FIRST DISTRICT APPELLATE PROJECT

APPELLATE REPRESENTATION TRAINING SEMINAR

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AN UPDATE ON THE APPLICATION AND INTERPRETATION OF RECENT AMELIORATIVE SENTENCING LEGISLATION

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I. Overview & Suggested Resources

Over the past few years, the Legislature has enacted several criminal justice reform bills that have significantly impacted felony sentencing and provided new avenues for resentencing. The goal of these materials, prepared in conjunction with FDAP's annual seminar in April 2024, is to provide an update on open questions related to the interpretation of these bills. These include several issues pending review in the California Supreme Court, as well other unresolved legal questions that may arise on appeal. These materials address Senate Bills 567, 81, and 483, and Assembly Bills 1950, 518, 1540, and 600. They do not address Penal Code section 1172.6 resentencing.

There are several resources available to help appellate practitioners learn about these recent changes to the Penal Code and stay up to date on sentencing and resentencing issues, including:

- Recent Developments in Sentencing Law, by Jonathan Grossman, SDAP (Apr. 2024) – will be posted on SDAP's website in June 2024
- Section 1170, Then and Now: Determinate Sentencing Reforms, Beyond Estrada; Some History and a Review of Potential Issues Concerning the New Sentencing Laws of 2022, by Bill Robinson, SDAP (2022).
- Judge Couzens' Memos, CCAP website. These memos are excellent background reading.
- CCAP Case Summaries by Issue.
- FDAP Recent Opinions page: search by keyword (e.g. "SB 81")
- OSPD Resentencing Listserv & Sharepoint site; this listserv was recently expanded to include all types of resentencings.

II. SB 567/AB 124: Amended 1170(b) to Limit Trial Courts' Discretion to Select a Base Term

A. Overview of SB 567

Senate Bill 567, effective January 1, 2022, amended section 1170(b) with significant impacts to the trial court's discretion to select the appropriate base term. The legislation combined two separate bills (SB 567 and AB 124), and the resulting amendments make the middle term presumptive, limit the court's ability to impose the upper term, and provide that the low term is presumptive in certain situations.

Imposition of the upper term for the offense and enhancements. Section 1170(b)(2) provides that the upper term may be imposed only "when there are circumstances in aggravation of the crime that justify the imposition of a term of imprisonment exceeding the middle term and the facts underlying those circumstances have been stipulated to by the defendant or have been found true beyond a reasonable doubt at trial by the jury or by the judge in a court trial." Subdivision (b)(3) provides for an exception to the jury trial requirement for consideration of the defendant's prior convictions, which can be established by a certified record of conviction. These provisions also apply to the selection of a term for enhancements punishable according to a sentencing triad, but there is no jury trial exception for prior convictions. (§ 1170.1(d).)

Presumption of the lower term. Subdivision (b)(6) provides for imposition of the lower term if certain mitigating factors are a "contributing factor in the commission of the offense." (*People v. Salazar* (2023) 15 Cal.4th 416, 432 [noting that § 1170(b) "*requires* the sentencing court to impose the low term in cases where a qualifying trauma contributed to the offense and permits the sentencing court to depart from the lower term only in specific circumstances"].) The lower term must be imposed unless "the court finds that the aggravating circumstances outweigh the mitigating circumstances that imposition of the lower term would be contrary to the interests of justice." (§ 1170(b)(6).) The enumerated mitigating circumstances are "psychological, physical, or childhood trauma," youth (under age 26), and having been a victim of domestic violence or human trafficking. (§ 1170(b)(6)(A)-(C).) Section 1170.1(d) does not mention the low term presumption as applied to enhancements with sentencing triads.

B. Issues Pending in the California Supreme Court

Several issues related to SB 567 are pending in the California Supreme Court:

- **What prejudice standard applies on appeal when determining whether a case should be remanded for resentencing in light of newly-enacted Senate Bill No. 567?** (*People v. Lynch* [unpub. opn] (S274942/C094174).) In *Lynch*, the Third District held that the trial court's consideration of six aggravating circumstances that were not admitted or found true by a jury was harmless error because one factor was the number of the defendant's prior convictions and one factor was based on facts found true by the jury. *Lynch* applied the two-step process articulated in *People v. Lopez* (2022) 78 Cal.App.5th 459, explained below.

The first case to consider how to assess prejudice where the upper term was imposed on aggravators not admitted or found true by the jury was *People v. Flores* (2022) 75 Cal.App.5th 495, 500-501. In *Flores,* sentencing took place prior to the passage of SB 567, and the trial court imposed the upper term based on several aggravating factors, including the defendant's numerous prior convictions. Division Three of the First District found that, although some of the circumstances were neither admitted nor found true by a jury, the error in considering them was harmless because the existence of a single aggravating fact is sufficient to support an upper term (see *People v. Sandoval* (2007) 41 Cal.4th 825).

In *People v. Lopez* (2022) 78 Cal.App.5th 459, Division One of the Fourth District disagreed with *Flores's* holding that the existence of one valid aggravating factor obviated the need for remand. Instead, the court proposed a two-step process for assessing prejudice: First, applying the *Chapman v. California* (1967) 386 U.S. 18 test, the appellate court must determine whether a jury would have found the aggravating factors true beyond a reasonable doubt. (*Lopez,* at pp. 465-466.) Second, the appellate court must determine whether the trial court would have selected the upper term in the absence of one or more of the aggravating factors. (*Lopez,* at p. 467, fn. 11.)

The court explained that

> the second question regarding the possible prejudice to a defendant in this situation is not whether the trial court could have relied on the single aggravating factor of Lopez's recidivism to

> impose the upper term sentence; unquestionably the trial court may still rely on any single permissible aggravating factor to select an upper term sentence under the newly-revised triad system. Rather, the second relevant prejudice question is whether we can be assured that the trial court would have exercised its discretion to impose the upper term based on a single permissible aggravating factor, or even two or three permissible aggravating factors, related to the defendant's prior convictions, when the court originally relied on both permissible and impermissible factors in selecting the upper term.

(*Lopez,* at p. 467.)

Lopez also made the excellent point that, where the sentence was imposed prior to the passage of SB 567 and so the trial court did not exercise "informed discretion," the appropriate question is whether the record "clearly indicate[s]" that the court would have reached the same decision had it understood the scope of its discretion. (*Lopez,* at p. 467, citing *People v. Guttierrez* (2014) 58 Cal.4th 1354; see also *People v. Falcon* (2023) 92 Cal.App.5th 911, rev. granted [focusing inquiry on *Gutierrez's* "clear indication test"].)

In *People v. Dunn* (2022) 81 Cal.App.5th 394, rev. granted, the Fifth District disagreed with both *Flores* and *Lopez* and instead applied

> a version of the standard articulated in *Lopez*, modified to incorporate [*People v. Watson* (1956) 81 Cal.App.5th 394] in the first step: The reviewing court determines (1)(a) beyond a reasonable doubt whether the jury would have found one aggravating circumstance true beyond a reasonable doubt and (1)(b) whether there is a reasonable probability that the jury would have found any remaining aggravating circumstance(s) true beyond a reasonable doubt. If all aggravating circumstances relied upon by the trial court would have been proved to the respective standards, any error was harmless. If not, the reviewing court moves to the second step of *Lopez*, (2) whether there is a reasonable probability that the trial court would have imposed a sentence other than the upper term in light of the aggravating circumstances provable from the record as determined in the prior steps. If the answer is no, the error was harmless. If the answer is

yes, the reviewing court vacates the sentence and remands for resentencing consistent with section 1170, subdivision (b).

(*Dunn,* at pp. 409-410.)

- **Does Senate Bill No. 567, which limits a trial court's discretion to impose upper term sentences, apply retroactively to defendants sentenced pursuant to stipulated plea agreements?** (*People v. Mitchell* (2022) 83 Cal.App.5th 1051 (S277314/A163476).)

In *Mitchell,* Division Five of the First District held that the amended section 1170(b) did not apply where the defendant stipulated to an upper term sentence prior to passage of SB 567, and her case was not final on appeal when SB 567 took effect. The court cited *People v. Brooks* (2020) 58 Cal.App.5th 1099, which addressed retroactive application of section 1170.91 (consideration of military service trauma). The court reasoned that the trial court had discretion only to accept or reject the plea bargain and lacked discretion to choose the appropriate base term. The court also found that the legislative history of SB 567 indicated that the Legislature did not intend that section 1170(b) apply to stipulated sentences. "In the case where there is a stipulated plea like here, there is no occasion for the trial court to find any aggravating facts in order to justify the imposition of an upper term at sentencing." (*Mitchell,* at p. 1059; see also *People v. Kelly* (2022) 87 Cal.App.5th 1, rev. granted.)

In *People v. Todd* (2023) 88 Cal.App.5th 373, rev. granted, the Sixth District disagreed with *Mitchell,* specifically as to its reliance on *Brooks*, and held that SB 567 applied to stipulated sentences because "imposition of the aggravated term exceeds the court's authority unless the statutory prerequisites are met or waived because the aggravated term cannot be imposed absent the court's finding of those circumstances." (*Todd,* at p. 379; see also *People v. Fox* (2023) 90 Cal.App.5th 826; *People v. De La Rosa Burgara* (2023) 97 Cal.App.5th 1054, rev. granted.) *Todd* also based its decision on section 1016.8, which authorizes the Legislature to pass laws that affect existing plea bargains. (*Todd,* at p. 379.)

If the Supreme Court resolves *Mitchell* in favor of the appellant, the subsequent question will be remedy – may the prosecution withdraw from the plea bargain if the trial court is inclined to impose the low or middle term based on the amended 1170(b)? The trial court will also need to decide how to determine whether aggravating factors exist such that the upper term may

be imposed; *De La Rosa Bugara* set forth detailed recommendations for the procedures on remand (see pp. 1064-1065).

Keep in mind that *Mitchell* and *Todd* involved situations where the defendant stipulated to the upper term before SB 567 took effect. A case where the defendant stipulated to the upper term after January 2022 will involve different analysis.

- **May a trial court rely on the certified record of a defendant's convictions to find true other related aggravators, or does section 1170(b)(3) limit the trial court's factfinding to the fact of the prior conviction?** (*People v. Wiley* (2024) 97 Cal.App.5th 676 (S283326/A165613).) Question on review: Did the sentencing court's consideration of circumstances in aggravation based on certified records of prior convictions, beyond the bare fact of the convictions, violate Penal Code section 1170, subdivision (b)(3) or defendant's Sixth Amendment right to a jury trial?

In *Wiley,* Division Four of the First District held that the trial court was constitutionally and statutorily permitted to rely on the certified record of defendant's convictions to find the related aggravating factors of (1) poor performance on probation and (2) increasing seriousness of convictions. Section 1170(b)(3) provides that "the court may consider the defendant's prior convictions in determining sentencing based on a certified record of conviction without submitting the prior convictions to a jury." The court interpreted (b)(3) to include both the fact of a prior conviction and "other related issues that may be determined from a certified record of conviction." (*Wiley,* at p. 685.) The court relied on *People v. Towne* (2008) 44 Cal.4th 63 and *People v. Black* (2007) 41 Cal.4th 799, which appellant in his petition for review contended may no longer be entirely reliable authority.

Other cases holding that the prior conviction exception encompasses other, related issues are *People v. Pantaleon* (2023) 89 Cal.App.5th 932*, People v. Ross* (2022) 86 Cal.App.5th 1346, rev. granted, *People v. Flowers* (2022) 81 Cal.App.5th 680, rev. granted. However, some Courts of Appeal have taken a more limited interpretation of section 1170(b)(3). (See *People v. Butler* (2023) 89 Cal.App.5th 953, 959, 961, 955, rev. granted; *People v. Falcon* (2023) 92 Cal.App.5th 911, rev. granted; *People v. Dunn* (2022) 81 Cal.App.5th 394, rev. granted.)

The United States Supreme Court is considering a similar question in *Erlinger v. United States* (No. 23-370): whether a jury must find that a defendant's predicate offenses were "committed on occasions different from one another" for purposes of imposing a higher sentence.

C. Other Open Questions: Imposition of Upper Term

- **Must aggravating factors be alleged in the accusatory pleading?**

There is a good argument that aggravating factors used to impose an upper term must be alleged in the accusatory pleading. (See Bill Robinson, Section 1170, Then and Now, pp. 11-12.) "[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 476, quoting *Jones v. United States* (1999) 526 U.S. 227, 243.)

However, in *People v. Pantaleon* (2023) 89 Cal.App.5th 932, the Third District held that the government was not required to plead aggravating factors related to the defendant's prior convictions. The court held that section 1170(b)(2)'s reference to "circumstances in aggravation alleged in the indictment or information" does not actually require that any aggravators be alleged. (*Pantaleon,* at p. 940; see also *People v. Hall* (2023) 97 Cal.App.5th 1084, 1095, fn. 4, rev. granted.) The court also rejected appellant's due process claim, finding that the fact of a prior conviction is a "sentencing factor" for which there is no due process right to notice. (*Pantaleon,* at p. 941.)

- **Which aggravating factors require jury instructions, and are the instructions given adequate?**

The March 2023 version of CALCRIM included several new instructions related to aggravating factors (CALCRIM 3224-3234). These instructions are new and may be imperfect. Additionally, some trial courts have written their own instructions or modified the CALCRIM pattern instructions. Be alert for instructional error related to aggravating factors.

In addition, not all aggravating factors have a corresponding pattern instruction. For example, the factor that the defendant's prior convictions were of "increasing seriousness" does not have a corresponding CALCRIM instruction. However, the term "increasing seriousness" is unclear, and determining the relative seriousness of a defendant's prior convictions may involve an inquiry into the facts of each prior. As the court in *People v. Butler* (2023) 89 Cal.App.5th 953, 961, rev. granted, explained, a "seriousness" comparison is not necessarily easy to accomplish:

> The last three convictions were subject to the same possible punishment, and the last two offenses were identical. Absent any information about the resisting [an officer] offenses other than the statutes that were violated, it is not possible to ascertain whether one was more serious than the other. None of the offenses is so strikingly more serious than any other by the nature of the offense or the punishment that we can conclude beyond a reasonable doubt that a jury would conclude beyond a reasonable doubt that the convictions were of increasing seriousness.

- **Are some aggravating factors unconstitutionally vague?**

In *Chavez Zepeda v. Superior Court* (2023) 97 Cal.App.5th 65, Division Four of the First District held that aggravating factors are subject to a constitutional vagueness analysis: "To say that the middle term is the relevant statutory maximum is to say, in effect, that the Legislature has created a liberty interest in a sentence that does not exceed the middle term. Liberty interests, once created, are subject to the requirements of the due process clause." (*Chavez Zepeda,* at p. 84, citations omitted.) But, the court found that rule 4.421 factors are not unconstitutionally vague (*id.,* at pp. 87-92) and pointed to the new pattern instructions as providing adequate guidance to the jury.

However, the court limited its holding to the two reasons advanced by the petitioner and amici, that (1) the factors "use qualitative terms that may not be defined" and (2) an aggravating factor "must make commission of the offense distinctly worse than the ordinary." (*Chavez Zepeda,* at pp. 91-92.)

> [N]othing in the foregoing discussion precludes a conclusion that a particular aggravating circumstance may be unconstitutionally vague for reasons that have not been raised here. Similarly, because the People in this case did not propose their own

> aggravating circumstances in reliance on the residual clause in rule 4.421(c)—"Any other factors . . . which reasonably relate to the defendant or the circumstances under which the crime was committed"—we do not decide whether that provision is unconstitutionally vague under the principles we have articulated.

(*Id.* at p. 92.) This seems to leave the door open for other creative arguments, especially where the prosecution proposes their own aggravating circumstances pursuant to rule 4.421(c).

D. Other Open Questions: Presumptive Low Term

- **Are mental illness and/or substance abuse considered "trauma" for purposes of presuming the low term applies?**

Section 1170(b)(6) applies to individuals who have "experienced psychological, physical, or childhood trauma, including, but not limited to, abuse, neglect, exploitation, or sexual violence." Though the statute does not specifically include mental illness as a qualifying mitigating circumstance, "psychological trauma based on mental illness may be a circumstance qualifying for the lower term presumption." (*People v. Banner* (2022) 77 Cal.App.5th 226, 241.)

> [W]e believe it strains credulity to conclude mental illness cannot result in psychological trauma. The criminal justice system is saturated with mentally ill persons. To California judges regularly presiding in criminal courtrooms, it takes no special insight to appreciate a correlation between mental illness, psychological trauma, indigency, and crime.

(*Banner,* at pp. 240-241.) "[M]ental illness alone" does not trigger the lower term presumption. (*Banner,* at p. 241.) "Psychological trauma must attend the illness, and that trauma must contribute to the crime under section 1170, subdivision (b)(6)." (*Ibid.*)

Subdivision (b)(6) does not define "mental illness," but section 1385(c)(5) (SB 81) defines a mental illness as "a mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders." The DSM-5 recognizes substance abuse disorder as a mental disorder. (See

In re Christopher R. (2014) 225 Cal.App.4th 1210, 1218, fn. 6.) Thus, a substance abuse disorder or other mental health diagnosis may trigger the low term presumption if psychological trauma is connected to the individual's illness.

- **What is the required showing of causation for the presumptive low term?**

Section 1170(b)(6) provides that the low term is presumptive if certain mitigating circumstances were "a contributing factor in the commission of the offense." In *People v. Banner,* 77 Cal.App.5th at p. 241, the Fifth District held that "contributing factor" is "something less than a 'significant factor,'" as used in the mental health diversion context (§ 1001.36). In addition, a trial court's finding that mental illness is not "a mitigating factor under the Rules of Court does not preclude a separate finding psychological trauma is a contributing factor to the crime" under section 1170(b)(6). (*Banner,* at p. 242.)

Initially, many cases were remanded for resentencing where the record did not necessarily show a nexus between the mitigator and the offense because the defendant had not had the opportunity to make such a showing. (See *People v. Flores* (2022) 73 Cal.App.5th 1032; *People v. De La Rosa Burgara* (2023) 97 Cal.App.5th 1054, 1065, rev. granted.) However, where the sentencing hearing occurred after January 1, 2022, and the parties and trial should have been aware of section 1170(b)(6), it will be more difficult to prevail on appeal if the record is sparse.

For example, in *People v. Fredrickson* (2023) 90 Cal.App.5th 984, Division Five of the First District held that the low term was not presumptive although the defendant was 23 at the time of the offense. Defense counsel did not argue that the defendant's young age was connected to the offense, and nothing in the record indicated her age was a contributing factor. The court found subdivision (b)(6) analogous to the mental health diversion (§ 1001.36) and military service-related factors (§§ 1170.9, 1190.91) statutes. In accordance with those statutes, the court suggested that, "in order to trigger the [low term] presumption, there must be some initial showing that the defendant's youth was a contributing factor, and only then must the record affirmatively show compliance with the statute." (*Fredrickson*, at p. 992.) "[A]n initial showing has been made when the record and/or arguments are sufficient to put a trial court on notice that a defendant's youth may have

been a contributing factor in commission of the underlying offense." (*Fredrickson*, at p. 994.) The "showing could be made by the prosecution or by facts or recommendations in a probation officer's report." (*Fredrickson*, at p. 994, fn. 8.)

Because the defendant's age was not discussed in the record in *Fredrickson,* the appellate court did not consider what would be "sufficient" to put a trial court on notice that a mitigating circumstance applied. However, two unpublished cases provide good examples of records with sufficient indication of a nexus: In *People v. Romero-Guzman* (A166209), the probation report and defense social worker's report contained information about the defendant's trauma and mental health history, he made delusional statements to police, and trial counsel argued that his client's mental illness was related to the offense. And, in *People v. Green* (A166461), trial counsel argued that the defendant's actions were related to his youth, and the probation officer discussed the defendant's age in court and in the probation report. Though *Romero-Guzman* and *Green* cannot be cited as authority, the opinions provide a window into the courts' analyses.

- **How does a trial court determine the existence of one of the specified mitigating factors for purposes of the presumptive low term?**

Good question. Section 1170(b)(6) does not explain *how* the trial court is to determine whether a mitigating factor exists or whether it is a contributing factor to the offense. This is in contrast to section 1001.36, which sets forth detailed procedures for determining a defendant's eligibility for mental health diversion. It is also differs significantly from section 1385(c)(2)'s (SB 81) requirement that a court "consider and afford great weight to evidence offered by the defense to prove" that specified mitigating factors are present in the context of determining whether to impose an enhancement.

I haven't seen cases address the situation where there was actual litigation in the trial court as to whether the defendant experienced trauma or domestic violence and/or whether the trauma contributed to the offense. However, this situation could certainly arise.

- **If a mitigating factor is present, may the middle term be imposed based on aggravators not found true by a jury?**

One possible reading of section 1170(b) is that, where the low term is presumptive, *Apprendi's* requirement that facts used to increase the statutory maximum sentence be found true by a jury applies to aggravating factors that elevate the presumptive low term to the middle term. This interpretation of the statute would result in a coherent approach to the selection of a base term: the trial court begins with the low or middle term and may impose a more severe punishment only if aggravating factors are found true by a jury. However, the decisions on this question have not been particularly favorable, likely because the amendments to section 1170(b) came from two separate bills, and so the relationship between (b)(2) and (b)(6) is unclear.

In *People v. Bautista-Castanon* (2023) 89 Cal.App.5th 922, Division Four of the First District fairly cursorily rejected this interpretation based on the plain language of (b)(2) and (b)(6), which do not clearly state a requirement for jury findings if the sentence is elevated from the low to middle term.

In *People v. Hilburn* (2023) 93 Cal.App.5th 189, Division One of the Fourth District agreed with *Bautista-Castanon*, but engaged a bit more discussion on the constitutional law aspect. Appellant argued that SB 567/AB 124 changed the statutory maximum to the low term for certain categories of defendants; thus, the court could not impose the middle term in the absence of a jury finding on an aggravating factor. The court in *Hilburn* viewed the situation differently: "because the low term becomes presumptive only after additional factfinding by the judge, it does not constitute the 'statutory maximum' for purposes of *Apprendi*." (*Hilburn,* at p. 205.) The court was also persuaded that the wording of the statute indicated the Legislature's intent to maintain the court's discretion to impose the middle term.

However, *Hilburn* did not address the legislative history of SB 567/AB 124, which may support an argument that the Legislature intended that factors used to elevate a low term to the middle term be submitted to a jury. The Assembly Committee on Public Safety report on AB 124 (Apr. 20, 2021) included a section (pp. 9-10) that addressed *Cunningham* and *Apprendi* and stated: "To the extent any aggravating factor in this calculation is viewed as 'sentence-elevating fact finding,' it will be within the province of the fact-finder/jury." This section of the report seems to communicate the

Legislature's understanding of (b)(6) as requiring a jury trial on any factors used to aggravate the low term to the middle term.

- **If a mitigating factor is present, how does a trial court weigh aggravating and mitigating factors to determine which term should be imposed?**

Section 1170(b)(6) provides that the lower term "shall" be imposed "unless the court finds that the aggravating circumstances outweigh the mitigating circumstances that imposition of the lower term would be contrary to the interests of justice." This grants the trial court the discretion to weigh aggravating and mitigating factors, but does not provide specific guidance on what is meant by "interests of justice," or whether one aggravating factor can outweigh a very strong mitigating factor or multiple mitigating factors.

III. Senate Bill 81: Dismissal of Enhancements Encouraged, § 1385(c)

A. Overview of SB 81

Effective January 1, 2022, SB 81 amended section 1385(c) to require a court to dismiss sentencing enhancements if it is in the furtherance of justice to do so (§ 1385(c)(1)) and to "consider and afford great weight" to evidence offered by the defense to prove that specified mitigating factors are present (§ 1385(c)(2)). Presence of certain mitigating factors "weighs greatly in favor of dismissing the enhancement, unless the court finds that dismissal would endanger public safety." (§ 1385(c)(2).) "'Endanger public safety' means there is a likelihood that the dismissal of the enhancement would result in physical injury or other serious danger to others." (§ 1385(c)(2).)

Section 1385(c)(3) sets forth the nine mitigating factors that "weigh[] greatly" in favor of dismissal. Where multiple enhancements are alleged or where the application of an enhancement could result in a sentence over 20 years, "the enhancement shall be dismissed." (§ 1385(c)(3)(B), (C).) Section 1385(c) applies to sentencings that occur after passage of SB 81. (§ 1385(c)(7).)

B. Issues Pending in the California Supreme Court

In *People v. Lipscomb* (2022) 87 Cal.App.5th 9, 17-19, Division Two of the First District held that the word "shall" (§ 1385(c)(3)(B), (C)) did not actually

mean the trial court was required to dismiss an enhancement if a mitigating factor was present. Instead, the Legislature intended "that the trial court retain the ability to impose an enhancement where failure to do so would endanger public safety." (*Lipscomb,* at p. 19.) However, *Lipscomb* did not explain how a trial court should exercise its discretion if a mitigating factor is present, as the trial court in that case made an explicit factual finding that dismissal of the enhancement would endanger public safety.

Subsequent cases have addressed how courts are to determine whether to strike or impose an enhancement when a mitigating factor is present, and the California Supreme Court has granted review on the following question:

- **Does the amendment to Penal Code section 1385, subdivision (c) that requires trial courts to "afford great weight" to enumerated mitigating circumstances create a rebuttable presumption in favor of dismissing an enhancement unless the trial court finds dismissal would endanger public safety?** (*People v. Walker* (2023) 86 Cal.App.5th 386 (S278309/B319961).)

In *Walker,* Division Two of the Second District found that SB 81 created a rebuttable presumption in favor of dismissing an enhancement if one of the mitigating factors listed in subdivision (c)(3) is present. SB 81 "places a thumb on the scale that balances the mitigating circumstances favoring dismissal against whether dismissal would endanger public safety, and tips that balance in favor of dismissal unless rebutted by the court's finding that dismissal would endanger public safety." (*Walker,* at pp. 399-400.)

Other cases have held that the "afford great weight" language does not create a rebuttable presumption, even if the Legislature intended to restrict or "fine tune the trial court's exercise of discretion." (*People v. Ortiz* (2023) 87 Cal.App.5th 1087, 1098; *People v. Anderson* (2023) 88 Cal.App.5th 233 [holding no presumption in favor of dismissal]; *People v. Ponder* (2023) 96 Cal.App.5th 1042, 1052 ["ultimate question" is whether dismissal of enhancement is in the furtherance of justice]; *People v. Mazur* (2023) 97 Cal.App.5th 438; *People v. Cota* (2023) 97 Cal.App.5th 318.) In *Ortiz, Anderson, Mazur,* and *Ponder,* review was granted with briefing deferred pending *Walker*.

Even if SB 81 did not create a rebuttable presumption in favor of dismissal of an enhancement when one of the specified mitigating factors is present, there is a good argument that the "great weight" language should be interpreted as

akin to a rebuttable presumption. The author of SB 81 wrote a letter explaining that the bill's use of the term "great weight" was intended to be consistent with *People v. Martin* (1986) 42 Cal.3d 437. (See *Lipscomb,* at p. 20.) If interpreted in accordance with *Martin,* SB 81 would require dismissal "unless there is substantial evidence of countervailing considerations which justify" imposition. (*Martin,* at pp. 447-448.) Thus, an enhancement could be imposed only if "substantial evidence" exists that dismissal would endanger public safety.

C. Other Open Questions

- **Does "enhancement" include sentencing pursuant to the Three Strikes law?**

Several cases have held that SB 81 does not apply to sentencing under the Three Strikes law because a prior strike conviction is part of an alternative sentencing scheme rather than an enhancement. (See *People v. Burke* (2023) 89 Cal.App.5th 237; *People v. Olay* (2023) 98 Cal.App.5th 60; *People v. Dain* (2024) 99 Cal.App.5th 399.) "A sentence enhancement is an additional term of imprisonment added to the base term." (*Burke*, at p. 243.)

However, the Third District in *Burke* noted that the legislative history "suggests that the term enhancement includes the Three Strikes law" and thus "is inconsistent with [the] plain language" of the bill. (*Burke*, at p. 243, fn. 3.) SB 81 implemented a recommendation made by the Committee on the Revision of the Penal Code, whose report "repeatedly refers to 'Strikes' as enhancements . . . and does not separate 'Strikes' from inclusion in its recommendation." (*Ibid.*) Some attorneys are making the argument that the Legislature intended SB 81 to apply to strike sentencing under the umbrella of "enhancements." The Committee's 2023 report recommends that the Legislature clarify that SB 81 applies to strikes.

- **Other questions regarding enhancements vs. alternative sentencing scheme**

Courts have reached similar decisions on other aspects of sentencing law that could be viewed as alternative sentencing schemes rather than enhancements. For example, *People v. McDowell* (2024) 99 Cal.App.5th 1147 held that SB 81 did not apply to a sentence imposed under section 236.1(c)(2) (human trafficking of minor with aggravating circumstances).

And, in *People v. Serrano* (Mar. 28, 2024, A166011), Division Five of the First District recently held that section 1385(c) does not apply to jury findings on the allegation that an attempted murder of a police officer was premeditated and deliberate (§ 664(e), (f)) because section 664 provides "alternative penalty provisions" "for the underlying felony itself."

IV. Senate Bill 483: Full Resentencing Hearings For All Individuals With a Judgment That Includes Certain Now-Invalid Sentence Enhancements, § 1172.75

A. Overview of SB 483

Effective January 1, 2022, SB 483 extended the retroactive application of Senate Bills 180 (2017-2018 Reg. Sess.) and 136 (2019-2020 Reg Sess.), which eliminated certain sentencing enhancements, to all persons "currently serving a term [of incarceration] for a judgment that includes" one of these now-invalid enhancements. (§ 1172.75(b).)

The bill provides for a full resentencing hearing for eligible individuals, at which the court must apply current sentencing rules and "any other changes in law that reduce sentences or provide for judicial discretion so as to eliminate disparity of sentences and to promote uniformity of sentencing." (§ 1172.75(d)(2); *People v. Monroe* (2022) 85 Cal.App.5th 393.) The court may consider postconviction factors at the resentencing hearing. (§ 1172.75(d)(3).) The individual has a right to be present for the hearing. (*People v. Velasco* (2023) 97 Cal.App.5th 663, 673-674 [section 1172.75 hearing is a "critical stage[] of the criminal prosecution"].) In *People v. Gray* (Apr. 4, 2024, F085699), the Fifth District recently held that section 1172.75 does not apply to NGI acquittees.

Although SB 483 required the review and resentencing process to be completed by December 31, 2023, that process has not been completed in all counties. And, several aspects of the interpretation of section 1172.75 remain undecided.

B. Issues Pending in the California Supreme Court

- **Does SB 483 apply to individuals serving a sentence where the now-invalid enhancement was imposed and stayed?** (*People v. Rhodius* (2023) 97 Cal.App.5th 38 (S283169/E080064).)

SB 483 applies to judgments that "include[]" an enhancement (§ 1172.75(c)), and makes multiple references to sentences that were "imposed" (§ 1172.75(d)(1), (4).) What does this mean for our clients whose sentences included stayed enhancements, such that the enhancements did not add custodial time to the sentence?

The first case on this question was *People v. Renteria* (2023) 96 Cal.App.5th 1276, in which the Sixth District held (and the Attorney General conceded) that a full resentencing hearing was required where the sentence included stayed sentencing enhancements. "As the Supreme Court has observed, "it is important to understand that the word 'impose' applies to enhancements that are 'imposed and then executed' as well as those that are 'imposed and then stayed.'" (*Renteria,* at p. 1282, citing *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1125.) No petition for review was filed.

The Supreme Court has granted review in *People v. Rhodius* (2023) 97 Cal.App.5th 38 (S283169/E080064), which was decided after *Renteria.* In *Rhodius,* Division Two of the Fourth District held that that the defendant was not entitled to a full resentencing hearing because "imposed" means "imposed and executed." (*Rhodius,* at p. 46.)

Subsequent to *Rhodius*, *People v. Christianson* (2023) 97 Cal.App.5th 300 and *People v. Saldana* (2023) 97 Cal.App.5th 1270, held that SB 483 applies to individuals with stayed enhancements. Review in *Christianson* and *Saldana* has been granted with briefing deferred pending *Rhodius.*

- **Does section 1172.75's full resentencing provision apply to Third Strike sentences? (***People v. Superior Court (Guevara)* (2023) 97 Cal.App.5th 978 (S283305/B329457); This case presents the following issue: Do the revised penalty provisions of the Three Strikes Reform Act of 2012 (Pen. Code, § 1170.12) apply when a defendant is resentenced pursuant to Senate Bill No. 483 (Pen. Code, § 1172.75)?)

In a 2-1 decision, Division Six of the Second District held in *Guevara* that section 1172.75 does not require the trial court to modify a third strike sentence where the defendant's petition for resentencing under section

1170.126 (Prop. 36) has already been denied on public safety grounds. Interpreting section 1172.75(d) to require trial courts to revisit third strike sentences would unconstitutionally amend section 1170.126. The dissent would have found that the defendant was entitled to a full resentencing, including modification of the portion of the sentence affected by the prior strikes, because the entire sentence was vacated upon a finding of eligibility for resentencing.

The two other published cases on this question likewise found section 1172.75 inapplicable to third strike sentences despite the Attorney General's concession. In *People v. Kimble* (Feb. 9, 2024) 99 Cal.App.5th 756, the Third District rejected the Attorney General's concession that, at defendant's 2022 resentencing under section 1172.75, the trial court was required to resentence him as a second-strike offender since stalking is not a serious or violent felony. The court reasoned that SB 483 does not allow a defendant to bypass the Prop 36 resentencing mechanism. (See also *People v. Santos* (Mar. 14, 2024) 100 Cal.App.5th 666 [same where defendant's third strike was drug-related].)

C. Other Open Questions

Other open questions remain which, though not yet pending in the California Supreme Court, continue to be litigated:

- **Who can initiate resentencing proceedings?**

Section 1172.75 directs the CDCR to identify eligible individuals and sets out a schedule for CDCR to provide counties with those lists. At this point, all eligible individuals should have been identified. Earlier in the resentencing process, some individuals brought their own pro per motions for resentencing. Several Courts of Appeal held that the trial courts lacked jurisdiction to hear these motions, given SB 483's establishment of a "uniform procedure" for holding resentencing hearings. (See *People v. Newell* (2023) 93 Cal.App.5th 265, 266; *People v. Burgess* (2022) 86 Cal.App.5th 375; *People v. Escobedo* (2023) 95 Cal.App.5th 440 [suggesting petition for a writ of habeas corpus is appropriate procedure].)

However, where the defendant initially filed his own petition for resentencing, and "during the pendency of the motion, the [CDCR] identified" him as potentially eligible for resentencing, the trial court had jurisdiction to hear the original motion. (*People v. Cota* (2023) 97 Cal.App.5th 318.) "[W[e

nevertheless disagree with *Escobedo* to the extent that case suggests that a court lacks jurisdiction to resentence a defendant who has been identified by the Department of Corrections and Rehabilitation as eligible for resentencing pursuant to section 1172.75 simply because that defendant also has filed a motion for such relief." (*Cota,* at p. 333.)

- **Do the full resentencing provisions of SB 483 apply to stipulated sentences?**

There is currently a split of the authority in the Court of Appeal. In *People v. Coddington* (2023) 96 Cal.App.5th 562, Division One of the First District held that the prosecutor could withdraw from a plea agreement if the court indicates its intention to reduce the defendant's sentence beyond striking the now-invalid enhancements. *People v. Carter* (2023) 97 Cal.App.5th 960 and *People v. Montgomery* (Mar. 15, 2024) 100 Cal.App.5th 768, held that the Legislature intended to preclude the prosecution from rescinding the plea agreement even if a SB 483 resentencing results in a shorter sentence than originally stipulated.

- **If the upper term was originally imposed, may the court re-impose the upper term without complying with the amended section 1170(b)?**

"Unless the court originally imposed the upper term, the court may not impose a sentence exceeding the middle term unless there are circumstances in aggravation that justify the imposition of a term of imprisonment exceeding the middle term, and those facts have been stipulated to by the defendant, or have been found true beyond a reasonable doubt at trial by the jury or by the judge in a court trial." (§ 1172.75(d)(4).)

How does this provision harmonize with subdivision (d)(2), which requires the court to "apply the sentencing rules of the Judicial Council and apply any other changes in law that reduce sentences?" Where the individual's original sentence included the upper term, must the court presume the middle term is appropriate and re-impose the upper term *only* if the proof requirements of section 1170(b) are met? And, what if the upper term was originally imposed, but one of the mitigating circumstances listed in section 1170(b)(6) is present?

In *People v. Renteria,* 96 Cal.App.5th at p. 1283, the Court of Appeal held (and the Attorney General conceded) that appellant "is entitled to application of Senate Bill 567."

> Even more pertinently, section 1170 now requires courts to impose the lower term if the defendant being sentenced "experienced ... childhood trauma" that was a contributing factor to commission of the offense. (§ 1170, subd. (b)(6).) Renteria has presented evidence of such trauma. As the Attorney General acknowledges, because the trial court did not consider the applicability of the newly amended section 1170, Renteria is entitled to have his case remanded for the trial court to consider in the first instance whether any of the seven consecutive sentences totaling 26 years imposed on him should be reduced.

Renteria did not discuss whether the upper term was originally imposed. However, the Attorney General's concession and holding in *Renteria* are consistent with other unpublished opinions holding that the upper term may only be re-imposed in compliance with the amended section 1170(b). (See *People v. Foster* (H050676); *People v. Thomas* (B326682); *People v. Eaton* (C096853).

However, in an unpublished opinion (*People v. Grandberry* (A167349), Division One of the First District held that (d)(4) allowed the trial court to re-impose the upper term without complying with amended section 1170(b): "The plain import of [1172.75(d)(4)] is that a resentencing court need not comply with the changes to subdivision (b) of section 1170 (which are set forth essentially verbatim in subdivision (d)(4)) in cases where the original sentencing court imposed the upper term." *Grandberry* may be an outlier, but we should be prepared for this argument.

V. Assembly Bills 1540 & 600: Recall and Resentencing Procedures, § 1172.1 (renumbered from 1170.03)

A. Overview of AB 1540 & AB 600

Effective January 1, 2022, AB 1540 added section 1170.03, moving the procedures for hearings on recall of sentence from section 1170(d). Effective

June 30, 2022, section 1170.03 was renumbered as 1172.1. Section 1172.1 applies to plea bargains. (§ 1172.1(a)(3).)

Effective January 1, 2024, AB 600 amended section 1172.1 to authorize the trial court to initiate recall for resentencing at any time if the applicable sentencing laws are subsequently changed due to new statutory or case law authority. AB 600 also made other changes to section 1172.1, including requiring the court to consider postconviction factors and other enumerated mitigating circumstances. (§ 1172.1(a)(5).) AB 600 is not discussed in-depth in these materials; more information is available on FDAP's website.

AB 1540 "clarified . . . procedural requirements" and "added a presumption in favor of recall and resentencing" when the recall request originates from the CDCR, District Attorney, or other correctional or prosecutorial agency. (*People v. McMurray* (2022) 76 Cal.App.5th 1035, 1038.) A letter from the CDCR notifying the trial court of a possible clerical error or unauthorized sentence is not necessarily a recommendation to recall and resentence. (*People v. Codinha* (2023) 92 Cal.App.5th 976.) Counsel must be appointed if the recall request comes from a custodial or prosecutorial agency. (§ 1172.1(b)(1).)

The presumption in favor of recall and resentencing "may only be overcome if a court finds the defendant currently poses an unreasonable risk of danger to public safety as defined" in section 1170.18(c) (unreasonable risk that the individual will commit a new "super strike" offense as listed in § 667(e)(2)(C)(iv)). (§ 1172.1(b)(2).) The "unreasonable risk" language mirrors the compassionate release statute (§ 1172.2(b)), and cases interpreting that statute may be helpful. (See *People v. Lewis* (Apr. 11, 2024, E082085) [finding abuse of discretion in denial of recall petition under 1172.2 where dangerousness finding not supported by substantial evidence]; *Njimeddin v. Superior Court* (2023) 90 Cal.App.5th 77 [trial court required to make finding of dangerousness under § 1172.2].)

When recalling and resentencing under section 1172.1, the court "shall apply the sentencing rules of the Judicial Council and apply any changes in law that reduce sentences or provide for judicial discretion so as to eliminate disparity of sentences and to promote uniformity of sentencing." (§ 1172.1(a)(2).) The court "shall" consider postconviction factors as well as

trauma, youth, and experience of domestic violence or trafficking. (§ 1172.1(a)(5).)[1]

Though not specifically stated in the statute, a full resentencing hearing is required. (*People v. Salgado* (2022) 82 Cal.App.5th 376, 381.) Where the request originates with an official entity (as opposed to the defendant), a summary denial without a hearing or any indication in the record that the trial court considered the factors enumerated in the statute does not satisfy section 1172.1. (*People v. Pierce* (2023) 88 Cal.App.5th 1074; 1172.1(a)(7), (c).)

B. Open Questions

There are no questions related to the interpretation of AB 1540/AB 600 pending in the California Supreme Court, but there are some open questions:

- **What happens when the party recommending recall and resentencing changes the recommendation?**

The answer may depend on the timing of the recission. In *People v. E.M.* (2022) 85 Cal.App.5th 1075, the Sixth District held that the CDCR's letter purporting to rescind recall recommendation did not eliminate the trial court's jurisdiction where the letter was sent two years after the original recommendation, while the appeal was pending.

In *People v. Vaesau* (2023) 94 Cal.App.5th 132, the San Francisco County DA recommended resentencing, but withdrew the recommendation following the election of a new DA. Division One of the First District held that the trial court has discretion to terminate resentencing proceedings when the DA identifies a "legitimate basis" for withdrawing the request. However, the court remanded the case because the record did not indicate that the DA offered such a reason or that the trial court understood the scope of its discretion to deny the DA motion to withdraw. The court also held that a defendant is entitled to due process once the recall and resentencing process is initiated.

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[1] Prior to January 1, 2024, section 1172.1(a)(4) provided that a court "may" consider postconviction and other mitigating factors; since AB 600 took effect, section 1172.1(a)(5) provides that a court "shall" consider these factors.

- **To what action does the presumption in favor of recall and resentencing apply?**

In *People v. Braggs* (2022) 85 Cal.App.5th 809, the Sixth District interpreted the presumption in favor of recall and resentencing to "apply to the initial determination of whether to grant a request to recall and resentence," not as a presumption in favor of the imposition of a more lenient sentence. "[N]othing in former section 1170.03 or current section 1172.1 provides for a presumption in favor of the Secretary's particular recommended sentence. Rather, the statute provides for a presumption regarding recalling and resentencing a defendant, but not a presumption as to a particular sentence recommended by the Secretary." (*Braggs*, at p. 819.) To interpret the statute, *Braggs* looked to an uncodified expression of legislative intent, Section 1 of AB 1540. Even if *Braggs* is correct, there is a presumption in favor of recalling a sentence, at which point a full resentencing hearing is required.

- **Does the passage of AB 600 materially change how the trial court is to consider a resentencing request?**

Much of the discussion of AB 600 has focused on the discretion of the trial court to initiate recall and resentencing proceedings. However, AB 600 also modified the prior version of subsection (a)(4) (now (a)(5)) to require a trial court to consider postconviction factors and certain mitigating factors. (See § 1172.1(a)(5).) Under the prior version of the statute, a court "may" consider postconviction factors. The trial court is also now directed to consider "evidence that the defendant's constitutional rights were violated in the proceedings related to the conviction or sentence at issue, and any other evidence that undermines the integrity of the underlying conviction or sentence." (§ 1172.1(a)(5).) These amendments should result in more resentencing petitions being granted, regardless of the initiating entity. If a trial court does not consider these factors, there may be a claim to raise on appeal.

VI. Assembly Bill 1950: Limitation on Probation Terms, § 1203.1

A. Overview of AB 1950

Effective January 1, 2021, AB 1950 amended section 1203.1 to reduce the maximum term of probation to two years in most felony cases. The two-year limit does not apply to offenses listed in section 667.5(c) ("violent" felonies), offenses that include "specific probation lengths" in their provisions, or theft offenses involving property over $25,000. (§ 1203.1(*l*)(1), (2).) The offenses to which the two-year limitation does not apply include offenses where section 1203.097 "domestic violence" terms apply, even where the offense was not a domestic violence offense. (*People v. Qualkinbush* (2022) 79 Cal.App.5th 879, 894-895.) However, the amended statute does limit the probation term imposed for violent felonies and domestic violence offenses to the "maximum possible term of the sentence." (§ 1203.1(*l*)(1).)

The amended statute is retroactive to all nonfinal cases; the remedy is reduction of the probation term, even where the longer term of probation was part of a negotiated plea. (*People v. Prudholme* (2023) 14 Cal.5th 961.)

Viable issues on appeal may arise where the client was placed on probation prior to 2021, and the sentence is imposed or executed after January 1, 2021. These are frequently situations where probation has been revoked and reinstated multiple times, and so it may be somewhat difficult to untangle the procedural history.

B. Issues Pending in the California Supreme Court

- **Does Assembly Bill No. 1950 apply retroactively to a defendant, serving a suspended-execution sentence, whose probation was revoked before the law went into effect?** (*People v. Faial* (2022) 75 Cal.App.5th 738 (S273840/A159026).)
- **Did the trial court exceed its jurisdiction by setting the amount of victim restitution after terminating defendant's probation pursuant to Assembly Bill No. 1950?** (*People v. McCune* (2023) 81 Cal.App.5th 648 (S276303/A163579).)

VII. Assembly Bill 518: Discretion to Impose Lesser Sentence Where Section 654 Precludes Punishment for Multiple Offenses

A. Overview of AB 518

Effective January 1, 2022, AB 518 amended section 654 by removing the requirement that a defendant be punished under the statute providing for the longest term of imprisonment. Under the prior version of section 654, "the sentencing court was required to impose the sentence that 'provides for the longest potential term of imprisonment' and stay execution of the other term." (*People v. Mani* (2022) 74 Cal.App.5th 343, 379.) "As amended by [AB] 518, . . . section 654 now provides the trial court with discretion to impose and execute the sentence of either term, which could result in the trial court imposing and executing the shorter sentence rather than the longer sentence." (*Mani, supra,* at p. 379.)

AB 518 is retroactively applicable to nonfinal cases and applies to indeterminate and determinate sentences. The trial court must exercise its discretion by choosing the appropriate term. (See *People v. Fugit* (2023) 88 Cal.App.5th 981 [remanded where "the record does not show that the trial court considered its discretion under AB 518 during the prior limited remand for resentencing under SB 567"].) However, I have not found any appeals from sentencings or resentencings where the error claimed on appeal was the trial court's abuse of discretion in selecting the longer sentence.

B. Open Questions

There are no issues related to the interpretation of AB 518 pending in the California Supreme Court, but there are some interesting open questions that could be litigated with some creativity:

- **Is there any limitation on the trial court's discretion to select the offense on which to impose sentence?**

In this unpublished case, "[d]efendant contends the trial court could not rely on factors not alleged in the information or found true beyond a reasonable doubt under section 1170, subdivision (b)(2) in choosing the base term. However, defendant provides no authority that section 1170, subdivision (b)(2), applies to a determination under amended section 654." (*People v. Campbell* [unpub. opn], No. E078833, 2023 WL 2887600, at *10 (Cal. Ct. App. Apr. 11, 2023).)

- **Does AB 518 apply to LWOP sentences, such that a trial court could stay an LWOP sentence and impose a lesser sentence on a different count**?

In *People v. Garcia* (2022) 83 Cal.App.5th 240, 257-258, Division Five of the First District held that a trial court may not stay an LWOP sentence and impose a lesser sentence because section 1385.1 (enacted as part of Prop. 115) provides that "[n]otwithstanding Section 1385 or any other provision of law, a judge shall not strike or dismiss any special circumstance which is admitted by a plea of guilty or nolo contendere or is found by a jury or court as provided in Sections 190.1 to 190.5, inclusive." The court in *Garcia* found that *staying* an LWOP sentence has the same practical effect as *striking* the circumstance and that interpreting the amended section 654 to allow courts to stay punishment on a special circumstance would render section 1385.1 "pointless." Not discussed in *Garcia* is the additional consideration that AB 518 could not amend section 1385.1 unless it passed with a two-thirds vote because section 1385.1 was enacted by initiative. Note: Review was granted in *Garcia* on a different question, with briefing deferred pending *People v. Hardin* (S277487).

- **Does AB 518 apply to One Strike sex offenses, such that a trial court could stay punishment on the One Strike offense in favor of a shorter, non-One Strike sentence?**

In *People v. Caparaz* (2022) 296 Cal.App.5th 669, Division Two of the First District held that section 667.61(h) precludes a trial court from staying the sentence on a qualifying One Strike offense in favor of a shorter non-One Strike sentence. Section 667.61(h) provides: "Notwithstanding any other law, probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, a person who is subject to punishment under this section."

VIII. Conclusion & Miscellaneous Practice Tips

The sentencing reforms enacted over the last few years have greatly benefitted our clients. However, the interpretation of these laws is not settled, and many questions remain unresolved.

The following are some miscellaneous practice notes, tips, and suggestions to help you raise and litigate claims on appeal:

- Many of these code sections were renumbered in July 2022, pursuant to AB 200. This is confusing!
- Even where legislation does not apply retroactively (e.g., SB 81), it will apply to any case remanded for resentencing, pursuant to the full resentencing rule articulated in *People v. Buycks* (2018) 5 Cal.5th 857, 993.
- Use the legislative intent and history of these reforms to support your claims. The impetus for many of these recent sentencing reforms were recommendations made by the Committee on the Revision of the Penal Code; the Committee's reports are available at http://www.clrc.ca.gov/CRPC.html and may provide useful background for appellate claims. Likewise, the promotion of racial justice and rectification of past discrimination in sentencing are explicitly mentioned in the legislative history and text of some of these bills. Including a discussion of this intention may support some claims.
- Don't be afraid to argue that older decisions on sentencing laws should be revisited. For example, in a statement concurring in the denial of review in *People v. Flores* (S274232), Justice Liu suggested "revisiting our decisions in *Black* and *Sandoval* in light of changes" to section 1170(b). Under *People v. Sandoval* (2007) 41 Cal.4th 825, 839, if "a single aggravating circumstance" would unquestionably have been found by the jury, the trial court's further finding of aggravating circumstances in violation of the Sixth Amendment is harmless. In *People v. Black* (2007) 41 Cal.4th 799, 813, issued the same day as *Sandoval,* the Court held that "the existence of a single aggravating circumstance is legally sufficient to make the defendant eligible for the upper term." As Justice Liu noted, those decisions were based on the determinate sentencing law as it existed

at the time, and SB 567's amendments to section 1170(b) may require a reconsideration of those holdings.

- Pay attention to the standard of review and frame issues to take advantage of a more favorable standard. For example, it may be better to characterize an error as the trial court's "misapprehension of statutory sentencing obligations" rather than as an objection to "the manner in which the trial court exercised its discretion." (*People v. Fredrickson* (2023) 90 Cal.App.5th 984, 994, fn. 8, citing *People v. Panozo* (2021) 59 Cal.App.5th 825, 840.)
- There are still many undecided questions related to these sentencing reforms, so let's be creative.