No. S271828

In the Supreme Court of the State of California

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

v.

EDGAR SANDOVAL CATARINO,
Defendant and Appellant.

Fourth Appellate District, Division One, Case No. D078832
Santa Clara County Superior Court, Case No. C1635441
The Honorable Cynthia A. Sevely, Judge

ANSWER BRIEF ON THE MERITS

ROB BONTA (SBN 202668)
Attorney General of California
LANCE E. WINTERS (SBN 162357)
Chief Assistant Attorney General
JEFFREY M. LAURENCE (SBN 183595)
Senior Assistant Attorney General
SETH K. SCHALIT (SBN 150578)
Supervising Deputy Attorney General
DONNA M. PROVENZANO (SBN 215302)
Supervising Deputy Attorney General
*MELISSA A. METH (SBN 263571)
Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 510-3827
Fax: (415) 703-1234
Melissa.Meth@doj.ca.gov
Attorneys for Plaintiff and Respondent

May 12, 2022

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES
(continued)

Page

COURT RULES

OTHER AUTHORITIES

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 Sixth Amendment guarantees that any fact, other than the fact of a prior conviction, "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.) Further, any fact, other than the fact of a prior conviction, that increases the mandatory minimum sentence for a crime, "is an 'element' that must be submitted to the jury." (*Alleyne v. United States* (2013) 570 U.S. 99, 103.)

The United States Supreme Court made clear in *Oregon v. Ice* (2009) 555 U.S. 160, 163, 168, however, that the Sixth Amendment does not apply to facts used to decide whether to impose a consecutive sentence. There, Justice Ginsburg reasoned that a jury historically played no role in determining whether sentences would run concurrently or consecutively and, therefore, "legislative reforms regarding the imposition of multiple sentences do not implicate the core concerns that prompted our decision in *Apprendi*." (*Id.* at p. 169.) Thus, "regime[s] for administering multiple sentences" remain "the prerogative of state legislatures." (*Id.* at p. 168.)

Consistent with that prerogative, the Legislature has enacted various statutes governing the imposition of concurrent or consecutive sentences. The general rules provide that a court typically—but not always—has discretion to determine whether to impose consecutive or concurrent sentences. (§ 669.) If a court imposes two or more determinate sentences, the court typically—but not always—sentences the defendant to a principal term and to a subordinate term set at one-third the midterm for any offense that is sentenced consecutively rather than concurrently. (§ 1170.1, subd. (a).)

Penal Code section 667.6 contains one situation in which the Legislature exercised its prerogative to devise a different scheme for administering multiple sentences.[1] It applies to enumerated sex offenses. If the defendant is convicted of two or more enumerated offenses and the trial court determines those crimes involved separate victims or the same victim on separate occasions, the court must sentence the defendant to full term consecutive sentences. (§ 667.6, subd. (d) (§ 667.6(d)).) The full terms can be the lower, middle, or upper term of the sentencing triad. (§ 1170, subd. (b).) If the crimes against the same victim did not occur on separate occasions or if a defendant committed only a single enumerated offense, the court has discretion to impose concurrent terms, consecutive terms using the one-third

[1] Further undesignated statutory references are to the Penal Code.

the midterm formula, or consecutive full terms. (§ 667.6, subd. (c) (§ 667.6(c)).)[2]

Catarino, convicted of multiple enumerated sex offenses against the same victim and sentenced under section 667.6(d) based on the superior court's finding that the offenses occurred on separate occasions, contends section 667.6(d) violates the Sixth Amendment. He reasons that the minimum term for a consecutive determinate sentence is one-third the midterm and that section 667.6(d) violates *Alleyne* by raising the minimum term to a full term. He is mistaken. The trial court's determination that his crimes occurred on separate occasions does not implicate the Sixth Amendment under the rationale of *Ice*, *supra*, 555 U.S. 160. As the Court of Appeal held below, *Apprendi* and *Alleyne* do not apply to facts bearing on the trial court's determination of whether to impose consecutive sentences for multiple criminal offenses. Additionally, even if the Sixth Amendment applied, section 667.6(d) did not increase Catarino's mandatory minimum sentence under *Alleyne*. Because Catarino committed an enumerated sex offense, his convictions alone did not entitle him to sentencing under section 1170.1, subdivision (a)

---

[2] As discussed below, although section 667.6(c) refers to "the same victim on the same occasion," it does not require proof of the "same occasion," contrary to appellant's view. Rather, section 667.6(c) applies to enumerated sex offenses any time the People do not prove that 667.6(d) applies, i.e., whenever it is not proved the defendant committed two or more enumerated offenses against "separate victims" or committed two or more enumerated sex offenses against "the same victim on separate occasions" (§ 667.6(d)(1)).

in the first instance. The Court of Appeal's judgment should therefore be affirmed.

Catarino contends further that any error here was not harmless beyond a reasonable doubt. However, the victim testified to a number of acts occurring over the course of months; had the question been submitted to the jury, it unquestionably would have found the acts occurred on separate occasions. Therefore, any Sixth Amendment error was harmless.

Catarino also argues that if the matter is remanded for resentencing, he must be resentenced pursuant to section 1170.1, subdivision (a), rather than the discretionary provision of section 667.6(c) because there is no affirmative finding that the acts occurred on the same occasion and it is unclear whether the jury convicted him of crimes occurring on separate occasions or on the same occasion. That argument fails because section 667.6(c) necessarily applies whenever section 667.6(d) does not. There is no loophole through which a defendant convicted of multiple enumerated sex offenses can escape the application of section 667.6.

Finally, if the Sixth Amendment applies to factfinding under section 667.6(d), the proper remedy would be for this Court (1) to reform section 667.6(d) to provide that the factfinding be made in conformity with the Sixth Amendment and (2) to grant the district attorney the opportunity to prove separate occasions in conformity with the reformed statute or to elect to proceed with resentencing under section 667.6(c).

LEGAL BACKGROUND

Catarino's claim that the court violated the Sixth Amendment by sentencing his multiple sex offenses against the same victim to full consecutive terms implicates both the Sixth Amendment and choices the Legislature has made about how to sentence defendants.[3]

A. The Sixth Amendment does not apply to legislative reforms regarding the imposition of multiple sentences

In a number of cases, the United States Supreme Court has addressed the scope of the Sixth Amendment right to a jury trial on facts that bear on a criminal defendant's sentence. Three cases on this issue merit discussion before turning to the particulars of this case: *Apprendi*, *supra*, 530 U.S. 466, *Alleyne*, *supra*, 570 U.S. 99, and *Ice*, *supra*, 555 U.S. 160.

1. *Apprendi* establishes the right to a jury trial on facts that increase the penalty for a crime beyond the statutory maximum

In *Apprendi*, the defendant was convicted of three crimes, including two firearm offenses, each carrying a potential sentence between 5 and 10 years. (*Apprendi*, *supra*, 530 U.S. at pp. 469-470.) However, because the trial court determined the defendant was motivated by racial bias as to one of the firearm offenses, the potential sentence increased to between 10 and 20 years. (*Id.* at pp. 468-469, 471.) The court sentenced the defendant to 12 years

---

[3] Although the electorate has also made sentencing choices by initiative, for simplicity, the People will generally refer to the Legislature.

on that charge and concurrent terms on the other charges. (*Id.* at p. 471.)

The defendant challenged the constitutionality of that 12-year term. Before turning to the merits of the claim, the high court clarified that its only concern was the sentence for the individual count at issue; the aggregate sentence for all of the defendant's crimes was irrelevant. (*Apprendi*, *supra*, 530 U.S. at p. 474.)

On the merits, the Court explained that the Fourteenth Amendment right to due process and the Sixth Amendment right to a jury trial "indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'" (*Apprendi*, *supra*, 530 U.S. at pp. 476-477.) The Court reviewed the historical foundation of those principles at common law. (*Id.* at pp. 477-481.) "[T]he English trial judge of the later eighteenth century had very little explicit discretion in sentencing. The substantive criminal law tended to be sanction-specific; it prescribed a particular sentence for each offense. The judge was meant simply to impose that sentence . . . ." (*Id.* at p. 479, internal quotation marks omitted.) But in this country, the practice developed of providing judges discretion within a permissible sentencing range. (*Id.* at p. 481.) Nothing in the Court's historical examination "suggest[ed] that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and

offender—in imposing a judgment *within the range* prescribed by statute." (*Ibid.*)

The Court determined, however, that New Jersey's statute was a "novelty" in that it "remov[ed] the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." (*Apprendi*, *supra*, 530 U.S. at pp. 482-483.) Thus, the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id.* at p. 490; see also *Blakely v. Washington* (2004) 542 U.S. 296, 303-304 ["the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant" (italics omitted)].)

2. *Alleyne* extends *Apprendi* to facts increasing the mandatory minimum sentence for a crime

In *Alleyne*, the high court extended the rule of *Apprendi* to any fact that increases the mandatory minimum sentence for a crime. (*Alleyne*, *supra*, 570 U.S. at p. 103.) There, the defendant was convicted of a gun crime. (*Id.* at pp. 103-104.) The conviction carried a prison sentence of not less than five years, but if the firearm was brandished, the sentence was not less than seven years, and if the firearm was discharged, the sentence was not less than 10 years. (*Ibid.*) The trial court determined the defendant had brandished the weapon and sentenced him to seven years. (*Id.* at p. 104.) The defendant brought a Sixth

Amendment challenge to increasing the minimum term based on a fact that was not submitted to a jury and proven beyond a reasonable doubt. (*Ibid.*)

The Supreme Court looked at the historical precepts underlying *Apprendi* and determined the same principles applied to facts increasing the mandatory minimum sentence. (*Alleyne*, *supra*, 570 U.S. at pp. 111-112.) "It is indisputable that a fact triggering a mandatory minimum alters the prescribed range of sentences to which a criminal defendant is exposed." (*Id.* at p. 112.)

Alleyne observed, "But for a finding of brandishing, the penalty [for the gun crime] is five years to life in prison; with a finding of brandishing, the penalty becomes seven years to life. Just as the maximum of life marks the outer boundary of the range, so seven years marks its floor. And because the legally prescribed range *is* the penalty affixed to the crime, it follows that a fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense." (*Alleyne*, *supra*, 570 U.S. at p. 112.)

The Court found support for its decision in the fact that "criminal statutes have long specified both the floor and ceiling of sentence ranges, which is evidence that both define the legally prescribed penalty." (*Alleyne*, *supra*, 570 U.S. at p. 112.) Further, facts increasing the legally prescribed floor aggravate the punishment, such that "the core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime, each element of which must be submitted to

the jury." (*Id.* at p. 113.) Additionally, "[d]efining facts that increase a mandatory statutory minimum to be part of the substantive offense enables the defendant to predict the legally applicable penalty from the face of the indictment." (*Id.* at pp. 113-114, citation omitted.) The Court thus concluded, "When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury." (*Id.* at pp. 114-115.)

3. *Ice* recognizes the inapplicability of *Apprendi* to aggregating sentences for multiple crimes

In *Ice*, the United States Supreme Court considered whether to extend the reasoning of *Apprendi* and *Blakely*, which the court noted had held "that it is within the jury's province to determine any fact (other than the existence of a prior conviction) that increases the maximum punishment authorized *for a particular offense*," to "a sentencing function in which the jury traditionally played no part: When a defendant has been tried and convicted *of multiple offenses*, each involving discrete sentencing prescriptions, does the Sixth Amendment mandate jury determination of any fact declared necessary to the imposition of consecutive, in lieu of concurrent, sentences?" (*Ice*, *supra*, 555 U.S. at p. 163, italics added.) The Court held it did not. (*Ibid.*)

The statute in *Ice* provided for concurrent sentences unless a judge found certain facts warranting consecutive sentences, including that the crimes did "not arise from the same continuous and uninterrupted course of conduct." (*Ice*, *supra*, 555 U.S. at p. 165.) This scheme "constrain[ed] judges' discretion by requiring

them to find certain facts before imposing consecutive, rather than concurrent, sentences." (*Id.* at p. 163.)[4] Because *Apprendi* and its progeny "involved sentencing for a discrete crime, not—as here—for multiple offenses different in character or committed at different times," those cases did not establish a directly applicable rule. (*Id.* at p. 167.)

Apprendi did, however, provide important insight into how to assess the judicial factfinding at issue. The "animating principle" behind the rule of *Apprendi* was "the preservation of the jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense." (*Id.* at p. 168.) Thus, "the Sixth Amendment [did] not countenance legislative encroachment on the jury's traditional domain." (*Ibid.*) However, "administration of a discrete criminal justice system [was] among the basic sovereign prerogatives States retain[ed]." (*Ibid.*)

The Court concluded that "[t]hese twin considerations—historical practice and respect for state sovereignty—counsel[ed] against extending *Apprendi*'s rule to the imposition of sentences for discrete crimes. The decision to impose sentences consecutively is not within the jury function that 'extends down

---

[4] That scheme was not universal. Some states had "entrust[ed] to judges' unfettered discretion the decision whether sentences for discrete offenses shall be served consecutively or concurrently," and some states had decided that "sentences for multiple offenses are presumed to run consecutively, but sentencing judges may order concurrent sentences upon finding cause therefor." (*Ice*, *supra*, 555 U.S. at p. 163.) The court noted it was "undisputed" that these two approaches did not "transgress" the Sixth Amendment. (*Ibid.*)

centuries into the common law.' Instead, specification of the regime for administering multiple sentences has long been considered the prerogative of state legislatures." (*Ice*, *supra*, 555 U.S. at p. 168.)

"The historical record demonstrates that the jury played no role in the decision to impose sentences consecutively or concurrently. Rather, the choice rested exclusively with the judge." (*Ice*, *supra*, 555 U.S. at p. 168.) "The historical record further indicates that a judge's imposition of consecutive, rather than concurrent, sentences was the prevailing practice." (*Id.* at p. 169.) The Court concluded that "[i]n light of this history, legislative reforms regarding the imposition of multiple sentences do not implicate the core concerns that prompted our decision in *Apprendi*. There is no encroachment here by the judge upon facts historically found by the jury, nor any threat to the jury's domain as a bulwark at trial between the State and the accused. Instead, the defendant—who historically may have faced consecutive sentences by default—has been granted by some modern legislatures statutory protections meant to temper the harshness of the historical practice." (*Ibid.*)

The Court rejected the defendant's argument that under the statute he was "entitled" to a concurrent sentence such that *Apprendi* had to apply to the factfinding that justified a consecutive sentence. (*Ice*, *supra*, 555 U.S. at p. 170.) Rather, "the scope of the constitutional jury right must be informed by the historical role of the jury at common law. It is therefore not the case that, as [the defendant] suggests, the federal

constitutional right attaches to every contemporary state-law 'entitlement' to predicate findings." (*Ibid.*)

The Court further noted that the "States' interest in the development of their penal systems, and their historic dominion in this area, also counsel against the extension of *Apprendi* that [the defendant] requests." (*Ice*, *supra*, 555 U.S. at p. 170.) States serve "as laboratories for devising solutions to difficult legal problems" and the statute, by limiting judicial discretion to impose consecutive sentences, served "salutary objectives" of ensuring sentences were proportionate to the gravity of the offense and reducing disparities in sentence length. (*Id.* at p. 171.) "All agree that a scheme making consecutive sentences the rule, and concurrent sentences the exception, encounters no Sixth Amendment shoal. To hem in States by holding that they may not equally choose to make concurrent sentences the rule, and consecutive sentences the exception, would make scant sense. Neither *Apprendi* nor our Sixth Amendment traditions compel straitjacketing the States in that manner." (*Id.* at p. 171, citations omitted.) "Moreover, the expansion that [the defendant] seeks would be difficult for States to administer. The predicate facts for consecutive sentences could substantially prejudice the defense at the guilt phase of a trial. As a result, bifurcated or trifurcated trials might often prove necessary." (*Id.* at p. 172.) Thus, the Court held the statute did not violate the Sixth Amendment. (*Ibid.*)

B. Pertinent California sentencing laws

When a defendant is convicted of multiple crimes, "[s]ection 669 authorizes the court to decide whether sentences should run concurrently or consecutively" (*People v. Jones* (1988) 46 Cal.3d 585, 592), unless another statute mandates consecutive terms. To make that sentencing choice, a court considers a variety of factors, including whether "(1) The crimes and their objectives were predominantly independent of each other; [¶] (2) The crimes involved separate acts of violence or threats of violence; or [¶] (3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior." (Cal. Rules of Court, rule 4.425(a); see also *id*., rule 4.425(b) [circumstances in aggravation and mitigation may generally be considered].)[5]

If a court orders consecutive sentences under section 669, then section 1170.1 generally governs the calculation of the aggregate sentence for determinate terms. (§ 1170.1, subd. (a); *People v. Sasser* (2015) 61 Cal.4th 1, 8-9.) It provides, in pertinent part: "Except as otherwise provided by law, and subject to Section 654, when any person is convicted of two or more felonies . . . , and a consecutive term of imprisonment is imposed under Sections 669 and 1170, 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

[5] Further undesignated rule references are to the California Rules of Court.

prison terms, and Section 12022.1." A subordinate term "shall consist of one-third of the middle term" of the prescribed punishment. (§ 1170.1, subd. (a)).

Section 667.6 is "a special sentencing scheme" for defendants convicted of certain enumerated sex offenses. (*People v. Craft* (1986) 41 Cal.3d 554, 558; accord, *Jones*, *supra*, 46 Cal.3d at pp. 592, 595; *People v. Belmontes* (1983) 34 Cal.3d 335, 346.) Among the enumerated sex offenses is the commission of a forcible lewd act in violation of section 288, subdivision (b) (§ 667.6, subd. (e)(5)), the crime repeatedly committed by appellant.

Pursuant to section 667.6, a defendant convicted of an enumerated sex offense may, and sometime must, receive full term consecutive sentences. Section 667.6(d) mandates full term consecutive sentences for multiple enumerated offenses if the judge finds either that enumerated offenses "involve[d] separate victims or involve[d] the same victim on separate occasions." (§ 667.6(d)(1).)[6]

---

[6] In full, section 667.6(d) states:

"(1) A full, separate, and consecutive term shall be imposed for each violation of an offense specified in subdivision (e) if the crimes involve separate victims or involve the same victim on separate occasions.

"(2) 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. Neither the duration of time between crimes, nor whether or not the defendant lost or

(continued…)

Section 667.6(c) authorizes a discretionary sentence to full term consecutive sentences instead of a sentence pursuant to section 1170.1, subdivision (a). In other words, if the court decides to impose a consecutive sentence, it has discretion to impose a sentence of one-third the midterm or full consecutive sentences. It applies if the defendant committed multiple enumerated offenses against the same victim not on separate occasions or if the defendant committed only one enumerated offense.[7]

(…continued)

abandoned the opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions.

"(3) The term shall be served consecutively to any other term of imprisonment and shall commence from the time the person otherwise would have been released from imprisonment. The term shall not be included in any determination pursuant to Section 1170.1. Any other term imposed subsequent to that term shall not be merged therein but shall commence at the time the person otherwise would have been released from prison."

The Legislature revised section 667.6(d) effective January 1, 2022, by replacing possessive pronouns and adding paragraph numbers. (Stats. 2021, ch. 626, § 30.) Because those changes do not affect resolution of the issue presented, the People cite the current version of the statute.

[7] It states: "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. A term may be imposed consecutively pursuant to this subdivision if a person is convicted of at least one offense specified in subdivision (e). If the term is imposed consecutively pursuant to this subdivision, it shall be served consecutively to any other term of imprisonment,

(continued…)

Thus, "[s]ection 669 is a general authorizing and procedural statute regarding sentencing for multiple convictions. Section 1170 sets forth the legislative findings and the basic provisions of the determinate sentencing law regarding imposition of terms for specific offenses. Section 1170.1, subdivision (a) is the *general* computational statute providing a method or scheme for calculating respective lengths of consecutive terms for multiple convictions. On the other hand, subdivisions (c) and (d) of section 667.6 are *specific* computational statutory provisions applying only to the imposition of full, separate and consecutive terms for certain multiple forcible sex crimes." (*People v. Waite* (1983) 146 Cal.App.3d 585, 590, disapproved on other grounds in *Jones*, *supra*, 46 Cal.3d at p. 600, fn. 8.)

Forcible lewd acts on a child under 14 years of age is "punished by imprisonment in the state prison for 5, 8, or 10 years." (§ 288, subd. (b)(1).) Because section 288, subdivision (b)(1) specifies three possible terms of imprisonment, "the court shall sentence the defendant to one of the terms of imprisonment specified unless the convicted person is given any other disposition provided by law . . . ." (§ 1170, subd. (a)(3).) Section

---

(…continued)

and shall commence from the time the person otherwise would have been released from imprisonment. The term shall not be included in any determination pursuant to Section 1170.1. Any other term imposed subsequent to that term shall not be merged therein but shall commence at the time the person otherwise would have been released from prison." (§ 667.6, subd. (c).)

1170, subdivision (b), sets forth the scope of the court's discretion to select from the sentencing triad.[8]

STATEMENT OF THE CASE

A. Catarino molests his niece

B. Doe is Catarino's younger female cousin. (Opinion 2 (Opn.).) Doe's mother, Angelica, was Catarino's father's sister. (Opn. 2-3.) Doe's father was Catarino's mother's brother. (Opn. 2-3.) "The two families were extremely close before the molestation and the families lived next door to one another." (Opn. 2-3.)

When Doe was in fourth grade, Doe and her younger sister would go to Catarino's house twice a week after school while her parents were at work. (Opn. 4; 3RT 735.) One day in February 2016, Doe told her mother she did not want to go to appellant's house because he would do "naughty things" to her. (Opn. 4; 3RT 736.) The acts started before Christmas 2015, when Doe was 9 years old. (3RT 618, 635-636, 669.)

Doe described the acts at trial and in a recorded interview with Sergeant Sugey Jaimez of the Santa Clara County Sheriff's office. (Opn. 3.) The incidents all took place in Catarino's bedroom. (Opn. 3.) "In describing the first incident, Doe stated that Catarino stood behind her, grabbed her by the waist, and put his hands under her clothing. Doe stated he touched her chest and her vagina under her clothes. Doe also testified that

---

[8] Section 1170, subdivision (b) has been materially amended since Catarino committed his crimes (Stats. 2021, ch. 6731, § 1.3), but not in a way relevant to the issue presented.

she could feel Catarino's penis on her buttocks. During her trial testimony and her interview with Jaimez, she stated that Catarino moved back and forth 'like a worm.' Doe stated she was scared and tried to push Catarino away." (Opn. 3; see 3RT 627-634, 640-641, 647-650; Exh. 2a at pp. 16-17.)

"After this first incident, there were other times Catarino stood behind Doe and moved in a way that she felt his penis. Doe testified that it happened more than twice. Doe also told Jaimez that Catarino would rub her vagina, which she called 'pineapple,' 'like a hurricane' and 'squish' it. Doe said that Catarino usually did not try to take off her underwear, but he would 'dig in' to her vagina. He touched her vagina over her clothes more than once." (Opn. 4; see 3RT 667; Exh. 2a at pp. 10-11, 40-45.)

One time Catarino tried to take off Doe's pants. (Opn. 4.) It was a separate incident from the first time he grabbed her and stood behind her. (Opn. 4.) Catarino pulled Doe's pants partway down her legs. (Opn. 4.) She pulled them back up and he tried to pull them down again. (Opn. 4.)

In one incident, Catarino had Doe sit on his lap on a chair in his bedroom. (3RT 659-664.) He started moving back and forth, again "like a worm." (3RT 662-664.) She could feel his penis on her bottom. (3RT 662; Exh. 2a at p. 43.)

"In another separate incident, Catarino put his hand under Doe's shirt and touched her bra. He tried to 'squish' her breasts." (Opn. 4.)

The last incident took place during a birthday party for Catarino's mother. (Opn. 4.) "It was late, and Doe went to lie

down in Catarino's bedroom. When she woke up, Catarino was in the room. Catarino walked toward the bed and bit Doe on her upper chest. It hurt and left a mark. Doe testified that Catarino had bit her on the chest on two occasions. Angelica testified that she had once noticed a bite mark on Doe's chest, but at the time she did not know it was caused by Catarino." (Opn. 4.)

"In each of the different instances of abuse, Doe was scared and she tried to fight off Catarino. Catarino told Doe not to tell anyone about his actions or he would get her in trouble, and said he would not let her play video games on his PlayStation, something nine-year-old Doe cared about. Because of Catarino's threats, Doe was scared to tell her mother." (Opn. 4.)

B. Charges, verdicts, and sentencing

Catarino was charged with eight counts of forcible lewd acts on a child under 14 years of age (§ 288, subd. (b)(1)), occurring between June 8, 2015, and March 9, 2016. (1CT 75-79.)

The jury found Catarino guilty of the first six counts of forcible lewd acts. (2CT 333-338.) On count 7, the jury convicted Catarino of the lesser included offense of attempted forcible lewd act. (2CT 339-340.) On count 8, the jury found Catarino not guilty. (2CT 341-343.)

The prosecution filed a sentencing memorandum arguing that mandatory consecutive sentencing was required under section 667.6(d) because the incidents occurred on separate occasions. Alternatively, the prosecution argued consecutive sentences were warranted under the discretionary provisions of section 667.6(c). (2CT 379-384.) Catarino countered that the

verdict forms did not provide sufficient information to determine the discrete acts the jurors based their verdicts on and that the sentences for three of the counts should be stayed pursuant to section 654. (2CT 386-388.)[9]

At sentencing, the prosecutor argued section 654 did not apply, and that the incidents were "separated in time, distance, location, how she was touched, [and] the manner in which it was done." (12RT 3304-3308.) Catarino responded "that this whole situation we're in right now is based on the fact there is a lack of information in the verdicts regarding which specific act they were referring to" and referred the court to his sentencing brief. (12RT 3308.)

The trial court found that "the victim testified that the defendant one, bit her chest more than one time; two, pressed his penis against her more than one time; three, touched the skin of her vaginal area, which she referred to as her pineapple; four, touched her vaginal area over the clothes more than one time; five, had her on his lap and moved like a worm one time; six, tried to take off her pants; and seven, put his hand under her shirt over her bra one time." (12RT 3308-3309.) In response to Catarino's argument that "the information and verdict forms do not provide enough on their face to determine which [discrete] acts constitute each offense," the court read aloud the jury instruction on unanimity, CALCRIM No. 3501, noted that the

[9] The verdict forms had a date range and did not specify a singular date for each count.

jury was presumed to have followed the instruction, and found "that the jury convicted the defendant of seven separate incidents pursuant to Penal Code section 667.6, [subdivision] (d)." (12RT 3309-3310.)

The court sentenced Catarino to eight years on count 1, consecutive five-year terms on counts 2 through 6, and a consecutive term of two years six months on count 7, for an aggregate sentence of 35 years 6 months. (12RT 3315-3316.)

C. Court of Appeal opinion

The Court of Appeal rejected Catarino's Sixth Amendment challenge to his sentence because "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. 16.) The court was unpersuaded by Catarino's reliance on *Apprendi* and *Alleyne*. Those cases "require a jury to determine factual questions that increase the punishment for a particular criminal offense. The rules announced in these cases do not apply to the court's determination of whether to impose consecutive sentences for convictions of multiple criminal offenses." (Opn. 16, citing *Ice*, *supra*, 555 U.S. at p. 168.)

The court also rejected Catarino's argument that substantial evidence did not support the trial court's determination that the acts occurred on separate occasions. (Opn. 16-17.) "This assertion is belied by the record. As the Attorney General outlines in his brief, Doe testified to *at least* six instances of abuse: (1) Doe testified the first time the abuse occurred,

Catarino stood behind her so that she felt his penis, moved like a worm, and touched her vagina under her clothes; (2) Doe also stated Catarino stood behind Doe and pressed his body against her more than twice (showing a second and third separate instance that occurred standing); (3) Doe also described the instance that Catarino pulled her pants down as separate; (4) likewise, Doe described another separate incident in which Catarino called her into his room, made her sit on his lap, and grinded [*sic*] against her while he held her in place; (5) Doe described as a separate incident the final instance of abuse, which occurred the night of her aunt's birthday party; and (6) Doe testified that Catarino bit her chest twice, rubbed her vagina over her clothes more than once, and put his hand under her shirt and touched her bra." (Opn. 17.)

The court ordered the matter remanded for resentencing on count 7, the conviction for attempted forcible lewd act, because the court and parties agreed the trial court erred in imposing that sentence. (Opn. 18.)

ARGUMENT

I. THE SIXTH AMENDMENT DOES NOT EXTEND TO THE "SEPARATE OCCASIONS" DETERMINATION MADE UNDER SECTION 667.6(D)

The Sixth Amendment guarantees a jury trial for any fact (other than a prior conviction) that increases the statutory minimum or maximum sentence for a discrete crime. It does not, however, extend to factfinding necessary under sentencing regimes that specify whether sentences for multiple convictions are served concurrently or consecutively. Because section 667.6(d)

involves factfinding necessary to make the choice between concurrent or consecutive sentences, it does not implicate the Sixth Amendment.

A. Under *Oregon v. Ice*, section 667.6(d) is part of a consecutive sentencing scheme to which *Apprendi* and *Alleyne* do not apply

The Sixth Amendment question raised here is controlled by the high court's decision in *Ice*, which rejected the argument that a fact essential to the decision to impose a consecutive term must be found by a jury beyond a reasonable doubt. Moreover, the key considerations in *Ice*—"historical practice and respect for state sovereignty" (555 U.S. at p. 168)—confirm that section 667.6(d) does not violate the Sixth Amendment.

1. *Ice* controls the analysis

Sections 667.6, 669, and 1170.1, are all part of California's "regime for administering multiple sentences." (*Ice*, *supra*, 555 U.S. at p. 168; see *Jones*, *supra*, 46 Cal.3d at p. 592 [sections 667.6 and 1170.1 are only applicable if a defendant is convicted of multiple crimes].) Because the relevant factfinding goes to the relationship between sentences for multiple offenses, not the sentence for a discrete offense, *Ice* controls.[10]

---

[10] Even before *Ice*, this Court held the Sixth Amendment did not apply to the determination under section 667.6(d) that the crimes involved the same victim on separate occasions. (*People v. Wilson* (2008) 44 Cal.4th 758, 808-809, 813 [claim that trial court erred by applying § 667.6(d) by "relying on factors that [the defendant] neither admitted nor were found true by the jury beyond a reasonable doubt" rejected because Sixth Amendment's jury trial right "does not apply to the sentencing choice to impose

(continued…)

Catarino contends *Ice* does not control because he is not challenging the consecutive nature of the sentence, but merely the amount of time imposed on each consecutive count. (OBM 11.) That is a false distinction. Although the finding under section 667.6(d) compels a full term consecutive sentence, rather than consecutive sentences calculated at one-third of the midterm under section 1170.1 or a concurrent term, the effect of the finding does not change the calculus that section 667.6(d) is a statute regarding the imposition of multiple sentences to which *Apprendi* does not apply. (See *Ice*, *supra*, 555 U.S. at pp. 168-169.) Catarino "has been tried and convicted of multiple offenses, each involving discrete sentencing prescriptions." (*Id*. at p. 163.) The facts necessary to impose the legally prescribed punishments consecutively do no need to be adjudicated in accordance with the Sixth Amendment. (*Id*. at pp. 163-164.) In other words, the facts used to decide how to punish multiple offenses do not "produce[] a new penalty" and do not "constitute[] an ingredient of the offense." (*Alleyne*, *supra*, 570 U.S. at p. 112.)

A decision of the Oregon Supreme Court helps explain why: In *State v. Cuevas* (2015) 358 Or. 147, the court addressed a statute that limited the length of an aggregate consecutive

---

(…continued)

consecutive rather than concurrent sentences"]; accord, *People v. Scott* (2015) 61 Cal.4th 363, 405 [describing *Wilson* as "rejecting defendant's claim that the trial court violated his 6th Amendment rights by imposing full consecutive terms under § 667.6, subd. (d)"]; see *People v. King* (2010) 183 Cal.App.4th 1281, 1324 [rejecting Sixth Amendment challenge to section 667.6(d)].)

sentence a trial court could impose if the convictions arose out of a single criminal episode. (*Id.* at pp. 149-150.) The trial court had determined that the defendant's multiple convictions arose out of separate criminal episodes and therefore the defendant was not entitled to the limitation on the aggregate sentence. (*Id.* at p. 151.) The defendant challenged the statute on Sixth Amendment grounds, arguing he was presumptively entitled to the limit on the aggregate sentence and therefore the factual determination that the convictions arose out of separate criminal episodes, which allowed the court to impose a greater aggregate sentence, was a factual question for the jury. (*Id.* at p. 156.)

The Oregon Supreme Court rejected the defendant's Sixth Amendment challenge. It first held as a matter of state law that the statute did not function as the defendant argued and the factual finding made under it served only to reduce the potential sentence; therefore, it did not trigger *Apprendi* concerns. (*Cuevas*, *supra*, 358 Or. at p. 157.) However, the court also rejected the defendant's challenge for the "second, independent reason" that "[b]y its terms, the holding in *Apprendi* did not extend to the question of how a trial court should aggregate multiple sentences." (*Id.* at p. 159.) The United States Supreme Court had "confirmed *Apprendi*'s limited reach in *Ice*" by declining "to extend *Apprendi* beyond 'the imposition of sentences for discrete crimes' to factual findings that served as the predicate for imposing sentences consecutively. That is, *Ice* declined to extend *Apprendi* to factual findings that were the predicate for imposing an increased aggregate sentence." (*Ibid.*, citations omitted.) The

Oregon Supreme Court thus held that "even if the question whether defendant's offenses arose out of separate criminal episodes were the factual predicate for imposing a greater aggregate consecutive sentence, as it was in *Ice*, that factual determination is not subject to *Apprendi*." (*Ibid.*)

The same analysis applies to section 667.6(d). It is "a mandatory consecutive sentencing scheme applicable *only* when a defendant has been convicted of two or more [enumerated sex offenses]." (*Jones*, *supra*, 46 Cal.3d at p. 595, italics added.) The statute mandates full term consecutive sentences where the crimes "involve separate victims or involve the same victim on separate occasions," and it provides guidance for a court in determining whether the crimes were committed on separate occasions. (§ 667.6, subd. (d)(1), (2).) That factual determination is thus a "predicate for imposing a greater aggregate consecutive sentence" to which *Apprendi* does not apply. (*Cuevas*, *supra*, 358 Or. at p. 160; accord, *Ice*, *supra*, 555 U.S. at p. 168.)

The United States Supreme Court "has not extended the *Apprendi* and *Blakely* line of decisions beyond the offense-specific context that supplied the historic grounding for the decisions." (*Ice*, *supra*, 555 U.S. at p. 163.) That line of cases requires a fact (other than a prior conviction) that alters the range of punishment for a discrete crime (by increasing a mandatory minimum or the maximum that could otherwise be imposed) be treated as elements and proven in accordance with the Sixth Amendment. (*Alleyne*, *supra*, 570 U.S. at pp. 103-104, 107-108.)

"[T]he legally prescribed range *is* the penalty affixed to the crime . . . ." (*Id.* at p. 112.)

Here, "the legally prescribed range" for a violation of section 288, subdivision (b)(1), is a sentence of 5, 8, or 10 years. (§ 288, subd. (b)(1).) Catarino's sentences—eight years on count 1 and five years each on counts 2 through 6 (12RT 3315)—were selected from that range. His sentences were thus fully authorized by the jury's verdict and do not violate the Sixth Amendment. (See *Blakely*, *supra*, 542 U.S. at pp. 303-304.)

2. Historical practice supports upholding section 667.6(d)

The finding made under section 667.6(d) does not impinge on the "animating principle" of *Apprendi*—"the preservation of the jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense." (*Ice*, *supra*, 555 U.S. at p. 168.) The right to a jury trial "must be informed by the historical role of the jury at common law." (*Id.* at p. 170; accord, *People v. Mosley* (2015) 60 Cal.4th 1044, 1049-1050, 1057-1060.) Historically, a jury played no role in the decision to impose consecutive or concurrent sentences. (*Ice*, at p. 169.) Thus, in *Ice*, the trial court's determination that the crimes did "not arise from the same continuous and uninterrupted course of conduct," which had the effect of subjecting the defendant to consecutive terms, did not invade the province of the jury. (*Id.* at pp. 165, 169.)

In California, under section 669, a judge determines whether to run sentences concurrently or consecutively by considering the circumstances of the crimes, including whether the crimes were committed "at different times or separate places." (Rule

4.425(a)(3).) There is no question that that determination does not violate the Sixth Amendment. (*People v. Black* (2007) 41 Cal.4th 799, 823 [determination of whether to run sentences consecutively does not implicate constitutional right to a jury trial]; *People v. McKinzie* (2012) 54 Cal.4th 1302, 1369 [same], overruled on other grounds in *Scott*, *supra*, 61 Cal.4th at p. 391, fn. 3.) It is that decision under section 669 that subjects a defendant to potential consecutive sentencing with subordinate terms calculated at one-third of the midterm under section 1170.1, subdivision (a).

A finding of "separate occasions" under section 667.6(d) is similar to an "at different times or separate places" (rule 4.425(a)(3)) finding and has a similar effect: It subjects a defendant to consecutive sentencing, but calculated under section 667.6(d) rather than section 1170.1, subdivision (a). Certainly, the findings under section 667.6(d) subjected Catarino to a longer aggregate sentence than if section 1170.1, subdivision (a) applied. But that difference is the product of the Legislature's choice to have more than one scheme governing consecutive sentencing. Appellant chose to commit crimes governed by scheme X instead of scheme Y. The existence of more than one scheme does not change the nature of the finding that triggers application of a particular scheme. Authorizing judicial factfinding does not encroach on facts "historically found by a jury" or threaten "the jury's domain as a bulwark at trial between the State and the accused." (*Ice*, *supra*, 555 U.S. at p. 169.) The Sixth Amendment

does not attach "to every contemporary state-law 'entitlement' to predicate findings." (*Id.* at p. 170.)

3. State sovereignty supports upholding section 667.6(d)

"States' interest in the development of their penal systems, and their historic dominion in this area, also counsel against the extension of *Apprendi*" to the Legislature's choice in section 667.6(d) to rely on judicial factfinding to determine whether mandatory full consecutive terms are to be imposed. (*Ice*, *supra*, 555 U.S. at p. 170.)

"[S]pecification of the regime for administering multiple sentences has long been considered the prerogative of state legislatures." (*Ice*, *supra*, 555 U.S. at p. 168.) That the Legislature chose to exercise that prerogative and make section 667.6(d) a mandatory full term consecutive sentencing scheme is immaterial. "All agree that a scheme making consecutive sentences the rule, and concurrent sentences the exception, encounters no Sixth Amendment shoal." (*Ice*, *supra*, 555 U.S. at p. 171.) Indeed, historically, the practice was to impose consecutive sentences. (*Id.* at p. 169.) Thus, the Legislature may properly mandate consecutive sentences for certain crimes and not others, and the implementation of that scheme may rely on judicial factfinding. (See *id.* at p. 171.)

States serve "as laboratories for devising solutions to difficult legal problems" (*Ice*, *supra*, 555 U.S. at p. 171), and California has a long history of being an active laboratory, both

as to sentencing for a single offense and sentencing multiple offenses.[11]

California has frequently adopted different rules for the aggregation of sentences. When first enacted in the Penal Code of 1872, section 669 required that sentences be served consecutively.[12] In 1927, section 669 was amended to grant courts discretion "in exceptional cases" to impose concurrent terms. (Stats. 1927, ch. 626, § 1, p. 1056.) In 1931, the Legislature again amended section 669, rewriting it, omitting the "exceptional cases" limitation on concurrent sentences, and requiring that the judgment specify how the terms were to be

---

[11] "In the early [California] law, it was common to specify terms of years as the proper sentences for particular felonies. The Indeterminate Sentence Law (ISL), enacted in 1917, divested the trial judge of this power and gave it to the Adult Authority, which established a specific term within a broad statutory range. [¶] The Indeterminate Sentence Law was repealed and replaced by the Determinate Sentencing Law (DSL) in 1977. Today, most sentences are imposed under the DSL. However, some statutes, notably the murder statute and the three strikes law, still impose an indeterminate term." (3 Witkin & Epstein, Cal. Criminal Law (4th ed. Apr. 2021 update) Punishment, § 309, citations omitted; *id.*, § 2 [discussing: changing legislatively identified purposes of sentencing; Propositions 8, 9, 21, 36, 47, 57, 64, 66, 83, 115, 184; and realignment].)

[12] As enacted in 1872, section 669 provided: "When any person is convicted of two or more crimes before sentence has been pronounced upon him for either, the imprisonment to which he is sentenced upon the second or other subsequent conviction must commence at the termination of the first term of imprisonment to which he shall be adjudged, or at the termination of the second or other subsequent term of imprisonment, as the case may be."

served.[13] An amendment in the 1940's provided that if a defendant was convicted of a crime for which the sentence was "expressly prescribed to be life imprisonment, whether with or without possibility of parole, then the terms of imprisonment on the other convictions, whether prior or subsequent," were "merged and run concurrently with such life term." (Stats. 1943, ch. 219, § 1, p. 1122.) Absent an express prescription of life imprisonment, however, a consecutive term was permissible in the court's discretion, even if the crime was punishable by an indeterminate term with a maximum term of life. (*Ex parte Quinn* (1945) 25 Cal.2d 799.)

Even now, the Legislature has adopted several schemes for sentencing a defendant guilty of multiple offenses. The Legislature has not always granted a court discretion to impose a concurrent term, nor has it invariably capped a consecutive term at one-third the midterm. Instead, the Legislature has enacted

---

[13] "When any person is convicted of two or more crimes, the judgment shall direct whether the terms of imprisonment or any of them to which he is sentenced shall run concurrently or whether the imprisonment to which he is or has been sentenced upon the second or other subsequent conviction shall commence at the termination of the first term of imprisonment to which he has been sentenced, or at the termination of the second or subsequent term of imprisonment to which he has been sentenced, as the case may be." (Stats. 1931, ch. 481, § 4, p. 1052.)

several provisions that vary from the scheme established in section 1170.1, subdivision (a).[14]

The mandatory full consecutive sentence scheme of section 667.6(d) is thus but one of many schemes adopted by the Legislature to calibrate punishment and culpability. Mandating full consecutive terms when the predicate facts required by section 667.6(d) are found "serves the 'salutary objectives' of promoting sentences proportionate to 'the gravity of the offense' and of reducing disparities in sentence length." (*Ice*, *supra*, 555 U.S at p. 171, citation omitted.)

---

[14] E.g., sections 1170.1, subdivisions. (c) (for two or more kidnappings "involving separate victims, the subordinate term for each consecutive offense of kidnapping shall consist of the full middle term and shall include the full term imposed for specific enhancements applicable to those subordinate offenses") & (d) (for in-prison offenses or escapee, if "the law either requires the terms to be served consecutively or the court imposes consecutive terms, the term of imprisonment for all the convictions that the person is required to serve consecutively shall commence from the time the person would otherwise have been released from prison. If the new offenses are consecutive with each other, the principal and subordinate terms shall be calculated as provided in subdivision (a)"), 1170.12, subd. (a)(6) (under three strikes law, "[i]f there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to this section") & (7) ("If there is a current conviction for more than one" strike, "the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law"), 4501.5 (battery by state prisoner on nonprisoner punishable by imprisonment "in the state prison for two, three, or four years, to be served consecutively").

"[R]espect for state sovereignty" thus counsels against extending the factfinding rule of *Apprendi* to the Legislature's choice. (*Ice*, *supra*, 555 U.S. at p. 168.)

B. Section 667.6(d) does not increase any "mandatory minimum" sentence in violation of *Alleyne*

Catarino rejects the view that *Ice* disposes of his claim. He contends that because 667.6(d) raises the mandatory minimum from one-third the midterm for a subordinate consecutive term under section 1170.1, subdivision (a) to a full consecutive term, judicial factfinding under section 667.6(d) violates *Alleyne*. (OBM 14-15.) Catarino's reliance on *Alleyne* is misplaced.

Alleyne did not overrule *Ice* or purport to limit it in any way. *Ice* remains a "narrow exception" to *Apprendi*. (*United States v. Haymond* (2019) ___U.S.___, fn. 3 [139 S.Ct. 2369, 2377, fn. 3].) And *Ice* recognized broad legislative powers to establish multiple-conviction sentencing schemes using judicial factfinding, as the Legislature has done here. (See *Ice*, *supra*, 555 U.S. at pp. 169, 171.) However, Catarino's argument fails for the further reason that as a matter of statutory construction, section 667.6(d) does not increase any "mandatory minimum" sentence. Therefore, it does not implicate the Sixth Amendment under *Alleyne*.

Catarino premises his argument on the assumption that he is entitled to subordinate terms under section 1170.1 on all but count 1 and therefore the finding under section 667.6(d) increases the minimum sentence. (OBM 13-14.) The fatal flaw in Catarino's argument, however, is that a defendant convicted of

multiple enumerated offenses is never entitled in the first instance to sentencing under section 1170.1.

Preliminarily, no offense, enumerated in section 667.6 or not, is punishable by one-third the midterm based on "the facts reflected in the jury verdict alone." (*Apprendi*, *supra*, 530 U.S. at p. 483.) Such a term is not part of the "the prescribed range of sentences to which a criminal defendant is exposed" (*Alleyne*, *supra*, 570 U.S. at p. 112) for the commission of a discrete offense.

That is so because while most felonies under the determinate sentencing law are punishable by a triad of terms (low, middle, and upper), none are punishable by a tetrad of terms (one-third the middle, low, middle, and upper). (§ 1170, subd. (b); *People v. Jefferson* (1999) 21 Cal.4th 86, 95.) Thus, for example, a felony without a specified term is punishable by imprisonment "for 16 months, or two or three years" (§ 18, subd. (a)), not for 8 or 16 months, or two or three years. Similarly, assault with a semiautomatic firearm is "punished by imprisonment in the state prison for three, six, or nine years" (§ 245, subd. (b)), not two, three, six, or nine years. And forcible lewd acts on a child under 14 (the crime at issue here) is "punished by imprisonment in the state prison for 5, 8, or 10 years," not—as appellant would have it—2 years 8 months, 5, 8, or 10 years.

The availability of a sentence of one-third the midterm is not the product of a legislative choice about the penalty for a discrete offense. Rather, it is the product of one of many legislative choices about the imposition of sentences for multiple offenses.

The choice to deviate from the historical rule of mandatory consecutive sentences by authorizing concurrent sentences, discretionary full consecutive sentences, or a lower sentence than otherwise permitted for the offense (e.g., one-third the midterm) does not implicate the Sixth Amendment because none of those variations alters the legally prescribed punishment for an offense.

This framework is at its most nuanced in cases of sex offenses subject to section 667.6. The starting point for calculating such an aggregate sentence is section 667.6(d)—not 1170.1, subdivision (a). "Section 667.6, subdivision (d), 'is mandatorily applicable to cases within its terms, supplanting to that extent the generally applicable consecutive sentencing scheme of section 1170.1.'" (*People v. Delgado* (2010) 181 Cal.App.4th 839, 854, citation omitted; accord, *Jones*, *supra*, 46 Cal.3d at p. 595.) Section 1170.1, subdivision (a) is clear that it applies "[e]xcept as otherwise provided by law." (§ 1170.1, subd. (a).) Catarino even acknowledges that section 1170.1 applies "unless another, more specific statute applies." (OBM 13.) Section 667.6(d) is one such specific statute. (See *Jones*, at p. 595; *Craft*, *supra*, 41 Cal.3d at pp. 558-559; *Delgado*, at p. 854; *Waite*, *supra*, 146 Cal.App.3d at p. 590.)

For a defendant convicted of multiple enumerated sex offenses, then, the sentencing judge begins the aggregation analysis by determining whether section 667.6(d)(1) applies by deciding the controlling factual question posed by it. (Rule 4.426(a) ["When a defendant has been convicted of multiple violent sex offenses as defined in section 667.6, the sentencing

judge must determine whether the crimes involved separate victims or the same victim on separate occasions"].) If the court determines any of the enumerated crimes involved separate victims or the same victim on separate occasions, then as to those offenses, the court must impose full term consecutive sentences, and that is the end of the consecutive sentence analysis for those offenses. (§ 667.6, subd. (d)(1) & (3); rule 4.426(a).) Of course, section 667.6(d) does not specify which of the three terms—the "legally prescribed range" (*Alleyne*, *supra*, 570 U.S. at p. 112) the court must select for each count; the court makes that selection pursuant to section 1170, subdivision (b). (See also rule 4.420 [selection of term from triad].)

If there is one victim and the court does not find that any of the offenses occurred on separate occasions, i.e. the crimes occurred on the same occasion, then sentencing for the enumerated offenses proceeds under section 667.6(c). (Rule 4.426(b).) The sentencing court first determines whether to impose consecutive or concurrent terms under the criteria listed in rule 4.425, and then, if imposing consecutive terms, determines whether to do so as full terms under section 667.6(c) or as subordinate terms under section 1170.1, subdivision (a). (*Belmontes*, *supra*, 34 Cal.3d at p. 348; rules 4.420(e), 4.426(b).)

Thus, a defendant, such as Catarino, who violated section 288, subdivision (b) would "know, *ex ante*, the contours of the penalty that the legislature affixed to the crime" (*Alleyne*, *supra*, 570 U.S. at pp. 112-113)—"5, 8, or 10 years" (§ 288, subd. (b)). What he would not know until the judicial factfinding required by

state law occurred was whether he would serve a term from the triad concurrently, a term from the triad consecutively, or a nontriad term that was lower than the lowest legally prescribed triad term consecutively.

A finding of separate occasions mandating full term consecutive sentences under section 667.6(d) does not have the effect of increasing the minimum sentence. The court, in that circumstance, would pick a term from the triad, the legally prescribed range. A finding that crimes against a single victim did not occur on separate occasions also does not increase the minimum term for the offense. If the judge opts to sentence concurrently, the court would impose a term from the triad. If the court opts to sentence consecutively and to impose a full term sentence, the court would also pick a term from the triad, the legally prescribed range. If the judge elects to sentence consecutively but chooses not to impose a full term sentence, the sentence imposed is not from the legally prescribed triad for the offense. Rather the sentence is one-third the midterm—*below* the legally prescribed range in the triad. In other words, for defendants convicted of multiple enumerated sex offenses, section 1170.1 is not a sentencing floor from which section 667.6(d) is a step up, leading to the creation of "a new, aggravated crime, each element of which must be submitted to the jury." (*Alleyne*, *supra*, 570 U.S. at p. 113.) Rather, the triad is the legally prescribed range and section 667.6(d) is the ceiling from which there is a potential to step down.

That a consecutive one-third term will lead to a greater aggregate sentence than a concurrent term from the triad does not make the one-third term a mandatory minimum. Under state law, a concurrent term is punishment. That is the reason that double punishment by concurrent terms is prohibited by section 654, a provision that reduces punishment. (E.g., *People v. Deloza* (1998) 18 Cal.4th 585, 592 ["Section 654 does not allow any multiple punishment, including either concurrent or consecutive sentences"]; *People v. Deegan* (2016) 247 Cal.App.4th 532, 547 ["*Apprendi* does not apply to determinations made by a trial court under section 654 because that statute entails sentencing reduction rather than a sentencing enhancement"].) The subordinate term rule of section 1170.1, subdivision (a) has a similar role: It reduces the legally prescribed punishment for an offense (the sentencing triad) when the court elects consecutive terms and no other provision controls the selection of the consecutive term.

Therefore, even if *Ice* does not control and the Sixth Amendment were applicable to section 667.6(d), section 667.6(d) would not violate the Sixth Amendment because it does not "increase" any otherwise "mandatory minimum" sentence.

II. IF SECTION 667.6(D) VIOLATES THE SIXTH AMENDMENT, IT SHOULD BE REFORMED

Before turning to whether the error in this case was harmless, the People request that if this Court determines that section 667.6(d) violates the Sixth Amendment, it reform the statute to preserve its constitutionality. Specifically, section

667.6(d) should be reformed to require a jury finding of "separate occasions" rather than have that determination made by a court.

"'[A] court may reform a statute to satisfy constitutional requirements if it can conclude with confidence that (i) it is possible to reform the statute in a manner that closely effectuates policy judgments clearly articulated by the enacting body, and (ii) the enacting body would have preferred such a reformed version of the statute to invalidation of the statute.'" (*Property Reserve, Inc. v. Superior Court* (2016) 1 Cal.5th 151, 208, quoting *Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 615; accord, *People v. Sandoval* (2007) 41 Cal.4th 825, 849.)

Section 667.6(d) was enacted to ensure longer prison terms for certain sex offenders. (*Jones*, *supra*, 46 Cal.3d at pp. 592, 595.) It did so by mandating full term consecutive sentences for some defendants and making full term consecutive sentences discretionary for others. "Inasmuch as subdivision (c) merely permits full, separate, and consecutive terms, while subdivision (d) mandates them, we must presume that the Legislature regarded some multiple offenders as automatically deserving of the harsher punishment, and that it must have used the language it did to single out such persons." (*Craft*, *supra*, 41 Cal.3d at p. 560.) To effectuate that policy judgment and preserve the statute's constitutionality, section 667.6(d)(2) should be revised to provide that the jury determines beyond a reasonable doubt whether the crimes occurred against the same victim on "separate occasions."

III. ANY ERROR WAS HARMLESS

If there were a Sixth Amendment violation, it would be subject to harmless error review under the test set forth in *Chapman v. California* (1967) 386 U.S. 18. (*Washington v. Recuenco* (2006) 548 U.S. 212, 222; *Sandoval*, *supra*, 41 Cal.4th at p. 838.) Any error under the Sixth Amendment was harmless under *Chapman* because a jury would have found beyond a reasonable doubt that each forcible lewd act occurred on a separate occasion.

In the context of Sixth Amendment error under *Apprendi*, this Court held, "[I]f a reviewing court concludes, beyond a reasonable doubt, that the jury, applying the beyond-a-reasonable-doubt standard, unquestionably would have found true at least a single aggravating circumstance had it been submitted to the jury, the Sixth Amendment error properly may be found harmless." (*Sandoval*, *supra*, 41 Cal.4th at p. 839.) Thus, any Sixth Amendment error here was harmless if this Court can determine beyond a reasonable doubt that had the question of "separate occasions" been submitted to the jury, the jury would have found separate occasions for each offense the superior court sentenced consecutively. (*Ibid.*; *Wilson*, *supra*, 44 Cal.4th at p. 812; see also *Neder v. United States* (1999) 527 U.S. 1, 18 ["Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?"].)

The meaning of separate occasions is explained in section 667.6(d)(2). "In determining whether crimes against a single victim were committed on separate occasions under [section 667.6(d)], 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).) "A finding that the defendant committed the sex crimes on separate occasions 'does not require a change in location or an obvious break in the perpetrator's behavior.'" (*King*, *supra*, 183 Cal.App.4th at p. 1325.)

Here, any error was harmless beyond a reasonable doubt because Doe testified that Catarino touched her on more than six separate occasions occurring over the course of months, from late 2015 to early 2016. (Opn. 4; 3RT 669.) Doe described the first incident as one where Catarino stood behind her so that she could feel his penis, moved like a "worm," and touched the top of her chest and her vagina under her clothes. (Opn. 3; 3RT 627-632, 640-641, 647-650.) Catarino argues this means that multiple acts happened on the same occasion (ABM 16), but while Doe said Catarino touched her vagina under her clothes only once, he stood behind her and pressed his body against hers more than twice. (3RT 667.) Thus, there were times Catarino stood behind Doe and pressed his body against hers that were separate from when he touched her vagina under her clothes. In other words, there were at least three separate occasions when Catarino stood behind Doe, touched her, and made her feel his penis. (Opn. 17.)

Additionally, Doe testified that the incident when Catarino tried to pull her pants down was a different incident from when he stood behind her, i.e. a fourth separate occasion. (3RT 642.) Catarino molested Doe on a fifth separate occasion when

Catarino had Doe sit in his lap. (3RT 659, 662-664.) In a sixth separate occasion, Catarino put his hand under Doe's shirt, touched her bra, and tried to "squish" her breasts. (Opn. 4; 3RT 664-665, 668; Exh. 2a at pp. 36-37.) A seventh separate occasion was the final incident, when Catarino bit Doe on the chest during his mother's birthday party. (Opn. 4; 3RT 654-657.) And Doe said that Catarino bit her twice, meaning there was an eighth occasion when he bit her. (Opn. 4; 3RT 667.) Based on Doe's description of the different acts that occurred at different times, any error in failing to submit the "separate occasions" question to the jury was harmless beyond a reasonable doubt.

Catarino contends the error was not harmless because the jury might have based its verdicts on acts that occurred on a single occasion. (OBM 16-17.) However, the question in the harmless error analysis is not which acts the jury *could have* based its verdicts on, but what the jury *would have done* had it been presented with the question of separate occasions. (*Sandoval*, *supra*, 41 Cal.4th at p. 839; *Neder*, *supra*, 527 U.S. at p. 18.) Given the numerous separate incidents that Doe described, the jury unquestionably would have found that the acts occurred on separate occasions. Indeed, Catarino concedes that Doe described acts that occurred on separate days. (OBM 20.) Thus, any error was harmless beyond a reasonable doubt.

IV. IF A SIXTH AMENDMENT ERROR WAS PREJUDICIAL, THE CASE SHOULD BE REMANDED FOR A SENTENCING-FACTOR TRIAL OR SENTENCING UNDER SECTION 667.6(C)

If judicial factfinding of the "separate occasion" sentencing factor violated the Sixth Amendment and if that error was not

harmless, the proper remedy is to remand to give the district attorney an opportunity to elect to try the existence of the factor to a jury or to submit the case to resentencing under section 667.6(c).

Catarino contends that if the matter is remanded for resentencing, he must be resentenced without regard to section 667.6. He argues he cannot be sentenced under the discretionary provision of section 667.6(c) because there has not been a "finding" that the crimes occurred on the same occasion. (OBM 17-19.) He further contends that because "it is impossible to discern which acts were the basis for the jury's verdicts," a trier of fact cannot now ascertain whether the jury convicted him of acts occurring on the same or separate occasions. (OBM 19-22.) Catarino thus concludes that he may only be resentenced according to section 1170.1. (OBM 22.) His premise, however, is incorrect.

Section 667.6(c) applies where section 667.6(d) does not as the subdivisions are premised on mutually exclusive foundational facts; either the multiple sex acts occurred on separate occasions or they did not, in which case they occurred on the same occasion. Section 667.6(c) applies any time it is not shown that the crimes occurred on separate occasions under section 667.6(d).

A. Remand is proper to provide the district attorney an election

If this Court determines there was prejudicial Sixth Amendment error, then the case should be remanded and the district attorney given the election of trying the "separate

occasions" allegation to a jury or permitting the court to resentence appellant in its discretion under section 667.6(c).

Such an election is proper because the jury was not instructed that it had to make a finding of "separate occasions." In the context of instructional error on greater or lesser included offenses, "[w]hen a greater offense must be reversed, but a lesser included offense could be affirmed, we give the prosecutor the option of retrying the greater offense, or accepting a reduction to the lesser offense." (*People v. Kelly* (1992) 1 Cal.4th 495, 528.) The jury here convicted of Catarino of six counts of forcible lewd acts. Those acts occurred, at a minimum, on the same occasion to warrant discretionary full term sentencing under section 667.6(c). (See Arg. IV.B., *post*.) However, the prosecution should be given the opportunity, at its election, to prove those acts occurred on separate occasions to mandate full term consecutive sentences under section 667.6(d). (See *Kelly*, at p. 528.)

An election would not violate the double jeopardy clause because sentencing factors are not part of the "offense" for double jeopardy purposes, at least in the absence of an express or implied acquittal. (See generally *People v. Anderson* (2009) 47 Cal.4th 92; *Porter v. Superior Court* (2009) 47 Cal.4th 125, 137.) Moreover, even if the double jeopardy clause otherwise could apply to the finding of separate occasions, because Catarino was not tried on those facts, he was never placed in jeopardy as to them (*Green v. United States* (1957) 355 U.S. 184, 188 ["a defendant is placed in jeopardy once he is put to trial before a

jury"]) and the People did not have "a full and fair opportunity" (*Ohio v. Johnson* (1984) 467 U.S. 493, 502) to prove the facts.

B. Section 667.6(c) does not require an affirmative finding that the acts occurred on the same occasion

If on remand the prosecutor elects not to try the finding of "separate occasions" to a jury, resentencing should proceed under section 667.6(c). Contrary to Catarino's argument, section 667.6(c) does not require proof that crimes occurred on the same occasion, notwithstanding its reference to crimes against "the same victim on the same occasion." (§ 667.6(c).) That phrase simply establishes that subdivision (c) applies when subdivision (d) of section 667.6 does not.

Statutes must be construed to give effect to the law's purpose. (*People v. Gonzalez* (2008) 43 Cal.4th 1118, 1125.) A court must give the statute's words their usual and ordinary meaning and the statute's plain meaning controls unless its words are ambiguous. (*Id.* at p. 1126.) If the statute itself does not provide a reliable indicator of legislative intent, a court should examine the context of the statutory language and adopt the construction that "best serves to harmonize the statute internally and with related statutes." (*Ibid.*, internal quotation marks omitted.) If a statute is amenable to two alternative interpretations, a court should follow the interpretation that leads to the more reasonable result. (*Ibid.*) "Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute . . . ." (*Ibid.*, internal quotation marks omitted.)

Section 667.6(d)(1) states: "A full, separate, and consecutive term shall be imposed for each violation of an offense specified in subdivision (e) if the crimes involve separate victims or involve the same victim on separate occasions." Section 667.6(d)(2) explains that a court making that determination considers whether the defendant had a reasonable opportunity to reflect between crimes and nevertheless resumed assaultive behavior. This provision abrogates *Craft*, *supra*, 41 Cal.3d at page 561, which had construed the phrase narrowly, by establishing an objective test for determining whether the crimes occurred on separate occasions and providing "'a broader, less stringent standard to prove that multiple sex crimes occurred against the same victim on separate occasions.'" (*People v. Jones* (2001) 25 Cal.4th 98, 104, fn. 2; see Stats. 1986, ch. 1431, § 2, p. 5129.)

As noted, section 667.6(c) authorizes a discretionary full consecutive term "if the crimes involve the same victim on the same occasion" or "a person is convicted of at least one" enumerated offense. Section 667.6(c) does not explain or define "same occasion."

In the context of a defendant convicted of multiple enumerated sex offenses against the same victim, the only factual scenarios that exist are that those acts occurred on the same occasion, separate occasions, or some combination thereof. To trigger mandatory consecutive sentencing, a factfinder, whether a judge or jury, must first determine whether the crimes occurred on separate occasions, applying the guidance of section 667.6(d)(2). (Rule 4.426(a).) Section 667.6(c) does not contain a

different definition of "same occasion." The only reasonable construction of the statutes, then, is that if the People fail to prove the crimes were committed on separate occasions under 667.6(d), then the crimes occurred on the same occasion. Sentencing then proceeds under section 667.6(c).

Catarino argues there is a "third option" in that there could be a failure of proof as to both "separate occasions" and "same occasion." He thus contends a defendant convicted of multiple sex offenses can avoid sentencing under section 667.6 altogether if the jury "just cannot tell" whether the crimes occurred on the same or separate occasions. (OBM 18-19.)

Catarino's argument should be rejected under the reasoning of *People v. Milward* (2011) 52 Cal.4th 580. In *Milward*, the Court considered two assault statutes: (1) assault "with a deadly weapon or instrument *other than a firearm*" (§ 245, subd. (a)(1), italics added); and (2) assault "*with* a firearm" (§ 245, subd. (a)(2), italics added). (*Milward*, at p. 585.) One issue was whether "other than a firearm" was an element the People had to prove for assault under section 245, subdivision (a)(1). Relying on *People v. Rios* (2000) 23 Cal.4th 450, 462, the Court concluded it was not. (*Id.* at p. 587.)

In reaching that conclusion, the Court posited the following scenario: "For instance, if a defendant committed an assault with a deadly weapon, and the jury was uncertain (because of conflicting evidence) whether the weapon was a firearm, that jury could not convict the defendant of assault with a deadly weapon other than a firearm (§ 245, subd. (a)(1)), because it had not been

established 'beyond a reasonable doubt' (the prosecution's burden of proof) that the weapon used was 'a deadly weapon . . . *other* than a firearm' (the phrase used in § 245, subd. (a)(1)). Nor could the jury in our hypothetical convict the defendant of assault *with* a firearm (§ 245, subd. (a)(2)), because of the conflicting evidence on whether the weapon was actually a firearm." (*Milward*, *supra*, 52 Cal.4th at pp. 587-588.)

To avoid placing a jury in "such a quandary," the Court concluded that "other than a firearm" is not an element under section 245, subdivision (a)(1); the phrase "serves simply to distinguish an assault so committed from the slightly more serious offense of assault 'with a firearm,' as set forth in section 245's subdivision (a)(2). Consequently, when, for instance, a jury is convinced beyond a reasonable doubt that the defendant assaulted the victim with a deadly weapon, but because of conflicting evidence is uncertain whether the weapon was indeed a firearm, the jury can convict the defendant of aggravated assault, the crime set forth in section 245's subdivision (a)(1)." (*Milward*, *supra*, 52 Cal.4th at p. 588.)

Applying that reasoning here, the phrase "the same victim on the same occasion" as used in section 667.6(c), is not an "element" the People have to prove, but rather it serves to distinguish 667.6(c) from section 667.6(d). Thus, while the People have to prove the crimes occurred on "separate occasions" to subject a defendant to mandatory consecutive sentencing under section 667.6(d), they do not also have to prove the crimes occurred on the "same occasion," in order to utilize discretionary

sentencing under section 667.6(c). (See *Milward*, *supra*, 52 Cal.4th at p. 588; *Rios*, *supra*, 23 Cal.4th at pp. 462-463.) The jury here was convinced beyond a reasonable doubt that Catarino committed six acts of forcible lewd conduct. Any uncertainty in whether the crimes occurred on the same or separate occasions should still make him eligible for to discretionary full term consecutive sentences under section 667.6(c). (See *Milward*, at p. 588; *Rios*, at p. 463.)

Catarino relies on *People v. Goodliffe* (2009) 177 Cal.App.4th 723 to argue an affirmative finding of "separate occasions" is required under section 667.6(c). (OBM 18.) *Goodliffe* analyzed section 667.6(c) in the context of a defendant convicted of only one enumerated sex offense. (*Goodliffe*, at pp. 725, 727-732.) The court held that because the defendant's sex offense was not committed on the same occasion as his other offenses, section 667.6(c) did not apply to that offense. (*Id.* at p. 732.)

Goodliffe is inapplicable here. Because the defendant in *Goodliffe* did not commit multiple sex offenses, the court had no occasion to consider how section 667.6(c) interacts with section 667.6(d). Given the purpose of section 667.6(c)—providing a consecutive sentence "[i]n lieu of the term provided in Section 1170.1" if there is "at least one" enumerated offense (§ 667.6(c))—it would subvert the Legislature's intent to require proof of a same occasion. Section 667.6(c)'s "same occasion" provision means that if crimes do not meet the definition of "separate occasions" set forth in section 667.6(d), they necessarily occurred

on the same occasion for purposes of section 667.6(c). There is no other definition of "same occasion" that must be met.[15]

Such a construction is consistent with the legislative intent of section 667.6, which was to provide longer prison terms for certain sex offenders. (*Jones*, *supra*, 46 Cal.3d at p. 592.) Section 667.6 was enacted as part of an "an extensive revision of legislation concerning sex crimes." (*Belmontes*, *supra*, 34 Cal.3d at p. 343.) The phrase "in lieu of the term provided in section 1170.1" in section 667.6(c) "discloses a legislative purpose . . . which must pervade any discussion of subdivision (c): that it was intended to provide, in the context of violent sex offenders, a discretionary sentencing alternative to the standard consecutive sentencing formula in section 1170.1." (*Jones*, at p. 595.)

---

[15] *Goodliffe* was also wrongly decided. As explained, the correct interpretation of section 667.6(c) is that the "same occasion" language is the direct counterpoint to "separate occasions" in section 667.6(d) for defendants who commit multiple enumerated sex offenses. (See *Jones*, *supra*, 46 Cal.3d at p. 594, fn. 5 ["separate victims" and "same victim on separate occasions" "necessarily imply multiple [enumerated sex offenses]"].) The "same occasion" language obviously cannot apply when a defendant commits only a single enumerated sex offense. This understanding is reflected in section 667.6(c), which requires "at least one" enumerated offense. (See also rule 4.426(b) [""If the defendant has been convicted of multiple crimes, including at least one violent sex crime, as defined in section 667.6, or if there have been multiple violent sex crimes against a single victim on the same occasion and the sentencing court has decided to impose consecutive sentences . . ."].) Anyone who commits one enumerated offense among multiple offenses is subject to the alternative sentencing scheme given the seriousness of the offense.

"Subdivision (d) contains no similar language and is not an alternative as such, but rather constitutes a mandatory consecutive sentencing scheme applicable only when a defendant has been convicted of two or more [enumerated sex offenses]." (*Ibid.*)

Catarino's interpretation of section 667.6(c) would permit a defendant convicted of multiple enumerated sex offenses to escape legislatively mandated punishment under section 667.6 altogether. While, as Catarino notes, section 667.6(c) has been amended since the Court's opinion in *Jones*, the amendment was part of "Jessica's Law," which "was a wide-ranging initiative intended to 'help Californians better protect themselves, their children, and their communities' from problems posed by sex offenders by 'strengthen[ing] and improv[ing] the laws that punish and control sexual offenders.'" (*In re E.J.* (2010) 47 Cal.4th 1258, 1263, citations omitted.) Nothing in the amendment changed the purpose of section 667.6(c)—providing an alternative sentencing scheme to section 1170.1 specifically for violent sex offenders.

Here, because Catarino committed multiple violent sex offenses, if this Court disagrees that the jury would have found beyond a reasonable doubt that Catarino's multiple acts of sexual abuse occurred on separate occasions, then those crimes necessarily occurred on the same occasion. If the prosecutor elects not to retry the "separate occasion" finding to a jury, Catarino must be resentenced in accordance with section 667.6(c). (See *In re Rodney* (1999) 73 Cal.App.4th 36, 38, 41 [where

evidence insufficient to support finding of separate occasion under 667.6(d), remanded for resentencing under 667.6(c)]; *People v. Irvin* (1996) 43 Cal.App.4th 1063, 1071-1072 [same].)

CONCLUSION

Accordingly, the judgment of the Court of Appeal should be affirmed.

Respectfully submitted,

ROB BONTA
Attorney General of California
LANCE E. WINTERS
Chief Assistant Attorney General
JEFFREY M. LAURENCE
Senior Assistant Attorney General
SETH K. SCHALIT
Supervising Deputy Attorney General
DONNA M. PROVENZANO
Supervising Deputy Attorney General

/Melissa A. Meth

MELISSA A. METH
Deputy Attorney General
Attorneys for Respondent

May 12, 2022

CERTIFICATE OF COMPLIANCE

I certify that the attached **ANSWER BRIEF ON THE MERITS** uses a 13 point Century Schoolbook font and contains 13,171 words.

ROB BONTA
Attorney General of California

/Melissa A. Meth/

MELISSA A. METH
Deputy Attorney General
Attorneys for Respondent

May 12, 2022

SF2022400154
43217705.doc

DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: **People v. Edgar Sandoval Catarino**
No.: **S271828**

I declare:

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

On May 12, 2022, I electronically served the attached **ANSWER BRIEF ON THE MERITS** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on May 12, 2022, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Ronald Richard Boyer
Attorney at Law
boyer@mac.com

Sixth District Appellate Program
servesdap@sdap.org

Santa Clara County Superior Court
Criminal Division - Hall of Justice
Superior Court of California
191 North First Street
San Jose, CA 95113-1090
Served by U.S. Mail

The Honorable Jeffrey F. Rosen
District Attorney
Santa Clara County District
Attorney's Office
DCA@dao.sccgov.org

California Court of Appeal
Sixth Appellate District
sixth.district@jud.ca.gov

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on May 12, 2022, at San Francisco, California.

Nelly Guerrero	/Nelly Guerrero/
Declarant	Signature

SF2022400154
43218428.docx

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. CATARINO**
Case Number: **S271828**
Lower Court Case Number: **D078832**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **Melissa.Meth@doj.ca.gov**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	S271828_ABM_Catarino

Service Recipients:

Person Served	Email Address	Type	Date / Time
Ron Boyer Attorney at Law 160513	boyer@mac.com	e-Serve	5/12/2022 2:55:40 PM
Melissa Meth Office of the Attorney General 263571	Melissa.Meth@doj.ca.gov	e-Serve	5/12/2022 2:55:40 PM
Santa Clara District Attorney	DCA@dao.sccgov.org	e-Serve	5/12/2022 2:55:40 PM
Sixth District Court of Appeal	sixth.district@jud.ca.gov	e-Serve	5/12/2022 2:55:40 PM
California Attorney General Docket Unit	sfagdocketing@doj.ca.gov	e-Serve	5/12/2022 2:55:40 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

5/12/2022
Date

/s/Nelly Guerrero
Signature

Meth, Melissa (263571)
Last Name, First Name (PNum)

California Dept of Justice, Office of the Attorney General
Law Firm