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

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for the 2022 Virtual SDAP Seminar[1]

[1]Note that the font of this cover page is "Californian FB"

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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 Senior Staff Attorney and DSL Survivor

A. Background/Introduction: A Short History of section 1170 et seq.

1. ISL & the Bad Old Days.

In the beginning there was ISL (the Indeterminate Sentencing Law), which Once Upon a Time, a Very Long Time Ago, was itself considered a sentencing reform because it gave prisoners a chance at early release through good behavior and rehabilitation.[2] But by the mid-1970s, when I started law school, Democrats had taken over the state house and the governor's mansion and ISL had become a horror show. Nearly every prison sentence was X years to life; you could even be sentenced to a term of one-year to life.[3] Supposedly set up to foster rehabilitation in prison, indeterminate sentences had became a nightmare, leading to prolonged terms subject to the discretion and whims of conservative parole boards and prison authorities, with all the implicit and explicit racial and class biases that went with such discretion and whim, leading to cases like *Rodriguez*, cited in the margin, which found a one-year to life sentence for a relatively minor child molest offense in violation of Penal Code section 288, where the client had served over 20 years, to be cruel or unusual punishment under the state constitution.[4]

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[2]"The general purposes of the indeterminate sentence law include reformation of the offender, protection of society from the offender who has not reformed, and by express declaration uniformity of administration as to all prisoners undergoing confinement." (*In re Cowen* (1946) 27 Cal.2d 637, 648-649.)

[3]This was the punishment for a violation of section 288! (See *In re Rodriguez* (1975) 14 Cal.3d 639, 643.

[4]Statutory references are to the Penal Code unless they aren't.

2. **DSL and the First Big Reform.**

The global response by the governor (Jerry Brown 1 [Governor Moonbeam]) and Legislature was the Determinate Sentencing Law of 1977 (DSL), most of which showed up in sections 1170 et seq. The DSL set very fair and moderate tripartite prison terms – for example, the punishment for second degree robbery was 2, 3, or 5 years – with a presumption in favor of imposing the middle term, where upper and lower terms could be imposed at the discretion of the sentencing judge based on aggravating and mitigating factors set forth in court rules.

DSL put reasonable limits on the ability to impose long prison sentences. Under section 1170.1, consecutive sentences could be imposed, for one-third the middle term, as well as enhancements for factors like personal use of a weapon or intentional infliction of great bodily injury. Recidivism was punished with a one-year term for a prison prior, with a more serious three-year term for violent felons who had previously been sentenced to prison for a violent felony. But there were "washout" provisions for older priors, and not yet anything like serious felony priors or strikes.

The new law originally affected even homicides, setting the punishment for second degree murder, as the most dramatic example, at 5, 6, or 7 years. There was also a "double the base term" limit for nonviolent offenses, which restricted the number of additional years that could be added in for consecutive terms and enhancements.

The DSL was intended to reduce prison population and correct racial disparity in imprisonment. But the backlash to this great reform, which came began almost immediately, turned into a tidal wave. It continued over three very long decades (including three quarters of my own legal career), filling up and overcrowding every California prison and leading to the construction of dozens of new ones (which in their turn were filled up and overcrowded), and, in the process,

destroying the lives of a lot of young men, mostly men of color, for little purpose beyond racism, vindictiveness, and political expediency.

3. The Backlash to DSL

The first onslaught against the great DSL reform came almost right away. The Briggs initiative, which passed by an overwhelming majority, was mostly focused on restoring the death penalty and creating life without parole (LWOP) sentences for those with special circumstances who did not get the death penalty. But it also jacked up the punishment for murder without special circumstances. First degree murder, formerly (including before DSL) punishable by "life imprisonment," with a minimum term of 7-years, was increased to the still-current term of 25 years to life. The short-lived determinate term for second degree murder (for which the punishment under ISL was 5-years to life) was jacked up to the current draconian term of 15-years to life. Thus, as to murders, at least, the response to DSL gave rise to a far harsher sentencing scheme than under ISL.

This was only the beginning. Every legislative term, some aspect of the DSL was made more punitive. One early example, still with us, was the 1979 enactment of section 667.6, which either mandated or allowed full-term consecutive sentences for sex crimes, turning many sexual offenses into virtual life crimes.

Four years later, Proposition 8 invented the category of "serious felony " offenses, which was much broader than "violent felonies," requiring five-year enhancement (as opposed to the three-year term for the more restrictive violent felonies) for anyone committing a serious felony with a previous conviction for a serious felony, irrespective of whether they had served a prison term or how old the prior was; Prop. 8 further precluded judges from striking such enhancements when they were admitted or found true. Prop. 8 did all sorts of other unfair things, mostly unrelated to sentencing, such as enacting the misnamed "truth in evidence" provision which was intended to, and did, preclude California courts from making

rulings in Fourth Amendment and related cases based on the independent authority of California's state constitution.[5]

The piling on continued. Every legislative session included new "tough on crime" measures increasing punishments. There were now extreme punishments for gang crimes and gang enhancements (§ 186.22); and as if section 667.6 was not bad enough, the Legislature passed the "One Strike" law (§ 667.61), mandating 15- or 25-to-life sentences for nearly all sex crimes, and then severely restricted conduct credits for persons convicted of violent felonies (§ 2933.1). The final tipping point – though not the end of the backlash – came in 1994 with the combined legislative and initiative enactment of the Three Strikes law, which outdid the recidivism laws of every other state by mandating a 25-to-life term for *any* current felony if the defendant had any two previous serious felony "strike" priors, drastically increased sentences for "second strike" offenders, with severe restrictions on prison conduct credits or any chance for early parole.

Our profession spent countless years beating our collective heads against the wall of this cascade of exponential punishment increases, with only limited successes, with an extremely conservative, anti-crime judiciary upholding these punitive provisions against all manners of attacks . The last major salvo, taking place throughout the 1990s and culminating with the last Big Bad Initiative in 2000, gave prosecutors the right to try juveniles – down to the age of 14 – as adults and put them away in state prison for most serious crimes. In the meantime, there were plenty of little mean new laws, like the one in 1996 that eliminated the "double the base term" restriction, or the 1997 statute that amended section 654 to require a court to impose the greater sentence when one of two crimes is subject to a stay under section 654, and a 2000 law eliminating presentence conduct credits

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[5]Can we PLEASE include the repeal of this provision in the next criminal justice initiative measure? The California Constitution demands it!

for persons convicted of murder.

When the U.S. Supreme Court, in *Cunningham v. California* (2007) 549 U.S. 270, extended the *Apprendi* rule to require a right to jury trial and proof beyond a reasonable doubt as to aggravating factors used to impose an upper term sentence under section 1170, because the statute included a presumption in favor a middle terms, both the Legislature and the state Supreme Court practically fell over each other to eradicate this requirement. (See *People v. Sandoval* (2007) 41 Cal.4th 825 & SB 40 (2007) [§ 1170], SB 150 (2009) [§ 1170.1]).)

This was only a couple of years after the same U.S. Supreme Court rejected the argument that the Three Strikes law, as applied to minor offense current offenses such as petty theft with a prior, violated the Eighth Amendment (*Ewing v. California* (2003) 538 U.S. 11, and California voters in 2004 narrowly rejected Prop. 66, which would have reformed the Three Strikes law (better than Prop. 36 eventually did, e.g., gotten rid of residential burglaries as serious felonies, no sex crime "super strikes").

These were dark times indeed.

4. Cracks in the Armor: the Current Wave of Sentence Reform Begins

Things finally began to tip the other way around the beginning of the previous decade. In 2012, Democrats took back the governorship, and had a firm hold on the Legislature, with California turning into a Very Blue State, which it has remained ever since.[6] Overcrowded prisons, subject to federal court orders, were no longer acceptable to the Legislature or to a majority of voters, and the Realignment Act moved the punishment site for more minor offenders to county

[6]You may be surprised to learn that California's electoral votes for President went to the Republican nominee during every election between 1968 and 1988, and has gone to a Democrat every election since 1992.

jail instead of state prison, accompanied by an ultimate doubling of presentence conduct credits.

Most of you are familiar with the series of initiative and legislative reforms which came next. In 2012, Prop 36 amended the Three Strikes law to eliminate life sentences for most non-serious felony current offenses, and provided a petition process to challenge final convictions for non-serious felony cases where life sentences were imposed. In 2014, Prop. 47 reduced a number of less-serious felonies to misdemeanors, and again provided a mechanism to challenge final convictions in such cases. And in 2016, Prop. 57 eliminated the situation where prosecutors could charge juveniles as adults without a transfer order from the juvenile court, which was found to apply retroactively under *Estrada* (*In re Estrada* (1965) 63 Cal.2d 740) by our Supreme Court in the *Lara* case (*People v. Superior Court (Lara)* (2018) 4 Cal.5th 299). Prop. 57 also sidestepped some of the more draconian sentencing laws by providing for early parole consideration – later construed by the courts as including Third Strikers whose current offenses were not for violent felonies – based on the longest single determinate term of an inmate's sentence, and gave rise to CDCR regulations enhancing prison conduct credits, which also led to more inmates being released earlier.

The next phase of change came in a series of increasingly profound legislative reforms, taking us back in time, as it were, to the early days of DSL. The first wave, in 2017 and 2018, was relatively modest, eliminating the prohibition against judges striking firearm use enhancements (2017) and then serious felony enhancements (2018), with both new laws found to apply retroactively under *Estrada* to non-final convictions on appeal, and providing us appellate lawyers a lot of small sentencing reversals. The second wave, in 2019, included three important new laws. The first, SB 1391, completely eliminated prosecution of 14 to 15 year olds as adults, which was held to be consistent with Prop. 57 (*O.G. v. Superior Court* (2021) 11 Cal.5th 82) and to apply retroactively

under *Estrada* and *Lara* to non-final criminal convictions. (*People v. Hwang* (2021) 60 Cal.App.5th 358.) The second, Senate Bill 136, eliminated "prison priors" under section 667.5(b) (except for specified sexual crimes), which was also held to apply retroactively to non-final convictions. (*People v. Jennings* (2019) 42 Cal.App.5th 664, 682.)

The third, more well-known change was in homicide law, with the enactment of SB 1437 – a topic covered in this year's SDAP seminar by my colleague Jonathan Grossman – which altered culpability for murder for non-killers whose convictions were premised on the natural and probable consequences doctrine or felony murder, and provided, again, a mechanism for challenging final convictions arguably obtained under these theories.

This set the table for the series of stunning reforms enacted by the Legislature effective January 1, 2022, which (*he's finally getting to it!*), is the subject of this article.

B. **2022 Criminal Justice Reforms, An Overview**.

The legislative changes in California criminal law enacted in 2021, effective January 1, 2022 were staggering. Most of you are pretty familiar with many of them. But just as a refresher, here's a list of the major changes, with the new laws emphasized in bold being the ones I will address in detail in the discussion that follows, and a quick summary of the pertinent changes as to each of the new laws and of court rulings holding that nearly all of them apply retroactively under *Estrada*.[7]

1. SB 73: Expanded court's ability to grant probation in drug cases;

2. **AB 518: Amendment to § 654: Gave judges discretion to impose any**

[7]Thanks to Deborah Rodriguez and Nathaniel Miller from FDAP for their detailed late Fall 2021, "End-of-Year Legislative Roundup Webinar", which I have borrowed from for this summary.

term, not just greatest term, when one sentence must be stayed under section 654. (Found retroactive to non-final convictions under *Estrada*, with both parties agreement, in *People v. Sek* (2022) 74 Cal.App.5th 657, 673, and in numerous unpublished opinions.)

3. AB 124 (Part 1): Expands "coercion" defense available to victims of human trafficking and also extends petitioning process rights available to such persons to victims of intimate partner violence. Directs prosecutors to consider, during plea bargaining process, whether a contributing factor to the offense was that the defendant was a victim of human trafficking or intimate partner violence. (Found retroactive to non-final convictions under *Estrada*, with both parties agreement, in numerous unpublished opinions.)

4. **SB 567 & AB 124 (cont.): Changes to DSL, mostly section 1170.**

a. **SB 567:**

- Reinstates middle term presumption;
- Revives *Cunningham* by requiring jury trial on aggravating factors, with proof beyond a reasonable doubt, as predicate to imposing an upper term sentence;
- Right to bifurcated trial on aggravators (unless facts are admissible at trial);
- Exception to jury trial right for proof of prior conviction (but likely limited to "fact of" conviction or other facts shown by certified copy of judgment)
- Same Rules Apply to Enhancements with Tripartite Terms (§ 1170.1(d))
- Found retroactive to nonfinal convictions under *Estrada*, with assent of both parties, in numerous unpublished opinions.

b. **AB 124: Creates New 1170(b)(6): (Sometimes) Mandatory Lower**

Terms:

- Lists Set of Mitigating Factors Requiring Middle Term
  - Childhood Trauma
  - Under 25 when committed offense
  - Defendant, prior to or during offense, is victim of intimate partner violence or human trafficking
- Court must impose lower term if these are shown *unless* aggravators outweigh mitigators, such that lower term not in the interest of justice.
- (Found retroactive to non-final convictions under Estrada, with both parties agreement, in multiple unpublished opinions.)

5. AB 1540 & AB 124 (Again) Amendments to § 1170(d)(1) (renumbered § 1170.03) Sentence Recall Provisions, key changes:

- Codifies key procedural rights:
  - Notice to Inmate/Defendant
  - Appointment of Counsel
  - Right to Hearing
- Creates Presumption in Favor of Resentencing, Only Rebuttable if court finds that Inmate/Defendant is Danger to Public per § 1170.18(c) [likely to commit a super-strike]
- Procedural Rights if Sentence Recalled:
  - Cannot deny without a hearing
  - Must state on record reasons for denial
  - Must apply all changes in the law that reduce sentences or give greater discretion
  - Gives broad authority to reduce sentence (on its own) and broader authority to vacate the judgment and reduce offense to lesser included or related offense, but only with the

concurrence of the DA (and D)

- AB 124 Part: requires consideration of trauma, intimate partner violence, youth of D if they were contributing factor in offense.
- Applies to Non-Final Convictions as a "Clarifying Amendment" (*People v. McMurray* (2022) 76 Cal.App.5th 1035, 1040-1041).
- (I should be covering this but I am not; maybe next time?)

6. AB 177: Eliminates a Bunch of Costs and Fees (for all of you who keep track of these). Unpublished decisions holding that specific operative date in statute signifies intention that changes not apply retroactively, but holding that any outstanding fines/fees cannot be collected under language of bill, e.g., *People v. Molina*, 2022 Cal.App.Unpub. LEXIS 4178.)[8]

7. AB 1228: Restricts ability to detain probationers for minor violations until hearing, and restricts imposition of bail.

8. **SB 81: Amendments to § 1385 re: Striking Enhancements**

Key provisions:

- New subdivision (c), directs that court "shall dismiss enhancement" if it is in furtherance of justice to do so....", and gives extra force to this provision by stating that it applies "notwithstanding any other law."
- Must give "great weight" to evidence of mitigation shown by defendant (re specified factors, see below)
- Proof of these factors "weighs greatly in favor of dismissing the

[8]It has never ceased to amuse me how much public money is spent litigating pocket money fines and fees. I leave the details to those of you who enjoy them.

enhancement" unless doing so would endanger public safety, i.e., likely result in "physical injury or serious danger to others."

- Enumerated factors:
  - Enhancement results in discriminatory impact under RJA
  - Multiple enhancements are alleged in a single case, "all enhancements beyond a single enhancement *shall* be dismissed."
  - Imposition of enhancement could result in sentence over 20 years, "the enhancement *shall* be dismissed."
  - Offense connected to mental illness
  - Offense connected to prior victimization or childhood trauma
  - Current offense is not a violent felony per § 667.5(c)
  - Defendant was a juvenile when they committed the offense *or* any prior juvenile adjudication triggers an enhancement in the case.
  - Enhancement based on a prior over five years old
  - Firearm used was inoperable
  - Expressly provided that its prospective only (§ 1385(c)(7); but if resentencing is mandated for any other reason, SB 81 must be applied at any resentencing hearing. (*People v. Sek*, *supra*, 74 Cal.App.5th at p. 674.)

9. AB 333: Massive Changes to Gang Crime Law. (Outside of scope of this Article) Key sentencing feature: Presumption of middle term for gang enhancement and gang crime.

10. **SB 1483: Completely Eliminated Prison Priors under section 667.5(c), fully retroactive. Petition process under new § 1172.75 for final**

conviction where prison prior "imposed prior to January 1, 2020."

Okay, end of summary. Let's no delve deeper into some of the key changes.

C. Drilling Down: Selected Issues and Crazy Ideas about Amendments to Sentencing Law.

In the discussion that follows, the author will attempt to both summarize some of the case law that has arisen as to the new sentencing laws (beyond *Estrada* application), and will engage in his usual practice of dealing with the unsettled nagging questions from the new laws, engaging in imaginative/lunatic speculation about arguments that can be raised by trial and appellate counsel. The crazy ideas I am putting forward are all my own, which is not to say that brighter (or loonier) minds have already come up with them but I wasn't paying attention, or that I borrowed an idea from someone else but can't remember it.

1. Issues Surrounding Amendments to § 1170(b)(1)-(3) (SB 567, Upper Terms)

a. Does the Full Panoply of *Apprendi*, Due Process and Jury Trial Rights Apply to Aggravating Circumstance Factors?

My answer is "Yes." By specifying, in the unmistakably clear and mandatory language of section 1170(b)(1), that the court "shall . . . order imposition of a sentence not to exceed the middle term . . .", except as provided in paragraph (2), which provides a right to jury trial as to aggravators, the amendment takes us right back to the holding in *Cunningham* that requires a jury trial on aggravating circumstances.

Although the narrow ruling of *Cunningham* focused only on the Sixth Amendment *jury trial* right, with no discussion of any right to notice and pleading of aggravating circumstances, both settled California law and the bedrock constitutional principles underlying *Apprendi* jurisprudence compel a right to notice of charges which give rise to a greater sentence than the statutory

maximum, which here means the prosecution must plead, as well as prove, enhancement allegations.

California law has consistently required both pleading and proof of facts which increase punishment. (See, e.g., *People v. Ford* (1964) 60 Cal.2d 772, 794 [prior convictions and "arming" allegations used to increase sentence must be charged in accusatory pleading and proven if not admitted], *People v. Lo Cicero* (1969) 71 Cal.2d 1186, 1193-1194 [following holding in *Ford* as to pleading and proof requirement for prior conviction that makes defendant ineligible for probation], and *People v. Mancebo* (2002) 27 Cal. 4th 735 [right to notice through pleading of One-Strike allegations enhancing sentence].) Taken together, these cases hold that facts which increase a defendant's sentence must be *both* pled and proven, or admitted by the defendant. Although based on the spirit of due process, these cases are not couched in due process constitutional terms.

However, the holding in *Apprendi* makes plain the fact that both pleading and proof of allegations which increase maximum punishment are required by due process. *Apprendi*, *supra*, 530 U.S. at 476, quoted *Jones v. United States*, 526 U.S. 227, 243, n. 6, for its holding that "'under 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 . . .'", then added that "[t]he Fourteenth Amendment commands the same answer in this case involving a state statute." (*Ibid*., emphasis added.)

Thus, I conclude that aggravators used to impose an upper term under amended section 1170 must be *both* pled and proven to a jury to satisfy the Sixth and Fourteenth Amendment, as well as the California cases cited above.

b. Where a Case with an Upper Term Sentence is Remanded Based on the *Estrada* Application of Amendments to Section 1170, Can

the Defendant Be Subject to the Upper Terms in a Mini-Retrial Based on Aggravators that Were Not Pled or Proven?

I know, that's a long question, but you get the idea. You've just won a reversal where your client had an upper term sentence based on, let's say, a "particularly vulnerable victim." When the case is remanded, the DA is unwilling to just resentence the client to a middle term. So she files an Amended Information, including the allegation that the defendant is particularly vulnerable, and seeks to have a mini-trial based on the aggravator. Is that proper? My tentative answer is, "Probably yes."

Of course defense counsel should argue that there is no basis for such a late amendment, or that it's precluded because it wasn't shown at the prelim. I think trial courts are going to accommodate prosecutors in this situation, based on the intervening change in the law, and the prosecutor's wide discretion in charging crimes and allegations.

c. **How Can They Charge Allegations Which Are Not Even In a Statute? Are Some Aggravators Arguably Void for Vagueness?**

There's a lot that's odd and unique about the post SB 567 universe of charging and proving enhancement allegations. One obvious feature is that, for the most part, aggravating circumstances, as we know them, are not listed in any statute. The only listing is in the Rules of Court (see, e.g., Cal. Rules of Court, rule 4.421(a) [factors related to the crime] and 4.421(b) [factors related to the defendant]). Moreover, the only reference to the Rules of Court in section 1170 provides that the court, when sentencing, "shall apply the sentencing rules of the Judicial Council." (§ 1170(a)(3).)

Mind you, some of the specified aggravating factors in Rule 4.421(a) correspond to criminal offenses or enhancements (e.g., Rule 421(a)(12) [crime constitutes a not-charged hate-crime under section 422.55], 421(a)(2) ["defendant was armed with or used a weapon at the time of the commission of the crime"],

and (421(a)(6) [threatened or dissuaded witnesses, suborned perjury]; but most do not. And many are phrased in rather vague terms [e.g., "great violence", "particularly vulnerable" victim, or defendant "took advantage of a position of trust"], which makes them hard to defend against.

Can a defendant charged with aggravating circumstances, especially those which do not correspond to any crime or enhancement in the Penal Code, demur to the accusatory pleading on the grounds that the "element" of the crime is not stated in the Penal Code, and that the defendant (who committed his crimes prior to the amendment to section 1170) had no notice that the type of conduct alleged could subject him or her to a higher punishment? And can appellate counsel then defend against the upper term imposed along the same grounds?

In a certain sense, this is akin to an "ex post facto law" which makes something criminal which was not criminal before, or increases punishment beyond what it was when the crime was committed. You could do it, but in my estimation, it doesn't have a great chance to succeed because at the time the crime was committed, the upper term was the maximum punishment, and the same aggravators, found by a court based on a preponderance, could have justified the upper term.

Okay, what about this one? Can you demur to an accusatory pleading on the grounds that the particular aggravators are so vague as to fail to give notice of the conduct prohibited? In theory, yes. (See, e.g., *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 269-270 [due process requires a criminal statute to be definite enough to (a) provide a "standard of conduct for those whose activities are proscribed" and must establish "a standard for police enforcement and for ascertainment of guilt"].) This could work with some aggravators; but bear in mind that early in DSL, the same type of challenge was made to the some of the same aggravators as Rules of Court, with courts construing these provisions in a manner so that they were not impermissibly vague. (See, e.g., *People v. Smith*

(1979) 94 Cal.App.3d 433, 435-436 ["particularly vulnerable" not vague].)

However there may be some help here, oddly enough, from the California Supreme Court in its post-*Cunningham* jurisprudence. In *People v. Sandoval*, *supra*, 41 Cal.4th at p. 840, the Court ordered remand for a post-*Cunningham* hearing, applying harmless error analysis under *Chapman* – more on this subject in a bit – and acknowledged that the determination by a jury of many enumerated aggravators "at issue in a particular case rests on a somewhat vague or subjective standard . . .", and specified that the aggravator at issue in that case, a "large" quantity of contraband, is vague and subjective. (See also *People v. Wilbur*, 2007 Cal. App. Unpub. LEXIS 8796 at *20 [applying the same standard to conclude there is similar vagueness and subjectiveness "about the jury's potential assessment of whether "'[t]he manner in which the crime was carried out indicates planning, sophistication, or professionalism . . .' (Rule 4.421[(a)](8))."[9]

It seems to me that the same vagueness and uncertainty which provided the basis for remand in the above cases could provide the basis for a demurrer, and/or an appellate challenge of "void for vagueness" about aggravating circumstances.

This type of challenge could be even better where, as the Rules of Court allow, a prosecutor charges an aggravating circumstance which is not enumerated in the Rules of Court. (See, e.g., Rule 4.408(a) [trial judge can consider non-enumerated factors related to decision made], *People v. Weber* (2013) 217 Cal.App.4th 1041, 1064-1065 [proper to consider non-enumerated factors in selecting upper term].) This is all the more reason why aggravators must both be "pled" as well as proven, and should be subject to challenge for vagueness as a further lack of due process notice to the defendant.

d. **What About Aggravating Circumstances Based on Prior**

[9] This unpublished case is cited here not as authority, but merely to suggest to you that an issue like this may be up for grabs.

Convictions or Facts "Related to" Prior Convictions?

The jury trial right under amended section 1170(b) has one specified limitation, allowing the court to "consider the defendant's prior convictions in determining sentencing based on a certified record of conviction without submitting the prior convictions to a jury." (§ 1170(b)(3).) What does this mean, and how far does it go?

Plainly, the "fact of" a prior conviction – Mr. Defendant was convicted in 2015 for mopery, established by a certified record – can be used as an aggravator without any jury findings. But this exception is itself subject to two important qualifications. First, section 1170 still precludes the use of a prior conviction as an aggravating circumstance when the same conviction is being used to enhance sentence (§ 1170(b)(5)), although the rules permit a prior conviction to be used to impose an upper term where the enhancement punishment is stricken. (Rule 4.420(g).)

The second limitation is one that will be familiar to the fans of *Descamps*, *Mathis*, and *Gallardo*. The prior conviction exception should plainly only apply to the "fact of" the prior conviction, and the elements of the prior crime, and should not include other recidivism facts, which encompasses nearly all of the aggravating "Factors relating to the defendant" listed in Rule 4.421(b), e.g., "violent conduct that indicates a serious danger to society," numerous or increasingly serious prior convictions, defendant on probation when current crime committed, or poor performance on probation. The one exception might be having served a prison or county jail term per section 1170(h) (Rule 4.421(b)(3)), which could be established by the records of conviction.[10]

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[10]There is, of course, an ironical twist here; with the demise of prison priors as a separate basis for enhancement under section 667.5(b), the same prison prior can come back to bite the defendant and lead to an upper term, which will often increase punishment more than the one-year for the prison prior.

Beyond that, though, the prior conviction exception should not allow courts to make findings about "recidivism facts" which typically provide a basis for upper terms, such as poor performance on parole or probation, "numerous" or "violent" pattern of prior criminal conduct, etc. One recent case suggests agreement with this premise, at least in *dicta*. In *People v. Flores* (2022) 75 Cal.App.5th 495, the court's opinion suggests that facts such as a defendant being on probation when the crime was committed, and prior poor performance on probation could not properly be considered without them being stipulated to or found true beyond a reasonable doubt, but then finds any such error to be harmless beyond a reasonable doubt because a jury could have found *at least one* of the aggravators to be true. (*Id*., at p. 500.) *Flores* cites *People v. Towne* (2008) 44 Cal.4th 63, a post-*Cunnningham* but pre-*Descamps* California Supreme Court case, which concludes that there is a very limited universe of recidivism issues which might require a jury trial. In my view, *Descamps* and *Gallardo* alter this.

The point is particularly cogent when the recidivism factor involves a qualitative determination, such as one that prior crimes are of "increasing seriousness," are "frequent," or involve "great violence,", or that prior performance on probation or parole were "poor." Documents regarding the prior crimes can't prove these judgment type of calls. Thus, I suggest that as to recidivism facts which go beyond the "fact of" a prior conviction and its elements, or other facts which can be determined based on records of conviction (e.g., serving a prison term, defendant was on probation when current offense committed) should give rise to a jury trial right.

e. What happens Where a Defendant Stipulated to a Particular Term as Part of a Plea Bargain?

Now comes trouble. And it's trouble that will apply to other new laws that apply by virtue of *Estrada* to convictions on appeal. There's this terrible and often incomprehensible dichotomy in California law between two lines of authority

regarding the interaction of changes in the law, which apply retroactively under *Estrada*, or because of an intervening court decision, and a conviction which was plea bargained.

On the one hand, there is *Doe v. Harris* (2013) 57 Cal.4th 64, 73-74, which holds that a plea agreement is deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy . . .", from which it follows that "requiring the parties' compliance with changes in the law made retroactive to them does not violate the terms of the plea agreement. . . ." This authority holds that "the failure of a plea agreement to reference the possibility the law might change" does not "translate into an implied promise the defendant will be unaffected by a change in the statutory consequences attending his or her conviction. To that extent, then, the terms of the plea agreement can be affected by changes in the law." (*Ibid*.)

On the other hand, the courts have held that because the application of a change in the law to a sentence which was specifically agreed to as part of a plea requires the trial court to exercise its plenary power to "withdraw its approval of a plea agreement bargain" in order to impose a sentence less than that agreed to, the prosecution, who is a party to the plea bargain agreement, has the power to either "agree to modify the bargain" to comport with this modification, or to exercise "the same remedy as the defendant – withdrawal of assent to the plea agreement." (*People v. Stamps* (2020) 9 Cal.5th 685, 707.) Put another way, a negotiated plea is, in essence, a contract between the prosecutor and the defendant to which the court agrees to be bound. (*Id.*, at p. 701; *People v. Shelton* (2006) 37 Cal.4th 759, 767.) "When a guilty [or no contest] plea is entered in exchange for specified benefits such as the dismissal of other counts or an agreed maximum punishment, both parties, including the state, must abide by the terms of the agreement." (*People v. Segura* (2008) 44 Cal.4th 921, 930-931.)

But it gets worse. Other cases have held that where a judge imposed an upper term pursuant to a negotiated disposition, there was no occasion to exercise discretion, and thus no violation of the jury trial right. (*People v. Mitchell* (10-3-2022) 83 Cal.App.5th 1051, 1059.) Our clients will also be accused of "trifling with the courts" for trying to renegotiate their plea deal. (See, e.g., *People v. Brooks* (2020) 58 Cal.App.5th 1099, 1103-1104.) The upshot of this interpretation is worse than *Stamps*, because there is no error and no remand with a chance for a lower sentence.

Mind you, this situation should be limited to one where the plea bargain specified a *particular* sentence, and not a range of punishment. (See, e.g., *People v. French* (2008) 43 Cal.4th 36, 49 [noting, in holding that a defendant whose plea agreement included a sentence range was entitled at a sentencing hearing to litigate matters relating to the trial court's choice of sentence because "defendant did not agree that a specified sentence would be imposed"].) If an argument for remand and resentencing based on imposition of an upper term is made in the context of a plea bargained sentence for a range of punishment, and the remedy, a middle term being imposed, fits within the sentencing range, under a case like *French* this should not present a problem under *Stamps* or *Segura*.

f. **Okay Wise Guy, What Prejudice Standard Applies?**

How does a reviewing court decide whether to send back an upper term case for remand and new sentence proceedings, including a potential jury trial on aggravators? The case law makes clear that *Apprendi* error, or *Cunningham* error, is not structural error, but is subject to federal constitutional harmless error analysis, which looks to see whether such error is "harmless beyond a reasonable doubt." (*Washington v. Recuenco* (2006) 548 U.S. 212.). Indeed, in *Sandoval*, the California Supreme Court itself applied this standard to *Cunningham*. (*Sandoval*, *supra*, 41 Cal.4th at p. 838.) The difficulty lies in the articulation of this standard

in the context of California determinate sentencing law. To understand the problem, a bit of a trip back in time to sentencing error under the good-old DSL is required.

In the non-constitutional context of DSL sentencing error, California courts applied a variant of the *Watson* test, holding that where there is sentencing error, remand is required if there is a "reasonable probability of a more favorable outcome on remand." (See, e.g., *People v. Avalos* (1984) 37 Cal.3d 216, 233.) But in the context of error concerning aggravating circumstances, courts construed this agreed-upon standard in very different ways.

Many courts took the draconian position that no remand is required so long as there is at least one valid aggravating circumstance remaining, reasoning that since this was sufficient to support an upper term, it negated the need for remand. (See, e.g., *People v. Osband* (1996) 13 Cal.4th 622, 728-729 [consecutive sentences], *People v. Butler* (2004) 122 Cal.App.4th 910, 920 [upper term].) Other courts poked holes in this prejudice analysis, reasoning that an appellate court would only be speculating if it assumed that a single aggravator is enough to find the error harmless, particularly where mitigating circumstances are arguably present. In fact, this is how the correct application of the *Watson* test to DSL sentencing error was described by the Supreme Court in *Avalos*, citing previous authority for the proposition that a court must reverse for sentencing error "where it cannot determine whether the improper factor was determinative for the sentencing court." (*Avalos*, *supra*, at p. 233.) As appellate attorneys, the former approach always seemed to be both unfair and wrong. It was one thing to say, as these courts did, that it took only one aggravator to be found true to uphold an upper term sentence. But unless there was something in the record to indicate that the court which relied on a number of aggravating circumstances to impose an upper term would have likely imposed an upper term if only one aggravator was present, it seemed utterly speculative to assume the court would have exercised its

discretion the same way with only one valid aggravator, particularly when mitigators were present.

When our Supreme Court considered the prejudice question in the context of *Cunningham* error, it took up the theme of the "one aggravator is enough" faction to find any *Cunningham* error to be harmless in two cases, decided on the same day, *Sandoval* and *People v. Black* (2007) 41 Cal.4th 799 (*Black* 2). *Black 2* held that "the existence of a single aggravating circumstance is legally sufficient to make the defendant eligible for the upper term . . .", such that constitutionally deficient findings of additional aggravating circumstances by the sentencing court did not "increase the maximum punishment" for the defendant's offense and therefore do not violate *Apprendi*. (*Id*., at p. 813.) Taking this one step further, in *Sandoval* the Court concluded that if "a single aggravating circumstance" would unquestionably have been found by the jury, any further finding of aggravating circumstances by the sentencing court is harmless. (*Sandoval*, *supra*, 41 Cal.4th at p. 839.)

Although the *Sandoval* holding was questionable for the reasons the same court explained two decades earlier in *Avalos*, many recent cases considering a similar issue have simply regurgitated this holding from *Sandoval*, and applied it to the question whether remand is required based on the *Estrada* application of the changes of law to section 1170 requiring jury findings of aggravating circumstances beyond a reasonable doubt. For example, in *Flores*, *supra*, 75 Cal.App.5th 495, the First District held that "if a reviewing court concludes, beyond a reasonable doubt, that the jury, applying the 'beyond-a-reasonable-doubt standard, unquestionably would have found true at least a single aggravating circumstance had it been submitted to the jury,' the error is harmless." (*Id*. at p. 501; accord, *People v. Salazar* (2020) 80 Cal. App. 5th 453, 465.)

Other courts have wisely taken a more cautious approach. The Fourth District in *People v. Lopez* (2022) 78 Cal.App.5th 459 (review pending, S274856)

(Lopez) espoused a two-part test. The first relevant question in determining whether prejudice resulted from the trial court's failure to apply the amended version of section 1170, subdivision (b), is whether the reviewing court can conclude that *all* of the aggravating factors on which the trial court relied on in exercising its discretion to select the upper term are true beyond a reasonable doubt. If the answer is "yes," then the defendant has not suffered prejudice. But, if the answer is "no," the reviewing court must consider a second question, i.e., whether it can be certain that the trial court would have selected the upper term if it had recognized that it could rely on only a single one of the aggravating factors, a few of the aggravating factors, or none of the aggravating factors, rather than all of the factors on which it had relied. (*Ibid*.; see also *People v. Zabelle* (July 11, 2022) 80 Cal. App. 5th 1098.) [harmless error analysis always requires an inquiry under *Watson* before a finding of harmlessness can be reached].)

As often happens when there is such a split, some courts will look to both standards for guidance. In *People v. Dunn* (2022) 81 Cal.App.5th 394 [grant and hold, 10-12-22], the Fifth District found the appropriate standard to lie somewhere between those articulated in *Flores* and *Lopez:*

> 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).

(*Id.* at pp. 409–410.)

Are we confused yet? I am. Fortunately, the Supreme Court has granted review to decide this issue. (See *People v. Lynch*, S274942, rev. gtd. 8-10-2022, and numerous cases with "grant and hold" orders behind *Lynch*.) However, I close this discussion by referring you to an excellent separate opinion by Justice Liu, concurring in the denial of review by the Court in *Flores*, which will provide you with ample grounds for arguing, pending the Supreme Court's decision in *Lynch*, that the *Sandoval* standard should no longer be applied. (*People v. Flores* (6-15-2022), 2022 Cal. LEXIS 3127 at *1 - *3, conc. stmt. by Liu, J.)

After summarizing the holding in *Sandoval*, Justice Liu notes that it's "one aggravator is enough" standard "was based on our interpretation of the language of the determinate sentencing law as it existed at the time, which specified that the middle term shall be imposed "unless there are circumstances in aggravation . . .," leading to the conclusion in *Black*, that "the existence of a single aggravating circumstance is legally sufficient to make the defendant eligible for the upper term. . .", such that "findings of additional aggravating circumstances by the sentencing court do not increase the penalty for the defendant's offense and therefore do not violate *Apprendi*. (Black, at p. 813.)" From that conclusion, *Sandoval* held that so long as "'a single aggravating circumstance" would unquestionably have been found by the jury, any further finding of aggravating circumstances by the sentencing court is harmless. (*Sandoval, supra*, 41 Cal.4th at p. 839.)"

Justice Liu then notes that the language of amended section 1170 "now says that a sentence higher than the middle 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." (Pen. Code, § 1170, subd. (b)(2), italics added.)

> As a result of this change, it may no longer be true that "the existence of a single aggravating circumstance is legally sufficient to make the defendant

> eligible for the upper term." (Black, supra, 41 Cal.4th at p. 813.) Instead, it appears a defendant is subject to an upper term sentence only if the aggravating circumstances are sufficient to "justify the imposition" of that term under all of the circumstances, which may include evidence both in aggravation and in mitigation. (Pen. Code, § 1170, subd. (b)(2); see, id., subd. (b)(4).)

Noting the current split of authority discussed above, Justice Liu opines that "[i]n an appropriate case, I suggest revisiting our decisions in *Black* and *Sandoval* in light of the changes to the determinate sentencing law." Hopefully, this will happen in *Lynch*. In the meantime, we will continue to argue against the "one aggravator is enough" standard as contrary to proper harmless error analysis.

2. **Lower Term Presumptions: AB 124, § 1170(b)(6)**

AB 124 does something that no previous version of DSL has ever done. It creates a statutory presumption in favor of a *lower term* when certain specified *mitigators* are present, and narrowly limits the situation where a trial court can override this presumption. Here is the precise wording of the statute, which will be important for the discussion that follows.

> (6) Notwithstanding paragraph (1) [presumptive middle term], and 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, the court shall order imposition of the lower term if any of the following was a contributing factor in the commission of the offense:
>
> (A) The person has experienced psychological, physical, or childhood trauma, including, but not limited to, abuse, neglect, exploitation, or sexual violence.
>
> (B) The person is a youth, or was a youth as defined under subdivision (b) of Section 1016.7 at the time of the commission of the offense.
>
> (C) Prior to the instant offense, or at the time of the commission of the offense, the person is or was a victim of intimate partner violence or

human trafficking.

(§ 1170(b)(6), as amended by AB 124.)[11]

There are a number of novel, interesting, and unresolved issues concerning this new provision, a few of which I will discuss below, with my suggestions about how to argue the issues when they come up.

a. **How Are the Statutory Mitigators to Be Proven?**

Nothing in paragraph (6) describes how a defendant can put forward these mitigating factors. Plainly, there is no requirement of any finding by a jury. Presumably, this means that they can be proven in the traditional manner that "sentencing facts" can be proven to a court, by a preponderance of evidence through any kind of "reliable evidence." (See, e.g., *McMillan v. Pennsylvania* (1986) 477 U.S. 79 [sentencing factors need not be proven to a jury beyond a reasonable doubt; preponderance standard is adequate]; see also, e.g., *People v. Arbuckle* (1978) 22 Cal.3d 749, 755, 150 Cal. Rptr. 778, 587 P.2d 220 [probation report inherently reliable], but also *People v. Williams* (1990) 222 Cal.App.3d 911, 914-918, 272 Cal. Rptr. 212 [multiple hearsay statements in probation report too unreliable].

Obviously, some factors – e.g., the defendant's age when the crime was committed ((b)(6)(B) – will be established from court records. Others, such as intimate partner violence or human trafficking ((b)(6)(C), may come out in a trial, or be recounted in the probation report. But most of the time, this factor, as well as childhood trauma ((b)(6)(A)), will have to be demonstrated by some type of evidence presented in connection with sentencing hearings. But the allowance for reliable hearsay means that it will typically be sufficient to present affidavits, or

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[11]And just so it's clear that paragraph (6) does not provide the *only* basis for imposing a lower term, paragraph (7) of subdivision (b) provides that "Paragraph (6) does not preclude the court from imposing the lower term even if there is no evidence of those circumstances listed in paragraph (6) present."

even letters to the court or counsel, attesting to these facts, as well as the type of "social history" documentation which are typically put forward in mitigation statements.

b. **Resolving Factual Disputes: Evidence Code section 402?**

What is less clear is what happens if the triggering fact – e.g., that defendant is victim of intimate partner violence – is disputed. Is this going to be situation where both sides present their own versions of this, including reliable hearsay, and the sentencing judge makes a credibility determination? Or is there, implicitly, a right to a hearing, with the rules of evidence applicable, as will be required to prove aggravators, when a triggering mitigating factor is contested by the prosecution?

It seems to me that Evidence Code section 402, which requires a hearing when any "preliminary fact' in a case is disputed, may be invoked in this situation to demand a hearing, subject to the rules of evidence. This would make any court determination subject to more careful review on appeal.

c. **Okay, let's get real crazy here: Does the *mandatory* nature of the sentence reduction phrasing trigger a kind of *Apprendi* situation, such that the prosecution has the burden to prove the absence of the mitigating fact beyond a reasonable doubt?**

Okay, you knew I'd come up with something like this somewhere in this article. Let's assume that the defendant stabbed her late husband to death, and pleads to voluntary manslaughter. She presents evidence at sentencing that she was a victim of intimate partner violence from her husband, the victim in the crime. The prosecutor disputes this, contending that defendant was the abuser.

Since the mitigating fact put forward by the defense creates a presumed lower term, under *Apprendi/Cunningham*, must the prosecutor prove, beyond reasonable doubt, the negative, i.e., that she was not the victim of intimate partner violence, in order to get around the presumption in favor of the lower term?

Put another way, who is the onus of proof on as to these facts? All that the statute says is that the lower term presumption applies "if any of the following [specified mitigators] was a contributing factor in the commission of the offense . . . ." My assumption all long, as suggested above, has been that this is a classic *McMillan* "sentencing fact" which must be presented by the proponent and proven by a preponderance of evidence. But *Apprendi* and *Cunningham* changed that rule where the "sentencing fact" at issue amounted to an increase in the presumptive statutory maximum. For the manslaughter crime described above, with the factor put forward by the defense, intimate partner violence added into the mix, arguably the "statutory maximum" would be the *lower term* for voluntary manslaughter, 3 years, which is a big difference from the middle term, 6 years. (See § 193.) Isn't this the flip side of *Apprendi* itself, which held that the crime committed by the defendant in that case, with the "hate crime" enhancement added in, is for 6th and 14th Amendment purposes, a new crime with a maximum punishment that's greater than the maximum for the crime on its own? Isn't the provision at issue here a kind of "mandatory minimum" term, and thus , in effect, a "maximum sentence" for the crime of voluntary manslaughter committed by a person who is a victim of intimate partner violence by the decedent?

Of course, if I'm right, this would require the prosecution to prove, beyond a reasonable doubt, that the defendant was not a victim of intimate partner violence which "was a contributing factor" in the crime committed. But requiring the prosecution to *disprove* a fact, or to prove a negative, is nothing new in the criminal law, and is required with respect to the absence of heat of passion or the absence of imperfect self-defense as the line between murder and manslaughter, and the absence of self-defense as to justification of murder or an assaultive crime. (See, e.g., *Mullaney v. Wilbur* (1975) 421 U.S. 684, 701-702.)

Okay, I think I've made my point here. A longshot, to be sure, but arguable.

d. **Overcoming the Presumption.**

The next challenge from the statute involves the provision that permits the trial court to conclude that a lower term is not justified because the aggravators outweigh the mitigators, such that the lower term would not be in the interest of justice. (§ 1170(b)(7).) I have identified four potential issues from this part of the statute.

i. **One or Two Elements, or an Alternative?**

If you're like me, you hate it when a statute uses bad syntax that makes it hard to understand. So what can I say about this part of paragraph (b)(7)? The lower term gets 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. . . ."

In the most obvious reading of the statute, which, in my reading inserts the word "such" into the phrase – so that it would read ""unless the court finds that the aggravating circumstances outweigh the mitigating circumstances [such] that imposition of the lower term would be contrary to the interests of justice. . . ." – is that the court can only determine "that the lower term would be contrary to the interest of justice" *if* "the aggravating circumstances outweigh the mitigating circumstances . . . ." That's my operative assumption. This would mean that a trial court can't just say that the lower term sentence would not be in interest of justice unless it can explain how the aggravators outweigh the mitigators.

Another, even more favorable reading to our side would be that the missing word is not "such" but "and"; i.e., the proper way to read this provision is that the court must impose the lower term " unless the court finds that the aggravating circumstances outweigh the mitigating circumstances [and] that imposition of the lower term would be contrary to the interests of justice. . . ." I like that reading; it requires a separate determination of both.

The third, least favorable reading is that the missing word is "or", meaning that the lower term should be imposed "unless the court finds that the aggravating circumstances outweigh the mitigating circumstances [or] that imposition of the lower term would be contrary to the interests of justice. . . ." If I'm the prosecutor, I am going to argue that this is the intended meaning here, which would explain why there are two separate provisions stated, either of which negate the presumption in favor of the lower term.

The legislative history, insofar as I can discern it, pretty strongly suggests that the first reading is correct. For example, the statements made in connection with the "Concurrence in Senate Amendments" made in the Assembly Floor Analysis of September 24, 2021 – the last word from the Legislature on AB 124 – supports this interpretation, and actually provides a bit more "Oomph" to the standard. It describes the requirement for imposing the lower term as controlling "unless the court finds that the aggravating circumstances *so far outweigh* the mitigating circumstances that imposition of the lower term would be contrary to the interests of justice. . . ." (Comments to Assembly Floor Analysis of 9-24-21, No. 2.)[12]

ii. ***Apprendi* (Again)?**

If the above standard applies, and following the *Apprendi* analysis advancedin Part c above, is the court's decision that the aggravators outweigh the mitigators itself subject to the *Apprendi* right to proof beyond a reasonable doubt of any fact that increases the maximum punishment? It should be because it increases the maximum punishment, as explained above. 'Nuff said.

iii. **If a Triggering Mitigator is Present, But the Aggravators Outweigh the Migitators, What is the Presumptive Term?**

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[12]Found at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220AB124.

Middle or Upper?

The next question to consider is: What sentence is the court supposed to impose if it concludes that the aggravators outweigh the mitigators, such that a lower term is not compelled?

In the typical, pre-amendment situation, this same conclusion would permit imposition of the upper term. Assuming, under the new scheme, that the aggravators were pled and either proven to a jury or admitted, is an upper term *permitted*? Arguably not. If the premise, "aggravators outweighing mitigators", would normally turn a *presumptive middle term* into an upper term, when, under 1170(b)(7), there's a *presumptive lower term* because of evidence of one or more of the super-mitigators listed in that paragraph, shouldn't the court's conclusion that the aggravators outweigh the mitigators mean that the *middle term* must be imposed?

The amended statute is silent on this subject, but it is a logical inference. At a minimum, it gives rise to a strong argument that the middle term should be imposed, since the Legislature has clearly given great weight to the enumerated mitigators which, if present, turn a normative middle term into a lower term. At a minimum, counsel should argue that in this situation, imposition of an upper term in any sentencing hearing where one of the super-mitigators has been demonstrated requires a *separate* statement of reasons above and beyond the required conclusion that the aggravators outweigh the mitigators, since it is a new sentencing choice.

iv. **Is there a right to jury trial, and proof beyond a reasonable doubt, on aggravators if they only turn a presumptive lower term into a middle term?**

Presumably, there is going to normally be a trial, or at least a right to trial, as to any charged aggravators, so this question may not arise. But does the jury trial right, including proof beyond a reasonable doubt, apply to aggravators used to rebut the lower term presumption of 1170(b)(7), even if the end result is a middle

term? It should, by parity of reasoning, or based on the *Apprendi* analysis described above.

Plainly, though, this is not required under the plain language of subdivision (b). So this could arise as a *constitutional* issue in this situation.

d. **Final Word on SB 24 & Lower Term Presumption**

This is a whole new ballgame; I have come up with some ideas about how this will work in practice, and what arguments can be made. But this is classic situation where we have to argue by analogy and get creative. So let's keep those new ideas coming.

3. **Amendment to Section 654 Amendment (SB 518)**

As you all know (or should know), section 654 provides a broad protection against imposition of more than one sentence for multiple crimes based on the same act, or on an indivisible course of conduct. Under its provisions, a court must impose sentence on one of such crimes, and then "stay" sentence on any others.

The way section 654 was originally written did not state anything about whether there was any requirement that a greater sentence be imposed, with a lesser sentence stayed. The controlling case law concluded from this that courts retained discretion to impose sentence on the greater or lesser crimes when section 654 applied. (*People v. Salazar* (1987) 194 Cal.App.3d 634.) During the latter part of the Bad-Old Days discussed above, the Legislature torpedoed this interpretation by amending section 654 to require that the defendant "shall be punished under the provision that provides for the longest term of imprisonment. . . ." (Former § 654, as amended by Stats 1997 ch 410 § 1 (SB 914).)

SB 518 flips the script, and expressly modifies section 654 to codify the holding in *Salazar*. The amended provision states that when a defendant is convicted of multiple offenses controlled by section 654, he or she " may be

punished under either of such provisions. . . ." The legislative history makes this change clear: "This bill allows a criminal act that is punishable in different ways by different provisions of law to be punished under any of those provisions, rather than requiring the provision that provides for the longest potential term of imprisonment." (Senate Floor Analysis, 8-18-21, "Digest.")

The change is straightforward. Judges are empowered to impose any sentence under section 654, and need not defer to the one with the greater punishment. I have one creative suggestion about how to interpret this provision. But first, a couple of obvious points.

a. **It applies to non-final convictions under *Estrada*.**

See *People v. Sek*, *supra*, 74 Cal.App.5th at p. 673.

b. **Beware of the Stipulated Sentence as Part of a Plea Bargain!**

See discussion in previous section.

c. **Won't Courts Just Impose the Greater Sentence Anyway? Is there Any Restriction on the Exercise of Discretion?**

Unfortunately "Yes" to the first question, but emphatically "Yes!" to the second; or so says I. Of course trial courts are going to do what they are accustomed to do, which is to impose the greater punishment, even if able trial counsel urges them to do otherwise. But I do believe there is some limit on their ability to do this. This is because decision whether to impose a greater or lesser punishment under amended section 654 is a "sentencing choice," which, arguably, must be subject to requirement of an on-the-record statement of reasons.

To get there requires a two-part analysis. First, this decision is clearly a "sentence choice" under CRC Rule 405(9), which is defined as "the selection of any disposition of the case that does not amount to a dismissal, acquittal, or grant of a new trial."

The next question is whether it's the type of sentence choice in which a

statement of reasons is required. Here's the applicable rule, Rule 4.406(b)

> (b) **When reasons required**
>
> Sentence choices that generally require a statement of a reason include, *but are not limited to*:
>
> (1) Granting probation when the defendant is presumptively ineligible for probation;
>
> (2) Denying probation when the defendant is presumptively eligible for probation;
>
> (3) Selecting a term for either an offense or an enhancement ;
>
> (4) Imposing consecutive sentences;
>
> (5) Imposing full consecutive sentences under section 667.6 (c) rather than consecutive terms under section 1170.1 (a), when the court has that choice;
>
> (6) Waiving a restitution fine;
>
> (7) Granting relief under section 1385; and
>
> (8) Denying mandatory supervision in the interests of justice under section 1170(h)(5)(A).

The selection of which punishment to impose, the greater or the lesser, when section 654 applies is closely akin to the categories where "statements of reasons" are required described in subparagraphs (3) through (5) above – selecting a term, imposing consecutive sentences, or imposing full consecutive terms – in that they each involve a discretionary determination whether to impose a higher punishment. Thus, it would seem to be the type of "sentence choice" implicitly intended to require a statement of reasons.

Rule 4.406(b), by its terms, does not limit its applicability to the specified situations. Rather, it says that the requirement of a statement of reasons applies in the specified instances, but is "not limited" to those instances. And the case law here is pretty good.

In the leading case, *People v. Belmontes* (1983) 34 Cal.3d 335, our Supreme Court required a separate statement of reasons, beyond that required for imposition of consecutive sentences, for a court's decision to impose *full term* consecutive

sentences under the discretionary provisions of section 667.6(c), basing this on the fact that this is a "separate and distinct decision." (*Id*., at p. 348.) The key holding in *Belmontes* explains that the rule requiring a statement of reasons recognizes that "[d]efendants are entitled to sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court. " (*Id*., at p. 348, fn. 8.) As the court in *People v. Brandt* (1987) 191 Cal.App.3d 143 put it, "By requiring an articulation of reasons for the trial court's sentencing choices, the trial court is forced to meaningfully weigh its decision to impose a particular sentence and to show its awareness of the different factors and rules which bear upon its decision." (*Id*., at p. 143.)

This reasoning applies strongly to newly bestowed (or reinstated) discretion to impose any term under section 654. This decision impacts a defendant's sentence; indeed, in some instances, it could be the difference between a life sentence and a determinate term – e.g., a case where a defendant is convicted of both premeditated attempted murder – which carries a life sentence – and assault with a deadly weapon – punishable by 2, 3, or 4 years – as to the same act and victim. Surely a court must be required to articulate its reasons for imposing the lengthier sentence, just as it must for imposing an upper term, a consecutive sentence, or a full consecutive sentence.

There does not appear to be any case law on this specific point, so go out there and make some!

4. **Amendments to Section 1385 re: Dismissal of Enhancements, SB 81**

Maybe the biggest bombshell of the 2022 changes in sentencing law was the amendment to section 1385 regarding enhancements. I will try to cover some of the issues here, but can't possibly anticipate all of them.

a. **Applicability to Appeals From Sentences Predating the Amendment.**

I will start by recapping a point summarized above: that while the express terms of SB 81's amendments to section 1385 state that it does not apply to sentencing hearings which precede its operative date – the type of "savings clause" which negates *Estrada* limited retroactivity (*People v. Buycks* (2018) 5 Cal.5th 857, 881) – where a defendant is entitled to resentencing for any other reason, they will get the benefit of the amendments to section 1385 at the resentencing hearing.

This conclusion, which the cases have so far agreed with (see *Sek*, *supra*, 74 Cal.App. at p. 674 – and my own unpublished decision in the *Cortez* case, where the court asked me to file a supplemental letter brief on this topic)[13], is based on the plenary nature of any resentencing hearing. (See, e.g. *People v. Walker* (2021) 67 Cal.App.5th 198, 201 ["where trial court conducted a resentencing to correct one sentencing enhancement while letting stand another enhancement that had become incorrect, we reverse and remand for a plenary resentencing."].) As our Supreme Court explained in *Buycks*, "when part of a sentence is stricken on review, on remand for resentencing 'a full resentencing as to all counts is appropriate, so the trial court can exercise its sentencing discretion in light of the changed circumstances.'" (*Buycks*, *supra*, 5 Cal.5th at p. 993, quoting *People v. Navarro* (2007) 40 Cal.4th 668, 681.)

b. **How strong is the statutory language here? And are any of the provisions *mandatory*?**

i. **The odd pattern of the statutory language: mandatory (with exceptions), followed by directory (with strong language favoring dismissal), then mandatory in certain specifics.**

Before doing any analysis, let's look at the peculiar phrasing of the amended statute, which seemingly moves from mandatory to directory and then

[13] I was not going to bring it up, figuring it was safer to raise it in the trial court.

back to mandatory as to certain specified provisions. We will start with the common understanding that, at least typically, "the word 'shall' means that something is mandatory." (*People v. Standish* (2006) 38 Cal.4th 858, 859.) "Indeed, 'the presumption [is] that the word "shall" in a statute is ordinarily deemed mandatory… .'" (*Ibid*.) The rule, of course, is subject to exception where legislative history, or the context of the statute, suggests otherwise. (See, e.g., *People v. Lara* (2010) 48 Cal.4th 2216, 227.) But there does not seem to be any reason to think the Legislature intended its use of "shall" in this SB 81 in anything other than its ordinary meaning.

The first provision of subdivision (c) states, in rather bold, near-mandatory language, that "*Notwithstanding any other law*, the court *shall dismiss* an enhancement if it is in the furtherance of justice to do so, except if dismissal of that enhancement is prohibited by any initiative statute." (§ 1385(c)(1).)[14]

The next paragraph, (c)(2), mentions the specific list of mitigators included in the statute, and then states, in directory but strong language, that the court "shall give great weight" to the enumerated factors, and then again states that the presence of the enumerated factors "weights greatly in favor of dismissing the enhancement . . .", with the specified exception for a situation where doing so would "endanger public safety," which it then defines as a finding of "a likelihood

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[14] Please note the disconnect between the first and last phrase of this sentence. "Notwithstanding any other law" is a phrase which is interpreted as meaning that the provision to come overrides any other laws and their limits or duties. (See, e.g., *People v. Fuentes* (2016 1 Cal.5th 218, 227.) Thus here, it would appear to override any other provision of law which precludes dismissal of an enhancement when doing so would be in furtherance of justice. But the final phrase makes an exception for a provision from an *initiative* measure which prohibits dismissal of an enhancement under section 1385. Plainly, this would appear to apply to special circumstance allegations, which cannot be dismissed based on the language of Proposition 115. (See, e.g,. *People v. Mora* (1995) 39 Cal.App.4th 607, 614-615), and to One-Strike allegations (Proposition 83, 2006). Thus, we can say that the term "notwithstanding any other law" refers only to statutes, not initiative measures restricting section 1385 discretion.

that the dismissal of the enhancement would result in physical injury or other serious danger to others." Strong words, "great weight," but not a mandatory duty.

When we then turn to the enumerated mitigators which "weigh[] greatly in favor of dismissing the enhancement . . .", we see that the Legislature again included the usually-mandatory term "shall" in two of them, but not in the rest; thus where "[m]ultiple enhancements are alleged in a single case . . .[,] all enhancements beyond a single enhancement *shall* be dismissed. (§ 1385(c)(3)(B), emphasis added). Likewise, where "[t]he application of an enhancement could result in a sentence of over 20 years . . ., the enhancement *shall* be dismissed." (*Id.,* (3)(C).)

How do we interpret these confusing provisions?

ii. Overall provision: must dismiss *if* court concludes its in the interest of justice.

The overriding import of paragraph (1), I suggest, means a "change in the goalposts," as it were for dismissal of enhancements. Under the previous law, a court *had the authority* to dismiss an enhancement if it was in furtherance of justice, but was plainly not *required* to do so. My view of the change here is that the Legislature is now saying that *if* dismissal of an enhancement fits within that broad rubric of "in furtherance of justice," a court *must* dismiss the enhancement. I'm not sure this changes much in practice, since a court retains broad discretion to determine whether something is in furtherance of jusice, but it gives us something to argue as appellate lawyers if a court declines to dismiss an enhancement and the totality of circumstances suggests it was in furtherance of justice to do so.

iii. ". . . great weight" and "weighs greatly in favor. . ."

The strongly worded directory language of paragraph (2) of section 1385(c) creates, I believe, a kind of *presumption* in favor of dismissal of an enhancement unless public safety is endangered. This, I think does not modify the provision of

the proceeding paragraph which makes it mandatory to dismiss an enhancement if in furtherance of justice, but perhaps *modifies* "furtherance of justice" to mean, at least in part, a finding that dismissal of the enhancement would not "likely" result in physical injury or danger to another person.

In interpreting this "dangerousness" provision, advocates for the defendant, in the trial court or on appeal, should point out that a consideration of danger to others must take into account the length of the sentence imposed without the enhancement, such that the risk of danger must be weighed in terms of when the client would likely be released. (See, e.g., *People v. Garcia* 20 Cal.4th 490, 500 [a proper assessment of dangerousness in a *Romero* motion takes into account the length of the sentence and age of client at the time of release].)

iv. More Mandatory Language: Multiple enhancements & those resulting in a 20-plus year sentence "shall be dismissed."

These provisions are somewhat devilish in their phrasing, for a number of reasons. The first question is whether the unqualified mandatory phrasing of these provisions means that the limits discussed above – "in furtherance of justice", and "endanger public safety" – no longer apply. One tool of statutory construction suggests that this should be so. Generally speaking, when interpreting a statute, "the specific controls over the general." (*Estate of Kramme* (1978) 20 Cal.3d 567, 576; *People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 637.) Does that mean that a court must always dismiss all-but-one enhancement in a case? Even, for example, where there are multiple victims for whom, let's say, great bodily injury or firearm enhancements are alleged? I can't see the courts agreeing to this, but it does seem to be what the plain language of the statute calls for.

Realistically, I see, at least as to the "multiple enhancement" provision, the "shall dismiss" language being interpreted as providing a *stronger* requirement for dismissal if it is in the interest of justice and does not compromise public safety,

but as not necessarily requiring mandatory dismissal.

The "more than 20 years" provision requires a different approach. At a minimum, it calls for great scrutiny of any enhancement provisions which lead to a sentence over 20 years – particularly where it is the enhancement or enhancements that send an under-20-years sentence into the over-20-years category. At a minimum, we can argue that this provision gives rise to a presumption that any sentence imposed in excess of 20 years which includes enhancements should be knocked down to 20 years or less in furtherance of justice.

That's the best I can do with that one.

c. What is "an enhancement" under § 1385(c)? Does it include "Strikes" or "One Strike" allegations?

I am going with a "Yes" and "No" answer to the foregoing: yes as to Three Strikes prior allegations (tentatively), but No as to One Strike allegations.

This is another very sticky area. As to the Three Strikes law, the impediment is decades of case law holding that three strike allegations are not "enhancements," but a separate punishment provision that controls over the usual provisions of section 1170 et., seq. For example, courts have held that for purposes of the "dual use of facts" prohibition regarding enhancements and upper terms in the rules of court, "the Three Strikes law is an alternative sentencing scheme, not an enhancement. . . ." (*People v. Cressy* (1996) 47 Cal.App.4th 981, 991; see also *People v. Fuller* (2006) 135 Cal.App.4th 1336, 1343 [applying same reasoning to One-Strike law sentence].)

However, it must be recognized that the courts have held that section 1385 applies generally to *any* allegation which increases sentences, including three-strike allegations (see, e.g., *Romero* (*People v. Superior Court (Romero*) 13 Cal.4th 497.) This suggests that the Legislature could have well intended the "enhancement" language of amended section 1385(c) to apply to these types of allegations.

A further tantalizing tidbit in terms of this important question of interpretation can be found in the provision in subdivision (c)(1) which precludes application of the changes of law at issue here to "dismissal of an enhancement prohibited by any initiative measure."

As far as I am aware, there have never been any *traditional* enhancement whose dismissal was prohibited by an initiative measure. Proposition 8 did not preclude dismissal of serious felony priors. (See, e.g., *People v. Williams* (1986) 180 Cal.App.3d 57; the Legislature later precluded this, a prohibition which has now been reversed.)

My reading of this provision is that it is intended to preclude use of SB 81 to dismiss special circumstance allegations, which are precluded by Proposition 115, and "One Strike" allegations, where dismissal is precluded by Proposition 83 in 2006. If that is so, the Legislature must have intended the general language of SB 81 to apply broadly to all punishment enhancing provisions which are subject to being stricken under section 1385, but to exclude special circumstance and One Strike allegations, the dismissal of which are precluded by an initiative. This distinction matters because, if I am right about this, the rules regarding enhancements set forth in SB 81 would apply to "strike" charges, and would provide strong ammunition for *Romero* motions. The statutory construction argument we would make about this is that the inclusion of the language foreclosing the amendment from applying to a law where 1385 discretion was proscribed by an initiative measure must have had some meaning – and not have been mere surplusage – which means the Legislature necessarily meant the term "enhancement" in SB 81 to apply broadly to any pleadings which have the result of enhancing punishment for a crime. (See *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1038-1039 ["avoid surplusage" maxim of statutory interpretation].)

As a final point favoring the interpretation that SB 81 applies to strike

allegations, take a look at the mitigating factor described in section 1385(c)(3)(G): "The defendant was a juvenile when they committed the current offense or *any prior juvenile adjudication* that triggers the enhancement or enhancements applied in this case." Looking to the latter factor – the defendant "was a juvenile when they committed . . . any prior juvenile adjudication that triggers the enhancement . . applied in this case . . ." – this can only refer to a "strike" prior. A juvenile prior can never be a serious felony, or a prison prior; but it can be a strike if the defendant was over 16 when he committed the crime, and it is both a serious felony and a Welfare & Institutions Codes section 707(b) offense. (See, e.g., *People v. West* (1984) 154 Cal.App.3d 100, 106 [juvenile adjudication for serious felony did not support enhancement under Prop. 8 for one " 'convicted of a serious felony'; see § 1170.12, subd. (b)(3) [describing juvenile prior strike].) The Legislature plainly must have intended some consequence by including enhancement based on prior juvenile adjudications, because of the rule of statutory construction, noted above, that all provisions of a statute should have meaning, which, as noted above, disfavors any interpretation which renders a particular provision to be surplusage. (*Tuolumne Jobs, supra*, 59 Cal.4th at pp. 1038-1039.) From this it must be inferred that the Legislature intended "enhancements" to include allegations of strike priors.

For now, until case law holds otherwise, I'm sticking with that interpretation, and urge trial and appellate lawyers to argue that the provisions of amended section 1385(c) apply to Third Strike allegations. As to One-Strike allegations, it will take an initiative measure to get rid of this prohibition.[15]

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[15]I would be happy to draft such an initiative, and to include in it a provision to repeal the Truth in Evidence Provisions of Proposition 8, a provision eliminating residential burglaries from the list of crimes described as serious felonies, and while we're at it, a provision overruling *In re Milton* (2022) 13 Cal. 5th 893 by declaring that *Descamps* and *Gallardo* apply retroactively to final judgments, and establishing a petition process for prisoners to challenge old strike priors which violate these 6th Amendment

Ultimately, even if we do not prevail in this interpretation, we can make the argument, in the context a *Romero* motion, or appellate review of denial of such a motion, that the specified mitigators in subdivision (c) still deserve "great weight" as factors favoring exercise of discretion because of the way the Legislature singled them out for particular consideration as to traditional enhancements. For example, if the issue in your case is the court's refusal to dismiss a juvenile prior strike allegation, the language of section 1385(c)(3)(G) quoted above provides a strong directive that the Legislature disfavors using such a prior to enhancement a sentence under any provision of law.

5. **Prison Priors, Resentencing Under § 1172.75 (SB 483)**

As a parting shot, I will briefly look at an issue that is now before me as appellate counsel, which was ably raised by Brian Mathews of the Santa Clara County Alternate Defender Office.

Under section 1172.75, anybody currently serving a prison sentence for a crime where an enhancement had been imposed for a prison or drug prior, can petition for resentencing to have that prior dismissed, and for resentencing that includes "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, subd. (d)(2).)

A question has arisen as to whether entitlement to resentencing under this provision only applies where a term of punishment for the enhancement was imposed by the court, but not "stricken" by the court at the time of sentencing. This matters because, as most of you know, it has been a fairly common practice for trial courts, especially when imposing lengthy sentences with other recidivism components (e.g., strikes, serious felony priors), to strike the punishment for prison

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principles. (I can dream, can't I?

priors. Where a court took this action, does this preclude a defendant from seeking resentencing under section 1172.75?

Brian Mathews's excellent briefing, which I will borrow from generously on appeal, points to legislature history of the provision which suggests it is directed broadly to persons in custody for a sentence where the "judgment includes a prison prior"; since the typical way prison priors are stricken is by striking *the punishment*, but not the enhancement itself, the defendant in that situation is, in fact, serving a sentence where the judgment includes a prison prior.

If this issue has arisen in one of your cases, either in the trial court or on appeal, or you are considering assisting a client with a petition pursuant to section 1172.75, I can share Brian Mathews briefing with you, as well as my own when I have prepared it.

CONCLUSION

Here's hoping that this excursion into the dark past and brighter present of determinate sentencing law has been helpful to you. Please feel free to get in touch with me if any of the issues raised in this article concerning the new sentencing laws – as well as the many which I have no doubt missed – come up in your cases.