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Supreme Court of California
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	**No. S277962**
	(Sixth District Court of Appeal H049412)
Plaintiff and Appellee,	
-vs-	
LUISRAMON MANZANO ARELLANIO	
Defendant and Appellant.	

APPELLANT'S ANSWER BRIEF ON THE MERITS

Appeal from the Judgment of the Superior Court
of the State of California for the County of Santa Clara
THE HONORABLE DANIEL NISHIGAYA

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	**No. S277962**
Plaintiff and Appellee,	)	**(Sixth District Court of Appeal No. H049412)**
-vs-	)	
LUISRAMON MANZANO ARELLANIO ,	)	
Defendant and Appellant.	)	

INTRODUCTION AND OVERVIEW

While the issue requested to be presented, i.e., "When a defendant obtains resentencing of a conviction under Penal Code section 1172.6, subdivision (e), is the trial court permitted to impose not only the target offense or underlying felony, but also corresponding enhancements?", ostensibly is a question of statutory interpretation, appellant contends that its resolution involves far more than that.

The Court of Appeal has accurately explained why the statutory language compels the conclusion that, when resentencing pursuant to 1172.6, the court may not impose enhancements to the target or underlying offense that it determines to be applicable. There are, however, additional principles of statutory construction that support the Court of Appeal's analysis and conclusively refute the contrary arguments made by the AG. Perhaps the most pertinent of those is the Canon of Constitutional Avoidance. What is obvious – and what the AG clumsily attempts to ignore – are the host of constitutional problems that would be raised if a

resentencing court were to attempt to impose sentencing enhancements as the trial court did in this case.

Respondent advocates "flexibility" in the selection of the target offense, a term suggested by the *Howard* (*People v. Howard* (2020) 50 Cal. App. 5th 727) and *Watson* (*People v. Watson* (2021) 65 Cal. App. 5th 474) courts but found nowhere in the statutory framework or legislative history. BOM p.8. Respondent promotes such "broad discretion" at the sake of due process and reliable fact finding. Such due process implications to the rights of a defendant from being subjected to unadjudicated enhancements include, but are not limited to, the right to notice, a fair adjudicatory process, the right to a jury trial, and the right of a defendant not to be found guilty unless proven so beyond a reasonable doubt. See AOB pp. 23, 33-37.)

Appellant contends that it is precisely those concerns, in addition to basic principles of statutory construction, that compel the result reached by the court of appeal. Indeed the constitutional infirmities that wold result from respondent's proposed interpretation are precisely the type of issues that are "fairly included" in the issue presented. (See Cal. Rules of Ct. 8.516 (a)(1).)

Indeed, respondent envisions a standardless process by which, as occurred here, a trial court, in determining criminal liability, may use its discretion in not only resurrecting dismissed or uncharged enhancements that, as occurred here, were never proven in any prior proceeding but likely never could be. Aside from the constitutional issues, the procedural morass that would from allowing such unbridled "flexibility" would inevitably lead to arbitrary and unjust results.

As mentioned, it is basic principle of statutory interpretation that in construing a statute a reviewing court should avoid constitutional issues wherever possible. The Court of Appeal decision is the only interpretation of the statute that accommodates that principle of judicial restraint, as well as procedural due process

and avoiding having to judicially legislate procedures that the legislature did not include or address in enacting the new law. In this regard, respondent is quite incorrect that section 1172.6 is a resentencing matter only. In Section I of Chapter 1015 of the new law, the legislature made clear that its provisions were based on the United States constitution as well as the decisions of this Court implementing the decisions of the United States Supreme Court.

In addition, that preamble provides that it is “a bedrock principle of the law and of equity that a person should be punished for his or her actions according to his or her own level of individual culpability” Subdivision (d) of section 1172.6 provides for nothing less than full due process guarantees in the process. It would indeed be anomalous for a trial court to conduct a subdivision (d) hearing on the issue of whether a petitioner is guilty of murder, and then after vacating such a conviction be permitted to designate the target offense on disputed evidence and its unarticulated gestalt view of that evidence. Respondent’s interpretation would also allow a "conviction" and sentencing based on evidence that did not meet any standard of proof, let alone proof beyond a reasonable doubt

Were this Court to follow the interpretation urged by respondent, it would need to import wholescale a set of procedures not set forth in the statute. The facts of this case, where there was no jury trial, indeed no hearing at all in which facts were presented with or without cross examination, are illustrative of this problem. As a result, both the facts underlying the murder, which remain murky with at least three different versions as to whether appellant was even armed with a firearm, and the procedural history, will be recited at length. By doing so appellant hopes to demonstrate that respondent has provided this Court with no guidance as to how a trial court should proceed in any manner other than as decided by the court of appeal.

LEGAL BACKGROUND

A The Statutory Framework [1]

Subdivision (d) (3) of section 1172.6 in pertinent part now provides as to the procedure for what occurs after the issuance of an order to show:

> (D)(3) At the hearing to determine whether the petitioner is entitled to relief, the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is guilty of murder or attempted murder under California law as amended by the changes to Section 188 or 189 made effective January 1, 2019. ...The admission of evidence in the hearing shall be governed by the Evidence Code, except that the court may consider evidence previously admitted at any prior hearing or trial that is admissible under current law, including witness testimony, stipulated evidence, and matters judicially noticed. The court may also consider the procedural history of the case recited in any prior appellate opinion. However, hearsay evidence that was admitted in a preliminary hearing pursuant to subdivision (b) of Section 872 shall be excluded from the hearing as hearsay, unless the evidence is admissible pursuant to another exception to the hearsay rule. The prosecutor and the petitioner may also offer new or additional evidence to meet their respective burdens. A finding that there is substantial evidence to support a conviction for murder, attempted murder, or manslaughter is insufficient to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing. If the prosecution fails to sustain its burden of proof, the prior conviction, and any allegations and enhancements attached to the conviction, shall be vacated and the petitioner shall be resentenced on the *remaining charges*.

As to those "remaining charges" Section 1172.6 states that the petitioner shall be resentenced " in the same manner as if the petitioner had not previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence." (§ 1172.6, subd. (d)(1).)

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[1] Since the filing of appellant's opening brief and respondent's brief section 1170.95 has been renumbered as section 1172.6, and those sections may be used interchangeably in this Answer brief according to the context in which the reference to new law is made.

If there are no “remaining charges”:

> (e) The petitioner’s conviction shall be redesignated as the target offense or underlying felony for resentencing purposes if the petitioner is entitled to relief pursuant to this section, murder or attempted murder was charged generically, and the target offense was not charged. Any applicable statute of limitations shall not be a bar to the court’s redesignation of the offense for this purpose.

How the target offense is to be determined has been the subject of some litigation in the court of appeal. How those decisions impacted the manner in which the trial court proceeded here are instructive as to how appellant contends this Court should resolve the issue presented.

B. Cases Decided by the Court of Appeal

Until the court of appeal here addressed the issue of enhancements directly, no court of appeal had interpreted whether an enhancement, charged or not, is included in the “target offense” referred to in section 1172.6. Respondent’s contention that a trial court having “flexibility” in selecting the target offense is based on the language in *People v. Howard* supra 50 Cal. App. 5th 727 and *People v. Watson* (2021) 65 Cal. App. 5th 474, and would be applicable, under respondent’s reasoning, to an uncharged offense or enhancement, as well as one that was charged and dismissed. As occurred here, respondent urges that a trial court be permitted to go beyond the record of conviction and determine in some manner, other by considering evidence offered at the time of the hearing, to what target offense and/or enhancements a petitioner should be re-sentenced. As mentioned, here no evidence was offered at the hearing, and the trial court did not specify how and in what manner it reached its finding that appellant could be sentenced not only for the robbery but for the use allegation.

At the outset, the proper construction of section 1172.6 subdivision (e) presents an issue of statutory interpretation. (*People v. Gonzalez* (2017) 2 Cal.5th

1138, 1141 "[W]hen construing statutes, our goal is 'to ascertain the intent of the enacting legislative body so that we may adopt the construction that best effectuates the purpose of the law.' [Citation.]" This Court must first examine the words of the statute, "giving them their ordinary and usual meaning and viewing them in their statutory context, because the statutory language is usually the most reliable indicator of legislative intent."' (*People v. Albillar* (2010) 51 Cal.4th 47, 54–55 ["If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend. If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy."]; *Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.)

Given these principles of statutory construction, and the lack of clarity as to how the target offense and any applicable enhancements, when uncharged, or in this case dismissed, can be identified, given due process considerations and the fact that some burden of proof must exist, *Howard* and *Watson* are not that helpful. As mentioned, both articulated only that the trial courts should be allowed some "flexibility in designating the underlying offense for resentencing purposes". (*People v. Watson* supra. 65 Cal. App. 5th 474, 488; *People v. Howard* supra. 50 Cal. App. 5th 727, 730.) While that standard on its face is subject to some scrutiny, in that neither case suggested the standard of proof required for this inquiry, both cases at least identified evidence in the record purporting to support the trial court's rulings. Neither case, however, involved a situation where a charge or allegation had been previously dismissed, nor where the record of conviction did not include the evidence upon which the trial court had made its determination.

***People v. Howard* (2020) 50 Cal. App. 5th 727**

Howard involved a jury trial, the transcript of which was apparently before

the trial court as well as the court of appeal. The issue was whether the trial court could, based on that record, determine the degree of the burglary, i.e. whether it was of the first degree, as well as whether it constituted a violent felony pursuant to 667.5 subd. (c)(21). Based on the record, the Court of Appeal upheld the trial court determining that the target offense indeed was a "residential burglary with a person present." (*Id.* at p. 734).

It is instructive, however, to note what the court in *Howard* also stated. As to the evidence that might be considered, the court stated, "We do not delineate the scope of evidence the court may consider when designating the underlying felony pursuant to section 1170.95, subdivision (e) because that issue is not squarely before us." The court also held, "Additionally, we question the practicality of requiring a trial court to ignore evidence established at trial when designating the underlying felony pursuant to section 1170.95, subdivision (e)."

In so stating, the court also noted that subdivision (d)(3) contains express language regarding the prosecution's burden to prove that the petitioner is not entitled to relief. It also identifies the evidence, i.e. the record of conviction supplemented by new evidence, that the court may consider when making an eligibility determination. (§ 1170.95, subd. (d)(3).) On the other hand, the court of appeal observed that section 1170.95, subdivision (e) contained no such language. "Reading subdivisions (d)(3) and (e) together suggests the Legislature knew how to circumscribe the court's redesignation decision-making power and declined to do so." (*Id.* p. 739)

The *Howard* court concluded that in "comparing these provisions (subdivision (d) and (e)) supports our conclusion that the Legislature intended to grant the trial court flexibility when identifying the underlying felony for resentencing under subdivision (e)". The court, however, also stated that "[c]onsistent with the legislative goal of placing Howard after resentencing in a

situation where the murder and any related enhancements no longer exist, Howard's resentencing may not include count-specific enhancements unless the People establish them related to the underlying felony by evidence presented at the hearing on the section 1170.95 petition." (at p. 741) Respondent appears to ignore that part of the *Howard* holding.

Contrary to *Howard,* of course, the instant case did not stem from a jury trial but rather a plea. In addition to the factual issues not being decided upon by a jury, they were never litigated in any manner, including at a preliminary hearing. As a result the "flexibility" referred to in *Howard* and *People v. Silva* (2021) 72 Cal. App. 5th 505 see *infra.*, even if those cases were correctly decided, if applied here could result in an arbitrary and unfair result.

***People v. Watson* (2021) 64 Cal. App. 5th 474**

In *Watson,* more applicable procedurally in that as here it involved a plea to second degree murder and re-sentencing, the issue was whether the trial court could designate more than one target offense for re-sentencing purposes. As in *Howard* and the instant case, the murder by the co-defendant occurred during a residential robbery/burglary. The issue presented however, unlike here, was whether the re-sentencing court could designate more than one offense shown by the evidence as the target offense(s). In *Watson*, in that the resentencing petition arose from a plea, the trial court based its determination of what to designate the target offense(s) on testimony by the defendant at the time of the transcript of his parole hearing. (*Id*. p. 479, 486 fn. 6.) The court concluded that to do so was within the intent of the statute, if such offense were shown by the evidence, and as long as the defendant was not sentenced to a greater term of imprisonment than the original sentence.

In that *Watson* did not involve enhancements, it is similarly not helpful to the specific issue presented here but does impact the question of to what extent a

trial court has any "flexibility" in deviating from the literal language of the statute that provides for the designation of a single target offense, charged or not, and if uncharged to what degree the due process rights of a criminal defendant demand something more than what could result in arbitrary fact finding by the trial court in designating one or more of such offenses and/or enhancements.

People v. Silva **(2021) 72 Cal. App. 5th 505**

Finally, in *People v. Silva,* the issue also was whether the trial court could designate more than one offense as the "target offense", even though the defendant was convicted of only two murders resulting from two residential robberies. The record of conviction in Silva's case included full trial transcripts, preliminary hearing transcripts, and the appellate opinions in the case, now no longer admissible at the (d) (3) hearing. The Court of Appeal allowed the two vacated murder convictions to be replaced with five underlying felonies, despite the fact that Mr. Silva was never tried for the additional underlying felonies against the three other victims. [2]

Silva is also not directly pertinent to the specific issue presented here. Further given the fact that the trial court there at least referred to prior transcripts of the same defendant's trial, it also does not address the problems that occurred in this case where the trial court relied on various forms of inadmissible hearsay that would not have been admissible in the (d)(3) hearing.

Collectively, however, *Howard, Watson ,* and *Silva* do all stand for the proposition that even though section 1172.6 does not provide the full panoply of

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[2] This issue that is now before this Court is whether, despite the fact that the jury only necessarily considered whether the petitioner was guilty of a single target offense, it was proper during the re-sentencing process for the trial court to have scoured the record of that trial to locate and identify other possible charges that he could have been but was not tried let alone convicted. (See *People v. Silva*, rev. gtd. No. S272229.)

constitutional rights available to a defendant at jury trial, due process nevertheless requires at least that there be some evidence either in the record of conviction or as adduced at the (d)(3) re-sentencing hearing in order for the court to designate the target offense. The *Silva* Court acknowledged the undeniable, that the redesignation process of subdivision (e) is something "unknown in criminal procedure before section 1170.95 created it." (*Id.* p. 523.) Nevertheless, rather than "acts of lenity" there should be little question that as Justice Stratton stated in dissent in *People v. Mitchell (*2022) 81 Cal. App. 5th 575, "Senate Bill No. 1437 (2017–2018 Reg. Sess.) and former section 1170.95 are more than just acts of lenity. They created evidentiary and procedural rights and obligations that must not be abrogated." p.603

STATEMENT OF THE CASE

A. Appellant's Conviction

On September 18, 1992, Appellant was charged, along with three co-defendants, with murder in violation of Penal Code section 187, robbery in violation of section 211, attempted robbery in violation of section 664/211, and burglary in violation of section 460(a), all occurring on January 3, 1992. [3]Also alleged and appended to the first two counts were allegations pursuant to section 12022.5, that appellant personally used a firearm in the commission of the offenses.

On October 1, 1992, prior to the preliminary hearing, appellant plead guilty to one count of murder, which was designated as murder of the second degree, and all other charges, as well as the allegations pursuant to section 12022.5, were dismissed. Appellant was was sentenced to 15 years to life, concurrent to a 6-year

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[3] Appellant's co-defendants were also charged in seven other counts with unrelated robberies and attempted robberies.

sentence he had received for a separate robbery.

B. Proceedings Pursuant to Penal Code Section 1172.6

On January 30, 2019, Petitioner appearing in pro per filed a document entitled "Petition for Resentencing" and seeking relief pursuant to Senate Bill 1437 and Penal Code section 1170.95. After the district attorney filed a motion in opposition to the showing of a prima facie case, the trial court found that appellant had demonstrated a prima facie case for relief, whereupon the district attorney stipulated to a resentencing. The trial court then vacated appellant's conviction for murder, and held that the "evidence" was sufficient to warrant its order that the target offense would remain the robbery but with the personal use of a firearm allegation as well. The only facts before the court however, were police reports and other attachments to the pleadings involving the prima facie issue. Without conducting an evidentiary hearing or even identifying the evidence upon which the trial court based it ruling it held:

> "... I am going to move forward with resentencing on the attempted robbery charge with the arming allegation pursuant to 12022.5 subdivision(a). While there may be a different factual argument to be made, and I understand Mr. Arellano has, at least in the materials that are in front of me, never even admitted to having been part of the crime itself, *there is evidence in the record* that would suggest that he did possess a handgun during the time of the underlying offenses. It was charged in all three counts." (emphasis added) May 24 p. 12

<u>THE DECISION OF THE COURT OF APPEAL</u>

The Court of Appeal in reaching its holding, based on statutory interpretation grounds alone, held that "the Legislature's use of the terms "any remaining counts" and "the remaining charges" in subdivision (d)(1) and (d)(3), when contrasted against the more specific phrase "target offense or underlying felony" in subdivision (e), suggests that the Legislature intended the redesignation

and resentencing under subdivision (e) to be narrower than any resentencing that would occur when there are remaining counts or charges (which would include any attached sentence enhancements) after the murder, attempted murder, or manslaughter conviction is vacated under section 1172.6." Op. p. 20

Further, the Court of Appeal acknowledged, without discussing them, that there are "the complexities that could arise in deciding which of the myriad sentencing enhancements in our penal law might be applicable to a particular factual scenario" (Op. 19) While this holding conforms in effect with the constitutional concerns expressed by appellant raised in the court of appeal as to the procedures used by the trial court in this case, Appellant contends that in addition to the question of statutory interpretation, these issues should be considered as well in this appeal, as ramifications of respondent's arguments and advocacy of the "flexibility" doctrine. Regardless of how this Court decides the scope of section 1172.6, subdivision (e), to uphold the procedures used by the trial court here, and as advanced by respondent as adequate, would in many cases, as Justice Stratton noted, violate the due process guarantees afforded any criminal defendant when liberty related decisions are at issue.

STATEMENT OF THE EVIDENCE

Because respondent urges this Court to render its decision based on abstract principles of statutory interpretation and their view of the statute's "purpose" and selective view of the legislative history, they make no mention of the underlying facts of the original conviction. Although there was no evidentiary hearing in this matter, in that following the trial court granting the order to show cause, neither party offered to introduce evidence at the "resignation" hearing, the trial court based its ruling on what it considered was the "evidence in the record" (RT 05/24/2021 p.12). Thus appellant summarizes the pertinent facts taken from the attachments filed during the earlier litigation regarding whether appellant had

made a prima facie showing for relief pursuant to section 1170.95.

There is no dispute that this case involved a home burglary-robbery, motivated by the fact that the victim's sister Rafaela Hernandez Benitez was selling gold and jewelry out of her home, that resulted in a death. Accounts differed as to appellant's involvement.(See CT 73-78)[4]

There were essentially five accounts of the robbery some differing only slightly:

1. Appellant: Mr. Arellano was part of the planning and 'advance work' for the robbery, but he didn't go into the house.

2. Victim Hernandez: Appellant is not mentioned in this account, but there is an unnamed Suspect #3 who was standing outside during the robbery. Co-defendant Mandujano was the shooter, and "Suspect #2" put the gun to her side.

3. Mandujano: He and co-defendant Mendoza and appellant entered the house with guns, and when victim Benitez appeared from his room, they chased him. Benitez retreated to his room and tried to hold the door closed, while Mandujano tried to keep it open it and while appellant banged on it. Mandujano then saw Benitez reaching into a drawer which Mandujano feared might contain a gun. A shot was discharged which killed Benitez, and Mandujano thought it might have been from his gun, but he wasn't sure and left open the possibility that another particpant Castillo Andrade, by all accounts the violent of the robbers, might have fired from outside the house.

4. Correctional Counselor's Statement: Essentially identical to #3, without mention of Benitez reaching into a drawer or the uncertainty over where the shot came from. The correctional counselor also appeared to say that Ms. Hernandez

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[4] For a more and specific and detailed version of the facts see appellant's opening brief in the court of appeal.

identified the people in the house by name, but there is nothing to suggest she knew who any of them were.

5. Mendoza: Co-defendant Mandujano was the only one who stayed in the house; co-defendant Mendoza and Mr. Arellano went inside initially, but then went back out: and stood by the front door as the robbery unfolded. Mandujano chased victim Benitez with a gun, and aimed it at Benitez before the shot rang out.

ARGUMENT

NEITHER PRINCIPLES OF STATUTORY CONSTRUCTION NOR THE TEXT AND STATUTORY PURPOSE OF THE NEW LAW REQUIRE OR PERMIT RESENTENCING COURTS TO IMPOSE ENHANCEMENTS IN DESIGNATING THE TARGET OFFENSE FOLLOWING A VACATED MURDER CONVICTION

After the trial court, over the objection of the District Attorney, found that petitioner has demonstrated a prima facie case for relief, the prosecutor then implicitly conceded that, based on the available record, he would be unable prove appellant guilty of murder beyond a reasonable doubt. The trial court then vacated appellant's murder conviction and re-designated the "target" offense as robbery in violation of section 211. It also however, added the personal use enhancement pursuant to section 12022.5, that had been charged in the initial complaint, but dismissed as part of the plea bargain.

Because this allegation, though initially charged, had been dismissed as part of the plea bargain and thus the truth of which had never been litigated, the trial court relied on subdivision (e) of then section 1170.95 to impose the enhancement as part of the target offense of attempted robbery. As mentioned, respondent does not address at all appellant's contentions that no admissible evidence was received to prove even the target offense let alone the enhancement. Nor was appellant even apprised of the evidence, if any, that the trial court considered, or whether the trial court had found the target offense and the enhancement had been proven beyond a

reasonable doubt. Indeed, respondent appears to suggest that, despite the fact that it was not only never the subject of a jury finding, the trial court had the power to resurrect it as part of the target offense merely because the weapons enhancement was charged in the original prosecution, and may well have been dismissed at the time for insufficient evidence.

Citing *Howard*, respondent's argues that "the absence of language regarding the procedure for redesignating the conviction and resentencing thereon suggests a purposeful design to afford trial courts with flexibility in carrying out these tasks." Resp p. 22. Respondent also notes similar language in *People v. Watson supra.* 65 Cal. App. 5th at p. 488, that "section 1170.95 "reflects a legislative intent to grant superior court's flexibility in designating the underlying felony for resentencing purposes".

Nothing in the statute however supports these claims nor do the holdings of *Watson* or *Howard,* at least with regard to imposing enhancements that were not alleged as part of the remaining counts of conviction. And basic principles of statutory construction suggest the opposite is true.

A. Applicable Principles of Statutory Construction

As discussed already, it is fundamental that "[i]n ascertaining the Legislature's intent, a court turns first to language of the statute, giving the words their ordinary meaning." (*People v. Broussard* (1993) 5 Cal.4th 1067, 1071; see also *People v. Lewis* (2021) 11 Cal.5th 952, 964 ["it is well settled that we must look first to the words of the statute, 'because they generally provide the most reliable indicator of\ legislative intent'"].) Statutes should not be read in a way that leads to absurd results inconsistent with apparent legislative intent. (*People v. Cruz* (1996) 13 Cal.4th 764, 782- 783.)

Further, in construing the proper interpretation of a statute the principle of the maxim of "expressio unius est exclusio alterius" applies. That means " 'the

expression of certain things in a statute necessarily involves exclusion of other things not expressed.' " (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1391, fn. 13. It is true that expressio unius est exclusio alterius is no magical incantation, nor does it refer to an immutable rule. Like all such guidelines, it has many exceptions. For example, the rule is inapplicable where no manifest reason exists why other persons or things than those enumerated should not be included and thus exclusion would result in injustice or would run counter to a well established principle of law or "would contradict a discernible and contrary legislative intent. ". (*In re Michael G*. (1988) 44 Cal.3d 283, 291; see also *Hennigan v. United Pacific Insurance* Co (1975) 53 Cal.App.3d 1, 7 ["An intent that finds no expression in the words of the statute cannot be found to exist. The courts may not speculate that the Legislature meant something other than what it said. Nor may they rewrite a statute to make it express an intention not expressed therein."].) "

In addition, under the "second rule of statutory construction" in criminal cases (also known as the rule of lenity), when a statute is susceptible to two reasonable constructions, it "shall be" construed "as favorably to the defendant as its language in the circumstances of its application may reasonably permit...." (*Keeler v. Superior Court* (1970) 2 Cal.3d 619, 631. The application of this rule is not discretionary. This Court has held that in considering a penal application of a statute whose language is susceptible of two constructions, the court *must* ordinarily adopt the construction more favorable to the offender. "The defendant is entitled to the benefit of every reasonable doubt, whether it arise out of a question of fact, or as to the true interpretation of words or the construction of language used in a statute." (*In re Tartar* (1959) 52 Cal.2d 250, 257; see also *People v. Piper* (1986) 42 Cal.3d 471, 477; *People v. Craft* (1986) 41 Cal.3d 554, 560.)

Finally, as already mentioned as well, it is a fundamental and long-standing

principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them. (*Lyng v. Northwest Indian Cemetery Protective Ass'n* (1988) 485 U.S. 439, 445; *People v. Navarro* (2007) 40 Cal. 4th 668, 675; see also *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 230–231; *Ashwander v. Valley Authority* (1936) 297 U.S. 288, 347 (conc. opn. of Brandeis, J.).)

As discussed below, the application of each and every one of those principles here compels the result reached by the court of appeal.

B. Neither the Text nor the Structure of Section 1172.6 Suggests that Resentencing Courts Should Depart from the Literal Language of the Statute

Respondent admits that enhancements have not been deemed to be an element of the substantive offense in many of the contexts in which the issue has arisen. (e.g, *People v. Law* (2011)195 Cal.App.4th 976, 982, (proof of gun enhancement); *People v. Rodriguez* (2009) 47 Cal.4th 501, 508 [applicability of section 654 to sentencing enhancements]; *People v. Coronado* (1995) 12 Cal.4th 145, 157, fn. 8 [multiple enhancements; *People v. Dennis* (1998) 17 Cal.4th 468, 500 and *People v. Wolcott* (1983) 34 Cal.3d 92, 96 [enhancements not part of the underlying offense for lesser offense purposes].)

Respondent goes on to argue, however, that by looking at other provisions of section 1172.6 it can be discerned that the legislature intended there be “flexibility” to fashion a target offense. Merely because subdivision (d) allows sentencing on the “remaining” counts, that is the counts of conviction, respondent appears to concludes that that evinces an intent to allow a trial court to impose an enhancement even if it does so from an undeterminable record. Quoting *Howard,* respondent argues that “]t]he absence of language regarding the procedure for redesignating the conviction and resentencing thereon suggests a purposeful design

to afford trial courts with flexibility in carrying out these tasks. (See *Howard*, supra, 50 Cal.App.5th at p. 739. Further, quoting *Howard* further, respondent asserts that "[r]eading subdivision (d)(3) and (e) together suggests the Legislature knew how to circumscribe the court's redesignation decisionmaking power and declined to do so". Resp. p 21 Of course, respondent does not extend this principle to limit the trial court's power to add an enhancement as part of the target offense, a power which the legislature could easily have provided. If the Legislature had intended to permit the resentencing court to reinstate the allegations and enhancements that had been originally dismissed, it surely would have said so.

It is apparent that respondent's interpretation is contrary to the foregoing principles of statutory construction support respondent's view of the legislative intent in enacting section 1172.6, including the literal words of the statute as written. Rather the principle of expressio unius est exclusio alterius, applied here, suggests that by omitting the term "enhancements" in subdivision (e) but using it in subdivision (d) with regard to vacating the murder, attempted murder or manslaughter and attendant enhancements, it was intended that enhancement not be deemed part of the target offense. Applying the rule of lenity, if there is any ambiguity, compels that that interpretation should be the one this Court adopts.

Nevertheless, respondent contends that applying these basic rules here would result in absurd results and a disparity between subdivision (d) and (e) that was not intended. Respondent relies primarily on imaginary scenarios where the result would depend on the arbitrary charging decisions in the original prosecution. As an example, petitioner envisions a prosecution for a murder and an underlying misdemeanor, apparently suggesting that some type of misdemeanor murder by an aider and abettor even exists. To the extent that aiding a misdemeanor under the natural and probable consequence doctrine was at one time possible (see e.g. *People v. Mouton (*1993) 10 Cal. App. 4th 118 (depublished after rehearing), that

possibility has rightly been eliminated by the amendments to section 188 as interpreted by the this Court. (*People v. Gentile* (2020) 10 Cal. 5th 830, 844.) If there is no underlying felony a defendant would not be resentenced to a felony whether it was charged or not.

Next, respondent hypothesizes that a literal interpretation of subdivision (e) would disallow dismissed charges or enhancements to be used by the trial court in resentencing following the vacating of the homicide conviction, but if they were never charged could be so used. Nothing in the decision of the court of appeal nor appellant's arguments suggests such an implausible scenario. That court recognized what such an interpretation would lead absurd to absurd results, and thus interpreted subdivision (e) in the manner in which it was obviously intended. If the underlying target offense was among the counts of conviction, a defendant would be sentenced to that offense under subdivision (d) and if the murder was charged generically or the charge dismissed, the trial court could readily discern the target offense from the remainder of the record of conviction. It matters not whether it was never charged or charged and dismissed. Appellant does not suggest a contrary result. No arbitrary results are likely from such an interpretation.

Again nothing in the plain text of the statute or any reasonable interpretation of it compels the result respondent urge here. While it is true that in identifying the target offense under subdivision (e) might involve combing the record of conviction in a similar manner as would be required in deciding if the facts of the case support the imposition of a sentencing enhancement, for the reasons already stated this fact does not support respondent's argument as to the scope of the permitted review. In addition And it is further true while the same "issues of notice and proof" (Resp. p. 25), as well as a number of other due process considerations (see supra. and infra.) are implicated when a court redesignates a vacated murder conviction this fact is irrelevant to the question presented. If

anything, such an observation merely supports the narrow interpretation of the court of appeal and appellant's arguments here.

Appellant agrees with respondent that the "purpose of Senate Bill No. 1437 is to reform the law so that sentences are proportional to the individual culpability of the defendant", and "a person should be punished for his or her actions according to his or her own level of individual culpability". (Stats. 2018, ch. 1015, § 1, subd. (d).) Resp p.8. He or she should receive a sentence that is nothing less nor nothing more than what is deserving. That determination, however, should not be at the sake of due process and a fair adjudication of that individual's culpability. Nor may an interpretation of an ambiguous statute result in one that is not construed "as favorably to the defendant as its language in the circumstances of its application may reasonably permit...." (*Keeler v. Superior Court* supra. 2 Cal.3d 619, 631. What respondent seeks apparently is for a trial court to exceed the language of the statute, apparently comb a record of conviction in which the facts may be equivocal, and fashion a target offense that includes enhancements that were not only never proven at trial but also can not now be proven beyond a reasonable doubt.

As mentioned, contrary to *Howard,* of course, the instant case did not stem from a jury trial but rather a plea. In addition to the factual issues not being decided upon by a jury, they were never litigated in any manner, including at a preliminary hearing. As a result the "flexibility" referred to in *Howard* and *People v. Silva* supra. 72 Cal. App. 5th 505 cannot be construed in any event in the manner respondent suggests. To the extent that the record in *Howard* contained proof of the "target offense", including enhancements, that was not the case here. Given the language of the statute and to obviate due process and constitutional implications, neither the text nor structure of the statute suggest that the legislature intended anymore than envisioned by the court of appeal here.

C. Nothing in the Legislative History Provides any Basis for an Interpretation of the Statute to Give the Resentencing Court the Power to Add Enhancements that were Neither Charged nor Proven in the Original Trial Court Proceedings

As mentioned appellant has no quarrel with respondent's emphasis on the purpose of SB 1437 as seeking to restore proportional responsibility in the application of California's murder statute, reserving the harshest punishments for those who intentionally planned or actually committed the killing." (Assem. Com. on Appropriations, Rep. on Sen. Bill No.1437 (2017-2018 Reg. Sess. (Aug. 8, 2018, p. 2.)) Indeed appellant concurs in particular with respondent's observations about the barbarity and overdue demise of the felony murder rule. And as mentioned, appellant similarly understands that some of the petitioners who seek relief under the new statute were guilty of serious crimes, even if they were not charged with or convicted of them at the time they were originally prosecuted. As a result of the passage of time many of these petitioners could not be prosecuted today. Appellant acknowledges justice must be done. However nothing in the legislative history of the new law as articulated by respondent in any way supports what respondent seeks here.

The principles for interpreting a statute have already been discussed. Nothing in those principles suggest that the interpretation of the court of appeal runs afoul of the law's purpose. The court of appeal examined the statutory language and gave it the only "plain and commonsense meaning" possible. In so doing it considered the "the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment." (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.)

Further, the rule of lenity aside, if the statutory language did permit more

than one reasonable interpretation, and this Court needed to refer to the legislative history as an extrinsic interpretive aid, including the statute's purpose, and the public policy considerations behind it, respondent still fails to articulate why its assertion that enhancements may be designated as part of the target offense under subdivision (e) is a " construction that comports most closely with the apparent intent of the lawmakers, with a view to promoting *rather than defeating the general purpose of the statute.'" (Mays v. City of Los Angeles* (2008) 43 Cal.4th 313, 321.)

Indeed, it is precisely because the statute does not contain a procedure to include enhancements, that the "flexibility" rationale in *Howard,* as espoused by respondent, would lead either to a unarticulated, standardless and potentially unconstitutional procedure of fact finding or would require this Court to judicially legislate such a process. Respondent implies that it would not be difficult to create a process by which a trial court would identify what enhancement(s) it proposed to make part of the target offense. Resp. p. 26. This would require, however, the creation of a procedure of how and in what manner the trial court would give notice of the proposed enhancement. It would require deciding whether the rules of evidence apply and also a procedure for determining if the proof was sufficient. This would all require judicial legislation. "[T]he judicial role in a democratic society is fundamentally to interpret laws, not to write them. The latter power belongs primarily to the [P]eople and the political branches of government ...." "This court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed." (*People v. Haykel* (2002) 96 Cal.App.4th 146, 151.)

And to the extent that this Court would then have to opine on the constitutionality of such a process, or the constitutionality of the lack of such a process, the "flexibility" respondent heralds, as mentioned, would further require

this Court to reach constitutional issues regarding the designation of an enhancement in advance of the necessity of deciding them. (*Lyng v. Northwest Indian Cemetery Protective Ass'n* supra. 485 U.S. 439, 445; *People v. Navarro* supra. 40 Cal. 4th 668, 675.) This consideration alone militates in favor of the narrow construction of the statute as interpreted by the court of appeal.

Further, unlike enhancements, every prosecution and conviction of an aider and abettor obtained on a theory felony murder or natural and probable consequences was, at the time, based on at least one felony target offense. Determining that fact from a record of conviction usually does not require the same degree of fact-finding and record review than "deciding which of the myriad sentencing enhancements in our penal law might be applicable to a particular factual scenario" (Opn. 19), which respondent admits would be problematic. Resp. 26

Understandably, respondent seeks that the guilty not escape their rightful punishment. What they propose, however, would likely lead to far more arbitrary results than what respondent laments would be the effect of the decision of the court of appeal. It is true that on occasion a trial court will encounter some difficulty in determining the target offense where the homicide was charged generically. That is not a reason, however, for injecting even more uncertainty and due process concerns into the process. In addition, this possibility is irrelevant to their argument that the legislature intended for enhancements to be designated as part of the target offense.

D. Section 1172.6 is a Special Proceeding and Because it Does Not Explicitly Provide for Adding Enhancements as Part of the Target Offense the Trial Court Had No Authority to Do So

In addition to the aforementioned rules of statutory construction, which require this Court to interpret section 1172.6 in the restrictive manner decided by

the court of appeal and does not require this Court to rewrite the statute, respondent's interpretation of the statute runs afoul of the rules of special proceedings. Section 1172.6 creates a special proceeding in which a court's discretion is strictly limited its terms, in the sense that it confers a limited form of jurisdiction and the right to adjudicate by its express terms. It is a post-judgment criminal proceeding unknown to the common law.

There are two types of judicial remedies, actions and special proceedings. (Code Civ. Proc., § 21.) "An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." (Code Civ. Proc., § 22.) "Every other remedy is a special proceeding." (Code Civ. Proc., § 23.) Jurisdiction in any proceeding is conferred by law; that is, by the constitution or by statute." (*Harrington v. Superior Court* (1924) 194 Cal. 185, 188 [citations omitted].)

"Special proceedings ... generally are 'confined to the type of case which was not, under the common law or equity practice, either an action at law or a suit in equity. [Citations.]' [Citation.] Special proceedings instead are established by statute. [Citations.] The term 'special proceeding' applies only to a proceeding that is distinct from, and not a mere part of, any underlying litigation. [Citation.] The term 'has reference only to such proceedings as may be commenced independently of a pending action by petition or motion upon notice in order to obtain special relief. [Citations.]' [Citation.]" (*People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 725.)

A special proceeding is subject to the basic rules that have been outlined n the past with regard to a court's authority to implement its purposes. "Special proceedings are creatures of statute and the court's jurisdiction in such proceedings is limited by statutory authority." (*Paramount Unif. School Dist. v. Teachers Ass'n*

of Paramount (1994) 26 Cal.App.4th 1371, 1387; *Airfloor Co. of Calif. v. Regents of the University of California* (1978) 84 Cal.App.3d 1004, 1007-1008.) Consequently, jurisdiction over special proceedings – though granted to the superior court by the Constitution – is strictly limited by the statutory terms and conditions under which the Legislature created the proceeding. (*Smith v. Westerfield* (1891) 88 Cal. 374, 379; *Estate of Quinn* (1955) 43 Cal.2d 785, 787.)

In other words, since "the jurisdiction over any special proceeding is limited by the terms and conditions of the statute under which it was authorized . . . the statutory procedure must be strictly followed." (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425 [citations omitted]; *Kwok v. Bergren* (1982) 130 Cal.App.3d 596, 599-600.) "A court acting under special powers has only the jurisdiction especially delegated." (*People v. Superior Court* (1930) 104 Cal.App. 276, 280; see also *City of Pasadena v. Porter* (1927) 201 Cal. 381, 388 [since jurisdiction is purely statutory, a court in a special statutory proceeding has no equitable jurisdiction].)

A Penal Code section 1172.6 post-judgment petition proceeding fits well within the above description. The fact that it is related to a criminal action does not diminish its status as a special proceeding. (See this Court's opinion in *People v. Superior Court (Laff)*, supra, 25 Cal.4th 703, 725-726 [involved a motion for determination of privilege as to attorney records seized under search warrant in criminal investigation is a special proceeding]; see also *People v. Masterson* (1994) 8 Cal.4th 965, 969 [competency proceeding within a criminal case is a special proceeding].)

More broadly, the Legislature also has the power to regulate criminal and civil proceedings by reasonable restrictions on the exercise of jurisdiction. (*People v. Standish* (2006) 38 Cal.4th 858, 879-880; *Brydonjack v. State Bar* (1929) 208 Cal. 439, 442-443.) The Legislature thus has the authority to prescribe the

procedures by which courts exercise jurisdiction, as long as the legislation does not defeat or materially impair the exercise of constitutional powers, and courts are obligated to follow such legislative mandates. (*Standish*, at p. 879; *Ex Parte Harker* (1875) 49 Cal. 465, 467.) Since jurisdiction over special proceedings is purely statutory and not defined by the state Constitution (*People v. Masterson* (1994) 8 Cal.4th 965, 969-970), the legislative authority to regulate jurisdiction and procedures in special proceedings again is absolute.

In enacting section 1172.6, the Legislature has granted the court jurisdiction only as it specifically allows. No basis exists for permitting a court broad discretion to add enhancements that either were not proven at the time of the conviction, either after trial or by plea. To the extent that some "flexibility" is permitted, the court cannot exceed the parameters of the literal language of the statute. The Legislature's grant of jurisdiction over the special proceeding in section 1172.6 does not permit any remedies other than specified in subdivisions (d) and (e) with the exception of considering a dismissed target offense the equivalent of an uncharged offense. (See supra.) That exception, however is a far cry from granting jurisdiction to the courts to add enhancements were not intrinsic to the original murder conviction.

If the Legislature had intended to permit the resentencing court to reinstate the allegations and enhancements that had been originally dismissed, it surely would have said so.

E. To Permit Resentencing Court the "Flexibility" Respondent Proposes Would Result in Constitutional Infirmities in the New Law or in the Alternative Would Require this Court to Judicially Legislate Procedures not Enacted by the Legislature

In their opening brief in the court of appeal, respondent characterized the new law as an "act of lenity". From this premise, respondent, as did the court in

Howard, proposed a "flexible" approach in providing great leeway to the trial court in designating the target offense or offenses, or as relevant here, any enhancements attendant to the target offense. As mentioned, respondent, though recognizing the problems the constitutional infirmities of interpreting section 1172.6 in the manner they propose, relegated any discussion of them to a footnote. Rather than have this Court adopt an interpretation that implicates those concerns, respondent suggests that in deciding the issue presented, this Court not address them at all but rather remand the case to the court of appeal so that that court must grapple with them. Resp. p. 26 fn.5. Appellant contends that the very existence of these potential constitutional concerns are precisely among the reasons that this Court should consider them now in upholding the decision of the court of appeal.

And the facts of this case provide the best reasons for doing so. Without prior notice or articulating the specific interpretation of the evidence upon which it was relying, the trial court here announced that it intended to append the contested use of a firearm allegation to the robbery as the target offense. It did not provide a hearing at which the parties could object to the evidence the court considered, allow them to introduce evidence or even argue the facts. Then, without providing reasons to support its finding and without identifying the burden of proof it employed, the trial court decided the issue. Yet had the matter gone to trial, whether appellant used a firearm during the robbery/burglary would have been the subject of conflicting evidence and the verdict unknown. In addition, unlike in *Howard*, where the court relied on the trial transcript, or even *Watson* where the evidence consisted of the transcript of a parole hearing, here it is not even clear if the trial court based its ruling on any facts at all. Indeed, as mentioned, it appears that the trial court may have relied on nothing more that the fact that the weapons allegation had originally been charged and that there was some "evidence in the record" to warrant the ruling. (See supra.)

To uphold the ruling of the trial court here would not only allow a court to base its designation of the target offense on disputed evidence and its unarticulated gestalt view of that evidence, it would also allow a "conviction" and sentencing based on evidence that did not meet any standard of proof, let alone proof beyond a reasonable doubt. To sanction such a procedure can only lead to arbitrary and capricious results. For that reason, appellant submits that this Court should not rely on the reasoning of *Howard* or *Watson* in resolving the issues in this case.

1. To Permit a Trial Court to Designate an Enhancement as Part of the Target Offense Would Violate Principles of Due Process

It is true that subdivision (e) permits a trial court to designate a target offense when a murder is charged generically. To that extent, as the Court of Appeal observed, the process does involve some fact finding outside the record of conviction but only in a "relatively definite manner to only a specific offense." Op. 26. Beyond that procedure, which at least conforms to the language of the statute, further factfinding, particularly with regard to whether an enhancement was proven, will inevitably raise due process issues.

Here, the use of a firearm allegation had been charged but dismissed at the time of the original disposition, whether for reasons of lack of proof are unknown. If the latter, an issue is presented of whether permitting a trial court to resurrect them as part of the target offense violates procedural due process. Even the court in *Silva* held, "... we conclude a redesignation and resentencing procedure that abandons the most basic tenets of notice and an opportunity to be heard would be fundamentally unfair and would violate due process, and we refuse to so construe section 1170.95." (p.523) Here the trial court provided the most cursory of indications of its intent in this regard. The court initially announced its intention to grant the petition on April 22, at which time the court made no mention of including the previously dismissed section 12022.5 allegation as part of the target

crime. It was not until April 26 that the court announced that that it was its intent. (RT 4/26/2021 p. 13.)

The "flexibility" that respondent urges would lead to such factual scenarios as occurred here and result inevitably in unfair, unreliable and arbitrary findings. To avoid such constitutional infirmities, unless this Court intends to require and promulgate a more detailed fact finding scheme, this is among the reasons that this Court should narrowly construe section 1172.6 and not permit a trial court to add enhancements to the target offense. (*People v. Navarro* supra. 40 Cal. 4th 668, 675.)

2. Right to a Jury Trial

Similarly, respondent's argument that the trial court should be afforded a standardless "flexibility" to resurrect dismissed enhancements (and presumably substantive counts) and even resentence a successful petitioner to enhancements that were never alleged, and regarding which no admissible (or even reliable) evidence exists in the record, may violate a defendant's right to jury trial. *Howard* based its holding that the Sixth Amendment right to a jury trial is not implicated by section 1172.6, because it is an legislative act of lenity. As discussed, the new resentencing law is far more than that. No less than when an enhancement is originally charged, the requirement that it be pled and proved is not merely a matter of jurisdiction or a statutory limitation, but rather implements the fundamental rights of a crimimal defendant, including that of a jury trial. (U.S. Const., Amends V, VI, XIV; *Apprendi v. New Jersey* (2000) 530 U.S. 466; *In re Winship* (1970) 397 U.S. 358; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278; *United States v. Gaudin* (1995) 515 U.S. 506, 509-511.)

Lower court decisions upholding these basic principles in various contexts abound. "It is elementary that a defendant should not be punished for a crime of which he was not convicted." (*People v. Torres* (2011) 198 Cal.App.4th 1131,

1148.) For “it is only after a conviction that a judge can exercise whatever discretion is given to him by statute.” (*People v. Garnett* (1973) 31 Cal.App.3d 255, 257.) Therefore, a sentence on a count on which there was no conviction is unauthorized and must be vacated. (*People v. Zackery* (2007) 147 Cal.App.4th 380, 386.)

Most recently, the United States Supreme Court applied these principles even to prior convictions. In *Descamps v. United States* (2013) 570 U.S. 254 and *Mathis v. United States* (2016) 579 U.S. —— [136 S.Ct. 2243]. The high Court held that the Sixth Amendment severely limits judicial factfinding about the basis of a prior conviction used to enhance a sentence. As the high court summarized in *Mathis*:

> “...a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense. [Citations.] He is prohibited from conducting such an inquiry himself; and so too he is barred from making a disputed determination about ‘what the defendant and state judge must have understood as the factual basis of the prior plea’ or ‘what the jury in a prior trial must have accepted as the theory of the crime.’ (Mathis, supra, 136 S.Ct. at pp. 2250, 2252.)

Following *Descamp*s and *Mathis*, this Court recently held in *People v. Gallardo* (2017) 4 Cal.5th 120 that a court in 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. (*Id*. p. 125.) 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.” (*Ibid.*)

Rather, the court's role is 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. (*Id.* at p. 136.) If the Sixth Amendment prohibits judicial factfinding about the nature of a prior conviction that was found true, then surely it also prohibits judicial factfinding about charges and enhancement allegations that were never filed and/or dismissed but upon which a court wishes to base a resentencing under section 1172.6.

To accept respondent's arguments would violate these principles and at the very least would require this Court to decide constitutional issues in advance of the necessity to do so. (*People v. Navarro* supra. 40 Cal. 4th 668, 675.)

3. Allowing "Flexibility" in Designating an Enhancement as Part of the Target Offense Would Allow a Trial Court to Base its Ruling on Inadmissible or Unreliable Evidence

Even if *Apprendi* and its progeny do not apply here because the unique "resentencing" process promulgated by S.B 1437 and S.B. 775 does not pertain to prior convictions, the fact remains that the "record of conviction" here does not contain admissible, let alone reliable, evidence to support the trial court's designation of the weapons enhancement. As discussed supra. in all the court of appeal decisions thus far that have addressed the issues of the procedures required for proving and designating the target offenses, at least an identifiable and reliable record was employed in making that determination. If this Court would accept the "flexibility" approach argument envisioned by respondent, but rejected here by the Court of Appeal, a trial court's fact-finding discretion would have no bounds. Thus, if the Court accepts the view that unproven enhancements can be made part of the target offense, this Court would need to set forth a constitutionally sound procedure, not enacted by the legislature, to ensure a petitioner due process. Again that would require this Court to consider constitutional questions in advance of the necessity of deciding them. (*People v. Navarro* supra. 40 Cal. 4th 668, 675.)

Howard held that the resentencing court in that case did not err in considering "uncontroverted" evidence in the record and "redesignating Howard's conviction as first degree burglary, because the evidence at trial demonstrated beyond any dispute the building was a residence." (*Silva* at p. 517) In cases involving a jury trial, such as in *Howard* at least, the trial transcript is available to serve as an evidentiary basis for such a determination. In many cases which involve a plea, extrinsic evidence could include the preliminary hearing transcript or even the colloquy at the time of the plea does not exist. That was the case here. The trial court had before it none of these resources. Indeed it had no arguably admissible evidence at all.

In addition to there being no admissible evidence, as defined in section 1172.6 subd.(d)(3), to support the weapons enhancement, the "evidence" that may have been considered by the trial court, if any was considered at all, was far from "uncontroverted". Not only was there not a jury trial in this case, in addition, no appellate opinion existed and the prosecutor presented no evidence to support the inclusion of the weapons enhancement as part of the target offense. The only "facts" before the court at all were those included in the attachments to appellant's reply to the prosecutor's opposition to a prima facie showing for relief. Those reports, consisting primarily of police reports, which contained contrary versions of the facts as to appellant's involvement in the offense. They appear to have been attached, in this pre-*Lewis* (*People v. Lewis* supra. 11 Cal.5th 952, 960) case, to demonstrate that petitioner had alleged a prima facie showing for relief, in that his plea of guilty contained no admissions, findings or stipulations that would disqualify him.

Without a stipulation, police reports and similar investigative reports are inadmissible at the subdivision (d)(3) stage of the proceedings. In *People v. Johnson* (2016) 1 Cal.App.5th 953, 968 fn. 16, the Court of Appeal held the

defendant could not rely on unsworn statements in a police report to establish his eligibility for resentencing under Prop. 47. It said, "[The report] does not contain admissible evidence; the report lacks authentication, and its statements of value of the stolen property contain multiple levels of hearsay." Similarly here, no party authenticated the police reports, and the reports contained multiple levels of hearsay – non-testifying officers describing what non-testifying witnesses told them about the crimes.

Even if such reports were "in the record" as the trial court asserted, (RT 5/24/2021, p.12), the reports were never received into evidence at the time of the hearing, nor did the prosecution assert any theory of their being admissible, let alone attempt to introduce them. The proponent of evidence bears the burden of establishing a proper foundation for the admissibility of evidence they seek to admit. (*People v. Livaditis* (1992) 2 Cal.4th 759, 778-779.) And, again there was no stipulation between counsel as to what records the trial court could rely. (*People v. Nguyen* (2020) 53 Cal.App.5th 1154; *People v. Perez* (2020) 54 Cal.App.5th 896.) In short, even if the reports attached during the litigation of the prima facie showing, and are thus part of the current record for that reason, they were not ipso facto admissible as evidence when the trial court considered whether the section 12022.5 enhancement allegation could be imposed as part of the target offense of robbery.

In addition, should this Court consider the "flexibility" approach, it would need decide further whether the parties at the at the resentencing phase may introduce "new evidence", as is the case when the challenged underlying conviction is litigated. While section 1172.6 in its current form does not specify the exact scope and nature of the "new or additional evidence" the parties may offer, the statute appears to permit live testimony and admission of new physical evidence in that phase of the hearing and that in general, the rules of evidence

apply. (Section 1172.6 subd. (d)(3) incorporating Evidence Code. § 300.)

Even though the hearing here took place before the effective date of the current version of section 1172.6, as amended by S.B. 775, it appears that the trial court recognized the problem regarding the available evidence upon which it might rely, and finessed it by resentencing appellant with the use enhancement included merely in part because it had been charged in the original complaint. In the words of the court; "*there is evidence in the record* that would suggest that he did possess a handgun during the time of the underlying offenses. It was charged in all three counts". Thus the trial court indicated that it had included the weapons enhancement in the target offense because: 1) it had originally been charged; and 2) there was *some* evidence, presumably from those police reports that *suggested* that that allegation was true.

If this Court decides that an uncharged or a dismissed and resurrected enhancement may be part of the target offense, this Court must also decide whether the trial courts's reasoning here complied not only with the import of section 1172.6 subds. (d) and (e) but basis principles of due process.

4. In Order for the Trial Court To Find a Weapons Enhancement True Proof Beyond a Reasonable is Required

Whether the original conviction was obtained at trial or by plea, the prosecution should bear the burden to prove any redesignated crimes beyond a reasonable doubt. In that designation of the target offense is analogous to the proof required for a criminal conviction, that should include enhancements found to apply per subdivision (e) of section 1172.6 as well. (See *People v. Aranda* supra. 55 Cal.4th 342, 356 ["Under the due process clauses of the Fifth and Fourteenth Amendments, the prosecution must prove a defendant's guilt of a criminal offense beyond a reasonable doubt"]; *In re Winship* supra. 397 U.S. 358, 364.) This standard – and its attendant requirement that the prosecution "convince the trier of

all the essential elements of guilt" – is "indispensable to command the respect and confidence of the community in applications of the criminal law." (*Id*. at pp. 361, 364, citation and internal quotation marks omitted.)).

When the Legislature passed SB 1437, it was well aware of the reasonable doubt standard and its role in preventing wrongful convictions. ""We presume the Legislature 'was aware of existing related laws' when it enacted [Senate Bill 1437], and that it 'intended to maintain a consistent body of rules.' [Citation.]" (*Presbyterian Camp & Conference Centers, Inc. v. Superior Court* (2019) 42 Cal. App.5th 148, 154.) The Legislature knew how to write a less demanding standard of proof into an ameliorative law. (See, e.g., Pen. Code, § 1170.18 [using preponderance of evidence standard]; Pen. Code, § 1170.126 [same].) It chose not to do so here. It would be anomalous for proof beyond a reasonable doubt to be the standard of proof at the Section 1172.6, subd. (d)(3) hearing but not once the murder, attempted murder etc. is set aside and the trial court was considering the evidence at the (d)(3) hearing.

Even the court in *Silva* held that designation of a new crime in lieu of a vacated murder conviction, is analogous to a criminal conviction, and that the prosecution bears the burden of proof to prove any redesignated crimes beyond a reasonable doubt. (*Silva* p. 523.) Thus, if this Court does adopt the "flexibility" approach in designating uncharged enhancements, this Court would need to address this issue as well.

Here, in addition to the trial court not basing its ruling on admissible or at even reliable evidence, the trial court did not specify what standard of proof it was applying when it ruled the enhancement to part of the target offense. The trial court's own words more than suggested that it was not utilizing the proof beyond a reasonable doubt standard ["there is evidence in the record that would suggest that he did possess a handgun during the time of the underlying offense." (May 24,

2021 p.120)) . If this Court adopts the "flexibility" approach therefore, it must also decide if, given the failure to use the correct standard of proof, the matter must be remanded for further proceedings in this regard.

Appellant contends that to do so would require consideration by this Court of yet another issue: whether to do so would violate principles of double jeorpardy. (infra.)

5. Rather than Remand this Matter to the Trial Court the Failure of Proof as well as Principles of Double Jeopardy Require that the Weapons Enhancement be Stricken from the Judgement

If this Court decides that a trial court has the authority to include uncharged or dismissed enhancements as part of the target offense, but that the trial court here did not provide petitioner the requisite due process protections and/or failed to utilize the beyond a reasonable doubt standard, rather than remand the matter to the trial court, this Court should order simply order the weapons enhancement stricken as part of the target offense in any event.

This is required, first, because whatever evidence could have been introduced was included as attachments in the pleadings, essentially as offers of proof. It should be apparent that even if that evidence were admissible, there is no reasonable possibility that the prosecution could establish the truth of the weapons enhancement beyond a reasonable doubt. Thus for this reason, there is no need therefore for a remand. (cf. *People v. Story* (2009) 45 Cal.4th 1282, 1295 [in considering whether a remand for retrial is required following a reversal because of the introduction of inadmissible evidence, the reviewing court should consider all the evidence, admissible or inadmissible in deciding whether retrial is permissible under the Double Jeopardy Clause])

Secondly, a remand would subject appellant to exactly what the Double Jeopardy Clause was intended to prohibit– multiple bites at the apple in order to

secure a conviction where the prosecution has presented insufficient evidence in past attempts. (See *Curry v. Superior Court* (1970) 2 Cal.3d 707, 716; *People v. Davis* (2002) 102 Cal.App.4th 377, 379, 386 [reversing conviction due to instructional error and for insufficient evidence, and thus ordering trial court to dismiss count].)

As a result, regardless of its determination of the other issues, this Court should summarily strike the weapons enhancement here and otherwise affirm the opinion of the Court of Appeal.

CONCLUSION

The judgement of the Court of Appeals should be affirmed in part. Rather than remand the matter to the trial court for "redesignation of Arellano's vacated murder conviction and resentencing consistent with this opinion", however, this Court should order that part of the target offense stricken without the need for a remand.

Dated: September 1, 2023

/s/
Peter F. Goldscheider
Attorney for Appellant

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA	)	
	)	**No. S277962**
Plaintiff and Appellee,	)	**H049412**
-vs-	)	**CERTIFICATE OF COMPLIANCE**
LUISRAMON MANZANO ARELLANIO ,	)	
Defendant and Appellant.	)	

This Appellant's Answer Brief on the Merits is proportionately spaced using a font of Times New Roman with a point size of 13. This brief contains approximately 11,587 words not exceeding the limits provided for in Rule 8.360(b) of the California Rules of Court. This office uses the program of Corel WordPerfect X9 and did so for this brief.

Dated: September 1, 2023

/s/

Peter F. Goldscheider

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I declare under penalty of perjury that the foregoing is true and correct as executed in Redwood City, California.

Dated: September 1, 2023

/s/

Peter F. Goldscheider

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STATE OF CALIFORNIA
Supreme Court of California

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