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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ARTURO BEJARANO, JR., Defendant and Appellant.	B271818 (Los Angeles County Super. Ct. No. VA125250)

APPEAL from a judgment of the Superior Court of Los Angeles County, Yvonne Sanchez and Robert J. Higa, Judges. Conditionally reversed, and remanded with directions.

Dan Mrotek, 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, Shawn McGahey Webb and David W. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Arturo Bejarano, Jr., appeals from the judgment entered following his convictions by jury on count 1 – first degree murder (Pen. Code, § 187, subd. (a))[1] with a robbery special circumstance (§ 190.2, subd. (a)(17)(A)), two counts of second degree robbery (§ 211; counts 2 & 5) with, as to count 2, firearm use (§ 12022.53, subd. (b)), two counts of assault with a firearm (§ 245, subd. (a)(2); counts 3 & 8), count 4 – false imprisonment by violence (§ 236), count 6 – first degree burglary, with a person present (§§ 459, 667.5, subd. (c)(21)), and count 7 – misdemeanor dissuading a witness (§ 136.1, subd. (b)(3)), with firearm use (§ 12022.5, subd. (a)) as to counts 4, 6, 7 and 8, and findings appellant suffered six strikes (§ 667, subd. (d)) and six prior serious felony convictions (§ 667, subd. (a)(1)).

We conditionally reverse the judgment and remand to the trial court for it to conduct a new in camera hearing on appellant's *Pitchess*/*Brady*[2] motion. Depending upon the outcome of that hearing, as more fully discussed *post*, either the trial court shall order a new trial, or the judgment shall be deemed reinstated with exceptions. The exceptions are that the jury's findings that, based on 1990 Texas burglary convictions, appellant suffered strikes for purposes of the Three Strikes law and prior serious felony convictions for purposes of section 667, subdivision (a)(1), are reversed; appellant's sentence is vacated; the section 1202.45 parole revocation fine imposed by the trial court is stricken; the trial court shall permit the People to

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[1] Unless otherwise indicated, subsequent section references are to the Penal Code.

[2] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*); *Brady v. Maryland* (1963) 373 U.S. 83 [10 L.Ed.2d 215] (*Brady*).

demonstrate to the trial court, based on the record of conviction of the 1990 Texas burglary convictions, that at the time appellant pled guilty and/or no contest in 1990 to the underlying burglaries, that plea encompassed a relevant admission about the nature of his crimes; and the trial court shall resentence appellant and conduct further proceedings consistent with this opinion. The trial court shall also forward to the prison authority an amended abstract of judgment.

FACTUAL SUMMARY

1. THE FLORES CRIMES.

A detailed recitation of the facts of the present offenses is unnecessary to resolve this appeal. The sufficiency of the evidence appellant committed the present offenses is undisputed except as to counts 3 and 8. Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established as follows. On March 2, 2012, appellant pointed a gun at Jaime Flores, robbed him (count 2), and falsely imprisoned him by violence (count 4).

In particular, on the above date, appellant entered a Huntington Park store and Flores, a store employee, was inside. Appellant pointed a black gun at him, said, "Don't move," and demanded Flores's money. Appellant ordered Flores to go to the back of the store and made him lie down. Appellant bound Flores's hands behind his back with a zip tie and tied his legs. Appellant covered Flores's mouth and eyes with duct tape and told him not to move. Appellant unsuccessfully tried to put a plastic bag over Flores's head. Appellant took Flores's wallet, containing $1,500, took $1,500 from the store's cash register, and eventually left. Appellant was in the store about five to six minutes and Flores kept his eye primarily on the gun.

2. THE REYES CRIMES.

On March 15, 2012, appellant committed the first degree murder of Veronica Hurtado Reyes (count 1) and robbed her (count 5). In particular, on the above date appellant entered a Huntington Park store and Reyes, an employee, was inside. After appellant entered the store he committed the crimes, taking $522 and Reyes's purse.

Police later entered the store and saw Reyes in the back of the store, lying face down on the floor. A sheet was tied around Reyes's neck, her hands were tied behind her back with a zip tie, duct tape was covering her mouth, and blood was seeping from under the tape. An autopsy revealed Reyes died from multiple injuries, including ligature strangulation, and she had asphyxia which could have been "partial mechanical asphyxia" caused by the duct tape on her mouth.

3. THE CARRASCO CRIMES.

On April 6, 2012, appellant pointed a gun at Dannya Carrasco (Dannya) and committed the first degree residential burglary of the home of Jaime Carrasco (count 6). Dannya was the daughter of Jaime Carrasco. Appellant also attempted to dissuade Dannya from being a witness (count 7).

In particular, on the above date Dannya was in bed when she heard her dog barking inside the house. She heard footsteps in the house and heard the dog crying as if someone had kicked or hurt it. Dannya hid in her closet. Appellant eventually entered the closet and Dannya hit him. Appellant grabbed her, pushed her back, and the two fled out of the closet. Appellant pointed a gun sideways at Dannya and said, "don't call the police." Dannya was afraid appellant would shoot her. Appellant

later left. Dannya was very afraid. Six hundred dollars in cash that had been in a closet was gone.

ISSUES

Appellant claims (1) this court should independently review the sealed transcript of the in camera hearing on appellant's *Pitchess* motion, (2) the trial court erroneously refused to discharge Juror No. 4, (3) the trial court erroneously adjudicated appellant's *Marsden*[3] motions, (4) the failure of appellant's trial counsel to make a section 1118.1 motion as to counts 3 and 8 constituted ineffective assistance of counsel, (5) there is insufficient evidence appellant's 1990 Texas convictions were for serious or violent felonies and the jury's findings concerning those convictions were erroneous, (6) the trial court erroneously imposed a 10-year term for firearm use on count 5, (7) the trial court erroneously imposed a section 12022.5, subdivision (a) enhancement on count 7, and (8) the trial court erroneously imposed a section 1202.45 parole revocation fine.

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[3] *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

DISCUSSION

1. CONDITIONAL REVERSAL IS APPROPRIATE REGARDING APPELLANT'S *PITCHESS/BRADY* MOTION.

On April 22, 2015, appellant, in propria persona, filed a pretrial hybrid *Pitchess/Brady* motion[4] seeking various information from the personnel files of Huntington Park Police Sergeant Steve Thoreson, who was assigned to investigate the Carrasco burglary.

The record of the proceedings in open court reflects as follows. At the May 15, 2015 hearing on the motion, the court granted it, limited to the issues of "planting of evidence, perjury, [and] fabrication of probable cause." On June 8, 2015, the court conducted an in camera hearing on the motion with the records custodian of the Huntington Park Police Department (HPPD) and counsel for HPPD to determine if there were discoverable items. The transcript of the in camera hearing was sealed and marked confidential. After the in camera hearing, the court found there were no discoverable items.

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[4] The motion, citing *Kyles v. Whitley* (1995) 514 U.S. 419, 434 [131 L.Ed.2d 490], argued a state statute barring discovery of otherwise discoverable exculpatory evidence, including impeachment evidence, solely on the ground the age of the evidence exceeded a given number of years, was unconstitutional. We will treat this as an argument appellant was entitled to all evidence discoverable under *Brady*, whether or not that evidence fell within the five-year limitation of Evidence Code section 1045, subdivision (b)(1).

Appellant asks this court to conduct an independent review of the sealed transcript of the June 8, 2015 in camera hearing. In *People v. Mooc* (2001) 26 Cal.4th 1216 (*Mooc*), our Supreme Court stated, "When a trial court concludes a defendant's *Pitchess* motion shows good cause for discovery of *relevant* evidence contained in a law enforcement officer's personnel files, the *custodian* of the records is obligated to bring to the trial court all '*potentially* relevant' documents to permit the trial court to examine them for itself. [Citation.] A law enforcement officer's personnel record will commonly contain many documents that would, in the normal case, be irrelevant to a *Pitchess* motion, including those describing marital status and identifying family members, employment applications, letters of recommendation, promotion records, and health records. (See Pen. Code, § 832.8.)" (*Mooc*, at pp. 1228–1229, italics added.)

Mooc then observed, "Documents *clearly irrelevant* to a defendant's *Pitchess* request need not be presented to the trial court for in camera review. But if the custodian has any *doubt* whether a particular document is relevant, he or she should present it to the trial court. Such practice is consistent with the premise of Evidence Code sections 1043 and 1045 that the locus of decisionmaking is to be the trial court, not the prosecution or the custodian of records. *The custodian should be prepared to state in chambers and for the record what other documents (or category of documents) not presented to the court were included in the complete personnel record, and why those were deemed irrelevant or otherwise nonresponsive to the defendant's Pitchess motion*. A court reporter should be present to document the custodian's statements, as well as any questions the trial court

may wish to ask the custodian regarding the completeness of the record." (*Mooc*, *supra,* 26 Cal.4th at p 1229, italics added.)

Mooc continued, "The trial court should then make a record of what documents it examined before ruling on the *Pitchess* motion. Such a record will permit future appellate review. If the documents produced by the custodian are not voluminous, the court can photocopy them and place them in a confidential file. Alternatively, the court can prepare a list of the documents it considered, or simply state for the record what documents it examined. Without some record of the documents examined by the trial court, a party's ability to obtain appellate review of the trial court's decision, whether to disclose or not to disclose, would be nonexistent. Of course, to protect the officer's privacy, the examination of documents and questioning of the custodian should be done in camera in accordance with the requirements of Evidence Code section 915, and the transcript of the in camera hearing and all copies of the documents should be sealed." (*Mooc*, *supra,* 26 Cal.4th at p. 1229.)

In *People v. Guevara* (2007) 148 Cal.App.4th 62 (*Guevara*), a case from Division Six of this district, a records custodian testified during an in camera hearing on the defendant's *Pitchess* motion that "none of the involved officers' personnel files contained any information that was potentially responsive to [the defendant's] discovery request." (*Id.* at p. 68.)[5] *Guevara* stated,

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[5] In *Guevara*, the city attorney gave the trial court a document with additional information that supported the custodian's decision to produce no records but the record failed to reflect the court reviewed the document, and the document was not part of the record on appeal. (*Guevara, supra*, 148 Cal.App.4th at pp. 68–69.)

"Accordingly, no documents from the personnel files were submitted to the court for review, and on that basis the court determined that [the defendant] was not entitled to any discovery." (*Ibid.*)

Guevara later stated, "*in cases such as this where the custodian of records does not produce the entire personnel file for the court's review, he or she must establish on the record what documents or category of documents were included in the complete personnel file. In addition, if it is not readily apparent from the nature of the documents that they are nonresponsive or irrelevant to the discovery request, the custodian must explain his or her decision to withhold them*. Absent this information, the court cannot adequately assess the completeness of the custodian's review of the personnel files, nor can it establish the legitimacy of the custodian's decision to withhold documents contained therein. Such a procedure is necessary to satisfy the Supreme Court's pronouncement that 'the locus of decisionmaking' at a *Pitchess* hearing 'is to be the trial court, not the prosecution or the custodian of records.' [Citation.] It is for the court to make not only the final evaluation but also a record that can be reviewed on appeal. [¶] No such record exists in this case. . . . We therefore conditionally reverse the judgment and remand for a new *Pitchess* hearing in which the proper procedure is followed." (*Guevara, supra*, 148 Cal.App.4th at p. 69, first italics added.)

In *People v. Fuiava* (2012) 53 Cal.4th 622 (*Fuiava*), a records custodian testified during an in camera hearing on a *Pitchess* motion, and produced one potentially responsive document. The trial court found no information should be disclosed to the defendant, and ordered sealed the hearing transcript and the produced document. (*Fuiava*, at pp. 646–647.)

On appeal, the defendant argued the trial court erred by failing to ask the custodian "whether there were other materials in the deputies' personnel files deemed nonresponsive to defendant's motion, and, if so, what those materials were." (*Id.* at p. 647.)

Fuiava concluded no trial court error occurred. (*Fuiava*, *supra,* 53 Cal.4th at p. 647.) The defendant had argued the contrary, relying on *Mooc's* statement that " '[t]he custodian should be prepared to state in chambers and for the record what other documents (or category of documents) not presented to the court were included in the complete personnel record, and why those were deemed irrelevant or otherwise nonresponsive to the defendant's *Pitchess* motion.' " (*Fuiava,* at p. 647.) However, *Fuiava* stated, "The guidance we offered in *Mooc* does not establish that in this case the trial court committed reversible error by failing to have [the custodian] do so." (*Ibid.*)

Fuiava observed, "In *Mooc*, we did not hold that a failure to specify what documents in a file were not brought to court would, by itself, result in an inadequate record. The problem we addressed at length in *Mooc* was the trial court's failure to make any record of what materials the custodian of records *did* bring to court, none of which the trial court ordered disclosed to the defendant. In other words, in *Mooc* the custodian had deemed some documents potentially responsive to the *Pitchess* motion, but the trial court found they were not, and appellate review of that decision was compromised because there was no record of the documents at issue." (*Fuiava*, *supra,* 53 Cal.4th at p. 647.)

Fuiava continued, "The circumstances of *Mooc* are markedly different from those in the present case, in which there is *solely* an absence of a statement from the custodian addressing what other documents might have been in the deputies' files that the sheriff's department deemed nonresponsive. As we acknowledged in *Mooc*, even if custodians of records were always ordered to bring complete personnel files for the court's review—a requirement we explicitly rejected [citation]—there would still be the opportunity for an unscrupulous custodian improperly to withhold responsive documents from the court's review. [Citation.] In every case, accepting the custodian's representations concerning what is in a personnel file will be, at bottom, a credibility determination for the trial court, regardless of whether the custodian produces what purports to be the entire file in court, produces only what purport to be the potentially responsive documents, or produces what purport to be the potentially responsive documents and specifies on the record what nonresponsive documents were omitted." (*Fuiava, supra*, 53 Cal.4th at pp. 647–648, italics added.)

Fuiava then observed, "[I]n the present case, the hearing on defendant's *Pitchess* motion predated our guidance in *Mooc* concerning what steps ought to be taken to ensure an ideal record, and as to the one document produced in this case, the trial court properly summarized it at the hearing and included a sealed copy in the record on appeal. Accordingly, we cannot conclude the trial court's acceptance of [the custodian's] sworn representation that there was only one potentially responsive document in the deputies' files, without requiring him to identify on the record any documents that he deemed nonresponsive, made the record in the present case so inadequate that reversible

statutory or constitutional error occurred." (*Fuiava*, *supra,* 53 Cal.4th at p. 648.) In a footnote, *Fuiava* added, "We need not, and do not, address whether a failure to require that a custodian of records state for the record what documents were deemed nonresponsive, occurring *after* our decision in *Mooc*, would constitute reversible error. (Cf. [*Guevara*, *supra,*] 148 Cal.App.4th [at p.] 69 . . . .)" (*Fuiava,* at p. 648, fn. 6.)

In *Sisson v. Superior Court* (2013) 216 Cal.App.4th 24 (*Sisson*), the trial court, during an in camera hearing on the defendant's *Pitchess* motion, failed to examine all documents produced by custodians. (*Sisson*, at pp. 37–39.) *Sisson* concluded the result was the trial court did not make an adequate record of the produced documents should an appellate court need to review them, and this violated *Mooc*. (*Sisson*, at p. 39.) Moreover, *Sisson* stated, "while the trial court made an effort to inquire into what types of documents the custodians opted not to produce, the effort fell short of requiring the custodians to establish on the record what documents or category of documents were included in the officers' complete personnel files and, where applicable, to explain their decisions to withhold certain documents." (*Ibid*.) *Sisson* concluded this violated *Guevara*. (*Sisson*, at p. 39.) Accordingly, *Sisson* held the trial court had to conduct a new in camera review of the personnel records at issue. (*Ibid.*; *People v. Wycoff* (2008) 164 Cal.App.4th 410, 415 (*Wycoff*) [judgment conditionally reversed and matter remanded for new *Pitchess* hearing, in part because custodian did not provide to trial court a summary of documents in personnel file but not presented to trial court].)

In the present case, during the June 8, 2015 in camera hearing, the trial court, after swearing in the records custodian,

indicated the trial court was conducting a *Pitchess/Brady* in camera hearing regarding the previously discussed three categories of relevant information pertaining to Thoreson.

However, the custodian's testimony was ambiguous. While the custodian offered that his review of Thoreson's personnel file revealed "no such allegations" and "nothing related" to the court's ruling, it is unclear whether he brought any records to the hearing for the court to review. It is similarly unclear whether there may have existed complaints against Thoreson that the custodian chose not to bring to the hearing, and if so, what his reasons were for not providing them to the court. The result is a record where meaningful appellate review is impossible.

For example, the custodian's testimony that there was "nothing related" reasonably may be viewed as too narrow a response. One definition of "related" is "connected by reason of an established or discoverable relation." (Merriam-Webster's Collegiate Dict. (10th ed. 1995) p. 987.) However, the custodian was required to produce everything in Thoreson's personnel file that was " *'potentially* relevant' " (*Mooc, supra*, 26 Cal.4th at pp. 1226, 1229, italics added), whether or not those items were, more broadly, connected by reason of an *established* relation. (This case then does not present the issue of whether a mere trial court failure to require a custodian to state for the record what documents were deemed nonresponsive is error.)

We will conditionally reverse the judgment and remand for a new *Pitchess/Brady* in camera hearing in which the proper procedure is followed. (*Guevara, supra*, 148 Cal.App.4th at p. 69.) Appellant retains the right to appeal from the judgment to challenge any adverse *Pitchess* finding following remand (*Wycoff, supra,* 164 Cal.App.4th at p. 415) (or to challenge any

other trial court action taken following remand and resulting from our resolution of appellant's other claims in this case).

2. THE COURT DID NOT ERRONEOUSLY FAIL TO DISCHARGE JUROR NO. 4.

a. Pertinent Facts.

On September 24, 2015, during voir dire of the prospective jurors, prospective Juror No. 11 indicated he was self-employed, did not get paid for jury service, and would be totally distracted as a juror. The following then occurred: "[Appellant's Counsel]: Does anyone else have the same issue you would be distracted because you want to get off? [¶] Number 13? [¶] Prospective Juror No. 13: I get very, I have anxiety attack [*sic*]. So if I have to think about other people's crime [*sic*], I will get stressed. [¶] And, you know, I work in a hospital. I seen [*sic*] so many sick people. I don't like guns. Sorry. [¶] [Appellant's Counsel]: Okay. So given your state of mind that you have just expressed, do you think it would be fair to Mr. Bejarano to have you on as a jur[or]? [¶] Prospective Juror No. 13: No, it wouldn't be. I can't concentrate right now. I'm just pale."

Appellant's counsel then inquired of prospective Juror No. 1. Prospective Juror No. 1 (1) indicated he/she felt the same way, (2) referred to personal and family-related issues, and (3) expressed concern he/she could not be fair to appellant.

The following later occurred: "[Appellant's Counsel]: . . . Does anyone else feel the same way? . . . [¶] . . . [¶] Prospective Juror No. 4: I feel the same way. I get anxiety and when the charge was read my stomach ache [*sic*]. Kind of turned my stomach. [¶] Kind of turned and I couldn't say these are things I deal with in my normal day-to-day basis and so they just seem[ ] a little uncomfortable for me. [¶] The Court: Thank you,

Juror Number 4. [¶] Prospective Juror No. 4: I don't have anxiety or anything."

At that point, the following occurred: "[Appellant's Counsel]: Well, back to what I said earlier. I said that these are sort of like a two-prong question. Do you have a bias or a prejudice or a certain feeling that you can't put aside. [¶] Is it such with you that you believe this feeling that you experience when dealing with things like murder, it is not a feeling that you can put aside. That is a feeling that might impact your ability to be fair and impartial to Mr. Bejarano? [¶] Prospective Juror No. 4: I could try. I could try to put it to the side. [¶] [Appellant's Counsel]: Well, how hard would you try? You know yourself better than I. [¶] Prospective Juror No. 4: I feel like I'm a fair person and I would be able to look at it. [¶] [Appellant's Counsel]: So what you are telling us, you would be able to put this uncomfortable feeling aside? [¶] Prospective Juror No. 4: Yes; and judge as fairly [*sic*.]"

Appellant did not challenge for cause, or exercise a peremptory challenge as to, prospective Juror No. 4. The jury and alternate jurors were later sworn.

During the morning session on Monday,[6] September 28, 2015, the court clerk, outside the presence of the jury, indicated as follows. The previous Friday (September 25, 2015), Juror No. 4 called the clerk, said Juror No. 4 had thought about it overnight, and indicated Juror No. 4 had had a change of heart and did not feel she would be fair.

The court later, outside the presence of the jury, inquired of Juror No. 4 and the following occurred. "The Court: You called

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[6] Appellant concedes September 28, 2015, was a Monday.

our clerk on Friday? [¶] Juror No. 4: Yes. [¶] The Court: All right. And we were informed at the time that you mentioned to the clerk that you weren't sure you could be fair in this case. [¶] Have you rethought that or do you still feel the same or what is the situation?"

The following later occurred: "[Juror No. 4:] On Thursday I stated I wasn't sure. An attorney asked me and I said I would try and the more I thought about it, I think it would be . . . very hard for me. [¶] The Court: Hard for anyone actually. [¶] Juror No. 4: Yeah. [¶] The Court: Hard for the other 13 jurors too. [¶] Juror No. 4: Yes."

The following then occurred: "The Court: Let me ask you this: assume you hear the whole trial. Okay? We finish the trial and you heard all the evidence. You heard arguments of the lawyers and you heard all my instructions of law. [¶] We have asked you to go back and decide this case. At that time considering the evidence and the law, . . . assume that under the evidence and the law that you reach the conclusion that the defendant is not guilty, could you vote not guilty? [¶] Juror No. 4: Yes. [¶] The Court: And assume that considering the evidence and the law and you are back deliberating and reach a conclusion the defendant is guilty. Can you vote guilty? [¶] Juror No. 4: Yes. [¶] The Court: Can you listen to the evidence with an open mind? [¶] Juror No. 4: Yes. [¶] The Court: Okay."

The court permitted appellant's counsel to inquire and the following occurred. "[Appellant's Counsel]: Earlier during the voir dire we emphasized the importance that you have an open mind during the trial. [¶] And there is something the judge, I believe the judge stated, but you must presume Mr. Bejarano to

be innocent. [¶] The Clerk [*sic*]: Right now. [¶] [Appellant's Counsel]: Right now. There is a question in your mind as to whether he really is innocent and you tried to honestly tell us that, correct? [¶] Juror No. 4: Correct. [¶] [Appellant's Counsel]: Or are you afraid we might look down on you or something like that if you admit that 'I think he is probably guilty and I'll probably find him guilty once they put the evidence on.' " The prosecutor objected to any further inquiry, arguing voir dire already had been conducted and the prosecutor understood Juror No. 4's reservations.

The following then occurred: "The Court: Let me clarify one point here that he brought. I told the jurors at the present time Mr. Bejarano is presumed to be innocent. Right now he is innocent. [¶] Juror No. 4: Yes. [¶] The Court: If you were to vote right now, how would you vote? [¶] Juror No. 4: I would have to vote innocent. . . . [¶] The Court: Right; okay. Anything else? [¶] [The Prosecutor]: No, thank you, your Honor. [¶] The Court: All right. You can return. It is fine. Juror number 4, we do appreciate your openness. [¶] Juror No. 4: I was trying to be honest. [¶] The Court: A lot of jurors feel that way when they first come in. It is the first time they have ever done anything like this. [¶] Juror No. 4: All right. Thank you." Juror No. 4 left the courtroom.

Outside the presence of the jury, the following later occurred: "[Appellant's Counsel]: Well, your Honor, I would urge that the court relieve this juror. It's clear to me and it was clear to me when we first did the voir dire that she had reservations about whether or not she could be fundamentally fair in a case of this magnitude and nature. [¶] She seems to be a rather meek person personality[-]wise and clearly was responding to leading

questions which would suggest that she would be fair when she already told us it would be hard for her to be fair. [¶] In a sense I think she is afraid to say she couldn't be fair. I would urge the court to dismiss her as a juror in this case."

The prosecutor stated, "Counsel had every opportunity to exercise a peremptory challenge and didn't do so. We have two alternates and a special [circumstance] homicide. I recommend against excusing her." The court told appellant's counsel, "Your motion, your objection to her sitting on the jury that is overruled."

b. Analysis.

Appellant claims the trial court erroneously denied his motion to discharge Juror No. 4. We disagree. "The trial court has the authority to discharge jurors for good cause, ... ([Citation]; § 1089[7].) When the trial court receives notice that such cause may exist, it has an affirmative obligation to investigate. [Citations.] Both the scope of any investigation and the ultimate decision whether to discharge a given juror are committed to the sound discretion of the trial court. [Citation.]" (*People v. Bonilla* (2007) 41 Cal.4th 313, 350.) We note "a trial judge who observes and speaks with a . . . juror and hears that person's responses (noting, among other things, the person's tone of voice, apparent level of confidence, and demeanor), gleans

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7 Section 1089, states, in relevant part, "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged . . . ."

valuable information that simply does not appear on the record." (*People v. Stewart* (2004) 33 Cal.4th 425, 451.)

People v. Beeler (1995) 9 Cal.4th 953 (*Beeler*), is illuminating. *Beeler* was a death penalty case in which the defendant committed first degree murder with a burglary special circumstance, and burglary with firearm use. (*Id.* at p. 965.) Shortly before the trial's guilt phase began, Juror McCoskey telephoned the court clerk to say she was not sure she could fulfill her duties as a juror, and the nature of the case was very upsetting. The clerk noted McCoskey had broken down and was crying on the phone. (*Id.* at p. 972.) The court asked the parties to stipulate to McCoskey's excusal, the defendant agreed to stipulate, but the prosecutor refused. (*Ibid.*)

Beeler observed, "The court then questioned McCoskey about her ability to serve as a juror. She had an apparent change of heart, apologized for her emotional phone call, and stated that she believed herself to be able to serve. The court refused to seat an alternate juror." (*Beeler*, *supra,* 9 Cal.4th at p. 973.)

During the questioning, McCoskey indicated she thought she was kind of in a state of shock but she was all right, she thought she could be fair, and the gravity of responsibility as a juror had caused her concern but she was now okay. McCoskey also indicated that after she heard the evidence, she would have no problem voting guilty or not guilty depending on which one she believed was the case; she would be able to reach a just verdict at the penalty phase; she could be fair (*Beeler, supra,* 9 Cal.4th at pp. 973–974); and she felt she could do "the job" (*id.* at pp. 974–975).

The defendant in *Beeler* contended the trial court's refusal to dismiss McCoskey violated the defendant's federal

constitutional rights to due process, an impartial jury, and a reliable penalty determination. *Beeler* rejected the contention. (*Beeler*, *supra,* 9 Cal.4th at p. 975.) *Beeler* observed, "The record reflects no demonstrable reality that McCoskey was unable to serve as a juror." (*Id.* at p. 975.) *Beeler* also said, "[s]ubstantial evidence supports the trial court's determination that McCoskey could fulfill her duty. In response to careful questioning by the court, she made clear her belief that she could be impartial and able to serve despite her prior misgivings. In that circumstance, the trial court was within its discretion not to remove her from the jury. (*People v. Goldberg* (1984) 161 Cal.App.3d 170, 192 . . . [no good cause to discharge juror who ultimately recanted her initially claimed inability to judge impartially]; *People v. Franklin* (1976) 56 Cal.App.3d 18, 25–26 . . . [same].)" (*Beeler*, at p. 975.)

In light of the above authorities, we conclude the record reflects no demonstrable reality Juror No. 4 was unable to serve as a juror, and there was substantial evidence supporting the trial court's determination she could fulfill her duty. The trial court did not abuse its discretion or violate appellant's constitutional rights when investigating or denying appellant's motion to discharge Juror No. 4. None of the cases cited by appellant, or his arguments, compel a contrary conclusion.[8]

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[8] This includes *People v. Burgener* (1986) 41 Cal.3d 505 (*Burgener*) and *People v. McNeal* (1979) 90 Cal.App.3d 830 (*McNeal*). *Burgener* discussed *McNeal*. (*Burgener*, at pp. 518–519.) *McNeal* was a case involving, inter alia, a trial court's failure to conduct the hearing required by section *1120* when a court is put on notice a juror has personal knowledge of a fact in controversy. (*McNeal*, at pp. 836–837.) In fact, *McNeal* indicated the section 1120 hearing appeared to be a more formal inquiry

3. THE COURT DID NOT ERRONEOUSLY DENY *MARSDEN* MOTIONS.

a. The October 1, 2015 "*Marsden*" Motion.

On October 1, 2015, after appellant's court-appointed counsel, Attorney Vincent Oliver, gave his closing argument to the jury, Oliver told the court he had spoken to appellant and appellant wanted to make a "*Marsden* motion." After the

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than that required by section 1089. (*McNeal*, at p. 837.) In the present case, the court conducted "an inquiry sufficient to determine the facts" (*Burgener*, at p. 519) concerning whether good cause existed to discharge Juror No. 4.

In a letter to this court, appellant cites *People v. Romero* (2017) 14 Cal.App.5th 774 (*Romero*), but, in that case, the defendant was charged with sexually assaulting two women (*id.* at p. 776) and the "trial court allowed a juror to remain on the panel after learning the juror was personally acquainted with [victim 1] herself to the depth and degree made manifest by the existence of a teacher-student relationship from which, even three years later, the teacher continued to have positive memories and impressions." (*Id.* at pp. 781–782.) *Romero* stated, "Critically, it does not appear that the court looked beyond [the juror's] statement that she did not 'think' her favorable teacher-student relationship with [victim 1] would affect how she perceived the evidence and participated in deliberations." (*Id.* at p. 782.) *Romero* also observed, "[The juror's] favorable impression of her former student was especially critical given that the counts involving [victim 1] relied on [victim 1's] credibility and ability to recall the details of the crime. Although [victim 2's] assault yielded DNA evidence that Romero could not reasonably contest, [victim 1's] case was not so supported, relying exclusively on witness identification rather than forensics." (*Id.* at p. 783.) Appellant's reliance on *McNeal, Burgener,* and *Romero* is misplaced.

prosecutor left the courtroom, appellant thanked the court for allowing him to make "this motion."

Appellant then indicated as follows. A defense expert tested two plastic zip ties that were seized from appellant's garage during the execution of search warrants. The district attorney said the zip ties were recovered from appellant's garage, but appellant always claimed they had been "planted." Appellant wanted to present evidence the test results were negative for appellant's DNA, "but [were] someone else's DNA." If there was an appeal, this evidence "could very well point to the presumption of innocence." The expert sent the "tests" to appellant's counsel "maybe two months ago, a month ago," appellant and Oliver "knew about it," and appellant wanted to present this "maybe exculpatory evidence."

The following then occurred: "The Court: Okay. [¶] Well, this isn't a *Marsden* motion. He just wants to put some evidence. Right? [¶] The Defendant: I just want to – [¶] The Court: All right. [¶] So that – are you finished?" Appellant said, "if we could do that with this jury, we want to save time . . . because I just want to tell this jury that those tests came back negative." Appellant stated, "I mean . . . I know it's something that just came up to mind but something tells me in my heart that to do it. If this jury was to find out those zip ties don't have my DNA, maybe it could bring in their mind the presumption of innocence." The court stated, "Okay. [¶] All right. Then that will be denied." On October 2, 2015, the jury reached its verdicts.

Appellant claims the trial court erroneously concluded he was not making a *Marsden* motion. We reject the claim. " 'When a defendant seeks new counsel on the basis that his appointed counsel is providing inadequate representation—i.e., makes what

is commonly called a *Marsden* motion [citation]—the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of inadequate performance. A defendant is entitled to relief if the record clearly shows that the appointed counsel is not providing adequate representation or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result. Substitution of counsel lies within the court's discretion. The court does not abuse its discretion in denying the motion unless the defendant has shown that a failure to replace counsel would substantially impair the defendant's right to assistance of counsel. [Citation.]' (*People v. Smith* (2003) 30 Cal.4th 581, 604 . . . [*Smith*].)

"But the duty to conduct an inquiry arises only when the defendant ' "asserts directly or by implication that his counsel's performance has been so inadequate as to deny him his constitutional right to effective counsel." ' " (*People v. Carter* (2010) 182 Cal.App.4th 522, 527–528 (*Carter*).) "Requests under . . . *Marsden* . . . must be clear and unequivocal." (*People v. Rivers* (1993) 20 Cal.App.4th 1040, 1051, fn. 7.) In order to make a *Marsden* motion, there must be a "*clear* indication by defendant that he wants a substitute attorney." (*People v. Lucky* (1988) 45 Cal.3d 259, 281, fn. 8, italics added.)

In *Carter*, the court said, "although defendant used the term '*Marsden* hearing' . . . , upon further inquiry defendant clarified that what he was actually seeking was self-representation—not new counsel. Under these circumstances, the trial court was not required to hold a *Marsden* hearing." (*Carter*, *supra,* 182 Cal.App.4th at p. 528; cf. *People v. O'Malley* 62 Cal.4th 944, 1006 ["the trial court did not erroneously deny a

request to discharge counsel because there was no request to be ruled on."].)

In the present case, although appellant used the phrase "*Marsden* motion," upon further inquiry he clarified he "just want[ed] to tell this jury that those [DNA] tests came back negative" as to appellant and the results pointed to "someone else's DNA." During appellant's explanation, he never mentioned his trial counsel. In particular, appellant never stated his trial counsel had rendered ineffective assistance, and never stated appellant wanted substitution of counsel. Appellant never stated whether appellant had discussed the DNA issue with his counsel, and never stated whether appellant's counsel intended on his own to seek to reopen to introduce the DNA evidence. Appellant indicated the issue "just came up to mind." Appellant did not make a clear and unequivocal request under *Marsden*. We agree with the trial court appellant did not in fact make a *Marsden* motion. (Cf. *Carter*, *supra,* 182 Cal.App.4th at pp. 527–528.)

Even if appellant made a *Marsden* motion, he made it during trial, indeed, after his counsel's closing argument. To grant the motion would have required either significant delay or a mistrial. The court's inquiry into appellant's concern was adequate. Moreover, appellant failed to demonstrate a conflict between himself and his counsel that was so great that it resulted in a total lack of communication preventing an adequate defense.

The trial court did not err or abuse its discretion by denying any *Marsden* motion, because appellant did not show a failure to replace counsel would have substantially impaired appellant's right to assistance of counsel.

b. The December 11, 2015 *Marsden* Motion.

On December 11, 2015, the court called the case and Attorney Marc Gibbons indicated he was standing in for Oliver. Appellant said he wanted to bring a *Marsden* motion pertaining to Oliver. The court stated, "Okay. [¶] Well, we can't do that unless he's here. Presently he's unavailable because he is in trial in another courtroom." Gibbons indicated Oliver would be available on January 12, 2016.

The court later indicated Oliver was involved in a serious case, "so he can't be here. And you have to bring the motion when he's here." Appellant replied, "I agree, your Honor. Thank you." The court then asked, "So do you agree that we should put this over to January 12th?" Appellant replied yes. The court continued the matter to January 12, 2016.

Appellant claims the trial court's "refusal to begin to hear" the *Marsden* motion was error. Appellant, citing case law, argues (1) a trial court must allow a defendant to speak in support of a *Marsden* motion, but (2) a trial court has discretion to order defense counsel to speak at such a motion. Appellant suggests the court was therefore required to permit appellant to speak on December 11, 2015.

However, appellant agreed with the trial court that appellant had to bring his *Marsden* motion when Oliver was present. The court, with appellant's consent, then continued the case to January 12, 2016. On January 12, 2016, appellant had an opportunity to make his *Marsden* motion but failed to do so. Having failed to take advantage of the opportunity to make his motion on January 12, 2016, appellant forfeited by abandonment his *Marsden* motion. (Cf. *People v. Vera* (2004) 122 Cal.App.4th 970, 980–982; see *People v. Saunders* (1993) 5 Cal.4th 580, 590

[" ' "No procedural principle is more familiar to this Court than that a constitutional right," or a right of any other sort, "may be forfeited in criminal . . . cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." ' "].)

Moreover, the trial court did not state on December 11, 2015, that case law required Oliver's presence during the motion or that, as a matter of law, appellant could not bring a *Marsden* motion absent Oliver. We do not understand appellant to have had case law in mind when he agreed with the court that Oliver's presence was required. The trial court and appellant, reasonably understood, were indicating Oliver's presence was required, not because it was mandated by law, but simply to facilitate efficient, contemporaneous consideration of appellant's complaint(s) and any responses of Oliver. No error or abuse of discretion occurred, including when the court then continued the matter to a date agreeable to appellant.

c. The January 12, 2016 "*Marsden*" Motion.

On January 12, 2016, appellant moved to represent himself and completed a *Faretta*[9] waiver form. Oliver asked if he should remain as standby counsel but appellant objected and the court did not appoint Oliver as standby counsel. The court relieved Oliver as counsel.

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[9] (*Faretta v. California* (1975) 422 U.S. 806 [45 L.Ed.2d 562].)

The following later occurred: "The Defendant: Excuse me, your Honor. Before Mr. Oliver leaves, I'm asking a *Marsden* hearing for the record, please. [¶] . . . [¶] . . . The Defendant: I'm requesting a *Marsden*. [¶] The Court: You're representing yourself. I'm relieving him. That's what you want. . . . [¶] The Defendant: Okay, your Honor. Then I'm going to have to say what I have to say in open court. I would like Mr. Oliver to give me an explanation why he suppressed evidence in my case, your Honor. [¶] The Court: He doesn't have [to] do that. You're relieving him. There's nothing [that] says he has to tell you anything right now."

Appellant claims that on January 12, 2016, he made a "pro per 'Marsden motion,' " and the trial court erroneously stated, "Mr. Oliver did not have to answer, as he had been relieved." We reject the claim. A defendant makes what is commonly called a *Marsden* motion when the defendant seeks new counsel on the basis the defendant's appointed counsel is providing inadequate representation. (*Smith*, *supra,* 30 Cal.4th at p. 604.) Appellant concedes "[a] Marsden motion is a request for an order relieving appointed defense counsel, and appointing new defense counsel."

At the time appellant asked for a "*Marsden* hearing," appellant was not requesting an order relieving Oliver as appointed defense counsel. Oliver already had been relieved as counsel at appellant's request. It follows that at the time of appellant's request, Oliver was not providing inadequate representation; he was providing no representation. Moreover, at the time appellant asked for a "*Marsden* hearing," appellant was not requesting the appointment of new defense counsel; appellant wanted to represent himself.

The fact appellant, after he was representing himself, would have "like[d]" Oliver to respond to appellant's vague complaint about Oliver's alleged suppression of unspecified evidence at an unspecified time did not transmute appellant's request into a *Marsden* motion. Appellant's January 12, 2016 request for a "*Marsden* hearing" was not a *Marsden* motion and the court did not err or abuse its discretion by telling appellant that Oliver did not have to tell appellant anything. None of the cases cited by appellant, or his arguments, as to the October 1, 2015, December 11, 2015, or January 12, 2016, alleged *Marsden* motions compel the conclusion the trial court erred or abused its discretion.[10]

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[10] Appellant asserts he made a motion for a new trial that raised several issues and he asserts the trial court denied the motion. Respondent says respondent omitted a description of the motion because it "does not form the basis for any of the arguments on appeal." Appellant does not contend the alleged issues in the new trial motion were raised during the earlier alleged *Marsden* motions or that any denial of the new trial motion was independent error. To the contrary, appellant asserts the new trial motion was prepared by appellant, in propria persona, and it was "fatally defective." There is no need to address any such new trial motion or its issues.

Moreover, on November 5, 2015, Attorney Anthony Garcia stood in for Oliver and asked for a continuance. Appellant agreed Garcia could stand in for Oliver and, with appellant's consent, the court continued the case to December 11, 2015. Appellant, later on November 5, 2015, indicated he had an "affidavit . . . not a motion." Appellant also said, "it is an issue of ineffective assistance of counsel, your Honor. I would like to exercise my *Faretta* rights then, your Honor." The court indicated it would handle the matter on December 11, 2015, and suggested

4. APPELLANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS TO COUNTS 3 AND 8.

After the People rested, appellant made a section 1118.1 motion for judgment of acquittal as to count 1 only. The court denied it. Appellant claims he was denied effective assistance of counsel by his trial counsel's failure to include in the motion counts 3 and 8 as well, on the grounds there was insufficient evidence as to each of those counts that the gun was loaded. We reject the claim.

" 'A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components.' [Citations.] 'First, the defendant must show that counsel's performance was deficient.' [Citations.] Specifically, he must establish that 'counsel's representation fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citations.]" (*People v. Ledesma* (1987) 43 Cal.3d 171, 216.) "In addition to showing that counsel's performance was deficient, a criminal defendant must also establish prejudice before he can obtain relief on an ineffective-assistance claim." (*Id.* at p. 217.) Moreover, on appeal, if the record sheds no light on why counsel acted or failed to act in the manner challenged, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, an ineffective assistance contention

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appellant have Oliver review the affidavit before it was filed. Appellant does not contend any error occurred on November 5, 2015. Appellant asserts his new trial motion referred to the above affidavit, but there is no need to further discuss it as appellant does not contend any denial of the new trial motion was error and we have rejected his *Marsden* claims.

must be rejected. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1219.)

"In ruling on a motion for judgment of acquittal pursuant to section 1118.1, a trial court applies the same standard an appellate court applies in reviewing the sufficiency of the evidence to support a conviction, that is, ' "whether from the evidence, including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged." [Citations.]' [Citation.] 'Where the section 1118.1 motion is made at the close of the prosecution's case-in-chief, the sufficiency of the evidence is tested as it stood at that point.' " (*People v. Cole* (2004) 33 Cal.4th 1158, 1212–1213.)

The court, using CALJIC No. 9.02, instructed the jury that to prove assault with a firearm, the People had to prove "1. A person was assaulted; and [¶] 2. The assault was committed with a firearm." There is no dispute this was a correct statement of the law.

"A long line of California decisions holds that an assault is not committed by a person's merely pointing an (unloaded) gun in a threatening manner at another person." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11, fn. 3 (*Rodriguez*).) On the other hand, "California courts have often held that a defendant's statements and behavior while making an armed threat against a victim may warrant a jury's finding the weapon was loaded. For example, in *People v. Montgomery* (1911) 15 Cal.App. 315 (*Montgomery*), the Court of Appeal, in the absence of direct evidence the gun used in the offense was loaded, and despite the defendant's own testimony it was not, held the jury was entitled, under the circumstances of the case, to reject contrary testimony and find

the gun was loaded. (*Id.* at pp. 317-319.) The court noted the defendant was enraged when he left a fight and that he returned with a gun he leveled at the victim, declaring, 'I have got you now.' (*Id.* at p. 318.) These words, the court reasoned, would be meaningless unless the weapon were loaded. (*Ibid.*)

"Similarly, in *People v. Mearse* (1949) 93 Cal.App.2d 834, 836–838 . . . (*Mearse*), the Court of Appeal, in rejecting a sufficiency of evidence challenge to an assault conviction, concluded the defendant's command to the victim to halt or 'I'll shoot' indicated the gun was then loaded. 'The acts and language used by an accused person while carrying a gun may constitute an admission by conduct that the gun is loaded.' (*Id.* at p. 837; cf. *People v. Hall* (1927) 87 Cal.App.634, 636 . . . (*Hall*) [robbery prosecution: 'The defendant's acts and the language used by him in the commission of the robbery constituted an admission by conduct, an implied assertion that the gun was loaded'].)" (*Rodriguez*, *supra,* 20 Cal.4th at p. 13.) *Rodriguez* concluded a "basic principle that we glean from the cases" is: "[a] defendant's own words and conduct in the course of an offense may support a rational fact finder's determination that he used a loaded weapon." (*Ibid.*)

As to count 3, there was substantial evidence as follows. Appellant displayed a gun, robbed, assaulted, and, by violence, falsely imprisoned Flores. Appellant pointed a gun at Flores and commanded him not to move. Appellant concedes there was evidence as to count 3 that a "gun" was pointed at Flores. Flores never testified appellant said at any time the gun was unloaded, or if Flores disobeyed any of appellant's commands, tried to free himself, or tried to remove the duct tape so he could see appellant

better or shout for help, appellant would merely hit him with the gun and not shoot him.

Similarly, as to count 8, there was substantial evidence as follows. Appellant displayed a gun, committed first degree residential burglary with Dannya present, and attempted to dissuade Dannya from being a witness. Appellant pointed a gun at Dannya and commanded her not to call the police. Appellant concedes there was evidence as to count 8 that a "gun" was pointed at Dannya. Dannya was afraid appellant would shoot her. Dannya never testified appellant said at any time the gun was unloaded, or if Dannya disobeyed appellant's command, appellant would merely hit her with the gun and not shoot her.

On this record, we cannot say there simply could be no satisfactory explanation for the failure of appellant's trial counsel to make the urged section 1118.1 motions as to counts 3 and 8. Indeed, there is a satisfactory explanation: counsel reasonably could have believed, based on the evidence, that there was sufficient evidence to convince a rational trier of fact, beyond a reasonable doubt, that (1) appellant's words spoken to Flores and Dannya, respectively, were meaningless unless the gun appellant pointed at each of them was loaded, and (2) appellant's own words and conduct during the course of the offenses against Flores and Dannya, respectively, demonstrated the gun appellant pointed at each of them was loaded. That is, appellant's trial counsel reasonably could have believed the urged section 1118.1 motions as to counts 3 and 8 would have been futile as without merit. None of the cases cited by appellant, or his arguments, compel a contrary conclusion.

5. THE COURT ERRONEOUSLY IMPOSED SENTENCES BASED ON APPELLANT'S 1990 TEXAS CONVICTIONS.

a. Pertinent Facts.

(1) *The Amended Information And Arraignment.*

The amended information filed on October 31, 2014, alleged as to all counts that appellant suffered six strikes, i.e., five October 5, 1990 "BURGLARY" convictions in El Paso County, Texas (case Nos. 54538, 57584, 58947, 58948, 58949) and a 1994 California conviction for first degree burglary (case No. VA024450). The amended information also alleged as to all counts, based on those same prior convictions, that appellant suffered six prior serious felony convictions for purposes of section 667, subdivision (a)(1). On October 31, 2014, appellant was arraigned, pled not guilty, and denied the above allegations.

(2) *People's Evidence and Appellant's Section 1118.1 Motion.*

On September 29, 2015, the People presented their case-in-chief as to the present offenses and rested. Appellant made a section 1118.1 motion as to count 1 and the court denied it.

(3) *Defense Evidence And Related Proceedings.*

Appellant was subsequently sworn as a witness. However, during a later sidebar conference, the court, noting there had been no motion to bifurcate the prior convictions trial, asked the prosecutor if he was proving the prior convictions. The prosecutor replied, "I have them." The court asked, "Don't we have to do it now?" The prosecutor replied, "It is no longer proof. Just for impeachment. Just impeach him with the priors."

The court observed the information alleged prior convictions and asked the prosecutor, "You aren't going to prove

them up?" The prosecutor replied, "I'm going to confront him with all of them." The court replied, "Isn't it time for you to do that in the People's case?" The prosecutor apologized and said he "did not put them on because we always bifurcate." The court stated no one had moved to bifurcate. The prosecutor replied, "I'll confront him with impeachment then." The court later asked, "You are going to prove it up in their case?" The prosecutor replied yes.

On September 29, 2015, appellant testified during direct examination concerning the alleged present offenses, Texas burglary convictions, and a later California burglary conviction for which the Texas burglary convictions served as enhancements. As to the Texas burglary convictions and California burglary conviction, appellant testified, inter alia, as follows. Appellant was arrested, convicted, and sent to prison in El Paso, Texas for "burglary," "a felony." Regarding that case, appellant "went on a spree of burglaries within a month," he was given a "package deal," and he was sentenced "separately on each count." In 1994, he was sentenced to prison in California for burglary.

During cross-examination, the following occurred without objection: "Q. You . . . went to the State of Texas where you mentioned you had five separate residential burglary convictions in 1990; is that correct? [¶] A. Yes. [¶] Q. You don't know the case numbers. Those all occurred in 1990? [¶] A. Yes." (We refer to these below as the Texas convictions.) Later during cross-examination, appellant testified without objection that he was "convicted of residential burglaries five separate times," they were "consolidated in . . . five package deals," and "California broke them all apart and sentenced me to 25 years enhancements

and they gave me two years for the [California] burglary." On September 30, 2015, additional defense witnesses testified and the defense rested.

(4) *Rebuttal Evidence And Additional Proceedings.*

On September 30, 2015, the People presented rebuttal evidence, including the testimony of Huntington Park Police Detective Michael Navia. Navia testified without objection that appellant admitted having gone on a spree of burglaries in Texas that resulted in a prison sentence there. Appellant said the business burglaries he would commit were usually at night and the residential burglaries were during the day. The People later rested. The court granted appellant's request to reopen, appellant presented testimony from an additional witness, then appellant rested.

(5) *Additional People's Evidence: People's Exhibit No. 33.*

Later on September 30, 2015, the People impliedly asked to reopen, the court granted the request, and the People presented testimony from a paralegal from the Los Angeles County District Attorney's Office pertaining to People's exhibit No. 33, a certified section 969b prison packet concerning appellant. The exhibit was admitted into evidence.

The exhibit includes, in pertinent part, two documents. The first document is an abstract of judgment in appellant's case No. VA024450 [a California burglary], and the abstract reflects as follows.[11] In 1993, appellant committed, and was convicted by

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11 The abstract lists Arturo Jose Bejarano as the defendant and there is no dispute that is appellant.

jury of, residential burglary (§ 459). In June 1994, the court sentenced him to prison for two years for that offense. The abstract elsewhere, under the heading "[e]nhancements charged and found true for prior convictions" (emphasis, and capitalization, omitted), lists "667(a)" as an "[e]nhancement" and "25 [years]" as the "time imposed" for the enhancement.

The second document is a "Department of Corrections" (some capitalization omitted) fingerprint card, dated June 22, 1994, for case No. VA024450, that refers to two years for first degree residential burglary "[with] 667(a) 25 YRS (CS)." After the court admitted People's exhibit No. 33 into evidence, the parties rested.

(6) ***The Modified CALJIC No. 17.25 Instruction.***

On October 1, 2015, the parties, outside the presence of the jury, agreed upon the proposed jury instructions. On that date, during the charge to the jury, the court gave a modified CALJIC No. 17.25 instruction. It stated, inter alia, "It is alleged that before the commission of the crimes charged in the information, the defendant was convicted of certain felonies namely residential burglary a violation of California Penal Code § 459, as well as five (5) residential[12] burglaries committed in the State of Texas[.] [¶] The defendant has denied the truth of the allegation."

The instruction later stated, "If you find the defendant guilty of one or more of the crimes charged in the information, you must determine whether the allegations of the prior

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12 Neither the information, nor the amended information that superseded the information (*People v. Scott* (2013) 221 Cal.App.4th 525, 532–533), alleged the Texas burglaries were residential.

convictions[ ] are true. [¶] The People have the burden of proving the truth of the allegations. If you have a reasonable doubt that they are true, you must find them to be not true. [¶] I find that the defendant is the person whose name appears on the documents admitted to establish the convictions. [¶] Include a special finding on that question in your verdict, using a form that will be supplied for that purpose."

(7) *Jury Argument And Verdicts.*

Later on October 1, 2015, the parties presented jury argument as to the present offenses. The People argued appellant's prior convictions impeached his testimony, but the People presented no argument as to whether they had proven the prior conviction allegations. Appellant's later jury argument did not refer to the prior convictions. On October 1, 2015, the court ordered the jury to retire to deliberate. On October 2, 2015, the jury announced its verdicts as to the substantive offenses.

(8) *Prior Conviction Verdict Forms, The Jury's Note, And Proposed Responses.*

On October 2, 2015, the court later told the jury, "there's additional decisions you have to make now that we neglected to give you the verdict forms on, so we will get them to you in a second. [¶] So if you'd all kindly return back to the jury room." The reporter's transcript later reflects, "jury commenced further deliberations." A verdict form was given to the jury.

The verdict form given to the jury stated, "We, the Jury in the above-entitled action, find the allegation [appellant] was convicted of a felony in cases VA024450, 58949, 58948, 58947[,] 54538, 57584 within the meaning of Penal Code Sections 667(a)(1); 1192.7 . . . as charged in the Information to be: ____." The form also stated, "We, the Jury in the above-entitled action,

find the allegation [appellant] was convicted of a serious or violent felony in cases VA024450, 58949, 58948, 58947, 54538, 57587 [*sic*] within the meaning of Penal Code Sections 1170.12(a)-(d) and 667(b)-(i) as charged in the Information to be: ____." The jury was to insert "True" or "Not True" above the blank lines, depending upon the jury's finding.

The jury later sent to the court a note stating, "Can you please identify for us cases 58949, 58948, 58947, 54538, 57584, 57587[.] [¶] Please also explain what we're deliberating on."

Outside the presence of the jury, the court suggested it give CALJIC No. 17.26, "[which tells] them they have to find the truth of the priors." The court observed, "[t]he priors are bifurcated in this case but in essence this is what we are doing; right?" (*Sic*.) The prosecutor agreed. The court also observed, "They still don't know how to connect these case numbers to the 969 packet." The prosecutor indicated he was uncertain "if the verdict form indicated that those refer to the Texas cases that he admitted to on the stand." The court proposed to tell the jury "those numbers refer to the Texas residential burglaries" and proposed to give CALJIC No. 17.26 to the jury. The parties agreed with the proposal.

(9) *Additional Instructions And Jury Findings.*

In response to the jury's note, the court told the jury, "[t]he numbers refer to the Texas prior burglary convictions." The court also gave a modified CALJIC No. 17.26. It stated, "It's also alleged in the Information that the defendant previously has been convicted of certain felonies. You must now determine the truth of these allegations. . . You must consider each of the alleged prior convictions separately. [¶] The People have the burden of proving the truth of these allegations. If you have a

reasonable doubt as to whether any such alleged prior convictions are true, you must find the allegations to be not true. [¶] You are instructed that the defendant is the person whose name appears on the documents admitted to establish any convictions. [¶] Include a special finding on that question using a form that will be supplied to you." The court told the jury to commence deliberations again. On October 2, 2015, the jury entered a "True" finding on each of the previously mentioned verdict forms.

Appellant's sentence was based in part on the fact he suffered prior convictions for serious felonies. In particular, on April 18, 2016, the court sentenced appellant to an unstayed prison term as follows: count 1 – life without the possibility of parole for the offense, plus 2 five-year section 667, subdivision (a)(1) enhancements, and on each of counts 2 and 6 – 25 years to life pursuant to the Three Strikes law for each offense, plus 2 five-year section 667, subdivision (a)(1) enhancements, plus a 10-year enhancement for firearm use. The court also imposed on count 7 a six-month county jail term, to be served in any penal institution. Pursuant to section 654, the court stayed the sentences on the remaining counts.

b. *Analysis.*

Appellant claims there is insufficient evidence the Texas convictions were for serious or violent felonies, therefore they were not strikes; there is insufficient evidence the Texas convictions were serious felonies, therefore they were not qualifying prior convictions for purposes of section 667, subdivision (a)(1); and the jury's findings concerning the Texas convictions were erroneous. He also claims he received ineffective assistance of counsel by his trial counsel's failure to object to evidence presented on these issues. He also observes

case law indicates he was entitled to a jury trial on the issue of the nature of the conduct underlying the Texas convictions.

As discussed below, we conclude the trial court was not entitled to rely on the Texas convictions when imposing the Three Strikes sentence and section 667, subdivision (a)(1) enhancements, because appellant was denied his Sixth Amendment right to a jury trial on an element of those sentencing provisions and he was denied effective assistance of counsel during the presentation of evidence of those convictions.

(1) *Applicable Law.*

(a) Background.

In this case, the prior conviction allegations based on the Texas convictions initially raised three issues: (1) did someone suffer the alleged prior convictions (*People v. Gallardo* (2017) 4 Cal.5th 120, 125 (*Gallardo*); § 1025, subd. (b)), (2) was appellant that person (*Gallardo*, at p. 125; § 1025, subd. (c)), and (3) was each Texas conviction for an offense that included all of the elements of a "serious felony" or a "violent felony" within the meaning of the Three Strikes law (§§ 667, subd. (d)(2), 667.5, subd. (c), 1192.7, subd. (c)), and was each Texas conviction for an offense including all of the elements of a "serious felony" within the meaning of section 667, subdivision (a)(1) (the five-year enhancement; §§ 667, subd. (a)(1), 1192.7, subd. (c)). Moreover, our later discussion related to the third above enumerated issue will be dispositive, therefore, there is no need to address further the first and second issues.

"A conviction in another jurisdiction qualifies as a strike if it contains all of the elements required for a crime to be deemed a serious or violent felony in this state." (*People v. Rodriguez* (2004) 122 Cal.App.4th 121, 128 (*People v. Rodriguez*).)

Similarly, section 667, subdivision (a)(1), applies to, inter alia, "any person convicted of a serious felony who previously has been convicted . . . of any offense committed in another jurisdiction which includes all of the elements of any serious felony."

There is no dispute appellant's Three Strikes sentence was unlawful if none of the Texas convictions contained all elements of (1) the serious felony of "any burglary of the first degree" within the meaning of section 1192.7, subdivision (c)(18), and/or (2) the violent felony of "*[a]ny burglary of the first degree*, wherein, . . . another person . . . was present" (italics added) within the meaning of section 667.5, subdivision (c)(21).[13]

Similarly, there is no dispute imposition of multiple section 667, subdivision (a)(1) enhancements was unlawful if none of the Texas convictions was for an offense including all elements of the serious felony of "any burglary of the first degree" within the meaning of section 1192.7, subdivision (c)(18). The common denominator of these provisions is the commission of a California first degree burglary. That is, appellant's Three Strikes sentence and imposition of the section 667, subdivision (a)(1) enhancements were unlawful if none of the Texas convictions contained all elements of California first degree burglary, which is also a serious felony.

(b) Right to a jury trial.

Gallardo observed, "In [*People v. McGee* (2006) 38 Cal.4th 682 (*McGee*)], we held that the Sixth Amendment permits *courts*

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[13] More fully, section 667.5, subdivision (c)(21) defines "violent felony" as including "[a]ny burglary of the first degree, as defined in subdivision (a) of Section 460, wherein it is charged and proved that another person, other than an accomplice, was present in the residence during the commission of the burglary."

to review the record of a defendant's prior conviction to determine *whether the crime qualifies as a serious felony* for purposes of the sentencing laws." (*Gallardo*, *supra,* 4 Cal.5th at p. 124, italics added.) *Gallardo* also observed, "*McGee* had clearly established that defendant had no right to a jury determination of whether her prior conviction qualified as a serious felony for purposes of the sentencing laws." (*Gallardo,* at p. 127.)

Serious felony determinations can involve three different types of judicial findings. One is a judicial finding on a *legal* issue. *McGee* made clear that the serious felony "inquiry is a 'limited one' that 'focus[es] on the elements of the offense of which the defendant was convicted." (*Gallardo*, *supra,* 4 Cal.5th at p. 124.) For example, *McGee* permits a court to make a finding that elements of one offense satisfy all the elements of an offense that is a "serious felony." (See *McGee*, *supra,* 38 Cal.4th 682, 694 [" '[s]ection 1192.7, subdivision (c), lists some felonies that are per se serious felonies, such as murder, mayhem, rape, arson, robbery, kidnapping, and carjacking. If a defendant's prior conviction falls into this group, and the elements of the offense have not changed since the time of that conviction, then the question whether that conviction qualifies as a serious felony is entirely legal.' "].)

Second, *Gallardo* discussed permissible judicial *fact*finding when a trial court determines whether a prior conviction was for a serious felony. (*Gallardo, supra,* 4 Cal.5th at p. 124.) *Gallardo* explained, "a sentencing court is permitted to identify those *facts* that were *already* necessarily *found* by a prior jury in rendering a guilty verdict [in the prior conviction case] or *admitted* by the defendant *in entering* a guilty plea [in the prior conviction case]." (*Ibid.*, italics added.) The sentencing court's identification of

those facts does not violate a defendant's Sixth Amendment right to a jury trial. (*Ibid.*)

However, *Gallardo* also discussed impermissible judicial *fact*finding. (*Gallardo*, *supra,* 4 Cal.5th at p. 125.) *Gallardo*, relying on *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [147 L.Ed.2d 435] (*Apprendi*), stated, "[W]hen the criminal law imposes added punishment based on findings about the *facts underlying* a defendant's prior conviction, '[t]he Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt.' " (*Gallardo*, at p. 124, italics added.)

Gallardo also stated, "we now hold that a court considering whether to impose an increased sentence based on a prior qualifying conviction may not determine the '*nature or basis'* of the prior conviction based on its independent conclusions about what *facts or conduct* 'realistically' supported the conviction. (*McGee*, *supra,* 38 Cal.4th at p. 706.) That inquiry invades the *jury's* province by permitting the court to make disputed findings about 'what a *trial* showed, or a plea *proceeding* revealed, about the defendant's underlying *conduct*.' [Citation.] The court's role is, rather, *limited* to identifying those *facts* that were established by virtue of the *conviction* itself—that is, facts the *jury was necessarily required to find to render a guilty verdict*, or that the defendant *admitted as the factual basis for a guilty plea*." (*Gallardo, supra*, 4 Cal.5th at p. 136, italics added.)

In *Gallardo*, the defendant's prior conviction was a guilty plea to "assault with a deadly weapon or with force likely to produce great bodily injury" within the meaning of former section 245, subdivision (a)(1). (*Gallardo*, *supra,* 4 Cal.5th at pp. 123, 136.) The issue was whether that conviction qualified as

the serious felony of "assault with a deadly weapon" within the meaning of section 1192.7, subdivision (c)(31), thus satisfying the Three Strikes law and section 667, subdivision (a)(1). (*Gallardo*, at pp. 123, 125.) A conviction for assault "with a deadly weapon" would have qualified, but a conviction for assault with force likely to produce great bodily injury would not have qualified. (*Ibid.*)

Gallardo observed, "Here, the trial court engaged in a form of factfinding that strayed beyond the bounds of the Sixth Amendment. . . . Defendant did not specify that she used a deadly weapon when entering her guilty plea. The trial court's sole basis for concluding that defendant used a deadly weapon was a transcript from a preliminary hearing at which the victim testified that defendant had used a knife during their altercation. Nothing in the record shows that defendant adopted the preliminary hearing testimony as supplying the factual basis for her guilty plea." (*Gallardo*, *supra,* 4 Cal.5th at p. 136.) "Because the relevant facts were neither found by a jury nor admitted by defendant when entering her guilty plea, they could not serve as the basis for defendant's increased sentence here." (*Id.* at p. 137.)

(c) California First Degree Burglary Law.

At the time of the present offenses, first degree burglary in California was a "serious felony" within the meaning of section 1192.7, subdivision (c)(18). Section 460, states, in relevant part, "(a) Every burglary of an *inhabited dwelling house*, vessel, . . . which is *inhabited* and designed for habitation, floating home, . . . or trailer coach, . . . or the *inhabited* portion of any other building, is burglary of the first degree. [¶] (b) All other kinds of burglary are of the second degree." (Italics added.) Moreover, section 459, states, in relevant part, "As used in this chapter,

'inhabited' means *currently being used for dwelling purposes*, whether occupied or not." (Italics added.)

(d) Texas Burglary Law.

In *People v. Rodriguez*, there was evidence a defendant suffered three Texas burglary-related prior convictions based on offenses starting in 1971 and ending in 1991. In particular, there was evidence the defendant was (1) indicted for a 1971 unlawful entry into a house in Texas and convicted of burglary in 1974 (*People v. Rodriguez, supra*, 122 Cal.App.4th at pp. 126–127, 135), (2) convicted of attempted second degree burglary in Texas in 1989 (*id.* at pp. 128, 137), and (3) indicted for a 1991 unlawful entry into a habitation in Texas and convicted of burglary in 1992 (*id.* at p. 127). A California trial court used those Texas prior convictions to impose Three Strikes sentences and section 667, subdivision (a)(1) enhancements. (*People v. Rodriguez*, at pp. 125, 131, 137.) On appeal, the defendant claimed this was error because there was insufficient evidence each prior conviction was for a "serious felony" under California law. (*Id.* at pp. 125, 131.) *People v. Rodriguez* agreed. (*Id.* at p. 125.)

People v. Rodriguez observed, "In Texas at the applicable times, a person committed the crime of burglary when he or she, 'without the effective consent of the owner . . . [¶] (1) enters a *habitation*, or a building or any portion of a building not then open to the public, with intent to commit a felony, theft, or an assault; or [¶] (2) remains concealed, with intent to commit a felony, theft, or an assault, in a building or *habitation*; or [¶] (3) enters a building or *habitation* and commits or attempts to commit a felony, theft, or an assault.' (Tex. Pen. Code, § 30.02.)" (*People v. Rodriguez*, *supra,* 122 Cal.App.4th at p. 133, italics added.)

After reviewing pertinent Texas case law, *People v. Rodriguez* concluded, "unlike California law, Texas law does not require that the structure be occupied or *currently used as a dwelling* in order for it to be a habitation." (*People v. Rodriguez, supra,* 122 Cal.App.4th at p. 135, italics added.) In other words, one can commit a Texas burglary that would not contain all the elements required for a crime to be deemed the "serious felony" of California first degree burglary, because one can commit a Texas burglary without committing a burglary of something "inhabited" as required by California first degree burglary. *People v. Rodriguez* thus concluded there was insufficient evidence any of the offenses underlying the Texas prior convictions in that case was for a California "serious felony," and the trial court erred by imposing a Three Strikes law sentence and section 667, subdivision (a)(1) enhancements based on those prior convictions. (*People v. Rodriguez*, at pp. 125, 135-137.)

(e) Admissible Evidence: the Record of Conviction.

Gallardo acknowledged that "For some time, California cases have held that [serious felony] determinations are to be made . . . *based on a review of the record of the prior criminal proceeding*." (*Gallardo*, *supra,* 4 Cal.5th at p. 125, italics added.) *Gallardo* observed that *McGee*, *People v. Woodell* (1998) 17 Cal.4th 448, and *People v. Guerrero* (1988) 44 Cal.3d 343 (*Guerrero*), "explained that ' "[b]ecause the nature of the *conviction* is at issue, *the prosecution is not allowed to go outside the record of conviction* to 'relitigat[e] the circumstances of a crime committed years ago . . . . ' " ' " (*Gallardo*, at p. 129, second italics added.)

Guerrero explained, "To allow the trier to look to the record of the conviction -- *but no further* -- is also fair: it effectively bars

the prosecution from relitigating the circumstances of a crime committed years ago and thereby threatening the defendant with harm akin to double jeopardy and denial of speedy trial." (*Guerrero, supra,* 44 Cal.3d at p. 355.) In *People v. Reed* (1996) 13 Cal.4th 217 (*Reed*), our Supreme Court stated, "By holding in *Guerrero* that the trier of fact may look to the entire record of conviction '*but no further*' [citation], we precluded the prosecution from calling *live witnesses* to the criminal acts in the prior case." (*Reed*, at p. 226, second italics added.) *Gallardo* observed *People v. Bartow* (1996) 46 Cal.App.4th 1573, "conclud[ed] that the logic of *Guerrero* bars both sides from calling live witnesses." (*Gallardo*, *supra,* 4 Cal.5th at p. 139, fn. 5.)

Gallardo remanded the matter to permit the trial court to determine what facts the defendant admitted in her plea, and *Gallardo* fashioned that remedy in part because "[o]ur precedent instructs that determinations about the *nature* of prior convictions are to be made by the court, rather than a jury, *based on the record of conviction*." (*Gallardo, supra*, 4 Cal.5th at p. 138, italics added.) *Gallardo* reiterated *Guerrero's* explanation as stated above.

In *Reed,* our Supreme Court "recognized that the term 'record of conviction' could be 'used technically, as equivalent to the record on appeal [citation], or more narrowly, as referring only to those record documents reliably reflecting the facts of the offense for which the defendant was convicted.' " (*People v. Trujillo* (2006) 40 Cal.4th 165, 177 (*Trujillo*).)

People v. Thoma (2007) 150 Cal.App.4th 1096 (*Thoma*), observed, "in determining whether a prior conviction qualifies as a strike, the *Trujillo* court concluded that a trial court may not rely upon the defendant's admission in a postconviction probation

report. Because such an admission follows the acceptance of the defendant's guilty plea, it 'does not reflect the facts upon which he was convicted.' ([*Trujillo, supra,* 40 Cal.4th] at p. 180.)" (*Thoma*, at p. 1102.) Moreover, "[a]lthough *Trujillo* concerned admissions in a postconviction probation report, the fair implication of *Trujillo* is that only admissions made prior to the acceptance of a defendant's guilty plea may be relied upon in determining whether a prior conviction qualifies as a strike. Admissions made after acceptance of the plea do 'not reflect the facts upon which [the defendant] was convicted.' ([*Trujillo*], at p. 180.)" (*Thoma*, at p. 1102.)

Finally, the failure of counsel at a trial on prior conviction allegations to object that items of evidence outside the record of conviction are inadmissible can constitute ineffective assistance of counsel. (*People v. Roberts* (2011) 195 Cal.App.4th 1106, 1112 (*Roberts*).)

(2) ***Application of the Law to this Case.***

(a) Appellant Was Denied His Sixth Amendment Right to a Jury Trial.

In the present case, appellant had a jury trial concerning his Texas conviction allegations. During that trial a variety of evidence was presented to the jury, including evidence appellant suffered his Texas convictions for residential burglary and those convictions were part of a "package deal," i.e., the prior convictions were based on pleas of guilty and/or no contest. The court also gave various instructions.

However, as mentioned, *People v. Rodriguez* concluded, "unlike California law, Texas law does not require that the structure be occupied or *currently used as a dwelling* in order for it to be a habitation." (*People v. Rodriguez, supra*,

122 Cal.App.4th at p. 135, italics added.) Respondent concedes "[*People v. Rodriguez*] provides an extensive description of the elements of burglary in [California and Texas], including the Texas elements as they stood at the time relevant to the present case."

Appellant had a right to a jury trial on the issue of whether someone suffered the Texas convictions (*Gallardo, supra,* 4 Cal.5th at p. 125; § 1025, subd. (b)). That right was satisfied, as reflected by the trial court's instructions and the jury's true findings on the verdict forms.

However, no evidence was offered to prove the Texas burglaries involved a structure that was "inhabited," i.e., "currently used as a dwelling." The court never instructed the jury that it had to find the Texas burglaries involved structures that were "inhabited," i.e., "currently used as . . . dwelling[s]." The prosecutor argued appellant's prior convictions impeached him, but the prosecutor presented no jury argument relating any prior conviction evidence to the prior conviction allegations in this case. In particular, the prosecutor did not argue the Texas convictions were for "serious" or "violent" felonies. The verdict forms neither permitted nor included a finding on the issue of whether the Texas burglaries involved "inhabited" structures. Appellant had a jury trial on the issue of whether someone suffered the Texas convictions, but the issue of whether the Texas burglaries involved "inhabited" structures was never submitted to the jury and appellant had no jury trial on that issue.

We conclude appellant was denied his Sixth Amendment right to a jury trial on the factual issue of whether the structures involved in the Texas burglaries were "inhabited," i.e., "currently

used as a dwelling." (Cf. *Gallardo*, *supra,* 4 Cal.5th at pp. 123–125, 128–137.)[14]

In *Gallardo*, our Supreme Court went from the conclusion that the Sixth Amendment right to a jury trial was violated to the remedy of a remand, without discussing whether the error, requiring reversal, was structural, or harmless error under *Chapman v. California* (1967) 386 U.S. 18. (*Gallardo, supra*, 4 Cal.5th at pp. 136–138.) Even if the Sixth Amendment error here was subject to the *Chapman* test for prejudice, reversal would be required.

The amended information alleged the Texas burglary convictions but did not allege they were "residential"; the amended information did not use the term "residential" to put the jury on notice that whether the Texas burglaries were residential was an issue. The CALJIC No. 17.25 instruction given to the jury stated the information alleged five "residential" burglaries committed in Texas, but neither the information nor the amended information alleged the burglaries were "residential." Absent the *Gallardo* factual issue, the only issue before the jury as to the Texas convictions was whether *someone* suffered them

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[14] *Gallardo* was decided after the briefing in this case. However, appellant, in his opening brief, cited *People v. Navarette* (2016) 4 Cal.App.5th 829, and *People v. Marin* (2015) 240 Cal.App.4th 1344, decisions the Sixth Amendment/*Apprendi* analysis of which presaged *Gallardo's* Sixth Amendment/*Apprendi* holding regarding impermissible judicial factfinding. Respondent neither cited nor discussed *Navarette*. Respondent cited *Marin*, not for its Sixth Amendment/*Apprendi* analysis, but only for another issue: *Marin's* discussion of the appropriate remedy if we conclude insufficient evidence supported the strike findings.

(*Gallardo, supra,* 4 Cal.5th at p. 125; 1025, subd. (b)), not whether the burglaries were *residential*. (The trial court had to decide the identity issue (§ 1025, subd. (c)).)

In *California*, a "residence" is an " 'inhabited dwelling house.' " (*People v. Harrell* (1989) 207 Cal.App.3d 1439, 1446.) However, the Texas convictions were based on *Texas* burglaries. We have discussed differences between Texas and California burglary law. Moreover, the trial court never gave the jury an instruction defining "residential." For all the record reflects, the jury might have used a definition of that term that did not require a residence to be "currently used as a dwelling" or an "inhabited dwelling house."[15]

The court instructed the jury that the five, five-digit case numbers in the verdict form referred to the "Texas prior burglary convictions," and the verdict form called for the jury to make a finding whether appellant was convicted of a "serious or violent felony" in those cases. However, the court never defined for the jury the phrase "serious felony" or "violent felony," never

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[15] One definition of "residential" is "of or relating to residence or residences." (Merriam-Webster's Collegiate Dict. (10th ed. 1995) p. 996.) One definition of "residence" is "the place where one actually lives as distinguished from one's domicile or a place of temporary sojourn" (*ibid.*), a definition which, when applied to burglary, suggests focus on a burglary in a certain geographical location, not necessarily in a structure. Another definition of "residence" is "a building used as a home: dwelling" (*ibid.*, capitalization omitted), a definition that does not expressly require that the building, home, or dwelling be "currently used as a dwelling." Another definition is "housing or a unit of housing provided for students" (*ibid.*), which does not necessarily require a structure "currently used as a dwelling."

instructed the jury that residential burglary was a serious or violent felony, and we cannot assume the jury would have been aware of those legal concepts. Indeed, in any event, it was for the *trial court* to decide the legal issue of whether the Texas convictions were for "serious" or "violent" felonies. The Sixth Amendment instructional error in this case was prejudicial. The trial court was not entitled to rely on the Texas convictions to impose appellant's Three Strikes sentence or the section 667, subdivision (a)(1) enhancements.

Where, as here, the Sixth Amendment right to a jury trial is violated because of impermissible judicial factfinding, the remedy is to remand the matter to permit the People to demonstrate to the trial court, based on the record of conviction in the 1990 Texas conviction proceedings, that at the time appellant pled guilty and/or no contest in 1990 to the underlying burglaries (*Gallardo*, *supra,* 4 Cal.5th at pp. 137–140), that "plea encompassed a relevant admission about the nature of [the defendant's] crime[s]." (*Id.* at p. 139.)

(b) Trial Counsel's Failure to Object to Inadmissible Evidence was Ineffective Assistance of Counsel.

Even if appellant were not entitled to a jury trial on the factual issue of whether each Texas conviction involved the burglary of a structure "currently used for a dwelling," the trial court was not entitled to rely on the Texas convictions for the separate reason that appellant's trial counsel provided ineffective assistance of counsel by failing to object to the admission into evidence of items outside the record of conviction of the Texas convictions.

Gallardo, fashioning its remedy for the Sixth Amendment violation, continued to maintain, "Our precedent instructs that determinations about the *nature* of prior convictions are to be made by the court, rather than a jury, *based on the record of conviction*." (*Gallardo, supra,* 4 Cal.5th at p. 138, italics added.) Similarly, as previously discussed, a determination of whether a prior conviction is for a serious felony is based on the "record of conviction" of that prior conviction. (*Id.* at pp. 125, 129, 138.)

In the present case, the *live* testimony in this case, including that from appellant on September 29, *2015*, and from Navia on September 30, *2015*, about the *1990* Texas convictions, clearly was not part of the record on appeal, or, therefore, record of conviction, as to the Texas convictions. Moreover, appellant's live 2015 testimony obviously was not "made prior to the acceptance" (*Thoma, supra,* 150 Cal.App.4th at p. 1102) of appellant's 1990 guilty and/or no contest pleas to the Texas conviction allegations.

The abstract of judgment in case No. VA024450, generated in connection with appellant's *1993* California burglary conviction, clearly was not part of the record on appeal, or record of conviction, as to the *1990* Texas convictions. The *1994* fingerprint card in case No. VA024450 was a prison record, not a court record (*People v. Williams* (1996) 50 Cal.App.4th 1405, 1413) and, in any event, was not part of the record of conviction as to the *1990* Texas convictions. The fact People's exhibit No. 33 and the fingerprint card were part of a *section 969b* prison packet obviated any authentication or hearsay problems, but not the fact the exhibit and card were not part of the *record of conviction*. (*People v. Scott* (2000) 85 Cal.App.4th 905, 913-914.)

Respondent argues, "The jury 'may look to the entire *record*.' ([*People v.*] *Rodriguez, supra,* 122 Cal.App.4th at p. 129.) [¶] Here, the jury heard that appellant had previously been sentenced under California law for five prior residential burglaries committed in Texas: he received enhancements for them, pursuant to section 667, subdivision (a). (3RT 711, 721, 740; 2CT 405.[16]) While not explicit, this enhancement corresponded to five separate five-year priors for committing serious felonies—that is, each of the Texas felonies must have been found to be a serious felony at the time of appellant's sentencing on his 1994 California burglary. . . . Additionally, the verdict form in the present case informed the jury that its prior felony findings must be made 'within the meaning of Penal Code Section[ ] 667(a)(1) . . . .' " (Italics added.) Respondent then argues, "Based on the combination of these factors, it was reasonable for the jury to infer that appellant's prior residential burglaries—which were serious felonies under section 667, subdivision (a) in 1994—were still serious felonies under section 667, subdivision (a) in 2015."

However, first, what *People v. Rodriguez – quoting Guerrero* – said was, " 'the [trier of fact] may look to the entire record *of the conviction* . . . .' " (*People v. Rodriguez, supra,* 122 Cal.App.4th at p. 128–129, italics added.) Second, respondent's omission of the phrase "of the conviction" permits respondent to erroneously focus on the record *of the 2015 prior convictions trial in this case* instead of the record *of conviction* pertaining to the *1990* Texas convictions case. This in turn

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16 We note these page numbers cited by respondent refer to appellant's live testimony and the abstract of judgment in case No. VA024450.

permits respondent to rely on impermissible live testimony and an abstract of judgment (in case No. VA024450) that were not part of the record *of conviction* of the Texas conviction proceedings.

Third, respondent's suggestion that uninstructed lay jurors would be sufficiently up on the California Penal Code to know about section 667, subdivision (a)(1), that it pertained to serious felonies, that it could apply to out-of-state felonies depending on the facts, and that multiple section 667, subdivision (a)(1) enhancements were punishable by full, consecutive five-year prison terms, with the result the jury would infer the Texas convictions were for California serious felonies, is sheer speculation. Finally, the verdict form in the present case reflected the jury's finding concerning any prior conviction evidence *previously* presented to the jury. The verdict form was not itself prior conviction evidence.

Appellant concedes, and there is no dispute, that by failing to object at the prior conviction trial below to the admission into evidence of items outside the record of conviction of the Texas convictions, appellant's trial counsel forfeited the admissibility issues. In *Roberts*, cited by appellant, certain postplea statements made after the defendant suffered a Washington prior conviction were admitted into evidence at the trial on a strike allegation based on that prior conviction, the defendant's trial counsel failed to object that the statements were outside the record of conviction, and the trial court found the defendant suffered the strike. *Roberts* held trial counsel's failure was ineffective assistance of counsel. (*Roberts*, *supra,* 195 Cal.App.4th at pp. 1112.)

Roberts stated, "Although . . . ineffective assistance claims are considered with 'deferential scrutiny' [citation], ' "[d]eference is not abdication" [citation]; it must never be used to insulate counsel's performance from meaningful scrutiny and thereby automatically validate challenged acts or omissions. Otherwise, the constitutional right to the effective assistance of counsel would be reduced to form without substance.' " (*Roberts, supra,* 195 Cal.App.4th at p. 1130.)

Roberts observed, "Here, we can conceive of no legitimate reason why defendant's trial counsel would forgo objecting to the postplea statements on the ground that they were not part of 'the entire record of the conviction' as required under *Guerrero*, *supra,* 44 Cal.3d at p. 352." (*Roberts*, *supra,* 195 Cal.App.4th at p. 1130.) *Roberts* also observed, "This is a clear instance in which the objection had substantial merit; there was no tactical reason for defense counsel's failure to assert it; and, because the postplea statements were significant in supporting the strike finding, the introduction of the evidence was prejudicial to defendant." (*Id.* at p. 1132.) *Roberts* concluded trial counsel's failure was ineffective assistance of counsel. (*Ibid.*)

Like the appellate court in *Roberts*, we can conceive of no legitimate reason why appellant's trial counsel would forgo objecting to items outside the record of conviction. Indeed, such objectionable items were the sole evidence of the Texas

convictions.[17] The trial court was not entitled to rely on the Texas convictions to impose appellant's Three Strikes sentence and the section 667, subdivision (a)(1) enhancements because the introduction of the evidence of the Texas convictions to prove the nature of those convictions was the result of ineffective assistance of counsel.

Respondent argues appellant's trial counsel did not provide constitutionally-deficient representation by preemptively eliciting testimony from appellant about the Texas convictions to soften their impeachment impact. Respondent also argues any constitutionally-deficient representation was not prejudicial

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[17] We reach this conclusion mindful of other evidence of ineffective assistance. As discussed, no bifurcation motion had been made before the trial court denied appellant's section 1118.1 motion as to count 1. Later, the prosecutor at least suggested he would introduce prior convictions evidence solely to impeach appellant and not to prove the prior conviction allegations. However, the court kept suggesting by its questions that, absent bifurcation, the People should have presented during their case-in-chief any evidence offered to prove the prior conviction allegations. The prosecutor eventually apologized, did not then expressly ask the trial court for permission to reopen to elicit testimony from appellant to prove those allegations, but instead elicited such testimony when cross-examining appellant. Later allowed to reopen, the prosecutor elicited from the paralegal testimony pertaining to People's exhibit No. 33 and that exhibit was admitted into evidence. The court later suggested the prior convictions trial was effectively being bifurcated. *Appellant's trial counsel never made, at the close of the People's case-in-chief, a section 1118.1 motion on the ground the People had not proven, during their case-in-chief, the prior conviction allegations based on the Texas convictions*.

because even if appellant's trial counsel had not elicited that testimony, the evidence would have been introduced through Navia's testimony or official Texas records.

However, during appellant's counsel's direct examination of appellant, appellant's counsel elicited testimony from appellant about prior convictions to soften their impeachment impact, not to prove strike or section 667, subdivision (a)(1) allegations. Appellant's trial counsel did not elicit from appellant on direct examination his testimony about "five," "1990," "residential" Texas burglary convictions; the prosecutor elicited the above quoted damaging testimony during unobjected-to cross-examination.

Navia's testimony, if offered to prove the Texas convictions were for serious felonies, was inadmissible live testimony. Respondent has failed to demonstrate from the record that official Texas records of the Texas convictions existed; indeed, the present offenses occurred in 2012, the preliminary hearing occurred in 2014, the jury was sworn and the prior convictions testimony was elicited in September 2015, but, as of September 2015, the prosecutor apparently still did not have official Texas records. Respondent's argument that any constitutionally-deficient representation was not prejudicial is inconsistent with *Roberts,* a case respondent neither cites nor discusses.

(c) Concluding Observations.

The present case involves prior convictions based on guilty and/or no contest pleas. *Gallardo* similarly involved a prior conviction based on a guilty plea. *Gallardo* stated, "We . . . remand the case, as both parties appear to acknowledge we should, to permit the People to demonstrate to the *trial court*, based on the record of the prior plea proceedings, that

defendant's guilty plea encompassed a relevant admission about the nature of her crime." (*Gallardo, supra,* 4 Cal.5th at p. 139, italics added.) Accordingly, *Gallardo* earlier stated, "We . . . agree with the parties that *the* appropriate course is to remand to permit the *trial court* to make the relevant determinations about what facts defendant admitted in entering her plea." (*Id.* at p. 138, italics added.)

In his concurring and dissenting opinion in *Gallardo*, Associate Justice Chin agreed with the majority that the defendant had a right to a jury trial on the nature of the prior conviction, but Justice Chin disagreed with the majority's remedy. (*Gallardo*, *supra,* 4 Cal.5th at p. 140 (conc. & dis. opn. of Chin, J.).) His remedy was to remand the matter for a *jury* trial in which the jury, limited to the record of conviction, would make factual findings about the nature of, i.e., the conduct underlying, the conviction. (*Id.* at pp. 140–141, 144.)

Our Supreme Court explicitly rejected that approach. The majority stated, "Justice Chin's . . . opinion takes the view that we can instead reconcile *Guerrero* with the Sixth Amendment right to a jury trial by simply reassigning the task of reviewing the record of conviction to a *jury*, as opposed to a judge." (*Gallardo, supra,* 4 Cal.5th at p. 138, italics added.)

The majority later observed, "such a proceeding—in which a *jury* would be impaneled for the sole purpose of reading the preliminary hearing transcript in defendant's prior assault case—would raise significant constitutional concerns under *Apprendi*. The basic rationale of *Apprendi* is that facts that are used to increase the defendant's maximum possible sentence are the functional equivalent of elements of the offense, and they must be proved in the same way: i.e., at a trial before a jury, and

beyond a reasonable doubt. [Citation.] To permit a *jury* to make factual findings based solely on its review of hearsay statements made in a preliminary hearing would be to permit facts about the defendant's prior conviction to be proved in a way that no other elemental fact is proved—that is, without the procedural safeguards, *such as the Sixth Amendment right to cross-examine one's accusers*, that normally apply in criminal proceedings. [Fn. omitted.] This kind of proceeding might involve a jury, but it would not be much of a trial. [Fn. omitted.]" (*Gallardo*, *supra,* 4 Cal.5th at pp. 138–139, italics added.)

In the second above omitted footnote, *Gallardo* considered but declined to follow the approach of previous appellate court cases that had remanded for a *jury* trial with the evidence to be limited to the record of conviction. (*Gallardo, supra,* 4 Cal.5th at p. 139, fn. 6.) The remedy of the remand to the trial court that we previously have discussed is the sole remedy. If, following remand, the People cannot demonstrate to the trial court, based on the record of the prior plea proceedings, that appellant's guilty and/or no contest plea underlying a Texas conviction encompassed a relevant admission about the nature of his crime, the trial court may not rely upon that Texas conviction to impose a sentence pursuant to the Three Strikes law and/or section 667, subdivision (a)(1).

There is no need to reach the issue of whether there was insufficient evidence that the Texas convictions were qualifying prior convictions, i.e., convictions for serious or violent felonies. Certainly there was insufficient evidence the Texas convictions were qualifying prior convictions if we exclude consideration of the evidence that was inadmissible to prove the nature of the Texas convictions, i.e., the items of evidence outside the record of

conviction. However, even if, because appellant forfeited the admissibility issues, we can properly consider the otherwise inadmissible evidence to reach a sufficiency issue, there is no need to reach it here. Because of the previously discussed Sixth Amendment/*Gallardo* violation and ineffective assistance of appellant's trial counsel, the trial court erred by relying on the Texas convictions to impose the Three Strikes sentence and section 667, subdivision (a)(1) enhancements in this case.

In *People v. Barragan* (2004) 32 Cal.4th 236, our Supreme Court stated, "The issue here is whether retrial of a strike allegation is permissible where a trier of fact finds the allegation to be true, but an appellate court reverses that finding for insufficient evidence. [The defendant] argues that retrial is barred by the constitutional requirement of fundamental fairness, equitable principles of res judicata and law of the case, and relevant statutory provisions. We conclude that retrial is permissible." (*Id.* at p. 239.)

Barragan does not conflict with our conclusion that the only remedy in the present case is to remand the matter for the previously discussed trial court determinations instead of for a jury trial. First, we have not reached the issue of whether there was insufficient evidence that the Texas convictions were qualifying prior convictions. Second, even if we had decided there was insufficient evidence, *Barragan* goes no further than to hold a *retrial* is not *barred* by the doctrines relied upon by the defendant in that case. That holding does not govern whether, at such a retrial, the adjudicator must be a court rather than a jury.

6. THERE IS NO NEED TO DECIDE APPELLANT'S FIREARM ENHANCEMENT CLAIMS.

In his opening brief, appellant claims the trial court erred during sentencing by imposing, and staying pursuant to section 654, a 10-year firearm use enhancement on count 5. However, after respondent's brief pointed out the trial court, during sentencing, later corrected itself and struck that enhancement, appellant, in his reply brief, abandoned his claim. Appellant then, for the first time in his reply brief, claims the abstract of judgment erroneously reflects the jury found true section 12022.53, subdivision (b) allegations as to counts 3, 4, and 6.

Moreover, respondent concedes appellant's claim that the trial court erroneously imposed a section 12022.5, subdivision (a) enhancement on count 7.

The above claims are moot because, for reasons previously discussed, if, following remand, the judgment is deemed reinstated, one exception will be that we will vacate appellant's sentence to permit resentencing. (Cf. *People v. Thomas* (2012) 211 Cal.App.4th 987, 1018; *People v. Lewis* (1996) 44 Cal.App.4th 845, 855.) We are confident that, following remand, the trial court will be mindful of the above discussed issues.

7. THE SECTION 1202.45 PAROLE REVOCATION FINE MUST BE STRICKEN.

During sentencing on April 18, 2016, the court stated, "$300 parole revocation fine, which is stayed." This was a section 1202.45 parole revocation fine. Accordingly, the abstract of judgment reflects, "$300 per PC 1202.45 suspended unless parole is revoked."

Respondent concedes appellant's claim that because the court sentenced appellant to prison to life without the possibility of parole (on count 1), the judgment must be modified to not impose the parole revocation fine and the abstract must be corrected accordingly. Because no sentence for any substantive offense in this case involved a determinate term of imprisonment, we accept the concession. (See *People v. Brasure* (2008) 42 Cal.4th 1037, 1075.) If, following remand, the judgment is deemed reinstated, one exception will be that the fine is stricken.

DISPOSITION

The judgment is conditionally reversed and the matter is remanded with the following directions. Following remand, and consistent with the views expressed in this opinion, the trial court shall conduct a new in camera hearing on appellant's *Pitchess/Brady* motion. If the trial court finds there is discoverable information, the trial court shall order disclosure, allow appellant an opportunity to demonstrate prejudice, and order a new trial if there is a reasonable probability the outcome would have been different had the information originally been disclosed.

If the trial court finds there is no discoverable information or finds appellant has failed to demonstrate prejudice, the judgment shall be deemed reinstated, except that the jury's findings that, based on the 1990 Texas burglary convictions, appellant suffered strikes for purposes of the Three Strikes law and prior serious felony convictions for purposes of section 667, subdivision (a)(1), are reversed; appellant's sentence is vacated; the section 1202.45 parole revocation fine is stricken; the trial court shall permit the People to demonstrate to the trial court, based on the record of conviction of the 1990 Texas burglary

convictions, that at the time appellant pled guilty and/or no contest in 1990 to the underlying burglaries, that plea encompassed a relevant admission about the nature of his crimes; and the trial court shall resentence appellant and conduct further proceedings consistent with this opinion. The trial court is directed to forward to the Department of Corrections and Rehabilitation an amended abstract of judgment.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

DHANIDINA, J.*

We concur:

LAVIN, Acting P. J.

EGERTON, 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.