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.	**S277962**

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

APPLICATION FROM THE CALIFORNIA PUBLIC DEFENDER'S ASSOCIATION FOR PERMISSION TO FILE A TIMELY AMICUS CURIAE BRIEF IN SUPPORT OF LUIS ARELLANO, APPELLANT

AND

AMICUS CURIAE BRIEF OF THE CALIFORNIA PUBLIC DEFENDER'S ASSOCIATION

THE CALIFORNIA PUBLIC DEFENDER'S ASSOCIATION

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APPLICATION BY THE *CALIFORNIA PUBLIC DEFENDERS ASSOCIATION* FOR PERMISSION TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT

TO: THE HONORABLE PATRICIA GUERRERO, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT

The CALIFORNIA PUBLIC DEFENDERS ASSOCIATION (CPDA) applies, under California Rules of Court, Rule 8.520(f), for permission to file the accompanying amicus curiae brief in support of appellant. This application summarizes the nature and history of CPDA, and our interest in the issues presented in this case. It also demonstrates that our proposed brief will assist the Court in the analysis and consideration of the issue presented.

A. Identification of CPDA[1]

With nearly 4,000 members, the California Public Defenders Association is the largest association of criminal defense attorneys, public defenders, and associated professionals in the State of California. Courts have granted CPDA leave to appear as amicus curiae in nearly 50 California cases which culminated in published opinions. We believe that our participation was helpful in many important cases. (See, e.g., *People v. Albillar* (2010) 51 Cal.4th 47 [sufficiency of the evidence in a gang-related prosecution]; *Barnett v. Superior Court* (2010) 50 Cal.4th 890 [post-trial discovery]; *Galindo v. Superior Court* (2010) 50 Cal.4th 1 [pre-prelim discovery]; *People v. Lenix* (2008) 44 Cal.4th 602 [comparative juror analysis for first time on appeal], *People v. Nelson* (2008) 43 Cal.4th 1242 [DNA evidence in a cold-hit case]; *Chambers v. Superior Court* (2007) 42 Cal.4th 673 [*Pitchess* procedures]; *People v. Sanders* (2003) 31 Cal.4th 318 [search could not be a reasonable "parole search" without

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[1] As required by Rule 8.520(f)(4), the undersigned, William Arzbaecher, on behalf of CPDA, certifies to this Court that no party involved in this litigation has authored any part of the attached amicus brief, tendered any form of compensation, monetary or otherwise, for legal services related to the writing or production of the amicus brief, and additionally certifies that no person or entity, other than amicus curiae, its members or its counsel has contributed any monies, services, or other form of donation to assist in the production of the amicus brief.

knowledge of the suspect's parole status]; *Mandalay v. Superior Court* (2002) 27 Cal.4th 537 [no separation of powers violation by the direct filing of juvenile cases in the criminal court]; *Morse v. Municipal Court* (1974) 13 Cal.3d 149 [mandate issued to compel consideration of diversion].) CPDA has also served as amicus curiae in the United States Court in numerous cases. (See, e.g., *California v. Trombetta* (1984) 467 U.S. 479 [the duty to preserve evidence is limited to evidence that might be expected to play a significant role in the suspect's defense]; *Monge v. California* (1998) 524 U.S. 721 [double jeopardy clause does not bar retrial of a prior conviction allegation after an appellate finding of evidentiary insufficiency].)

The author of the accompanying amicus brief has authored, or helped author, briefs and argued before the Court in *People v. French* (2008) 43 Cal.4th 36; *People v. Sloan* (2007) 42 Cal.4th 110; *People v. Navarro* (2007) 40 Cal.4th 668; *People v. Britt* (2004) 32 Cal.4th 944; *People v. Toney* (2004) 32 Cal.4th 228; and *People v. Reyes* (1998) 19 Cal.4th 747. On behalf of CPDA, he filed amicus briefs in *People v. Sasser* (2015) 61 Cal.4th 1, and *People v. Buycks* (2018) 5 Cal.5th 857. He has also assisted appointed counsel in a number of other cases decided by this Court.

In summary, CPDA and its legal representatives have the necessary experience, collective wisdom, and interest in matters of court policy to serve this court as amicus curiae. Our

statewide perspective can be helpful when the Court is confronted by a controversy that effects practitioners statewide.

B. Statement of Interest of CPDA

CPDA members and their clients have a great interest in the question on which this Court has granted review, which is: "When a defendant obtains resentencing of a conviction under Penal Code section 1172.6, subdivision (e), is the trial court permitted to impose not only the target offense or underlying felony, but also corresponding enhancements?"

CPDA believes that the decision of the Court of Appeal in this matter (*People v. Arellano* (2023) 86 Cal.App.5th 418) correctly concluded that enhancements not subsumed within the original judgment may not be added to the judgment when a section 1172.6 petition is granted, the defendant's murder conviction is vacated, and the defendant is resentenced on the remaining charges (§ 1172.6, subd. (d)(3)) or on the target offense or underlying felony to which the murder conviction (if generically charged) has been redesignated (§ 1172.6, subd. (e)). For the reasons set forth in the accompanying brief, CPDA believes that the position of the People in this matter, and the appellate opinions supporting it, that convictions and enhancements not subsumed within the original judgment may be added to the judgment at a section 1172.6 resentencing, is incorrect and comports neither with the language nor the legislative intent of section 1172.6, nor with the constitutional rights of criminal defendants.

C. The brief is timely

The People's Reply Brief on the Merits was filed on November 17, 2023. Therefore, under Rule 8.520(f)(2) of the California Rules of Court, the original deadline for filing an application to file an amicus curiae brief was December 18, 2023. This Court granted CPDA extensions of time to file this application and accompanying brief to and including January 24, 2024. Therefore, this application and the accompanying brief are timely under rule 8.520(f)(2).

D. Prayer

Based upon this Application and the accompanying brief, the California Public Defenders Association applies for an order granting permission to file an amicus curiae brief in support of Appellant. That brief is combined with this Application.

DATED: January 24, 2024

/s/ William J. Arzbaecher

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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.	**S277962** **Sixth Appellate District Court** **No. H049413** **Santa Clara Superior Court Case No. 159386**

AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT

Pursuant to Rule 8.520(f) of the California Rules of Court, the California Public Defender's Association ("CPDA") submits the following argument in support of defendant/appellant Luis Ramon Manzano Arellano ("appellant").

QUESTION PRESENTED

The Court has granted review of the following question: When a defendant obtains resentencing of a conviction under Penal Code section 1172.6, subdivision (e), is the trial court permitted to impose not only the target offense or underlying felony, but also corresponding enhancements? To CPDA, the question really at issue in this case is whether it was the Legislature's intent in enacting section 1172.6 that it be used as a vehicle for adding more convictions and enhancements to a

defendant's judgment, and whether any such intent is a constitutional.

ARGUMENT

I. INTRODUCTION.

A. Summary of prior proceedings and the decision of the Court of Appeal.

1. Superior Court proceedings.

As set forth in the Court of Appeal's opinion in this matter (*People v. Arellano* (2022) 86 Cal.App.5th 418 (*Arellano*)), appellant (along with two codefendants) was charged in 1992 with murder (Pen. Code[2] § 187, subd. (a)), attempted robbery (§§ 664, 211, 212.5, subd. (a)), and first-degree burglary (§ 459, 460, subd. (a)), and with an allegation that he personally used a firearm during the commission of the murder and attempted robbery. (*Arellano*, *supra*, 86 Cal.App.5th at p. 423.) He subsequently pleaded guilty to second-degree murder, was sentenced to 15 years to life in prison, and (pursuant to his negotiated plea) the attempted-robbery and burglary charges and firearm enhancement were dismissed. (*Id.*)

In 2020, Mr. Arellano filed a petition for resentencing under section 1170.95.[3] At a hearing the following year, the

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[2] Undesignated statutory references are to the California Penal Code.

[3] Section 1170.95 was modified in 2021, to (among other things) add murder and manslaughter as offenses eligible for resentencing. The modification otherwise did not change the

District Attorney stipulated that Arellano was entitled to be resentenced, and the trial court vacated his murder conviction. (*Arellano* at p. 424.) Although the parties originally stipulated that appellant's vacated murder conviction could be redesignated as an attempted-robbery conviction with a firearm-use enhancement, appellant's counsel subsequently objected to the inclusion of the enhancement in the new judgment, arguing that adding an enhancement that was not previously admitted or found true by a trier of fact was not supported by the statute and would violate Mr. Arellano's constitutional rights under *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*). (*Arellano* at pp. 425-426.)

The trial court rejected this argument, concluding that *People v. Howard* (2020) 50 Cal.App.5th 727 (*Howard*), and *People v. Watson* (2021) 64 Cal.5th 474 (*Watson*) supported the imposition of enhancements and convictions not subsumed within the original judgment, "to properly reflect the defendant-petitioner's individual culpability ...[,]" and that "there [was] evidence in the record that would suggest that [Arellano] did possess a handgun during the time of the underlying offenses."

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statute for purposes of the issue on which this Court has granted review. (Stats. 2021 ch. 551 (S.B. 775), § 2.) In 2022, the statute was amended again (without substantive change) and renumbered as section 1172.6. (Stats. 2022, ch. 58 (A.B. 200), § 10.) CPDA will refer to the statute under its current number (§ 1172.6) in this brief.

(*Arellano* at p. 426-427.) The trial court then redesignated Mr. Arellano's murder conviction as a conviction for attempted robbery (§§ 664, 211, 212.5, subd. (a)) with a firearm-use enhancement (§ 12022.5, subd. (a)) and resentenced Arellano to a time-served term of seven years in prison – three years for the attempted robbery and four years for the enhancement. (*Id*.) Mr. Arellano appealed.

2. The Court of Appeal's decision.

On appeal from the resentencing, the Court of Appeal reversed the trial court's imposition of a firearm-use enhancement in resentencing Mr. Arellano. The court concurred with *Howard*, *supra*, that the phrase "target offense or underlying felony" in subdivision (e) of section 1172.6 (subdivision (e)) "mean[s] the 'offense' upon which liability was based for either the natural and probable consequences doctrine or the felony-murder rule." (*Arellano*, 86 Cal.App.5th at p. 435.) However, *Arellano* disagreed with the *Howard* court's conclusion that a target offense or underlying felony within the meaning of subdivision (e) includes sentence enhancements.

The court in *Arellano* concluded that, "[b]y directing that the vacated conviction shall be redesignated only 'as the target offense or underlying felony for resentencing purposes' (§ 1172.6, subd. (e)) and failing to mention sentence enhancements, the Legislature spoke to both redesignation for the conviction and resentencing for that conviction. That is, through the specific

language it chose for section 1172.6, subdivision (e), the Legislature stated that 'for resentencing purposes,' the newly redesignated conviction shall include only the offense upon which liability for murder or attempted murder was based." (*Arellano* at p. 436.)

> Given the settled distinction in our penal law between an "offense" and a sentence enhancement and the statutory framework of section 1172.6 as a whole, we conclude that the phrase "target offense or underlying felony" in section 1172.6, subdivision (e), does not authorize a court to include a sentence enhancement when it redesignates a vacated conviction as the target offense or underlying felony for resentencing purposes under that subdivision. Because the trial court redesignated Arellano's conviction and resentenced him under the purview of section 1172.6, subdivision (e), it could not properly include the firearm enhancement (§ 12022.5, subd. (a)) in Arellano's new conviction and sentence.

(*Id*. at p. 437, footnote omitted.)

The Court of Appeal reversed Arellano's redesignated conviction and remanded the matter for further proceedings to redesignate it as a conviction of the underlying felony and to resentence him. The court "[left] it to the trial court and parties on remand to determine whether the underlying felony for resentencing purposes should comprise either or both attempted robbery and first-degree burglary." (*Id*.)

The Court of Appeal's rationale in reversing of the firearm enhancement in *Arellano* did not rest on the fact *Arellano's* original judgment did not include a firearm enhancement. The

Court of Appeal's decision rests on the conclusion that subdivision (e) of section 1172.6 does not provide for the imposition of enhancements as to a murder conviction redesignated as the target offense or underlying felony pursuant to that subdivision. (*Arellano* at pp. 436-437.)

It is unclear from the Court of Appeal's decision whether the court agrees with the view expressed in *People v. Watson*, *supra*, 64 Cal.App.5th 474 and *People v. Silva* (2021) 72 Cal.App.5th 505 (*Silva*) that a single (generically charged) murder conviction vacated pursuant to section 1172.6 may be redesignated as more than one target offense or underlying felony under subdivision (e). Again, the Court of Appeal left that question for the trial court and parties to address on remand. (*Arellano* at p. 437.)

B. Summary of Respondent's arguments.

In Respondent's Opening Brief on the Merits (Opening BOM), respondent contends that the Court of Appeal erred in reversing the trial court's imposition of a firearm enhancement in resentencing appellant. Relying on *Howard, Watson*, *Silva*, respondent argues that the Legislature intended to give the courts broad discretion and flexibility in resentencing defendants whose section 1172.6 petitions are granted. (Opening BOM, pp. 10-14, 18-26.) This broad discretion – which (as held in *Howard*, *Watson*, and *Silva*) includes the discretion to impose convictions and enhancements not subsumed within the original judgment –

is necessary, respondent contends, to effectuate the Legislature's intent that the defendant's punishment be commensurate with his or her conduct. (Opening BOM, pp. 27-31, citing Stats. 2018, ch. 1015, § 1, subd. (d).)

In the Opening BOM, respondent eschews a discussion of the constitutional objections that Mr. Arellano raised in the superior court and Court of Appeal (which included arguments that imposing an enhancement that was not part of the original judgment would violate the defendant-petitioner's jury-trial rights), asserting, in a footnote, that those objections are not within the scope of this Court's grant of review. (Opening BOM, p. 26, fn. 5.)

Respondent does address those arguments in Respondent's Reply Brief on the Merits (Reply BOM). In that brief, respondent argues that using the section 1172.6 resentencing process to impose new convictions and enhancements not subsumed within the defendant's original judgment does not violate petitioners' constitutional right to trial by jury, because section 1172.6 is an ameliorative statute and act of lenity that does not involve a criminal prosecution and so does not implicate these rights. (Reply BOM, pp. 7, 18-19, 24.)

> 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].)

(Reply BOM, pp. 18-19, footnote omitted; and see *id.* at p. 7 ["No grave constitutional question is implicated here."].)

C. Summary of CPDA's arguments.

CPDA agrees with the views of Mr. Arellano, the Office of the State Public Defender, amicus curiae (OSPD), and the Court of Appeal that neither the express language of section 117.2.6 nor the legislative intent behind Senate Bill (SB) 1437 (or SB 775) supports respondent's view (and the view of the Court of Appeal in *Howard*) that sentencing enhancements may be added to the target offense or underlying felony to which a vacated murder conviction has been redesignated pursuant to section 1172.6, subdivision (e). (See *Arellano*, *supra*, at pp. 436-437; Answer

BOM, pp. 23-35; OSPD Amicus Brief, pp. 18-34.) CPDA also agrees with the views of appellant and OSPD that adopting the interpretation of subdivision (e) espoused by respondent would raise grave constitutional concerns that are best avoided. (See Answer BOM, pp. 35-46; OSPD Amicus Brief, pp. 34-51.)

CPDA is most concerned that subdivision (e) not be interpreted as authorizing California courts to impose convictions and enhancements that are not subsumed within the petitioner's original judgment. CPDA believes that it is unfortunate that case law prior to *Arellano* was trending in that direction. (See *People v. Howard*; *People v. Watson*; *People v. Silva.*) CPDA believes that these decisions establish dangerous precedent regarding the alienability of our constitutional right to trial by jury. This troubling trend is what this brief will focus on.

It has been almost a quarter century since the United States Supreme Court held in *Apprendi* that criminal defendants have the right to jury findings beyond a reasonable doubt on all facts legally essential to punishment. (*Apprendi v. New Jersey*, *supra*, 530 U.S. 466, 490 ["Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."]; and see *Blakely v. Washington* (2004) 542 U.S. 296, 303-304 ["the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the*

jury verdict or admitted by the defendant"], emphasis in original; and *id.* at p. 313 ["As *Apprendi* held, every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment."].)

Since long before *Apprendi*, the High Court's jurisprudence has made clear that, in the absence of an express, knowing, intelligent, and voluntary waiver of the right to a jury trial, a court may not constitutionally convict someone of a crime, regardless of how strong the evidence may be of the defendant's guilt. (See *Rose v. Clark* (1986) 478 U.S. 570, 594 ["a trial judge is prohibited from entering a judgment of conviction ... regardless of how overwhelmingly the evidence may point in that direction"], quoting *United States v. Martin Linen Supply Co.* (1977) 430 U.S. 564, 572-573; see also *People v. Vera* (1997) 15 Cal.4th 269, 278 ["Article I, section 16 of the California Constitution declares `[t]rial by jury is an inviolate right and shall be secured to all.'"]; and see additional cases cited in section III.A, *post*.)

CPDA agrees with respondent that section 1172.6 is an "ameliorative" statute. However, CPDA strenuously disagrees with respondent's contention that the ameliorative aspects of section 1172.6, and the statute's mandate that any resentencing pursuant to its provisions may not exceed the sentence initially imposed (§ 1172.6, subd. (d)(1)), allow courts to increase a defendant's judgment by adding convictions and enhancements not subsumed within those returned by the defendant's jury or

admitted by the defendant. In CPDA's view, any statute that allows courts to do that (and to thereby expose the defendant to increased penal consequences in the future) is a criminal *prosecution*, not an amelioration of the judgment or "act of lenity." A statute is ameliorative only to the extent it ameliorates. Adding enhancements and convictions to a judgment does not ameliorate it; it does just the opposite.

Aside from *Howard*, *Watson*, and *Silva*, respondent's position is not supported by the authority upon which it purports to rely. And none of the decisions that do support respondent's position (i.e., *Howard*; *Watson*; *Silva*) explains *how* adding convictions and enhancements to a criminal judgment without a jury does not violate the state and federal jury-trial guarantees. They simply hold that the defendant-petitioner's constitutional rights are not implicated as long as their sentence is not increased. And these holdings, too, rest on authority that does not support them.

CPDA believes that the view espoused by respondent and by the Courts of Appeal in *Howard*; *Watson*; *Silva*, that courts can increase the convictions and enhancements in a criminal judgment as long as they don't increase the defendant's sentence, is wrong and violates defendant-petitioners' jury-trial rights under the Sixth Amendment and Article I, section 16 of the California Constitution.

Respondent's position (and the holdings in *Howard*; *Watson*; *Silva*) that courts may use the section 1172.6 resentencing process to convict petitioners, without a jury, of new crimes and enhancements that are not subsumed within the petitioner's original judgment ascribes to the Legislature an intent to legislate beyond its constitutional authority, an intent that is nowhere manifest in the language or legislative history of section 1172.6.

For these reasons (and those provided by Mr. Arellano, the OSPD, and the Court of Appeal), CPDA believes the Court of Appeal's reversal of the trial court's imposition of a firearm enhancement that was not part of Mr. Arellano's original judgment is correct and should be affirmed. And *Howard*, *Watson*, and *Silva* should be disapproved.

II. THE CONSTITUTIONALITY OF RESPONDENT'S POSITED INTERPRETATION OF SUBDIVISION (e) IS NECESSARILY WITHIN THE SCOPE OF THE QUESTION ON WHICH THIS COURT GRANTED REVIEW. THIS COURT HAS PREVIOUSLY RECOGNIZED THAT THE QUESTION OF WHETHER COURTS MAY INCREASE THE CONVICTIONS IN A JUDGMENT AS LONG AS THEY DON'T INCREASE THE SENTENCE IS (AT A MINIMUM) SUBJECT TO THE RULE OF CONSTITUTIONAL AVOIDANCE.

Respondent suggests that this Court's review should not include an assessment of the constitutionality of respondent's posited interpretation of section 1172.6. (Opening BOM, p. 26, fn. 5; Reply BOM, p. 7 ["It is not necessary ... 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." (Reply BOM, pp. 7-8.)

CPDA disagrees. When a question of statutory interpretation implicates constitutional issues, the Court is "guided by the precept that ""[i]f 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 [citations omitted].) "This rule, called the canon of constitutional doubt [citations], has been described as a 'cardinal principle' of statutory interpretation that 'has for so long been applied … that it is beyond debate.'" (*Id.*,

quoting *DeBartolo Corp. v. Fla. Gulf Coast Trades Council* (1988) 485 U.S. 568, 575.)

The Legislature is, of course, bound by the United States Constitution, as is this Court. (U.S. Const., Art. VI, cl. 2.) Since respondent has asked this Court to reverse the Court of Appeal's judgment, and to reject that court's interpretation of section 1172.6 in favor of respondent's own construction of the statute, respondent has necessarily asked this Court to assess the constitutionality of its position.

Respondent's argument that this Court should decline to consider Mr. Arellano's (or, presumably, OSPD's or CPDA's) constitutional objections can only be accommodated if this Court *rejects* respondent's interpretation of section 1172.6 as inconsistent with the intent of the Legislature. In other words, the only way for this Court to avoid addressing the constitutional objections Mr. Arellano, OSPD, and CPDA have raised to respondent's interpretation of section 1172.6 is by *applying* the doctrine of constitutional avoidance and concluding that respondent's interpretation of the statute is incorrect.

Respondent's argument that the doctrine of constitutional avoidance does not apply because "[n]o grave constitutional question is implicated" by respondent's interpretation of section 1172.6 (Reply BOM, pp. 7, 19) is a tautological one that asks the Court to accept as a premise the constitutionality of respondent's position. For the reasons given in sections III and IV, *post*, CPDA

believes that respondent's construction of section 1172.6, subdivision (e), as allowing courts to add convictions and enhancements to a defendant's judgment does not merely give rise to grave constitutional concerns, it is patently unconstitutional.

And respondent's contention that the rule of constitutional avoidance does not apply to respondent's position that courts, without juries, can increase the convictions and enhancements in a defendant's judgment, as long as they don't increase the defendant's sentence, is belied by the fact that this Court has already applied that doctrine to that position in a very similar context. (See *People v. Navarro* (2007) 40 Cal.4th 668 (*Navarro*).)

In *Navarro*, this Court addressed whether an appellate court may, upon finding that insufficient evidence supports the defendant's conviction, substitute convictions for multiple lesser included offenses shown by the evidence at trial. This Court concluded that the statutory provisions pursuant to which the court of appeal made that modification (§§ 1181, subd. 6, 1260) do not authorize it. (*Id.*, 40 Cal.4th at pp. 671-672.)

Navarro was convicted by a jury of attempted kidnapping during the commission of a carjacking. Upon concluding that that conviction was not supported by sufficient evidence, the court of appeal modified it into two convictions for lesser included offenses – one for attempted kidnapping and the other for attempted carjacking – pursuant to sections 1181, subdivision 6,

and 1260. Although those statutes provided for the modification of the unsupported greater conviction to a "lesser crime" (using the singular), the court of appeal held that, since section 7 provides that the singular includes the plural, since both attempted carjacking and attempted kidnapping were lesser included offenses of *Navarro's* conviction, and since both lesser offenses were supported by substantial evidence at trial, the proper remedy was to modify Navarro's single conviction to convictions for both lesser offenses. (*Id*., 40 Cal.4th at pp. 673-675.)

On review before this Court, *Navarro* argued (*inter alia*) that this modification of a single conviction into two convictions violated his constitutional to trial by jury as to the additional conviction, raising points and authorities very similar to those raised by CPDA in this brief. While acknowledging *Navarro's* constitutional objections to the Court of Appeal's modification of the judgment, this Court found it unnecessary to address them because it found that neither section 1181, subdivision 6, nor section 1260 authorized the Court of Appeal's procedure. (*Id*., 40 Cal.4th at p. 675.) Quoting the United States Supreme Court's decision in *Lyng v. Northwest Indian Cemetery Prot. Assn.* (1988) 485 U.S. 439, 445, this Court applied the "'fundamental and longstanding principle of judicial restraint [that] requires that courts avoid reaching constitutional questions in advance of the

necessity of deciding them.'" (*Navarro*, *supra*, 40 Cal.4th at p. 675.)

This Court then proceeded to address the statutory schemes and legislative and jurisprudential history of sections 1181, subdivision 6, and 1260, noting that they provided no support for interpreting those statutes as permitting a court to modify one conviction into more than one conviction. (*Id.*, 40 Cal.4th at pp. 675-680.) The Court concluded that section 7's general provision that the singular includes the plural "would appear too be a slim reed upon which to support the Court of Appeal's unprecedented action." (*Id.* at p. 680.) Reversing the judgment of the Court of Appeal, this Court also opined that "there is little doubt that modifying one greater offense to reflect convictions for two lesser offenses" would be a great "departure in our criminal jurisprudence" and a "startling innovation." (*Id.*)

CPDA believes that the application of the doctrine of constitutional avoidance is appropriate in this case as well. As the Court of Appeal, Mr. Arellano and OSPD have persuasively explained, there is nothing in the plain text of section 1172.6 or its legislative history that supports respondent's position (and the holding in *Howard*) that enhancements may be added to a target offense or underlying felony to which the defendant's vacated murder conviction is redesignated pursuant to subdivision (e). And, as explained in section III, *post*, there is a long, steady, and clear stream of United States and California Supreme Court

decisions holding that courts cannot add convictions or enhancements to a criminal judgment unless the defendant expressly, knowingly, intelligently, and voluntarily waives their right to trial by jury. Because nothing in section 1172.6 or its legislative history remotely provides for such a waiver, there is no need for this Court to read one into the statute and then decide whether it is constitutional.

The Legislature clearly intended to respect defendants' constitutional rights in enacting section 1172.6. Respondent's unsupported and unconstitutional interpretation of the statute (and those in *Howard*, *Watson*, and *Silva*) should be rejected on statutory construction grounds.

III. RESPONDENT'S VIEW (SHARED BY THE COURTS OF APPEAL IN *HOWARD*, *WATSON*, AND *SILVA*) THAT SECTION 1172.6, SUBDIVISION (e), AUTHORIZES COURTS TO REDESIGNATE A VACATED MURDER CONVICTION IN A WAY THAT INCREASES THE CONVICTIONS AND ENHANCEMENTS IN THE DEFENDANT'S JUDGMENT VIOLATES THE DEFENDANT'S CONSTITUTIONAL RIGHT TO A JURY TRIAL

A. In the absence of a jury verdict of guilt or an express, knowing, intelligent, and voluntary waiver of the right to a jury trial, courts are not constitutionally authorized to enter a judgment of conviction against a defendant.

The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." (U.S. Const., Amend. 6.)

The right to jury trial "includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277.) The Sixth Amendment "requires an actual jury finding of 'guilty.'" (*Id.*)

"Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi v. New Jersey*, *supra*, 530 U.S. 466, 490; and see *Blakely v. Washington* (2004) 542 U.S. 296, 303-304 ["the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*"], emphasis in original; and *id.* at p. 313 ["As *Apprendi* held, every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment."]; *Cunningham v. California* (2007) 549 U.S. 270, 281 ["under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge"].)

"[T]he jury's determination of ultimate guilt is indispensable." (*U.S. v. Gaudin* (1995) 515 U.S. 506, 510, fn. 2.) "[A] trial judge is prohibited from entering a judgment of conviction ... regardless of how overwhelmingly the evidence may point in that direction." (*Rose v. Clark* , *supra*, 478 U.S. 570, 594, quoting *United States v. Martin Linen Supply Co.*, *supra*, 430

U.S. 564, 572-573; and see *California v. Roy* (1996) 519 U.S. 2, 7 [“a criminal defendant is constitutionally entitled to a jury verdict that he is guilty of the crime”], conc. opn. of Scalia, J., emphasis in original.)

“Article I, section 16 of the California Constitution declares `[t]rial by jury is an inviolate right and shall be secured to all.'" (*People v. Vera*, *supra*, 15 Cal.4th 269, 278.) "Unless the defendant agrees, the prosecution cannot obtain a conviction for any uncharged, nonincluded offense." (*People v. Birks* (1998) 19 Cal.4th 108, 128; *People v. Lohbauer* (1981) 29 Cal.3d 364, 368.)

The waiver of the right to a jury trial must be knowing, intelligent and voluntary. (*Boykin v. Alabama* (1969) 395 U.S. 238, 242-243.) And its waiver must be express. (*Id.* at p. 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."].)

These rights apply not just to charged crimes, but also to sentencing enhancements legally essential to punishment. (*Apprendi*, *supra*, 530 U.S. at p. 494 [“the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?”]; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326 [“*Apprendi* treated the crime together with its sentence

enhancement as the 'functional equivalent' of a single 'greater' crime."]; *People v. Cross* (2015) 61 Cal.4th 164, 170.)

B. Respondent's position (and the holdings in *Howard, Watson*, and *Silva*) that the Constitution doesn't apply to the post-judgment addition of convictions and enhancements to a criminal judgment, as long as the process by which that happens also ameliorates the judgment in some way and doesn't increase the defendant's sentence, is not supported by the authority for which it relies on that understanding of the Constitution.

As the authorities cited in section III.A, *ante*, make clear, the Constitution protects us, not just from punishment requiring jury findings, but also from *convictions* imposed without a jury. Respondent argues that this protection does not apply at a section 1172.6 resentencing because that statute "provides retroactive reduction of an otherwise valid sentence through an act of lenity." (Reply Brief, p. 18, citing *People v. Perez*, *supra*, 4 Cal.5th 1055, 1063-1064; *Dillon v. United States* , *supra*, 560 U.S. 817, 828-829; and *Howard*, *supra*, 50 Cal.App.5th at p. 740.) *Howard* supports respondent's argument. As previously noted, so do *Watson* and *Silva*. However, the other decisions cited by respondent – *People v. Perez*, *supra*; *Dillon v. United States*, *supra* – do not. And (as explained below) the rationale in *Howard, Watson*, and *Silva*) is as tautological and legally unsupported as that in respondent's argument. It consists of little more than the misapplication of a label, "act of lenity," to an act –

the expansion of a criminal judgment to include new convictions and enhancements – that is *not* lenitive.

1. *Howard, Watson*, and *Silva*.

In *Howard*, the trial court "redesignated" Howard's felony-murder conviction (which had been vacated pursuant to section 1172.6, subdivision (d)(2)) as a conviction for residential burglary with a "non-accomplice present" finding, so as to render the redesignated felony both a serious felony and violent felony for future purposes (see §§ 667.5, subd. (c)(21), 1192.7, subd. (c)(18)), even though the defendant's jury had not found that the burglary was of a residence or that a non-accomplice was present during the burglary. The trial court also re-imposed an arming enhancement (§ 12022, subd. (a)(1)) that had been attached to the murder conviction and on which that the defendant's jury had returned a "true" finding. (*Howard*, 50 Cal.App.5th at p. 734.)

Rejecting a number of statutory arguments raised by *Howard*, the Court of Appeal held that this redesignation of the murder to the underlying felony was a proper application of subdivision (e) of section 1172.6,, reasoning (as respondent does in this case) that "[r]eading subdivisions (d)(3) and (e) together suggests the Legislature knew how to circumscribe the court's redesignation decision making power and declined to do so[,]" and this omission, along with legislative purpose of "'calibrat[ing]' a defendant's punishment to his or her culpability" (*Howard* at p. 742), supported "the conclusion that the Legislature intended to

grant the trial court flexibility when identifying the underlying felony for resentencing under subdivision (e)." (*Id.* at p. 739.)

Like respondent's Reply BOM in this case, the Court of Appeal in *Howard* provided only a very terse response to Howard's argument that increasing his judgment to include findings not subsumed within the original judgment violated his *Apprendi* rights:

> The retroactive relief provided by section 1170.95 reflects an act of lenity by the Legislature "that does not implicate defendants' Sixth Amendment rights." (*People v. Anthony* [(2019)] 32 Cal.App.5th [1102,] 1156; see *People v. Perez* (2018) 4 Cal.5th 1055, 1063–1064 [232 Cal. Rptr. 3d 51, 416 P.3d 42] [retroactive application of Prop. 36, the Three Strikes Reform Act of 2012, is a legislative act of lenity that does not implicate 6th Amend. rights].)
>
> Here, the process by which a trial court redesignates the underlying felony pursuant to section 1170.95, subdivision (e) does not implicate *Howard's* constitutional jury trial right under *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L. Ed. 2d 435, 120 S. Ct. 2348] or *Alleyne v. United States* (2013) 570 U.S. 99 [186 L. Ed. 2d 314, 133 S. Ct. 2151]. The redesignation does not increase *Howard's* sentence. We reject *Howard's* argument that the residential burglary designation violated his constitutional due process rights.

(*Howard* at p. 740.)

In Watson, 64 Cal.App.5th 474, the defendant was convicted by plea of second-degree murder following a planned

robbery of the victim in his hotel room during which a codefendant fatally stabbed the victim. Years later, *Watson* petitioned for resentencing under former section 1170.95. Following an evidentiary hearing at which *Watson* testified that he participated in the robbery but did not intend for the victim to be stabbed, the trial court granted the petition, vacated Watson's murder conviction, and redesignated that conviction as two offenses: first degree burglary and first-degree robbery. (*Watson*, at pp. 477-480.)

On appeal, *Watson* argued that "the plain language of [former] section 1170.95, subdivision (e) requires a court 'to select one felony as the designated underlying offense, and sentence him only as to that one.'" (*Watson*, 64 Cal.App.5th at p. 483.) Relying on the general rule of statutory construction in section 7 that "the singular includes the plural, and the plural the singular," the Court of Appeal rejected Watson's plain reading of the statute. (*Id*. at pp. 485-487.) The *Watson* court concluded that the Legislature's use of the singular form of the phrase "underlying felony" in subdivision (e) "was not necessarily intended to restrict courts to designating only one underlying felony under [former] section 1170.95, subdivision (e)." (*Watson*, at p. 485.) Rather, "[t]he plain language of the statute … confirms that the Legislature did not intend to require courts to designate only one felony in all cases." (*Id*. at p. 487.)

The *Watson* court also relied on the reasoning in *Howard*, that former section 1170.95 was intended to make punishment commensurate with culpability (*Watson* at pp. 491-492) and to provide trial courts with "flexibility in designating the underlying offense for resentencing purposes." (*Id.* at p. 488.) Finding the "evidence establishe[d] beyond a reasonable doubt that *Watson* aided and abetted both a burglary and a robbery prior to [the] killing" (*id.* at p. 492), the *Watson* court concluded that an interpretation of subdivision (e) that "requires a court to redesignate a vacated murder conviction as only one underlying felony—even when the evidence shows beyond dispute the commission of more than one underlying felony—would run directly contrary" to those purposes. (*Id.* at pp. 488, 492.)

Watson did not address how its holding would accord with the Sixth Amendment's proscription of court-imposed convictions, apparently because *Watson* did not raise a Sixth Amendment objection to the court's redesignation of a single murder conviction as two convictions (for robbery and residential burglary) pursuant to section 7 and subdivision (e) of former section 1170.95.[4]

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[4] *Watson* did address a claim that it would be unconstitutional to use new convictions imposed pursuant to subdivision (e) as serious- or violent-felony strikes in any future prosecution. (See *id.* at p. 489.) The *Watson* court's response to that argument is discussed in section IV.B, *post*.

In *People v. Silva*, *supra*, 72 Cal.App.5th 505, the defendant was convicted by a jury of two counts of first-degree murder arising out of a home invasion robbery and sentenced to 50 years to life in prison. A few years later, the trial court granted Silva's resentencing petition, vacated his two murder convictions, and redesignated those convictions as six convictions (for home invasion robbery or attempted robbery), based on the number of robbery victims alleged in the original information, even though *Silva's* original judgment did not include convictions for any of those offenses. He was resentenced to 16 years in prison, receiving consecutive terms on all but one of the redesignated-offense convictions. (*Silva*, at pp. 509-515.)

On appeal from the resentencing, *Silva* did raise several constitutional challenges to the imposition of additional convictions beyond those raised in the original judgment, including a contention that the new judgment violated his right to trial by jury. (*Silva*, at pp. 515-516.) The Court of Appeal affirmed the trial court's resentencing as to five of the redesignated-offense convictions. (*Id.* at p. 510.) In doing so, the *Silva* court agreed with *Watson*'s holding that, because Penal Code section 7 provides that "the singular includes the plural, and the plural the singular," the Legislature necessarily intended that trial courts "redesignate" a single murder conviction as multiple convictions, if the murder was charged generically, the target offense was not charged, and the evidence supports

convictions for more than one target offense or underlying felony. (*Silva*, *supra*, 72 Cal.App.5th at pp. 530-532.) According to the *Silva* court, this interpretation better serves the statute's purpose of making punishment commensurate with culpability than does an interpretation of subdivision (e) that limits the number of convictions on which the petitioner is resentenced to those returned by the defendant's jury. (*Silva* at p. 532.)

While acknowledging that its interpretation of subdivision (e) consistently with *Howard* and *Watson* authorized resentencing courts to engage in factfinding in imposing new convictions not subsumed within the defendant's original judgment (*Silva*, at p. 520), the Court of Appeal spent relatively little time explaining how that interpretation of subdivision (e) does not violate the petitioner's right to trial by jury. The holding in *Silva* on this question relies entirely on the reasoning in *Howard*, *supra*. According to *Silva*, the Sixth Amendment right to a jury trial is not implicated when a trial court increases the number of convictions in a criminal judgment pursuant to former section 1170.95 (currently section 1172.6), because the resentencing-petition process "is not a criminal prosecution[,]" but a legislative act of lenity that does not increase the defendant's sentence. (*Silva*, 72 Cal.App.5th at p. 520, citing *Howard*, 50 Cal.App.5th at p. 740; *People v. James* (2021) 63 Cal.App.5th 604, 610–611; and *People v. Perez*, *supra*, 4 Cal.5th 1055, 1063-1064.)

2. Neither respondent's "act of lenity" argument nor the decisions in *Howard*, *Watson*, and *Silva* provides a reasoned basis for the conclusion that adding convictions and enhancements to a judgment is an act of lenity that does not implicate the state and federal jury-trial guarantees.

Collectively, *Howard*, *Watson*, and *Silva* hold that courts can convict defendants without juries of additional crimes and enhancements not subsumed within their criminal judgments as long as the statute pursuant to which the additional convictions and enhancements are imposed also results in an amelioration of the defendant's judgment (i.e., the vacatur of one of the defendant's convictions) and prohibits the imposition of a greater sentence. The fact that a statutory resentencing procedure (e.g., § 1172.6) ameliorates the defendant's judgment in one way (by vacating one of the defendant's convictions), and does not increase the defendant's sentence, allows the Legislature (and courts) to expand the judgment with new convictions and enhancements without regard to the defendant's jury-trial rights. (See *Howard*, *supra*, at pp. 739-742; *Silva*, *supra*, at pp. 520, 530-532.) Respondent apparently shares this view. (See Reply BOM, p. 18.) This understanding of the Constitution does not follow from the authority cited in support of it. And it does not hold "inviolate" the state and federal jury-trial guarantees.

CPDA acknowledges that a number of published decisions support respondent's (and *Howard*'s and *Silva*'s) description of

section 1172.6 (nee § 1170.95) as an "act of lenity" rather than a criminal prosecution that is subject to the Sixth Amendment jury guarantee. (See *People v. Anthony*, *supra*, 32 Cal.App.5th 1102, 1156; *People v. James*, *supra*, 63 Cal.App.5th at pp. 609-610.) Indeed, in *People v. Mitchell* (2022) 81 Cal.App.5th 575, the Court of Appeal went so far as to say this about the statute, in rejecting *Mitchell's* claim that evidence from his parole hearing should have been excluded from his section 1172.6, subdivision (d)(3), hearing:

> A petition under . . . section [1172.6] is not a criminal prosecution. [Citation.] It is the opposite of a criminal prosecution. A criminal prosecution can only hurt a defendant and can never help. The process here is the reverse: it can only help the defendant and never hurt. The statute offers petitioning prisoners the possibility of getting out sooner. From the defendants' perspective, this process is all gain and no cost. That can never be said of a criminal prosecution. Criminal prosecutions heavily burden defendants they target. [Accordingly,] [m]any constitutional protections that characterize burdensome criminal prosecutions thus do not apply in this ameliorative process. [Citations].

(*People v. Mitchell*, *supra*, 81 Cal.App.5th at pp. 587-588.)

CPDA agrees that the Legislature intended section 1172.6 to be a wholly ameliorative statute that can only help and never hurt the defendant. The problem is, that is not the way it has been interpreted in *Howard*, *Watson*, and *Silva*, and it is not the way respondent is asking this Court to interpret it. As posited by respondent (and held by *Howard*, *Watson*, and *Silva*), section

1172.6 is partly ameliorative – because it can result in the vacatur of the defendant's murder (or attempted murder, or manslaughter) conviction(s) and a reduction of the defendant's sentence – and partly punitive – because it allows the defendant to be subjected to new convictions and enhancements that were not subsumed within the defendant's original judgment, and thereby exposes the defendant to enhanced punishment in any future prosecution.

Collectively, respondent, *Howard*, *Watson*, and *Silva* cite four authorities (besides each other) as support for the proposition that the process of adding convictions and enhancements to a judgment is an ameliorative one that does not implicate the defendant's jury-trial rights: *Dillon v. United States*, *supra*, 560 U.S. 817, 828-829; *People v. Perez*, *supra*, 4 Cal.5th 1055, 1063-1064; *People v. Anthony*, *supra*, 32 Cal.App.5th 1102, 1156; and *People v. James*, *supra*, 63 Cal.App.5th 604, 610–611.

However, none of those cases supports that proposition because none of them involved a resentencing process that *increased* the defendant's judgment in any way. They all simply stand for the proposition that, when a legislative body creates a means by which an already-convicted defendant can seek a *reduction* of their criminal judgment, to get the benefit of a subsequent, wholly ameliorative change in the law, that judgment-*reducing* statute is not a prosecution to which our normal constitutional rights (including our right to trial by jury)

apply. (See *Dillon v. U.S.*, *supra*, 560 U.S. at pp. 828-829 [holding that the limitation of relief in an ameliorative sentence-modification proceeding did not implicate the defendant's *Apprendi* rights]; *People v. Perez*, *supra*, 4 Cal.5th at pp. 1063-1064 [holding that section 1170.126's provision that judges make factual findings in determining the defendant's eligibility for resentencing under the Three Strikes Reform Act does not implicate the Sixth Amendment]; *People v. Anthony*, *supra*, 32 Cal.App.5th at p. 1156 [rejecting the defendant's argument on direct appeal that SB 1437 applied retroactively to his case because requiring him to follow the resentencing petition process of former section 1170.95 would deprive him of his right to a jury trial on SB 1437's ameliorative changes to murder law];[5] *People v. James*, *supra*, 63 Cal.App.5th at pp. 608-611 [rejecting a section 1172.6 petitioner's appeal from the denial of his request for a jury trial at his subdivision (d)(3) evidentiary hearing, because a judge's determination of the defendant's eligibility for a reversal of his murder conviction does not implicate the right to trial by jury].)[6]

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[5] *Anthony*'s holding that SB 1437 does not apply retroactively to cases not yet final on appeal was validated by this Court in *People v. Gentile* (2020) 10 Cal.5th 830, 851-859, but later legislatively superseded by SB 775. (See § 1192.7, subd. (g); Stats. 2021, ch. 551, § 2.)

[6] CPDA believes that the propriety of the holding in *People v. James*, *supra*, will need to be revisited if this Court concludes

None of these cases stands for the proposition that a statute that provides for an increase in the defendant's judgment by increasing the convictions and enhancements in it, while also ameliorating it in another way, does not implicate the Constitution. None of the cases cited by respondent, other than *Howard* and *Silva*, holds that the cases cited in section III.A, *ante*, have no application when a court adds convictions and enhancements to a criminal judgment. And *Howard*, *Watson*, and *Silva* provide no actual analysis of how the right to trial by jury is not implicated when a court adds convictions and enhancements to a judgment. So, ultimately, respondent's assertion (and the holdings in *Howard* and *Silva*) that imposing additional convictions and enhancements in resentencing a section 1172.6 petitioner is an "act of lenity," not a prosecution that implicates the petitioner's constitutional rights, is based on the misuse of that label, not on any authority that actually explains how that label is correct as applied by respondent.

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that the purpose of the (d)(3) evidentiary hearing is not only to ascertain whether the petitioner's murder conviction should be vacated if the People are unable to prove her guilty of murder under the law as modified by SB 1437, but also to determine whether the defendant is guilty of new convictions not already subsumed within her judgment. As argued herein, CPDA believes that the (d)(3) hearing would be one to which the petitioner's jury-trial rights *would* attach if that hearing is treated as a court trial one purpose of which is to determine the defendant's guilt of new offenses and enhancements.

IV. RESPONDENT'S POSITION AND THE HOLDINGS IN *HOWARD*, *WATSON*, AND *SILVA* DO NOT COMPORT WITH *PEOPLE V. GALLARDO* (2017) 4 CAL.5TH 120

A. Like court trials on prior conviction allegations (and prima facie determinations under § 1172.6, subds. (a)-(c)), the application of subdivision (e) in redesignating a vacated murder conviction involves a question of law, not of fact.

In *People v. Gallardo* (2017) 4 Cal.5th 120 (*Gallardo*), this Court held that a trial court violates a defendant's Sixth Amendment right to a jury trial when it makes factual findings about the nature of a defendant's prior conviction that enhances the defendant's sentence for a subsequent conviction. (*Gallardo*, at pp. 124-125.) Guided by the United States Supreme Court's decisions in *Descamps v. United States* (2013) 570 U.S. 254 and *Mathis v. United States* (2016) 579 U.S. 500, and disapproving its own prior decision in *People v. McGee* (2006) 38 Cal.4th 682, *Gallardo* held that.

> When the criminal law imposes added punishment based on findings about the facts underlying a defendant's prior conviction, "[t]he Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt." (*Descamps*, *supra*, 570 U.S. at p. 269.) While a sentencing court is permitted to identify those facts that were already necessarily found by a prior jury in rendering a guilty verdict or admitted by the defendant in entering a guilty plea, the court may not rely on its own independent review of record evidence to determine what conduct "realistically" led to the defendant's conviction. Here, the

> trial court violated defendant's Sixth Amendment right to a jury trial when it found a disputed fact about the conduct underlying defendant's assault conviction that had not been established by virtue of the conviction itself.

(*Gallardo*, 4 Cal. 5th at pp. 124-125.)

This Court's decision in *Gallardo* makes clear that the inquiry required to identify the nature of a prior conviction – and whether it qualifies as a prior conviction under a recidivism-deterrence statute (e.g., the Three Strike Law) that can be used to enhance a defendant's sentence for a crime – involves a question of law, not of fact, because allowing courts to make factual findings about the nature of a prior conviction that were not made by the defendant's jury or admitted by the defendant in the prior case would violate the rationale behind *Apprendi*. (*Gallardo*, 4 Cal.5th at p. 134, citing *Descamps*, *supra*, 570 U.S. at p. 269.) Because the "fact of a prior conviction" exception to Apprendi is based on the presumption the defendant already was provided his "*Apprendi*" rights in the prior case, the proper inquiry is not whether the evidence in the record of conviction shows that the defendant's conduct in the prior case satisfies the relevant anti-recidivism statute, but what offense the record of conviction shows the defendant's jury necessarily *found* him to have committed (or what offense the defendant necessarily admitted in pleading guilty) in the prior case. (*Gallardo* at p. 134; and see *Jones v. U.S.* (1999) 526 U.S. 227, 249 ["unlike virtually any other consideration used to enlarge the possible penalty for an offense, ... a prior conviction must itself have been established

through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees"].)

This inquiry is very similar to the one trial courts are required to make in determining whether a defendant-petitioner has made out a prima facie case for relief under section 1172.6: the trial court must issue an order to show cause unless the record of conviction shows as a matter of law that the defendant's jury already convicted him of (or the defendant, in pleading guilty, already admitted) a form of murder or attempted murder that is still valid under the changes in the law effected by SB 1437 and SB 775. (See *People v. Lewis* (2021) 11 Cal.5th 952, 972 ["In reviewing any part of the record of conviction at this preliminary juncture, a trial court should not engage in 'factfinding involving the weighing of evidence or the exercise of discretion.'"], quoting *People v. Drayton* (2020) 47 Cal.App.5th 965, 980.)

Of course, before a court determines *how* to apply subdivision (e) following the vacatur of a murder conviction, it must first determine *whether* subdivision (e) applies, i.e., whether any of the "remaining charges" of which the defendant was convicted include the target offense or underlying felony through which malice was imputed to the defendant. (See § 1172.6, subd. (d)(3).) If so, the defendant should be resentenced on those "remaining" target offenses or underlying felonies pursuant to subdivision (d)(3), and the subdivision (e) redesignation process does not apply. (See *People v. Fouse* (Jan. 18, 2024) __ Cal.App.5th __ [F085131; 2024 Cal. App. LEXIS 27; 2024 WL 193716] (*Fouse*).) And this determination of *whether* subdivision

(e) applies is, also, a legal one, involving an analysis of the charges, jury instruction, and verdicts, rather than the facts, in the case. (See *Fouse*, 2024 Cal. App. LEXIS 27 at pp. *15-16, 25, 29-39.)

In *Fouse*, the defendant was convicted by a jury of two counts of attempted murder of a peace officer, three counts of first-degree robbery, one count of assault likely to cause great bodily injury, and one count of conspiracy to commit first degree robbery. After petitioning for resentencing under section 1172.6, *Fouse* (who was the getaway driver) was found not responsible for the attempted murders under the amended law. The resentencing court vacated the two convictions for attempted murder of a peace officer and, pursuant to subdivision (e), redesignated those offenses as two counts of assault with a firearm on a peace officer. The court also added a conviction for felony evading a peace officer that had not been charged. (*Fouse*, 2024 Cal. App. LEXIS 27 at pp. *1-2.)

On appeal, *Fouse* argued that, because the jury convicted her of the target offenses of robbery, the trial court erred in redesignating the attempted murders as assaults with a firearm on a peace officer and evading a peace officer, because subdivision (d)(3) of section 1172.6 limited resentencing to the robbery target offenses of which she was charged and convicted. The Court of Appeal agreed and reversed the trial court's order. (*Id.*)

The appellate court held that, under the plain language of section 1172.6, subdivision (e) does not apply at the resentencing if, after the vacatur of the defendant's murder or attempted murder conviction, the target offense that was the basis for

imputing malice to the defendant is among the "charges" of which the defendant "remain[s]" convicted. In that situation, the defendant should instead be resentenced on the "remaining charges" as provided in subdivision (d)(3). (*Fouse*, 2024 Cal. App. LEXIS 27 at pp. *2, 26-30.)

The Court of Appeal's determination that subdivision (e) did not apply rested, not on the evidence in the case, but on the operative charging document, verdicts, and jury instructions. (See *Fouse*, 2024 Cal. App. LEXIS 27 at pp. *15-16, 25, 29-39 [finding *Howard*, *Watson*, and *Silva* inapposite].)

CPDA submits that this type of "as a matter of law" inquiry is also what the Legislature expected to be used in *applying* subdivision (e) of section 1172.6, when the defendant's generically charged murder conviction has been vacated and must be redesignated as the target offense or underlying felony pursuant to which malice was imputed to her (i.e., because the "remaining charges" don't include that target offense or underlying felony).

Because, under *Gallardo*, it is unconstitutional for a court to make findings of fact in determining the nature of a prior conviction used to enhance a defendant's sentence, and because prosecutors will no doubt allege that the target offenses and underlying felonies to which a murder conviction has been redesignated pursuant subdivision (e) ("SB 1437 convictions") are convictions warranting enhancement of the defendant's sentence in future criminal prosecutions, the redesignation process must comply with *Gallardo*. It must involve a legal inquiry based on the charges, verdicts and jury instructions (or the defendant's admissions in plea cases), not a factual inquiry about the

criminal conduct the evidence in the record shows. Because *Gallardo* was decided before SB 1437 and SB 775 were enacted, the Legislature should be presumed to have intended that the process of applying subdivision (e) would comply with that decision. (See *In re W.B.* (2012) 55 Cal.4th 30, 57 ["the Legislature is presumed to know about existing case law when it enacts or amends a statute'].)

B. *Watson* was wrong in concluding that the question of whether judge-made "SB 1437" convictions and enhancements beyond those subsumed within the original judgment can be used to enhance the petitioner's sentence in any future prosecution (e.g., as a strike or serious-felony prior) is not ripe for decision.

For the reasons previously discussed, CPDA does not see how it can be constitutional for courts to add convictions and enhancements to a judgment when it is unconstitutional for courts to add facts to a conviction. And, if subdivision (e) is interpreted as a vehicle for adding convictions and enhancements to a defendant's judgment without a jury, CPDA does not see how such a resulting "conviction" (as enhanced) could constitutionally be used as a prior conviction for recidivism purposes in any future prosecution.

The Court of Appeal in *Watson* held that these questions would not be ripe for addressing until such time (if ever) as the defendant-petitioner is prosecuted for a crime in the future. (*Watson*, 64 Cal.App.5th at p. 489.) CPDA believes this holding is wrong for several reasons.

First, the basic purpose of anti-recidivism statutes (e.g., the Three Strikes Law (§ 1170.12)) is to provide additional deterrence

against the defendant's commission of future crimes. (*Ewing v. California* (2003) 538 U.S. 11, 25 ["Recidivism has long been recognized as a legitimate basis for increased punishment."]; *People v. Jackson* (1985) 37 Cal. 3d 826, 833 "The basic purpose of [section 667 is] the deterrence of recidivism"].) A conviction cannot effectively provide such deterrence if the defendant doesn't know the extent to which a conviction could result in additional punishment in the future.

Second, if the section 1172.6 process is one in which courts can add convictions and enhancements to the defendant's judgment, the statute presents defendants with a strategic decision about whether to make use of its "ameliorative" provisions. If section 1172.6 is only partially ameliorative (because it can lower the defendant's sentence) and partially adverse to the defendant's interests (because it can enhance or increase the number of convictions in the judgment and thereby expose the defendant to enhanced punishment in future prosecutions), a defendant who may be innocent of murder under post-SB 1437 law may nonetheless choose to forgo petitioning for relief for that reason.

It must be borne in mind that some section 1172.6 petitioners have already been released from custody, and their primary interest in seeking section 1172.6 relief is not to reduce a sentence that they have already served, but to clear their names. There is, of course, significant ignominy associated with being a "convicted murderer" or attempted murderer. Petitioners whose primary interest is to no longer be burdened by that label should

not have to risk suffering additional strike and serious-felony convictions in the process. No petitioner should.

There is nothing in the language or legislative history of section 1172.6 suggesting that the right to resentencing that it provides should come at such a cost. Had the Legislature intended section 1172.6 to pose that strategic decision to potential petitioners, it presumably would have made that intent clearer in the statute, so potential petitioners could make the decision intelligently, with knowledge of the effect the petition process could have on their criminal records.

Third, delaying resolution of the question of whether a judge-made "SB 1437 conviction" is a constitutionally legitimate one for future sentence-enhancement purposes, until the time (if ever) the defendant-petitioner is prosecuted for a future offense, is of no help to prosecutors. If that determination is not made until after the defendant has recidivated, the determination will be too late to qualify the conviction as a "prior" conviction that can be used to enhance the defendant's sentence, because it will not have preceded the defendant's (future) offense. (See *People v. Flood* (2003) 108 Cal.App.4th 504, 507 ["The word 'previously' [in the Three Strikes Law] means the conviction for a serious or violent felony must precede the present felony; the present felony must be committed after the serious or violent felony conviction."]; *People v. Huynh*, 227 Cal.App.4th 1210, 1217 [conviction could not be used to apply the one-strike law (§ 667.61, sud. (d)(1)) because it post-dated the defendant's current offense]; and see *People v. Thomas* (2012) 53 Cal.4th 771, 820 ["Defendant is correct that prior felony convictions are not

admissible under section 190.3, factor (c), unless the conviction preceded the commission of the capital crime."].)

Finally, for the reasons already provided (see sections III-IV.A, *ante*), delaying resolution of the question as to whether judge-made "SB 1437" convictions may be used as prior-conviction enhancements in future cases merely delays the answer that they may not be.

Obviously, the time to answer the question of whether the Constitution allows section 1172.6, subdivision (e), to serve as a vehicle for judges to add strikes to a defendant's record – and whether that is what the Legislature intended it to be used for – is now.

V. THE HOLDINGS IN *WATSON* AND *SILVA* THAT A SINGLE MURDER CONVICTION CAN BE REDESIGNATED AS MORE THAN ONE TARGET OFFENSE OR UNDERLYING FELONY IS INCONSISTENT WITH THE PLAIN TEXT OF SECTION 1172.6 AND WITH THE LEGISLATURE'S INTENT IN ENACTING IT

Section 1172.6 entitles defendants convicted of murder under a vicarious culpability theory that no longer exists in California "to file a petition with the court that sentenced the petitioner to have the petitioner's murder, attempted murder, or manslaughter conviction vacated and to be resentenced on any remaining counts ...." (§ 1172.6, subd. (a).) It also provides that "[t]he petitioner's conviction shall be redesignated as the target offense or underlying felony for resentencing purposes if the petitioner is entitled to relief pursuant to this section, murder or attempted murder was charged generically, and the target offense was not charged." (§ 1172.6, subd. (e).)

Subdivision (e) uses the singular in describing "*the* target offense or underlying felony" that the petitioner's vacated, generically charged murder conviction must be "redesignated [as] for resentencing purposes." CPDA questions how the Legislature could have intended that the singular be interchanged with the plural, pursuant to section 7, in its use of the singular in subdivision (e). CPDA wonders how the Legislature could have intended that, in using the singular in referring to "the target offense or underlying felony," it meant that a single murder conviction can be "redesignated" as a plural number of convictions for target offenses or underlying felonies. CPDA does not believe it is reasonable to ascribe to the Legislature the intent to apply section 7 in an internally inconsistent manner within subdivision (e).[7]

CPDA believes the use of the singular in subdivision (e) was intentional because (in addition to the unconstitutionality the use of the plural causes, discussed *ante*) the imposition of convictions additional to those returned by the defendant's jury cannot be fairly said to have

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[7] CPDA does not contend that section 7 does not apply at all to section 1172.6, subdivision (e); it merely objects to the *way Watson* and *Silva* apply it, with a single "conviction" becoming multiple "target offense[s] or underlying felon[ies]." It would not be unreasonable to read the latter phrase in the plural if the defendant had more than one murder conviction vacated so as to render section 7 also applicable to the word "conviction." CPDA's objection to the *Watson* and *Silva* courts' application of section 7 is that it is both internally inconsistent and inconsistent with the statutory scheme as a whole, and with defendants' constitutional rights.

been "*re*designated." Such additional convictions cannot be said to have been re-"anythinged," because they never existed before. They are brand new convictions created by a court out of evidence, not modified from prior convictions in the petitioner's original judgment.

CPDA also believes the word "resentencing" is inapt as applied to new convictions that were never the subject of an earlier judgment. Its use implies that the Legislature anticipated that section 1172.6 would involve just that – a determination of eligibility for relief as to a murder conviction and a "*re*sentenc[ing]" on "any remaining convictions" (§ 1172.6, subd. (a), emphasis added) or on "the target offense or underlying felony" necessarily subsumed within "the" murder conviction, if the murder was charged generically and "the target offense or underlying felony" was not charged. (§ 1172.6, subd. (e).)

The *Watson* and *Silva* courts' interpretation of subdivision (e) also renders section 1172.6 internally inconsistent by allowing the imposition of new convictions as to petitioners generically charged with murder and not charged with "the target offense or underlying felony" to receive convictions in addition to those returned by their jury, while providing that petitioners who were charged with "the target offense or underlying felony" may only be resentenced on "the remaining charges" of which they were convicted. (See § 1172.6, subd. (d)(3).) The Legislature should not be presumed to have intended that similarly situated defendants be treated so disparately at their section 1172.6 resentencing. (See Cal. Rules of Ct., rule 4.410(a)(7) [the general objectives of sentencing include "[a]chieving uniformity in sentencing"]; *People*

v. Wilkinson (2004) 33 Cal.4th 821, 836 [equal protection is implicated when the state adopts "a classification that affects two or more similarly situated groups in an unequal manner."].) Again, the intent to create such an anomalous result is belied by the plain language of the statute.

CPDA believes that the conclusion that the *Watson* and *Silva* courts' use of section 7 in applying subdivision (e) is necessary to achieve the stated purpose of section 1172.6 "to punish a defendant commensurate with his individual culpability" (*Silva*, *supra*, 72 Cal.App.5th at p. 532, quoting *Howard*, *supra*, 50 Cal.App.5th at p. 742) is incorrect. CPDA agrees that better aligning punishment with culpability is the main purpose of SB 1437 and section 1172.6. (See 2018 Stats., ch. 1015, § 1(d); *People v. Gentile*, *supra*, 10 Cal.5th 830, 845-846.) But CPDA vigorously disagrees with the analysis in *Watson* and *Silva* of *how* that culpability is to be determined in cases in which the murder was charged generically, and the defendant was not also charged with (or convicted of) the "target offense" upon which his former murder culpability was predicated. In those cases, the solution plainly provided in subdivision (e) is that "[t]he petitioner's *conviction* shall be redesignated as the target *offense* or underlying *felony* for *re*sentencing purposes ...." (§ 1172.6, subd. (e), emphasis added.)

A murder conviction that is no longer valid under SB 1437 may be deemed to subsume a single target offense or underlying felony because the existence of one such target offense or underlying felony is legally essential to a court's determination that the defendant is entitled to relief under section 1172.6. If

section 1172.6 litigation shows (as a matter of law at the prima facie stage or beyond a reasonable doubt at the subdivision (d)(3) stage) that the defendant's murder conviction does *not* rest on at least one target offense or underlying felony that more accurately describes her culpability, the defendant is not entitled to be resentenced under section 1172.6. (See § 1172.6, subds. (a)(3), (c), (d)(3); *People v. Lewis*, *supra*, 11 Cal.5th 952, 971.)

But the existence of more than one target offense or underlying felony is not legally
essential to entitlement to section 1172.6 relief. Since the litigation required for relief requires only one target offense or underlying felony, any additional convictions for target offenses or underlying felonies are superfluous to that determination. So petitioners may not be deemed to waive any constitutional rights with respect to such additional offenses when they file a section 1172.6 petition. And the Legislature cannot be deemed to have intended any such implicit waiver of the right to a jury trial as a condition of relief. (See *Boykin v. Alabama*, *supra*, 395 U.S. 238, 243; *People v. Holmes*, *supra*, 54 Cal.2d 442, 444.)

The *Silva* court's reliance on the fact that subdivision (e) provides that "[a]ny applicable statute of limitations shall not be a bar to the court's redesignation of the offense" as support for its holding (*Silva*, *supra*, 72 Cal.App.5th at p. 530) is misplaced, for two obvious reasons: (1) that provision, like the rest of subdivision (e), uses the singular, "*the* offense;" and (2) a statutory provision that expressly deems a person to have waived one right – not to be prosecuted for a time-barred offense –

cannot reasonably be deemed to support the implicit waiver of a different right – to be convicted by a jury of one's peers (see *In re Lance W.* (1985) 37 Cal.3d 873, 888 ["expressio unius est exclusio alterius"]), especially not when the Constitution does not allow for the implicit waiver of the latter right.

Allowing the petitioner whose murder conviction must be vacated pursuant to section 1172.6 to remain convicted of the number of target offenses or underlying felonies of which her jury expressly or necessarily found her guilty, but no more, more perfectly satisfies the legislative aim of matching culpability with punishment than does the interpretation of the statute in *Watson* and *Silva*. The analysis in those decisions is inferior (and, as previously explained, unconstitutional) because it puts the punishment "cart" before the conviction "horse" by assessing the defendant's culpability on the basis of what a judge thinks the petitioner should have been convicted of, rather than on the basis of what the petitioner actually or necessarily was convicted of by his jury. CPDA submits that allowing judges to supplant juries in determining the convictions upon which the petitioner's culpability should be based manifestly is not the "resentencing" the Legislature intended in enacting section 1172.6.

CONCLUSION

Wherefore, the California Public Defender's Association, amicus curiae in support of defendant and appellant Luis Arellano, respectfully submits that the opinion of the Court of Appeal holding that the trial court erred in imposing a firearm enhancement on Mr. Arellano's redesignated conviction should be affirmed and that the decisions in *Howard*, *Watson*, and *Silva* should be disapproved.

Dated: January 24, 2024

Respectfully submitted,

/s/ William J. Arzbaecher

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DEFENDERS ASSOCIATION

Amicus Curiae in Support of
Defendant and Appellant

CERTIFICATE OF LENGTH

I, WILLIAM J. ARZBAECHER, counsel for Appellant, certify pursuant to the California Rules of Court, that the word count for this document is 11,021 words, excluding the cover, tables, this certificate, and any attachment permitted under rule 204(d). This document was prepared in Microsoft Word, the word count generated by the program for this document. I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed, at Sacramento, California, on January 24, 2024.

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Defendant and Appellant

Re: *People v. Arellano, Case No. S277962*

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **January 24, 2024**, at Sacramento, California.

/s/ *Kimberly M. Quinn*
Kimberly M. Quinn

STATE OF CALIFORNIA
Supreme Court of California

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Date

/s/Kimberly Quinn

Signature

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