying harmless error analysis to asserted trial court error in limiting evidence of the defendant's eligibility for resentencing under Proposition 47, the Safe Neighborhoods and Schools Act of 2014 (§ 1170.18), to the defendant's record of conviction].)

DISPOSITION

The order is affirmed.

SMALL, J.*

We concur:

PERLUSS, P. J.

SEGAL, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.