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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

THE PEOPLE, Plaintiff and Respondent, v. DAVID DENETRIX BOWERS, Defendant and Appellant.	B282917 Los Angeles County Super. Ct. No. BA153362

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

Richard B. Lennon, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

In 1997, defendant David Denetrix Bowers entered a bank and tried to cash a fraudulent check. He was charged with and convicted of check forgery and possession of a check with intent to defraud, and sentenced to a third-strike term of 25 years to life. After the electorate passed the Three Strikes Reform Act in 2012 (Proposition 36), defendant petitioned for recall of sentence and resentencing. The prosecutor opposed the petition, arguing that defendant was ineligible for relief based on a 1990 kidnapping conviction that qualified as a sexually violent felony under Proposition 36. The trial court agreed and found defendant ineligible by a preponderance of the evidence. Because the prosecution was required to prove defendant's ineligibility beyond a reasonable doubt, we reverse.

BACKGROUND

In 1997, a jury convicted defendant of forgery (Pen. Code,[1] § 470, subd. (a); count 1) and possessing a check with intent to defraud (§ 475a; count 2). According to our opinion in his appeal from that conviction, at "a jury trial on the truth of the prior conviction allegations, the People presented the testimony of a case record specialist from the Department of Corrections and a fingerprint comparison expert which indicated Bowers had prior convictions of kidnapping in 1990 and robbery in 1992.

"During deliberations on the prior conviction allegations, one of the jurors presented a note which indicated the juror could not 'perform the task requested by you with regard to the alleged

[1] All undesignated statutory references are to the Penal Code.

prior convictions of the defendant. I am opposed to the current Three Strikes law and do not believe that the conviction of forgery warrants the defendant's imprisonment for life.' Numerous other jurors indicated they agreed with the sentiment expressed in the note. The trial court declared a mistrial.

"On December 10, 1997, while a jury panel waited to retry the prior conviction allegations, Bowers indicated he intended to admit both prior convictions 'for 25 to life. I want to go to prison.' The trial court inquired if Bowers was sure he wanted to follow that course. Bowers responded, 'I'm sure, positive.' The trial court told Bowers defense counsel wanted a jury trial. Bowers stated, 'No. Send me for 25 to life now, be through with it, come out on appeal whatever, 50 years, whatever. I'm tired of this.' Defense counsel indicated Bowers's stated intention was 'a hundred percent against my advice to my client. This is not what I want to do. I would like to do a trial on the priors. [¶] I'm not going to join him in the plea. … [¶] This is totally against my advice.' The trial court inquired if Bowers still wished to admit the prior conviction allegations and he answered, 'Yes. Admit both of them.' Bowers then admitted prior convictions of kidnapping in 1990 and robbery in 1992.

"At the time of sentencing, the trial court had before it the report of the probation officer which indicated 27-year-old Bowers had undergone a 90-day diagnostic evaluation after the kidnapping conviction in 1990, and thereafter had been granted probation. In 1992, Bowers was sentenced to 7 years in state prison for the robbery conviction. In July of 1996, Bowers was convicted of unlawful use of a weapon, a misdemeanor, in Missouri, and sentenced to 52 days in jail." (*People v. Bowers* (Mar. 26, 1999, B119661) [nonpub. opn.] [pp. 3–4].)

The court denied defendant's motion to strike one of his prior convictions under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 and imposed a third-strike term of 25 years–life in state prison for count 1. (*People v. Bowers*, *supra*, B119661 [at pp. 2, 6].) The court imposed an identical concurrent sentence for count 2, and stayed that sentence under section 654. Defendant appealed, and we affirmed by unpublished opinion.

After Proposition 36 passed in 2012, defendant filed a petition seeking recall of his third-strike sentence and resentencing under the Reform Act. On February 19, 2013, the court issued an order to show cause why the petition should not be granted. On September 30, 2013, the prosecution filed an opposition arguing that defendant was ineligible and unsuitable for resentencing.

On January 22, 2016, the court denied defense counsel's 17th extension request and ordered her to appear to explain why another extension was needed. At a hearing on February 1, 2016, the matter was taken off calendar. Defense counsel finally filed a reply brief on June 30, 2016. On August 30, 2016, the prosecution filed a supplemental opposition with exhibits arguing that defendant was ineligible for resentencing. The exhibits included transcripts from defendant's pre-plea preliminary hearing and from his plea to a kidnapping charging in the 1990 case.

After a contested hearing on March 3, 2017, the court issued a written statement of decision on March 29, 2017, in which it held by a preponderance of the evidence that defendant's prior kidnapping conviction was a sexually violent offense that rendered him ineligible for Proposition 36 relief. The court explained that "[b]ecause there is no constitutional or statutory requirement that a disqualifying offense must be proven beyond a

reasonable doubt, Evidence Code section 115 controls and [the court] only needs to find the existence of [defendant's] disqualifying offense by a preponderance of the evidence."

Defendant filed a timely notice of appeal.

DISCUSSION

Defendant contends the court applied the wrong burden of proof when it found him ineligible for Proposition 36 relief. The People concede the error but claim it was harmless because there was overwhelming evidence defendant committed a sexually violent offense.

1. Proposition 36

" 'Under the Three Strikes law as originally enacted, a felony defendant who had been convicted of a single prior serious or violent felony (a second strike defendant) was to be sentenced to a term equal to "twice the term otherwise provided as punishment for the current felony conviction." [Citation.] By contrast, a defendant who had been convicted of two or more prior serious or violent felonies (a third strike defendant) was to be sentenced to "an indeterminate term of life imprisonment with a minimum term of" at least 25 years. [Citation.]' [Citation.] Thus, under the original law, a defendant previously convicted of two qualifying strikes was subject to a life term if he was subsequently convicted of *any* new felony, regardless of whether it was a serious or violent one." (*People v. Frierson* (2017) 4 Cal.5th 225, 230 (*Frierson*).)

Proposition 36 modified this sentencing scheme in two fundamental ways: First, the Reform Act operates prospectively by restricting life sentences to cases in which the current crime is a serious or violent felony or the prosecutor has pled and proved

an enumerated qualifying factor. (§ 1170.12, subd. (c)(2).) Second, it applies retrospectively by creating a post-conviction resentencing procedure whereby an inmate serving a life sentence under the Three Strikes law for a crime that is no longer a third-strike trigger may petition to have his or her sentence recalled and to be resentenced as a second-strike offender. (§ 1170.126; *Frierson*, *supra*, 4 Cal.5th at pp. 230–231.)

The resentencing procedure requires the court to make two determinations. "First, an inmate must be eligible for resentencing. (§ 1170.126, subd. (e)(2).) An inmate is eligible for resentencing if his or her current sentence was not imposed for a violent or serious felony *and* [he or she does not have a current or prior conviction] for any of the offenses described in clauses (i) to (iv) of section 1170.12, subdivision (c)(2)(C). (§ 1170.126, subd[s]. (e)(2), [(e)(3)].)" (*People v. Estrada* (2017) 3 Cal.5th 661, 667 (*Estrada*).) Those clauses describe certain kinds of criminal conduct, including a prior or current conviction for a "sexually violent offense," as defined by subdivision (b) of Welfare and Institutions Code section 6600.

"Second, an inmate must be suitable for resentencing. Even if eligible, a defendant is unsuitable for resentencing if 'the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.' (§ 1170.126, subd. (f).) If an inmate is found both eligible and suitable, the inmate's third strike sentence is recalled, and the inmate is resentenced to a second strike sentence. (*Ibid.*; § 1170.12, subd. (c)(1).)" (*Estrada*, *supra*, 3 Cal.5th at p. 667.)

2. The prosecution must prove ineligibility beyond a reasonable doubt.

A defendant seeking recall and resentencing under the Reform Act bears the initial burden of establishing that his third strike was not for a serious or violent felony. (*People v. Johnson* (2016) 1 Cal.App.5th 953, 963.) "Once that initial showing is made by the defendant, the prosecution bears the burden of proving that one of the ineligibility criteria applies." (*Frierson*, *supra*, 4 Cal.5th at p. 234.)

But because the Reform Act does not indicate what standard of proof applies to claims of ineligibility for second-strike sentencing (*People v. Guilford* (2014) 228 Cal.App.4th 651, 657), a split developed among the Courts of Appeal over the applicable evidentiary standard: some courts approved a preponderance of the evidence standard (see, e.g., *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1040), and others—including this division—required proof beyond a reasonable doubt (*People v. Arevalo* (2016) 244 Cal.App.4th 836, 853). (*Frierson*, *supra*, 4 Cal.5th at p. 235.) In its recent opinion in *Frierson*, the Supreme Court resolved the split, agreeing with *Arevalo* that the People are required to establish beyond a reasonable doubt that a petitioner is ineligible for resentencing. (*Frierson*, at pp. 230, 235–236.)

Here, defendant was sentenced in 1997 as a third striker when he was convicted of one count of forgery (§ 470, subd. (a)) and one count of possessing a check with intent to defraud (§ 475a). Neither crime is a serious or violent felony. (§ 1192.7, subd. (c) [serious felonies]; § 667.5, subd. (c) [violent felonies].) The prosecution argued that defendant was nevertheless ineligible for the Reform Act's ameliorative provisions because his

1990 kidnapping conviction was a sexually violent offense. Under *Frierson*, however, the prosecution was required to prove that claim beyond a reasonable doubt. As the court explicitly rejected *Arevalo* and instead applied the less stringent preponderance of the evidence standard to determine ineligibility, the court plainly erred.

3. The error was not harmless.

The People concede this much but assert the court's error in applying the wrong evidentiary standard must be deemed harmless because overwhelming evidence established that defendant committed a sexually violent offense. In so arguing, the People cite *People v. Barasa* for its holding that even where a defendant is "convicted with an incorrectly allocated burden of proof, in cases where there is uncontradicted evidence as to a point, there can be no prejudice … ." (*People v. Barasa* (2002) 103 Cal.App.4th 287, 296–297.) But unlike *Barasa*, where uncontroverted evidence and the defendant's own admissions established the factor that disqualified him for probation, the evidence before the court in this case pertaining to whether defendant's prior kidnapping conviction qualified as sexually violent was in dispute.

Under section 1170.126, an inmate is ineligible for resentencing under the Reform Act if he has a prior conviction for any offense appearing in section 1170.12, subdivision (c)(2)(C)(iv). (§ 1170.126, subd. (e)(3).) Among the offenses listed in that subdivision is any *sexually violent offense* as defined by Welfare and Institutions Code section 6600. (§ 1170.12, subd. (c)(2)(C)(iv)(I).) As relevant here, kidnapping is a sexually violent offense if it is committed "by force, violence, duress, menace, [or] fear of immediate and unlawful bodily injury on the

victim or any other person" *and* is committed with the intent to commit sodomy (§ 286) or oral copulation (§ 288a). (Welf. & Inst. Code, § 6600, subd. (b).) That is, the kidnapping must be committed by force or violence *and* the kidnapping must be committed with the intent to commit an enumerated sex offense.

Here, the court found by a preponderance of the evidence that (1) defendant kidnapped the victim with the intent to commit oral copulation, and (2) defendant committed oral copulation by force. But since defendant was not convicted of oral copulation, the relevant inquiry was not whether he used force or fear to commit oral copulation but rather whether he used force or fear to commit *kidnapping* within the meaning of Welfare and Institutions Code section 6600—and the court made no explicit finding on this point.[2] Indeed, it is not even clear from the court's analysis what facts gave rise to the kidnapping or when the kidnapping occurred vis-à-vis the dismissed offenses. And because we cannot discern the basis for the court's implied

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[2] While we recognize that force or fear is an element of kidnapping, proof of that element is not necessarily sufficient to satisfy the requirement in Welfare and Institutions Code section 6600, subdivision (b), that the kidnapping be committed "by force, violence, duress, menace, [or] fear of immediate and unlawful bodily injury … ." For example, section 6600 requires a specific type of fear, whereas kidnapping does not. (See, e.g., *People v. Majors* (2004) 33 Cal.4th 321, 331 [implicit but false threat of arrest may satisfy the force or fear element of kidnapping]; *People v. Cook* (2017) 8 Cal.App.5th 309 [elements of the offense of assault with intent to commit rape, standing alone, are insufficient to satisfy requirements of Welf. & Inst. Code, § 6600, subd. (b), for Prop. 36 purposes]; *People v. Jernigan* (2014) 227 Cal.App.4th 1198 [same; attempt to commit forcible oral copulation].)

conclusion that the kidnapping was committed by force, we cannot find the error harmless.[3]

On these facts, the determination of whether defendant's prior kidnapping conviction disqualifies him from relief could well turn out differently under the more stringent beyond a reasonable doubt standard, and we cannot deem the court's error in applying the wrong standard of proof to be harmless. In accordance with *Frierson*, defendant is entitled to a hearing on his petition in which the court applies the correct evidentiary standard. (See *Frierson*, *supra*, 4 Cal.5th at p. 240 [remanding case to the Court of Appeal with directions to return the case to the trial court for further proceedings on defendant's petition for resentencing]; *People v. Cook*, *supra*, 8 Cal.App.5th at pp. 309, 315–316 [case remanded to trial court to reconsider under the correct standard whether defendant's prior conviction was for one of the enumerated offenses that would disqualify him from Proposition 36 relief].)

On remand, the trial court shall determine whether the prosecution can prove beyond a reasonable doubt that defendant's kidnapping prior was a sexually violent offense. If the court concludes the prosecution has failed to meet this burden, it must then decide whether resentencing would pose an unreasonable danger to public safety. (§ 1170.126, subd. (f); *Frierson*, *supra*, 4 Cal.5th at pp. 238–239.)

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[3] We note that the People do not address the question of whether the kidnapping was committed by force. Instead, they argue the error was harmless "in light of the overwhelming evidence that appellant's prior conviction for kidnapping was committed with the intent to commit forcible oral copulation … ."

DISPOSITION

The order denying defendant's petition for recall of sentence and resentencing under Proposition 36 is reversed and the matter is remanded to the trial court for further proceedings consistent with *Frierson* and this opinion.

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LAVIN, J.

I CONCUR:

EDMON, P. J.

EGERTON, J., Concurring.

I agree the case must be remanded for the superior court to determine whether the People can prove the statutory ineligibility for resentencing of defendant and petitioner David Denetrix Bowers beyond a reasonable doubt. In addition, as the superior court noted, if Bowers is eligible for resentencing the court then will address the issue of his suitability. I write separately because I see the eligibility issue differently from my colleagues in the majority.

By pleading to a kidnapping charge and stipulating to a factual basis for that plea, Bowers admitted he used force on, or instilled reasonable fear in, the victim. (See CALCRIM No. 1215.) It is true—as the majority notes—that the Welfare and Institutions Code's definition of a " 'sexually violent offense' " includes not merely any "fear" but, more specifically, "fear of immediate and unlawful bodily injury on the victim . . . or threatening to retaliate in the future against the victim . . . ." (Welf. & Inst. Code, § 6600, subd. (b).) In my view, the record here establishes beyond a reasonable doubt that one or more of the four perpetrators did commit forced oral copulation on the victim by using fear as so defined and by threatening to retaliate against him. The question, as discussed below, is precisely what Bowers's involvement was.

1. The charges and preliminary hearing testimony

In 1990, the People charged Bowers, together with three co-defendants—Eric Billingsley, James Joyner, and Wayne McMahon—with oral copulation by threat and in concert in violation of Penal Code section 288a, subdivision (d). The People alleged additional counts for the same crime against Billingsley

and Joyner, as well as sodomy by force against Joyner. The prosecution arose from a March 21, 1990 incident. As the case settled before trial, the relevant testimony comes from the preliminary hearing.[1]

Jerald Matt J.[2] was working in the California Conservation Corps with the four defendants. On the evening in question, Matt walked with the four defendants to a Lucky supermarket to buy beer. The five men started drinking the beer in the parking lot outside. Bowers, Billingsley, Joyner, and McMahon "went over to a little meeting area" and "started talking" among themselves, leaving Matt "completely alone." At some point, Billingsley called Matt over. Matt thought Billingsley just wanted to talk. Billingsley told Matt to get down on his knees. Billingsley said, "[S]uck my dick or I'll kill you." Matt orally copulated Billingsley. Joyner either was there at the time or walked over shortly thereafter. Matt refused to orally copulate Joyner. Joyner then pulled an eight-inch buck knife from his belt and handed it to Billingsley. Joyner told Matt, "If we have to use this, we will." Billingsley held the knife three to four inches from Matt's face. Billingsley told Matt, "If you . . . don't do it, I will kill you." Matt then orally copulated Joyner.[3] Matt did not try to run away because he was scared.

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[1] The preliminary hearing transcript is part of the record of conviction. (*People v. Reed* (1996) 13 Cal.4th 217, 223; cf. *People v. Estrada* (2017) 3 Cal.5th 661, 667-668, 676 & fn. 7 (*Estrada*); see also Couzens et al., Sentencing California Crimes (The Rutter Group 2018) ¶ 20:64.)

[2] I refer to the victim as "Matt." (Cal. Rules of Court, rule 8.90(b)(4).)

[3] Matt's preliminary hearing testimony contained some inconsistencies. First, he testified Billingsley and Joyner were both

After that, Matt orally copulated Bowers and McMahon. According to Matt, he was "forced by David" to orally copulate him. However, Bowers did not grab Matt, rough him up, threaten to use a weapon, or threaten to "kick [his] ass." Matt was forced to orally copulate Billingsley a second time. That took place "around at the back" of the Lucky. McMahon told Matt to "let [Joyner] fuck you up your ass." McMahon told Matt, "If you don't do this I will kill you." Joyner then sodomized Matt. At some point, the four defendants walked Matt "around to the back side of Lucky's." Billingsley and Joyner were in front and Bowers and McMahon were in back; Matt was in the middle. Eventually, Matt orally copulated Joyner a second time. McMahon told Matt if he didn't "do him [Joyner] right," so that Joyner ejaculated, "we'll kill you." Joyner pulled Matt by his arms and said, "Come with me." Joyner and Matt walked 20 to 30 feet away from the others, "off down a little ways on the back side of Lucky's."

McMahon said to Matt, "If you go back and tell anybody, I'm going to kill you." He said that "over and over and over again." McMahon repeated that admonition "a couple more

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there when Joyner pulled out his knife and handed it to Billingsley, and Billingsley then told Matt, "[I]f you don't suck our dicks we'll kill you." Later, he testified he and Billingsley were "some distance" from the other three defendants, Joyner then approached, Billingsley "stayed there" briefly, and Joyner took out his knife and gave it to Billingsley when Matt refused to orally copulate Joyner. Still later, he testified Joyner called him over and told him to "[s]uck [Billingsley's] dick." Notwithstanding these inconsistencies, Matt maintained throughout his testimony that Billingsley and Joyner were the first to demand oral copulation, he was threatened with a knife, and thereafter he was made to perform oral copulation on Bowers and McMahon, as well as on Billingsley and Joyner a second time.

times" when the men returned to the center where they were housed.

Rafael Mijares was in the Conservation Corps with the defendants and Matt. Sometime between 9:00 p.m. and 10:00 p.m. that night, Bowers, Billingsley, and McMahon called Mijares into Bowers's room. "They were all pretty excited," "blurting things out left and right." The threesome told Mijares "they had just had Matt suck their dicks." McMahon said he had been "slapping Matt back and forth like a bitch" because Matt at first refused to perform the sex acts. Bowers and the other two said they had "pushed [Matt] around"—"[t]hey were all standing around and pushing him." Later that evening, Mijares saw Joyner in a phone booth near the front desk. Mijares asked Joyner if what Bowers and the other two had told him were true. Joyner "laughed" and "said that he had 'nutted' in [Matt's] mouth."

2. The amendment of the information and the change of pleas

On December 10, 1990, the People amended the information to add a count against all four defendants for a violation of Penal Code section 207, subdivision (a), commonly known as simple kidnapping. From the transcript of the plea proceedings, it appears the prosecution and defense counsel had agreed all four defendants would plead to the kidnapping charge and the court would order a "diagnosis and recommendation" from the Department of Corrections under Penal Code section 1203.03. Defense counsel told the court their clients would "enter an open plea to the amended count," meaning there was no agreement between the prosecution and the defendants as to a particular sentence. The court then amended the information on

the People's motion, and Bowers, Billingsley, and Joyner entered pleas of no contest to the kidnapping charge. McMahon pleaded guilty. The prosecutor asked Bowers, "Mr. Bowers, do you understand the nature of the charges, the elements of the offenses, and defenses if any to which you are pleading no contest?" Bowers answered, "Yes, I do." Bowers's attorney stipulated there was a factual basis for Bowers's plea. The court accepted the pleas and found "there is a factual basis for this plea, based upon the conferences that I've had with your lawyers and with the District Attorney, as well as reading of the probation report and review of the clerk's file."

The diagnosis and recommendation from the Department of Corrections does not appear in the file. On May 14, 1991, the trial court sentenced Bowers to three years in state prison, suspended execution of that sentence, and placed Bowers on probation for three years.[4] The court apparently dismissed all of the remaining charges, including the charge against Bowers for oral copulation by threat and in concert.

3. Discussion

The superior court concluded Bowers is ineligible for resentencing because his 1990 conviction was for a sexually violent offense. The court stated that, while simple kidnapping is not a sexually violent offense, "simple kidnapping with the intent to commit a felony violation of . . . section 288a *is* a sexually violent offense" under Welfare and Institutions Code section

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[4] Fewer than ten months later, Bowers committed the robbery that constitutes his second strike.

6600, subdivision (b).[5] Citing *People v. Manning* (2014) 226 Cal.App.4th 1133 (*Manning*), the court considered the "evidence in the record of conviction"[6] and concluded, "because [Bowers] committed the act by fear of immediate and unlawful bodily injury on the victim, and because he committed the act with the intent to force the victim to orally copulate him and others, the simple kidnapping offense became a sexually violent offense . . . making [Bowers] ineligible for relief."

The superior court did not address the elements of a kidnapping charge, including the requirement of asportation.[7]

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[5] The trial court noted the People could have charged Bowers in the 1990 case with kidnapping for oral copulation in violation of Penal Code section 209(b).

[6] In determining whether a petitioner was convicted of a disqualifying crime, the court may consider anything in the record of conviction. Courts look to "the substance of a prior conviction, i.e., the nature and circumstances of the underlying conduct." (*Manning*, *supra*, 226 Cal.App.4th at p. 1141, italics omitted, quoting *People v. Martinez* (2000) 22 Cal.4th 106, 117. See also *People v. White* (2014) 223 Cal.App.4th 512, 524-526; *People v. Guerrero* (1988) 44 Cal.3d 343; *People v. Gomez* (1994) 24 Cal.App.4th 22, 31 [what matters is "the conduct of the defendant, not the specific criminal conviction"].) "[A] trial court may deny resentencing under [Proposition 36] on the basis of facts underlying previously dismissed counts," as long as those "facts also underlie a count to which the defendant pleaded guilty." (*Estrada*, *supra*, 3 Cal.5th at pp. 665, 674.)

[7] For kidnapping, the prosecution must prove that the perpetrators, using force or fear, "moved the [victim] [or made the (victim) move] a substantial distance." (CALCRIM No. 1215.) According to the jury instruction, "substantial distance" "means more than a slight or trivial distance." Questioning at the preliminary hearing did not bear on this "asportation" issue, presumably because the defendants were charged with only sex crimes, not kidnapping, at that juncture. While the

This makes sense: Bowers had pleaded no contest to kidnapping, his attorney had stipulated to a factual basis for the plea, and the court had found a factual basis based on the stipulation, the court's conversations with the parties, and the court's review of the record. Accordingly, as the superior court correctly noted, the eligibility issue before it was whether Bowers's conduct constituted only simple kidnapping or—taking into account the entire record—kidnapping for a "sexually violent offense," defined, in turn, as oral copulation "when committed by force, violence, duress, menace, fear of immediate and unlawful bodily injury on the victim . . . or threatening to retaliate in the future against the victim . . . ." (Welf. & Inst. Code, § 6600, subd. (b).) The court concluded, "the record shows that the victim was forced to orally copulate [Bowers]. . . . [¶] The evidence also shows that the victim was in 'fear of immediate and unlawful bodily injury.' "

When the superior court heard and considered Bowers's petition for resentencing, and issued its ruling, appellate decisions were in conflict on whether the People are required to prove a petitioner's ineligibility by a preponderance of the evidence or beyond a reasonable doubt. Nine months after the court issued its memorandum of decision in this case, our Supreme Court held in *People v. Frierson* (2017) 4 Cal.5th 225 that "proof beyond a reasonable doubt is required." (*Id.* at p. 230.) In my view, the testimony at the preliminary hearing was sufficient to prove by a preponderance of the evidence that

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victim briefly described walking from one point to another with the four defendants walking ahead of and behind him, little was said at the preliminary hearing about any movement of the victim in the course of the sexual assaults.

Bowers committed a sexually violent offense. Whether the evidence was sufficient to prove that disqualifying factor beyond a reasonable doubt, however, is a closer question. While Billingsley and Joyner threatened Matt with Joyner's knife, and McMahon repeatedly told Matt he would kill him if he told anyone about the assaults, the issue of any use of "force, violence, duress, menace, [or] fear of immediate and unlawful bodily injury," or of "threat[s] to retaliate in the future," by Bowers—whether as a principal or as an aider and abettor—is more equivocal. When asked, "Were you forced to orally copulate David . . . after you had been threatened with your life?" Matt answered, "Yes, I was." "Yes, I was forced by David." On direct examination, Matt testified as follows:

"[The prosecutor]: And what did you do with David?

"[Matt]: I orally copulated him.

"[The prosecutor]: Was this done—did you do this freely and voluntarily, sir?

"[Matt]: No.

"[The prosecutor]: Were you forced to do this?

"[Matt]: Yes, I was.

"[The prosecutor]: Was this done after they had threatened to kill you?

"[Matt]: Yes."

Matt testified Bowers was one of the four who walked out of earshot and conferred among themselves shortly before the demands for oral copulation began. Matt also testified Bowers, together with his three companions, surrounded him and "walked" him from one point to another. Mijares testified Bowers was one of the three men who, upon returning to the center, were "pretty excited"; Mijares testified Bowers, as well as Billingsley

and McMahon, told him they had been "standing around" "push[ing] [Matt] around" and they had "had Matt suck their dicks." On cross-examination, however, Matt testified that Bowers never grabbed him by the arms, or roughed him up, or threatened to use any type of weapon on him, or threatened to "kick [his] ass." Matt said he orally copulated Bowers because "[h]e wanted it done." Matt added, "But, it was the others that were making me do it, the other three." When asked, "David wasn't making you do it; right? All he said was, 'Do it to me'; right?" Matt answered, "Yes." Although Bowers's counsel's questions were poorly phrased as double negatives, Matt seemed to confirm that Bowers did not use force or threats, or hit him.

For all of these reasons, I agree the evaluation of the evidence for a determination of whether the People have proved beyond a reasonable doubt the disqualifying factor of Bowers's commission of a sexually violent offense should be done by the superior court in the first instance. The matter therefore must be remanded to that court to reconsider Bowers's eligibility for resentencing using the proper standard of proof, beyond a reasonable doubt.

EGERTON, J.