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No. S293388

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

RACE FARREL FLOWERS,
Defendant and Appellant.

Second Appellate District, Division Six, Case No. B312522
San Luis Obispo County Superior Court, Case No. 20F-02462-B
The Honorable Michael L. Duffy, Judge

ANSWER BRIEF ON THE MERITS

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May 15, 2026

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ISSUE PRESENTED

Did the Court of Appeal err by declining to remand for resentencing under the amended Penal Code section 1170, subdivision (b)? (See *People v. Wiley* (2025) 17 Cal.5th 1069; *People v. Lynch* (2024) 16 Cal.5th 730; *People v. Salazar* (2023) 15 Cal.5th 416; *People v. Gutierrez* (2014) 58 Cal.4th 1354.)

INTRODUCTION

Appellant Race Flowers was convicted of robbery and sentenced to the upper term based on five aggravating circumstances. While his appeal was pending, Senate Bill No. 567 (SB 567) (2021-2022 Reg. Sess.) (Stats. 2021, ch. 731), which amended Penal Code section 1170, subdivision (b), became effective.[1] Applying this Court's holdings in *People v. Wiley* (2025) 17 Cal.5th 1069 and *People v. Lynch* (2024) 16 Cal.5th 730, the Court of Appeal determined that remand for a jury trial on these aggravating circumstances under the amended law was unnecessary because it concluded beyond a reasonable doubt that a jury, applying the same standard, would have found true all of the aggravating facts relied upon by the trial court to justify the upper term sentence. It also concluded that the record clearly indicated the trial court would not impose any different sentence on remand.

The Court of Appeal correctly declined to remand the matter for resentencing. The record and Flowers's own concessions at the sentencing hearing irrefutably established the aggravating circumstances relating to his criminal history. The trial evidence

[1] Undesignated statutory references are to the Penal Code.

and records of conviction also established that Flowers engaged in violent conduct indicating a serious danger to society. Further, the jury convicted Flowers of robbery as an aider and abettor based, as both parties agree, on evidence of Flowers's preparatory conduct leading up to the robbery. The jury would therefore undoubtedly have found true the aggravating circumstance that the offense involved planning, especially since that preparatory conduct was the underlying basis for Flowers's guilt.

In addition, the superior court explained at the sentencing hearing that it was imposing the upper term based on Flowers's long and significant criminal history and the numerous factors in aggravation, clearly indicating that it would have concluded that these aggravating circumstances justified the upper term even under the amended sentencing provisions.

LEGAL BACKGROUND

Under the Sixth Amendment to the United States Constitution, "any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." (*Cunningham v. California* (2007) 549 U.S. 270, 281; accord, *Apprendi v. New Jersey* (2000) 530 U.S. 466, 489.) The United States Supreme Court has long recognized an exception to this jury trial right for "the fact of a prior conviction." (*Apprendi*, at p. 490; *Almendarez-Torres v. United States* (1998) 523 U.S. 224, 243-244, 247.) Under this exception, a sentencing court may find the fact of a prior conviction and the then-existing elements of that offense without

submitting the issue to a jury. (*Erlinger v. United States* (2024) 602 U.S. 821, 838; *Wiley, supra,* 17 Cal.5th at pp. 1082-1083 [under *Erlinger*, prior conviction exception is limited to "a narrow factual finding that the convictions were sustained and what elements were required to prove them"].)

Prior to 2022, section 1170, subdivision (b) provided that a sentencing court had broad discretion to choose between the low, middle, or upper term and impose the sentence that best served the interests of justice. (*Lynch, supra*, 16 Cal.5th at p. 747.) Effective January 1, 2022, SB 567 amended section 1170, subdivision (b) to set the middle term as the presumptive sentence unless aggravating circumstances justify the upper term and the facts underlying such circumstances "have been stipulated to by the defendant or have been found true beyond a reasonable doubt at trial by the jury or the judge in a court trial." (§ 1170, subd. (b)(2), as amended by Stats. 2021, ch. 731, § 1.3.) Like the exception to the jury trial right for "the fact of a prior conviction" under the Sixth Amendment, section 1170, subdivision (b)(3) also "authorizes a sentencing court to 'consider the defendant's prior convictions in determining sentencing based on a certified record of conviction without submitting the prior convictions to a jury.'" (*Wiley, supra*, 17 Cal.5th at p. 1085, quoting section 1170, subdivision (b)(3).) To avoid any application that would conflict with the Supreme Court's constitutional interpretation of the prior conviction exception, the scope of section 1170, subdivision (b)(3) is interpreted "in a

manner that is coextensive with high court dictates." (*Wiley,* at p. 1086.)

In *Lynch*, this Court held that a sentencing court's reliance on improperly proven aggravating facts to impose an upper term sentence does not constitute structural error and is subject to harmless error analysis. (*Lynch*, *supra*, 16 Cal.5th at pp. 751-754.) Applying the standard of review under *Chapman v. California* (1967) 386 U.S. 18, *Lynch* explained that the lack of a jury finding on aggravating circumstances is harmless if "an appellate court can conclude beyond a reasonable doubt that a jury would have found true all of the aggravating facts relied upon by the trial court to justify an upper term sentence, or that those facts were otherwise proved true in compliance with the current statutory requirements." (*Lynch*, at p. 768.) If a reviewing court cannot determine that the factfinding error is harmless, remand for resentencing is required. (*Ibid.*)

Moreover, when the scope of a court's sentencing discretion changes after the sentence was imposed, remand is required unless the record clearly indicates that the sentencing court would have imposed the same sentence even had it been aware of the change. (*Lynch*, *supra*, 16 Cal.5th at p. 773.) This is because a defendant is entitled to a sentencing decision made in the exercise of informed discretion. (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.) The "clearly indicates" standard applies in cases where an upper term sentence was imposed prior to the enactment of SB 567, since that legislation created a presumption favoring the middle term. (*Lynch*, at p. 773.) Thus, even if a

reviewing court determines that a sentencing court's reliance on improperly proven aggravating factors was harmless under *Chapman*, remand is still required unless there is a clear indication in the record that the sentencing court would have imposed the upper term notwithstanding the presumption in favor of the middle term. (*Id*. p. 773.)

"Mere reliance on the length of the original sentence and attendant decisions, such as imposing consecutive sentences, imposing middle or upper terms sentences, or declining to strike enhancements, is not sufficient to provide a clear indication of what a sentencing court might do on remand if it had been fully aware of the scope of its discretionary powers." (*People v. Salazar* (2023) 15 Cal.5th 416, 431.) However, a court's statements explaining its sentencing decision may clearly indicate that remand would be an idle act. (See e.g., *ibid.* [positing hypothetical scenario where "sentencing court announces that it is aware of forthcoming legislation and then explains how it would exercise its discretion under that legislation"]; *People v. Flores* (2020) 9 Cal.5th 371, 432 [remand to exercise newly conferred discretion to strike firearm enhancements would be idle act where sentencing court stated it believed the death penalty to be the appropriate sentence].)

STATEMENT OF THE CASE

A. The trial and verdicts

In 2020, Flowers and Mario Alford were each charged with robbery (§ 211). Alford was separately charged with kidnapping (§ 209, subd. (b)(1)) and personally using a firearm in the commission of both crimes (§ 12022.53, subd. (b).) It was alleged

that Flowers had suffered prior serious or violent felony convictions for robbery (§ 211) in 1995 and criminal threats (§ 422, subd. (a)) in 2014, within the meaning of the Three Strikes law (§§ 667, subds. (d)-(e), 1170.12, subds. (b)-(c)). (1CT 10-16.)

The trial evidence showed that, in November 2019, Flowers and Alford robbed Check Into Cash, a business in Morro Bay providing check cashing, pay advances, and similar cash transactions. (17RT 4852-4854; 18RT 5200; 20RT 5767-5772, 5782.) On the day of the robbery, Alford entered the business, pointed a gun at the manager, Rebecca Dorado, and ordered her to open the safe. (17RT 4853, 4857-4859.) Dorado said that the safe was on a timer but that there was cash in the front. (17RT 4859.) Dorado pretended to need to use the bathroom, and once there, she triggered a silent alarm. (17RT 4860-4861.) Alford had brought duct tape with him and used it to bind Dorado's legs, wrists, and face. (17RT 4861-4862.) He told Dorado to not look up or "somebody will get mad." (17RT 4862-4863.) Dorado saw Alford take money from the front register and leave. (17RT 4863-4864.)

Subsequent investigation revealed substantial planning activity by Flowers and Alford. Flowers had performed multiple Google searches for the phone number to the Check Into Cash in Morro Bay. (20RT 5781-5782.) Two days before the robbery, a witness had seen Flowers and Alford (who was wearing a disguise) walking toward Check Into Cash. (18RT 5200.) The day before the robbery, Alford sent a text message to Flowers

stating that he was "in Morro Bay checking shit out." (20RT 5767.) Flowers texted Alford, "All I can do is think of tomorrow," and "Can't wait," with Alford replying, "Same here." (20RT 5768-5770.) The day of the robbery, Flowers again searched the internet for the phone number to the Check Into Cash in Morro Bay. (20RT 5782.) He sent text messages to Alford telling Alford where to pick him up and instructing, "Make sure when you come we have plenty of time before she closes. Make sure of that." (20RT 5770-5771.) Flowers also said, "This is our fucking night[,]" and "Man, I can't wait until this shit is behind u[s], and we are just living, living good, like we're supposed to. It's going to be nice." (20RT 5771-5772.) Flowers placed a call to Check Into Cash a few hours before the robbery. He hung up when Dorado answered and identified herself. (18RT 5112-5113, 5152.)

In addition, cell phone records placed Alford and Flowers near Check Into Cash at the time of the robbery, and the same witness from two days earlier recognized Alford and Flowers again walking toward Check Into Cash at the time of the robbery. (20RT 5200-5209, 5743-5744, 5752-5757.) Flowers placed phone calls to Alford every minute that Alford was inside the business committing the robbery. (20RT 5745, 5776.) Alford wore a disguise, put gloves on, and brought duct tape with him. (17RT 4858, 4862; 18RT 5177-5178, 5189; 19RT 5421.) A few hours after the robbery, Flowers viewed a news story about it. (20RT 5783-5784, 5793-5796.)

Ten days later, police officers pulled Alford and Flowers over in Alford's car. (18RT 5267-5269.) Officers found a small

handgun and ammunition in the front center console and the disguise Alford wore during the robbery in a plastic bag in the trunk underneath the spare tire. (18RT 5270-5273, 5280-5282, 5287-5288, 5296-5298.) Dorado recognized Flowers as a previous customer of Check Into Cash, but she did not see him the day of the robbery. (18RT 5117-5120, 5139.) Flowers had cashed checks at Check Into Cash six times between 2014 and 2017. (18RT 5147-5150, 5154.)

A jury found Flowers guilty of second degree robbery. (2CT 585.) Flowers waived his right to a jury trial on the prior conviction allegations. (3CT 784; 23RT 6609.) The trial court reviewed certified records of conviction and found beyond a reasonable doubt that Flowers had suffered a prior felony conviction for robbery (§ 211) in 1995 and a prior felony conviction for making a criminal threat (§ 422, subd. (a)) in 2014. (2CT 463, 469, 526-527; 23RT 6611-6612.) The court found that these were serious or violent felony convictions within the meaning of the Three Strikes law. (23RT 6611-6612.)

B. The probation report and sentencing hearing

As summarized in the presentence probation report, Flowers was convicted of 16 misdemeanor and felony crimes between 1994 and 2019. (2CT 686.) The report listed five possible factors in aggravation: (1) the manner in which the crime was carried out indicates planning; (2) the defendant engaged in violent conduct that indicates a serious danger to society; (3) the defendant's prior convictions as an adult are numerous or of increasing seriousness; (4) the defendant has served a prior prison term; and

(5) the defendant's prior performance on probation or parole was unsatisfactory. (2CT 698; see Cal. Rules of Court, rule 4.421.) The report did not list any mitigating factors. (2CT 698.)

Before the May 2021 sentencing hearing, Flowers's counsel filed a sentencing memorandum and requested that the court dismiss a prior strike conviction under section 1385, subdivision (a) and *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497. (2CT 610-644.) At the hearing, defense counsel argued that Flowers's role in the underlying robbery was limited and that he was a "corrigible" individual. (25RT 7214-7215.) Counsel requested that the court strike two portions of the probation report that stated Flowers had a history of firearm use and that he showed no remorse. (25RT 7215-7216.) The court struck the statement indicating Flowers expressed no remorse. (25RT 7216; 2CT 698.) Counsel also acknowledged that "historically there was a problem certainly with parole and probation," but argued that "a more recent experience shows success." (25RT 7215.) Counsel did not contest any of the other aggravating circumstances listed in the probation report or argue that there were any mitigating factors. (25RT 7214-7216.)

In a sentencing brief, the People emphasized Flowers's lengthy criminal history and his arrests for resisting arrest a few weeks after committing the robbery in this case and selling a controlled substance one month later. (2CT 653, 655.) The People acknowledged that Flowers's 1995 strike conviction was 25 years old and did not involve the use of a weapon. (2CT 655.) They also acknowledged that Flowers had cooperated with law

enforcement during the investigation of the robbery in this case. (2CT 655.) In light of those circumstances, the People recommended that the court dismiss the 1995 strike conviction and sentence Flowers to a determinate sentence of 15 or 20 years, consisting of the upper term of five years doubled based on the 2014 prior strike, plus an additional five or 10 years for Flowers's prior serious felony convictions. (2CT 655.)

The court considered the sentencing briefs filed by both parties, the probation report, a victim impact statement from Dorado, and a statement Flowers previously made. (25RT 7216.)[2] It sentenced Flowers as follows:

> The court, given the district attorney's position regarding prior 12, that's the 1995 Penal Code section 211 conviction alleged pursuant to the Penal Code section 667(d) and (e) and 1170.12(b) and (c), we'll strike it—so I'm striking one of those strikes as suggested by [the prosecutor]. The court will consequently . . . sentence you to the upper term of five years for count 1. I selected the upper term because of your long and significant criminal history, and because of the numerous factors in aggravation. I'll then double the five years for a total of 10 years based on the true findings as to prior 13, the 2014 Penal Code 422(a) conviction alleged pursuant to Penal Code section 667(d) and (e), and 1170.12(b) and (c).

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[2] At the sentencing hearing, defense counsel referenced a statement about remorse Flowers had made directly to the court at a prior appearance. The court said it took Flowers's statement into consideration, but there is no transcript of Flowers's statement in the reporter's transcripts. (See 25RT 7215-7216.)

(25RT 7216-7217.) It then imposed an additional five years for each prior serious felony conviction (§ 667, subd. (a)). In total, the court sentenced Flowers to 20 years in prison. (25RT 7217.)

C. The Court of Appeal's opinions

On direct appeal in 2022, the Court of Appeal addressed the applicability of SB 567, which became effective while Flowers's appeal was pending. (See *People v. Flowers* (July 26, 2022, B312522) opn. ordered nonpub. June 11, 2025, S276237.) It declined to determine whether SB 567 applied retroactively to Flowers's nonfinal judgment because it concluded that, ultimately, remand for resentencing was unnecessary. (*Ibid*.) Relying on *People v. Towne* (2008) 44 Cal.4th 63 and *People v. Black* (2007) 41 Cal.4th 799, the Court of Appeal reasoned that three of the five aggravating factors relied on by the sentencing court could be "readily established by the certified records." (*Flowers*, previously published at 297 Cal.Rptr.3d 436, 440.) Further, the Court of Appeal reasoned that "the record 'clearly indicates' that the trial court would not impose a more favorable sentence upon theoretical reversal for resentencing" because there were no mitigating circumstances. (*Id*. at p. 441.) It concluded that any error was harmless and there was no miscarriage of justice. (*Ibid*.) This Court granted review and deferred further action pending the decision in *Lynch*. (*People v. Flowers* (Oct. 12, 2022, S276237).) After *Lynch* was decided, this Court transferred the matter back to the Court of Appeal for reconsideration. (*People v. Flowers* (June 11, 2025, S276237).)

Upon reconsideration, and after applying *Lynch* and *Wiley*, the Court of Appeal again affirmed the judgment. (Opn. 12.) First, the court concluded that "[a]ny fact-finding error here is harmless beyond a reasonable doubt because the jury would have found every and 'all' of the aggravating sentencing factor[s] true beyond a reasonable doubt." (Opn. 8.) In reaching that conclusion, the Court of Appeal explained that the "factual predicate to the robbery is horrendous" and referenced Dorado's impact statement that she had not worked since the robbery, which had "forever changed" her life and caused mental trauma. (Opn. 8.) The Court of Appeal further reasoned that certified records established Flowers's five prior felony convictions and three prior prison terms, which proved the aggravating factors that Flowers's convictions as an adult were numerous (Cal. Rules of Court, rule 4.421(b)(2)) and that Flowers had served a prior prison term (Cal. Rules of Court, rule 4.421(b)(3)). (Opn. 8.) The court also concluded that Flowers's poor performance on probation and parole (Cal. Rules of Court, rule 4.421(b)(5)) was evident from the certified records, which it summarized as follows:

> [Flowers] was convicted of robbery in 1995 and was granted five years' probation, which he violated. Probation was revoked and terminated after he committed attempted burglary in 1997. The court executed a two-year sentence for robbery and a consecutive eight months for the attempted burglary. He was convicted of a domestic violence offense in 2003 and granted three years' probation, which he violated. His probation was revoked and a five-year prison sentence was imposed. He also repeatedly violated parole following his first two prison commitments. He

> was convicted of criminal threats in 2014 and was granted three years' probation. He admitted a probation violation a few months thereafter. Although he completed the remainder of the probation term, he committed the current offense just two years later.

(Opn. 8-9.)

In distinguishing *Wiley*, the Court of Appeal noted that none of Wiley's offenses was more serious than the others and a jury could have disagreed as to whether his criminal conduct increased in seriousness. (Opn. 9, citing *Wiley*, *supra*, 17 Cal.5th at p. 1090.) But here, the court explained, *all* of Flowers's felony convictions were serious. The Court of Appeal further reasoned that, in any case, the sentencing court focused on the "length and significance" of Flowers's criminal history and did not mention the "increasing seriousness" of Flowers's convictions. (Opn. 9-10.) The Court of Appeal concluded, "[i]n sum, had these aggravating factors been presented to the jury, they would have been found . . . all true beyond a reasonable doubt (*Lynch*, *supra*, 16 Cal.5th at p. 777[])" and "no 'rational fact finder could have come to the *opposite* conclusion.'" (Opn. 9, 10, citing *Wiley*, at p. 1090.)

The Court of Appeal further determined that the sentencing court "'clearly indicate[d]' that it would not have imposed a lesser sentence had it been aware of its more limited discretion." (Opn. 10.) The Court of Appeal referenced the sentencing court's emphasis on Flowers's "'long and significant criminal history'" that spanned over 20 years. (Opn. 10.) It concluded there was no miscarriage of justice and that remand for resentencing was not necessary. (Opn. 10.)

ARGUMENT

THE COURT OF APPEAL CORRECTLY DETERMINED THAT REMAND FOR RESENTENCING UNDER AMENDED SECTION 1170, SUBDIVISION (B) WAS UNWARRANTED

While it is undisputed that amended section 1170, subdivision (b) applies retroactively to Flowers's nonfinal judgment, remand for resentencing is not required here. (See *Lynch*, *supra*, 16 Cal.5th at p. 742.) Applying the *Lynch* harmless error standard and the *Gutierrez* "clearly indicates" standard, the Court of Appeal correctly determined that remand would be an idle act. (See *Lynch*, at p. 768; *Gutierrez*, *supra*, 58 Cal.4th at p. 1391.) The record demonstrates that each aggravating factor relied on by the sentencing court to impose the upper term sentence would have been found true beyond a reasonable doubt if presented to a jury. The record also clearly indicates that the sentencing court would still have imposed the upper term sentence even if it had been aware of its more limited discretion.

A. The sentencing court relied on five aggravating circumstances to impose the upper term

At the sentencing hearing, the court selected the upper term because of Flowers's "long and significant criminal history, and because of the numerous factors in aggravation." (25RT 7216-7217.) The parties agree that the sentencing court's reference to the "numerous factors in aggravation" to justify the upper term indicates that the court relied on all five aggravating circumstances listed in the probation report. (OBM 26-30.)

The only aggravating factor solely "relating to the crime" was that the manner in which the crime was carried out

indicated planning. (2CT 698; Cal. Rules of Court, rule 4.421(a)(8).) Aggravating factors "relating to the defendant" included that: he engaged in violent conduct that indicates a serious danger to society; his prior convictions as an adult are numerous or of increasing seriousness; he served a prior prison term; and his prior performance on probation or parole was unsatisfactory. (2CT 698; see Cal. Rules of Court, rule 4.421(b).) The parties agree that all of these aggravating circumstances fall outside the *Almendarez-Tores* prior conviction exception. (See OBM 24, 30-40 [focusing on harmless error analysis for each factor].)

B. The record and Flowers's concessions establish that each aggravating circumstance relied upon by the sentencing court would have been found true beyond a reasonable doubt by a jury

Applying *Lynch*, the Court of Appeal correctly determined that each of the aggravating factors relied on by the sentencing court to impose the upper term sentence would have been found true beyond a reasonable doubt by a jury. (Opn. 3, 8-9.)

1. Flowers served a prior prison term

First, the aggravating fact that Flowers served a prior term in prison (Cal. Rules of Court, rule 4.421(b)(3)) "was uncontested and supported by overwhelming evidence" (*Neder v. United States* (1999) 527 U.S. 1, 17). The probation officer's report referenced case number SLO F342427 for this aggravating circumstance (2CT 698), and the certified records of conviction established that Flowers served a prison term for that conviction (2CT 484, 494, 506). The certified records of conviction further established that Flowers had suffered four other felony

convictions and served two other prison terms. (2CT 463-556.) Moreover, Flowers has never contested that he served a prior term in prison. (See OBM 37-40; see also AOB 18-25; ASB 13-14.)[3] In fact, Flowers acknowledged in his sentencing memorandum that he had received prison commitments in 1997, 2004, and 2011. (2CT 623.) In light of the certified records of conviction and Flowers's own admissions, no reasonable juror would have found that Flowers had not served a prior prison term.

2. Flowers had numerous prior convictions

Second, the aggravating fact that appellant's prior convictions were numerous (Cal. Rules of Court, rule 4.421(b)(2)) was supported by overwhelming evidence.[4] As explained, the certified records of conviction established that appellant had suffered five felony convictions. (2CT 463-556.) No rational juror would have found five felony convictions not to be "numerous." (See e.g., *People v. Searle* (1989) 213 Cal.App.3d 1091, 1098 [finding three prior DUI convictions to be "numerous" under rule

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[3] "ASB" refers to Flowers's Supplemental Brief filed in the Court of Appeal following this Court's transfer after *Lynch*.

[4] In *Wiley*, this Court left open the question of whether a determination as to the numerosity of prior convictions falls within the prior conviction exception. (*Wiley, supra*, 17 Cal.5th at p. 1085, fn. 9 [finding it unnecessary to decide whether four prior felony convictions falls within the *Almendarez-Torres* exception].) The question need not be resolved here because, even assuming a numerosity determination falls outside the prior conviction exception, it is clear from the record that a jury would have found beyond a reasonable doubt that Flowers's convictions were numerous.

4.421(b)(2)]; cf. *People v. Berry* (1981) 117 Cal.App.3d 184, 191 [noting that two prior convictions "cannot be 'numerous'"].) Furthermore, the probation officer's report revealed a total of 16 felony and misdemeanor convictions between 1994 and 2019. (2CT 695.) Like with the prior prison term circumstance, Flowers did not contest the probation officer's summary of his criminal history or the numerosity of his prior convictions. (25RT 7214-7216.) Indeed, Flowers's own sentencing memorandum listed 17 prior convictions between 1994 and 2014, and included four additional criminal cases filed in 2019 and 2020. (2CT 622-623.) In light of this uncontested evidence, no rational juror would have found that Flowers's prior convictions were not numerous.

Flowers's reliance on *People v. Wright* (2025) 113 Cal.App.5th 832 is misplaced. (OBM 37-38.) In *Wright*, the lack of a jury trial on the aggravating factor of whether the defendant had suffered numerous prior convictions could not be deemed harmless beyond a reasonable doubt because, as the parties agreed, there were "factual uncertainties about the number and character" of the defendant's convictions. (*Wright*, at p. 847.) For instance, 11 out of the defendant's 13 convictions stemmed from a single incident in which he robbed a restaurant while 11 people were inside. (*Ibid.*) The defendant conceded only three convictions arising out of separate occasions, and the appellate court in *Wright* was "unsure" that a jury would unanimously agree that three robberies over the course of 49 years was "numerous." (*Ibid.*) Here, by contrast, Flowers actually listed

more prior convictions in his sentencing memorandum than were listed in the probation report, and each prior conviction was indisputably associated with a separate case number. (Compare 3CT 622-623 with 3CT 698.) Thus, the factual uncertainties regarding the number and character of convictions that existed in *Wright* are not present here. In light of the uncontested and overwhelming evidence that had Flowers suffered at least five and as many as 17 prior convictions, no reasonable juror would have found that his prior convictions were not numerous.

3. Flowers's prior performance on probation and parole was unsatisfactory

Third, overwhelming evidence supported the aggravating fact that appellant's prior performance on probation and parole was unsatisfactory. (Cal. Rules of Court, rule 4.21(b)(5).) The certified records of conviction established that Flowers's parole was revoked on 12 separate occasions between 1997 and 2010, resulting in a return to prison custody each time. (2CT 500, 502, 504, 508, 510, 512.) The certified records further established that appellant had absconded from parole supervision on five separate occasions between 2006 and 2009. (2CT 500, 502, 504.) Flowers's performance on probation was similarly poor, with the certified records of conviction establishing that Flowers *admitted* probation violations in 1996, 1997, and 2014. (2CT 466-467, 476-479, 486-487, 531.)

"The lack of a jury trial is not harmless under *Chapman* if 'the record contains evidence that could rationally lead to a contrary finding with respect to the aggravating fact at issue." (*Wiley*, *supra*, 17 Cal.5th at p. 1087.) But here, the record

contained no such evidence. Indeed, at the sentencing hearing, Flowers's attorney acknowledged that "historically there was a problem certainly with parole and probation." (25RT 7215.)

Although Flowers's attorney asked the sentencing court to reconsider this aggravating circumstance because "a more recent experience shows success" (25RT 7215), he also acknowledged that Flowers had spent time in prison due to "repeatedly absconding from parole after his first two commitments" (3CT 623). Thus, even accepting Flowers's argument that he successfully completed postrelease community supervision after his release in 2012, and that he completed probation with only one violation after his most recent release in 2014, these facts would not undermine the conclusion that Flowers's *overall* performance on probation and parole was unsatisfactory. Further, unlike in *Wiley*, where the probation officer's report characterized Wiley's "mixed performance on probation as *both* an aggravating factor *and* a mitigating factor" (*Wiley*, *supra*, 17 Cal.5th at p. 1091), Flowers's performance on probation and parole could not fairly be characterized as "mixed" or as both an aggravating and mitigating circumstance. (*Ibid.*) Instead, in light of the overwhelming evidence of Flowers's numerous parole violations and admitted probation violations, no rational juror could have found that Flowers's overall performance on parole or probation was satisfactory.

4. The robbery involved planning

Next, the record established that the robbery involved planning (Cal. Rules of Court, rule 4.421(a)(8)), and no rational

juror could conclude otherwise. As the Court of Appeal noted, the robbery was calculated (Opn. 8), and the evidence of planning was undisputed. Jurors tasked with determining whether the offense was carried out with planning are instructed: "Planning refers to conduct before the crime, preparing for its commission." (CALCRIM No. 3230.) In other words, planning simply means the crime was not spontaneous.

As Flowers acknowledges, he was convicted as an aider and abettor based on the evidence of his preparatory conduct leading up to the robbery. (OBM 32-35.) The ample evidence of Flowers's planning included multiple phone calls and text messages between Flowers and Alford in the days leading up to the robbery (20RT 5740-5745, 5756, 5776); surveilling the Check Into Cash two days prior to the robbery (18RT 5200); conducting Google searches for Check Into Cash's phone number (18RT 20RT 5781-5782); placing a phone call to Check Into Cash to determine whether Dorado was working (18RT 5112-5113, 5152); and instructing Alford to "[m]ake sure when you come we have plenty of time before she closes. Make sure of that" (20RT 5770-5771). Moreover, Flowers knew that Alford intended to wear a disguise (18RT 5200), and Alford brought duct tape to use on Dorado (17RT 4858, 4862; 18RT 5177-5178, 5189; 19RT 5421), further showing the crime was planned and not spontaneous.

Given that evidence, no rational juror could have found that the crime did not involve planning. (See *People v. DeHoyos* (2013) 57 Cal.4th 79, 153-154 [defendant's deliberate acts of acquiring a private room, driving to areas where young children could be

found, and using a ruse to lure victims "showed the kidnapping and sexual crimes were not a spontaneous decision based on a coincidental encounter" and a jury "[u]nquestionably" would have found the crime involved planning under former rule 421(a)(8), making any error under *Apprendi* harmless].) Indeed, it would be impossible for a jury to find Flowers guilty as an aider and abettor based on this evidence without also finding that the crime involved planning. (See *In re Lopez* (2023) 14 Cal.5th 562, 580 ["if no reasonable jury would have found in favor of the defendant on the missing fact, given the jury's actual verdict and the state of the evidence, the error may be found harmless beyond a reasonable doubt," internal quotation marks and brackets omitted]; see also *People v. Aledamat* (2019) 8 Cal.5th 1, 15 [one way of assessing alternative theory error "examines what the jury necessarily did find and asks whether it would be impossible, on the evidence, for the jury to find *that* without *also* finding the missing fact as well"].)

Flowers disputes that the crime involved planning (OBM 32-35), but his arguments largely focus on whether the crime was carried out with "sophistication," which notably was not underlined by the probation officer with regard to this aggravating circumstance. (See 2CT 698 ["4.421(a)(8) - the manner in which the crime was carried out indicates planning, sophistication, or professionalism"]; OBM 34 [arguing Flowers did not think through the robbery because he did not try to conceal his cellphone location, took no measures to avoid being seen, and did not delete his Google search history or text

messages]; 3CT 698.) As explained, jurors tasked with finding this aggravating circumstance are instructed that planning activity simply refers to conduct before the crime preparing for its commission, which was amply established here. Further, jurors need not agree on which acts or conduct demonstrate that the manner of committing the crime involved planning. (CALCRIM No. 3230.) Flowers's arguments contesting the evidence of planning have even less force since jurors need not agree on the specific acts establishing planning.

5. Flowers engaged in violent conduct

Finally, the trial evidence and record of conviction established that Flowers engaged in violent conduct indicating a serious danger to society (Cal. Rules of Court, rule 4.421(b)(1)). Jurors tasked with determining this aggravating circumstance are instructed to consider the defendant's conduct before or after the commission of the crime, as well as evidence about the defendant's background. (CALCRIM No. 3234.)

As explained, the trial evidence showed that Flowers and Alford planned and carried out an armed robbery of Check Into Cash specifically when Dorado was working. Alford duct taped Dorado's wrists, ankles, and eyes, pointed a gun at her, and threatened that if she looked up "somebody will get mad." (17RT 4861-4863.) Although Alford was the direct perpetrator of the robbery (OBM 35-37), the jury found that Flowers was an aider and abettor to the crime, meaning it found beyond a reasonable doubt that Flowers knew Alford intended to commit the robbery, and intended to and did aid, encourage, or facilitate Alford's

commission of the crime. (2CT 313-314.) The prosecutor's theory was that Flowers provided his knowledge of the business as a former customer. (22RT 6087-6088.) Flowers also acted as a lookout, and text messages showed he instructed Alford to pick him up with plenty of time before Dorado closed for the evening. (22RT 6088-6091, 6305.) Moreover, as explained, Flowers's records of conviction showed five prior felony convictions and two prior serious or violent felony convictions. (2CT 463-556.) No rational juror would find that Flowers's conduct of planning and carrying out the armed robbery that traumatized the victim, coupled with his prior history of serious or violent felonies, did not indicate a serious danger to society. (17RT 4852; 3CT 660.)

Unlike the defendant in *Lynch*, Flowers did not contest this aggravating factor at his sentencing hearing. While defense counsel argued in part that Flowers fell outside the spirit of the Three Strikes law because he played a minimal role in the robbery, counsel did not dispute that Flowers's conduct and background showed he posed a serious danger to society. (See 3CT 617-620; 25RT 7214-7215; *Lynch*, *supra*, 16 Cal.5th at p. 776 [where defense counsel contested whether Lynch posed a serious danger to society and the jury acquitted Lynch of the most serious charge, it would not have been impossible for the jury to find in his favor on this factor].)

It is possible that Flowers might have presented additional evidence contesting each of the aggravating circumstances in a jury trial. (OBM 31-32; *Wiley*, *supra*, 17 Cal.5th at p. 1091; *Lynch*, *supra*, 16 Cal.5th at pp. 775-776.) However, additional

evidence contesting these factors would not have undermined the undisputed evidence already in the record—e.g., that Flowers served prior prison terms (2CT 463-556); concededly suffered between five and 17 prior convictions (3CT 622-623); concededly repeatedly violated probation and parole (3CT 623-624; 25RT 7215); was found guilty as an aider and abettor based largely on planning activity (OBM 32-35; 3CT 617-620); and engaged in violent conduct and had a criminal history indicating a serious danger to public safety (2CT 463-556). In light of this overwhelming evidence, the Court of Appeal correctly determined that each aggravating circumstance relied on by the sentencing court would have been found true beyond a reasonable doubt by a jury.

C. The record clearly indicates the sentencing court would have imposed the same upper term sentence under amended section 1170, subdivision (b)

The Court of Appeal correctly concluded that, notwithstanding the intervening change in law establishing a middle term presumption, remand for resentencing was unnecessary because the record clearly indicates the sentencing court would have imposed the same upper term sentence under amended section 1170, subdivision (b). (Opn. 10.) In concluding that remand for resentencing was unwarranted, the Court of Appeal properly focused on the sentencing court's reasons for finding the upper term justified and did not merely focus on the length of the original sentence or the subsidiary decisions that the sentencing court made in constructing it. (Opn. 10; see *Salazar*, *supra*, 15 Cal.5th at p. 431.) The trial court explained

that it "selected the upper term because of [Flowers's] long and significant criminal history, and because of the numerous factors in aggravation." (25RT 7216-7217.) This statement "clearly indicates that it would have found aggravating circumstances sufficiently weighty to 'justify' an upward departure from the legislative mandate for no more than a middle term sentence." (*Lynch, supra*, 16 Cal.4th at p. 777.)

Salazar does not compel reversal here. At issue in *Salazar* was section 1170, subdivision (b)(6), which requires a sentencing court to impose the low term if there is evidence that the defendant's psychological, physical, or childhood trauma was a contributing factor in the commission of the offense. (§ 1170, subd. (b)(6)(A).) Under this subdivision, a trial court must impose the low term unless the court finds that aggravating circumstances outweigh the mitigating circumstances such that imposition of the lower term would be contrary to the interests of justice. (§ 1170, subd. (b)(6).) Thus, for a sentencing court to deviate from the low term presumption when there is evidence that psychological, physical, or childhood trauma was a contributing factor, the court must find both that aggravating circumstances outweigh the mitigating circumstances and that imposition of the low term would be contrary to the interests of justice. (§ 1170, subd. (b)(6).)

In *Salazar*, it was undisputed that there was evidence in the record sufficient to trigger the low term presumption; in fact, the sentencing court referenced mitigating evidence about defendant's psychological, physical, or childhood trauma, as well

as other mitigating factors, at the sentencing hearing. (*Salazar*, *supra*, 15 Cal.5th at pp. 426-427.) In light of this mitigating evidence, the sentencing court exercised its discretion to impose the middle term, impliedly finding that the aggravating circumstances did not justify imposition of the upper term. (*Id.* at p. 427.) This Court determined that the presence of the exact mitigating circumstances that would trigger a low term presumption, coupled with the sentencing court's express acknowledgement of those mitigating factors, made the record unclear as to whether the sentencing "court would have concluded that 'the aggravating circumstances outweigh the mitigating circumstances so that imposition of the lower term would be contrary to the interests of justice.'" (*Id.* at p. 428, brackets omitted.)

But here, the record clearly indicates that the sentencing court would have imposed the same upper term sentence under the current statute. The court explained that it selected the upper term because of Flowers's "long and significant criminal history, and because of the numerous factors in aggravation." (25RT 7216-7217.) Notably, unlike the court in *Salazar*, the court here found no mitigating factors. Although the sentencing court's reasoning did not definitively state that "it would not impose a lesser sentence under any circumstances" (*Lynch, supra*, 16 Cal.5th at p. 777), it would not be speculative to conclude from the sentencing court's exclusive focus on Flowers's "long and significant criminal history" and "the numerous factors in aggravation" that "it would have found aggravating

circumstances sufficiently weighty to 'justify' an upward departure from the legislative mandate for no more than a middle term sentence" (*ibid.*).

Flowers argues that there is evidence in the record suggesting the sentencing court may have imposed a lower sentence had it been aware of its more limited discretion under section 1170, subdivision (b). (OBM 41-42.) He underscores that the sentencing court considered the nature and circumstances of his prior serious and violent felony offenses and found that he was outside the spirit of the Three Strikes law. (OBM 42.) But as Flowers acknowledges, this Court explained in *Lynch* that a sentencing court's Three Strikes determination under *Romero* differs from its determination of whether aggravating circumstances justify imposition of the upper term and is not indicative of what the sentencing court would do upon hypothetical remand. (*Lynch*, *supra*, 16 Cal.5th at p. 776.) Further, contrary to Flowers's argument (OBM 42), the prosecutor's position on the *Romero* motion does not aid Flowers. Indeed, Flowers ignores that the prosecutor agreed he should be sentenced as a second (rather than third) strike offender, but further advocated for the upper term sentence doubled by the most recent strike conviction. (3CT 655.)

CONCLUSION

The judgment of the Court of Appeal should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Answer Brief on the Merits uses a 13-point Century Schoolbook font and contains 6,664 words.

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May 15, 2026

DECLARATION OF ELECTRONIC SERVICE

Case Name: **People v. Flowers** Case No.: **S293388**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on May 15, 2026, at Los Angeles, California.

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Declarant

Signature

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