IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. LUIS RAMON MANZANO ARELLANO, Defendant and Appellant.	**No. S277962** Sixth District Court of Appeal No. H049413 Santa Clara County Superior Court No. 159386

AMICUS CURIAE BRIEF OF THE OFFICE OF THE STATE PUBLIC DEFENDER IN SUPPORT OF APPELLANT

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INTEREST OF AMICUS

The Office of the State Public Defender (OSPD) represents indigent persons in their appeals from criminal convictions in both capital and non-capital cases. The Legislature has instructed OSPD to "engage in related efforts for the purpose of improving the quality of indigent defense." (Gov. Code, § 15420, subd. (b).) To that end, it has "authorized [OSPD] to appear as a friend of the court[.]" (Gov. Code, § 15423.) OSPD has a longstanding interest in the fair and uniform administration of California criminal law, especially regarding prosecutions for murder and attempted murder, and more generally in the protection of the constitutional and statutory rights of those convicted of crimes.

OSPD has a particular interest in the proper interpretation of Penal Code[1] section 1172.6, at issue in the underlying case. OSPD has represented and currently represents numerous petitioners appealing superior court decisions in Penal Code section 1172.6 proceedings. Since the Legislature passed Senate Bill No. 1437 (Stats. 2018, ch. 1015) ("SB 1437"), OSPD has provided amicus input and briefing in several cases in this Court involving section 1172.6, including *People v. Gentile* (2020) 10 Cal.5th 830, *People v. Lopez* (2021) 286 Cal.Rptr.3d 246, *People v. Strong* (2022) 13 Cal.5th 698, *People v. Delgadillo* (2022) 14 Cal.5th 216, *People v. Reyes* (2023) 14 Cal.5th 981, and *People v. Curiel* (2023) 15 Cal.5th 433.

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[1] Statutory references are to the Penal Code unless otherwise specified.

The Court of Appeal's opinion holds that trial courts lack the statutory authority to add an enhancement (which was not imposed at the original sentencing) to the designated resentencing offense pursuant to section 1172.6, subdivision (e). Because the appellate courts are split on this issue, the lower courts require guidance on resentencing successful petitioners who have their homicide or attempted homicide convictions vacated under section 1172.6.

BACKGROUND

Penal Code Section 1172.6 requires trial courts to revisit past murder, attempted murder and manslaughter convictions that were based on now outdated theories of imputed malice liability. Pursuant to the statute's petition process, if the prosecution cannot prove a petitioner guilty under *current* definitions of murder or attempted murder at an evidentiary hearing, the conviction is vacated and replaced with the lesser crime the petitioner committed.

As an example, a person might have been convicted of the murder of a named victim in count 1 under a felony-murder theory and convicted of the underlying felony of robbery of the same victim in count 2. If the petitioner prevails at the evidentiary hearing, the petitioner's murder conviction, and any attached enhancement(s) are vacated. They are then resentenced on the remaining count 2 – the robbery against the same victim from the vacated count. [2]

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[2] Usually, when the underlying felony or target offense is separately charged, the sentence for that count is stayed under section 654. In a section (d)(3) resentencing, that stayed count will be revived and become the replacement conviction for the murder.

(§ 1172.6, subd. (d)(3).) According to the text of the subdivision, the petitioner is to be resentenced "on the remaining charges" that are undisturbed after the murder conviction is vacated. (*Ibid*.)

Sometimes, however, murder convictions are charged generically[3] and the underlying felony (in felony murder theory cases) or the target offense (in natural and probable consequences (NPC) theory cases) is not separately charged. In that scenario, there are no "remaining charges" to replace the now invalid murder conviction under section 1172.6 subdivision (d)(3); instead, subdivision (e) is triggered. Under this subdivision, trial courts must replace the vacated murder, attempted murder, or manslaughter conviction with the underlying, non-murder crime the petitioner committed. The statute provides that, in cases in which the murder or attempted murder was "charged generically" and no underlying felony or target offense for the murder victim was separately charged, the now invalid conviction must be "redesignated as the target offense or underlying felony." (§ 1172.6. subd. (e).)

The question in this case is whether section 1172.6, subdivision (e) grants trial court judges the additional authority to add whatever enhancement (or enhancements) to the "target offense

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[3] A murder that is "charged generically" is one that did not limit the prosecution to any particular theory of liability. (*People v. Flores* (2022) 76 Cal.App.5th 974, 987; *People v. Eynon* (2021) 68 Cal.App.5th 967, 977-978.) Historically it has not been necessary for prosecutors to separately charge the underlying felony (in a felony-murder) or target offense (in an NPC case) but in those situations, the crime is normally identified in jury instructions or the prosecutor's closing arguments. (See *People v. Prettyman* (1996) 14 Cal.4th 248, 254; *People v. Risenhoover* (1968) 70 Cal.2d 39, 49-50.)

or underlying felony" they believe are justified, regardless of the absence of any jury finding or admission by the defendant to such enhancement(s).

INTRODUCTION

As the Court of Appeal correctly held, "the plain meaning of the phrase '[t]he petitioner's conviction shall be redesignated as the target offense or underlying felony for resentencing purposes' in section 1172.6, subdivision (e), does not authorize enhancements to be attached to the redesignated conviction for resentencing." (*People v. Arellano* (2022) 86 Cal.App.5th 418, 435 (*Arellano*).)

Only a plain reading of subdivision (e) can be harmonized with the other provisions of the statute. In subdivision (d)(3), the Legislature explicitly provided that, when the prosecution cannot prove that the petitioner is guilty of murder under current law, the court must vacate both the prior murder conviction *and* any attendant enhancement(s). The Legislature was conspicuously silent about reimposing any enhancement(s) in subdivision (e). Moreover, subdivisions (a), (d)(1), and (d)(3) all make reference to resentencing the successful petitioners on the "remaining" counts or charges, suggesting that the statute was not intended to allow trial courts to tack on any *new* charges (or, implicitly, enhancements) that they believed could be applied. Instead, the statute limits resentencing to those allegations that "remain[]" after the murder conviction is vacated.

Of course, in cases where murder was charged generically, subdivision (e) provides that the underlying felony or target offense must be supplied if it was not originally specified. But it would be

incongruous for the Legislature to limit resentencing to the "remaining" charges under subdivision (d)(3) but give creative courts and prosecutors carte blanche under subdivision (e) to add any new sentence-increasing allegation they believe may be borne out by the facts. Read together these companion provisions leave room for only one conclusion: The Legislature did not intend for enhancements to be added to the new sentence.

Reading the statute as it is written also furthers the Legislature's expressed goals of reducing mass incarceration, remedying documented regional disparities in how sentences are imposed, and making sentences more justly and equitably reflect individual culpability.[4]

The Attorney General insists that to accord with the plain meaning of the provision would produce "absurd" results and defy the Legislature's intent. The Attorney General places the entire weight of this argument on the observation that, in enacting the statute, "the Legislature sought to ensure criminal punishment that is more proportional to culpability." (ROB[5] 15.) The only way to achieve that goal (the Attorney General argues) is to afford trial courts "flexibility" – meaning discretion, unbounded by any

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[4] The Attorney General insists, here and in many other cases, that SB 1437 was "an act of lenity" on the part of the Legislature. While amicus most certainly does not agree with the Attorney General regarding the implications of that phrase (that petitioners are not entitled to the basic protections afforded defendants in other criminal proceedings), we do agree that lenity, in the truest sense, was what the Legislature intended. Maximizing punishment on resentencing does nothing to serve that end.

[5] Respondent's Opening Brief.

presently defined standards or procedures, to impose whatever enhancements the individual court believes to be supported by the record.

The first (and itself fatal) defect in the Attorney General's argument is that it radically misconstrues the legislative intent. To be sure, the Legislature was concerned with making punishment better align with the individual's culpability. But that intent was expressed in the context of finding that these petitioners – who have been convicted of, and given extremely lengthy sentences for, crimes that no longer exist – are being excessively punished. Thus, a key purpose of the law was to "*limit* convictions and subsequent sentencing so that the law of California fairly addresses the culpability of the individual and *assists in the reduction of prison overcrowding*." (Stats. 2018, ch. 1015, § 1(e), italics added.) That purpose is not served by allowing courts to impose punishment above and beyond what the statute specifies in order to satisfy whatever the individual court believes to be appropriate.

That brings up another respect in which the Attorney General's position defies what the Legislature had in mind. The Legislature was keenly aware of the glaring disparities in the sentences imposed on similarly-situated defendants in different regions of the state, particularly disparities correlated to the race, ethnicity, and gender of the particular defendant. The Legislature passed SB 1437 in part to remedy those disparities; the Attorney General's attempt to rewrite the statute in the name of "flexibility" would instead perpetuate them.

A plain reading of the statute also avoids the thorny constitutional issues that arise from allowing criminal liability to be imposed through a process bare of standards or procedures that conform to constitutional norms.

The Attorney General stoutly insists that the discretion to add additional enhancements it proposes is not (as *Arellano* contends) "standardless" – but nowhere in either of its briefs does the Attorney General describe what standards *would* apply to limit the exercise of that discretion. Thus, a host of pressing constitutional issues familiar to criminal jurisprudence – e.g., notice, the right to call and confront witnesses, the burden of proof and how it is allocated, and the limits on judicial fact-finding must now be worked out by the courts, free of any textual guidance. The simplest answer to these difficult questions is that the Legislature did not intend to pose them to the resentencing courts in the first place.

Rather than open this Pandora's Box, and in keeping with the canons of construction and the dictates of logic and fairness, the appropriate way to interpret the statute is to credit just what it says.

WHY THE COURT OF APPEAL'S OPINION SHOULD BE AFFIRMED

I.
THE TEXT AND STRUCTURE OF SECTION 1172.6 DO NOT AUTHORIZE ADDING ENHANCEMENTS AT A RESENTENCING HEARING

A. The plain meaning of the statute should be followed

Whether section 1172.6 subdivision (e), is read alone or in the context of the statute as a whole, the conclusion is the same: the

plain meaning of the statute does not authorize enhancements to be attached to the redesignated conviction.

1. The text of subdivision (e) is unambiguous and makes no reference to resentencing on new enhancements

The plain, common-sense language of the statute itself is "generally the most reliable indicator of legislative intent." (*People v. Trevino* (2001) 26 Cal.4th 237, 241.) A court goes no further when the language of the statute is clear. (*People v. Scott* (2014) 58 Cal.4th 1415, 1421.)

As the Court of Appeal concluded, the plain meaning of the phrase "[t]he petitioner's conviction shall be redesignated as *the* target offense or underlying felony for resentencing purposes" in section 1172.6, subdivision (e), recognizes a redesignation to a singular offense or underlying felony. (*Arellano*, *supra*, 86 Cal.App.5th at p. 430, other italics omitted.) In other words, "target offense or underlying felony" contemplates one replacement "offense" upon which imputed liability was based – generally under either the NPC doctrine or the felony-murder rule. (*Id.* at p. 435; see *id.* at p. 431, fn. 9.)

Under established rules of statutory construction, "statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387.) The surrounding context of the statute confirms that the Legislature did not contemplate resentencing petitioners with enhancements under subdivision (e). Immediately preceding

subdivision (e), in subdivision (d)(3), the statute explicitly provides that when the prosecution fails to sustain its burden of proof on the homicide charge, the prior conviction, "and any allegations and enhancements attached to the conviction, *shall* be vacated." (§ 1172.6 subd. (d)(3), italics added.) It would make no sense for the Legislature, in the very next section of the statute, to have silently authorized enhancements – possibly even the exact same ones it just ordered vacated – to be attached to the resentencing offense.

The text of statute provides further evidence of an intent to *constrain* resentencing options. Earlier in the text of the statute, both subdivisions (a) and (d)(1) explain that the purpose of the statute is to resentence successful petitioners to the "remaining" counts or charges. (§ 1172.6, subds. (a) & (d)(3).) Thus, for resentencing under subdivision (d)(3), the statute specifically dictates a defendant must be resentenced "on the remaining charges." (§ 1172.6 subd. (d)(3).) "Remaining" clearly denotes a limitation, not supplementation. In contrast, nowhere in the statute is there any mention of "additional" or "new" sentence-increasing allegations.[6]

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[6] The Attorney General argues that the only explicit limitation on resentencing in the text of section 1172.6 is that the new sentence is "not greater than the initial sentence." (ROB at p. 8.) This is inaccurate. As noted, subdivisions (d)(1) and (d)(3) limit resentencing to "remaining counts" or "remaining charges" as opposed to any new charges. A subdivision (d)(2) stipulation or finding mandates automatic relief, making no provision for sentencing to additional charges or enhancements. And subdivision (e) similarly requires reduction to the underlying felony or target offense rather than any crime the judge might decide would be a good replacement.

Under subdivision (e), of course – when the petitioner was charged generically with murder and no underlying crime was charged – there is no "remaining" charge under which to sentence a successful petitioner. Nonetheless, the jury finding that the petitioner was guilty of an underlying felony or target offense is implicit in the conviction for felony murder or under a natural and probably consequences theory. There is no reason to treat petitioners resentenced under subdivision (e) differently than petitioners sentenced under subdivision (d)(3): both should be resentenced to the target offense or underlying felony without supplying new enhancements not originally placed before the jury or admitted by the defendant.

Contrary to what the Attorney General contends, subdivision (e) does not allow for successful petitioners to receive new enhancements at the time of resentencing. Put simply, courts are not "empowered to insert what a legislative body has omitted." (*People v. Zapien* (1993) 4 Cal.4th 929, 955.) If the Legislature intended to allow reimposition of enhancements or allegations under subdivision (e), it would have expressly stated or referenced enhancements as a possible addition to the underlying felony or target offense.[7]

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[7] The Attorney General also imagines authority for judges to add enhancements to a final sentence in the text of subdivision (d)(1) which provides that, if relief is granted, the court shall "recall the sentence and resentence the petitioner on any remaining counts in the same manner as if petitioner had not previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence." (ROB at p. 23.) But that general language

This Court has also "repeatedly stated that when a statute defining a crime or punishment is susceptible of two reasonable interpretations, the appellate court should ordinarily adopt that interpretation more favorable to the defendant." (*People v. Braden* (2023) 14 Cal.5th 791, 824, quoting *People v. Avery* (2002) 27 Cal.4th 49, 57.) Amicus disagrees that there are two reasonable interpretations of subdivision (e)'s silence regarding enhancements. But even if there were, and this Court could "do no more than guess what the legislative body intended," the rule of lenity requires this Court to abide by the interpretation that favors Mr. Arellano. (*Ibid.*, citing *People v. Manzo* (2012) 53 Cal.4th 880, 889.) As such, the "target offense" and "underlying felony" mentioned in subdivision (e) are to be used in their ordinary singular sense, in harmony with the plain meaning doctrine of statutory interpretation, legislative intent and the constitutional avoidance doctrine.

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is subject to the more specific provisions that follow it; section 1172.6, subdivision (d)(1)'s language does not give authorization to resentence beyond what is specifically described in subdivisions (d)(2)-(3) and (e). Moreover, if the petitioner is to be sentenced "in the same manner as if he had not been previously sentenced" there would be no authority for a court to tack on enhancements that were not admitted or placed before a jury. Under current law "[a]ll enhancements shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be by the trier of fact." (See § 1170.1, subd. (e).)

B. The Legislature acted reasonably in precluding imposition of enhancements

The Attorney General argues that an interpretation that does not authorize adding enhancements to the new "resentencing" offense would produce absurd results. (ROB p. 22.) On the contrary: Reading the statute exactly as it is written yields the most (indeed, we submit, the only) reasonable result.

In construing statutory language, courts start with dual presumptions: that the Legislature "intends reasonable results consistent with its apparent purpose" (Commission on *Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 290 (*POST*), and, conversely, that it does not intend absurd consequences or results (*People v. Mendoza* (2000) 23 Cal.4th 896, 908; *In re Head* (1986) 42 Cal.3d 223, 232). This Court has also made clear that it applies common sense (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1122), favors the construction that leads to the more reasonable result (*POST*, *supra*, 42 Cal.4th at p. 290), and avoids the construction that leads to problematic results and consequences, whether they be deemed absurd (*Mejia v. Reed* (2003) 31 Cal.4th 657, 671-672), unreasonable (*POST*, *supra*, 42 Cal.4th at p. 290), arbitrary (*ibid.*), anomalous (*Equilon Enterprises*, *LLC v. Consumer Cause*, *Inc.* (2002) 29 Cal.4th 53, 64), unjust (*In re Haines* (1925) 195 Cal. 605, 613), or unfair (*Stanton v. Panish* (1980) 28 Cal.3d 107, 115).

The Attorney General finds it absurd that interpreting the statute in accordance with its plain meaning would preclude trial courts from maximizing the punishment imposed upon successful petitioners. But there was nothing absurd about the Legislature

limiting additional penal consequences. Prohibiting enhancements would mean less prison time for those previously convicted under now invalid legal theories which, the Legislature recognized, had led to excessive sentences—and reducing terms for those serving unduly harsh sentences was the central intent of the Legislature. The Legislature reasonably wanted to limit "a petitioner's exposure in a relatively definite manner to only a specific offense." (*Arellano*, *supra*, 86 Cal.App.5th at p. 436; ROB, at pp. 25-26.) No other interpretation holds true to the Penal Code's requirement that "its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice." (§ 4.)

Limiting resentencing to the target offense or underlying felony – as the Legislature did in subdivision (e) – was also an eminently reasonable response to troubling sentencing disparities.[8] Sentencing enhancements are disproportionately and most commonly applied to people of color. (Com. on Revision of the Penal Code, Sentence Enhancements in California (Mar. 2023) p. 3 <https://www.capolicylab.org/wp-content/uploads/2023/03/Sentence-Enhancements-in-California.pdf> [as of Jan. 11, 2024].) Moreover, enhancements in California have been unevenly applied geographically, with the highest rates in the far Northern counties, the counties in the Central Valley, and Inland Empire counties. (*Ibid.*) To suppose (as the Attorney General posits) that the Legislature intended to maximize available punishment through the

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[8] As will be discussed in the next section of this brief, the Legislature was keenly aware of such disparities, and anxious to remedy them.

use of enhancements ignores all of these recognized problems. It is far more reasonable to conclude that the Legislature sought to avoid them and so chose the simpler (and more uniform) course of sentencing the successful petitioner to the underlying felony or target offense.

As the Court of Appeal observed, construing the statute as written also avoids the "complexities that could arise in deciding which of the myriad sentencing enhancements in our penal law might be applicable to a particular factual scenario." (*Arellano*, *supra*, 86 Cal.App.5th at p. 436.) The Attorney General responds that this really would not be a problem and contends that, for example, selecting an applicable sentencing enhancement in a case where a gun was used would be "obvious" to the trial court. (RRB at p. 17.) Putting aside that the interpretative question before the Court would apply to numerous contexts outside of firearm enhancements, even the Attorney General's chosen example is far from "obvious" – indeed it is obviously problematic. First, it is frequently not obvious whether a gun enhancement can be fairly applied, and second, even if *some* gun enhancement is arguably appropriate, any number of questions arise as to *which* enhancement should be applied.

In cases like Arellano's, which was a conviction following a plea, there are generally no trials or jury findings that would definitively settle these questions. Allegations (frequently decades old) that one person or another had a weapon, how precisely it was used, who was aware of the weapon(s) and when, and whether a

given individual in fact aided in their use and how, are often extremely difficult to resolve.

But even when there has been a jury trial, it is often hotly contested who possessed weapons, the precise circumstances of their use in the underlying felony or target offense, and the awareness or involvement of the petitioner in providing and/or using a firearm during the crime. Whether and to what extent prior jury findings conclusively resolve any of these questions can present complicated legal issues. (See *People v. Curiel*, *supra*, 15 Cal.5th 433; *People v. Reyes*, *supra*, 14 Cal.5th 981; *In re Ferrell* (2023) 14 Cal.5th 593; *In re Lopez* (2023) 14 Cal.5th 562.)

And even assuming that some gun enhancement could be appropriate, allowing courts to pick and choose from the enormous range of such enhancements could render the intended benefit of the statute illusory. The Penal Code includes over 100 unique sentencing enhancements.[9] Depending on which (and how many) enhancements a trial court might add, gun enhancements alone could extend a petitioner's prison sentence anywhere from one year to 25 years to life and thus could erase any practical benefit from getting one's invalid murder sentence vacated. [10] (§ 12022, subd. (a)

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[9] Com. on Revision of the Penal Code, Sentence Enhancements in California, *supra*, p. 3.) <https://www.capolicylab.org/wp-content/uploads/2023/03/Sentence-Enhancements-in-California.pdf> [as of Jan. 11, 2024].

[10] In *People v. Watson* (2021) 64 Cal.App.5th 474, the court of appeal held that trial courts may redesignate multiple underlying crimes or target offenses to replace a single vacated murder despite the fact that the text of the statute (§ 1172.6, subd. (e)) contemplates

[one year], § 12022.5, subd. (a) [3, 4, 10 year triad], 12022.5, subd. (b) [5, 6, 10 year triad], 12022.53 [10, 20, 25 to life triad].) Similarly, a gang enhancement – which, as this Court is well aware, poses a host of thorny legal and factual questions[11] – can extend a petitioner's prison sentence anywhere from one year to 15 years to life. (§ 186.22, subd. (a) [one year], § 186.22, subd. (b)(1)(A) [2, 3, 4 year triad], § 186.22, subd. (b)(1)(B) [five years], § 186.22, subd. (b)(1)(C) [ten years], § 186.22 subd. (b)(4)-(5) [7 to life or 15 to life].)

As observed by the *Arellano* court, the Legislature had many good reasons to limit the imposition of enhancements in section 1172.6 resentencing proceedings, and there is nothing "absurd" about the Legislature having done so.

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a *single* replacement charge for each vacated murder. Accordingly, *Watson's* analysis would do nothing to prevent trial courts from stacking multiple enhancements to each redesignated conviction. Amicus strongly disagrees with the reasoning in *Watson*, which bases its holding on Penal Code section 7. (See *id.* at pp. 485-487.) This Court has observed that section 7, which, "[i]n a laundry list of general provisions . . . provides in relevant part that the singular member includes the plural, and the plural the singular," is a "slim reed" upon which to support unprecedented statutory interpretation. (*People v. Navarro* (2007) 40 Cal.4th 668, 680.) The only time this Court appears to have relied on section 7 to uphold a court's statutory interpretation of a plural in the place of a stated singular command was nearly 100 years ago in *Ex Parte Mathews* (1923) 191 Cal. 35, 43, where it held that an ordinance would be discriminatory if it made the keeping of goats lawful when done by several persons and unlawful when done by one.

[11] See e.g., *People v. Cooper* (2023) 14 Cal.5th 735, 742; *People v. Rojas* (2022) 80 Cal.App.5th 542, 550-551; *People v. Renteria* (2022) 13 Cal.5th 951, 965.

II.
THE LEGISLATIVE HISTORY OF SB 1437 DEMONSTRATES THAT SECTION 1172.6(e) DOES NOT AUTHORIZE ADDING SENTENCE ENHANCEMENTS TO A REDESIGNATED UNDERLYING FELONY OR TARGET OFFENSES

Courts may look to legislative history to confirm the plain-meaning construction of statutory language. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1046.) The Attorney General argues that by adopting reforms that allow a "finer calibration of the sentence" the Legislature meant to give trial courts authority to judicially impose sentencing enhancements. (ROB p. 30, RRB,[12] p. 7.) In fact, the legislative history convincingly demonstrates the opposite. In enacting SB 1437, the Legislature had goals beyond punishment that militate against allowing the imposition of enhancements in subdivision (e).

A. Enacting SB 1437, the Legislature sought to reduce the prison population, save money, and repair past harms of mass incarceration

In the findings and declarations section of SB 1437, the Legislature identified several goals. It wanted to "more equitably sentence offenders in accordance with their involvement in homicides" (Stats. 2018, ch. 1015, § 1(b)), it wanted to "limit convictions and subsequent sentencing so that the law of California fairly addresses the culpability of the individual and assists in the reduction of prison overcrowding . . ." (Stats. 2018, ch. 1015, § 1(e)) and it outlined the "need" for the bill with reference to the high

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[12] Respondent's Reply Brief.

annual cost of incarceration.[13] (*Ibid.*) Judicially adding enhancements on redesignated convictions could only undermine those stated goals by lengthening prison sentences, increasing incarceration costs and negatively impacting communities already disproportionately harmed by over-incarceration.

This Court observed, in *People v. Lewis* (2021) 11 Cal.5th 952, that in enacting SB 1437 legislators were thinking about the potential cost savings that would result from shorter prison sentences. Legislators were informed that resentencings would result in "significant cost savings for the Department of Corrections and Rehabilitation." (*Id.* at p. 969.) The Senate Appropriations Committee observed that, depending on the number of individuals who could successfully petition for reduced sentences under SB 1437, the proposed legislation could result in "'[u]nknown, potentially major out-year or current-year savings in reduced incarceration expenses,'" and "'[w]hen these averted admissions are compounded, the savings could reach into the millions of dollars annually.'" (*Ibid.*, citing Sen. Com. On Appropriations, Analysis of Sen. Bill 1437 (2017-2018 Reg. Sess.) introduced Feb. 16, 2018, p. 1.)

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[13] Subsection § 1(e) adopted Senate Concurrent Resolution 48, wherein one year earlier, the Legislature observed that "California continues to house inmates in numbers beyond its maximum capacity at an average of 130 percent of capacity . . . Overpopulation has been the main contributing factor to inhumane and poor living conditions; and . . . incarceration of an inmate by CDCR is costing taxpayers $70,836 annually, according to the Legislative Analyst's Office as of the 2016-17 fiscal year." (Sen. Conc. Res. No. 48, Stats. 2017 (2017-2018 Reg. Sess.) res. Ch. 175 (Senate Concurrent Resolution 48).)

A key argument in favor of SB 1437, reported by the Assembly Public Safety Committee was the following:

> To *meaningfully reduce prison populations and repair the harm of decades of mass incarceration*, the state must also provide relief to those with violent felony convictions. By addressing the characteristic unfairness of accomplice liability law, the California Legislature will demonstrate its commitment to bringing overdue reforms to violent felony sentencing and redirecting state resources away from costly investments in corrections.

(Assem. Com. Pub. Safety, Analysis of Sen. Bill No. 1437 (2017-2018 Reg. Sess.) as amended May 25, 2018, p. 7, italics added.) It was acknowledged that accomplice liability laws "disproportionally impact youth of color and women." (*Ibid.*)

Data collected from the California Department of Corrections and Rehabilitation (CDCR) reveals that, to date, cost savings have been monumental. Hundreds of sentences based on now invalid murder and attempted murder theories are being vacated, people are being resentenced to dramatically lower sentences and millions of dollars in incarceration costs are being saved. Since the statute became effective in January of 2019, through the end of June 2023, 834 people have been resentenced and 13,567 years have been removed from sentences, resulting in $181 million dollars in reduced incarceration costs.[14] To read the statute as silently authorizing

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[14] SB 1437/775: A Snapshot of Impact (https://www.ospd.ca.gov/1437-fact-sheet-jan-2019_june-2023_website-version/) OSPD's data fact sheet was created based on individual offender data collected from CDCR. (See Exh. A, Declaration of Tatyana Kaplan and SB1437/775: A Snapshot of

judges to add more prison time with sentencing enhancements would blunt the impact of the reform and threaten to reverse the gains made so far by SB 1437 and its amendment, SB 775.

In practice, the statute is also working to repair past wrongs. Those who have been successfully resentenced are predominately from the communities most historically impacted by mass incarceration. Of those who have received relief to date, 40% are Black, 22% are Hispanic, 19% are Mexican, 11% are White, 5% are "Other", 2% are Asian or Pacific Islander, and 1% are American Indian/Alaskan Native. (Exh. A, p. 3.) To further punish those who are finally getting relief with judicially imposed sentencing enhancements would replicate the historical inequities that the Legislature sought to remedy.

The Attorney General's proposed reading of the statute would only mean longer replacement sentences, which would be inimical to the drafters' stated purposes of reducing costs and repairing the effects of overincarceration. The Court should not endorse a reading of the statute so clearly at odds with the legislative intent.

Impact, attached hereto.) Earlier versions of the fact sheet have been mentioned in various publications: Rector, *How 600-plus California inmates got more than 11,000 years cut off their prison sentences*, Los Angeles Times (Aug. 3, 2023) <https://www.latimes.com/california/story/2023-08-03/california-criminal-justice-reform-reduced-prison-terms-felony-murder> [as of Jan. 11, 2024], Stillman, *Sentenced to Life for an Accident Miles Away*, *The New Yorker* (Dec. 11, 2023) pp. 34-35 <https://www.newyorker.com/magazine/2023/12/18/felony-murder-laws> [as of Jan. 11, 2024].)

B. The Legislature was critical of sentence enhancements and had reasons not to impose them

SB 1437 was one of a host of bills passed in the 2017-2018 legislative session, specifically enacted to provide relief from lengthy prison sentences, by lawmakers aware of the prevalence of sentencing enhancements.[15] Other laws enacted by the same legislators who passed SB 1437 provide relevant background for interpreting its intent.[16] (See *Carmack v. Reynolds* (2017) 2 Cal.5th 844, 849-850 ["Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent."].) "[T]he rule that statutes *in pari materia* should be construed together is most justified, and light from that source has the greatest probative force, in the case of statutes relating to the same subject matter that were passed at the same session the legislature, especially if they were passed or approved or take effect on the same day. . . ." (*People v. Caudillo* (1978) 21 Cal.3d 562, 585.)

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[15] The Assembly Committee on Public Safety reviewing SB 1393 cited statistics showing that "as of September 2016, 79.9% of prisoners … had some kind of sentence enhancement; 25.5% had three or more." (Assem. Com. on Pub. Safety, Analysis of Sen. Bill No. 1393 (2017-2018 Reg. Sess.) as amended May 9, 2018, pp. 3-4.)

[16] In addition to the bills discussed, the same Legislative session passed SB 1391 (2017-2018 Reg. Sess.), banning the transfer of 14- and 15-year olds to adult court and Assembly Bill (AB) 2942 (2017-2018 Reg. Sess.), amending the recall and resentencing statutes to allow prosecutors to recommend recall and resentencing for those whose sentences no longer serve the interest of justice. (Now renumbered as section 1172.1 per AB 200 (2021-2022 Reg. Sess.).)

SB 1437 became effective on January 1, 2019, as did SB 1393 (2017-2018 Reg. Sess.), which granted courts discretion to strike previously mandatory five-year recidivist sentencing enhancements. Approving the latter bill, legislators were aware that, "Experts note that reducing prison lengths of stay has little to no impact on either crime rates or recidivism." (Assem. Com. on Pub. Safety, Analysis of Sen. Bill No. 1393 (2017–2018 Reg. Sess.) as amended May 9, 2018, p. 3.)

During the same session, the Legislature approved SB 620 (2017-2018 Reg. Sess.) allowing courts the authority to strike previously mandatory gun enhancements. In doing so, the Legislature observed that "[l]onger sentences do not deter crime or protect public safety according to research on these laws. . . Instead, research has found that these enhancements cause problems. They disproportionately increase racial disparities in prison populations, and they greatly increase the population of incarcerated persons." (Sen. Rules Com., Analysis of Sen. Bill 620 (2017-2018 Reg. Sess.) as amended Sept. 23, 2017, pg. 5.)

The fact that the SB 1393 and SB 620 reforms explicitly empower judges to continue to impose sentencing enhancements in appropriate cases demonstrates that the Legislature knew how to bestow the authority to impose enhancements in an ameliorative statue when it chose to do so. The fact that no such textual authorization is set forth in section 1172.6, subdivision (e) compels the conclusion that the Legislature did not intend to allow enhancements to be added here. (See, e.g., *Yeager v. Blue Cross of California* (2009) 175 Cal.App.4th 1098, 1103 [Courts "may not

make a silent statute speak by inserting language the Legislature did not put in the legislation"].)

The Attorney General's premise – that the Legislature silently authorized the imposition of enhancements in order to ensure that successful petitioners receive the maximum punishment the resentencing judge thinks they deserve – is not supported by the legislative history. Seen in this broader context, the legislative silence regarding enhancements in subdivision (e) was a conscious choice by the Legislature to create a resentencing process that would not perpetuate long prison sentences and historical inequities.

III.
THE ATTORNEY GENERAL'S READING OF THE STATUTE WOULD CREATE GRAVE CONSTITUTIONAL PROBLEMS AND REQUIRE UNSANCTIONED JUDICIAL RULEMAKING

This Court has emphasized that "'consideration should be given to the consequences that will flow from a particular interpretation' of a statute." (*Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1252, quoting, *Dyna-Med*, *Inc. v. Fair Employment & Housing Com.*, *supra*, 43 Cal.3d at p. 1387.) In practice, the Attorney General's proposal will engender proceedings in which trial judges have untrammeled freedom to add sentencing enhancement to convictions that were never admitted or considered by a jury, with lifetime consequences for petitioners.

Responding to Mr. Arellano's concerns about the constitutional implications of such proceedings, the Attorney General repeatedly insists that its interpretation of subdivision (e) is

not an endorsement of a "standardless process." (RRB, pp. 7, 16, 19.) But the Attorney General's assurances are betrayed by their inability to identify any specific standards or rules that would govern the determination of enhancements in resentencing proceedings. (RRB, pp. 21-22.)

Put in terms of the established process of statutory interpretation, the Attorney General's reading of the statute would violate at least two additional canons: (1) the doctrine of constitutional avoidance and (2) recognized limitations on judicial legislating.

A. The Attorney General's construction violates the constitutional avoidance doctrine

A fundamental requirement of statutory interpretation is that courts construe penal laws in a manner that avoids serious constitutional questions. (*People v. Gutierrez* (2014) 58 Cal.4th 1354.) Courts adopt the less constitutionally problematic interpretation of a penal statute so long as that interpretation is "fairly possible." (*People v. Buza* (2018) 4 Cal.5th 658, 682, *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 513.) In this case, a plain reading of the statute – an interpretation that does not contain a silent authorization of judicially imposing enhancements – is not only possible but necessary to avoid grave constitutional issues.

1. Constitutional concerns are necessarily triggered when a petitioner is subject to lasting criminal convictions

The constitutional protections that are implicated when new criminal liability is assigned –the right to a jury trial, due process,

evidentiary standards, and burdens of proof – are among the most important aspects of our entire constitutional system. In a traditional criminal proceeding, the Sixth Amendment to the United States Constitution, as interpreted in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*), requires that any fact, other than the fact of a prior conviction, that increases the statutorily authorized penalty for a crime must be found by a jury beyond a reasonable doubt. (U.S. Const., 6th Amend.) In California, a "[t]rial by jury is an inviolate right and shall be secured to all ...." (Cal. Const, art. I § 16.) Our state ensures criminal defendants a right to notice and a jury trial on enhancements. (See § 1170.1, subd. (e). ["All enhancements shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact."].)

The Attorney General claims that section 1172.6 only allows for a reduction of the petitioner's sentence and so does not implicate federal and state constitutional protections. (RRB, pp. 7, 18.) The Attorney General is mistaken, for section 1172.6 does not merely afford an opportunity to shorten the length of a person's sentence; rather it creates a proceeding that contemplates the full erasure and replacement of now invalid final convictions.

While section 1172.6 proceedings do not have all the trappings of a criminal trial, once a petitioner's murder conviction is vacated as invalid under current law, resentencing proceedings necessarily implicate many of the same fundamental constitutional concerns – particularly when new allegations are at issue. Specifically, imprisoning a petitioner (now innocent of murder) under a sentence-increasing enhancement which was neither found by a jury nor

admitted by them (and which may have never even been charged), sounds very much like imprisonment by judicial factfinding. (Cf. *Ring v. Arizona* (2002) 536 U.S. 584, 610 (conc. opn. of Scalia, J.) ["[T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives — whether the statute calls them elements of the offense, sentencing factors, or Mary Jane — must be found by the jury beyond a reasonable doubt."].)

Considering issues arising from these hearings, the appellate courts have recognized that some constitutional protections are inherent and necessary in section 1172.6 proceedings. In the recent cases *People v. Basler* (2022) 80 Cal.App.5th 46, 57, and *People v. Quan* (2023) 314 Cal.Rptr.3d 618, 625-626, for instance, courts found a right to be present for a section 1172.6 hearing based on the Sixth and Fourteenth Amendment as well as the state constitution. In *People v. Foley* (2023) 97 Cal.App.5th 653, 659-660, the Court of Appeal affirmed the right to effective assistance of counsel at the section 1172.6 evidentiary hearing based on the state and federal constitutions. As these cases recognize, the section 1172.6 retroactive resentencing vehicle is in some important ways more akin to an adversarial criminal process than what the Attorney General dismissively terms an "act of lenity by the Legislature" (RRB, p. 18) where the petitioner's rights and protections are always subordinate.[17]

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[17] The most thorough and careful discussion of this point was provided by Presiding Justice Stratton in her dissenting opinion in

The Attorney General argues that Mr. Arellano is overstating the constitutional concerns and cites cases involving other state and federal post-conviction relief vehicles for the proposition that constitutional protections can be dispensed with when a post-conviction vehicle is used to reduce a sentence. (RRB, p. 18, discussing *Dillon v. United States* (2010) 560 U.S. 817 (*Dillon*) and *People v. Perez* (2018) 4 Cal.5th 1055, 1059 (*Perez*).) The Attorney General's argument misses the critical difference between section 1172.6 and the statutory provisions in play in those cases.

At issue in each of those cases was judicial discretion to determine the sentence for a crime for which the defendant had suffered a valid conviction. In *Dillon* the trial court was called upon to decide whether to afford sentence modification as a form of discretionary relief to defendants previously convicted of federal drug offenses. (*Dillon*, *supra*, 560 U.S. at p. 825.) The high court held that, in that circumstance, the Sixth Amendment did not require the judge to only consider facts that had been found by a jury beyond a reasonable doubt. (*Id.* at p. 828, citing *Apprendi*,

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People v. Mitchell (2022) 81 Cal.App.5th 575, 603. Justice Stratton observed that section 1172.6 proceedings are "not indicative of the Legislature's simple intent to bestow lenity upon convicted defendants." She notes that the Legislature did not merely "offer reclassification of a conviction" but instead insisted on a retroactive vehicle that retries eligible defendants with the right to counsel, the right to proof beyond a reasonable doubt, the right to be confronted only with evidence admissible under the Evidence Code, and the right to insist that the prosecution bear the burden of proof. (*Ibid.*) "This framework is indicative of the Legislature's intent that these evidentiary hearings be treated with the same solemnity and under the same rules as was the initial trial (albeit without a jury)." (*Ibid.*)

supra, 530 U.S. at p. 481.) Similarly, in *Perez* this Court held that the Sixth Amendment did not prevent judges from disqualifying petitioners from retroactive Three Strikes resentencing relief under Proposition 36, based on facts the judges found true rather than facts that had been submitted to a jury. (*Perez*, *supra*, 4 Cal.5th at p. 1059.) Again, judicial factfinding in this context is readily distinguishable. If courts find Proposition 36 petitioners ineligible for relief, they are not saddled with new criminal convictions or enhancements in a proceeding in which the Sixth Amendment right to a jury trial had never applied. They simply do not qualify for the reduction in sentence. Were judges able to add *new* strikes under Proposition 36 based on their own factfinding, the outcome would obviously be different.

In both *Perez* and *Dillon*, judges were considering lesser sentences for historical criminal convictions that were themselves left intact. On its face, the proceeding under section 1172.6, subdivision (e) is something quite different: the petitioner's underlying conviction has been vacated and criminal liability is being assigned anew. If there is a basis to dispense with the constitutional protections that normally attend the imposition of enhancements in such circumstances, it is not to be found in the precedent on which the Attorney General relies.

The Attorney General suggests that there cannot be a constitutional problem judicially imposing enhancements because the same concerns – not having a jury finding beyond a reasonable doubt – would also compromise the "redesignation of a murder conviction to an uncharged target offense under subdivision (e)".

(RRB, p. 18.) But redesignating a murder or an attempted murder or manslaughter via section 1172.6, subdivision (e) does not offend the state or federal constitution. This is so because under the previously allowable murder theories, the underlying felony or target offense was legally essential to the determination of guilt.[18]

Thus, section 1172.6 petitioners were afforded a trial, wherein a jury necessarily (if not explicitly) found them guilty of an underlying felony or target offense. Reducing a conviction to its component parts when the overall theory of conviction has been invalidated does not disturb the constitutional protections the accused had when they went to trial or took a plea. In analogous circumstances, courts have long had the power to reduce convictions when the evidence shows that an improperly convicted defendant was in fact guilty of a lesser included offense. (§1181, subd. 6; § 1260; *People v. Enriquez* (1967) 65 Cal.2d 746, 749; see also *People v. Navarro*, *supra*, 40 Cal.4th at p. 681.)

Nor are there constitutional issues with notice under a proper reading of subdivision (e). Critically, because the statute specifically announces (pursuant to subdivision (e)) that a vacated murder conviction will be replaced with its underlying felony or target offense, a petitioner is on notice before seeking relief under section

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[18] In relying on NPC or felony murder accomplice liability theories, prosecutors referred to the underlying crimes, which were easier to prove up than murder. Prior to SB 1437 juries were instructed that, in order to find a person guilty of murder under the NPC doctrine, they had to find that the person aided and abetted a target offense; for felony murder they had to find liability for the underlying felony. (CALCRIM Nos. 402, 540A- 540C, CALJIC Nos. 3.00 – 3.02.)

1172.6 that, if they are successful, they will still be held accountable for the underlying crime. Not only did the jury implicitly find them guilty of this offense, petitioners have effectively waived any objection to the lesser conviction by seeking the specific benefit that the text of the 1172.6 promises.

On the other hand, if a person prevails at their evidentiary hearing and is newly sentenced to the underlying felony or target offense – but then is *also* deemed judicially convicted of enhancements that were never mentioned in the text of the statute (and never found by a jury or accepted by a plea), they have had their sentence increased beyond what they agreed in filing their petition. Now innocent of murder, they will be held in prison based on the findings of a judge, untested by a true trial by either judge or jury.

Under the Attorney General's reading of the statute, the successful section 1172.6 petitioner could potentially emerge from the resentencing proceeding with a constitutionally questionable conviction as to which the panoply of constitutional protections were never applied. Petitioners may not be deemed to have waived any constitutional rights with respect to such additional enhancements when they file a section 1172.6 petition as there is no mention of adding enhancements in the text of subdivision (e). Nor is there any clear indication to petitioners of the enhancements to which they may now be exposed. The Legislature cannot be deemed to have intended any such implicit waiver of fundamental constitutional rights as a condition of relief. (*Boykin v. Alabama* (1969) 395 U.S. 238, 243 ["We cannot presume a waiver of [this] important federal

right[] from a silent record."]; *People v. Holmes* (1960) 54 Cal.2d 442, 444 ["waiver must be so expressed and will not be implied from a defendant's conduct"].)

The Attorney General contends that the fact that the petitioner's final sentence may be the same or less makes the whole process beyond the reach of the constitution. That cannot be the case. The act of filing the petition in search of a resentencing on remaining charges or an underlying felony/target offense cannot be a total surrender of any and all constitutional rights attached to any criminal convictions the judge seeks to impose.

Lastly, in practice, constitutional problems arising from judicially imposed enhancements have real life consequences and will not end when the section 1172.6 proceeding concludes. Constitutionally questionable replacement convictions may continue to infect any future proceedings involving a petitioner resentenced under the Attorney General's reading of subdivision (e). Criminal convictions carry not just the "stigma of criminality" (*T.N.G. v. Superior Court* (1971), 4 Cal.3d 767, 775) but also future recidivist penal consequences. A successful section 1172.6 petitioner's final conviction could become a strike due solely to an enhancement – never found by a jury – added by a judge.[19] In the future, that constitutionally dubious "strike" could serve as the basis of a Second or Third strike sentence (Pen. Code, § 667, subds. (b)-(i)), potentially subjecting the person to a 25 years-to-life sentence based on a

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[19] Enhancements that frequently make a felony a strike include weapons enhancement, great bodily injury enhancements, and gang enhancements. (See § 1192.7, subd. (c); § 667.5, subd. (c).)

"strike" for which they never had a jury trial and where they may not have been found guilty beyond a reasonable doubt. Complications will loom indefinitely because a claim that an invalid strike was being relied upon to increase a sentence would not be ripe until a person was charged with a new serious or violent.[20] (Pen. Code, § 667, subds. (b)-(i)).)

The point here is not that the Court should take this occasion to decide the nature and full extent of the constitutional rights to be afforded petitioners regarding the imposition of enhancements in proceedings under section 1172.6, subdivision (e). In fact, it is exactly the opposite: In accordance with the canon of constitutional avoidance, amicus urges the Court *not* to wade into this avoidable thicket and instead adopt the plain meaning of the statute.[21] (See *People v. Buza*, *supra*, 4 Cal.5th at p. 682.)

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[20] Concerns about the potential effects of judge-made-strikes were noted (but not resolved) in *People v. Watson*, *supra*, 64 Cal.App.5th at p. 489. The court in that case designated more than one replacement "strike" conviction for the vacated murder, leaving the petitioner vulnerable to increased punishment for subsequent offenses under the Three Strikes law. The *Watson* Court found that the issue would not be ripe for decision unless and until the petitioner was charged with a new offense. (*Ibid.*)

[21] The Court should also decline the Attorney General's suggestion that it remand the case to the Court of Appeal for further consideration of the constitutional issues. (RRB, p. 23.) If this Court finds the Attorney General's reading of the statute otherwise persuasive but remains concerned about the constitutional implications, remanding the case for that purpose would pointlessly prolong the litigation and perpetuate confusion in the lower courts. Following the Attorney General's recommended course of action would leave intact the split of authority with *People v. Howard*

B. The Attorney General's construction violates this Court's prohibition on legislating from the bench

Effectively conceding that no statutory text guides the imposition of enhancements in subdivision (e), the Attorney General suggests courts should "improvise" and *sua sponte* formulate rules governing notice, evidentiary requirements and a standard of proof that would govern resentencing proceedings imposing enhancements. (RRB, pp. 19-21.)

Even if judicial rulemaking is theoretically possible, authorizing such an exercise is both unnecessary and heedless of the cautionary statements in this Court's precedent. Furthermore, were this Court to invite future judicial rulemaking, there is no consensus as to what the rules should be; the effect of licensing *ad hoc* determinations by the individual trial courts in the first instance would be chaotic. Inevitably, such an approach would require further intervention by this Court when conflicting rules are adopted. Such a scenario will be avoided if this Court limits the scope of statute to what its text expressly authorizes.

1. There is no reason to make rules to facilitate imposing enhancements never mentioned in the text of subdivision (e)

This Court has been mindful of a court's "limited role in the process of interpreting enactments from the political branches of our

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(2020) 50 Cal.App.5th 727 as to whether courts are authorized to impose enhancements and leave thousands of pending SB 1437 petitioners without clarity as to the extent of criminal liability upon the filing of a section 1172.6 petition.

state government." (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 632.) The Court has also observed it has "no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed." (*Id.* at p. 633.) Specifically, courts may not "bless procedural innovations inconsistent with the will of the Legislature or that usurp the Legislature's role by fundamentally altering criminal procedures." (*People v. Lujan* (2012) 211 Cal.App.4th 1499, 1507.) as modified on denial of reh'g (Jan. 15, 2013).)

People v. Collie (1981) 30 Cal.3d 43 (refusing to create reciprocal discovery procedures, superseded by § 1054.3) and *Reynolds v. Superior Court* (1974) 12 Cal.3d 834 (refusing to create alibi notice requirements, superseded by § 1054.1 et seq.) are instructive in this regard. Both cases involved discovery orders in criminal cases fashioned by the trial court and directed against the defendant, for which no clear statutory authority existed at the time. In both cases, this Court concluded that the orders at issue should not have been judicially created. (*Collie*, at pp. 51-56; *Reynolds,* at pp. 837-850.) As the *Reynolds* court said,

> It is one thing for a court to prescribe judicial procedures *necessary* to protect some fundamental constitutional principle or to effectuate some specific constitutional guarantee of individual liberty. [Citations.] It is quite another thing for a court to design judicial procedures which are in no way required by higher law but which may seem to some socially desirable and perhaps may be *permitted*—at least to some extent—by our state and federal Constitutions

(*Reynolds*, at pp. 845-846, italics in original.)

Like in *Reynolds* and *Collie*, the silence as to the imposition of enhancements in section 1172.6. subdivision (e), creates no *necessity* for courts to create rules and procedures allowing the imposition of enhancements. In effect, the Attorney General's rulemaking fix is a solution in search of a problem. This is simply not a situation in which this Court should sanction rulemaking.

The post-conviction criminal cases on which the Attorney General relies do not commend judicial rulemaking in this situation. (RRB, p. 21.) In *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*) and *In re Cook* (2019) 7 Cal.5th 439 (*Cook*) the Court judicially fashioned procedures (specifically a remand for a hearing in *Franklin* and the recommended expanded use of existing section 1203.01 as a record-making vehicle in *Cook*) to assist defendants with the collection of records and statements for future use at a youth offender parole hearing.[22] The youth offender parole statute specifically references the opportunity for family, friends and others with knowledge of the individual to "submit statements for review by the board". (§ 3051, subd. (f)(2).) The problem in *Cook* was how to give "juvenile offender[s] with a final conviction . . . access to the trial court for an evidence preservation proceeding." (*Cook*, at p. 451.) This Court's solution was to encourage courts to use their inherent procedural authority to provide the opportunity the

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[22] Section 4801, subdivision (c) directs that the Parole Board, in conducting a youth offender parole hearing, "shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law."

Legislature had already clearly identified in the text of the youth offender parole statutes. Here, in contrast, there is no reference to enhancements in the text of section 1172.6, subdivision (e) and thus no similar authority for the court to create a process to judicially impose lasting criminal convictions. Critically, the record-making procedures authorized in *Franklin* and *Cook* do nothing to alter a person's actual criminal conviction or the length of their imposed sentence.[23] These cases are not authority for judicial rulemaking in section 1172.6 proceedings, which bear essentially the same consequences as criminal trials.

2. Courts should not make rules and standards for imposing enhancements on an *ad hoc* basis

Urging this Court to rely on lower courts to fashion rules for imposing enhancements, the Attorney General points to *People v. Silva* (2021) 72 Cal.App.5th 505 (*Silva*) as a case which, it is claimed, properly established procedures for resentencings under section 1172.6 that were never written in the text of the statute. (RRB, pp. 21-22.) In *Silva*, the Court of Appeal held a court could resentence successful petitioners not only to a single underlying felony for which they were implicitly convicted but also to any and all other concurrent felonies that the trial court believed were supported by the record. (*Silva,* at p. 532.) The *Silva* Court reached this conclusion despite the text of the statute indicating that in such cases the defendant should be resentenced to "*the* [singular] target

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[23] Indeed, this Court highlighted that the petitioner in *Cook* was "not seeking a resentencing." (*Cook, supra,* at p. 456.)

offense or underlying felony" not to (plural) target offenses or underlying felonies. (§ 1172.6, subd (e), italics added.)

This awkward construction – reading the singular as the plural – not only strained the text of the statute but created significant constitutional concerns which the Court of Appeal appeared to recognize. (*Silva*, *supra*, 72 Cal.App.5th at pp. 521-523.) Successful petitioners at resentencing were now potentially exposed to being imprisoned, based on judicial findings, on charges that were never brought against them before and with no prior notice. Thus, the *Silva* Court began to fashion a due process fix to the problem its construction created: mandating notice and a right to be heard on any new charges for which the petitioner was to be resentenced. (*Id*. at pp. 521-529.) But its newly minted constitutional rules left many difficult questions unanswered.

As to the contours of the right to a hearing on the replacement conviction(s), the *Silva* Court explicitly did not decide "whether a paper review by the judge, including briefing by the petitioner, would be an adequate opportunity to be heard." (*Silva*, *supra*, 72 Cal.App.5th at p. 526.) Nor did the *Silva* Court set a specific time period for the requisite notice.[24] The *Silva* Court also found it unnecessary to designate the applicable standard of proof for the replacement conviction(s), but merely accepted that (in that particular case) "the prosecution met its burden since the proof [in that case] was in fact 'beyond any dispute.'" (*Silva*, *supra*, 72

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[24] In *Silva*, the petitioner had nine days of notice as to new underlying crimes that would be imposed which the court deemed sufficient time in a very case specific analysis. (*Silva,* at p. 525.)

Cal.App.5th at p. 527, quoting *People v. Howard, supra*, 50 Cal.App.5th at p. 738.)

Contrary to the Attorney General's suggestion, *Silva* is not a helpful illustration of how unproblematic it is for courts to fashion constitutional remedies and apply them to section 1172.6 proceedings. On the contrary, the opinion in *Silva* is an example of an incomplete formulation of judicially established rules that are not clearly defined; as such it fails to provide guidance to practitioners and the lower courts. And, if anything, *Silva* highlights the importance of constitutional avoidance. *Silva's* interpretation of the statute created constitutional problems so serious that they required formulating a raft of poorly defined due process protections, but the simpler answer was to read the statute to avoid those problems in the first instance. (See *People v. Buza*, *supra*, 4 Cal.5th at p. 682 [courts should adopt construction which does not raise constitutional issues when such an interpretation is "fairly possible"].)

If recent history is any guide, allowing courts to manufacture their own rules in the manner of cases like *Silva*, which provide no bright line or prescriptive guidance, will sow competing resentencing schemes throughout the state. Following this path will inevitably result in unpredictable, nonuniform results. There is ample evidence in the myriad conflicting court cases interpreting SB 1437 in the last five years that there is often little consensus on how to implement the statute.[25] There is no reason to think that things

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[25] For example: When courts started holding section 1172.6 subdivision (d)(2) evidentiary hearings in 2019, some judges

would be different in the context of imposing disputed enhancements. Some controversial splits were resolved with the passage of SB 775 (2021-2022 Reg. Sess.),[26] but it is not reasonable to expect the Legislature, or this Court, to repeatedly step in to resolve disputed interpretations indefinitely.

Considering the history, it seems unlikely lower courts will create consensus rules governing issues such as notice, the admissibility of evidence, discovery, and burdens of proof in the context of enhancements. Practices and procedures may vary widely across the state, creating regional disparities in the length of sentences that replace vacated murder and attempted murder convictions. Add to that concern California's checkered history of racial disparities in the use of sentencing enhancements and there is

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admitted "reliable hearsay" – including police reports and probation reports since those type of documents have been allowed at other post-conviction proceedings. (*People v. Williams* (2020) 57 Cal.App.5th 652, 661-662.) Other trial courts applied the rules of evidence, keeping out hearsay that did not fall within an exception. (*Jauregi v. Superior Court* (1999) 72 Cal.App.4th 931, 940; Evid. Code, § 300 [rules of evidence should apply at all evidentiary hearings].) This Court ordered depublished and transferred for reconsideration under SB 775 cases that split on the government's burden to establish the new murder conviction. (*People v. Duke* (2020) [substantial evidence], review granted Jan. 13, 2021, and cause transferred Nov. 23, 2021, S265309; *People v. Fortman* (2021) [beyond a reasonable doubt], review granted July 21, 2021, and cause transferred Dec. 22, 2021, S269228.)

[26] SB 775 affirmed both that the Evidence Code was to apply at a section 1172.6 evidentiary hearing and that the burden of proof was beyond a reasonable doubt.

simply too much at stake to leave the system to be developed *ad hoc* in the lower courts.

A simpler solution is available. All of this controversy and confusion can be avoided if this Court, applying the accepted canons of statutory construction, simply follows the text of the statute and does not allow enhancements to be added in the first place.

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CONCLUSION

For the reasons discussed above, the State Public Defender as amicus curiae urges this Court to affirm the judgment of the Court of Appeal, and to hold that section 1172.6, subdivision (e) does not authorize the addition of enhancements when successful petitioners are sentenced to redesignated offenses.

Dated: January 17, 2024

Respectfully Submitted,

GALIT LIPA
STATE PUBLIC DEFENDER

/s/
Jennifer Hansen
Deputy State Public Defender

CERTIFICATE OF COUNSEL

I, Jennifer Hansen, have conducted a word count of this brief using our office's computer software. On the basis of the computer-generated word count, I certify that this brief is 10,296 words in length, excluding tables and this certificate.

Dated: January 17, 2024

Respectfully Submitted,

/s/
Jennifer Hansen
Deputy State Public Defender

EXHIBIT A:

DECLARATION OF TATYANA KAPLAN
AND
SB 1437/775: A SNAPSHOT OF IMPACT

DECLARATION OF TATYANA KAPLAN

I, Tatyana Kaplan, declare the following:

1. I received a Ph.D. in Social Psychology from the University of Nevada in Reno in 2020.

2. Since November 2022, I have been employed as a Research Data Specialist II for the Indigent Defense Improvement Division of the Office of the State Public Defender.

3. On September 27, 2023, I created the one-page flyer "SB 1437/775: A Snapshot of Impact," which is attached hereto. The content of the flyer sets forth the results of the research described in this declaration.

4. On July 5, 2023, the Office of the State Public Defender submitted a data request to the California Department of Corrections and Rehabilitation for a list of offenders with murder offenses as of December 31, 2018, who were resentenced pursuant to Penal Code section 1170.95/1172.6 from January 1, 2023, through June 30, 2023. OSPD received a password to retrieve an Excel file from a data portal used by the California Department of Corrections and Rehabilitation on September 7, 2023. The Excel file contained each person's CDCR number, first name, last name, middle name, race, ethnicity, current age, admission date, release date (if applicable), case number, original sentencing county, original sentencing date, original maximum prison term, original offense, original time imposed (in months), current sentencing date, current maximum prison term, (new) original offense, and current time imposed (in months).

5. Using Excel, I counted the number of unique persons in the dataset and calculated the percentage of people for each racial category the California Department of Corrections includes in their race variable.

6. Using Excel, I computed the difference, in years, between a person's original sentence and their current sentence. For persons with original indeterminate sentences, I subtracted the current sentence from the number of years at which the person would have been eligible for parole in the original sentence. For example, if someone's original sentence was 25 years to life and their new sentence was a determinate sentence of 10 years, the difference would be 15 years. For individuals whose original sentences were life without parole, I used remaining life expectancy values retrieved from the Social Security Administration's Actuarial Life Table (https://www.ssa.gov/oact/STATS/table4c6.html) based on the person's current age (given the new sentence was also not life without parole) and subtracted any additional years remaining in the new sentence.

7. After computing the difference in years between original and new sentences, I ran a formula in Excel which capped all sentencing difference values at a person's life expectancy based on their current age (https://www.ssa.gov/oact/STATS/table4c6.html). For example, if the difference between a person's sentence was 30 years and that person was a 55-year-old male, the formula would cap the sentencing difference at 24.27 years (the remaining life expectancy according to the Social Security

Administration's Actuarial Life Table for a 55-year-old male). I then summed the capped sentencing difference values.

8. Using the summed capped sentencing difference values, I then computed two potential incarceration cost-related savings estimates. I multiplied the summed capped sentencing difference values with the California Department of Corrections and Rehabilitation's marginal cost saving value of $8,259 per person per year and with the Legislative Analyst's Office $106,131 estimate to house an inmate in California per year (https://lao.ca.gov/policyareas/cj/6_cj_inmatecost).

I declare under penalty of perjury that the contents of this declaration are true and correct. Executed this 12th day of January, 2024, at Sacramento, California.

Tatyana Kaplan Digitally signed by Tatyana Kaplan
Date: 2024.01.12 09:42:07 -08'00'

Tatyana Kaplan
Research Data Specialist II

Office of the State Public Defender
Indigent Defense Improvement Division

SB 1437/775: A SNAPSHOT OF IMPACT (Jan 2019-Jun 2023)

Demographics

834 people have been resentenced[1]

78% of those resentenced were serving indeterminate or life without parole sentences[2,3,4]

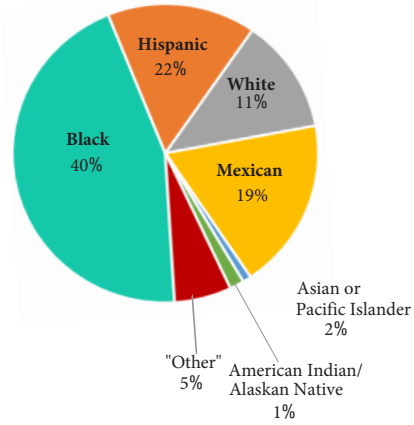
13,567 years

returned to individuals to care for loved ones and contribute to their communities[4]

$181 Million

in potential incarceration cost reduction[5]

Racial and ethnic background of people resentenced[3]



Overview

In 2018, the Legislature began amending California's homicide laws to remedy the long-standing problem of people being convicted of murder and given lengthy prison sentences when the individual was not personally responsible for the loss of life and did not have the intent to kill.

SB 1437: Effective January 1, 2019, SB 1437 created **a legal path** for those convicted of murder under the old laws to ask a judge to resentence them to a lesser crime if they (1) **were not the person who took a life**, (2) **did not act with intent to take a life**, or (3) **were not a major participant** who **acted with reckless indifference to life** in a felony that resulted in a loss of life.

SB 775: Effective January 1, 2022, SB 775 allowed those with similarly invalid manslaughter or attempted murder convictions to seek resentencing to a more appropriate lesser crime.

Public Defense Pilot Program: The Budget Act of 2021 (SB 129) established the Public Defense Pilot Program through which the Legislature provided needed funding to counties for public defenders to represent people in 1437/775 hearings.

Impact on Our Communities

Benefit to Taxpayers: Between January 1, 2019 and June 30, 2023, 834 people were resentenced. Based on these figures, estimated incarceration cost reductions range from **$99.7 million to 1.28 Billion**, with $181,208,878 estimated using the Legislative Analyst's Office (LAO) marginal incarceration cost estimate.[5]

SB 1437/775 Provides Relief to Communities of Color: Approximately **88%** of the people resentenced under SB 1437 and SB 775 were **people of color**, with **Black Californians** comprising the largest share (40%). Most were serving indeterminate sentences (e.g., 25 years to life) and some were serving a life sentence without the possibility of parole.

SB 1437/775 Provides Relief to Families: About 47% of people incarcerated in state prisons in the U.S. are **parents to minor children**.[6] Parental incarceration can have deleterious psychological, academic, behavioral, and economic effects on children. Under SB 1437 and SB 775, approximately **11,353 years** have been returned to individuals to care for loved ones and contribute to their communities.

Impact to Public Safety: Research suggests that individuals released from a long prison sentence recidivate at a much lower rate than other populations. For example, according to CDCR, the three-year re-conviction rate for persons who previously served an indeterminate term was 3.2%.[7]

1-According to data received from the California Department of Corrections and Rehabilitation (CDCR) spanning January 1, 2019 - June 30, 2023
2,3,4-Based on calculations conducted by the Indigent Defense Improvement Division (IDID) on data received from CDCR.
5-CDCR estimates $8,259 in marginal incarceration costs per person per year. The LAO estimates a marginal incarceration cost of $15,000 per person per year and $106,131 in average incarceration costs per year, https://lao.ca.gov/policyareas/cj/6_cj_inmatecost.
6-Bureau of Justice Statistics (2021) https://bjs.ojp.gov/library/publications/parents-prison-and-their-minor-children-survey-prison-inmates-2016
7-Based on findings in the Recidivism Report for Offenders Released from the CDCR FY 2015-16

Office of the State Public Defender
770 L St., Suite 1000
Sacramento, California 95814-3362
www.ospd.ca.gov/idid

DECLARATION OF SERVICE

Case Name: ***People v. Luis Ramon Manzano Arellano***
Case Number: **Supreme Court Case No. S277962**
6DCA Case No. H049413
Santa Clara County Superior
Court No. 159386

I, **Christopher Gonzalez**, declare as follows: I am over the age of 18, and not party to this cause. I am employed in the County of Sacramento. My business address is 770 L Street, Suite 1000, Sacramento, California 95814. I served a true copy of the following document:

AMICUS CURIAE BRIEF OF THE OFFICE OF THE STATE PUBLIC DEFENDER IN SUPPORT OF APPELLANT

by enclosing it in envelopes and placing the envelopes for collection and mailing with the United States Postal Service with postage fully prepaid on the date and at the place shown below following our ordinary business practices.

The envelopes were addressed and mailed on **January 17, 2024**, as follows:

Santa Clara Superior Court Hall of Justice Dept. 29A 190 W. Hedding St. San Jose, CA 95110	

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The aforementioned document(s) were served electronically (via TrueFiling) to the individuals listed below on **January 17, 2024**:

Michelle May Peterson Attorney at Law P.O. Box 387 Salem, MA 01970-0487 may111072@gmail.com	Peter F. Goldscheider Attorney at Law 600 Allerton Street, Suite 201 Redwood City, CA 94063 pfgolds@aol.com
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Office of the Attorney General San Francisco Office 455 Golden Gate Avenue Suite 11000 San Francisco, CA 94102-7004 sfagdocketing@doj.ca.gov	Sixth District Appellate Program (SDAP) 95 S. Market Street, Suite 570 San Jose, CA 95113 lori@sdap.org servesdap@sdap.org
California Public Defenders Association William J. Arzbaecher Attorney at Law 2150 River Plaza Drive, Suite 300 Sacramento, CA 95833 barzbaecher@capcentral.org	Sixth District Court of Appeal 333 West Santa Clara Street Suite 1060 San Jose, CA 95113 *Served via TrueFiling to Sixth District Court of Appeal Case No. H049413*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **January 17, 2024**, at Sacramento County, California.

Christopher Gonzalez

Digitally signed by Christopher Gonzalez
Date: 2024.01.17 12:53:03 -08'00'

Christopher Gonzalez

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: **jennifer.hansen@ospd.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	20240117_Arellano_Amicus_Brief_TrueFile
APPLICATION	20240117_Arellano_App_to_File_Amicus_TrueFile

Service Recipients:

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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.

1/17/2024

Date

/s/Christopher Gonzalez

Signature

Hansen, Jennifer (249733)

Last Name, First Name (PNum)

Office of the State Public Defender

Law Firm