IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION TWO

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| PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>[redacted]<br><br>Defendant and Appellant. | [redacted]<br><br>(Los Angeles County Superior Court<br>[redacted]) |

Appeal from Judgment of the Superior Court of the State of California for the County of Los Angeles

[redacted]

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**APPELLANT'S OPENING BRIEF**

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| PEOPLE OF THE STATE OF CALIFORNIA, [redacted]<br><br>Plaintiff and Respondent,<br><br>v.<br><br>[redacted]<br><br>Defendant and Appellant. | (Los Angeles County Superior Court [redacted]) |

## APPELLANT'S OPENING BRIEF

## INTRODUCTION

[redacted] was entitled to a full resentencing after this Court reversed various gang-related allegations and a special circumstance in his first appeal. [redacted] [1] During the resentencing proceedings on remand, however, the trial court deprived Mr. [redacted] of

[1] This Court reversed allegations that the offenses were committed for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)), that a principal discharged a firearm causing great bodily injury (Pen. Code, § 12022.53, subds. (d) and (e)(1)), and a special circumstance that alleged the murder was committed to further the activities of a criminal street gang (Pen. Code, § 190.2, subd. (a)(22)). (1CT:42–44, 47–48.) Throughout this brief, the gang-related allegations and special circumstance are referred to, collectively, as the "gang enhancements."

constitutional and statutory rights to which he was entitled. The court sentenced Mr. [redacted] to die in prison for an offense that occurred when he was 18 years old, and for which he was not the actual killer, without any confidential communication with or meaningful assistance from his attorney. For the following reasons, the judgment must be reversed and the matter remanded to the superior court for a new hearing.

First, the court denied Mr. [redacted] his right to counsel when it conducted two hearings in counsel's absence, and then denied counsel's request for a continuance at the third and final hearing—her first appearance in the case—before counsel had a confidential call with Mr. [redacted] The court's denial prevented counsel from speaking confidentially with Mr. [redacted] before or at the resentencing. This forced counsel's nonparticipation in the proceedings, and turned the resentencing into a perfunctory exercise. The court's error, of constitutional magnitude, requires reversal without an analysis of prejudice. Division Seven of this Court recently addressed a case in which the same trial judge had presided, and the Court reversed the judgment based on nearly identical conduct. (See *People v. Grajeda* (2025) 111 Cal.App.5th 829 (*Grajeda*).)

Next, even if this right-to-counsel violation did not require it, reversal would be required because the court abused its discretion by denying defense counsel's continuance request under Penal Code[2] section 1050, without complying with the procedural

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[2] Further unspecified statutory references are to the Penal Code.

requirements of the statute. The record shows that counsel did not have a confidential means of communicating with Mr. [redacted] during the resentencing hearing, and counsel's need to discuss the case with Mr. [redacted] was good cause to continue the matter. But the court interrupted counsel before she finished making her motion and failed to make the findings required by section 1050, subdivisions (d) and (f). This abuse of discretion rendered the proceedings fundamentally unfair and was prejudicial under any standard, requiring reversal.

Additionally, the court imposed sentence remotely, in violation of section 977's mandate that Mr. [redacted] be personally present at the imposition of sentence and in violation of his constitutional right to be present. Though section 977.2 permits remote appearances for people who are incarcerated in state prison, it requires a confidential phone line to permit communication between Mr. [redacted] and defense counsel, and here the record reflects no such confidential means of communication. To the extent Mr. [redacted] was permitted to waive his right to personal presence, the court did not obtain a knowing, intelligent, and voluntary waiver of this right.

Moreover, Mr. [redacted] was sentenced to life without the possibility of parole (LWOP) at his resentencing solely because of the jury's true finding on the drive-by special circumstance. (§ 190.2, subd. (a)(21); 1CT:134–135; 2RT:307–308.) The mandatory imposition of LWOP due to the "drive-by" special circumstance enhancement violates the United States and California Constitutions in two ways. First, there is no rational basis for

distinguishing youthful offenders, like Mr. [redacted] for whom the drive-by special circumstance is found true (§ 190.2, subd. (a)(17)), from those who are convicted of first degree drive-by murder (§ 190, subd. (a)), because the elements are the same. Thus, the mandatory imposition of LWOP for the drive-by special circumstance, but not drive-by murder, violates the Equal Protection Clauses. Next, the mandatory imposition of LWOP on an 18 year old who was not an actual killer, without individualized consideration, violates the prohibition against cruel or unusual punishment under the California Constitution, facially and as applied to Mr. [redacted]

Finally, the record from Mr. [redacted] trial, which this Court previously incorporated by reference, reveals that several in-court actors exhibited bias and used racially discriminatory language. These exhibitions of racial bias violated the California Racial Justice Act (RJA), and they require a remedy under section 745, subdivision (e).

The trial court prevented counsel from raising the above constitutional challenges to the LWOP sentence, and from raising claims under the RJA, by denying counsel's continuance request at her first appearance in the case. Under these circumstances, and in the interests of fundamental fairness and judicial economy, these claims are reviewable on appeal in the first instance because they affect Mr. [redacted] substantial rights.

Accordingly, the constitutional and statutory errors discussed herein require reversal. For the reasons set out in Argument VI.C.1., 2., 3., and 4., Mr. [redacted] asks this Court to "vacate the conviction and sentence, find that it is legally invalid, and order new

proceedings consistent with subdivision (a)" of section 745. (§ 745, subd. (e)(2)(A).) In the alternative, he requests that this Court reverse the judgment and: (1) remand for a full resentencing hearing, at which he must be permitted to raise any challenges to the court's intended sentence and seek relief under any applicable ameliorative legislation, and at which the trial court must impose a sentence based on individualized consideration; (2) direct the trial court to impose a remedy for the RJA violation established in Argument VI.C.5., along with any other RJA claims raised at the resentencing hearing; (3) reform section 3051 to include youthful offenders sentenced to LWOP due to the drive-by special circumstance; (4) direct the trial court to preserve evidence of youth-related mitigation pursuant to *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*); and (5) declare the mandatory imposition of LWOP for an 18-year-old non-killer unconstitutional, facially and as applied to Mr. [redacted]

## FACTUAL AND PROCEDURAL BACKGROUND

In 2019, a jury convicted [redacted] [redacted] of murder (§ 187, subd. (a); count 1) and two counts of attempted murder (§§ 664/187, subd. (a); counts 2 and 4). (1CT:38, 45.) Mr. [redacted] was convicted of these offenses, which occurred just months after he turned 18, as "the driver and not the shooter" during a drive-by shooting. (1CT:131.) The jury also found true allegations that the offenses were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)), and that a principal discharged a firearm causing great bodily injury (§ 12022.53, subds. (d) and (e)(1)). (1CT:45.) As to count 1, the jury found true two special circumstances: first, that the

offense was committed by means of discharging a firearm from a motor vehicle at persons outside the vehicle (§ 190.2, subd. (a)(21)), and second, that the offense was committed to further the activities of a criminal street gang (§ 190.2, subd. (a)(22)). (1CT:45.) The court sentenced Mr. [redacted] to life without the possibility of parole, plus 30 years to life. (1CT:38, 46.)

Mr. [redacted] appealed. (1CT:44.) On appeal, this Court vacated the gang allegations, the gang-related firearms enhancements, and the gang-murder special circumstance in an unpublished opinion. (1CT:42–44, 47–48.) The Court remanded the case to the trial court and permitted the prosecution to retry these enhancements and this special circumstance if they elected to do so. (1CT:42–44, 47–48.)

The first post-conviction hearing in the trial court took place on September 5, 2024. (1ART[3]:3.) Neither Mr. [redacted] nor his counsel were present, and the trial court believed Mr. [redacted] was still represented by his trial counsel, [redacted]. (1ART:3 [court: "For Mr. [redacted] it's [redacted] for defense"].) However, Attorney [redacted] was at some point appointed to represent Mr. [redacted] for the proceedings on remand. (1CT:133.) The Deputy District Attorney informed the court, in Mr. [redacted] and his attorney's absence, that his office did not intend to retry the gang enhancements. (1ART:5.) The court continued the hearing to November 19, 2024, and stated it intended to e-mail trial counsel to

[3] The augmented Reporter's Transcript is referred to as "ART."

determine if the continued court hearing date was "an okay date" for him. (1ART:6.)

At the November 19, 2024, hearing, Ms. [redacted] did not enter an appearance. (2ART:303–308.) Though the court reporter's caption on the transcript of the hearing lists Ms. [redacted] under "appearances," she never verbally entered an appearance, and the transcript makes clear that she was not present when the matter was called by the court.[4] (See 1CT:133; 2ART:303–308.) Nor was counsel present when the Deputy District Attorney again informed the court that his office would not retry the gang enhancements, or when the court stated that the next proceeding would be a resentencing. (2ART:303–308.)

During the November 2024 hearing, the court stated its understanding of the scope of the resentencing proceedings as follows: "So it would just be a re-sentencing, but if [sic] it doesn't change the sentence at all, because they just told me to strike it. That's all they said to do on the remittitur. So I can do that." (2ART:306.) The court then continued the hearing, still in counsel's absence, to January 23, 2025. (2ART:308.)

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[4] Where there is conflict between the reporter's transcript and clerk's transcript, the court should "adopt the transcript that should be given greater credence under the circumstances of the particular case." (*People v. Contreras* (2015) 237 Cal.App.4th 868, 880.) Here, the clerk's transcript does not reflect the substance of the hearing aside from the date the hearing was continued to. (1CT:133.) The reporter's transcript, however, reflects the events that occurred during the proceedings, as well as counsel's absence. (2ART:303–308.) Thus, the reporter's transcript should control.

At the continued hearing on January 23, 2025, Ms. [redacted] and Mr. [redacted] both appeared virtually via "Webex." (1CT:134; 2RT:303.) The court told Mr. [redacted] "you have a right to be physically present here in court for this resentencing. But if you are—you are physically present here in court for sentencing, you lose your housing, lose any jobs that you might have. Do you agree this court can proceed with this resentencing today via Webex system?" (2RT:303–304.) Mr. [redacted] replied, "yes, your Honor." (2RT:304.)

The court informed the parties it had sent them a "resentencing graph on how to resentence with vacating the gang and gun allegations."[5] (2RT:304.) Ms. [redacted] told the court that she had not received this graph. (2RT:304.) The court responded, "you don't have to receive what is considered my work product." (2RT:304.)

Ms. [redacted] then informed the court that she had yet to have a confidential call with Mr. [redacted] (2RT:304.) She asked to continue the hearing, and began to say that she needed the call to explain to Mr. [redacted] the prosecution's decision not to retry the gang enhancements. (2RT:304–305.) But before she could finish her sentence, the court interrupted and said, "you just heard they are not retrying the gang allegations. Today was the date of the hearing.

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[5] This Court ordered the record on appeal augmented to include the trial court's resentencing graph. (See No. B344297, May 30, 2025, Augmentation Order.) The superior court clerk did not transmit the resentencing graph. Instead, they filed a declaration attesting that the graph "was not written up per JA." (1ACT:5.) The augmented Clerk's Transcript is referred to as "ACT."

I have no 1050, and what you are requesting is not good cause. The answer is no." (2RT:305.)

After the court denied her continuance request, Ms. [redacted] asked the court take into account its discretion under section 1385.1, and sentence Mr. [redacted] accordingly. (2RT:305.) Ms. [redacted] did not file a statement of mitigation or orally offer any mitigation on Mr. [redacted] behalf. (1CT; 2RT:305–306.) Nor did she raise any legal challenges to the life without parole sentence, or argue the application of ameliorative legislation like the RJA. (See 1CT; 2RT:305–306.) When Ms. [redacted] concluded her comments by stating that she echoed her "previous arguments," the court responded, "there were no previous arguments as to—okay. I understand what you are saying." (2RT:306.) Counsel said a total of just 31 words after the court denied her continuance request. (See 2RT:304–309.)

Prior to imposing Mr. [redacted] sentence, the court indicated that if section 1385.1 became discretionary, it would not strike the special circumstance. (2RT:306–307.) But in making these comments, the court acknowledged that it had not received "any kind of packet that would involve … any kind of factors in mitigation that would involve Mr. [redacted] at the present time." (2RT:306.) Thus, the court was unaware whether any of the "youth or juvenile factors" existed. (2RT:307.)

The court imposed the following sentence: life without the possibility of parole on count 1; life with the possibility of parole on count 2, concurrent to count 1; life with the possibility of parole on

count 4, concurrent to count 1. (1CT:134; 2RT:307–308.) Mr. [redacted] timely appealed.

## STATEMENT OF APPEALABILITY

This appeal is authorized by section 1237, subdivision (a), as an appeal taken from a final judgment.

## ARGUMENT

### I.
### The trial court violated Mr. [redacted] right to the assistance of counsel under the California Constitution and the Sixth Amendment and Due Process Clause of the United States Constitution

After this Court reversed the gang enhancements under Assembly Bill No. 333 (2021–2022 Reg. Sess.) (AB 333), and the prosecution elected not to retry these sentencing enhancements on remand, Mr. [redacted] was entitled to a full resentencing hearing. (See *People v. Mitchell* (2023) 97 Cal.App.5th 1127, 1131, fn. 2.) A resentencing hearing on remand from a direct appeal is a "critical stage" of the criminal process. (*People v. Cutting* (2019) 42 Cal.App.5th 344, 348 (*Cutting*) [a "[s]entencing is considered to be [a] critical stage [citations], and, because the trial has discretion to reconsider the entire sentence on remand, resentencing is another critical stage"].) Mr. [redacted] was therefore entitled to the assistance of counsel at the resentencing proceedings under the California Constitution and the Sixth Amendment and Due Process Clause of the United States Constitution. (*Grajeda*, *supra*, 111 Cal.App.5th at pp. 837–838; Cal. Const., art. I, § 15; U.S. Const., 6th & 14th Amends.)

Mr. [redacted] was, however, deprived of these constitutional rights when the trial court conducted two hearings in counsel's absence, and then denied counsel's request to continue the resentencing at her first appearance in the case. (1ART:3; 2ART:303–308; 2RT:305.) The court's order denying counsel's continuance request prevented counsel from consulting with Mr.

[redacted] at a critical stage of the proceedings and forced counsel's nonparticipation at the resentencing.

The court's order denying counsel's continuance request, after the court conducted two hearings in counsel's absence, was an abuse of discretion because it deprived Mr. [redacted] of his fundamental constitutional rights. (*People v. Fontana* (1982) 139 Cal.App.3d 326, 333 (*Fontana*) ["when a denial of a continuance impairs the fundamental rights of an accused, the trial court abuses its discretion"].) Such an error is presumptively prejudicial and requires reversal. (*Grajeda*, *supra*, 111 Cal.App.5th at p. 841 [prejudice is presumed where an unconstitutional court order impedes counsel in "'rendering assistance of counsel to [their] client"']; *United States v. Cronic* (1984) 466 U.S. 648, 659, fn. 25 (*Cronic*) ["The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding"], citing *Geders v. United States* (1976) 425 U.S. 80 (*Geders*).) Accordingly, Mr. [redacted] asks this Court to reverse the judgment and remand the matter to the superior court for a full resentencing hearing consistent with his right to counsel.

### A. The trial court deprived Mr. [redacted] of his right to the assistance of counsel when, after conducting two hearings in counsel's absence, and before counsel had a confidential call with Mr. [redacted] the court denied counsel's request for a continuance at her first appearance in the case and proceeded to impose sentence

Although a trial court generally has broad discretion in ruling on a continuance motion, the court may not exercise its discretion in a manner that deprives the defendant or their attorney of the reasonable opportunity to prepare. (*People v. Alexander* (2010) 49 Cal.4th 846, 934 (*Alexander*).) This is because "an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel." (*Morris v. Slappy* (1983) 461 U.S. 1, 11–12.) Such insistence on expeditiousness is particularly pernicious in a case like Mr. [redacted] in which the court imposed life without the possibility of parole—the most severe sentence short of death—before Mr. [redacted] had a confidential call with his attorney to discuss his case. (2RT:304–308.)

As discussed below, the trial court's order denying counsel's continuance request at her first appearance impaired Mr. [redacted] fundamental rights under the California Constitution, and the Sixth Amendment and Due Process Clause of the United States Constitution, in two ways. First, the court's ruling prevented counsel from consulting with Mr. [redacted] Next, the court's ruling prevented counsel from meaningfully advocating on Mr. [redacted] behalf.

### 1. The trial court's order denying counsel's continuance request prevented Mr. [redacted] from consulting with his attorney

Mr. [redacted] right to the assistance of counsel at his resentencing hearing guaranteed him the right to consult with his attorney. (See *Geders*, *supra*, 425 U.S. at pp. 88–91; *Perry v. Leeke* (1989) 488 U.S. 272, 284.) Consultation is, in fact, a "basic part" of the right to representation. (*People v. Zammora* (1944) 66 Cal.App.2d 166, 235.) This required the trial court to situate Mr. [redacted] in the courtroom so that he could "freely and uninterruptedly communicate and consult with his attorney" during the proceedings. (*Ibid*.) Remote appearances may be permitted during some criminal proceedings, but counsel must have the ability to communicate confidentially with their client at the hearing. (See § 977.2, subds. (a) & (c); cf. *People v. Whitmore* (2022) 80 Cal.App.5th 116, 125–126 (*Whitmore*) [defendant's remote appearance did not thwart fairness of hearing because he *was* able to confidentially communicate with counsel].)

In *Grajeda*, another division of this Court held that the same trial judge who sentenced Mr. [redacted] to LWOP erred when she refused the defendant's request to postpone his resentencing hearing so that he could speak with his lawyer. (*Grajeda*, *supra*, 111 Cal.App.5th at pp. 839–840.) The error was presumptively prejudicial and required reversal. (*Id*. at pp. 840–842.) The circumstances in *Grajeda* are nearly identical to Mr. [redacted] case.

There, the defendant appeared remotely at a resentencing hearing, and his counsel appeared in person. (*Grajeda*, *supra*, 111

Cal.App.5th at p. 835.) When the court asked Mr. Grajeda if he agreed to appear remotely, he asked to continue the hearing. (*Ibid.*) Mr. Grajeda told the court he needed the continuance to speak with his lawyer about the application of ameliorative legislation. (*Ibid.*)

The court—the same court that sentenced Mr. [redacted] told Mr. Grajeda that the continuance was, "not going to happen here today. There's been ample opportunity, and everybody's here and ready to go, unless there's agreement to a continuance with both counsel." (*Grajeda*, *supra*, 111 Cal.App.5th at p. 835.) Defense counsel indicated that she was ready to proceed with the hearing, but she acknowledged that she had not spoken with Mr. Grajeda. (*Ibid.*) The court then denied the continuance request and resentenced Mr. Grajeda to a life term. (*Ibid.*)

On appeal, *Grajeda* held that when the court failed to postpone the resentencing hearing to allow Mr. Grajeda to speak with his attorney, it deprived him of his right to communicate with counsel under article I, section 15, of the California Constitution, and the Sixth Amendment and Due Process Clause of the United States Constitution. (*Grajeda*, *supra*, 111 Cal.App.5th at pp. 837–843.) Noting that Mr. Grajeda had the right to the effective assistance of counsel at this critical stage of the proceedings, the court held that the trial court abused its discretion because it deprived him of this right. (*Id.* at p. 837.) This error was presumptively prejudicial, and therefore the defendant did not have to demonstrate prejudice on appeal. (*Id.* at pp. 840–842.)

Here, as in *Grajeda,* the record reflects that counsel had "yet" to have a confidential call with Mr. [redacted] (2RT:304–305.)

Counsel had "just heard" the prosecution's election not to retry the gang enhancements, and counsel had not yet confidentially consulted with Mr. [redacted] regarding the case. (2RT:304–305.) The record further demonstrates that counsel could not have confidentially consulted with Mr. [redacted] *during* the hearing because they both appeared virtually. (See 2RT:303–304.) Mr. [redacted] and his counsel were, therefore, prevented from speaking with each other at a critical stage of the proceedings.

Counsel's confidential consultation with Mr. [redacted] could have covered, among other topics, whether arguments could be made regarding the application of ameliorative legislation, whether mitigating circumstances might be presented, whether challenges to the LWOP sentence or arguments for a reduced sentence could be presented to the court, and any other matters relevant to the case.

Nevertheless, the trial court found that counsel's need to communicate with Mr. [redacted] whom she had not had a confidential call with prior to the hearing, was not good cause to support a continuance. (2RT:305.) The court also interrupted counsel before she could make a complete record as to any other circumstances relevant to the continuance request. (2RT:305.) Like the ruling in *Grajeda,* the judge's ruling violated Mr. [redacted] right to consult with his counsel under the California and the United States Constitutions. (See *Geders*, *supra*, 425 U.S. at p. 96 [court impaired defendant's Sixth Amendment right to consult with counsel by precluding consultation during an overnight recess].)

In concluding its opinion, the *Grajeda* court asked: "What good is having an attorney in a criminal case if the court won't let

you speak with her?" (*Grajeda*, *supra*, 111 Cal.App.5th at p. 843.) The axiomatic answer to this question is, categorically, no good at all. Counsel's lack of advocacy at Mr. [redacted] resentencing makes this all the more clear.

### 2. The trial court's order denying counsel's continuance request, after the court conducted two proceedings in counsel's absence, forced counsel's nonparticipation in the proceedings

At all critical stages of the criminal proceedings, including a resentencing hearing, the defendant is entitled to the assistance of counsel. (Cal. Const., art. I, § 15; U.S. Const., 6th & 14th Amends.; *People v. Doolin* (2009) 45 Cal.4th 390, 417 (*Doolin*); *Cutting*, *supra*, 42 Cal.App.5th at p. 348 [a resentencing hearing on remand from a direct appeal is a critical stage]; *Marshall v. Rodgers* (2013) 569 U.S. 58, 62.) A defendant is deprived of counsel when the court conducts critical proceedings without counsel present. (*People v. Rubalcava* (1988) 200 Cal.App.3d 295, 300 (*Rubalcava*) [defendant deprived of his right to counsel where the trial court answered a jury question without counsel present].) And where the denial of a continuance request forces counsel's nonparticipation in a critical stage of the criminal proceedings, the defendant is also denied the assistance of counsel. (See, e.g., *In re Cassandra R.* (1983) 139 Cal.App.3d 670, 676–677 [court deprived the defendant of her right to the assistance of counsel by denying counsel's day-of-hearing continuance request where counsel was unprepared to proceed and did not participate in the proceeding]; *People v. Locklar* (1978) 84 Cal.App.3d 224, 227–229 [court deprived defendant of his right to the assistance of

counsel by denying interim counsel's day-of-trial continuance request where interim counsel was unfamiliar with the case and assigned counsel was ill].)

Here, after this Court reversed the gang enhancements and remanded Mr. [redacted] case, the trial court conducted three hearings. (1ART:3; 2ART:303; 2RT:303.) At the first two hearings, defense counsel was not present when the prosecutor stated his office did not intend to retry the gang enhancements. (1ART:5; 2ART:306.) Mr. [redacted] was also not present at the first hearing. (1ART:3.) The clerk's transcript of these hearings does not include the prosecution's statement that his office would not retry the gang enhancements. (1CT:132–133.)

Notice of the prosecution's decision regarding retrial held significant consequences for Mr. [redacted] because it determined what would happen next: whether the case would proceed to a retrial of the gang and firearm enhancements, or to a resentencing at the next hearing. (*Bell v. Cone* (2002) 535 U.S. 685, 687 (*Cone*) [a "critical stage" is a step of the criminal proceedings that holds "significant consequences for the accused"].) It also determined the enhancements to which Mr. [redacted] could be sentenced and therefore the scope of the resentencing proceedings. Yet, the court conducted the critical proceedings at which this notice was given without counsel present. (1ART:3; 2ART:303–308.)

Moreover, defense counsel's absence at these first two hearings held significant consequences for Mr. [redacted] because it fundamentally impaired counsel's performance at the third and final resentencing hearing. Because counsel was not present at the prior

hearings when the prosecution announced its election regarding retrial, and she had "just heard" the prosecution's decision at the January 2025 hearing, she could not have known the court would resentence Mr. [redacted] that morning, rather than conduct proceedings related to the retrial. (See 2RT:305.) Nor could counsel have anticipated the need to file a written request for a continuance under section 1050, two days in advance of January 23, 2025, when she did not know the resentencing would occur on that date until she appeared virtually in court that morning.

Nonetheless, the court forced counsel to proceed at the final resentencing hearing unprepared, which infringed upon Mr. [redacted] right to counsel. (See *People v. Maddox* (1967) 67 Cal.2d 647, 652 [counsel's ability to prepare is as fundamental as the right to counsel itself].) As part of counsel's duty to perform effectively at Mr. [redacted] resentencing hearing, she was required to pursue the most advantageous sentencing disposition (see *People v. Guevara* (2025) 115 Cal.App.5th 919, 926), including by bringing any available challenges to the sentence the court intended to impose, and by presenting "evidence with respect to mitigation of sentence" (*People v. McGraw* (1981) 119 Cal.App.3d 582, 594, fn. 1). Such mitigating evidence would include circumstances that arose since the initial sentencing, like evidence of positive post-judgment behavior. (*People v. Yanaga* (2020) 58 Cal.App.5th 619, 625 (*Yanaga*).) Counsel should have also been permitted to raise arguments based on ameliorative legislation that has been enacted since the original sentencing. (See *People v. Lopez* (2025) 17 Cal.5th 388, 392–393, 400 (*Lopez*).)

But where, as here, defense counsel does "nothing before, during, or after" the resentencing hearing (*People v. Ruiz* (2023) 89 Cal.App.5th 324, 332 (*Ruiz*)), the defendant suffers the complete absence of the assistance of counsel. For example, in *Ruiz*, defendant's sentence was recalled after the California Department of Corrections and Rehabilitation (CDCR) notified the trial court of a sentencing error. (*Id.* at p. 327.) The court conducted a resentencing hearing, and defense counsel, who was suffering from a brain tumor, filed no documents in the trial court prior to the hearing. (*Id.* at pp. 328, 332.) Nor did counsel make any substantive oral argument on behalf of his client. (*Id.* at p. 328.) Counsel made just nine statements, which totaled 46 words, during the hearing. (*Id.* at p. 332.)

On appeal, the court characterized counsel's representation as "inaction on every front." (*Ruiz*, *supra*, 89 Cal.App.5th at p. 334.) Counsel's failure to advocate on behalf of his client went to the "entirety" of the resentencing proceedings; counsel never challenged the prosecution's evidence that supported imposition of a sentence similar to the one originally imposed, he never presented mitigating evidence, nor did he orally "make any argument at all on behalf" of his client at the hearing. (*Id.* at p. 334.) Thus, in the absence of any advocacy by his attorney, the defendant was left, essentially, "on his own" without the "guiding hand" of the attorney to which he was constitutionally entitled. (*Ibid.;* see also *Cronic*, *supra*, 466 U.S. at p. 658 [the Constitution guarantees "the guiding hand" of counsel].)

Here, as in *Ruiz*, counsel entirely failed to subject the prosecution's case to meaningful adversarial testing. After the trial

court denied counsel's continuance request, counsel made just two statements, totaling 31 words. (See 2RT:305–308.) Counsel's only statements asked the court to exercise its discretion under section 1385.1—a statute that *precludes* the exercise of judicial discretion to strike or stay a special circumstance independent of the underlying conviction. (2RT:305; § 1385.1) This was not meaningful advocacy; indeed, the court recognized as much when counsel later said she wished to "echo the previous arguments," and the court responded: "There were no previous arguments as to—okay. I understand what you're saying." (2RT:306.)

Counsel did not ask the court to exercise its discretion to reduce Mr. [redacted] sentence from first degree murder to second degree murder, which would have vacated the special circumstance by operation of law. (See *People v. Frederickson* (2025) 116 Cal.App.5th 910 [339 Cal.Rptr.3d 674, 678–679] (*Frederickson*) [notwithstanding section 1385.1, the trial court was permitted to reduce a conviction of first degree murder to second degree murder at a resentencing hearing, thereby vacating the special circumstance].)[6] The 31 words she spoke at the hearing were even fewer than the limited statements proffered by defense counsel in *Ruiz*, whom the court found to be completely absent.

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[6] *Frederickson* involved a resentencing proceeding under section 1172.1, a procedure that the trial court was within its discretion to employ within 120 days, or at any time following a change in the applicable sentencing laws, to reduce Mr. [redacted] conviction from first degree murder to second degree murder. (§ 1172.1, subd. (a)(1); *Frederickson*, *supra*, 339 Cal.Rptr.3d at pp. 678–679.)

Moreover, like counsel in *Ruiz*, Mr. [redacted] counsel did not file any documents in the trial court on his behalf. (See 1CT.) The record does not contain a full probation report that could have provided information about Mr. [redacted] and counsel orally proffered no information on his behalf. (See 1CT:35–37; ATCT[7]:73 [clerk's May 10, 2021, certificate attesting to the absence of a probation report].) The trial court noted that it had not received "any kind of packet that would involve … any kind of factors in mitigation" and it was therefore unaware whether any "youth or juvenile factors" existed. (2RT:306–307.)

This was not a case where counsel simply remained silent because she had "nothing to say."[8] (*Ruiz*, *supra*, 89 Cal.App.5th at

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[7] This Court previously incorporated by reference the record from Mr. [redacted] trial. (See May 20, 2025 order incorporating by reference the prior appellate record.) The trial clerk's transcript is referred to as "TCT," the augmented trial clerk's transcript is referred to as "ATCT," and the trial reporter's transcript is referred to as "TRT."

[8] Not only was this not a case where counsel had nothing to say, there is no indication that she would not have investigated and presented all available arguments for a lesser sentence. On December 16, 2025, Mr. [redacted] filed a motion for stay and remand under the procedures authorized by the RJA, and the motion included a declaration from his counsel, [redacted]. ([redacted], Motion for Stay and Remand; Exhibit A.) The contents of Ms. [redacted] declaration confirm what can be inferred from the record: that Ms. [redacted] appeared in court on the morning of January 23, 2025, without having had a confidential conversation with Mr. [redacted] and not knowing that the prosecution did not intend to retry the gang enhancements and that the case would therefore proceed to a resentencing. (2RT 303–305.)

pp. 333–334 [finding counsel ineffective; noting, "[t]his is not a case where counsel was silent because there was nothing to say"].) Mr. [redacted] was 18 years old when the offense was committed, and he was convicted as the driver, rather than the shooter. (1CT:4, 7.) Mr. [redacted] did not have a mother (4TCT:827–830), and he had contemplated suicide, as a teenager, after his arrest (4TCT:835, 837). These facts are evidence of the "factors in mitigation" that the trial court noted were completely absent at the resentencing. (2RT:306.) The mitigation was relevant to the court's discretion under *Frederickson* to reduce the first degree murder conviction to second degree at a resentencing, which would thereby vacate the special circumstance allegation by operation of law. (See *Frederickson*, *supra*, 339 Cal.Rptr.3d at pp. 678–679.) And it should have been considered as part of the court's constitutional duty to impose a sentence based on individualized consideration. (See Argument V., *post*.) Counsel also could have challenged Mr. [redacted] exclusion from youth offender parole on equal protection grounds, as explained below in Argument IV. And more, as set out in detail below in Argument VI., the trial record reveals multiple significant violations of the RJA, which counsel could have raised on remand. (See § 745, subd. (j)(1); *Lopez*, *supra*, 17 Cal.5th at p. 400.)

But by denying defense counsel's continuance request immediately after she learned the prosecution would not retry the gang enhancements, the court limited counsel's ability to perform to that of the "proverbial potted plant." (*People v. Taylor* (1992) 5 Cal.App.4th 1299, 1313.) The court's order prevented counsel from meaningfully advocating on Mr. [redacted] behalf, and left him,

effectively, "on his own," without the "guiding hand" of the attorney he was constitutionally entitled to. (*Ruiz*, *supra*, 89 Cal.App.5th at p. 334; *Cronic*, *supra*, 466 U.S. at p. 658.)

### B. The trial court's infringement of Mr. [redacted] constitutional right to counsel was presumptively prejudicial and requires reversal

Typically, when a defendant asserts they were denied the assistance of counsel, they must show they were prejudiced by their attorney's deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 688 (*Strickland*).) There are, however, circumstances "in which a defendant need not show prejudice to prevail" on such a claim. (*Ruiz*, *supra*, 89 Cal.App.5th at p. 329.) Under the framework established in *Cronic*, *supra*, 466 U.S. at p. 59, and later discussed in the context of sentencing in *Cone*, *supra*, 535 U.S. at p. 685, reversal for a Sixth Amendment violation is compelled without an analysis for prejudice in the following circumstances.

"First and '[m]ost obvious' [is] the 'complete denial of counsel'" at a critical stage of the proceedings. (*Cone*, *supra*, 535 U.S. at p. 695, quoting *Cronic*, *supra*, 466 U.S. at p. 659.) Next, "where counsel is called upon to render assistance under circumstances where competent counsel very likely could not, the defendant need not show that the proceedings were affected." (*Cone*, at p. 696, quoting *Cronic,* at pp. 659–662.) And finally, the presumption of prejudice is required if "'counsel entirely fails to subject the prosecution's case to meaningful adversarial testing.'" (*Cone*, at p. 696, quoting *Cronic,* at p. 659.)

Here, the trial court interfered with Mr. [redacted] right to consult with his attorney under the California and United States Constitutions and prevented counsel from advocating on his behalf. (Cal. Const., art. I, § 15; U.S. Const., 6th & 14th Amends.) In these circumstances, all three exceptions to the prejudice requirement described in *Cronic* and *Cone* are applicable. Thus, for the following reasons, reversal of the judgment is required, "without analysis for prejudice or harmless error." (*People v. Ramos* (2016) 5 Cal.App.5th 897, 910.)

First, defense counsel was *entirely absent* from the first two hearings. (1ART3; 2ART:302–308.) As previously discussed, the notice provided at these hearings carried significant consequences for Mr. [redacted] and counsel's absence from these hearings fundamentally impaired her performance at the third hearing, at which sentence was imposed. Because of counsel's absence at these hearings, she did not know the prosecution had made its election regarding retrial, nor that resentencing would occur at the January 2025 hearing. (2RT 305 [the court to defense counsel: "you *just* heard they are not retrying the gang allegations" (italics added)].) Consequently, counsel had not yet had a confidential call with Mr. [redacted] nor did she file any pleadings on his behalf, offer any mitigating evidence, or make any arguments on the basis of ameliorative legislation—including the arguments under the RJA set out in Argument VI., below. Counsel's complete absence at the first two proceedings, which held such significant consequence for Mr. [redacted] falls under the first prong of *Cronic*.

Next, the court's order denying counsel's continuance request at her first appearance, before she had a confidential call with Mr. [redacted] forced counsel to proceed under circumstances where competent counsel could not provide effective assistance. (See *Cronic*, *supra*, 466 U.S. at pp. 659–662.) When a case is remanded for resentencing after an appeal, the trial court *must* consider circumstances that have arisen since the initial sentencing. (*Yanaga*, *supra*, 58 Cal.App.5th at p. 625; see *People v. Jackson* (1987) 189 Cal.App.3d 113, 119.) But here, because counsel was forced to proceed at her first appearance in the case, before she had a confidential call with Mr. [redacted] she could not present this relevant sentencing information to the court. Ms. [redacted] was not Mr. [redacted] original trial counsel, and under these circumstances competent counsel would not be able to bring the challenges to the sentence discussed below in Arguments IV. and V., or effectively present the RJA claims discussed below in Argument VI. (See *People v. Garcia* (2022) 85 Cal.App.5th 290, 295–298 (*Garcia*) [trial court erred in failing to grant reasonable continuance of resentencing hearing to permit defendant to raise claims under the RJA].)

Finally, because the Court forced counsel to proceed under circumstances where competent counsel could not, she failed to act "in the role of an advocate" and subject the prosecution's case to meaningful adversarial testing. (*Cronic*, *supra*, 466 U.S. at p. 656.) Her failure to meaningfully advocate on Mr. [redacted] behalf was complete and went to the entirety of the resentencing proceedings. Counsel said less than 31 words after the court denied her

continuance request, and her statements did not include a single fact about Mr. [redacted] (2RT:304–308.)

Mr. [redacted] story was left completely untold, and no meaningful argument was made on his behalf. This is particularly problematic in this case because the record does not reflect that the court ordered or considered a supplemental probation report before imposing the sentence. (See *Yanaga*, *supra*, 58 Cal.App.5th at p. 625, fn. 2 [“‘“[t]here may be compelling reasons for ordering a probation report even when the defendant is ineligible for probation. The defendant’s postconviction behavior and other possible developments remain relevant to the trial court’s consideration upon resentencing”’”].)

Mr. [redacted] untold story includes the fact that he was just 18 years old when the offenses were committed, and that the law recognizes that areas of the brain “relevant to judgment and decisionmaking” are still developing at such a young age. (*People v. Hardin* (2024) 15 Cal.5th 834, 846 (*Hardin*), citing Sen. Com. on Public Safety, Rep. on Sen. Bill No. 261 (2015–2016 Reg. Sess.) as amended Mar. 24, 2015, p. 3.) And counsel failed to remind the court that Mr. [redacted] was convicted as the driver and *not* the shooter during the offenses. (1CT:131.) Nor did counsel file or read into the record the transcript of teenage Mr. [redacted] stating, after his arrest, that he couldn’t eat, and that he was going to hang himself, and that he wanted to die. (4TCT:828, 830, 835–837.) Counsel didn’t play the recording of Mr. [redacted] crying as he described his lack of familial support, stating, “I don’t even have a mom.” (4TCT:828;

830.) At no point during the hearing, did counsel even say Mr. [redacted] name. (See 2RT:303–308.)

For this kind of structural error—the same one that occurred in *Grajeda*—Mr. [redacted] need not demonstrate prejudice to prevail because the court's order interfered with his right to counsel under the California and United States Constitutions. (*Grajeda*, *supra*, 111 Cal.App.5th at p. 842, citing *United States v. Triumph Capital Group, Inc.* (2d Cir. 2007) 487 F.3d 124, 131 ["it is well settled that, in the *Geders* context, 'a violation of a defendant's Sixth Amendment right to counsel … constitutes a structural defect which defies harmless error analysis and requires automatic reversal'"].) "[A] contrary rule—requiring [Mr. [redacted] to show prejudice—would require [this Court] to speculate about what [Mr. [redacted] could have said to his attorney, how his attorney would have responded … and whether the court would have been persuaded by it." (*Grajeda*, *supra,* at p. 843.) Under these circumstances, reversal is compelled. (*Ibid.*)

## II.
## The trial court abused its discretion by denying defense counsel's continuance request under section 1050, rendering the proceedings fundamentally unfair in violation of Due Process

Even if the constitutional errors set out in Argument I. did not require it, reversal would be necessary because the trial court abused its discretion when it peremptorily denied counsel's request for a continuance under section 1050. This peremptory denial violated section 1050 because the court did not adhere to the procedural requirements of the statute, and because counsel proffered good cause in support of her motion. The abuse of discretion in ruling on the continuance motion impaired Mr. [redacted] due process rights, and he was prejudiced by the order. Accordingly, the judgment must be reversed.

### A. The trial court abused its discretion when it failed to conduct the proceedings required by section 1050 before denying counsel's request for a continuance

Under section 1050, continuances are granted upon a showing of "good cause." (§ 1050, subd. (e).) A continuance request should be in writing and filed at least two days before the hearing sought to be continued. (§ 1050, subd. (b).) A party may, however, make a continuance request without complying with these written notice requirements. (§ 1050, subd. (c).)

Where a party fails to comply with the written notice procedures required by section 1050, subdivision (b), the trial court shall "hold a hearing on whether there is good cause for the failure to comply with those requirements." (§ 1050, subd. (d).) The court

must make findings whether good cause has been shown, and a "statement of the finding and a statement of facts shall be entered in the minutes." (§ 1050, subd. (d).) If court finds there is good cause for counsel's failure to comply with the notice requirements, the court must then decide whether there is good cause for granting a continuance. (*People v. Harvey* (1987) 193 Cal.App.3d 767, 771 [describing the process required by section 1050, subdivision (d), as a "two-step decision"].)

Here, defense counsel made an oral motion to continue the hearing at the January 2025 resentencing proceeding. (2RT:304–305.) This was counsel's first appearance in the case, and she informed the court that she had not yet had a confidential call with Mr. [redacted] (2RT:305.) Before counsel could finish her sentence, the court interrupted her and denied the continuance motion. (2RT:305.)

In issuing its ruling, the court failed to conduct the hearing required by section 1050, subdivision (d), to evaluate whether good cause supported the absence of a written motion. And by interrupting counsel and failing to inquire into the reasons for the absence of a written request, the court prevented counsel from explaining the circumstances that required her to make an oral motion. (See 2RT:304–305.) Moreover, the court failed to issue a statement of findings related to the good cause requirement, nor were any such findings reflected in the minutes, as required by subdivision (d). (See 2RT:304–305; 1CT:133–136.) Yet, the court expressly relied on the absence of a "1050" to deny counsel's motion. (2RT:305 ["I have no 1050"].)

The record demonstrates that good cause supported counsel's failure to file a written request under 1050. Because counsel was not present when the prosecutor announced his intent not to retry the gang enhancements, she did not know the resentencing would occur at the January 2025 hearing. And because she did not know that resentencing would occur, it is difficult to imagine how she could have prepared and filed, two days in advance of the resentencing, a written request to continue it.

This error in failing to adhere to procedures prescribed by section 1050 was not inconsequential because the court expressly relied on the absence of a "1050" to deny the motion, before it ever inquired into whether good cause supported its absence. (2RT:305.) Moreover, the court's error in disregarding these statutory requirements was compounded by its failure to recognize the good cause that counsel proffered in support of her motion, discussed further below.

### B. The trial court abused its discretion when it denied defense counsel's request for a continuance that was supported by good cause

Continuance motions made under section 1050 should be granted upon a showing of good cause. (§ 1050, subd. (e).) In determining whether a continuance request is supported by good cause, a trial court must consider all "'relevant circumstances of the particular case, "applying principles of common sense to the totality of circumstances[.]"'" (*People v. Kocontes* (2022) 86 Cal.App.5th 787, 870 (*Kocontes*).) Relevant factors include "whether the moving party acted diligently, the anticipated benefits of the continuance, the

burden that the continuance would impose on witnesses, jurors and the court, and whether a continuance will accomplish or hinder substantial justice." (*People v. Reed* (2018) 4 Cal.5th 989, 1004.) In evaluating these factors and determining whether good cause exists, a court's discretion ""'may not be exercised so as to deprive the defendant or his attorney of a reasonable opportunity to prepare.'" [Citation.]" (*Alexander*, *supra*, 49 Cal.4th at p. 934.)

This Court reviews the trial court's ruling on a motion under section 1050 for an abuse of discretion. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037.) Although the trial court's discretion to rule on a continuance motion is "broad" (*ibid.*), it "is not unlimited. 'The discretion of a trial judge ... is subject to the legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown. [Citation.]'" (*Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 355; see *Sargon Enterprises, Inc. v. University of California* (2012) 55 Cal.4th 747, 773 ["To determine if a court abused its discretion, [the reviewing court] must thus consider 'the legal principles and policies that should have guided the court's actions'"].)

Here, the record is limited because the trial court interrupted counsel as she made her continuance motion, and the court denied the motion while counsel was mid-sentence. (2RT:305.) The trial court was not permitted to prevent counsel from making her record "'until reasonable opportunity for appropriate objection or other indicated advocacy ha[d] been afforded.'" (*Cooper v. Superior Court* (1961) 55 Cal.2d 291, 298.) But because of the court's interruption,

counsel was unable to explain the circumstances relevant to her motion and make a complete record.

Nonetheless, the record offers no reasonable basis to deny counsel's continuance request, at her first appearance, before she had a confidential call with her client. What can be gleaned from the record demonstrates good cause to support counsel's motion.

First, the record demonstrates that counsel acted diligently, under the circumstances, in making the request. At the start of the resentencing hearing, upon learning the prosecution's election not to retry the gang enhancements, counsel orally moved for a continuance. (2RT:304–305.) She had not been present at the prior hearings at which the prosecution announced its intent regarding retrial, and therefore the record offers no indication she was aware, prior to the January 2025 hearing, that the prosecution had made its election not to retry the gang enhancements.[9] (1ART:3; 2ART:303–308.) She therefore acted diligently in making her continuance motion at her first appearance in the case.

Moreover, the benefits of a continuance in this case would have been significant. The continuance would have safeguarded Mr. [redacted] right to consult with his attorney and his right to the assistance of counsel. As discussed in Argument I. above, the trial court's continuance denial prevented counsel from communicating with Mr. [redacted] and forced counsel's nonparticipation in the proceedings. When weighed against these substantial constitutional interests, the burden of continuing the hearing—a resentencing

[9] See fn. 8, *ante*.

proceeding, rather than a trial on the substantive offenses or allegations—was minimal. (See 2RT:303–308.)

Finally, the continuance would have accomplished the ends of substantial justice. In *People v. Jacobs* (2007) 156 Cal.App.4th 728 (*Jacobs*), the defendant sought a three-day continuance of his sentencing hearing to accommodate his request to be sentenced by the judge who presided over his trial but was unavailable on the scheduled date of the hearing. (*Id.* at pp. 730, 735.) Defense counsel made the motion orally, on the date of the scheduled hearing, upon learning the trial judge was unavailable. (*Id.* at pp. 731–732.) The court denied the defendant's request, citing administrative concerns relating to overcrowding of the local jail. (*Id.* at p. 733.)

On appeal, *Jacobs* concluded the trial court had abused its discretion in denying the defendant's continuance request. (*Jacobs*, *supra*, 156 Cal.App.4th at p. 735.) This was so even though the defendant did not have the right to be sentenced by the judge who presided over his trial. (*Id.* at pp. 733–734.) *Jacobs* recognized, however, that it is the "strongly preferred procedure" for the judge who presided over the trial to impose the sentence. (*Id.* at p. 738.) Accordingly, the decision to proceed with the sentencing by another judge was "was not in 'conformity with the spirit of the law.'" (*Id.* at pp. 738, 741.) The court therefore held that the denial of the continuance was arbitrary because it defeated "the ends of substantial justice.'" (*Id.* at p. 741.)

Here, counsel proffered even stronger grounds to support her continuance request than counsel did in *Jacobs*. The record does not reflect that counsel had a confidential means of communicating with

Mr. [redacted] at his prison during the hearing, as required by section 977.2, subdivision (c). Counsel's need to confidentially communicate with Mr. [redacted] with whom she had not yet had a confidential call, is not just a "strongly preferred" procedure; it is a right engrained in the California and United States Constitutions.

### C. The denial of counsel's continuance request rendered the proceedings fundamentally unfair, in violation of Due Process

A trial court's denial of a continuance request may be so arbitrary as to violate due process. (*People v. Mungia* (2008) 44 Cal.4th 1101, 1118.) Thus, "[w]here denial of a continuance would result in a manifest injustice, … the policy disfavoring continuances must give way." (*Hamilton v. Orange County Sheriff's Department* (2017) 8 Cal.App.5th 759, 766.)

Here, the court's denial of counsel's continuance request, and the manner in which the court exercised its discretion, can only be described as arbitrary. In denying the request, the court stated: "today was the date of the hearing. I have no 1050, and what you are requesting is not good cause. The answer is no." (2RT:305.) But counsel could not have filed a motion under section 1050 in advance of the hearing because, not having been present at the prior proceedings, counsel did not know that the resentencing would go forward. And the court interrupted counsel before she could offer additional reasons in support of her motion.

More, as discussed in Argument I., the denial of the continuance prevented counsel from communicating with Mr. [redacted] and impeded counsel's ability to prepare for the hearing.

Thus, this erroneous ruling was so arbitrary that it rendered the proceeding fundamentally unfair. (See *Doolin*, *supra*, 45 Cal.4th at p. 450 [denial of a continuance may be so arbitrary as to deny due process].) The order and its pernicious effects defeated the substantial ends of justice, and as discussed further below, the error requires reversal.

### D. The trial court's error in denying counsel's continuance request under section 1050 was prejudicial

Generally, an error that is purely a violation of state law is reviewed for prejudice under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*). Under this standard, the reviewing court asks "whether it was reasonably probable the error affected the outcome of the case." (*Kocontes*, *supra*, 86 Cal.App.5th at p. 889.) But where, as here, a lower court's ruling is so arbitrary as to deny the defendant due process, the error is reviewed under *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*). Under the *Chapman* standard, reversal is required unless the error is harmless beyond a reasonable doubt, and the "burden is on the People, not the defendant, to demonstrate that the violation of the defendant's federal constitutional right was harmless beyond a reasonable doubt." (*Cutting*, *supra*, 42 Cal.App.5th at p. 349.)

Although *Chapman* applies because the court's error deprived Mr. [redacted] of his constitutional rights, reversal is required under either *Chapman* or *Watson*. The denial of counsel's continuance request prevented her from having a confidential call with Mr. [redacted] and forced counsel's nonparticipation in the proceedings.

(See Argument I., *ante*.) Consequently, counsel did not file any documents on Mr. [redacted] behalf prior to the hearing, nor did she make any arguments orally at the hearing. (See 2RT:303–308; 1CT.) Nor did she emphasize mitigating evidence that already existed in the record, such as Mr. [redacted] youth, his role in the offense as the driver and not the shooter, the absence of his mother, or his suicidal ideation after his arrest. (See 4TCT:827–830.)

The absence of this evidence cannot be harmless where it informed the court's perspective. The court expressly noted that it had not received "any kind of packet that would involve … any kind of factors in mitigation" and it was therefore unaware whether any "youth or juvenile factors" existed. (2RT:306–307.) And notwithstanding the special circumstance allegation, the court was within its discretion to reduce the first degree murder offense to second degree murder and vacate the special circumstance as a matter of law at a resentencing. (See *Frederickson*, *supra*, 339 Cal.Rptr.3d at pp. 678–679.) But counsel, who had not yet had a confidential call with Mr. [redacted] did not have evidentiary support to make such a request at her first appearance. (See 2RT:304–305.) Nor could counsel raise the RJA claims that Mr. [redacted] was permitted to raise as part of the resentencing proceedings on remand, or raise legal challenges to the imposition of LWOP on the grounds the sentence was cruel or unusual and violated equal protection. (See Arguments IV., V., and VI., *post*.)

Accordingly, the prosecution cannot meet its burden of proving the errors harmless beyond a reasonable doubt under *Chapman*. And assuming arguendo this Court applied the standard

in *Watson*, there is a reasonable probability that, had the court not abused its discretion by denying counsel's request for a continuance, the result would have been more favorable to Mr. [redacted] The Court should therefore reverse and remand for a full resentencing.

## III.
## The trial court erred in sentencing Mr. [redacted] remotely, without affording him a confidential means of communication with counsel, and in failing to obtain a knowing, intelligent, and voluntary waiver of his right to be personally present

Mr. [redacted] and his attorney both appeared remotely at the January 23, 2025, resentencing, and Mr. [redacted] remote appearance did not comply with the requirements of section 977.2. Absent proper adherence to this statute, the court was not permitted to resentence Mr. [redacted] without his physical presence in court or a valid waiver of that right. While the court elicited Mr. [redacted] agreement to proceed by Webex, Mr. [redacted] did not knowingly, intelligently, and voluntarily waive his right to be present.

### A. Legal background

A defendant has the right to be personally present in the courtroom at his resentencing hearing. (*Cutting*, *supra*, 42 Cal.App.5th at pp. 347–348; see also *E.P. v. Superior Court* (2020) 59 Cal.App.5th 52, 58–59 [right "to be present" means the right to be physically present in the courtroom]; cf. *Whitmore*, *supra*, 80 Cal.App.5th at pp. 125–126 [noting there is little authority on the question whether requiring defendants to appear remotely during the Covid pandemic violated the due process right to presence, but out-of-jurisdiction case law supports the conclusion that such remote appearances are constitutionally permissible].) This right is guaranteed by the Sixth and Fourteenth Amendments of the federal Constitution and article 1, section 15 of the California Constitution.

(*People v. Blacksher* (2011) 52 Cal.4th 769, 798–799; Cal. Const., art. I, § 15 [protecting a defendant's right to "be personally present *with counsel*" (italics added)].) And statutorily, section 977 requires that a defendant in a felony case "shall be physically present … at the time of the imposition of sentence." (§ 977, subd. (b)(1); subd. (c)(1)(E) ["a defendant charged with a felony shall not appear remotely at resentencing, except for postconviction relief proceedings and as otherwise provided by law"].)

Under section 977.2, however, where a person "is currently incarcerated in the state prison," a sentencing hearing may be conducted "by two-way electronic audio[/]video communication between the defendant and the courtroom in lieu of the physical presence of the defendant in the courtroom." (§ 977.2, subd. (a).) But under these circumstances, the statute requires a confidential telephone line between the court and the CDCR institution for "communication between the defendant's counsel in court and the defendant at the institution." (§ 977.2, subd. (c); see *People v. Underwood* (2024) 99 Cal.App.5th 303, 321, fn. 12 [Attorney General conceded that Mr. Underwood's statutory right under section 977.2, subd. (c), was violated when court conducted an evidentiary hearing while Mr. Underwood listened from prison, without a means of confidentially communicating with counsel].)

This court should review Mr. [redacted] challenge to his remote appearance de novo. This is because the interpretation and application of a statutory scheme to an undisputed set of facts is a question of law subject to de novo review. (*People v. Carroll* (2014) 222 Cal.App.4th 1406, 1412.) Constitutional questions, likewise, are

reviewed de novo. (See *People v. Woodward* (2025) 116 Cal.App.5th 379, 395.)

### B. The trial court did not comply with section 977.2, subdivision (c), and failed to obtain a valid waiver of Mr. [redacted] right to be personally present

Here, at the January 2025 resentencing hearing, both Mr. [redacted] and his counsel appeared remotely via Webex. (2RT:303–304.) Because of these dual remote appearances, Mr. [redacted] did not have access to the confidential means of communication required by section 977.2, subdivision (c). Thus, the circumstances of Mr. [redacted] remote appearance did not provide the safeguards required by the statute. Nor did they satisfy the requirements of the California Constitution, which entitles criminal defendants "to be personally present with counsel." (Cal. Const., art. I, § 15.) Mr. [redacted] was not present "with counsel" in any sense; they each appeared remotely and had no means of communicating with one another. Absent proper adherence to section 977.2, the court was not permitted to resentence Mr. [redacted] without his physical presence in the courtroom or a valid waiver of that right. (Cal. Const., art. I, § 15; § 977, subd. (b)(1); § 1193, subd. (a); see also U.S. Const., 6th Amend.)

Although Mr. [redacted] agreed to proceed by Webex, his waiver of his right to be personally present was not valid. (See 2RT:303–304.) Any waiver of this right must be knowing, intelligent, and voluntary. (*People v. Cunningham* (2015) 61 Cal.4th 609, 633 ["As a matter of both federal and state constitutional law … a defendant may validly waive his or her right to be present during

a critical stage of the trial, provided the waiver is knowing, intelligent, and voluntary"].) Mr. [redacted] waiver did not meet this standard: While the trial court emphasized what it predicted Mr. [redacted] would lose if he sought to appear in person (his prison job and housing), it never informed him of what he would lose if he agreed to appear remotely (his right to confidentially communicate with his attorney). (2RT:303–304.) And the court never explained to Mr. [redacted] that he was entitled to a full resentencing hearing, at which the court was required to consider evidence of mitigation, and at which he could have raised legal challenges to his sentence and claims under applicable ameliorative legislation.

These errors affected the outcome of the proceedings and require reversal. This Court should apply the *Chapman* standard because the trial court, without a valid waiver, conducted a critical stage of the proceedings without Mr. [redacted] physically present in the courtroom and in a manner that precluded him from speaking with his attorney. (See Arguments I. and II., *ante*; see also *Chapman*, *supra*, 386 U.S. 18.) Even under *Watson*, however, reversal is required. (Argument II.D., *ante*; see *Watson*, *supra*, 46 Cal.2d 818.) Ms. [redacted] was not Mr. [redacted] attorney during the initial trial proceedings, and therefore she would not have been familiar with the mitigating factors that the court expressly noted were not presented at the resentencing hearing. Mr. [redacted] could not communicate with Ms. [redacted] regarding this mitigation—or anything else—because they did not have a confidential means of communication at the hearing, nor had they had a confidential call before the hearing. For all the reasons set forth above in Argument

II.D., there is a reasonable probability that, had the court not erred by conducting a resentencing that failed to comply with section 977.2 and at which Mr. [redacted] did not validly waive his right to be "personally present with counsel," the outcome would be more favorable to Mr. [redacted]

Thus, this Court should reverse and remand for a full resentencing held in compliance with Mr. [redacted] constitutional and statutory rights to be present.

## IV.
## Denial of the opportunity for youth offender parole based on the drive-by special circumstance violates Equal Protection

Mr. [redacted] was sentenced to LWOP at his resentencing solely because of the jury's true finding on the drive-by special circumstance. (§ 190.2, subd. (a)(21); 1CT:134–135; 2RT:307–308.) Though he had turned 18 only five months before the crime, and though he did not shoot anyone, he is not eligible for youth offender parole under section 3051 because he was sentenced to LWOP. (§ 3051, subd. (h); 1CT:15, 17, 129.)

Mr. [redacted] LWOP sentence violates Equal Protection because the elements of the drive-by special circumstance mandating this sentence (§ 190.2, subd. (a)(21)) are identical to the elements of the drive-by theory of first degree murder ("drive-by murder") (§ 189, subd. (a)), which results in a parole-eligible sentence. A youthful offender convicted of first degree drive-by murder would be sentenced to 25 years to life and would be eligible for youth offender parole, whereas the drive-by special circumstance requires a sentence of LWOP and excludes young adults, like Mr. [redacted] from youth offender parole. (§ 190, subd. (a); § 190.2, subd. (a); § 3051, subds. (b)(3) & (h).) Because there is no rational basis for distinguishing youthful offenders convicted of drive-by murder from youthful offenders convicted of the drive-by special circumstance, section 3051 must be reformed to include individuals in the latter category in order to comport with the Equal Protection Clauses.

## A. Legal background

### 1. Standard of review

Appellate courts review de novo the constitutionality of a statute, including claims challenging the statute on equal protection grounds. (*Vergara v. State of California* (2016) 246 Cal.App.4th 619, 642; *People v. Briscoe* (2024) 105 Cal.App.5th 479, 487 (*Briscoe*).)

### 2. The relevant sentencing scheme and eligibility for youth offender parole under section 3051

Generally, a conviction for first degree murder "results in a life sentence with parole eligibility after 25 years." (*Hardin*, *supra*, 15 Cal.5th at p. 859.) When a special circumstance under section 190.2, subdivision (a), has been found true, however, the penalty is LWOP. (§ 190.2, subd. (a).) These special circumstances are intended to apply only in "circumstances that make a murder particularly egregious," because the resultant sentence "is the most severe sentence of imprisonment in California." (*Briscoe*, *supra*, 105 Cal.App.5th at pp. 487–488.)

Under the youth offender parole statute (§ 3051), a youthful offender[10] who has been sentenced to 25 years to life is eligible for a parole hearing after 25 years. (§ 3051, subd. (b)(4).) This statute was enacted in 2013 in response to "a series of court decisions identifying Eighth Amendment limits on the sentencing of juvenile offenders." (*Hardin*, *supra*, 15 Cal.5th at p. 843.) The cases recognized that

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[10] A youthful offender is someone, like Mr. [redacted] who was under 26 years of age at the time of the controlling offense. (§ 3051, subd. (a)(1).)

"juvenile offenders are 'constitutionally different' from adult offenders for purposes of criminal sentencing." (*Id.* at p. 844.) But section 3051 categorically precludes eligibility for youth offender parole where a person has been sentenced to LWOP, if the offense occurred after the person reached the age of 18. (§ 3051, subd. (h).)

### 3. The Equal Protection Clauses require a rational basis for government action that fails to treat similarly situated individuals alike

The Equal Protection Clause of the Fourteenth Amendment is "'essentially a direction that all persons similarly situated should be treated alike.'" (*Hardin*, *supra*, 15 Cal.5th at p. 847, quoting *Cleburne v. Cleburne Living Center, Inc.* (1985) 473 U.S. 432, 439 (*Cleburne*).) At its core, the clause "'ensures that the government does not treat a group of people unequally without some justification.'" (*Hardin*, at p. 847, quoting *People v. Chatman* (2018) 4 Cal.5th 277, 288.) Article I, section 7 of the California Constitution likewise guarantees equal protection of the law.

Absent a suspect classification, such as race, or a fundamental right, the "'general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.'" (*Hardin*, *supra*, 15 Cal.5th at p. 847, quoting *Cleburne*, *supra*, 473 U.S. at p. 440.) But an enactment must be struck down if an equal protection challenger demonstrates that "'there is no "rational relationship between the disparity of treatment and some legitimate governmental purpose."'" (*Hardin*, at p. 839, quoting *People v. Turnage* (2012) 55 Cal.4th 62, 74.)

### B. Excluding individuals from youth offender parole due to the drive-by special circumstance (§ 190.2, subd. (a)(21)) violates Equal Protection

In *Hardin*, the California Supreme Court rejected an equal protection challenge brought by a youthful offender who argued that the Legislature had no rational basis to distinguish youthful offenders sentenced to LWOP, like himself, from youthful offenders sentenced to a lengthy indeterminate term, or even to the "functional equivalent of life without parole." (*Hardin*, *supra*, 15 Cal.5th at p. 858.) The Court held that "[b]y excluding persons sentenced to life without parole from youth offender parole proceedings, the Legislature exercised its prerogative to define degrees of culpability and punishment by leaving in place longstanding judgments about the seriousness of these crimes and, relatedly, the punishment for them." (*Id.* at p. 853.) But the Court explicitly held open "the possibility of … as-applied challenges to the statute[.]" (*Id.* at p. 839.)

In *Briscoe*, *supra*, 105 Cal.App.5th at p. 479, the Court of Appeal addressed such an as-applied challenge. It held that section 3051 must be reformed to include youth offenders who were sentenced to life without parole under section 190.2, subdivision (d), for murder during a robbery or burglary. (*Briscoe*, *supra*, at p. 495.) This was because the law irrationally distinguished offenders convicted under two statutes that employed the same standard of liability. (*Id.* at pp. 494–495.)

In reaching its conclusion, *Briscoe* noted that section 3051 offers the opportunity for parole to youth offenders convicted of first degree felony murder under section 189, subdivision (e)(3), while

excluding those sentenced for special circumstance felony murder under section 190.2, subdivision (d). (*Briscoe*, *supra*, 105 Cal.App.5th at pp. 492–493.) Because the two statutes employ the same standard of liability, there is no rational basis for allowing youth offenders convicted under one statute the opportunity for parole, while denying that opportunity to youth offenders convicted under the other. (*Id.* at p. 490 [reforming section 3051 because it contributed to "an irrational distinction between equally culpable youth offenders seeking parole that the Legislature did not contemplate"].) The distinction "'"do[es] not reflect a thoughtful effort to distinguish between different offenses"' but is an unconsidered result of the interaction between the relevant statutes." (*Id.* at p. 493, quoting *People v. Fisher* (2021) 71 Cal.App.5th 745, 758.)

So too here. The elements of first degree drive-by murder under section 189, subdivision (a), and of the drive-by murder special circumstance under section 190.2, subdivision (a)(21), are the same. The drive-by theory of first degree murder requires the prosecution prove that the "murder … is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death." (§ 189, subd. (a).) The drive-by special circumstance applies when "[t]he murder was intentional and perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person or persons outside the vehicle with the intent to inflict death." (§ 190.2,

subd. (a)(21).)[11] The elements of drive-by murder under section 189, and the drive-by special circumstance under section 190.2, reflected in the jury instructions below, are the same.

| CALCRIM 521<br>(Drive-by murder) | CALCRIM 735<br>(Special Circumstance) |
|---|---|
| 1. He/she shot a firearm from a motor vehicle; AND<br>2. He/she intentionally shot at a person who was outside the vehicle; AND<br>3. He/she intended to kill that person | 1. He/she shot a firearm from a motor vehicle; AND<br>2. He/she intentionally shot at a person who was outside the vehicle; AND<br>3. At the time of the shooting, he/she intended to kill |

This Court has, in fact, acknowledged that the drive-by special circumstance "is defined in the same terms as the third category of first degree murder defined in section 189." (*People v. Rodriguez* (1998) 66 Cal.App.4th 157, 164.) And drive-by murder, as defined by section 189, subdivision (a), is not included in the list of

[11] Not only are the statutory elements the same; the jury instructions in Mr. [redacted] case make clear that there is no daylight between first-degree drive-by murder and murder with a drive-by special circumstance. The instructions the jury received were essentially the same: each contained the element that the defendant shot a firearm from a motor vehicle, intentionally, at a person outside the vehicle, and that he intended to kill that person. (5TCT:962, 969 [CALCRIM 521]; 5TCT:970, 977 [CALCRIM 735].)

felony murder offenses for which liability may attach when the defendant acts with reckless indifference to human life. (*People v. Chavez* (2004) 118 Cal.App.4th 379, 385–387.) Rather, drive-by murder requires the intent to kill, which is a "mental state that felony murder does not require." (*Id.* at p. 386.) Likewise, the drive-by special circumstance also requires the intent to kill. (§ 190.2, subd. (a)(21) [defendant must act "with the intent to inflict death"]; CALCRIM 735 [at the time of shooting, defendant must have "intended to kill"].) Thus, the mental states are the same.

Here, as in *Briscoe*, "[t]he disparate treatment of offenders who committed murder per these identical provisions … cannot reflect any difference in culpability." (*Briscoe*, *supra*, 105 Cal.App.5th at p. 492.) Because neither differences in culpability, nor any other conceivable basis, support the exclusion of individuals convicted of the drive-by special circumstance under section 190.2, subdivision (a)(21), from youth offender parole, this Court should hold that their exclusion violates equal protection and reform section 3051 to reflect this holding.

### C. The claim is reviewable on appeal

Constitutional challenges that raise pure questions of law may be raised for the first time on appeal. (*People v. Anderson* (2024) 104 Cal.App.5th 577, 583–584 (*Anderson*); *In re Sheena K.* (2007) 40 Cal.4th 875, 888.) Such is this case here; Mr. [redacted] equal protection challenge to the denial of youth offender parole for those convicted of a drive-by special circumstance is purely a question of law, based on undisputed facts.

Moreover, claims that affect a person's substantial rights and go to the overall fairness of the proceeding are reviewable on appeal. (*People v. Anderson* (2020) 9 Cal.5th 946, 962–963 (*Anderson*).) As discussed in Argument I., the trial court violated Mr. [redacted] Sixth Amendment rights when it denied defense counsel's continuance request at her first appearance. The court's ruling effectively prevented counsel from raising constitutional challenges to the sentence, or requesting to preserve evidence of youth-related mitigation under *Franklin*, *supra*, 63 Cal.4th 261, because the record demonstrates counsel could not know that the sentencing would go forward the morning of the January 2025 hearing. Fundamental fairness dictates that Mr. [redacted] should be able to raise constitutional challenges on appeal when the trial court's conduct prevented him from raising these claims in the superior court in the first instance.

Finally, this Court should address Mr. [redacted] constitutional challenge in the interest of judicial economy. If the legal question is left unanswered, Mr. [redacted] may raise this claim in a motion to preserve evidence of youth-related factors under section 1203.01. (See *People v. Sands* (2021) 70 Cal.App.5th 193, 201–202.) But the trial court will be left without guidance as to Mr. [redacted] eligibility under the statute. An order denying a motion for a *Franklin* hearing is appealable (*Sands,* at p. 200), and therefore, if left unresolved, this claim may be back before the Court.

### D. Conclusion

After *Briscoe* found an equal protection violation under circumstances similar to Mr. [redacted] case, the court then "consider[ed] the proper remedy, … attempting to select the one the Legislature would prefer." (*Briscoe*, *supra*, 105 Cal.App.5th at p. 495.) The court concluded that reform of section 3051 to include youth offenders sentenced to LWOP based on a statutory provision duplicated by a first degree murder theory was appropriate. (*Ibid.*)

This Court should do the same here. In addition, as in *Briscoe*, the Court should remand with directions to afford Mr. [redacted] a *Franklin* hearing so he may present evidence of youth-related mitigation for the purpose of an eventual parole hearing under section 3051. (*Briscoe*, *supra*, 105 Cal.App.5th at pp. 495–496.)

## V.
## The mandatory imposition of LWOP for an 18 year old who was not an actual killer, without individualized consideration, violates the United States and California Constitutions, facially and as applied to Mr. [redacted]

Mr. [redacted] who had turned 18 only five months before the offense he was convicted of aiding and abetting, was sentenced to a mandatory term of LWOP due to the drive-by special circumstance finding. (1CT:15, 17, 134–135.) This sentence was the harshest penalty a person could receive, short of the death penalty, though Mr. [redacted] was not the actual killer. Had Mr. [redacted] been a few months younger, he would have been eligible for parole under section 3051(b)(4)—even if he had been the actual killer. But his LWOP sentence excludes him from the youth offender parole scheme set forth in section 3051. (§ 3051, subd. (h).)

People who are sentenced to life without the possibility of parole—regardless of age—are sentenced to die in prison. (See *Graham v. Florida* (2010) 560 U.S. 48, 69 (*Graham*).) A sentence of LWOP is "akin to the death penalty." (*Miller v. Alabama* (2012) 567 U.S. 460, 475 (*Miller*).) And perversely, a young person sentenced to LWOP will receive one of the harshest sentences a person can receive *because of* their youth and the number of years they will necessarily serve in prison. (See *ibid.*, quoting *Graham*, at p. 70 [young LWOP offenders "will almost inevitably serve 'more years and a greater percentage of [their lives] in prison than an adult offender'"].)

The California Constitution prohibits the imposition of cruel or unusual punishment. (Cal. Const., art. I, § 17.)[12] In the years since this Court decided Mr. [redacted] first appeal, two states with similar "cruel or unusual" provisions have interpreted their constitutions to prohibit the mandatory imposition of LWOP on 18 year olds like Mr. [redacted] (See Argument V.A., *post*.) Justices from our high court have found these decisions "compelling," and urged review of similar cases in which an LWOP sentence has condemned an 18 year old "to die in prison without any individualized consideration." (*People v. Powell* (Feb. 23, 2024, A167066) [nonpub. opn.], review den. June 12, 2024, S284418 (dis. stmt. of Evans, J.); see *People v. Denem* (Jan. 16, 2025, B333016) [nonpub. opn.], review den. May 14, 2025, S289464 (dis. stmt. of Lui, J.).)

In 2020, in *People v. Avila*, Division Three of this Court noted that our Legislature has enacted numerous ameliorative statutes "effect[ing] a sea change" in sentencing, including for juvenile and youthful offenders. (*Avila*, *supra*, 57 Cal.App.5th at p. 1151.) In the years since *Avila* was decided, the Legislature has continued its "multiyear course correction" designed to address "the errors and

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[12] Mr. [redacted] raised this claim in his first appeal, and the Court rejected it. He raises it again here, several years later, because "interpretation of the cruel or unusual punishments clause" is not "static," but rather should take into account the "standards of the age" (*People v. Anderson* (1972) 6 Cal.3d 628, 648, superseded by constitutional amendment on other grounds as stated in *People v. Bean* (1988) 46 Cal.3d 919, 957) and the "evolving state of California's criminal jurisprudence" (*People v. Avila* (2020) 57 Cal.App.5th 1134, 1150 (*Avila*).)

harm caused by the hyperpunitive policies enacted in the 1980s and 1990s, which led to the era of mass incarceration ….” (Assem. Bill No. 1104 (2023–2024 Reg. Sess.) (AB 1104), § 1, subd. (a).) This course correction has included AB 333, which reformed gang enhancements that “have … been used to legitimize severe punishment,” and the Racial Justice Act and its subsequent amendments, which have targeted, among other injustices, racial disparities in sentencing. (AB 333, § 2, subd. (i); Assem. Bill No. 2542 (2019–2020 Reg. Sess.) (AB 2542), amended by Assem. Bill No. 256 (2021–2022 Reg. Sess.) (AB 256), Assem. Bill No. 1118 (2023–2024 Reg. Sess.) (AB 1118), and Assem. Bill No. 1071 (2025–2026 Reg. Sess.) (AB 1071).) This legislation—through which our Legislature has committed to eradicating historically racist practices and sentencing disparities—is “the ‘clearest and most reliable objective evidence of contemporary values.’” (*Atkins v. Virginia* (2002) 536 U.S. 304, 312.)

These recent developments underscore the need for a “fresh look” (*Avila*, *supra*, 57 Cal.App.5th at p. 1151) at the question of the constitutionality of mandatory LWOP sentences for youthful offenders. Such a fresh look is particularly appropriate considering the disproportionate imposition of LWOP on young people of color, discussed in Argument V.C. This question is reviewed de novo, i.e. “independently … considering any underlying disputed facts in the light most favorable to the judgment.” (*Id*. at pp. 1145–1146; see *People v. Em* (2009) 171 Cal.App.4th 964, 971.) Mr. [redacted] asks this Court to hold that the mandatory imposition of LWOP for an 18 year old who was not the actual killer, without individualized

consideration, violates the state Constitution, facially and as applied in his case.[13]

### A. Given changes in sentencing norms since Mr. [redacted] initial appeal, imposing a mandatory LWOP sentence on an 18 year old who was not the actual killer shocks the conscience

Under the Eighth Amendment of the United States Constitution, which is applied to the states, cruel *and* unusual punishment is prohibited. Article I, section 17 of the California Constitution, by contrast, prohibits the infliction of cruel *or* unusual punishment. This distinction in "wording between the federal and state constitutions is substantive and not merely semantic." (*Avila*, *supra*, 57 Cal.App.5th at p. 1145, fn. 13; *People v. Carmony* (2005) 127 Cal.App.4th 1066, 1085.) California's constitutional provision—phrased with the disjunctive "or"—is necessarily broader than its federal counterpart. (See *People v. Smithey* (1999) 20 Cal.4th 936, 1019, fn. 1 (conc. opn. of Mosk, J.).) Courts therefore must construe the state provision separately from its federal counterpart. (*People v. Baker* (2018) 20 Cal.App.5th 711, 723.)

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[13] Regarding the Eighth Amendment, Mr. [redacted] recognizes this court is bound by decisions of higher courts. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; *People v. Bradley* (1969) 1 Cal.3d 80, 86.) For purposes of further review, he maintains that the mandatory imposition of LWOP on an 18 year old, not the actual killer, without consideration of the mitigating qualities of youth, is cruel and unusual under the Eighth Amendment.

A sentence violates the state Constitution if it is so disproportionate to the crime "'that it shocks the conscience and offends fundamental notions of human dignity.'" (*People v. Dillon* (1983) 34 Cal.3d 441, 478.) Three techniques, first identified *In re Lynch* (1972) 8 Cal.3d 410 (*Lynch*), are commonly assessed in determining whether a sentence is disproportionate under the state Constitution: the nature of the offense and the offender; comparison of punishments, in California, for different offenses; and comparison of punishments for the same offense in other jurisdictions. (*Id.* at pp. 425–428.) Any one of these can be sufficient by itself to demonstrate a particular sentence is unconstitutional. (*In re Nunez* (2009) 173 Cal.App.4th 709, 725 (*Nunez*); *Dillon*, *supra*, 34 Cal.3d at pp. 479–489; *id.* at 487, fn. 38.)

The context in which the *Lynch* techniques are applied is not static; dating back to *Lynch*, contemporary standards of decency have been brought to bear. Addressing a life sentence for indecent exposure, *Lynch* noted that at common law, and for 80 years after enactment of the 1872 Penal Code, indecent exposure was a misdemeanor. (*Lynch*, *supra*, 8 Cal.3d at p. 429.) The Court also noted proposed legislation to reclassify indecent exposure as a misdemeanor. (*Id.* at p. 437.) The life sentence for indecent exposure was thus, in historical context, an anomaly.

Similarly, in *People v. Anderson* (1972) 6 Cal.3d 628, later abrogated by statute, the Court held that capital punishment was impermissibly cruel judged against "contemporary standards of decency." (*Id.* at p. 650.) "The framers of our Constitution … anticipated that interpretation of the cruel or unusual punishments

clause would not be static but that the clause would be applied consistently with the standards of the age in which the questioned punishment was sought to be inflicted." (*Id.* at p. 648; see *Avila*, *supra*, 57 Cal.App.5th at p. 1150 [the "evolving state of California's criminal jurisprudence is relevant to … what is cruel or unusual punishment under our state constitution"].)

Application of the *Lynch* factors may result in a categorical bar on a particular punishment. (E.g. *Lynch*, *supra*, 8 Cal.3d at pp. 431–437.) The sole test, however, remains whether the punishment shocks the conscience and offends fundamental notions of human dignity. (*Dillon*, *supra*, 34 Cal.3d at p. 487, fn. 38.) In conducting an assessment under this test, courts have emphasized that "[w]hat has become routine should not blunt our constitutional senses to what shocks the conscience and offends fundamental notions of human dignity." (*Avila*, *supra*, 57 Cal.App.5th at p. 1151.)

While life sentences, including LWOP, may have become common in California, true LWOP—with no possibility of parole—may nonetheless, like the life sentence for indecent exposure in *Lynch*, be viewed as an historical anomaly. True LWOP was not common in California until the mid-1990s, when Board of Prison Terms reviews of LWOP sentences were discontinued. (See Com. on Revision of Pen. Code, First Supp. to Staff Memorandum 2021–06, Extreme Sentences and High-Profile Enhancements, Panelist Materials, Exh. C, written submission of Prof. Christopher Seeds <https://perma.cc/32RF-LKH7> [as of Feb. 21, 2026] (Extreme Sentences).)

The Legislature has since embarked on a "multiyear course correction" to designed to address "hyperpunitive policies" from that time period. (AB 1104, § 1, subd. (a).) This course correction has included legislation ameliorating punishment for youthful offenders. The Legislature, recognizing that science now establishes that areas of the brain affecting judgment and decision-making do not fully develop until young adulthood, has gone beyond Eighth Amendment requirements for juvenile sentencing. (See *People v. Montelongo* (2020) 55 Cal.App.5th 1016, 1037–1040 (conc. opn. of Segal, J.) (*Montelongo*).) Twice, the Legislature has amended section 3051, which originally provided for the possibility of parole for juveniles. In 2015, the Legislature extended youth offender parole to those under 23, and in 2017, it raised the age of eligibility to 25. (*In re Jones* (2019) 42 Cal.App.5th 477, 484–485 (conc. opn. of Pollak, J.).)

More, high courts in other jurisdictions—Massachusetts, Michigan, and Wisconsin—have recently held that their state constitutions' prohibitions of cruel or unusual punishment do not allow for the imposition of mandatory LWOP sentences for 18 year olds—and in two of these cases, even for older young adults. (See *Commonwealth v. Mattis* (Mass. 2024) 224 N.E.3d 410, 416 (*Mattis*) [holding LWOP for 18 to 20 year olds violates the Massachusetts Constitution's prohibition against "cruel or unusual punishment"]; *People v. Parks* (Mich. 2022) 987 N.W.2d 161, 183 (*Parks*) [holding mandatory LWOP for 18 year olds violates the Michigan Constitution's prohibition against "cruel or unusual punishment"]; *In re Pers. Restraint of Monschke* (Wash. 2021) 482 P.3d 276, 279 (*Monschke*) [holding mandatory LWOP for 18 to 21 year olds

violates the Washington Constitution's prohibition against "cruel punishment"].) Justices on our high court have cited these cases to urge review of the constitutionality of mandatory LWOP sentences, without individualized consideration, in cases involving "emerging adults" who are over 18 but under 26. (See *Powell*, *supra*, review den. (dis. stmt. of Evans, J.); *Denem*, *supra*, review den. (dis. opn. of Lui, J.).)

These legislative developments in California, and the case law from other jurisdictions prohibiting the mandatory imposition of LWOP for an 18 year old, are relevant to the question of disproportionality under our state Constitution. (See *Avila*, *supra*, 57 Cal.App.5th at p. 1150.) Contemporary standards on youth and sentencing have changed, even since this Court's decision in Mr. [redacted] first appeal, and a mandatory sentence of LWOP—a sentence to die in prison—for an 18-year-old non-shooter is disproportionate and shocking to the conscience. Thus, this Court should conclude that the mandatory imposition of LWOP under these circumstances violates California's prohibition against cruel or unusual punishment and should remand Mr. [redacted] case for resentencing.

### B. Mr. [redacted] sentence is unconstitutional under the techniques in *Lynch*

Under the first technique identified in *Lynch*, courts examine the nature of the offense and the offender's background, looking to the defendant's individual culpability, considering his age, personal characteristics, and state of mind. (See *Nunez*, *supra*, 173 Cal.App.4th at p. 725; *Dillon*, *supra*, 34 Cal.3d at p. 479.) Courts

also assess the totality of the circumstances surrounding the offense and whether the punishment fits the offender. (*Baker*, *supra*, 20 Cal.App.5th at p. 724.) Courts should account for the modern scientific and legislative understanding of extended adolescence when applying this technique. (Cf. *Montelongo*, *supra*, 55 Cal.App.5th at pp. 1037–1040 (conc. opn. of Segal, J.) [discussing modern science and social science in adolescent development to evaluate the exclusion of young adult offenders from section 3051; *Powell*, *supra*, review den. (dis. stmt. of Evans, J.) [discussing the neuroscientific findings that demonstrate young adults share many characteristics with adolescents under the age of 18, including a lack of maturity and sense of responsibility].)

Here, Mr. [redacted] personal characteristics establish a diminished level of culpability in several critical respects; namely, his age, his susceptibility to peer pressure, and that he was not the actual killer. [redacted] turned 18 five months before the offense; just months earlier, he was a juvenile, who after 25 years would be eligible for youth offender parole. (See *People v. Mendez* (2010) 188 Cal.App.4th 47, 65 [age at time of crime is highly relevant].) He first joined a gang at age 12 or 13 (2TRT:G95) and like the defendant in *Mendez*, who was 16 at the time of his crime, "it can be reasonably assumed that [he] was influenced by peer pressure." (*Mendez*, at p. 65.) This fact, along with the fact that Mr. [redacted] mother was absent (4TCT:828, 830), indicate the presence of mitigating factors that would have diminished Mr. [redacted] culpability and exposed the harshness of his sentence— had the trial court not deprived him

of a real opportunity to present them at his resentencing. (See Argument I., *ante*; *Mendez*, at pp. 65–66.)

The court should also consider the totality of the circumstances of the offense, including "the way the offense was committed and the extent of the defendant's involvement." (*Dillon*, *supra*, 34 Cal.3d at p. 479.) A punishment that is "not disproportionate in the abstract is nevertheless constitutionally impermissible if it is disproportionate to the defendant's individual culpability." (*Id*. at p. 480.) The question, thus, is not whether LWOP is disproportionate for murder, but rather the appropriateness of LWOP for Mr. [redacted] own conduct as an 18 year old with a still-developing brain who was not the actual killer. (See *ibid*.)

Mr. [redacted] did not use a gun or pull the trigger during the offense, and this is relevant to his individual culpability. (1CT:131 [this Court noting that Mr. [redacted] was convicted as "the driver and not the shooter"].) In *Mendez*, this Court concluded that the defendant's youth, combined with the fact that, unlike his co-defendant, he did not personally cause physical harm to any victim, raised a "strong inference that [his] de facto LWOP sentence was grossly disproportionate[.]" (*Mendez*, *supra*, 188 Cal.App.4th at p. 66.)

Under the next *Lynch* technique, the court should compare the punishment imposed with punishments prescribed in California for more serious offenses. (*Lynch*, *supra*, 8 Cal.3d at pp. 426–427.) "[I]f among them are found more serious crimes punished less severely than the offense in question, the challenged penalty is to

that extent suspect." (*Id.* at p. 426.) A comparison nonetheless "remains instructive" when an offense is punished just as severely as a more serious crime. (*Dillon*, *supra*, 34 Cal.3d at p. 487, fn. 38.) Because some statutes proscribe a wide range of conduct, courts must consider the entire range of conduct covered by the statute and a determination of the seriousness of the crime must turn on the facts of the individual case. (See *People v. Wingo* (1975) 14 Cal.3d 169, 177–178.)

Mr. [redacted] sentence places him in a group with the most culpable offenders, including defendants who have committed first degree murders with special circumstances involving bombing, multiple murder, and torture. (§ 190.2, subd. (a).) As of 2021, there were over 5,000 people serving LWOP in California, ten percent of whom were sentenced before turning 21. (Extreme Sentences, *supra*, at p. 6.) Mr. [redacted] who was only 18 and not the actual killer, does not belong in this group of the approximately 500 most culpable 18- to 20-year-old offenders in the state.

Moreover, nothing distinguishes Mr. [redacted] case from many other cases involving aiders and abettors not charged with the drive-by special circumstance and thus not eligible for LWOP. In fact, in many drive-by cases, prosecutors often decide not to charge even the actual killer with the special circumstance. (See, e.g., *People v. Booker* (2020) 58 Cal.App.5th 482; *People v. Acosta* (Mar. 23, 2021, B306034) 2021 WL 1101108 [nonpub. opn.]; *People v. Reyes* (July 1, 2020, B302341) 2020 WL 3567975 [nonpub. opn.] & *People v. Membreno* (Oct. 29, 2010, B302341) 2010 WL 3862100 [nonpub. opn.]; *People v. Torrence* (Aug. 15, 2019, A155017) 2019

WL 3822517 [nonpub. opn.] [driver and shooter in gang related drive-by killing of three year old charged with and convicted of first degree murder without special circumstances]; cf. *People v. Eatmon* (May 28, 2019, A150688) 2019 WL 2267048 [nonpub. opn.].)[14]

Under the final *Lynch* technique, in assessing whether a sentence is unconstitutionally disproportionate, courts should compare the sentence with punishments other jurisdictions prescribe for the same offense. It is important in conducting this analysis to contextualize LWOP in California, which "has one of the highest proportions of prisoners serving life or virtual-life sentences in the country." (Extreme Sentences, *supra*, p. 1.)[15]

First, a significant number of states (22) and the District of Columbia "do not mandate [LWOP] in any circumstance.'" (*Mattis*, *supra*, 224 N.E.3d at pp. 426–427.) Moreover, as discussed above, the high courts of other states have recently held that their state constitutions prohibit mandatory sentences of LWOP for 18 year olds. (See *Monschke*, *supra*, 482 P.3d at p. 287; *Mattis,* at p. 416; *Parks*, *supra*, 987 N.W.2d at p. 169.) In *Parks,* Michigan's high court applied the test set out in *People v. Lorentzen* (Mich. 1972) 194 N.W.2d 827, a case this Court had relied on in *Lynch*, *supra*, 8 Cal.3d at 422–423, in holding that California's cruel or unusual punishment provision bars disproportionate punishments. (*Parks*, at p. 169.)

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[14] The unpublished cases are not cited as authority for the propositions therein.

[15] As discussed further below in Argument V.C, the people serving LWOP are disproportionately people of color.

This Court should likewise hold that sentencing an 18 year old who was not the actual killer to LWOP is cruel or unusual punishment, particularly in these circumstances, where the sentence was mandatorily imposed without individualized consideration. At 18, Mr. [redacted] shared the attributes of younger adolescents who receive individualized consideration of youth-related mitigation. Applying a rigid cutoff at 18 means that adolescents without fully developed brains, like Mr. [redacted] will receive essentially the longest LWOP sentence a person can receive in California. (*Miller*, *supra*, 567 U.S. at p. 475.) This Court should hold, under the state Constitution, that Mr. [redacted] sentence is unconstitutional and that a sentencing court must have discretion to consider an offender's young age and youth-related mitigation. Mr. [redacted] asks this Court to declare the imposition of his mandatory sentence of LWOP, without individualized consideration, unconstitutional, vacate his sentence, and remand for resentencing.

### C. The disparate imposition of LWOP on young people of color violates the state Constitution's prohibition against cruel or unusual punishment

The disproportionate imposition of LWOP on youth of color, including young Latine people like Mr. [redacted] further demonstrates that the LWOP sentence is cruel or unusual punishment. As Justice Evans explained in dissenting from the denial of review in *Powell*, statistical disparities may inform whether depriving a person of the opportunity for release is arbitrary and capricious and thus constitutes cruel or unusual punishment under the California Constitution. (*Powell, supra,*

review den. (dis. stmt. of Evans, J.); see *Mosby v. Superior Court* (2024) 99 Cal.App.5th 106, 123 [the RJA "was enacted, in part, to address *McCleskey v. Kemp* (1987) 481 U.S. 279, 295–299, 312, which found that there was 'a discrepancy that appears to correlate with race' in death penalty cases in Georgia, but the court would not intervene without proof of a discriminatory purpose" when considering an Eighth Amendment challenge]; see AB 2542, § 2, subd. (f).)

In California, stark racial disparities are found in the imposition of LWOP on young people. Justice Evans explained these disparities in her dissenting opinion in *Hardin*:

> While racial disparities exist across age groups, racial disparities are most prevalent "among people who were 25 or younger at the time of the offense and received a life without parole sentence—86% are people of color." [Citation.] The total LWOP population in California is over 5,000, and 62 percent are youthful offenders. [Citation.] Of the roughly 3,100 youthful offenders sentenced to LWOP, 38 percent are Black, 38 percent are Latinx, 14 percent are White, 2 percent are Asian or Pacific Islander, 2 percent are American Indian/Alaskan Native, and 7 percent are "other." [Citation.] In contrast, for the overall LWOP population, 35 percent are Black, 35 percent are Latinx, and 21 percent are White, with the same percentages for the remaining demographic groups. [Citation.] The seven percent point differential (86 percent of youthful offenders sentenced to LWOP are people of color, compared to 79 percent of the overall LWOP population are people of color) is due to an increased rate in sentencing Black and Latinx youth to LWOP, and a decreased rate in sentencing White youth to LWOP. [Citation.] "African American youth are sentenced to life without parole at a rate that is 18.3 times the rate for whites. *Hispanic youth in California are sentenced to*

> *life without parole at a rate that is five times the rate of white youth in the state*."

(*Hardin*, *supra*, 15 Cal.5th at pp. 901–902 (dis. opn. of Evans, J.), italics added, fn. omitted; see also Com. on Revision of the Pen. Code, 2021 Annual Report and Recommendations, p. 50 and Figure 24: Race and Age Demographics of Life Without Parole, p. 51 <https://perma.cc/JF3S-8R7J> [as of Feb. 21, 2026].)

More specifically, the drive-by special circumstance underlying Mr. [redacted] LWOP sentence also appears to apply disproportionately to Latine people. *Death by Stereotype*, published in 2019, presented the results of a study examining data, including data provided by CDCR, on homicides with offense dates from 1978 through 2002. (Grosso et al., *Death by Stereotype* (2019) 66 UCLA L.Rev. 1394, 1417, 1418 (*Death by Stereotype*).) The study revealed that special circumstances "apply to defendants disparately by race and ethnicity." (*Id*. at p. 1441.)[16]

The disparities that the researchers uncovered related to Latine defendants were striking. Latine defendants represented 53 percent of all cases subject to a drive-by shooting special circumstance. (*Death by Stereotype*, *supra*, at pp. 1428–1429.) Thus,

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[16] This study examined a 1900-case stratified sample of 27,453 California homicide cases originally constructed to assess whether California's death penalty satisfied the Eighth Amendment's narrowing requirement. (*Death by Stereotype*, *supra*, p. 1419.) The authors assessed the death eligibility of the cases in the sample by determining whether a special circumstance was found by a factfinder or, if not rejected by a factfinder, potentially chargeable based on the facts of the case as reflected in the probation report. (*Id*. at pp. 1422–1423.)

they represented the majority of cases subject to this special circumstance, at a statistically significantly higher rate than Black or White defendants. (*Id.* at p. 1432.) Relative to White defendants, Latine defendants were subject to being charged with a drive-by shooting special circumstance at a ratio of eight to one. (*Id.* at p. 1429.) The researchers further found that the likelihood that a drive-by shooting special circumstance would be found or present in a case involving a Latine defendant was 2.5 times greater than that of similarly situated defendants of other races. (*Ibid.*)

The research also demonstrated that the pattern of racial disparity holds true in Los Angeles County—the county where Mr. [redacted] was convicted. (*Death by Stereotype*, *supra*, at p. 1434, fn. 145.) In analyzing the disparate application of the special circumstances, the researchers replicated "the analysis for Los Angeles County alone and the study without Los Angeles County cases. Neither analysis produced meaningfully different results." (*Ibid.*)

After determining that the likelihood that various special circumstances would be found or present was greater for some racial and ethnic groups than others, the authors went on to evaluate the charging and finding of specific special circumstances based on the categories of race and ethnicity. The authors' analysis "suggest[ed] robust patterns of differential charging of aggravators by defendant race." (*Death by Stereotype*, *supra*, at p. 1438.) In constructing the analytical model, the researchers also considered "whether these patterns simply reflect[ed] the disparate epidemiology of homicide by race in California in the specific homicide categories." (*Id.* at p.

1439.) The model controlled for this contingency, including the defendant's culpability, and still found disparate treatment by race. (*Ibid.*)

Punishments that produce such racial disparities are unconstitutionally cruel because the "disparities ... raise[] the inference that the punishment is not meaningfully serving a purpose of punishment that a less harsh sanction could not adequately fulfill. If a punishment served a real purpose, prosecutors, judges, and juries would use it regularly and evenly." (Smith et al., *State Constitutionalism & the Crisis of Excessive Punishment* (2023) 108 Iowa L.Rev. 537, 586.) And a punishment that "'serves no valid legislative purpose'" is cruel and unusual. (*Lynch*, *supra*, 8 Cal.3d at p. 422.)

In sum, sentences that are so disparately imposed on the basis of race violate the evolving standards of decency and serve no valid penological purpose. Thus, the mandatory imposition of LWOP on youthful offenders like Mr. [redacted] is impermissibly and unconstitutionally cruel. Mr. [redacted] asks this Court to consider the racially disparate application of LWOP sentences to conclude that his sentence violated the constitutional prohibition against cruel or unusual punishment.

### D. This claim is reviewable on appeal

Mr. [redacted] may raise his constitutional challenge to the mandatory imposition of LWOP for the first time on appeal because the facial aspects of his claim raise a pure question of law. (*Anderson*, *supra*, 40 Cal.App.5th at pp. 583–584.) More, this Court should review this claim in the first instance because the trial

court's denial of defense counsel's continuance request at her first appearance prevented counsel from raising the challenge in the court below, and therefore fundamental fairness is affected. (See *Anderson*, *supra*, 9 Cal.5th at pp. 962–963; *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1368 [Court of Appeal and then Supreme Court addressed Mr. Gutierrez's cruel and unusual punishment claim, although Court of Appeal had found the claim forfeited]; *Avila*, *supra*, 57 Cal.App.5th 1134, 1145, fn. 12 [exercising discretion to reach claim that sentence was cruel or unusual]; cf. *People v. Sanchez* (2016) 245 Cal.App.4th 1409, 1417–1418 [counsel did not forfeit cruel and unusual punishment claim where defendant was not present at his resentencing; noting "an unlawful sentence may be challenged at any time"].)

And finally, this Court should address Mr. [redacted] claim in the interest of judicial economy. Mr. [redacted] may raise the question of the constitutionality of his sentence in a habeas petition or in a section 1203.01 motion, and therefore if this legal question is left unresolved it may be back before this court. (See *Nunez*, *supra*, 173 Cal.App.4th at pp. 730, 739 [granting petition for writ of habeas corpus on the grounds that the statute prescribing an LWOP sentence for a juvenile convicted of a no-injury kidnapping for ransom was cruel and/or unusual punishment]; cf. *Sands*, *supra*, 70 Cal.App.5th at pp. 201–202 [Mr. Sands could raise an equal protection challenge to the denial of youth offender parole in a section 1203.01 motion].)

### E. Conclusion

The mandatory imposition of LWOP on an 18 year old who did not actually kill violates the state constitutional prohibition of cruel or unusual punishment. On its face, and as applied to Mr. [redacted] this sentence shocks the conscience and offends fundamental notions of human dignity. Moreover, the disproportionate imposition of LWOP on young people of color provides additional grounds for this Court to hold that Mr. [redacted] LWOP sentence is arbitrary and capricious and constitutes cruel or unusual punishment. This Court must therefore vacate the sentence and remand for resentencing.

## VI.
## Trial participants exhibited bias and used racially discriminatory language during Mr. [redacted] trial in violation of the RJA

### A. Introduction

At Mr. [redacted] 2018 trial, and his sentencing in 2020, law enforcement officers and the court used racially discriminatory language and exhibited anti-Latine bias on multiple occasions. After Mr. [redacted] sentencing, the California Legislature declared "we can no longer accept racial discrimination and racial disparities as inevitable in our criminal justice system." (AB 2542, § 2, subd. (g).) To that end, it enacted the RJA, a statutory scheme for combatting racial discrimination and disparities in every facet of the criminal legal system. (*Ibid.*; § 745.) The RJA requires remedies for the following exhibitions of bias and uses of discriminatory language that occurred in Mr. [redacted] case.

First, the prosecution's gang expert described aspects of Latine culture as indicia of gang membership. (11TRT:3646.) He told the jury that speaking a mixture of Spanish and English, and using the term "órale" (an interjection meaning "right!" or "OK!")[17] constituted "gang-member talk." (10TRT:3474–3475.) He identified baggy clothing and attire with sports logos as connected with criminal street gang membership, and he opined that whether a person wearing a sports logo is a gang member would "depend on what area you're standing in." (11TRT:3652–3653.) He likewise opined that a tattoo that simply read "Compton," the name of a

[17] Oxford Spanish Dict., (3d ed. 2003) p. 588.

primarily Latine city, indicated gang membership. (10RT:3451; 11TRT:3654.) This testimony conflated aspects of or proxies for Latine culture—language and place of residence—with criminal street gang membership. It also appealed to stereotypes of Latinos as criminal gang members and evoked particular incarnations of that stereotype. The gang expert at the preliminary hearing, and the prosecutor, in questioning that gang expert, similarly used discriminatory language and appealed to bias.

Next, another detective implicitly appealed to the stereotype of Latinos as criminal when he told the jury that he wanted the *Perkins*[18] agent to look like "any other criminal" and then described the particular agent he chose primarily by his Hispanic ethnicity. (9TRT:2724–2725; 8TRT:2192.)

Finally, the judge used language akin to words recently identified by the Legislature as among the "'many incarnations of racism that have plagued our criminal justice system[] …." (AB 1071, § 1, subd. (c) [findings and declarations, identifying "dehumanizing and othering language such as 'predator,' … 'brute,' … [or] 'uncivilized'" and "racially incendiary or coded words such as 'ghetto,' 'hood,' [or] 'baby mama'"].) She gratuitously used racially coded slang to admonish the audience for "mad dogging" the jury. (7TRT:1537.) And during a sentencing proceeding, the judge used racially discriminatory language when she referred to Mr. [redacted] and Mr. [redacted] as "savages who were hunting for pr[e]y." (12TRT:8112.)

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[18] *Illinois v. Perkins* (1990) 496 U.S. 292.

Effective January 1, 2023, the RJA became applicable to all cases in which judgment is not final. (§ 745, subd. (j)(1), as amended by AB 256.) And effective January 1, 2024, the Legislature provided that a defendant with RJA claims "based on the trial record" may "raise a claim alleging a violation of subdivision (a) on direct appeal from the conviction or sentence." (AB 1118, § 1; § 745, subd. (b).) Thus, Mr. [redacted] whose case is not yet final on direct appeal, is entitled to the benefits of the statute. (§ 745, subd. (j)(1).)

In the circumstances of this case, and in the interest of justice, Mr. [redacted] RJA claims are reviewable on appeal because they affect his substantial rights and go to the overall fairness of the proceeding. (*Anderson*, *supra*, 9 Cal.5th at pp. 962–963.) Mr. [redacted] should have been permitted to raise his RJA claims in the trial court after his case was remanded for retrial of the gang-related enhancements in 2024. (See *Garcia*, *supra*, 85 Cal.App.5th at pp. 295–298; *Lopez*, *supra*, 17 Cal.5th at pp. 392–393.) But he was unable to do so because, as set forth above, the trial court peremptorily denied counsel's request for a continuance at her first appearance in the case. (Arguments I. and II., *ante*.) Because counsel was thwarted in her attempt to obtain a continuance that would have allowed her to pursue relief under the RJA, review of these claims on appeal is all the more warranted. (*Anderson*, *supra,* 9 Cal.5th at pp. 962–963.)

### B. The RJA prohibits the exhibition of bias and the use of racially discriminatory language by trial participants

Section 745, subdivision (a), provides that a violation of the RJA is established if the defendant shows by a preponderance of the evidence that the judge, an attorney, a law enforcement officer, an expert witness, or a juror "exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin[,]" or if, during trial, one of these participants "used racially discriminatory language about the defendant's race, ethnicity, or national origin, or otherwise exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin, whether or not purposeful." (§ 745, subds. (a)(1) and (a)(2).)[19]

The RJA defines "[r]acially discriminatory language" as "language that, to an objective observer, explicitly or implicitly appeals to racial bias, including, but not limited to, racially charged or racially coded language, language that compares the defendant to an animal, or language that references the defendant's physical appearance, culture, ethnicity, or national origin." (§ 745, subd. (h)(4); see AB 2542, § 2, subd. (e).) The focus of the objective observer

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[19] This brief uses the terms "race" or "racial" when characterizing the nature of the anti-Latine bias exhibited during this trial even though Latine identifies a person's ethnicity and not their race. The United States Supreme Court has "used the language of race when discussing the relevant constitutional principles in cases involving Hispanic persons." (*Peña-Rodriguez v. Colorado* (2017) 580 U.S. 206, 214.) The California Supreme Court has done so as well. (See *People v. Gomez* (2018) 6 Cal.5th 243, 310–312.)

test is not on "how an appeal to racial bias might affect a juror's weighing of the evidence," it is "on whether the challenged language *would appeal* to the racial bias of a person who simply hears the language." (*People v. Stubblefield* (2024) 107 Cal.App.5th 896, 920, review granted Mar. 12, 2025 (*Stubblefield*), italics added.)

Moreover, the RJA prohibits not only overt racial discrimination and explicitly discriminatory language, but also implicit bias, which, even if activated unintentionally or unconsciously, nevertheless similarly infects a trial with racism. "Indeed, the primary motivation for the [RJA] was the failure of the judicial system to afford meaningful relief to victims of unintentional but *implicit* bias."[20] (*Bonds v. Superior Court* (2024) 99 Cal.App.5th 821, 828, original italics.) To understand how multiple actors in this case violated the RJA, it is important to first consider how coded language operates to activate implicit bias, particularly in the context and history of anti-Latine discrimination in the United States and, more specifically, in California. Mr. [redacted] discusses this background and history below.

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[20] Implicit bias describes the cognitive process "'composed of well-learned associations that reside below conscious awareness and can automatically drive behavior in a manner that is inconsistent with one's personal attitudes.'" (Bowman, *Confronting Racist Prosecutorial Rhetoric at Trial* (2020) 71 Case W. Rsrv. L.Rev. 39, 45, (Bowman).) Research on implicit bias focuses on how negative attitudes are "activated through 'priming,' which involves presenting information in ways that trigger association with other ideas." (*Id.* at p. 57.)

### 1. Coded language may appeal to racial stereotypes and bias

In enacting the RJA, the Legislature expressly recognized that stereotypes and coded language can evoke racial bias in jurors and other actors in the criminal justice system. (AB 2542, § 2 subds. (a), (e), (g) & (h).) It specifically relied on scholarship explaining that:

> Over a decade of research shows that implicit racial stereotypes can be activated easily and can lead to biased decision-making …. Researchers have found that even the "simplest of racial cues" can automatically evoke racial stereotypes and affect the way jurors evaluate evidence ... Once racial stereotypes have entered a trial, the defendant's ability to be judged by an impartial jury is lost.

(Prasad, *Implicit Racial Biases in Prosecutorial Summations: Proposing an Integrated Response* (2018) 86 Fordham L.Rev. 3091, 3101–3102 (Prasad), cited in AB 2542, § 2, subd. (e).)

In other words, no one is immune to racial bias that is "implicit, subtle, and often unintended." (Goff et. al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences* (2008) 94 J. Pers. Soc. Psychol. 292; Liu, *Implicit Bias, Structural Bias, and Implications for Law and Policy* (2023) 25 U. Pa. J. Const. L. 1280, 1290 ["Judges and lawyers are also not immune to implicit bias"]; AB 2542, § 2, subd. (g).) Indeed, "[w]hile jurors may be more 'careful and thoughtful' about their opinions when a prosecutor explicitly references race, they are not usually as careful with implicit racial references." (Prasad, *supra*, at pp. 3101–3102.) Coded language may, in fact, trigger implicit bias more effectively than explicit references to race, because seemingly race-neutral language sidesteps conscious

egalitarian beliefs without the listener's awareness. (Bowman, *Seeking Justice: Prosecution Strategies for Avoiding Racially Biased Convictions* (2023) 32 South. Calif. Interdiscip. L.J. 515, 527.)

Coded language has the potential to introduce "themes or euphemisms that evoke a conception of 'us' versus 'them,'" which highlight differences between jurors and non-White defendants, suggesting that non-White defendants are inherently different from the jury and "deserve less sympathy …." (*State v. Bagby* (Wash. 2023) 522 P.3d 982, 993 (*Bagby*), quoting Prasad, *supra*, at pp. 3101–3102; see Alford, *Appellate Review of Racist Summations: Redeeming the Promise of Searching Analysis* (2006) 11 Mich. J. Race & L. 325, 335 (Alford) [language or imagery that defines the defendant as the "'other' … someone outside of the moral community" can "induce a negative emotional response towards the defendant"].)

And the effects of priming and implicit bias are not eliminated when the use of coded language is brief or isolated. As the Legislature recognized, the "'impact of … evidence [of racial bias] cannot be measured simply by how much air time it received at trial or how many pages it occupies in the record. Some toxins can be deadly in small doses.'" (AB 2542, § 2, subd. (a), quoting *Buck v. Davis* (2017) 580 U.S. 100, 122.) The RJA thus recognizes that coded language—though not explicitly racist—can prime the jury and activate subconscious or implicit bias. (§ 745, subds. (a)(2) & (h)(4); AB 2542, § 2, subd. (i); see *State v. Zamora* (2022) 512 P.3d 512, 521 (*Zamora*) ["subtle references to racial stereotypes are 'just as insidious' and '[p]erhaps more effective.' [Citation.] 'Like wolves in

sheep's clothing, a careful word here and there can trigger racial bias.' [Citation.]"].)

### 2. The history of anti-Latine bias in the United States and its recent incarnations underlie the racially coded language used during the trial proceedings

The discriminatory language at issue in this case must be viewed within the context and history of discrimination against the Latine community in the United States. (See AB 1071, § 1, subd. (d), eff. Jan. 1, 2026 ["The Legislature intends that in applying the RJA, courts consider evidence of racism's origins, insidious shifts, and current manifestations"].) Anti-Latine discrimination was a motivating factor in passing the Undesirable Aliens Act of 1929 in the United States. (See e.g. *United States v. Carrillo-Lopez* (D.Nev. 2021) 555 F.Supp.3d 996, 1005–1009 [the 1929 Act was motivated by anti-Latine animus], revd. (9th Cir. 2023) 64 F.4th 1133, 1150 [agreeing that the 1929 Act was motivated by anti-Latine animus but disagreeing that Carrillo-Lopez had overcome the "strong presumption of good faith" with respect to the 1952 Act].) Legislators spoke of Mexicans as "poisoning the American citizen" because they are a "very undesirable" class. (*Id.* at p. 1009.) And the largest mass deportation in American history occurred in 1953 and was code-named "Operation Wetback." (Johnson, *Trump's Latinx Repatriation* (2019) 66 UCLA L.Rev. 1444, 1460–1464.) Over a million Latine people, including many U.S. citizens, were forcibly removed to Mexico before the operation ended. (*Id.* at p. 1446.)

Latine people were also among the non-White people historically targeted for violence and lynching. (Willis-Esqueda, *Bad*

*Characters and Desperados: Latinxs and Casual Explanations for Legal System Bias* (2020) 67 UCLA L.Rev. 1204, 1210 (Willis-Esqueda); Romero, *State Violence and the Social Construction of Latino Criminality: From El Bandido to Gang Member* (2001) 78 Denv. U. L.Rev. 1081, 1091 (Romero); Delgado, *The Law of the Noose: A History of Latino Lynching* (2009) 44 Harv. C.R.-C.L. L.Rev. 297, 298 [exploring the lynching of Latinos during the Jim Crow era].) American culture has reduced the Latine resistance to such violence and oppression to the "image of a violent, barbarous, and ferocious Latino bandido." (Romero, at p. 1090.) In cinematic depictions of the bandido, he is portrayed as a "despicable creature who must be punished for his brutal behavior." (*Id*. at p. 1089, fn. 39.) The stereotypical image of Mexican Americans evolved from the "greasy bandi[d]o of the Old West, to crazed Zoot-Suiters and pachuco killers in the 1940s, to contemporary cholos, gangsters and gang members," all the while maintaining the association between Latine men and violent criminality. (Mirandé, Gringo Injustice: Insider Perspectives on Police, Gangs, and Law (2019) pp. 106–113 (Mirandé); see also Romero, at p. 1089, fn. 39.)

The demonization and dehumanization of Latinos—and specifically, the stereotype that they are gang members—has continued to this day. (See, e.g., *S.A. v. Trump* (N.D. Cal. 2018) 363 F.Supp.3d 1048, 1059–1061 [recounting President Trump's statements about Latinos from 2015 to 2018; noting "Candidate Trump … categorize[d] Latinos as gang members, killers, and rapists …."].)

### 3. Enforcement of gang enhancement statutes has targeted Latine communities and has both contributed to and resulted from stereotypes conflating Latine ethnicity with gang membership and criminality

Scholars have found a statistically significant correlation between the proportion of Latine people in a community and the establishment of a specialized gang unit. (Katz et al., *The creation of specialized police gang units: A macro-level analysis of contingency, social threat and resource dependency explanations* (2002) 25 Policing: Int'l J. of Police Strategies & Mgmt. 472, 487.) Across the country, "over ninety percent of people added to gang databases are Black or Latino, most with no serious criminal record." (Stephan, *Conspiracy: Contemporary Gang Policing and Prosecutions* (2018) 40 Cardozo L.Rev. 991, 993–994.) This is the case even though research indicates that up to 40 percent of adolescent gang members are White, and even conservative studies find that at least 25 percent of gang members are White. (*Ibid.*; Greene & Pranis, Gang Wars: The Failure of Enforcement Tactics and the Need for Effective Public Safety Strategies (Justice Policy Institute, 2007) p. 6 <https://perma.cc/4ZVM-VN2V> [as of Feb. 22, 2026].)

Disproportionate enforcement of laws targeting gangs has afflicted California, most notably in Los Angeles County, where Mr. [redacted] was tried. (See AB 333, § 2, subds. (a), (d), & (h); Com. on Revision of the Pen. Code (2020) *Annual Report and Recommendations*, pp. 44–46 <https://perma.cc/7B75-C9Q4> [as of Dec. 15, 2025] [noting that over 98% of people sentenced to prison for a gang enhancement in Los Angeles are people of color, while

research shows that White people make up the largest group of youth gang members].)

"Perhaps the most common representation of Latino youth in popular culture today is as a gang member." (Woods, *Systemic Racial Bias and RICO's Application to Criminal Street and Prison Gangs* (2012) 17 Mich. J. Race & L. 303, 337 (Woods).) Stereotypes like this, in turn, can shape the perceptions and decisions of police and prosecutors. (*Id.* at pp. 337–339; cf. Moriearty et al., *Race, Racial Bias, and Imputed Liability Murder* (2024) 51 Fordham Urb. L.J. 675, 740 [describing "feedback loop" in which group homicides have become stereotypically "'Black crimes[,]'" leading to the overuse of murder charges based on imputed liability against Black defendants].) Thus, disparate enforcement and the well-worn stereotype of Latinos as criminal and gang-associated are mutually reinforcing phenomena, with the result that gang enforcement statutes—and particularly those in effect at the time of Mr. [redacted] trial—have "criminalize[d] entire neighborhoods ... as they punish people based on their cultural identity, who they know, and where they live." (AB 333, § 2, subd. (a).)

### C. Trial participants used racially discriminatory language and exhibited anti-Latine bias

Coded language, stereotyping, and bias towards the Latine community were evident at each stage of the proceedings against Mr. [redacted] from the preliminary hearing onward through voir dire, trial, and sentencing. Although each of the claims discussed below demonstrates an individual violation of the RJA, this Court should consider the "totality of the proffered facts," in evaluating the

claims. (*Hernandez v. Superior Court* (2025) 115 Cal.App.5th 1120, 1129–1130 (*Hernandez*).) The standard of review is de novo. (See *People v. Lawson* (2025) 108 Cal.App.5th 990, 999 (*Lawson*) [where trial court did not make any RJA findings, appellate court reviews the record independently to determine whether defendant has demonstrated a violation].) Because Mr. [redacted] has proven, by a preponderance, that the exhibitions of racial bias and use of discriminatory language violate the RJA, a remedy is required. (§ 745, subd. (e).)

1. **The prosecution's gang expert described aspects of Latine culture as indicia of gang membership**

During Mr. [redacted] trial, the prosecution's gang expert, Detective [redacted], described characteristics and conduct he believed to be typical of gang members. (10TRT:3473–3475.) In doing so, he evoked stereotype and conflated gang membership with Latine culture, illustrating a problem identified by the Committee on Revision of the Penal Code in its 2020 Annual Report: "[P]olice often have difficulties knowing the difference between active gang members, former gang members, and people who are non-members but are 'meshed in a gang social network by virtue of family and neighborhood.'" (Com. on Revision of the Pen. Code (2020) *Annual Report and Recommendations*, p. 46 <https://perma.cc/7B75-C9Q4> [as of Dec. 15, 2025]; see AB 333, § 2, subd. (a); *id.* subd. (d)(9) [people are frequently automatically lumped into a gang social network simply because of their family members or their neighborhood].)

Even prior to the RJA, our high court recognized that discrimination against Latine people may "turn on some nonphysical characteristic such as a name, an accent or a style of dress." (*People v. Trevino* (1985) 39 Cal.3d 667, 686, disapproved on other grounds by *People v. Johnson* (1989) 47 Cal.3d 1194, 1221.) Here, the bias exhibited and appealed to in Detective [redacted] testimony turned on language, clothing, and neighborhood.

First, when asked to describe "gang-member talk," [redacted] testified it consists of "street slang," sometimes a mixture of Spanish and English. (10TRT:3474.) Detective [redacted] provided the word "órale"—a term of approval akin to "okay"—as an example of such "gang-member talk." (10TRT:3474–3475.) But he also acknowledged that this word is common throughout the Hispanic community and not unique to gang members. (10TRT:3475.)

Speaking a combination of Spanish and English is, of course, not specific to gang members. Rather, it is an example of interlingualism—the blend and juxtaposition of Spanish and English words—and it is a prominent feature of Chicano[21] culture. (De Katzew, *Interlingualism: The Language of Chicanos/as* (2004) NACCS Annual Conference Proceedings 6, p. 61.) Interlingualism is strongly connected with Latine identity in the United States, as it speaks to the historical and cultural process of "acculturation, assimilation and/or resistance." (*Id.* at p. 66.) But Detective

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[21] Chicano identifies a person of Mexican descent living in the United States indefinitely, regardless of citizenship. (Villarreal, *Culture in Lawmaking: A Chicano Perspective* (1991) 24 U.C. Davis L.Rev. 1193, 1242.)

[redacted] testimony connected this important aspect of Latine identity to gang-related criminality.

Detective [redacted] also testified that he could discern who is a gang member, in part, by their clothing. (11TRT:3646.) Asked to define "gang member dress," he opined that it could be "consistent with baggy clothing," though he then acknowledged that baggy clothing is not unique to gang members. (10TRT:3473, 3474.) Baggy clothing is, however, associated with ethnicity: The "relationship between race and 'baggy' clothing[] support[s] a conclusion that there is a long history of the public in general and police in particular perceiving clothing and ethnicity as a strong indicator of criminality." (*Hernandez*, *supra*, 115 Cal.App.5th at p. 1133, fn. 4, citing NPR, *Sagging Pants and the Long History of 'Dangerous' Street Fashion* (Sept. 11, 2014) <https://perma.cc/C8CL-63DR> [as of Dec. 15, 2025]; see Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness* (1996) 81 Minn. L.Rev. 367, 442–443 ["The Latino-as-criminal stereotype often affects young male Latinos who are assumed to be gang members, particularly if they live in a low-income high-crime neighborhood and wear baggy pants and T-shirts"].)

More, according to Detective [redacted], gang members sometimes wear attire with sports team logos. (11TRT:3646.) However, he acknowledged that clothing depicting sports team logos is not worn exclusively by gang members; his opinion on whether a person wearing such a logo is a gang member would "depend on what area you're standing in." (11TRT:3652–3653.) His unspoken implication was that a person wearing a sports logo in a

neighborhood targeted for gang enforcement—a neighborhood that serves as a proxy for Latine or Black identity (see, e.g., *People v. Howard* (2024) 104 Cal.App.5th 625, 655 (*Howard*))—would be identifiable as a gang member, while a person wearing a sports logo elsewhere would not. (See, e.g., *Bonds*, *supra*, 99 Cal.App.5th at p. 830 [discussing expert testimony that a "'hoodie is a piece of clothing' that has been 'criminalized' because it 'invoke[s] some thoughts of a threat … depending on who's wearing it'"].)

[redacted] also opined that tattoos with the word "Compton" indicated gang membership (10TRT:3451–3452, 3454.) This opinion amounted to racially coded testimony connecting an entire predominantly Latine community to a gang. In many instances, a person's place of residence "may serve as a proxy for race." (*Howard*, *supra*, 104 Cal.App.5th at p. 655; see *United States v. Bishop* (9th Cir. 1992) 959 F.2d 820, 828 ["Residence, as it were, often acts as an ethnic badge"].) Compton is a city in the Southwest portion of Los Angeles County that has a majority Latine population. (See Demographic Information, Compton City <https://perma.cc/WMJ8-7BLS> [as of Dec. 15, 2025] [the "Hispanic" population makes up 68 percent of the community in Compton].) Detective [redacted] testimony that a tattoo paying homage to this city indicated gang membership served to further stereotype this Latine community.

In sum, [redacted] evoked stereotype and conflated aspects of Latine identity—language and neighborhood—with membership in a criminal street gang. More broadly, while gangs were frequently spoken of in terms of the ethnicity of their members, at only one point in the entire case was it ever suggested that a gang might be a

"White gang" as opposed to a "Hispanic gang," "Black gang," or "Asian gang." (See 10TRT:3443 [Prosecutor: "is this a Hispanic gang, a—a Black gang, a White gang? What type of gang is this?"]; compare 10TRT:3447 [redacted]: "their rival gangs are most of the Hispanic Compton gangs"]; 10TRT:3446 [counsel for Mr. redacted asks redacted about his training in "street gang subcultures": "do they deal only with Hispanic gangs, Black gangs, Asian gangs—what kind of gangs did it deal with?"; redacted responds that "there was a wide variety but I recall the majority of it being on Hispanic gangs"]; 11TRT:3628 [counsel for Mr. redacted asks redacted about the gangs in Compton: "And some of those gangs are Hispanic gangs? … Some of them are Black gangs? … Some of them are Asian gangs?"; redacted agrees some of the gangs are Hispanic and some are Black, but does not recall any Asian gangs].) These questions and answers appealed to the bias of any listener who associated criminal street gangs with people of color generally, and young Latinos like Mr. redacted particularly. (See Woods, *supra*, 17 Mich. J. Race & L. at p. 337 ["most common representation of Latino youth in popular culture" is that of "a gang member"].)

Moreover, redacted testimony was all the more damaging because during voir dire, jurors had heard a steady drumbeat of disparaging remarks about gangs and their members from the court and the attorneys. For example, the court told one panel, "Nobody likes gangs. We're not stupid. Nobody likes gangs." (3TRT:116.) When defense counsel asked the court to clarify that gang membership is not illegal, the court did so, but then added, "You may not like that person, you may not invite them to dinner …."

(4TRT:358–359.) And after, the court declared "It's okay. You can just flat out say, 'No. I don't like gangs.' I think it's an honest response"—which elicited laughter in the courtroom. (4TRT:411.) The attorneys posed similar questions, asking: "nobody here in the group thinks gangs are a positive thing, do they?" (4TRT:411); "do you hate gangs?" (4TRT:412); and "you're not neutral about gangs. They're bad things; aren't they?" (4TRT:413).

The court's and the attorneys' statements and questions during jury selection—which in most cases referred generally to "gangs," a broad term that includes more than just "criminal street gangs" covered by the Penal Code—evoked a theme of "us" versus "them." (See *Bagby*, *supra*, 522 P.3d at p. 993, quoting Prasad, *supra*, at pp. 3091, 3101–3102.) Such distancing severs the other "from their humanity and transforms them into something less—typically something mechanistic, animalistic, monstrous, or alien." (Bakhshay, *The Dissociative Theory of Punishment* (2023) 111 Geo. L.J. 1251, 1271.)

The steady stream of disparaging remarks about "gangs" came at a time when jurors are particularly susceptible to the dangers of such problematic language. (*Zamora*, *supra*, 512 P.3d at p. 520 ["there is an increased danger of infecting the jury with bias and prejudice when the improper conduct occurs at the jury's introduction to the case …. The jury is, in the voir dire phase, primed to view the prosecution through a particular prism"].) Then, at trial, Detective [redacted] associated gangs and gang members—groups that "nobody likes" and people that jurors would not want to "invite to dinner"—with Latine identity. This association appealed

to any preexisting biases held by the jurors. (See Mirandé, *supra*, at p. 35; Romero, *supra*, at p. 1089, fn. 39; Woods, *supra*, at p. 337; see *Stubblefield*, *supra*, 107 Cal.App.5th at pp. 920–921 [language violates the RJA when it appeals to preexisting biases the listener may have].) Accordingly, the detective's testimony and the context in which it occurred demonstrate violations of sections 745, subdivisions (a)(1) and (a)(2).

### 2. The testimony of the gang expert at Mr. [redacted] preliminary hearing similarly appealed to racial bias

At the preliminary hearing, the prosecution presented the testimony of gang expert [redacted]. (1TCT:373.) Asked to tell the court "a little bit about" the [redacted] gang, he said, "It's an extremely violent Hispanic gang based in Compton—" (1TCT:374.) The relevance of his identification of the gang as "Hispanic" was not explained.

Later, [redacted] was provided with hypothetical questions purportedly based on the facts of the May 26, 2014, shooting, and designed to elicit his opinion that the shooting was for the benefit of, at the direction of, in association with [redacted], the gang he had characterized as "an extremely violent Hispanic gang[.]" (1TCT:374, 392–395.) Counsel for Mr. [redacted] and Mr. [redacted] made a series of objections to the hypothetical questions, including an objection based on the fact that while the hypothetical posited that the victims of the shooting were gang members, there was no evidence on that point. (1TCT:398.) The court "noted" the objection but did not sustain it. (1TCT:398.)

The prosecutor responded, however, by posing a new question, in which he substituted racial identifiers—"just male Hispanics, male Black"—for his previous descriptions of a group of people fixing a car and of a group of "rivals":

> Let me ask you this:
> If there was—if the group that was shot at, there were no gang members in it, they were just male Hispanics, male Black, various ages but—but not really old, with the exception of one, would that still benefit the gang even if you shot at nongang members, would it still benefit [redacted]?

(1TCT:399.)

[redacted] responded affirmatively: "If the gang member is a member of [redacted] and he commits a shooting, it's going to benefit his reputation." (1TCT:399.)

Again, the relevance of race and ethnicity remained unexplained. The prosecutor could have simply described the group that was shot at as a group of people fixing a car. Instead, he identified the individuals by race and ethnicity. While the victims of the May 26, 2014, shooting were in fact Hispanic and Black, the prosecutor never established the relevance of this fact to the question whether the shooting was gang-related.[22] Indeed, it is

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[22] In presenting another hypothetical based on the facts underlying counts 12, 13, and 14, charging Mr. [redacted] alone with attempted murder in relation to an incident in which Mr. [redacted] was not involved, the prosecutor similarly focused on the race—and not just the race, but the skin tone—of the victims: "Let's assume that there's three male Hispanics, at least two male Hispanics, one a dark Indian …. One dark and Indian …. Indian from India." (1ATCT:5–6.) In this context, again, the prosecutor failed to offer any explanation for why the race, ethnicity, or skin tone of the victims was relevant to whether the shooting was gang related.

difficult to imagine how the race and ethnicity of the people who were shot at bore on the question of whether the shooting benefitted [redacted].

The prosecutor's decision to identify the group by race and ethnicity, and his phrasing ("no gang members … just male Hispanics, male Black") suggests that gang members are always Black and Hispanic—that there are two kinds of Black and Hispanic people, gang members and nongang members, or that being Black or Hispanic is somehow a lesser included status of being a gang member, or vice versa. The irrelevant insertion of race and ethnicity into this question, and the manner in which the question was phrased, appealed to the bias of anyone who holds the stereotype of Hispanic and Black young men as gang-involved, or who views Hispanic and Black people in terms of their gang status, or who views crimes committed by people of color against other people of color as likely to be gang-related. (Cf. Woods, *supra*, 17 Mich. J. Race & L. at p. 308 ["Gang stereotypes also make law enforcement, prosecutors, and members of society more prone to assume that crimes committed by groups of racial minorities—especially Blacks, Latinos, and Asians in urban neighborhoods—are gang related"].)[23] Thus, this testimony constituted "racially discriminatory language about the defendant's race, ethnicity, or national origin" and an

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[23] As noted, the violations described in this section occurred at the preliminary hearing. The RJA does not "require the defendant to show whether or how an appeal to racial bias could have affected a *juror* …. [T]here is no requirement that a juror must hear the language." (*Stubblefield*, *supra*, 107 Cal.App.5th at p. 920.)

exhibition of bias towards Mr. [redacted] because of his race. (§ 745, subd. (a)(1), (a)(2), (h)(4).)

### 3. A law enforcement officer implicitly appealed to bias when he connected the *Perkins* agent's Hispanic ethnicity to law enforcement's objective that *Perkins* agents look like criminals

During Mr. [redacted] trial, the prosecutor called Detective [redacted] to describe the *Perkins* operation that police had used against Mr. [redacted] and Mr. [redacted]. (8TRT:2190.) [redacted] testified during his direct examination that "the [*Perkins*] agents look like other criminals or other people that are incarcerated. And they're dressed normal, like everyday people, just so they can gain the trust of the person …." (8TRT:2192.) On cross-examination, [redacted] gave the following testimony:

> Q: I think you testified on direct that you wanted the – the agent to be someone who looked like any other criminal locked up in that cell; is that right?
> A: I think so.
> Q: Could you describe the Perkins agent that you placed in the cell with Mr. [redacted]
> ***
> The witness: He was a Hispanic male. I think he was about 6 foot, 300 pounds.

(9TRT:2724–2725.)

The effect of Detective [redacted] testimony was to connect the ethnicity of the *Perkins* agent—here, a "Hispanic male"—to law enforcement's objective that *Perkins* agents look like "criminals." When reminded of his testimony that he wanted the agent to look like "any other criminal," and then asked what the agent looked like, the salient descriptor [redacted] identified was the agent's Hispanic

ethnicity. This implicitly appealed to well-worn stereotypes of Latinos as criminal. (Willis-Esqueda, *supra*, at pp. 1212–1213 [describing "the stereotypical notion of criminality" historically applied to people of Mexican descent]; see *Stubblefield*, *supra*, 107 Cal.App.5th at p. 917 [RJA prohibits not only language that is biased, but also language that *implicitly appeals* to bias].) Though [redacted] may not have intended to implicitly appeal to racial bias, the RJA "directs the 'objective observer' to disregard whether the person using the discriminatory language intended for it to be discriminatory." (*Stubblefield*, at p. 917.) Thus, this testimony demonstrates violations of sections 745, subdivisions (a)(1) and (a)(2).

#### 4. The judge exhibited bias and used discriminatory language when she admonished the audience about "mad dogging" the jury

During a break in Mr. [redacted] trial, the court used the term "mad-dogging" to describe conduct by the courtroom audience, some of whom were apparently members of Mr. [redacted] family. (7TRT:1537; 9TRT:3057–3058.) The court admonished the audience outside the presence of the jury, stating: "To the members of the audience, you're invited as guests. But guests have to conduct themselves accordingly in court, which means there can't be any under-the-breath commentaries or anything like that. I have not seen it, personally, but it has been shared with me by sources that that is going on. That—a term commonly known as 'mad dogging' is going on or comments about the prosecutor's opening statement." (7TRT:1537.)

Later during trial, the judge stated that the jurors were not "feeling good" and felt they were "getting mad dogged out in the parking lot and out in the hallway." (9TRT:3057.) The court told the audience, in the presence of the jury, "if you choose to stay in this courtroom, you will wait, and you will stay here for about five minutes until after this jury leaves; otherwise, don't come. You're not going to be able to watch the trial. Okay. So that may alleviate some concerns." (9TRT:3053–3054.)

The co-defendant's attorney, [redacted], objected to the court's comments. (9TRT:3057–3058.) He acknowledged that the judge was entitled to manage security concerns, but he noted that the she raised her voice towards the audience in front of the jury and that the audience included some of his client's family members. (9TRT:3058.) Mr. [redacted] argued that the judge's comments and the volume of her voice reflected "detrimentally" towards his client. (9TRT:3058.)

The court's gratuitous use of a slang word like "mad dogging" to admonish the audience, some of whom were members of Mr. [redacted] family, amounted to coded language highlighting racial difference. (See *Hernandez*, *supra*, 115 Cal.App.5th at p. 1136 [without determining whether officers' use of terms such as "homie," "primo," "bro," and "fo sholly" by themselves sufficed to establish a prima facie violation of the RJA, court noted that that language "certainly supports an implication that the officers exhibited ethnic bias" against the Latine defendant and stated that the defendant would be allowed to present additional evidence to support the claim at an evidentiary hearing]; Alford, *supra*, p. 353 [noting the infinite

and surreptitious ways to inject race into criminal proceedings to highlight racial difference].) The Legislature has provided examples of similarly racially coded language targeted by the RJA, like "hood" and "baby mama[.]" (AB 1071, § 1, subd. (c), eff. Jan. 1, 2026.)

The court's use of the term "mad dogging" and the context in which it was used—to refer to Mr. [redacted] family—poses a particular potential for harm in criminal cases involving Latine people, because in those cases "gestures, and non-verbal exchanges between jurors, judges, and perhaps even the Latin[e] defendant's family" may validate preexisting stereotype. (Fleury-Steiner and Argothy, *Legal 'Borders': Elucidating Jurors' Racialized Discipline to Punish in Latino Defendant Death Cases* (2004) p. 77.)[24] Although the judge was certainly entitled to exercise control over the courtroom, her use of the term "mad dogging," along with her raised voice, expressed an attitude towards the audience that suggested a risk of danger. This attitude served to reinforce racial stereotypes against Latine people, including Mr. [redacted] because it perpetuated "historical and unacknowledged racialized fears that people of color are … a present or future danger[.]" (AB 1071, § 1, subd. (c), eff. Jan. 1, 2026.) Accordingly, the court's language and the context in which it occurred demonstrate racial bias under the RJA. (§ 745, subds. (a)(1)–(2).)

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[24] The jury was not present when the court used the term "mad dogging"; again, the RJA does not "there is no requirement that a juror must hear the language." (*Stubblefield*, *supra*, 107 Cal.App.5th at p. 920.)

### 5. The court used racially discriminatory language when it described Mr. [redacted] and his co-defendant as "savages"

At Mr. [redacted] sentencing hearing, his attorney emphasized his client's youth and presented mitigating evidence to the court. (12TRT:8110.) In response, the court described both Mr. [redacted] and Mr. [redacted] as "savages who were hunting for pr[e]y." (12TRT:8112.) Following this racially biased characterization, the court concluded that imposing an LWOP sentence on two young men, both of whom were teenagers when the offense was committed, was "exactly the kind of punishment they deserve." (12TRT:8112.)

Then, in imposing a consecutive prison term for the gun enhancement alleged against Mr. [redacted], the court continued the "hunting" theme, stating: "There is hunting with a bow and arrow for sustenance for meat in this world to sustain life for a higher purpose. Although I do not spread [sic] the killing of animals for hunting, in some respect, I'm no fool. I do eat meat. I get it. There is quite a bit of difference with the hunting of a gun to just kill for the sake of gangs. So for count 1, it will be LWOP, plus 25-to-life." (12TRT:8112.) Although the court's reasoning is puzzling, its continued comparison of Mr. [redacted] and Mr. [redacted] to "savages who were hunting for pr[e]y" was clear. (12TRT:8112.)

The RJA targets precisely this type of language. In enacting AB 1071, the Legislature identified the terms "uncivilized," "brute," and "predator" as examples of the "many incarnations of racism that have plagued our criminal and juvenile justice systems since their inception." (AB 1071, § 1, subd. (c), eff. Jan. 1, 2026, citing *Hardin*,

*supra*, 15 Cal.5th at p. 906 (dis. opn. of Evans, J.).) The epithet "savage" likewise impermissibly and intolerably evokes "historical and unacknowledged racialized fears that people of color are deceptive, manipulative, crime prone, or a present or future danger." (AB 1071, § 1, subd. (c), eff. Jan. 1, 2026.)

At Mr. [redacted] 2025 resentencing hearing, the trial judge showed no sign she had altered her view that Mr. [redacted] was a "savage" who deserved the law's harshest punishment short of death. Without prompting, the judge stated that her views would persist even if the law were to change, and regardless of mitigation that might be proffered by the defense of Mr. [redacted] lack of culpability, background, or youth, though none had been offered. (2RT:306–307.) This was so even though Mr. [redacted] had turned 18 only five months before the crime, and even though the undisputed evidence showed he was *not* the shooter. (1CT:131, 4, 7.)[25]

In sum, the judge who sentenced Mr. [redacted] to LWOP used dehumanizing and racially biased language when she characterized him and his co-defendant as a "savages." This rhetoric reflects the biased perspective that regards "Latinas/os as a lesser class of people, indeed, as less than human … [The] construction of Latinas/os as subhuman … encompass[es] [traits] associated with

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[25] Indeed, the judge appeared hostile to notions of leniency and mitigation. During voir dire, she had agreed with a juror who said he had "strong feelings about Jerry Brown opening up the jails and letting criminals loose"; she responded, "We all do, but since I'm on the record I won't share mine" and she thanked the juror for his candor. (6TRT:1351.)

animals, particularly dogs, and with a savage, primitive culture." (Bender, Greasers and Gringos: Latinos, Law, and the American Imagination (2003) at p. 114.) The RJA was designed to guard against this language, and its presence in the proceedings against Mr. [redacted] is incompatible with a fair system of justice. (AB 2542, § 2, subd. (i).) This error demonstrates a violation of section 745, subdivisions (a)(1) and (a)(2).

### D. The RJA claims are reviewable on appeal

The RJA expressly permits claims based on the trial record to be raised on direct appeal. (§ 745, subd. (b).) Mr. [redacted] was unable to raise the above-discussed RJA claims in the trial court in the first instance because the RJA did not exist at the time of the initial trial and sentencing. (See, e.g. *People v. Gomez* (2018) 6 Cal.5th 243, 297.) The claims could not have been raised in Mr. [redacted] first appeal to this Court because the RJA was not made retroactive to cases on appeal until after that appeal was decided. (§ 745, subd. (j)(1), eff. Jan. 1, 2023.) Nor could trial counsel have raised them at Mr. [redacted] resentencing, because the trial court's ruling denying counsel's continuance request at her first appearance prevented counsel from reviewing his case for claims under the RJA. (See Arguments I. and II., *ante*.) Indeed, trial counsel's lack of notice affected her ability to raise the claims in the trial court; she was not even aware that the gang enhancements would not be retried and that sentencing would take place until she appeared on the day Mr. [redacted] was sentenced. (See 2RT:305; *Anderson*, *supra*, 9 Cal.5th at p. 963 [Anderson was deprived of timely notice of the potential sentence he faced where "the

prosecutor's intentions did not become clear until the day of the sentencing hearing"].)

In these circumstances, and in the interest of justice, these RJA claims are reviewable on appeal because they affect Mr. [redacted] substantial rights and because fundamental fairness favors review in a case, like Mr. [redacted] in which the trial court's ruling prevented the RJA claims from being raised in the lower court in the first instance. (Cf. *Anderson*, *supra*, 9 Cal.5th 946 at pp. 962–963.) Courts of Appeal have analyzed the merits of RJA claims where an appellant's Sixth Amendment rights were violated by trial counsel's failure to raise an RJA violation. (See *People v. Quintero* (2024) 107 Cal.App.5th 1060, 1076; *People v. Simmons* (2023) 96 Cal.App.5th 323, 336.) So too here; this court should review the above-described violations of the RJA because they are intolerable and "inimical to a fair criminal justice system" (AB 2542, § 2, subd. (i)), and because fundamental fairness supports review where the trial court's conduct impeded counsel from previously raising the claims.

### E. A remedy under section 745, subdivision (e), is required

In enacting the RJA, the Legislature found that "racism in any form or amount, at any stage of a criminal trial, is intolerable, inimical to a fair criminal justice system, is a miscarriage of justice under Article VI of the California Constitution and violates the laws and Constitution of the State of California." (AB 2542, § 2, subd. (i).) Violations of the RJA are thus not subject to prejudice analysis.

(*Ibid.*)[26] Moreover, when the trial record shows that a judge, law enforcement officer, attorney, or juror involved in the case used racially discriminatory language or otherwise exhibited racial bias, neither the finding of a violation nor the relief available turns on the speaker's purpose or intentionality, or the overtness of the appeal to bias. Instead, "the court *shall* vacate the conviction and sentence" if the conviction was "sought or obtained" in violation of the statute (§ 745, subd. (e)(2)(A), italics added), and "the court *shall* vacate the sentence," if the sentence alone was "sought, obtained, or imposed" in violation of the RJA (§ 745, subd. (e)(2)(B), italics added).

Mr. [redacted] has demonstrated, by more than the preponderance of the evidence, that his trial and sentencing were infected with racially discriminatory language and the exhibition of bias in violation of the RJA. Accordingly, he asks this court to vacate his conviction and sentence and remand for proceedings consistent with subdivision (a) of section 745. (§ 745, subd. (e)(2)(A).)

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[26] The exception set out in section 745, subdivision (k), applies only to habeas corpus petitions, not to RJA violations found on direct appeal. (See § 745, subd. (k) ["For petitions that are filed in cases in which judgment was entered before January 1, 2021, *and only in those cases,* if the petition is based on a violation of paragraph (1) or (2) of subdivision (a), the petitioner shall be entitled to relief as provided in subdivision (e), unless the statute proves beyond a reasonable doubt that the violation did not contribute to the judgment"], italics added.)

### F. In the alternative, this court should remand for further factual development of the RJA violations appearing on the appellate record and consideration of these RJA violations along with additional RJA claims regarding racial disparities

Should this Court conclude that the record is insufficient to establish violations of the RJA by a preponderance of the evidence, Mr. [redacted] asks that the Court remand the matter for further factual development of his RJA claims and consideration of these claims in tandem with additional claims relating to racial disparities.

Mr. [redacted] contends that he has established the RJA violations discussed above by a preponderance of the evidence. But should this Court disagree, he contends that his claims could be strengthened by "social science research or expert testimony" which could be presented to demonstrate that the language used by trial participants "evince[d] racial bias." (*People v. Coleman* (2024) 98 Cal.App.5th 709, review den. May 1, 2024, S283717 (conc. stmt. of Evans, J.); see *People v. Wagstaff* (2025) 111 Cal.App.5th 1207, 1222 [absent factual development, the reviewing court could not determine whether the term "strong young buck" appealed to racial bias]; *Lawson*, *supra*, 108 Cal.App.5th at p. 999 [concluding the appellant had not demonstrated certain language was racially discriminatory where appellant did not make a motion under section 745 in the trial court, nor did the appellant ask to stay the appeal and remand the matter to file such a motion].)

Moreover, Mr. [redacted] case presents potential claims regarding disparate charging and sentencing under section 745,

subdivisions (a)(3) and (a)(4), and regarding disparate application of *Perkins* operations against Latine people.[27] The RJA claims set forth above are properly resolved "in tandem" with the additional disparities-related claims. (*Young v. Superior Court* (2022) 79 Cal.App.5th 138, 163; see *Hernandez*, *supra*, 115 Cal.App.5th at p. 1120.) Thus, if this Court is unable to conclude, based on the record on appeal, that the RJA claims set forth here require reversal of Mr. [redacted] convictions, it should remand for a hearing at which Mr. [redacted] can present additional factual support for the claims presented in this brief, and seek discovery to support his disparities-based claims.

[27] Mr. [redacted] described these claims in detail in his motion for stay of appeal and remand to the superior court, filed in this Court on December 16, 2025, and denied on December 18, 2025. As set forth in Mr. [redacted] motion, these claims will require discovery under section 745, subdivision (d).

## CONCLUSION

For the reasons set out in Argument VI.C.1., 2., 3., and 4., Mr. [redacted] asks this Court to "vacate the conviction and sentence, find that it is legally invalid, reverse and remand to the superior court, and order proceedings consistent with subdivision (a)" of section 745. (§ 745, subd. (e)(2)(A).) In the alternative, he requests that this Court reverse the judgment and: (1) remand for a full resentencing hearing, at which he must be permitted to raise any challenges to the court's intended sentence and seek relief under any applicable ameliorative legislation, and at which the trial court must impose a sentence based on individualized consideration; (2) direct the trial court to impose a remedy for the RJA violation proven in Argument VI.C.5., along with any other RJA claims raised at the resentencing hearing; (3) reform section 3051 to include youthful offenders sentenced to LWOP due to the drive-by special circumstance; (4) direct the trial court to preserve evidence of youth-related mitigation pursuant to *Franklin*, *supra*, 63 Cal.4th 261; and (5) declare the mandatory imposition of LWOP for an 18-year-old non-killer unconstitutional, facially and as applied to Mr. [redacted]

Dated: March 5, 2026

Respectfully submitted,

GALIT LIPA
STATE PUBLIC DEFENDER

/s/

L. ALEX MCDONALD
Deputy State Public Defender

**CERTIFICATE OF COUNSEL**
(Cal. Rules of Court, rule 8.360(b)(1))

I, L. Alex McDonald, am the Deputy State Public Defender assigned to represent appellate [redacted] in this appeal. I have conducted a word count of this brief using our office's computer software. On the basis of the computer-generated work count, I verify that this brief is 25,273 words in length excluding tables and this certificate.

Dated: March 5, 2026

/s/
L. ALEX MCDONALD
Deputy State Public Defender

## DECLARATION OF SERVICE

Case Name: ***People v.*** [redacted]
Case Number: **2DCA, Division Two Case No.** [redacted]
**Los Angeles County Superior Court Case No.** [redacted]

I, **Guadalupe G. Cabrera**, declare as follows: I am over the age of 18, and not party to this cause. I am employed in the county where the mailing took place. My business address is 770 L Street, Suite 1000, Sacramento, CA, 95814. I served a true copy of the following document:

**APPELLANT'S OPENING BRIEF**

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

The envelopes were addressed and mailed on **March 5, 2026**, as follows:

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The aforementioned document was served electronically via TrueFiling to the individuals listed below on **March 5, 2026**:

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| Office of the Attorney General<br>300 South Spring Street, First Floor<br>Los Angeles, CA 90013<br>*docketinglaawt@doj.ca.gov* | California Appellate Project, Los Angeles<br>520 S. Grand Avenue, Fourth Floor<br>Los Angeles, CA 90071<br>*capdocs@lacap.com* |

| | |
|---|---|
| [redacted] | District Attorney, Los Angeles County<br>Hall of Justice<br>211 W. Temple St., Floor 12<br>Los Angeles, CA 90012<br>*Truefiling@da.lacounty.gov* |

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **March 5, 2026**, at Sacramento, California.

GUADALUPE G. CABRERA