IN THE SUPREME COURT OF CALIFORNIA

	No. S271828
PEOPLE OF THE STATE OF CALIFORNIA,	Fourth District Court of Appeal
Plaintiff and Respondent,	No. D078832
v.	Santa Clara County Superior Court
EDGAR CATARINO,	No. C1635441
Defendant and Appellant,	Hon. Cynthia Sevely Judge of the Superior Court

Opening Brief on the Merits

The Sixth District Appellate Program
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Issue Presented

Does Penal Code section 667.6, subdivision (d), which requires that a "full, separate, and consecutive term" must be imposed for certain offenses if the sentencing court finds that the crimes "involve[d] the same victim on separate occasions," comply with the Sixth Amendment to the U.S. Constitution?

Introduction

The United States Supreme Court has held that a criminal defendant has a Sixth Amendment right to a jury trial on any fact that increases the mandatory minimum sentence on a count. (*Alleyne v. United States* (2013) 570 U.S. 99, 111-112, 114-115.)

In lieu of the of one-third the middle term that is otherwise the mandatory minimum on subordinate[1] counts, subdivision (d) of Penal Code[2] section 667.6 requires a sentencing judge to impose a full term on subordinate counts of specified sex offenses when those offenses were committed on a "separate occasion."

The California Rules of Court, however, specify that the finding of whether a subordinate count was committed on a "separate occasion" is to be made by a judge. (Cal. Rules of Court, rule 4.426(a).) That was done in the instant case. (12 RT 3309-3310.)

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[1] Strictly speaking, once a count after the first is brought under the sentencing scheme of subdivision (d) of section 667.6, it is no longer referred to as "subordinate." (*People v. Pelayo* (1999) 69 Cal.App.4th 115, 124-125.) Appellant herein uses that term to refer to all counts that are subordinate under the sentencing scheme of section 1170.1, which is to say that they are subordinate in the absence of a finding that brings them under subdivision (d) of section 667.6.

[2] Except as otherwise specified, statutory citations herein are to the Penal Code.

For appellant, the finding that each count occurred on a "separate occasion" increased the mandatory minimum sentence on each subordinate count from 2 years, 8 months, to 5 years. It denied appellant his Sixth Amendment right to a jury trial for this factfinding to be done by a judge. (*Alleyne v. United States, supra,* 570 U.S. 99, 111-112, 114-115.)

The only open question is whether this unconstitutional result was mandated by section 667.6, or only by rule 4.426(a).

Statement of the Case

An information filed November 8, 2017, charged appellant with eight counts of violating subdivision (b)(1) of section 288 [lewd or lascivious act with child under the age of 14 accomplished by means of force, violence, duress, or threat of immediate bodily injury]. (1 CT 75-79.)

On April 6, 2018, a jury found appellant not guilty of Count 8 and not guilty of the lesser included offenses of Count 8. (2 CT 341-342; 11 RT 3006-3008.) The jury found appellant not guilty of Count 7, but, on that count, guilty of the lesser included offense of an attempted violation of subdivision (b)(1) of section 288. (2 CT 339-340; 11 RT 3006.) The jury found appellant guilty of Counts 1 through 6. (2 CT 333-338; 11 RT 3004-3005.)

On November 9, 2018, the court sentenced appellant to full-term, consecutive sentences on each count—8 years on Count 1, consecutive terms of 5 years each on Counts 2 through 6, and a consecutive term of 2 years, 6 months, on Count 7—for a total determinate term of 35 years, 6 months. (2 CT 452-453, 456-457; 12 RT 3315-3316.) On December 3, 2018, appellant filed a notice of appeal. (2 CT 459.)

On October 14, 2021, the Fourth District Court of Appeal issued an opinion remanding appellant's case for resentencing on the attempted violation of subdivision (b)(1) of section 288, but otherwise affirming the judgment. On January 19, 2022, this court granted appellant's petition for review.

Statement of Facts

B. Doe and appellant are cousins. (3 RT 621.) Appellant is about 16 years older than Doe. (3 RT 617; 6 RT 1577.) When Doe was about 9 years old, they lived next door to each other. (3 RT 624-625, 714.) Appellant's parents would sometimes babysit Doe and her younger sister; the families visited at other times. (3 RT 620, 623-624, 722, 735.)

One day, Doe told her mother that she did not want to be left at appellant's house because appellant would do naughty things to her. (3 RT 736.) Doe described what she meant in a statement to a detective and in her testimony at trial. (3 RT 615-721; Exhibit 2a.)

The acts described by Doe included: (1) appellant bit her on her upper chest, sort of below her throat (3 RT 656; Exhibit 2a, pp. 23, 25); (2) while they were both clothed, appellant pressed his private part against her bottom and moved his body back and forth (3 RT 631-632, 636-637; Exhibit 2a, p. 21); (3) appellant touched her vaginal area under her clothes (3 RT 648-650; Exhibit 2a, pp. 37-39); (4) appellant touched her vaginal area over her clothes (Exhibit 2a, pp. 40-41, 44-45); (5) appellant had her on his lap and moved back and forth "like a worm" (3 RT 659-662, 664; Exhibit 2a, pp. 13, 15-16); (6) appellant pulled Doe's pants down (3 RT 639, 642-645; Exhibit 2a, pp. 18-19); (7) appellant touched her across the top of her chest. (3 RT 630-631);

and (8) appellant put his hand under her shirt and her bra (3 RT 664-666; Exhibit 2a, pp. 36-37).

At trial, Doe testified about the first time that appellant had touched her in a bad way. (3 RT 628.) On that first occasion, appellant grabbed her around the waist. (3 RT 628-629.) He grabbed inside her clothes. (6 RT 629-630.) Appellant touched her across the top of her chest. (3 RT 630-631.) His body was pressed up against the back of her body. (3 RT 631-632.) He was at the time moving his body back and forth. (3 RT 636.) This was the movement that Doe described as moving like a worm. (3 RT 640-641.) On that same occasion, appellant touched Doe in what the court described as the groin area. (3 RT 647-648.) This was under her clothes, under her underwear, on her skin, on what Doe described as her "pineapple." (3 RT 648-650.)

In an interview with a detective, Doe described sexually inappropriate touchings that occurred on an unspecified but multiple number of days. Doe said that there was more than one time when appellant touched her while she was sitting on his lap. (Exhibit 2a, pp. 42-43.) More than one time appellant touched the vicinity of her vagina over her clothes. (Exhibit 2a, pp. 44-45.) More than one time, when on the bed, appellant touched her. (Exhibit 2a, p. 43.) At trial, she said there were more than two times when appellant stood behind her and moved like a worm. (3 RT 667.) And more than one time appellant bit her. (3 RT 666.)

Appellant testified that these acts did not happen. (7 RT 1830-1831.) Several witnesses testified that they had not seen appellant act inappropriately with children and that appellant is not the type of person who would do these kinds of acts with children. (5 RT 1208, 1212, 1222-1223, 1235, 1238-1239, 1251, 1260-1261, 1280, 1282; 6 RT 1511-1513.) Appellant's girlfriend testified that appellant did wrestle

with and tickle Doe and her sister and she was of the opinion that such acts were inappropriate because they could be misinterpreted, but she, too, testified that she had never seen appellant act in a sexually inappropriate way and that he did not have the character traits of a person who would act sexually inappropriately with children. (6 RT 1535-1537, 1547-1551.)

Argument

1. The Sixth and Fourteenth Amendments require the findings of fact specified in subdivision (d) of section 667.6, facts that increase the mandatory minimum term on subordinate counts, to be found by a jury, not a judge.

A. How the issue reached this court.

The information in the instant case did not cite section 667.6 and did not allege that the several counts had occurred on separate occasions. The first time that the district attorney alleged that the offenses had occurred on "separate occasions" within the meaning of subdivision (d) of section 667.6 was in a sentencing memorandum filed after the jury had been discharged. (2 CT 380-384.) Inconsistently, that sentencing memorandum also alleged that each of the seven counts had occurred on the "same occasion" and was subject to sentencing under subdivision (c) of section 667.6. (2 CT 384.)

In response, appellant's counsel in a supplemental sentencing memorandum argued, "[R]elying on the jury question and/or the closing arguments of counsel to speculate on which specific acts Mr. Catarino was convicted on constitutes a violation of Mr. Catarino's

right to Due Process and a violation of his Sixth Amendment rights. The jury's question is not a jury finding." (2 CT 387.)

In his opening brief in the court of appeal appellant argued that he was denied his Sixth Amendment right to a jury trial in that the finding of fact that triggered full-term sentences on subordinate counts should have been made by a jury. (AOB 51-59, citing inter alia *Alleyne v. United States, supra,* 570 U.S. 99, 111-112, 114-115.)

Respondent's only counterpoint to this argument was, "that 'the United States and California Supreme Courts have held that the decision whether to run individual sentences consecutively or concurrently does not implicate the Sixth Amendment right to jury trial.'" (RB 24, citing inter alia *Oregon v. Ice* (2009) 555 U.S. 160, 162-165.)

In his reply brief, appellant explained at length that respondent's point regarding consecutive sentencing was irrelevant because appellant's argument was premised on the change in the maximum and mandatory minimum sentence on each subordinate count, not on the mandate that sentences be imposed consecutively. (ARB 22-25.) Nonetheless, the court of appeal treated as dispositive the fact that "the United States and California Supreme Courts have held that the decision whether to run individual sentences consecutively or concurrently does not implicate the Sixth Amendment right to jury trial." (Opn. of Court of Appeal (Oct. 14, 2021), p. 16, citing inter alia *Oregon v. Ice, supra,* 555 U.S. 160, 162-165.)

Appellant filed a petition for rehearing pointing out that the court of appeal had failed to address appellant's argument on this point. (RP 12.) That petition was denied.

Appellant filed a petition for review that included a request for this court to address the question, "Given that subdivision (d) of Penal

Code section 667.6 increases the mandatory minimum sentence on each subordinate count committed on a 'separate occasion,' does the Sixth Amendment require the fact of being on a 'separate occasion' to be found by a jury?" (PFR 5.) That petition was granted, with the issue to be briefed and argued limited to: "Does Penal Code section 667.6, which requires a 'full, separate, and consecutive term' must be imposed for certain offenses if the sentencing court finds the crimes 'involve[d] the same victim on separate occasions,' comply with the Sixth Amendment to the U.S. Constitution?"

B. The United States Supreme Court has held that a criminal defendant has a Sixth and Fourteenth Amendment right to a jury trial on any fact that increases the mandatory minimum sentence for a crime.

The United States Supreme Court has held that any fact that increases a mandatory minimum sentence for a crime is an "element" that under the Sixth Amendment must be found by a jury, not a judge. (*United States v. Alleyne, supra,* 570 U.S. 99, 111-112.) "The Fourteenth Amendment commands the same answer in this case involving a state statute." (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 476.)

C. Under section 667.6, subdivision (d), the fact of having been on a "separate occasion" increases the mandatory minimum sentence for each subordinate count of section 288, subdivision (b), from 2 years, 8 months, to 5 years.

The determinate sentencing law designates "three fixed-year, or determinate, sentencing options for nearly all felony offenses." (*People v. Sasser* (2015) 16 Cal.4th 1, 8.) When a defendant has been convicted

of multiple offenses, the sentencing judge has discretion to impose the sentence on each concurrently or consecutively, unless a specific statute limits that discretion. (§ 669; *People v. Bradford* (1976) 17 Cal.3d 8, 20.)

When imposed consecutively, felony sentences on multiple counts are calculated under section 1170.1 unless another, more specific statute applies. (*People v. Sasser, supra,* 61 Cal.4th 1, 8-9, citing *People v. Williams* (2004) 34 Cal.4th 397, 402). Under section 1170.1:

> If the sentencing court imposes consecutive terms, "the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, the subordinate term, and any additional term imposed for applicable enhancements for prior convictions, prior prison terms, and [prior offenses committed while released on bail or recognizance]." (§ 1170.1(a).) The principal term consists of "the greatest term of imprisonment imposed by the court for any of the crimes," including any applicable offense-specific enhancements. (*Ibid*.) The subordinate term consists of "one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed," plus "one-third of the term imposed for any specific enhancements applicable to those subordinate offenses." (*Ibid*.)

(*People v. Sasser*, *supra*, 61 Cal.4th 1, 8-9.) Thus, unless a more specific statute applies, the mandatory minimum term on a subordinate felony count is one-third of the middle term.

As noted, section 669 confers the discretion to impose concurrent sentences. Concurrent sentences are full-term sentences. (*People v. Quintero* (2006) 135 Cal.App.4th 1152, 1156, fn. 3.) Because this provision is discretionary, however, it has no bearing on the mandatory minimum to be imposed on a subordinate count.

Similarly, subdivision (c) of section 667.6 provides for discretionary full-term sentencing on subordinate counts when there is a finding that the offenses occurred on the "same occasion." Because

sentencing under subdivision (c) of section 667.6 is discretionary, that subdivision also has no bearing on the mandatory minimum term to be imposed on subordinate counts.

When multiple specified sex offenses "involve separate victims or involve the same victim on separate occasions," instead of the term provided in section 1170.1, a sentencing judge must impose a full term on each. (§ 667.6, subd. (d).)[3] Because subdivision (d) of section 667.6 requires that subordinate counts carry a full term, rather than the one-third the middle term that would otherwise apply under section 1170.1, it has the effect of increasing the mandatory minimum term on subordinate counts.

As relevant to the subordinate counts in the instant case, the middle term for a violation of subdivision (b)(1) of section 288 is 8 years. (§ 288, subd. (b)(1).) One third of that is 2 years 8 months. When proceeding under section 1170.1, 2 years, 8 months is the minimum term that a court may impose on a subordinate count of section 288, subdivision (b)(1).

Where there has been a finding that a subordinate count involves a separate victim or involves the same victim on a "separate occasion," then under the operation of subdivision (d) of section 667.6, the court is to impose a full-term sentence, which on a violation of subdivision (b)(1) of section 288, is a term of 5, 8, or 10 years. (§§ 288, subd. (b)(1), 667.6, subd. (d).) This mandatory minimum term of 5 years is greater than the term of 2 years 8 months that would be the

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[3] Determining whether crimes occurred on "separate occasions" requires consideration of "whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon the defendant's actions and nevertheless resumed sexually assaultive behavior." (§ 667.6, subd. (d)(2).)

mandatory minimum sentence in the absence of the finding specified in subdivision (d) of section 667.6.

Because it increases the mandatory minimum term that must be imposed on a subordinate count, the fact of being on a "separate occasion" is an "element" that under the Sixth Amendment must be found by a jury, not a judge. (*United States v. Alleyne*, *supra*, 570 U.S. 99, 111-112.) The application of subdivision (d) of section 667.6 to appellant based upon findings made by a judge denied appellant his right to a jury trial under the Sixth and Fourteenth Amendments.

D. The error was not harmless.

Where a defendant has been sentenced based on a fact found by a judge that under the Sixth Amendment should have been determined by a jury, the error is reviewed under the standard of *Chapman*. (*Washington v. Recuenco* (2006) 548 U.S. 212, 218-222; *People v. French* (2008) 43 Cal.4th 36, 52-53; *Chapman v. California* (1967) 386 U.S. 18.) Applying the *Chapman* standard in this context requires the court to ask whether it can say beyond a reasonable doubt that the "'jury, applying the beyond-a-reasonable doubt standard, unquestionably would have found'" that the offenses of which the defendant was convicted were committed on "separate occasions." (*People v. French, supra,* 43 Cal.4th 36, 53, quoting *People v. Sandoval* (2007) 41 Cal.4th 825, 838.) The failure to submit the issue to the jury may be found harmless "if the evidence supporting [the finding] is overwhelming and uncontested, and there is 'no evidence that could rationally lead to a contrary finding.'" (*Ibid.*, quoting *Neder v. United States* (1999) 527 U.S. 1, 19.) That is not true in the instant case.

Doe testified to multiple acts having occurred in conjunction with one another. In particular, at trial, Doe testified about the first time that appellant had touched her in a bad way. (3 RT 628.) On that first occasion, appellant grabbed her around the waist. (3 RT 628-629.) He grabbed inside her clothes. (6 RT 629-630.) Appellant touched her across the top of her chest. (3 RT 630-631.) His body was pressed up against the back of her body. (3 RT 631-632.) He was at the time moving his body back and forth. (3 RT 636.) This was the movement that Doe described as moving like a worm. (3 RT 640-641.) On that same occasion, appellant touched Doe in what the court described as the groin area and Doe described as her "pineapple." (3 RT 647-650.) The record does not foreclose the possibility that the jury based its verdicts on some or all of these acts. The record does not provide a basis for finding that the jury did not base some or all of its verdicts on acts that were not separated by an opportunity to reflect.

Furthermore, Doe testified that there was only one time when appellant had Doe sit on his lap and moved his body back and forth like a worm. (3 RT 667-668.) She also testified that there was only one occasion when appellant touched the skin of her "pineapple." (3 RT 667.) She testified that there was only a single occasion when appellant tried to pull down her pants and only a single occasion when he had put his hand under her shirt. (3 RT 668.)

In her interview with the detective, Doe said that appellant's pulling her pants down coincided with appellant's putting his hand under her shirt. (Exhibit 2a, p. 18.) And Doe said that appellant's biting of her coincided with appellant's moving like a worm. (Exhibit 2a, pp. 11, 14, 19-22, 28.)

Moreover, the jury was not unanimously convinced of more than six touchings, total. Based on the record in the instant case, the jury

could well have based more than one of their verdicts, even all of their verdicts, on a single occasion.

This is not a record where the evidence is overwhelming that the verdicts of the jury were based upon acts occurring on "separate occasions." For this reason, the error is not harmless. (*People v. French, supra,* 43 Cal.4th 36, 53.)

E. Appellant's case should be remanded for resentencing under the general determinate sentencing provisions of sections 669, 1170, and 1170.1, without reference to section 667.6.

In *United States v. Alleyne*, the United States Supreme Court's remedy was to vacate the sentence and "remand the case for resentencing consistent with the jury's verdict." (*United States v. Alleyne, supra,* 570 U.S. 99, 117-118.) Applying that remedy in the instant case, appellant should be resentenced without reference to section 667.6.

(1) Appellant cannot be sentenced under subdivision (c) of section 667.6 because there has been no finding that the various offenses of which appellant was convicted occurred on the "same occasion."

To the court of appeal, respondent argued that an appropriate remedy would be to remand appellant's case for resentencing under subdivision (c) of section 667.6. (RB 30-31, citing *In re Rodney* (1999) 73 Cal.App.4th 36, 38, 41, *People v. Irvin* (1996) 43 Cal.App.4th 1063, 1071-1072, *People v. Riddle* (1987) 189 Cal.App.3d 222, 230, 233, *People v. Williams* (1984) 180 Cal.App.3d 57, 61-63.)

Subdivision (c) of section 667.6 specifies a finding that will support the discretion to impose a full-term consecutive sentence on

multiple specified sex offenses. It provides, "In lieu of the term provided in Section 1170.1, a full, separate, and consecutive term may be imposed for each violation of an offense specified in subdivision (e) if the crimes involve the same victim on the same occasion."

Prior to November 7, 2006, subdivision (c) of section 667.6 applied "*whether or not* the crimes were committed during a single transaction." (*People v. Goodliffe* (2009) 177 Cal.App.4th 723, 726, fn. 7, quoting former § 667.6, subd. (c), as amended by Stats. 2002, ch. 787, § 16, emphasis supplied.) All of the cases cited by respondent—*In re Rodney*, *People v. Irvin*, *People v. Riddle*, and *People v. Williams*—were interpreting that earlier version of the law.

The current version of subdivision (c) of section 667.6 does not apply "whether or not the crimes were committed during a single transaction." (*People v. Goodliffe, supra,* 177 Cal.App.4th 723, 728-732, emphasis omitted.) That subdivision applies only when there has been a finding that the offenses "involve the same victim on the same occasion." (*Id.* at p. 732.) Without a finding that the offenses involved the same victim on the same occasion, sentencing cannot proceed under subdivision (c) of section 667.6. (*Ibid.*)

Respondent urged to the court of appeal, "if no reasonable trier of fact could have found that appellant committed his different offenses on separate occasions then the only remaining possibility is that he committed them on the same occasion." (RB 30.) But that is not the only remaining possibility. As to any two offenses, there are three possibilities. First, the evidence may be sufficient to support a finding that the two offenses occurred on the same occasion. Second, the evidence may be sufficient to support a finding that the two offenses each occurred on a separate occasion. Third, the evidence may be insufficient to support either finding. On some records, a finder of fact

just cannot tell whether the offenses of which the defendant was convicted were separated by a reasonable opportunity to reflect. The fact of the evidence being insufficient to support a finding that the offenses each occurred on separate occasions is not sufficient to compel a finding that the offenses all occurred on the same occasion.

Sentencing under subdivision (c) of section 667.6 is authorized only when there has been a finding that two offenses occurred on the "same occasion" within the meaning of that subdivision. The only finding that has been made in the instant case (albeit by the wrong factfinder) is that each of the offenses was committed on a "separate occasion." For this reason, the instant case cannot be remanded with directions to resentence under subdivision (c) of section 667.6.

(2) Appellant cannot be resentenced under subdivision (c) of section 667.6 because the record is insufficient to support a finding, now, that each act of which the jury convicted appellant occurred on the "same occasion".

There is a second reason why appellant cannot be resentenced under subdivision (c) of section 667.6: it is impossible to discern which acts were the basis for the jury's verdicts.

The jury convicted appellant of six counts of violating subdivision (b)(1) of section 288 and one count of attempted violation of subdivision (b)(1) of section 288. (2 CT 333-342.) Appellant had been charged with eight counts of violating subdivision (b)(1) of section 288. (1 CT 75-79.) Doe described more than eight acts that would have violated that section (3 RT 666-668), but the jury found that there had been only six touchings of the kind specified in section 288. The jury also found one and only one occasion when appellant, with the intent specified in section 288, attempted but failed to touch Doe.

The jury's verdict implies that it did not find more than six acts of actual touching to be supported by the evidence. While the jurors knew which six acts were the basis for their six guilty verdicts, we do not. From among the more than eight acts of touching described in the evidence, the record provides no basis for identifying which six the jury found to be true and which the jury found not to be proven. In particular, without any basis for discerning which six acts are the basis for the jury's six guilty verdicts, a finder of fact can have no basis for finding that each of these acts, or any of them, or none of them was separated by a reasonable opportunity to reflect. The record does not provide a principled basis for discerning whether any, all, or none of the acts that were the basis of the jury's verdict occurred on the "same occasion" within the meaning of subdivision (c) of section 667.6.

Doe described sexually inappropriate touchings that occurred on an unspecified but multiple number of days. Doe said that there was more than one time when appellant touched her while she was sitting on his lap. (Exhibit 2a, pp. 42-43.) She said there were more than two times when appellant stood behind her and moved like a worm. (Exhibit 2a, p. 43; 3 RT 667.) More than one time when on the bed appellant touched her. (Exhibit 2a, p. 43.) More than one time when appellant touched the vicinity of her vagina over her clothes. (Exhibit 2a, pp. 44-45.) More than one time when appellant bit her. (Exhibit 2a, pp. 11-12; 3 RT 666.)

This record does not preclude the possibility that the six acts that the jury credited and upon which it based its verdicts were from among these and were not on the same occasion. The record provides no basis for a finder of fact to now find that the particular acts that the jury used to convict appellant of each offense occurred on the same occasion as

any or all or none of the other acts that the jury used to convict appellant of each other offense.

For that reason, appellant cannot now be sentenced under subdivision (c) of section 667.6.

(3) The evidence is also insufficient to support a finding, now, that the offenses upon which the jury returned guilty verdicts were committed on "separate occasions."

There is in the instant case no record or evidence that would support a finding, now, that the crimes of which the jury convicted appellant occurred on "separate occasions" within the meaning of section 667.6. Specifically, the record does not support a finding that each of the offenses of which the jury convicted appellant was separated by an opportunity to reflect and the resumption of sexually assaultive behavior. (§ 667.6, subd. (d)(2); Cal. Rules of Court, rule 4.426(a)(2).)

As noted above, Doe described how on the first occasion that appellant touched her inappropriately, he grabbed her around the waist (3 RT 628-629), grabbed inside her clothes (3 RT 629-630), touched her across the top of her chest (3 RT 630-631), pressed his body against the back of her body and moved back and forth like a worm (3 RT 636, 640-641), and touched her "pineapple" under her clothes (3 RT 647-650). She told the detective that on this first occasion appellant also put Doe on his lap and moved like a worm and also bit her. (Exhibit 2a, pp. 12-16, 28.)

Neither Doe's testimony, nor her statement to detectives, nor any other evidence would support a finding that such acts in conjunction with one another were separated by a reasonable opportunity to reflect. Further, while Doe did describe acts that occurred on separate days, the record does not show whether or not the jury convicted appellant of

acts that occurred on separate days. For these reasons, the record in the instant case would not support a finder of fact in now making a determination that the acts of which the jury convicted appellant occurred on "separate occasions" within the meaning of subdivision (d) of section 667.6.

On the record in the instant case, there is insufficient evidence for a finder of fact, now, to find that the six completed acts and the one attempt that the jury credited each occurred on a "separate occasion" for the purposes of subdivision (d) of section 667.6.

(4) Upon remand, resentencing on the subordinate counts should be under sections 669, 1170, and 1170.1.

Subdivision (d) of section 667.6 cannot now be applied to appellant because the evidence is insufficient to support a finding that each subordinate offense, or any of them, occurred on a "separate occasion" within the meaning of that subdivision. Subdivision (c) of section 667.6 cannot now be applied to appellant because the evidence is insufficient to support a finding that each subordinate offense, or any of them, occurred on the "same occasion" within the meaning of that subdivision.

Accordingly, upon remand appellant should be sentenced under the general determinate sentencing provisions of sections 669, 1170, and 1170.1. That is, this court should vacate the sentence and "remand the case for resentencing consistent with the jury's verdict." (*United States v. Alleyne, supra,* 570 U.S. 99, 117-118.)

F. The answer to the court's question depends upon how subdivision (d) of section 667.6 is construed.

Appellant has reviewed how (1) the Sixth and Fourteenth Amendment require facts that increase the mandatory minimum sentence for a crime to be found by a jury, (2) the finding specified in subdivision (d) of section 667.6 increases the mandatory minimum term on specified offenses, (3) application of subdivision (d) of section 667.6 to appellant based on findings by the sentencing judge denied appellant's Sixth and Fourteenth amendment right to a jury trial, (4) the error was not harmless, and (5) the appropriate remedy for appellant is resentencing under the general provisions of the determinate sentencing law. There is one other matter that must be addressed: the court's question. Does subdivision (d) of section 667.6 comply with the Sixth Amendment?

The answer to this question depends on how this court construes section 667.6. "[T]o the extent there is any question about the proper interpretation of the statute, it might well be resolved by reference to the usual rule that a statute will be interpreted to avoid serious constitutional questions if such an interpretation is fairly possible." (*People v. Buza* (2018) 4 Cal.5th 658, 682, citing *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1373.)

The rules of court are explicit that it is the sentencing judge who should make the finding as to whether the offenses occurred on "separate occasions" for the purposes of section 667.6. (Cal. Rules of Court, rule 4.426(a).) Section 667.6 is not so explicit. The closest that section 667.6 comes to specifying the finder of fact on this issue is the sentence: "In determining whether crimes against a single victim were committed on separate occasions under this subdivision, *the court shall consider whether*, between the commission of one sex crime and another,

the defendant had a reasonable opportunity to reflect upon the defendant's actions and nevertheless resumed sexually assaultive behavior." (§ 667.6, subd. (d)(2), emphasis supplied.) If the words "the court shall consider" may reasonably be read as including a judge's instructions that the jury consider the specified factors and jury's subsequent consideration of those factors, then section 667.6 is not unconstitutional because it does not actually specify who shall be the finder of fact.

Such a construction is consistent with the role of the jury in the judicial process. "Unlike the executive and legislative branches, the judicial branch's definition of 'decision maker' includes *both* judges and jurors and is not limited to elected or appointed officials. [¶] Jurors are an integral part of the judicial process." (*Lyons v. Wickhorst* (1986) 42 Cal.3d 911, 920 [Bird, C.J., concurring], emphasis in original.)

If section 667.6, subdivision (d), is reasonably read as not designating the judge as the finder of fact, it would be only rule 4.426(a) that runs afoul of *Alleyne* and the Sixth and Fourteenth Amendments. There is no saving rule 4.426(a).

Ultimately, however, the outcome of this case does not turn on whether this court holds both rule 4.426(a) and section 667.6 to be unconstitutional or only holds rule 4.426(a) to be unconstitutional. Regardless of where the error originates, it is clear that appellant's Sixth and Fourteenth Amendment rights were violated, that the error was not harmless, and that appellant's case should be remanded for resentencing without reference to section 667.6.

Conclusion

Because the finding that it occurred on a "separate occasion" within the meaning of subdivision (d) of section 667.6, increases the mandatory minimum term on each subordinate count, the Sixth and Fourteenth Amendments require that finding to be made by a jury, not a judge. Accordingly, the sentence imposed upon appellant was a denial of his right to a jury trial and to due process of law. The sentence should be reversed and appellant's case remanded for resentencing without reference to section 667.6.

Dated: February 18, 2022

Respectfully submitted,

Ron Boyer

Attorney for Appellant
Edgar Catarino

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true.

Executed February 18, 2022.

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STATE OF CALIFORNIA
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