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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. FERNANDO ADRIEL GUZMAN, Defendant and Appellant.	B263956 (Los Angeles County Super. Ct. No. PA080401)

APPEAL from an order of the Superior Court of Los Angeles County, Ann I. Jones, Judge. Affirmed.

Kenneth J. Sargoy, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Lance E. Winters, Assistant Attorney General, Mary Sanchez and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

Fernando Adriel Guzman petitioned under Proposition 47, the Safe Neighborhoods and Schools Act (Pen. Code, § 1170.18),[1] to recall his felony conviction sentence and to resentence him to a misdemeanor. The trial court denied the petition on the ground that reducing Guzman's sentence from a felony to a misdemeanor would pose an unreasonable risk of danger to public safety, which is a statutory basis for denying Proposition 47 petitions. In making its finding of future dangerousness, the trial court relied heavily on a probation officer's report that was prepared after Guzman was charged in this case, but that was not part of his record of conviction and that contains hearsay.

We believe that the evidence in the probation officer's report was likely insufficient to support the trial court's finding of future dangerousness. However, Guzman forfeited any challenge to the sufficiency of the evidence because he did not properly raise it on appeal. The only argument that Guzman properly raised is the meritless claim that the trial court's reliance on the probation officer's report constituted legal error. According to Guzman, Proposition 47 bars consideration of any evidence outside the petitioner's record of conviction, as well as the consideration of hearsay. Proposition 47 imposes no such limitations. The trial court thus did not commit legal error in considering the probation officer's report. We affirm the order denying Guzman's petition.

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

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Charges Against Guzman*

On April 22, 2014, the People filed a three-count information against Guzman, charging him with second degree robbery (§ 211; count 1), false imprisonment by violence (§ 236; count 2), and assault with a deadly weapon (§ 245, subd. (a)(1); count 3). As to the robbery and false imprisonment counts, the information alleged that Guzman personally used a knife in the commission of the crimes (§ 12022, subd. (b)(1)). Guzman pleaded not guilty to all three counts.

According to a probation officer's report that was prepared on May 27, 2014, Guzman and the victim of his alleged offenses, a female, had been friends. Guzman became angry with the victim because he believed a friend of hers had stolen money from him. When the victim denied knowing anything about this, Guzman pulled out a knife, pointed it at her, and screamed at her. Then Guzman put the knife away, took out his cell phone, crushed it to intimidate her and told her she would not get away with it. He lunged forward, grabbed her cell phone from her hand and put it in his pocket. The victim then told Guzman she was going to her friend's house. Guzman tried to force her into his car, and when she resisted and began walking away, he walked with her. As he did so, he pressed a sharp object, which the victim believed was the knife, against her stomach. When the victim arrived at her friend's house, Guzman saw the friend's father and walked away. The victim called the police from her friend's house. When the police arrested Guzman, they found in his back pack the victim's cell phone, a knife, a glass pipe, and a small bag of methamphetamine.

The probation officer's report stated that Guzman was a member of the Brown Pride gang. It further stated that while the victim suffered no physical injuries or financial loss, she was frightened that Guzman's fellow gang members would retaliate against her. The victim's mother told the probation officer that because of the victim's fears, the family was moving out of their neighborhood, which was the neighborhood in which Guzman resided.

On June 19, 2014, the People filed an amended information, which added a fourth count charging Guzman with possession of a controlled substance, methamphetamine (Health & Saf. Code, § 11377, subd. (a); count 4). Guzman again pleaded not guilty.

B. *The Plea Agreement*

On October 9, 2014, Guzman and the People entered into a plea agreement. Under the agreement, Guzman pleaded no contest to a new, fifth count that charged him with felony grand theft of the victim's cell phone (§ 487, subd. (a)). The trial court convicted Guzman on that count and sentenced him to a two-year state prison term, which he was to serve in county jail. In exchange for Guzman's plea on count 5, the People moved to dismiss the remaining counts; the trial court granted that motion.

C. *Guzman's Proposition 47 Petition*

On March 23, 2015, Guzman filed a petition under Proposition 47, which the voters of California enacted in November 2014, a month after Guzman's conviction. In his petition, Guzman asserted that Proposition 47 reclassified as a

misdemeanor the felony grand theft offense for which he was convicted and sentenced, and, therefore, his sentence should be recalled and reduced to a misdemeanor.

At an April 10, 2105 hearing, the People objected to Guzman's petition on the grounds that a reduction in his sentence from a felony to a misdemeanor would "thwart the benefit of the bargain" that both sides obtained in the plea agreement. In elaborating on this objection, the deputy district attorney referred to the description in the probation officer's report of Guzman's allegedly violent conduct that led to the filing of the first three felony counts against him. She stated that a conviction on any of those counts would have qualified as "strikes" in a future criminal proceeding against Guzman. She further stated that, notwithstanding Guzman's violent conduct, the People agreed to dismiss those counts in exchange for Guzman's plea to the nonstrike felony count of grand theft. A reduction of the felony sentence to a misdemeanor, she claimed, would give Guzman a better deal than the one he received in the plea agreement, while upsetting the expectations of the People.

The trial court interpreted the People's "benefit of the bargain" objection to Guzman's petition as an argument that the parties' plea agreement rendered Guzman ineligible for Proposition 47 relief. The court rejected that argument, stating that Proposition 47 can have retroactive effect on pre-Proposition 47 plea agreements; therefore, Guzman was eligible for Proposition 47 relief, notwithstanding his plea agreement.[2]

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[2] The California Supreme Court subsequently rejected the "benefit of [the] bargain" argument in holding that the People are not entitled to have pre-Proposition 47 plea agreements set aside whenever a defendant petitions under Proposition 47 for a recall

The trial court then turned from Guzman's eligibility for Proposition 47 relief to whether he posed an unreasonable risk of danger to public safety. Citing the probation officer's report as the basis for its concerns about Guzman's future dangerousness, the trial court noted that Guzman had admitted to membership in the Brown Pride gang; he had used a knife during the incident with the victim; and was carrying methamphetamine in his back pack. The court asked the parties whether "someone who has methamphetamine in which to ingest on his person, who has knives and who is in the business of intimidating folks might, in fact, some day step over the line and attempt to murder or murder someone," thus making him a "dangerous man [who] ought not to be entitled to a misdemeanor . . . ."

The deputy district attorney answered that Guzman was "a danger to society" for the reasons the trial court just had articulated. In her answer, Guzman's counsel referred to Guzman's criminal history set forth in the probation officer's report. That history showed that Guzman had suffered misdemeanor convictions in 2006 for a hit and run and driving without a valid driver's license, but that he had no record of using "weapons or guns or the like." Guzman's counsel further asserted that if Guzman were a gang member, the People presumably would have alleged that in the information. The trial court interrupted Guzman's counsel and expressed concern about "the combination of drugs, weapons, affiliating with problematic associates," and about the particular incident giving rise to the information, which the court said had a "gangster quality" to it.

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of his plea-bargained-for sentence. (*Harris v. Superior Court* (2016) 1 Cal.5th 984, 992.)

Guzman's counsel responded that there was "no record to show that [Guzman] has been involved" in gang activities, and that "there is not enough" evidence to believe that Guzman posed a future danger to society.

The trial court then announced its decision, stating that it was a "very close call, but I am actually going to deny the petition on the grounds of dangerousness, here are my reasons why: I understand that it's a narrow bandwidth of types of crimes I'm allowed to prognosticate and whether or not this particular defendant has been previously convicted of more violent crimes, this one was a doozy, and for whatever reason, it was pled to an eligible offense, but it was so serious and so violent, combined with both of the factors of drugs and gang that I am very comfortable predicting his future may be much more serious than what he has done so far, because [Proposition 47] was intended to be directed at low level offenders who were likely not to pose any danger to the community at all . . . . [Guzman] falls outside of that purview. For that reason, I deny his application."

DISCUSSION

A. *Resentencing Under Proposition 47*

Proposition 47 reclassified as misdemeanors certain drug and theft offenses that previously had been classified "as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors)." (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.)[3] Proposition 47 effectuated this

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[3] The offense remains a felony or wobbler if it was "committed by certain ineligible defendants." (*People v. Rivera*, *supra*, 233 Cal.App.4th at p. 1091.)

reclassification by adding several criminal statutes and amending others. (*Ibid.*) As relevant to the felony grand theft charge against Guzman, one of the statutes that Proposition 47 added was section 490.2, subdivision (a). (*People v. Hall* (2016) 247 Cal.App.4th 1255, 1261 (*Hall*).) It provides that, "[n]otwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by the theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor . . . ." (§ 490.2, subd. (a).)

Proposition 47 also established a resentencing procedure, codified in section 1170.18, for persons seeking to reduce felony sentences they currently are serving to misdemeanors. (*Hall*, *supra*, 247 Cal.App.4th at p. 1261.) Under this procedure, such persons may, under subdivision (a) of section 1170.18, petition the trial court "for a recall of [their] sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47." (*Ibid.*) To be eligible for resentencing under section 1170.18, subdivision (a), the petitioner must establish that he or she """is currently serving a felony sentence for a crime that would have been a misdemeanor had Proposition 47 been in effect at the time the crime was committed."""" (*People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 449.) Subdivision (b) of section 1170.18 provides that a petitioner who is eligible for resentencing under the statutes that Proposition 47 added or amended "'shall have his or her sentence recalled and be "resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public

safety." [Citation.]' [Citation.]" (*Hall*, *supra*, 247 Cal.App.4th at p. 1261.)

Section 1170.18 thus creates a two-step process for evaluating Proposition 47 petitions. "'First, the trial court must determine if the petitioner is eligible for resentencing . . . .' [Citation.]" (*Hall*, *supra*, 247 Cal.App.4th at p. 1261.) Second, if the petitioner is eligible for resentencing, the trial court then "'must determine the factual issue of whether the petitioner presents an unreasonable risk of danger to public safety if resentenced.' [Citation.]" (*Ibid*.)

In determining whether the petitioner would pose an unreasonable risk of danger to public safety, the trial court "may consider all of the following:

"(1) The petitioner's criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes.

"(2) The petitioner's disciplinary record and record of rehabilitation while incarcerated.

"(3) Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).)

The term "'unreasonable risk of danger to public safety'" is defined in section 1170.18, subdivision (c), as "'an unreasonable risk that the petitioner will commit a new violent felony within the meaning of [section 667, subdivision (e)(2)(C)(iv)].'" (*Hall*, *supra,* 247 Cal.App.4th at p. 1262, fn. omitted.) In turn, section 667, subdivision (e)(2)(C)(iv), sets forth a list of those

violent felonies, known as "'super strikes.'" (*Hall*, *supra*, at p. 1262, fn. 6.)[4]

The petitioner bears the burden of proving by a preponderance of the evidence that he or she is eligible for resentencing under Proposition 47. (*People v. Perkins* (2016) 244 Cal.App.4th 129, 136.) The People bear the burden of proving by a preponderance of the evidence that resentencing an eligible Proposition 47 petitioner to a misdemeanor would pose an unreasonable risk of danger to public safety. (*People v. Jefferson* (2016) 1 Cal.App.5th 235, 241.) We review a trial court's finding that the petitioner poses such a danger for abuse of discretion.

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[4] The super strike felonies listed in that provision are as follows: "(I) A 'sexually violent offense' as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code. [¶] (II) Oral copulation with a child who is under 14 years of age, and who is more than 10 years younger than he or she as defined by Section 288a, sodomy with another person who is under 14 years of age and more than 10 years younger than he or she as defined by Section 286, or sexual penetration with another person who is under 14 years of age, and who is more than 10 years younger than he or she, as defined by Section 289. [¶] (III) A lewd or lascivious act involving a child under 14 years of age, in violation of Section 288. [¶] (IV) Any homicide offense, including any attempted homicide offense, defined in Sections 187 to 191.5, inclusive. [¶] (V) Solicitation to commit murder as defined in Section 653f. [¶] (VI) Assault with a machine gun on a peace officer or firefighter, as defined in paragraph (3) of subdivision (d) of Section 245. [¶] (VII) Possession of a weapon of mass destruction, as defined in paragraph (1) of subdivision (a) of Section 11418. [¶] (VIII) Any serious and/or violent felony offense punishable in California by life imprisonment or death." (§ 667, subd. (e)(2)(C)(iv).)

(*Id*. at pp. 242-243.) Under the abuse of discretion standard, a trial court's factual findings are upheld if there is sufficient evidence to support to them. (*People v. Fuiava* (2012) 53 Cal.4th 622, 650.)

B. *Guzman Forfeited Any Challenge to the Sufficiency of the Evidence Underlying the Trial Court's Future Dangerousness Finding*

After rejecting the People's "benefit of the bargain" objection to Guzman's petition and finding that Guzman was eligible for resentencing,[5] the trial court found that resentencing Guzman to a misdemeanor would pose an unreasonable risk of danger to public safety; therefore, the court denied the petition.

We have serious doubts whether there was sufficient evidence to support the trial court's future dangerousness finding. That finding rested on references in the probation officer's report to Guzman's gang membership, his intimidation of the victim in the incident that led to his conviction, his use of a knife in the incident, and his carrying of methamphetamine in a backpack. As the trial court acknowledged, however, Guzman

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[5] The trial court did not specify the basis for its eligibility finding. But the record supports that finding. Guzman was convicted of felony grand theft (§ 487, subd. (a)). Proposition 47 converted that offense to a misdemeanor when the value of personal property taken does not exceed $950. (§ 490.2.) Guzman claimed that the value of the property he took from the victim, a cell phone, was less than $950, and the People do not argue to the contrary. Proposition 47's change to the punishment for certain grand thefts thus made Guzman eligible for resentencing.

had no prior record of committing violent crimes, he pled only to grand theft, not to the charges of violent crimes that the People dismissed, and there is "a very narrow bandwidth" of violent offenses that qualify as super strikes under section 667, subdivision (e)(2)(C)(iv), that any defendant might be predicted to commit in the future. Nevertheless, the court stated that it felt "comfortable predicting [that Guzman's] future may be much more serious than what he has done so far . . . ." We do not share the trial court's comfort. On the record that was before the trial court, it seems highly speculative that reducing Guzman's felony conviction to a misdemeanor would pose an unreasonable risk of Guzman's future commission of a felony that qualifies as a super strike. The trial court's finding is highly suspect.

Guzman's appeal briefs did not, however, properly raise a challenge to the sufficiency of the evidence underlying the trial court's future dangerousness finding. Guzman's opening brief frames the issue on appeal not as whether the evidence was sufficient to support that finding, but rather, "whether the lower court's reliance on inadmissible hearsay statements in the probation report satisfied the evidentiary requirements for denial of a section 1170.18 petition for recall of sentence." Likewise, Guzman's brief does not state that the standard of review in this case is abuse of discretion; rather, it states, "Because appellant raises a question of law, this [c]ourt should review denial of the petition for recall of sentence, de novo." Consistent with the statement of the issue and standard of review, the main "Argument" heading in Guzman's opening brief states, "The lower court erred when it considered evidence outside of the record of conviction . . . ." The first substantive subheading states, "The trial court is limited to the record of conviction in

determining eligibility for recall of sentence." Guzman then devotes four pages to arguing that Proposition 47 forbids the consideration of matters outside the petitioner's record of conviction and therefore the trial court erred as a matter of law in denying his petition based on the probation officer's report, which was not part of the record of conviction. The second subheading states, "The lower court erred by relying on inadmissible hearsay in the probation report, a document not part of the record of conviction. . . ." Guzman then devotes four pages to arguing that Proposition 47 forbids the consideration of hearsay evidence and therefore the trial court erred as a matter of law because the probation officer's report contained hearsay.

Towards the end of the "hearsay" subsection, on the brief's second-to-last page, Guzman musters a single paragraph that mentions the sufficiency of the evidence to support the trial court's finding of future dangerousness. This reference has no connection to the brief's statement of the issue and standard of review, however. It also is not set off with its own separate section heading or subheading. And coming on the heels of pages of argument that the trial court erred as a matter of law by relying on the probation officer's report, it appears in the brief as an after-thought. Guzman's reply brief referred to the evidence in the probation officer's report underlying the finding of future dangerousness. But the thrust of the reply brief was that the trial court erred in considering this evidence because it was hearsay.

We asked the parties to submit supplemental briefs on whether Guzman properly raised a sufficiency of the evidence challenge, and, if so, whether sufficient evidence supported the trial court's finding. Guzman's supplemental brief says that he

did raise the issue. But in our view, it confirms that he did not. The supplemental brief does not address the disconnect between the lone paragraph on the sufficiency of the evidence in the opening brief and everything else in that brief. It was this disconnect that prompted us to call for supplemental briefing in the first place. Instead of confronting the problem head on, Guzman's supplemental brief largely avoids it. It couples a bald assertion that the paragraph in question sufficed with a rehashing of the argument from his briefs that the trial court erred as a matter of law by considering evidence outside his record of conviction, including hearsay evidence, plus a lengthy discussion of a recent decision addressing those legal issues. The supplemental brief also incorrectly states that Guzman's opening brief "set forth the abuse of discretion standard as the test for reversing the lower court's ruling." As indicated above, Guzman's opening brief urged us to review the ruling de novo.

All told, we conclude that Guzman raised the sufficiency of the evidence in such a perfunctory fashion in his briefs that he forfeited the issue for purposes of appeal. (See *People v. Harper* (2000) 82 Cal.App.4th 1413, 1419, fn. 4 [the defendant's equal protection argument, made "[a]t the end of the discussion in [his] opening brief [in] a single paragraph," and not set out under a separate heading, was "raised in such [a] perfunctory fashion [that it was] waived"]; see also *People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19 ["To the extent [the] defendant perfunctorily asserts other claims, without development and, indeed, without a clear indication that they are intended to be discrete contentions, they are not properly made, and are rejected on that basis"]; Cal. Rules of Court, rule 8.204(1)(B) ["Each brief must: [¶] . . . [¶]

[s]tate each point under a separate heading or subheading summarizing the point . . ."].)

C. *Proposition 47 Does Not Preclude the Consideration of Evidence Outside the Petitioner's Record of Conviction*

Guzman argues that Proposition 47 precludes the consideration of any evidence that is outside the petitioner's record of conviction, and thus the trial court's reliance on the probation officer's report constituted legal error.[6]

Proposition 47 does not erect the bounds that Guzman claims were exceeded here. In reviewing a Proposition 47 petition, trial courts may consider evidence outside the petitioner's record of conviction. The probation officer's report thus was fair game in the disposition of Guzman's petition. The trial court did not err in considering it.[7]

Our holding is rooted in the statutory text governing Proposition 47's dangerousness inquiry. Section 1170.18,

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[6] A probation officer's report generally is outside the record of conviction. (See, e.g., *People v. Burnes* (2015) 242 Cal.App.4th 1452, 1458.)

[7] Guzman did not object below when the People, and then the trial court itself, referred to the probation report as a basis for concluding that Guzman posed an unreasonable risk of danger to public safety. Therefore, Guzman arguably has forfeited his claim that Proposition 47 forbids consideration of any evidence outside the record of conviction. The People do not, however, urge us to decline to reach the merits of Guzman's claim on the ground that he forfeited it. Accordingly, we are deciding this appeal on the merits. (*People v. Hronchak* (2016) 2 Cal.App.5th 884, 892, fn. 5.)

subdivision (b), provides that, in addition to "[t]he petitioner's criminal conviction history," the trial court may base its dangerousness determination on two other factors: "[t]he petitioner's disciplinary record and record of rehabilitation while incarcerated," [and] "[a]ny other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).) A petitioner's "disciplinary record and record of rehabilitation while incarcerated" are not part of the record of conviction: these records necessarily post-date the conviction. And the phrase "[a]ny other evidence the court, within its discretion, determines to be relevant" does not restrict trial courts to relevant evidence in the record of conviction. It means what it says: *any* evidence the court deems relevant, no matter the source, may be considered. Guzman's claim that Proposition 47 prohibits the consideration of evidence outside the record of conviction is thus directly contrary to the text of section 1170.18, subdivision (b).

Construing section 1170.18, subdivision (b), to allow the consideration of matters outside the record of conviction in making Proposition 47 dangerousness determinations is consistent with the broad evidentiary leeway afforded to trial courts in sentencing proceedings. At sentencing, trial courts may consider a wide range of information about the defendant's future dangerousness, including information outside the record of conviction contained in probation officer's reports. (*People v. Towne* (2008) 44 Cal.4th 63, 85; *People v. Otto* (2001) 26 Cal.4th 200, 212-213; *People v. Arbuckle* (1978) 22 Cal.3d 749, 754; *People v. Sledge* (2017) 7 Cal.App.5th 1089, 1095.) Resentencing under Proposition 47 "is a type of sentencing proceeding. Nothing in

Proposition 47 suggests the applicable rules of evidence are any different than those which apply to other types of sentencing proceedings." (*Sledge*, *supra*, at p. 1095.)

Guzman relies heavily on *People v. Bradford* (2014) 227 Cal.App.4th 1322 (*Bradford*), which involved a petition for resentencing under Proposition 36, the Three Strikes Reform Act of 2012. That measure authorizes certain eligible persons serving indeterminate prison sentences under the three strikes law to petition the trial court for the recall of their sentences and to seek resentencing. (§ 1170.126, subd. (b).) If the petitioner is eligible, then, as with Proposition 47, the court must determine whether "resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).) The factors informing the future dangerousness inquiry under Proposition 36 are the same as under Proposition 47.[8]

Notwithstanding the parallels between Proposition 36 and Proposition 47, *Bradford* is inapposite. The Third District in that case held only that Proposition 36's *eligibility* determinations must be based on the petitioner's record of conviction and the trial court there thus committed legal error by considering evidence outside that record in finding the petitioner ineligible

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8 "(1) The petitioner's criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes; [¶] (2) The petitioner's disciplinary record and record of rehabilitation while incarcerated; and [¶] (3) Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety." (§ 1170.126, subd. (g).)

for resentencing. (*Bradford*, *supra*, 227 Cal.App.4th at pp. 1337-1338.) The Third District did not, however, hold that the Proposition 36 *dangerousness* inquiry should be limited to the petitioner's record of conviction as well. Indeed, if anything, the Third District recognized that it should not be. In particular, it noted that once the determination is made that the Proposition 36 petitioner is eligible for resentencing, "the trial court considers a nonexclusive set of factors based on the defendant's history both before *and after the crime* as well as any 'evidence' the trial court determines to be relevant 'within its discretion' to 'whether a new sentence would result in an unreasonable risk of danger to public safety.' [Citation.]" (*Bradford*, *supra*, at p. 1337, italics added.) The Third District did not reach the dangerousness issue because the trial court had stopped at the first step, eligibility, and concluded that the petitioner was ineligible.

By contrast, the trial court here found Guzman eligible for sentencing under Proposition 47. It thus proceeded to the next step and denied Guzman's petition on the grounds of future dangerousness, relying on evidence outside the record of conviction. *Bradford* imposes no impediment to the consideration of such evidence in evaluating future dangerousness.[9]

Unlike *Bradford*, *People v. Franco* (2014) 232 Cal.App.4th 831, which Guzman overlooked, is a Proposition 36 case that

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9 *People v. Manning* (2014) 226 Cal.App.4th 1133, another Proposition 36 case on which Guzman relies, is inapposite. Like *Bradford*, it involved a Proposition 36 eligibility determination, not a dangerous determination. The remand in *Manning* directing the trial court to "specify the records it relied on" in deciding that the petitioner was ineligible (*id*. at p. 1144) thus has no bearing here.

reached the future dangerousness issue. *Franco* held that trial courts have discretion to consider a probation officer's report in making future dangerousness determinations under Proposition 36. (*Franco*, *supra*, at p. 834.) In short, *Franco*, not *Bradford* is the Proposition 36 case that is germane here. And it is consistent with our holding that the trial court did not err by considering the probation officer's report in denying Guzman's Proposition 47 petition.[10]

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[10] Even as to Proposition 47's eligibility determination, courts have distinguished *Bradford* and declined to impose a record of conviction limitation. That is because, notwithstanding the parallels between the two measures, the Proposition 47 eligibility determination typically requires consideration of matters outside the record of conviction, whereas the Proposition 36 eligibility determination does not. (*People v. Johnson* (2016) 1 Cal.App.5th 953, 966-967 ["[U]nder Proposition 36, in order to determine eligibility (whether initially or otherwise), the resentencing court need consider only the petitioning defendant's *existing prior convictions*. . . . [¶] In contrast, under Proposition 47 the relevant inquiry for purposes of establishing a petitioning defendant's initial eligibility is 'guilt[] of a misdemeanor' (§ 1170.18, subd. (a))—which often cannot be established merely from the record of conviction of the felony . . . . [¶] . . . As such, the trial court is not limited to the record of conviction in its consideration of the evidence to adjudicate eligibility for resentencing under Proposition 47"]; *People v. Salmorin* (2016) 1 Cal.App.5th 738, 744 [Proposition 36 eligibility determination "turns on the nature of the petitioner's convictions—whether an offender is serving a sentence on a conviction for nonserious, nonviolent offenses and whether he or she has prior disqualifying convictions for certain defined offenses. . . . By contrast, under Proposition 47, eligibility often turns on the simple factual question of the value of the stolen property. In most such cases,

D. *Proposition 47 Does Not Preclude the Consideration of Hearsay Evidence*

Guzman argues that section 1170.18, subdivision (b), should be read to impose a requirement that only "competent" evidence, i.e., non-hearsay evidence, be considered in resolving Proposition 47 petitions. Such a limitation would preclude consideration of the probation officer's report in this case because it contained hearsay evidence.

The problem for Guzman is that it has long been the rule that trial courts may consider hearsay in sentencing proceedings, so long as the hearsay is reliable. (*People v. Arbuckle*, *supra*, 22 Cal.3d at p. 754, fn. 2; *People v. Sledge*, *supra*, 7 Cal.App.5th at p. 1095; *People v. Lamb* (1999) 76 Cal.App.4th 664, 683.) Guzman failed, however, to challenge the reliability of the hearsay in the probation officer's report.[11]

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the value of the property was not important at the time of conviction, so the record may not contain sufficient evidence to determine its value. . . . [W]e do not believe the *Bradford* court's reasons for limiting evidence to the record of conviction are applicable in Proposition 47 cases"], quoting *People v. Perkins*, *supra*, 244 Cal.App.4th at p. 140, fn. 5.)

[11] Guzman did not address the reliability of the probation officer's report in his opening brief. His reply brief contains a one-sentence statement, without any substantiation, that the report is unreliable. We do not consider Guzman's unreliability contention because he raised it for the first time on reply. (See *Mansur v. Ford Motor Co.* (2011) 197 Cal.App.4th 1365, 1387-1388 ["We will not consider arguments raised for the first time in a reply brief, because it deprives [the respondents] of the opportunity to respond to the argument"].)

Guzman's reliance on *People v. Reed* (1996) 13 Cal.4th 217 as support for his "[c]ompetent evidence" requirement is misplaced. In *Reed*, the California Supreme Court disapproved the People's introduction of hearsay evidence in a probation officer's report at the second phase of a bifurcated jury trial to prove the truth of an allegation that the defendant previously had committed a serious felony. (*Id*. at pp. 220-221, 228.) *Reed* did not, however, question the propriety of introducing at sentencing hearsay evidence in probation officers' reports.

In sum, the trial court committed no legal error in denying Guzman's Proposition 47 petition based on hearsay evidence of his dangerousness contained in the probation officer's report.

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.