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No. S277962

In the Supreme Court of the State of California

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

v.

LUIS RAMON MANZANO ARELLANO,
Defendant and Appellant.

Sixth Appellate District, Case No. H049413
Santa Clara County Superior Court, Case No. 159386
The Honorable Daniel Nishigaya, Judge

REPLY BRIEF ON THE MERITS

ROB BONTA (SBN 202668)
Attorney General of California
LANCE E. WINTERS (SBN 162357)
Chief Assistant Attorney General
CHARLES C. RAGLAND (SBN 204928)
Senior Assistant Attorney General
ERIC A. SWENSON (SBN 190813)
Supervising Deputy Attorney General
ALAN L. AMANN (SBN 301282)
Deputy Attorney General
*CHRISTINE Y. FRIEDMAN (SBN 186560)
Deputy Attorney General
600 West Broadway, Suite 1800
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 738-9050
Fax: (619) 645-2012
Christine.Friedman@doj.ca.gov
Attorneys for Plaintiff and Respondent

November 17, 2023

TABLE OF CONTENTS

Page

Introduction 6

Argument 8

I. Arellano's restrictive reading of section 1172.6, subdivision (e), is unsupported by the text and structure of the statute and contravenes other indicia of legislative intent 8

II. It is not necessary to adopt Arellano's narrow interpretation of section 1172.6, subdivision (e), in order to avoid grave constitutional problems or practical procedural difficulties 16

III. Reversal and remand is the appropriate remedy 22

Conclusion 25

TABLE OF AUTHORITIES

Page

CASES

Alcala v. Superior Court
(2008) 43 Cal.4th 1205 14

Central Coast Forest Assn. v. Fish & Game Com.
(2017) 2 Cal.5th 594 23

Chevron U.S.A., Inc. v. Echazabal
(2002) 536 U.S. 73 10

Dillon v. United States
(2010) 560 U.S. 817 18

Dorsey v. Barry
(1864) 24 Cal. 449 12

Hamilton v. Asbestos Corp., Ltd.
(2000) 22 Cal.4th 1127 23

Howard Jarvis Taxpayers Assn. v. Padilla
(2016) 62 Cal.4th 486 10

In re J.W.
(2002) 29 Cal.4th 200 10

In re Manuel G.
(1997) 16 Cal.4th 805 23

In re Quinn's Estate
(1955) 43 Cal.2d 785 12

In re R.V.
(2015) 61 Cal.4th 181 21

In re Reno
(2012) 55 Cal.4th 428 20

James H. v. Superior Court
(1978) 77 Cal.App.3d 169 21

TABLE OF AUTHORITIES
(continued)

Page

Lexin v. Superior Court
(2010) 47 Cal.4th 1050 11

People v. Anderson
(1987) 43 Cal.3d 1104 19

People v. Arrendondo
(2019) 8 Cal.5th 694 20

People v. Blackburn
(2015) 61 Cal.4th 1113 12

People v. Cook
(2019) 7 Cal.5th 439 21

People v. Franklin
(2016) 63 Cal.4th 261 21

People v. Gutierrez
(2014) 58 Cal.4th 1354 19

People v. Hernandez
(2021) 60 Cal.App.5th 94 24

People v. Howard
(2020) 50 Cal.App.5th 727 .... 9, 18

People v. Manzo
(2012) 53 Cal.4th 880 11

People v. Perez
(2018) 4 Cal.5th 1055 18

People v. Sek
(2022) 74 Cal.App.5th 657 24

People v. Silva
(2021) 72 Cal.App.5th 505 .... 9, 21, 22

TABLE OF AUTHORITIES
(continued)

Page

People v. Watson
(2021) 64 Cal.App.5th 474 9

People v. Wilson
(2023) 14 Cal.5th 839 24

Silverbrand v. County of Los Angeles
(2009) 46 Cal.4th 106 10

STATUTES

Penal Code
§ 242 14
§ 954 14
§ 1170.95 .... 18, 24
§ 1172.6 .... *passim*
§ 1172.6, subd. (d)(3) 14
§ 1172.6, subd. (e) .... *passim*
§ 1368 21

Vehicle Code
§ 2800.1, subd. (a) 14

CONSTITUTIONAL PROVISIONS

United States Constitution
Sixth Amendment 7, 16, 18

COURT RULES

California Rules of Court
rule 8.516(b)(3) 23

INTRODUCTION

In his answer brief on the merits, Arellano maintains that Penal Code[1] section 1172.6, subdivision (e), does not permit the imposition of enhancements in connection with redesignated convictions. In support of his interpretation of the statute, Arellano invokes canons of statutory construction and the concept of limited jurisdiction in special proceedings, and he argues that various constitutional infirmities and procedural difficulties would arise if resentencing courts were permitted to impose enhancements under subdivision (e).

Neither the principles of statutory construction that Arellano relies on, nor the concept of limited jurisdiction in special proceedings, supports his narrow reading of the statute. The text of subdivision (e) provides little guidance regarding the scope and process of resentencing after a murder conviction has been vacated. Ultimately, none of the principles Arellano invokes resolves the interpretive question presented here or avoids the necessity of looking to other indicia of legislative intent in construing the scope of resentencing under section 1172.6. And indeed, his reliance on those principles is in some tension with his acknowledgment that the text of the statute cannot be applied literally, including to the facts of this case. For the reasons discussed in the opening brief, consideration of the statutory scheme as a whole as well as legislative statements of purpose and intent support the conclusion that courts possess broad

[1] All further statutory references are to the Penal Code.

discretion to fashion a sentence proportionate to culpability, including by imposing enhancements, when resentencing under section 1172.6.

Arellano's argument that a narrow interpretation of section 1172.6's resentencing authority should be adopted in order to avoid potential constitutional and procedural complications is also unpersuasive. Arellano admits that these same complications would arise even under his narrow reading of the statute; courts would thus need to resolve them in any event. Moreover, Arellano overstates the magnitude of the potential constitutional issues and practical procedural difficulties that he envisions. No *grave* constitutional question is implicated here. Because section 1172.6 provides for retroactive reduction of an otherwise valid sentence through a legislative act of lenity, the Sixth Amendment requirements of trial by jury and proof beyond a reasonable doubt do not apply. And courts can and should formulate appropriate constitutional and procedural protections for resentencing proceedings under section 1172.6. Contrary to Arellano's supposition, the People do not contemplate a "standardless process" for resentencing on uncharged offenses or enhancements after a murder conviction is vacated. (ABM 11.)

It is not necessary, however, to reach those constitutional and procedural questions for purposes of resolving the issue presented in this case. Arellano asks this Court to order that his firearm enhancement be stricken on grounds that the proceedings in the resentencing court below violated his constitutional rights. But the Court of Appeal never reached

Arellano's constitutional arguments because of its holding that courts may not impose uncharged enhancements when resentencing under section 1172.6. The appropriate remedy is to reverse the Court of Appeal's judgment and remand so that the Court of Appeal may consider those arguments in the first instance.

ARGUMENT

I. ARELLANO'S RESTRICTIVE READING OF SECTION 1172.6, SUBDIVISION (E), IS UNSUPPORTED BY THE TEXT AND STRUCTURE OF THE STATUTE AND CONTRAVENES OTHER INDICIA OF LEGISLATIVE INTENT

Based, in part, on canons of statutory construction and principles applicable to special proceedings, Arellano argues for a narrow interpretation of section 1172.6, subdivision (e), that would exclude the possibility of imposing any sentence enhancement. (ABM 24-27, 32-35.) These arguments are substantially undermined by Arellano's acknowledgement that a resentencing court's authority is not limited by what section 1172.6 explicitly provides. Arellano agrees that he can be resentenced under subdivision (e) even though his case does not fall within the literal terms of the statute's resentencing provision because the target offense was initially charged but later dismissed. (ABM 28; see § 1172.6, subd. (e) [providing for redesignation and resentencing where "the petitioner is entitled to relief pursuant to this section, murder or attempted murder was charged generically, and the target offense was not charged"].) And he recognizes that the statute does not speak to any particular procedure for determining or adjudicating the underlying felony or target offense in cases where murder was

charged generically. (ABM 28, 32.) Because a textual analysis does not resolve ambiguity about the proper bounds of resentencing under section 1172.6, guidance must be sought in other indicia of legislative intent. Those indicia support a flexible resentencing approach, not the artificially narrow one espoused by Arellano.

As explained in the People's opening brief, the text of section 1172.6 provides scant guidance on the scope and process of resentencing after a murder conviction has been vacated. (OBM 20-21.) But consideration of the statutory scheme as a whole (OBM 21-27), as well as the legislative history (OBM 27-31), supports the conclusion that a court may impose an enhancement when resentencing under that statute because it was intended to afford courts flexibility in calibrating proportional punishment after a murder conviction is vacated. (See *People v. Howard* (2020) 50 Cal.App.5th 727, 739; see also *People v. Silva* (2021) 72 Cal.App.5th 505, 532; *People v. Watson* (2021) 64 Cal.App.5th 474, 488.) Arellano points to several principles of statutory construction that he contends favor his narrow interpretation of a court's resentencing authority under section 1172.6. None of these principles, however, resolves the question of statutory interpretation presented by this case.

Arellano relies on the principle of *expressio unius est exclusio alterius*, arguing that by omitting the term "enhancements" in section 1172.6, subdivision (e), but including it in subdivision (d), the Legislature necessarily excluded sentencing enhancements from the redesignation and resentencing process under

subdivision (e). (ABM 24-25, 27.) However, the *expressio unius* canon applies only when "there is some reason to conclude an omission is the product of intentional design," such as when a statute contains "a specific list or facially comprehensive treatment." (*Howard Jarvis Taxpayers Assn. v. Padilla* (2016) 62 Cal.4th 486, 514; see also *Chevron U.S.A., Inc. v. Echazabal* (2002) 536 U.S. 73, 81 [*expressio unius* canon requires a "series of terms from which an omission bespeaks a negative implication"].) Subdivision (e) addresses the redesignation of the petitioner's conviction as the target offense or underlying felony without supplying any other details regarding resentencing; it does not include a list of items, nor does it come close to providing a comprehensive treatment regarding redesignation and resentencing. Accordingly, there is no basis for inferring that the omission of a specific reference to enhancements in subdivision (e)'s broad language was a deliberate choice.

Moreover, courts do not apply the principle of *expressio unius est exclusio alterius* "'if its operation would contradict a discernible and contrary legislative intent.'" (*In re J.W.* (2002) 29 Cal.4th 200, 209; see also *Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 126 ["the principle always is subordinate to legislative intent"].) "In the end, a court must adopt the construction most consistent with the apparent legislative intent and most likely to promote rather than defeat the legislative purpose and to avoid absurd consequences." (*J.W.*, at p. 213.) This canon therefore does not avoid the necessity to look beyond the text of subdivision (e) to discern the Legislature's intent

regarding the scope and nature of a court's resentencing authority under section 1172.6, nor does it supersede that manifest intent.

Arellano also invokes the rule of lenity, arguing that any ambiguity in subdivision (e) must be construed favorably to him. (ABM 25, 27.) But "[t]he rule of lenity does not apply every time there are two or more reasonable interpretations of a penal statute." (*People v. Manzo* (2012) 53 Cal.4th 880, 889.) Instead, the rule applies "only if the court can do no more than guess what the legislative body intended; there must be an *egregious* ambiguity and uncertainty to justify invoking the rule." (*Ibid.*, internal quotation marks omitted.) In other words, "the rule of lenity is a tie-breaking principle, of relevance when two reasonable interpretations of the same provision stand in relative equipoise." (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1102, fn. 30, internal quotation marks omitted.) This is not a case in which the Court can only guess which one of competing reasonable interpretations the Legislature must have intended. Again, the structure of the statute and its legislative history resolve the question of statutory interpretation here, and resort to the "tie-breaking" rule of lenity is not necessary.

Arellano raises an additional argument that redesignation and resentencing under section 1172.6 is a special proceeding that does not specifically allow for the imposition of enhancements, which is consequently forbidden. (ABM 32-35.) "In special proceedings, the Court vested with jurisdiction by the statute possesses only such powers as the Act creating the special

case has conferred, and in the exercise of those powers it is limited by the terms of the Act." (*Dorsey v. Barry* (1864) 24 Cal. 449, 452; see also *In re Quinn's Estate* (1955) 43 Cal.2d 785, 787 [superior court was circumscribed in special proceedings "by the provisions of the statute conferring such jurisdiction, and may not competently proceed in a manner essentially different from that provided"].)

This principle, however, does not mean that a statute governing a special proceeding must be interpreted as narrowly as possible, as Arellano seems to suggest. (See ABM 35 [in a special proceeding, "the court cannot exceed the parameters of the literal language of the statute"].) Rather, the rule is simply that a court has no general jurisdiction to proceed other than as statutorily defined by the scope of the special proceeding. Determination of that scope, however, is subject to ordinary rules of statutory interpretation. (See, e.g., *People v. Blackburn* (2015) 61 Cal.4th 1113, 1124 [looking at text and purpose of statutes governing special proceeding under Mentally Disordered Offender Act to determine whether trial court must obtain a personal waiver of the defendant's right to a jury trial].) Indeed, Arellano's acknowledgement that resentencing is permissible here even though subdivision (e) does not, by its literal terms, permit redesignation where the underlying felony or target offense was charged and later dismissed belies his simultaneous assertion that section 1172.6 resentencing is a special proceeding that must be limited to "the literal language of the statute." (ABM 35.)

In addition to his reliance on canons of statutory interpretation and the principle of limited jurisdiction in special proceedings, Arellano attempts to counter the arguments in the People's opening brief as to the proper construction of section 1172.6's resentencing provisions. (ABM 26-29, 30-32.) These counterarguments, however, are unpersuasive.

Arellano disputes the People's point that the relatively detailed procedure in section 1172.6 governing the eligibility hearing, contrasted with the lack of detail with regard to resentencing, suggests a purposeful design to allow courts flexibility in the latter. (OBM 22.) In his view, the contrast suggests the opposite, in that the Legislature could have provided express authorization to impose enhancements but did not. (ABM 26-27.) But, as with Arellano's reliance on the *expresio unius* canon, there is no strong support for the negative inference he attempts to draw. Section 1172.6's resentencing provisions are not facially restrictive, nor do they address some matters specifically while excluding others or attempt to set out resentencing procedures in any thorough way. Rather, they simply lack detail altogether. And given the myriad resentencing scenarios the Legislature would have had to address had it sought to expressly authorize each one, the inference of flexibility from the statute's lack of detail is far stronger than the restrictive inference Arellano tries to draw. That is especially so when considered in light of the other indicia of intent discussed in the People's opening brief.

Arellano also dismisses the inconsistencies pointed out by the People that would ensue under his restrictive view of a resentencing court's authority under section 1172.6. (See OBM 22-25.) Initially, Arellano misunderstands the People's example showing that his interpretation of section 1172.6 could result in resentencing on a misdemeanor that was charged along with a murder. (See OBM 25.) Arellano reads that example as "apparently suggesting that some type of misdemeanor murder by an aider and abettor even exists." (ABM 27.) That is not the People's suggestion. Rather, a prosecutor could choose to charge a murder without charging any underlying target offense, and in addition could charge a misdemeanor committed during the same criminal incident—for example, evading a peace officer (Veh. Code, § 2800.1, subd. (a)), or a misdemeanor battery committed against a different victim (§ 242). (See § 954 [permitting the joinder of "two or more different offenses connected together in their commission"]; *Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220 [because joinder ordinarily promotes efficiency, it is "the course of action preferred by the law"].) Under a strict reading of section 1172.6's resentencing provisions, that misdemeanor would qualify as a "remaining charge" after vacatur of the murder conviction, requiring resentencing on that charge and no other. (See § 1172.6, subd. (d)(3).)

Ultimately, Arellano does not directly dispute the other examples of inconsistencies that the People highlight in the opening brief. He acknowledges that prohibiting resentencing altogether in this case would qualify as an absurd result that

should be avoided. (ABM 28.) But without drawing any persuasive analytical line, he contends that other inconsistencies should be tolerated because the People's interpretation of the statute's resentencing provisions "would likely lead to far more arbitrary results." (ABM 32.) He does not explain why that would be so, however, other than to invoke what he sees as substantial constitutional and procedural hurdles that would accompany a flexible resentencing approach, which is a separate question (ABM 31-32; see Arg. II, *post*).[2]

Finally, Arellano resists the People's reliance on the statute's purpose and legislative history. (See OBM 27-31.) He agrees that, in reforming the law of murder, the Legislature sought to ensure criminal punishment that is more proportional to culpability. (ABM 29, 30.) But without reconciling that acknowledgment with his restrictive conception of resentencing under section 1172.6, he simply posits that proportionality should be assessed only within the confines of the statutory language as narrowly construed. (ABM 29.) He does not answer how the legislative purpose and intent to ensure proportionality in sentencing would accommodate the very different punishments

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[2] Arellano similarly posits that, at a minimum, a flexible approach to resentencing under section 1172.6 should be limited to cases with an underlying trial record, as opposed to guilty-plea cases. (ABM 29.) There is no support in the statute for that kind of line-drawing, however. And as explained below, any deficiencies relating to an inadequate record can be accounted for by appropriate judicially-formulated rules governing resentencing under the statute. (See Arg. II, *post*.)

his narrow approach to resentencing would produce in similar cases. (See ABM 22-25.) Instead, he again falls back to his position that the People's interpretation "would lead either to a unarticulated, standardless and potentially unconstitutional procedure of fact finding or would require this Court to judicially legislate such a process." (ABM 31.) The People address that argument in the next section.

II. IT IS NOT NECESSARY TO ADOPT ARELLANO'S NARROW INTERPRETATION OF SECTION 1172.6, SUBDIVISION (E), IN ORDER TO AVOID GRAVE CONSTITUTIONAL PROBLEMS OR PRACTICAL PROCEDURAL DIFFICULTIES

Arellano argues that section 1172.6, subdivision (e), should be construed narrowly because identifying and imposing enhancements at resentencing under that section would require "a set of procedures not set forth in the statute" and would implicate serious constitutional issues, including the Sixth Amendment right to a jury trial, the due process right to fair notice, questions regarding the reliability and admissibility of evidence, and the applicable standard of proof. (ABM 11-12, 31, 35-45.) Arellano overstates the extent to which potential constitutional and procedural issues might complicate resentencing under section 1172.6. Those potential issues do not provide a persuasive reason for rejecting the broadly discretionary resentencing approach that is most consistent with the statutory text and purpose.

Arellano acknowledges that resentencing on an uncharged target offense—as is expressly called for under subdivision (e)—"might involve combing the record of conviction in a similar manner as would be required in deciding if the facts of the case

support the imposition of a sentencing enhancement" and "the same 'issues of notice and proof' [citation], as well as a number of other due process considerations [citation] are implicated when a court redesignates a vacated murder conviction." (ABM 28.) That acknowledgement undermines Arellano's arguments that those same potential constitutional and procedural difficulties militate in favor of his narrow approach when it comes to imposing enhancements under section 1172.6, subdivision (e).

As explained in the People's opening brief, a narrow interpretation of section 1172.6's resentencing provisions does not avoid the "complexities" Arellano points to; the fact that they would also arise under a flexible resentencing approach thus provides little support for Arellano's view, since courts will need to resolve those issues even under his narrow interpretation of the statute's resentencing provisions. (See OBM 25-26.) Arellano responds that the statute should be construed narrowly so as to minimize those complexities to the extent possible, even if they cannot be entirely avoided. (See ABM 28-29.) But little would be gained by that approach, while it would thwart the evident purpose of the statute to ensure more proportional punishment.[3]

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[3] Arellano also contends that identifying an uncharged target offense would be "relatively definite" as compared to identifying an applicable enhancement. (ABM 37; see also ABM 32.) But there is no reason why identifying an applicable enhancement would not also be "relatively definite" in some, or even many, cases. A case like Arellano's, for example, involving the use of a weapon, raises the obvious possibility that a weapon enhancement might apply.

Moreover, Arellano substantially overstates the potential difficulties that courts might face in identifying and imposing enhancements when resentencing under section 1172.6. To begin with, resentencing under that statute does not implicate the same constitutional rights that would apply at initial criminal proceedings. (See ABM 38.) Section 1172.6 provides retroactive *reduction* of an otherwise valid sentence through an act of lenity by the Legislature, and therefore the Constitution does not compel trial by jury, proof beyond a reasonable doubt, or other similar protections in such proceedings. (See *People v. Perez* (2018) 4 Cal.5th 1055, 1063-1064 [Sixth Amendment does not prohibit trial courts from relying on facts not found by a jury in determining the applicability of Proposition 36's resentencing ineligibility criteria]; *Dillon v. United States* (2010) 560 U.S. 817, 828-829 [because sentencing guideline revisions were a congressional act of lenity, proceedings to modify otherwise final judgments in accordance with the revised guidelines did not implicate the Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt]; *Howard*, *supra*, 50 Cal.App.5th at p. 740 [retroactive relief provided by section 1170.95 does not implicate Sixth Amendment].)[4]

[4] Again, redesignation of a murder conviction to an uncharged target offense under subdivision (e) would implicate the same sorts of constitutional issues that imposing an uncharged enhancement would. (See ABM 28.) But Arellano does not appear to argue, for example, that an uncharged target offense would have to be proven to a jury beyond a reasonable doubt in resentencing proceedings under section 1172.6.

For that reason, Arellano's reliance on the canon of constitutional avoidance is misplaced. Under this canon, "If a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, *or raise serious and doubtful constitutional questions*, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable." (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1373, internal quotation marks omitted, italics added.) Whatever due process or other constitutional principles might govern a court's selection and imposition of an enhancement in resentencing a defendant under section 1172.6, such proceedings do not "raise *grave and doubtful* constitutional questions." (*People v. Anderson* (1987) 43 Cal.3d 1104, 1146.)

Indeed, the potential issues Arellano points to do not pose any particularly difficult problem for resentencing courts, which may readily account for and address any constitutional or procedural objections that might arise in connection with resentencing on uncharged offenses or enhancements. The People do not dispute that it would be appropriate for courts to formulate appropriate safeguards—such as notice, evidentiary requirements, and a standard of proof (see ABM 37-45)—that would govern the identification and imposition of enhancements when resentencing under section 1172.6. Thus, the specter raised by Arellano of a "standardless" process that he envisions

would ensue under a flexible resentencing approach is only an imaginary one. (ABM 11, 31, 37-45.)[5]

As this Court has explained, courts possess the inherent authority in ordinary actions and special proceedings to formulate rules of procedure not specified by statute. (*In re Reno* (2012) 55 Cal.4th 428, 522 [it is "'well established that courts have fundamental inherent equity, supervisory, and administrative powers, as well as inherent power to control litigation before them'"].) "'Courts are not powerless to formulate rules of procedure where justice demands it.'" (*Ibid.*) Rather, "'all courts have inherent supervisory or administrative powers which enable them to carry out their duties, and which exist apart from any statutory authority'" and they may "'adopt any suitable method of practice, both in ordinary actions and special proceedings, if the procedure is not specified by statute or by rules adopted by the Judicial Council.'" (*Ibid.*, italics omitted.) In other words, courts may properly exercise their inherent authority to "create new forms of procedures in the gaps left unaddressed by statutes and the rules of court." (*People v. Arrendondo* (2019) 8 Cal.5th 694, 706-707, internal quotation marks omitted.) The exercise of that authority does not amount to improper "judicial legislation." (ABM 31; see also ABM 35.)

In the juvenile court context, for example, courts "routinely improvise procedures to meet changing constitutional

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[5] The People do not suggest, for example, that a resentencing court's factfinding discretion should "have no bounds." (ABM 40.)

requirements while awaiting legislative clarification." (*In re R.V.* (2015) 61 Cal.4th 181, 189, citing *James H. v. Superior Court* (1978) 77 Cal.App.3d 169, 175-176 [juvenile court had inherent authority to fashion a section 1368-like procedure for juvenile courts making competency determinations].) Similarly, in *People v. Franklin* (2016) 63 Cal.4th 261, this Court exercised its inherent authority to create a procedure for preserving evidence for an eventual youth offender parole hearing. (*Id*. at p. 284.) In *People v. Cook* (2019) 7 Cal.5th 439, this Court noted that it "unquestionably ha[d] the power" to establish the procedure outlined in *Franklin* even though the Legislature "is in a superior position to consider and implement rules of procedure in the first instance" and "remains free to amend the pertinent statutes to specify what evidence-gathering procedures should be afforded to youth offenders . . . ." (*Id*. at p. 459.)

Accordingly, in the absence of legislative guidance, courts may formulate procedures governing the redesignation of a conviction and resentencing thereon, including imposition of applicable enhancements. These procedures may specify, among other things, what notice must be given, what evidence may be considered, and the standard of proof. For example, in *Silva*, *supra*, 72 Cal.App.5th 505, the Court of Appeal determined that, as a matter of fundamental fairness, a petitioner is entitled to explicit notice of any offense the court or prosecutor proposes to redesignate as an underlying felony or target offense, and such notice must be given reasonably in advance of the subdivision (e) determination. (*Id*. at pp. 520-524.) The court also held that the

petitioner has a due process right to the opportunity to be heard. (*Id*. at pp. 523, 525-526.) Such judicial formulation of procedures for resentencing under section 1172.6 is entirely proper.

III. REVERSAL AND REMAND IS THE APPROPRIATE REMEDY

Arellano requests that this Court order that his firearm enhancement be stricken because, he contends, the resentencing proceedings below violated his constitutional rights. (ABM 30-37, 45-46.) He argues that "[t]o uphold the ruling of the trial court here would not only allow a court to base its designation of the target offense on disputed evidence and its unarticulated gestalt view of that evidence, it would also allow a 'conviction' and sentencing based on evidence that did not meet any standard of proof, let alone proof beyond a reasonable doubt." (ABM 37.) But it is not necessary for the Court to reach any of those arguments in resolving the interpretive question presented in this appeal. And a holding by this Court that a resentencing court may impose a sentence enhancement on a redesignated conviction would not constitute a determination that the superior court in this case properly did so. These are issues that should be addressed by the Court of Appeal on remand in the first instance. (See OBM 26, fn. 5.)

Although Arellano raised claims in the Court of Appeal based on due process, the right to a jury trial, proof beyond a reasonable doubt, evidentiary sufficiency, and double jeopardy (OBM 26), the Court of Appeal did not reach any of these issues and instead held that section 1172.6 "does not authorize enhancements to be attached to the redesignated conviction for

resentencing" (Opn. 17). This Court granted review on an issue of statutory interpretation: "In resentencing a person whose murder conviction has been vacated under Penal Code section 1172.6, may a court impose any sentence enhancement in addition to the sentence for the target offense or underlying offense?"

Because the Court of Appeal never reached Arellano's constitutional and procedural claims based on the particular record in this case, remand would be appropriate if this Court reverses the Court of Appeal's decision, so that the Court of Appeal can consider those issues in the first instance. (See Cal. Rules of Court, rule 8.516(b)(3); *Hamilton v. Asbestos Corp., Ltd.* (2000) 22 Cal.4th 1127, 1149 [remanding for the Court of Appeal to resolve issues it did not reach because of its holding]; *Central Coast Forest Assn. v. Fish & Game Com.* (2017) 2 Cal.5th 594, 606 [given reversal of Court of Appeal's procedural ruling barring relief, it was appropriate to remand the matter for the Court of Appeal to consider other unresolved issues regarding interpretation of the statute and an evidentiary claim].) Similarly, the Court of Appeal did not address Arellano's claim that there was insufficient evidence that he possessed a firearm during the crime. Accordingly, the Court of Appeal should be given the opportunity to consider this claim in conjunction with Arellano's other claims. (See *In re Manuel G.* (1997) 16 Cal.4th 805, 820, fn. 8 [remanding for Court of Appeal to consider minor's argument that there was insufficient evidence of requisite intent

because Court of Appeal never addressed this argument, having reversed on a different ground].)[6]

Contrary to Arellano's contention (ABM 45-46), double jeopardy principles do not preclude this Court from remanding the case. Double jeopardy does not apply because section 1172.6 proceedings involve a resentencing procedure under an ameliorative statute, not a new prosecution. (See *People v. Hernandez* (2021) 60 Cal.App.5th 94, 111 ["The retroactive relief provided by section 1170.95 is a legislative 'act of lenity' intended to give defendants serving otherwise final sentences the benefit of ameliorative changes to applicable criminal laws and does not result in a new trial or increased punishment that could implicate the double jeopardy clause"]; see also *People v. Wilson* (2023) 14 Cal.5th 839, 852-853 [double jeopardy does not prevent retrial when defendant succeeds in getting conviction set aside because of some error in the proceedings leading to conviction other than insufficiency of the evidence]; *People v. Sek* (2022) 74 Cal.App.5th 657, 669-670 [intervening change in elements of criminal offense does not implicate evidentiary insufficiency so as to trigger double jeopardy].)

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[6] This Court's consideration of such issues, moreover, would be facilitated by a record in which the claims were first developed in the trial court. The present record, for example, contains little indication about how the trial court might have applied a particular standard of review or what additional evidence might have been available to support the weapon enhancement.

CONCLUSION

The judgment of the Court of Appeal should be reversed.

Respectfully submitted,

ROB BONTA
Attorney General of California
LANCE E. WINTERS
Chief Assistant Attorney General
CHARLES C. RAGLAND
Senior Assistant Attorney General
ERIC A. SWENSON
Supervising Deputy Attorney General
ALAN L. AMANN
Deputy Attorney General

/S/ *Christine Y. Friedman*
CHRISTINE Y. FRIEDMAN
Deputy Attorney General
Attorneys for Plaintiff and Respondent

November 17 2023

CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY BRIEF ON THE MERITS uses a 13-point Century Schoolbook font and contains 4,908 words.

ROB BONTA
Attorney General of California

/S/ *Christine Y. Friedman*
CHRISTINE Y. FRIEDMAN
Deputy Attorney General
Attorneys for Plaintiff and Respondent

November 17, 2023

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

Case Name: **People v. Arellano**

No.: **S277962**

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 November 17, 2023, I electronically served the attached **REPLY 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 November 17, 2023, 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 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Clerk of the Court
Hall of Justice
Santa Clara County Superior Court
191 North First Street
San Jose, CA 95113

Sixth District Court of Appeal
333 West Santa Clara Street
Suite 1060
San Jose, CA 95113

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 November 17, 2023, at San Diego, California.

N. Rodriguez
Declarant

Signature

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Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 11/17/2023 by Karissa Castro, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. ARELLANO**
Case Number: **S277962**
Lower Court Case Number: **H049413**

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: **Christine.Friedman@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	Reply Brief on the Merits

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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.

11/17/2023

Date

/s/Natalie Rodriguez

Signature

Friedman, Christine (186560)

Last Name, First Name (PNum)

Department of Justice, Office of the Attorney General-San Diego

Law Firm