No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2019

ANDY NGUYEN, Petitioner,

v.

STATE OF CALIFORNIA, Respondent

_____

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION THREE

_____

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QUESTIONS PRESENTED

Should the Court reconsider its majority opinion in *Oregon v. Ice*, 555 U.S. 160, 167-168, 173-177, 129 S.Ct. 711, 172 L.Ed.2d 517 (2009) (*Ice*) which permits consecutive sentencing for multiple felony convictions based upon post-verdict *judicial* fact-finding which relates solely to the commission of the underlying offenses and which apply only a preponderance of evidence standard? (See Justice Scalia's dissenting opinion in *Ice*, joined in by Chief Justice Roberts and Justices Thomas and Souter at pp. 173-178 [concluding that the majority's reasoning had been specifically rejected in *Apprendi v. New Jersey*, 530 U.S. 466, 482-483, 120 S.Ct. 2348, 2358-2359, 147 L.Ed.2d 435 (2000) (*Apprendi*); see also *Alleyne v. United States* 570 U.S. 99, 111-112, 133 S.Ct. 2151, 2160, 186 L.Ed.2d 314 (2013) (*Alleyne*).)

Would overruling *Ice* undermine principles of *stare decisis,* ***or*** would such a decision only minimally affect governmental reliance on past precedent because "prosecutors are perfectly able to 'charge facts upon which [consecutive sentencing] is based in the indictment and prove them to a jury.' *Harris [v. United States]*, 536 U.S. [545] at p. 581, 122 S.Ct. 2406, 153 L.Ed.2d 524 [(2002)] (Thomas, J., dissenting)." (*Alleyne, supra,* 570 U.S. at pp. 119 (concurring opinion of Justice Sotomayor, with whom Justices Ginsburg and Kagan join)?

LIST OF PARTIES

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Petitioner ANDY NGUYEN respectfully prays that a writ of certiorari issue to review the decision of the California Court of Appeal, Second Appellate District, Division Three, affirming that portion of the judgment of the Superior Court of California, County of Los Angeles, resulting in consecutive terms of imprisonment upon his convictions for two counts forcible oral copulation. (Calif. Penal Code, § 288a, subd. (C)(2)(A).)[1]

[1] Unless otherwise noted all code section references are to the California Penal Code. Citations to the trial court proceedings at issue are contained in a Clerk's and Reporter's Transcripts on Appeal which are designated "CT" and "RT", respectively, and by volume number.

OPINIONS BELOW

The opinion of the Court of Appeal, filed October 24, 2019, is unreported. It appears at Appendix A to this petition.

JURISDICTION

The Court of Appeal entered its judgment on October 24, 2019. On November 26, 2019, petitioner filed a Petition for Review to Exhaust State Remedies in the California Supreme Court. (See California Rules of Court, Rule 8.508 (a).) On January 2, 2020, the California Supreme Court issued an order denying review; a copy of that order appears at Appendix B to this petition.

Petitioner invokes the jurisdiction of this Court under 28 U.S.C., section 1257(a), and on the grounds that his rights under the Sixth and Fourteenth Amendments to the United States Constitution were violated.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed,...."

United States Constitution, Fourteenth Amendment:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty,

or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF CASE

This matter comes before the Court as a result of a state court direct appeal of the trial court's discretionary sentencing decision to impose *consecutive* rather than concurrent terms of imprisonment, a decision based solely on the trial court's own post-verdict findings of fact related exclusively to the commission of the underlying offenses, facts which were neither found by petitioner's jury or implicit in their general verdicts nor admitted by petitioner. It calls into question this Court's majority holding in *Oregon v. Ice,* 555 U.S. 160, 168-172, 129 S.Ct. 711, 172 L.Ed.2d 517 (2009) (*Ice*) which refused to extend the rule of *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 137 L.Ed.2d 435 (2000) (*Apprendi*) to consecutive sentencing decisions based on factors related to the commission of the underlying offenses.

Justice Scalia dissented in *Ice*, asserting that the majority's reasoning had been specifically rejected in *Apprendi.* (*Ice, supra,* 555 U.S. at pp 173-178.) Chief Justice Roberts and Justices Thomas and Souter joined in Justice Scalia's dissent.

As relevant here, petitioner was convicted by jury of two counts of forcible oral copulation and sentenced to consecutive terms of 25 years-to-life on each pursuant to California's One Strike Law governing sex

offenses. (See §§ 288a, subd. (C)(2)(A); 667.61, subdds. (a), (b), (d) and (e); 1 CT 207-212; 8 RT 2588-2592; 9 RT 4514-4518.)

California law mandates that trial courts impose consecutive sentences on multiple sex offenses such as those for which appellant was convicted *if* those offenses are committed against a single victim *on separate occasions*. (§ 667.61, subd. (i).) Section 667.61, subdivision (i) states:

> "For any offense specified in paragraphs (1) to (7), inclusive, of subdivision (c), or in paragraphs (1) to (6), inclusive of subdivision (n), the court shall impose a consecutive sentence for each offense that results` in a conviction under this section ***if the crimes involve separate victims or involve the same victim on separate occasions as defined in subdivision (d)*** of Section 667.6". (Bolded italics added.)

Subdivision (d) of section 667.6 provides: "In determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court ***shall consider whether, between the commission of one sex crime and another***, ***the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior***. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on

separate occasions."[2] (Bolded italics added; see also Cal. Rules of Court, rule 4.425(a)(3) ["The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior."].)

Here, after referencing these provisions with respect to counts 2 and 3 (see 1 CT 222-225; 9 RT 4514-4517), the trial court concluded that these counts were committed on 'separate occasions' within the meaning of subdivision (d) of Section 667.6. (9 RT 4517-4518). However, petitioner's jury was never instructed on these principles since that subject

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[2] Prior to 2006, "multiple sex offenses occurred on a 'single occasion' within the meaning of ... section 667.61, subdivision (g), if there was a close temporal and spatial proximity between offenses." (*People v. Jones* (2001) 25 Cal.4th 98, 100-101, 107.) In so interpreting the statute *Jones* refused to apply the test adopted under section 667.6 to determine whether forcible sex crimes were committed against the victim "on separate occasions" under section 667.6, subdivision (d), namely, whether the defendant had a meaningful opportunity to reflect between the attacks. As *Jones* explained, "given the harshness of the punishment dictated by ...section 667.61, subdivision (g) – of life imprisonment – and the lack of definitive legislative direction, the rule of lenity also points to the conclusion that the Legislature intended to impose no more than one such sentence per victim per episode of sexually assaultive behavior [Citation.]....[T]he rule we adopt should result in a single life sentence, rather than three consecutive life sentences, for a sequence of sexual assaults by defendant against one victim that occurred during an uninterrupted time frame and in a single location." (*Id*. at p. 107.)

However, in September 2006 the Legislature amended the One Strike law to eliminate section 667.61, former subdivision (g). (Stats. 2006, ch. 337, § 33, pp. 2165-2167). The version of the One Strike law applicable to appellant's offenses does not contain it. The sole provision relevant to the sentencing of multiple offenses under the applicable One Strike law is section 667.61, subdivision (i) is section 667.6, subdivision (d). (*People v. Rodriguez* (2012) 207 Cal.App.4th 204, 212-213.)

was irrelevant to its adjudication of the underlying charges given current California law.

Petitioner appealed the trial court's judgment asserting that "he was entitled to have the jury decide whether his two acts of forcible oral copulation took place 'on separate occasions' within the meaning of section 667.61, subdivision (i)" light of this Court's holding in *Apprendi, supra*. (Appendix A at p. 6.)[3] As anticipated, the Court of Appeal rejected his claim, relying on the majority holding in *Ice, supra,* 555 U.S. 160, 164, 172. (Appendix A at pp. 6-7)).

In his Petition for Review to Exhaust State Court Remedies to the California Supreme Court petitioner reasserted that same claim of error. (See Cal. Rules of Ct., rule 8.508, subd. (a).)[4] The California Supreme Court denied petitioner's Petition for Review on January 2, 2020. (Appendix B.)

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[3] "The rule of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), is clear: Any fact — other than that of a prior conviction — that increases the maximum punishment to which a defendant may be sentenced must be admitted by the defendant or proved beyond a reasonable doubt to a jury." (*Ice, supra*, 555 U.S. at p. 173 (dissenting opinion of Scalia, J.).)

[4] Although not asserted in the trial court, any such constitutional challenge would have been futile in light of *Ice, supra*. (See *People v. Sandoval*, 41 Cal.4th 825, 837, fn. 4, (2007) (*Sandoval*).) Petitioner's Sixth and Fourteenth Amendment objections were raised in the California appellate courts in order to preserve his claims for subsequent federal court review. (*Reese v. Baldwin* (9th Cir.2002) 282 F.3d 1184, 1190.)

REASONS FOR GRANTING THE WRIT

This Court should reconsider its majority holding in *Ice, supra,* 555 U.S. 160, 167-168, 173-177, which permits consecutive sentencing for multiple felony convictions based upon post-verdict *judicial* fact-finding relating solely to the commission of the underlying offenses and which applies a preponderance of evidence standard rather than proof beyond a reasonable doubt.

The *Ice* majority held, in light of historical practice and the States' authority over administration of their criminal justice systems, that the Sixth Amendment does not inhibit states from assigning to judges, rather than to juries, the finding of facts necessary to the imposition of consecutive *rather than concurrent* sentences for multiple offenses. (*Ice, supra,* 555 U.S. at pp. 168-172, opinion of Ginsburg, joined by Stevens, Kennedy, Breyer and Alito, J.J.) Accordingly, the majority refused to extend the rule of *Apprendi, supra,* to the imposition of sentences for discrete crimes. (*Ibid*.)

Justice Scalia disagreed asserting that the majority's reasoning had been specifically rejected in *Apprendi.* (555 U.S. at pp 173-178.) Chief Justice Roberts and Justices Thomas and Souter joined in that dissent. (*Id*. at 173.)

Petitioner submits that Justice Scalia's dissent not only supports his Sixth and Fourteenth Amendment challenges but is better reasoned

than the majority's while remaining true to the principles first enunciated in *Apprendi* and reaffirmed by this Court in subsequent decisions including those post-dating *Ice*. Under such circumstances, a reexamination of the *Ice* majority opinion and a determination that its analysis was flawed would be a justifiable departure from precedent.[5]

A. *Apprendi* and Its Progeny

"The Sixth Amendment provides that those 'accused' of a 'crime' have a right to a trial 'by an impartial jury.' This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt. *United States v. Gaudin,* 515 U.S. 506, 510,115 S.Ct. 2310, 132 L.Ed. 2d 444 (1995); *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The substance and scope of this right depend upon the proper designation of the facts that

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[5] Petitioner does not herein challenge the traditional role of judges to consider factors in aggravation or mitigation which are *personal* to the defendant and which do *not* bear on the commission of the underlying offenses. For example, such factors may include: (1) whether the defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness; (2) whether the defendant has served a prior term of imprisonment; (3) whether the defendant was on probation or parole when the crime was committed or has engaged in violent conduct that indicates a serious danger to society; (4) whether the defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime; (5) whether the defendant voluntarily acknowledged wrongdoing before arrest or at an early stage of the criminal process; (6) whether the defendant is ineligible for probation and but for that ineligibility would have been granted probation; or (7) whether the defendant made restitution to the victim. (See Cal. Rules of Ct., rules 4.421, subd. (b)(1-5); 4.423, subd. (b)(1-6).)

are elements of the crime." (*Alleyne v. United States,* 570 U.S. 99, 104-105, 133 S.Ct. 2151, 2156, 186 L.Ed.2d 314 (2013) (*Alleyne*).) However, as observed by Justice Thomas, "[t]he question of how to define a 'crime' – and, thus, how to determine what facts must be submitted to the jury – has generated a number of divided opinions from the this Court." (*Id*. at p. 105.)

In *Apprendi, supra,* the defendant was sentenced to 12 years imprisonment under a New Jersey statute that increased the maximum term of imprisonment from 10 years to 20 years if the trial judge found that the defendant committed his crime with racial bias. (530 U.S. at p. 470.) In defending its sentencing scheme, New Jersey argued that under *McMillan v. Pennsylvania,* 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986) (*McMillan*) the state legislature could define racial bias as a sentencing factor to be found by the judge.[6] This Court declined to extend *McMillan* that far explaining that there was no "principled basis for treating" a fact increasing the maximum term of imprisonment differently than the facts constituting the base offense. (530 U.S. at p. 476.)

"The historic link between crime and punishment, instead, led [the Court] to conclude that any fact that increased the prescribed statutory maximum sentence must be an 'element' of the offense to be found by

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[6] The term "sentencing factor", first introduced in *McMillan*, refers to facts that are not found by a jury but which can nonetheless increase a defendant's punishment. (477 U.S. at p. 86.)

the jury. [*Apprendi, supra*, 530 U.S.] at 483, n. 10, 490, 120 S.Ct. 2348....[T]hus,...,...Apprendi's sentence had been unconstitutionally enhanced by the judge's finding of racial bias by a preponderance of the evidence. (*Id*., at 491-492, 120 S.Ct. 2348." (*Alleyne, supra,* 570 U.S. at p. 106.)

Subsequent decisions of this Court have implemented *Apprendi's* rule variously. In *Ring v. Arizona*, 536 U.S. 584, 602, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) the Court applied *Apprendi* to fact finding allowing for a sentence of death; in *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) to fact finding which would allow a sentence to exceed the "standard" range in Washington state's sentencing scheme (542 U.S. at pp. 304-305); in *United States v. Booker*, 543 U.S. 220, 244, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) to facts prompting an elevated sentence under then-mandatory Federal Sentencing Guidelines; and in *Cunningham v. California,* 549 U.S. 270, 291,127 S.Ct. 856, 166 L.Ed.2d 856 (2007) (*Cunningham*) to facts permitting imposition of an "upper term" sentence under California's tripartite determinate sentencing law. (See § 1170.1, subd. (a) and former Cal. Rule of Ct., rule 4.420 (a).)

More recently, the Court applied *Apprendi* principles to Federal Sentencing Guidelines where fact finding increases a *mandatory minimum term* because "a fact triggering a mandatory minimum alters the

prescribed range of sentences to which a criminal defendant is exposed." (*Alleyne, supra* 570 U.S. at p. 112 and 112-115 [disapproving its contrary holding in *Harris v. United States* 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002).) That same reasoning was reaffirmed and applied one year later in *Burrage v. United States*, 571 U.S. 204, —, 134 S.Ct. 881, 887, 187 L.Ed.2d 715 (2014), a case involving a 20-year mandatory minimum sentence under the penalty enhancement provisions of the Controlled Substances Act where "death resulted" from the use of a controlled substance unlawfully distributed by the defendant. (See 21 U.S.C. § 841(b)(1)(C).)

And, at the end of last term the Court addressed the question of whether a federal statute governing revocation of supervised release and authorizing a new mandatory minimum sentence above the term authorized by the defendant's initial crime of conviction based on judicial fact-finding by a preponderance of evidence similarly violated the Due Clause and the Sixth Amendment right to trial by jury. (*United States v. Haymond* __ U.S. ___ , 139 S.Ct. 2369 (2019) (*Haymond*).)[7]

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[7] Andre Haymond was convicted of possessing child pornography, a crime that carries a prison term of zero to 10 years. After serving a prison sentence of 38 months, and while on supervised release, Mr. Haymond was again found with what appeared to be child pornography. The government sought to revoke his supervised release and secure a new and additional prison sentence. A district judge, acting without a jury, found by a preponderance of the evidence that Mr. Haymond knowingly downloaded and possessed child pornography. Under 18 U.S.C. § 3583(e)(3), the judge could have sentenced him to a prison term of between zero and two additional years. But because possession of child

Writing the Court's lead opinion, Justice Gorsuch, joined by Justices Ginsburg, Sotomayor and Kagan with Justice Breyer filing an opinion concurring in the judgment, concluded that it did, citing, inter alia, *Apprendi, supra,* and its progeny including *Alleyne, supra*. (__ U.S. ___, 139 S.Ct. at pp. 2376-2383.) "Only a jury, acting on proof beyond a reasonable doubt, may take a person's liberty. That promise stands as one of the Constitutions' most vital protections against arbitrary government." (*Id*. at p. 2373.)

In a footnote reference, Justice Gorsuch acknowledged two narrow exceptions to *Apprendi's* general rule previously recognized by the Court: "Prosecutors need not prove to a jury the fact of a defendant's prior conviction (*Almendarez-Torres v. United States*, 523 U.S. 224, 118 C.St. 1219, 140 L.Ed.2d 350 (1998), or facts that affect whether a defendant with multiple sentences serves them concurrently or consecutively, *Oregon v. Ice,* 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517 (2009)." (__ U.S. ___ 139 S.Ct. At p. 2377, fn. 3].) Other than noting that neither exception was implicated in *Haymond* there was no further discussion of

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pornography is an enumerated offense under § 3583(k), the judge instead imposed that provision's 5-year mandatory minimum. On appeal, the Tenth Circuit observed that whereas a jury had convicted Mr. Haymond beyond a reasonable doubt of a crime carrying a prison term of zero to 10 years, this new prison term included a new and higher mandatory minimum resting on facts found only by a judge by a preponderance of the evidence. The Tenth Circuit therefore held that § 3583(k) violated the right to trial by jury guaranteed by the Fifth and Sixth Amendments. (139 S.Ct. at pp. 2372-2375.)

either. Petitioner asks this Court to revisit the latter exception and discard it insofar as it permits post-verdict judicial fact-finding pertaining solely to the existence of aggravating circumstances surrounding the commission of the underlying offenses.

B. The *Ice* Majority's Analysis Is Incompatible with *Apprendi*

Petitioner submits that the dissenting opinion in *Ice*, *supra*, is consistent with this Court's current Sixth Amendment jurisprudence including its most recent decision in *Haymond,* and clearly demonstrates why the *Ice* majority's analysis is incompatible with *Apprendi*. It is worthy of further reflection.

> "The rule of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), is clear: Any fact — other than that of a prior conviction — that increases the maximum punishment to which a defendant may be sentenced must be admitted by the defendant or proved beyond a reasonable doubt to a jury. Oregon's sentencing scheme allows judges rather than juries to find the facts necessary to commit defendants to longer prison sentences, and thus directly contradicts what we held eight years ago and have reaffirmed several times since. The Court's justification of Oregon's scheme is a virtual copy of the dissents in those cases." (555 U.S. at p. 173.)

> *"The judge in this case could not have imposed a sentence of consecutive prison terms without making the factual finding that the defendant caused 'separate harms' to the victim by the acts that produced two convictions.* See 343 Ore. 248, 268, 170 P.3d 1049, 1060 (2007) (Kistler, J., dissenting). There can thus be no doubt that the judge's factual finding was 'essential to' the punishment he imposed. *United States v. Booker*, 543 U.S. 220, 232, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). That 'should be the end of the matter.' *Blakely v. Washington*, 542 U.S. 296, 313, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)." (555 U.S. at p. 173,

italics added.)

"Instead, the Court attempts to distinguish Oregon's sentencing scheme by reasoning that the rule of *Apprendi* applies only to the length of a sentence for an individual crime and not to the total sentence for a defendant. I cannot understand why we would make such a strange exception to the treasured right of trial by jury. Neither the reasoning of the *Apprendi* line of cases, nor any distinctive history of the factfinding necessary to imposition of consecutive sentences, nor (of course) logic supports such an odd rule." (555 U.S. at p. 173.)

"We have taken pains to reject artificial limitations upon the facts subject to the jury-trial guarantee. We long ago made clear that the guarantee turns upon the penal consequences attached to the fact, and not to its formal definition as an element of the crime. *Mullaney v. Wilbur*, 421 U.S. 684, 698, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). More recently, we rejected the contention that the 'aggravating circumstances' that qualify a defendant for the death penalty did not have to be found by the jury. 'If,' we said, 'a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact — no matter how the State labels it — must be found by a jury beyond a reasonable doubt.' *Ring v. Arizona*, 536 U.S. 584, 602, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). A bare three years ago, in rejecting the contention that the facts determining application of the Federal Sentencing Guidelines did not have to be found by the jury, we again set forth the pragmatic, practical, nonformalistic rule in terms that cannot be mistaken: The jury must "find the existence of "'any particular fact"' that the law makes essential to [a defendant's] punishment.' *Booker, supra*, at 232, 125 S.Ct. 738 (quoting *Blakely, supra*, at 301)." (555 U.S. at pp. 173-174.)

"This rule leaves no room for a formalistic distinction between facts bearing on the number of years of imprisonment that a defendant will serve for one count (subject to the rule of *Apprendi*) and facts bearing on how many years will be served in total (now not subject to *Apprendi*). There is no doubt that consecutive sentences

are a 'greater punishment' than concurrent sentences, *Apprendi, supra*, at 494, 120 S.Ct. 2348. We have hitherto taken note of the reality that 'a concurrent sentence is traditionally imposed as a less severe sanction than a consecutive sentence.' *Ralston v. Robinson*, 454 U.S. 201, 216, n. 9, 102 S.Ct. 233, 70 L.Ed.2d 345 (1981) (emphasis deleted). The decision to impose consecutive sentences alters the single consequence most important to convicted noncapital defendants: their date of release from prison. For many defendants, the difference between consecutive and concurrent sentences is more important than a jury verdict of innocence on any single count: Two consecutive 10–year sentences are in most circumstances a more severe punishment than any number of concurrent 10–year sentences." (555 U.S. at p. 174.)

"To support its distinction-without-a-difference, the Court puts forward the same (the very same) arguments regarding the history of sentencing that were rejected by *Apprendi*. Here, it is entirely irrelevant that common-law judges had discretion to impose either consecutive or concurrent sentences, *ante*, at 717–718; just as there it was entirely irrelevant that common-law judges had discretion to impose greater or lesser sentences (within the prescribed statutory maximum) for individual convictions. There is no Sixth Amendment problem with a system that exposes defendants to a known range of sentences after a guilty verdict: 'In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail.' *Blakely, supra,* at 309, 124 S.Ct. 2531. The same analysis applies to a system where both consecutive and concurrent sentences are authorized after only a jury verdict of guilt; the burglar-rapist knows he is risking consecutive sentences. Our concern here is precisely the same as our concern in *Apprendi*: ***What happens when a State breaks from the common-law practice of discretionary sentences and permits the imposition of an elevated sentence only upon the showing of extraordinary facts?*** In such a system, the defendant 'is entitled to' the lighter sentence 'and by reason of the Sixth Amendment [,] the facts bearing upon that entitlement must be found by a jury.' *Blakely, supra,* at 309, 124 S.Ct. 2531." (555 U.S. at p. 174-175, bolded italics added.)

"The Court protests that in this case there is no 'encroachment' on or 'erosion' of the jury's role because traditionally it was for the judge to determine whether there would be concurrent terms. *Ante*, at 718–719. Alas, this argument too was made and rejected in *Apprendi*. The jury's role was not diminished, the *Apprendi* dissent contended, because it was traditionally up to judges, not juries, to determine what the sentence would be. 530 U.S., at 556, 559, 120 S.Ct. 2348 (opinion of BREYER, J.). The Court's opinion acknowledged that in the 19th century it was the practice to leave sentencing up to the judges, within limits fixed by law. But, it said, that practice had no bearing upon whether the jury must find the fact where a law conditions the higher sentence upon the fact. ***The jury's role is diminished when the length of a sentence is made to depend upon a fact removed from its determination. Id., at 482–483, 120 S.Ct. 2348. The same is true here.*** (555 U.S. at pp. 175-176, bolded italics added.)

"The Court then observes that the results of the Oregon system could readily be achieved, instead, by a system in which consecutive sentences are the default rule but judges are permitted to impose concurrent sentences when they find certain facts. Ante, at 718– 719. Undoubtedly the Sixth Amendment permits a system in which judges are authorized (or even required) to impose consecutive sentences unless the defendant proves additional facts to the Court's satisfaction. See ibid. But the permissibility of that alternative means of achieving the same end obviously does not distinguish *Apprendi*, because the same argument (the very same argument) was raised and squarely rejected in that case: (555 U.S. at p. 176.)

"....

"Ultimately, the Court abandons its effort to provide analytic support for its decision, and turns to what it thinks to be the '"salutary objectives"' of Oregon's scheme. Ante, at 719. 'Limiting judicial discretion,' we are told, promotes sentences proportionate to the gravity of the offense, and reduces disparities in sentence length. Ibid. The same argument (the very same argument) was made and rejected in *Booker*, see 543 U.S., at 244, 125 S.Ct. 738, and *Blakely*, see 542 U.S., at 313, 124 S.Ct. 2531. The protection of the

> Sixth Amendment does not turn on this Court's opinion of whether an alternative scheme is good policy, or whether the legislature had a compassionate heart in adopting it. The right to trial by jury and proof beyond a reasonable doubt is a given, and all legislative policymaking — good and bad, heartless and compassionate — must work within the confines of that reality...." (555 U.S. at pp. 176-177.)

Two years before *Ice* this Court found a California statutory sentencing scheme analogous to that here at issue to have violated the constitutional principles set forth in *Apprendi*. (*Cunningham, supra*, 549 U.S. at p. 287.) Cunningham had been tried and convicted of continuous sexual abuse of a child under 14. Under California's Determinate Sentencing Law (DSL), that offense was punishable by one of three precise terms of imprisonment: a lower term sentence of 6 years, a middle term sentence of 12 years, or an upper term sentence of 16 years. The DSL obliged the trial judge to sentence Cunningham to the 12 year middle term *unless the judge found* one or more additional "circumstances in aggravation. State court rules adopted to implement the DSL defined "circumstances in aggravation" as facts that justify the upper term.[8] Those facts, the rules provided, must be established by a preponderance of the

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[8] The DSL directed the State's Judicial Council to adopt Rules guiding the sentencing judge's decision whether to "[i]mpose the lower or upper prison term." (§ 1170.3(a)(2).) Restating section 1170(b), the Council's Rules provide that "[t]he middle term shall be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation." (Former Rule 4.420(a).) "The reasons for selecting one of the three authorized terms of imprisonment referred to in section 1170(b) must be stated orally on the record." (Calif. Rules of Ct., rule 4.420(e).)

evidence. Based on a post-trial sentencing hearing, the judge found by a preponderance of the evidence six aggravating facts, including the particular vulnerability of the victim, and one mitigating fact, that Cunningham had no record of prior criminal conduct. Concluding that the aggravators outweighed the sole mitigator, the judge sentenced Cunningham to the upper term of 16 years. (549 U.S. at pp. 275-276.)[9]

In an opinion opinion written by Justice Ginsburg, joined by Chief Justice Roberts and Justices Scalia, Thomas and Souter, the Court found the California scheme constitutionally flawed.

> "'Our precedents make clear ... that the "statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant .... In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment," ... and the judge exceeds his proper authority.' Id., at 303–304, 124 S.Ct. 2531 (quoting 1 J. Bishop, Criminal Procedure § 87, p. 55 (2d ed. 1872); emphasis in original)." (*Cunningham, supra,* 570 U.S. at pp. 283, quoting *Blakely, supra,* 542 U.S. at pp. 303-304.) "Because circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt, see supra, at 862, the DSL violates *Apprendi's* bright-line rule". (549 U.S. at p. 287.)

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[9] The particular vulnerability of the victim is listed in Rule 4.421(a)(3) as a fact "relating to the crime." Violent conduct indicating a serious danger to society is listed in Rule 4.421(b)(1) as a fact "relating to the defendant."

The decision to impose consecutive sentences under current California law allows trial courts to undertake the same type of post-verdict judicial fact finding condemned by this Court in *Cunningham, supra*. It should meet the same fate.

C. Reexamination of *Ice* Does Not Undermine Principles of Stare Decisis

"Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of stare decisis demands special justification." (*Arizona v. Rumsey*, 467 U.S. 203, 212, 104 S.Ct. 2305, 2311, 81 L.Ed.2d 164 (1984); see also *Alleyne, supra,* 570 U.S. at pp. 118-122, concurring opinion of Justice Sotomayor, with whom Justices Ginsburg and Kagan joined).

"In deciding whether this case presents such justification, we recall Justice Frankfurter's admonition that 'stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.' (*Helvering v. Hallock*, 309 U.S. 106, 119, 60 S.Ct. 444, 451, 84 L.Ed. 604 (1940). Remaining true to an 'intrinsically sounder' doctrine established in prior cases better serves the values of stare decisis than would following a more recently decided case inconsistent with the decisions that came before it; the latter course would simply compound the recent error and would likely make the unjustified

break from previously established doctrine complete. In such a situation, 'special justification' exists to depart from the recently decided case." (*Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 231, 115 S.Ct. 2097, 2114-2115 (1995).)

A special justification for departing with precedent is present here: "when procedural rules are at issue that do not govern primary conduct and do not implicate the reliance interests of private parties, the force of stare decisis is reduced. [Citations.] Any reliance interest that the Federal Government and state governments might have is particularly minimal here because prosecutors are perfectly able to 'charge facts upon which a...sentence is based in the indictment and prove them to a jury.' *Harris*, 536 U.S., at 581, 122 S.Ct. 2406 (Thomas, J., dissenting)." (*Alleyne, supra,* 570 U.S. at p. 119, concurring opinion of Justice Sotomayor.)

The *Ice* majority holding presents a singularly anomalistic and unreasonable departure from a consistent line of this Court's Sixth Amendment decisions beginning in 2000 with *Apprendi* and reaffirmed most recently in 2019 in *Haymond, supra*. Just as this Court in *Alleyne, supra*, revisited and overruled its contrary holding in *Harris v. United States, supra*, 536 U.S. 545, decided only 7 years prior, so too should it now revisit and overrule the majority holding in *Ice, supra*.

D. *Apprendi* Error Was Prejudicial

The denial of the right to a jury trial on aggravating circumstances is reviewed under the harmless error standard set forth in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (*Chapman*) as applied in *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (*Neder*). *Neder* held that an erroneous jury instruction which omits an element of the offense is subject to *Chapman* analysis; i.e. whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman, supra,* 386 U.S. at p. 24; *Neder, supra,* 527 U.S. at p. 15.)

In *Washington v. Recuenco*, 548 U.S. 212, 220,126 S.Ct. 2546, 165 L.Ed.2d 466 (2006), this Court held that a similar harmless error analysis applies to the failure to submit a sentencing factor to a jury, finding no distinction for purposes of harmless error analysis of Sixth Amendment violations between a sentencing factor that must be submitted to a jury and an element of a crime.

However, in the context of the present case the question is not whether the error "contribute[d] to the verdict obtained" (*Chapman, supra,* 386 U.S. at p. 24) because the jury's verdict on the charged offense is not at issue. Instead, this Court must determine: if the question of the existence of an aggravating circumstance or circumstances had been submitted to the jury would the jury's verdict have authorized consecutive

sentencing in this case?

Accordingly, a reviewing court must take into account the differences between the nature of the errors at issue in the present case and those in a case in which the trial court fails to instruct the jury on an element of the crime but where the parties were aware during trial that the element was at issue.

In a case such as petitioner's a reviewing court cannot assume that the record necessarily reflects all of the evidence that would have been presented had aggravating circumstances of the crime been submitted to the jury. Although the aggravating circumstances found here by the trial court were based upon its recollection of evidence presented to the jury, those aggravating circumstances were *not part of the charge* and were *not at issue during trial*. Indeed, under California law such aggravating circumstances are based upon facts that are not elements of the crime. (Cal. Rules of Court, rule 4.420(d).) Thus, petitioner had no reason, let alone the opportunity during trial, to challenge the evidence supporting those aggravating circumstances unless such a challenge would have also tended to undermine proof of an element of an alleged offense, which it did not. (See *Sandoval, supra*, 41 Cal.4th at p. 839.)[10]

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[10] While it could be argued that petitioner "did have an incentive and opportunity at the sentencing hearing to contest any aggravating circumstances [being considered], that incentive and opportunity were not necessarily the same as they would have been had the aggravating circumstances been tried to a jury. First, the standard of proof at the sentencing hearing was lower; the trial court was required to make a

To the extent a potential aggravating circumstance at issue in a particular case rests on a somewhat vague or subjective standard, it may be difficult for a reviewing court to conclude with confidence that, had the issue been submitted to the jury, the jury would have assessed the facts in the same manner as did the trial court. Indeed, California's sentencing rules which set forth aggravating circumstances were not drafted with a jury in mind. Rather, they were intended to "provid[e] criteria for the consideration of the trial judge." (§ 1170.3, subd. (a).) Because these rules are intended to be applied to a broad spectrum of offenses they are "framed more broadly than" criminal statutes and necessarily "partake of a certain amount of vagueness which would be impermissible if those standards were attempting to define specific criminal offenses." (*People v. Thomas, 87 Ca*l.App.3d 1014, 1023, 1024 (1979).)[11]

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finding of one or more aggravating circumstances only by a preponderance of the evidence. (Cal. Rules of Court, rule 4.420(b).) Second, because the trial court had broad discretion in imposing sentence, a finding by the court concerning whether or not any particular aggravating circumstance existed reasonably might have been viewed by defense counsel as less significant than the court's overall assessment of defendant's history and conduct. Counsel's strategy might have been different had the aggravating circumstances been tried under a beyond-a-reasonable-doubt standard of proof to a trier of fact that was responsible only for determining whether such circumstances were proved (and not for making the ultimate sentencing decision). Accordingly, a reviewing court cannot always be confident that the factual record would have been the same had aggravating circumstances been charged and tried to the jury." (*Sandoval, supra,* 41 Cal.4th at pp. 839-840.)

[11] Many of the aggravating circumstances described in the rules require an imprecise quantitative or comparative evaluation of the facts. For example, aggravating circumstances set forth in the sentencing rules call

On the record of petitioner's trial, it cannot confidently be concluded that a jury would have made such aggravating findings when obliged to apply the "beyond a `reasonable doubt" standard to the evidence. Petitioner has established prejudice under *Chapman's* "harmless error" principles.

CONCLUSION

Petitioner respectfully requests this Court grant his petition for certiorari, reconsider the majority holding in *Ice,* reverse the Court of Appeal's decision upholding the trial court's consecutive sentencing order, and remand the case to the trial court for further proceedings consistent with *Apprendi*.

Dated: January 28, 2020.

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ANDY NGUYEN

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for a determination as to whether "[t]he victim was particularly vulnerable,"... (Cal. Rules of Court, rule 4.421(a)(3)...). In addition, the trial court may consider aggravating circumstances not set forth in rules or statutes. Such aggravating circumstances need only be "reasonably related to the decision being made." (*Id.*, rule 4.408(a).) "Aggravating circumstances considered by the trial court that are not set out in the rules are not subject to clear standards, and often entail a subjective assessment of the circumstances rather than a straightforward finding of facts." (*Sandoval, supra*, 41 Cal.4th at p. 840.)

A P P E N D I X A

Opinion, California Court of Appeal, Second Appellate District,
Division Three, filed October 24, 2019

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ANDY NGUYEN, Defendant and Appellant.	B290564 Los Angeles County Super. Ct. No. KA112263

APPEAL from a judgment of the Superior Court of Los Angeles County, Juan Carlos Dominguez, Judge. Conviction affirmed; remanded with directions.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Paul M. Roadarmel, Jr., and Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Andy Nguyen of assault to commit a felony (forcible oral copulation) during the commission of a first degree burglary, two counts of forcible oral copulation, and first degree residential burglary. On appeal, Nguyen contends (1) the trial court should have stayed his sentence on the first degree residential burglary count; (2) he had a right to have the jury determine whether his two acts of forced oral copulation took place "on separate occasions"; and (3) he was entitled to good time/work time credits. The Attorney General agrees with Nguyen's first and third contentions but disagrees with his second. We reject Nguyen's second contention.

In a supplemental brief, Nguyen asserts the trial court erred in ordering him to pay a restitution fine and court fees without determining his ability to pay. The Attorney General disagrees, as do we.

We remand the case for the trial court to stay Nguyen's sentence on the burglary count and to award him presentence good conduct credits. We otherwise affirm Nguyen's conviction.

FACTS AND PROCEDURAL BACKGROUND

As Nguyen does not challenge the sufficiency of the evidence, we summarize it only briefly.

In June 2014, Angel Doe[1] was working as a bartender. On June 5, Angel finished her shift around 3:00 a.m. and drove home, stopping on the way to pick up some fast food. She was sitting on her couch, eating the food and looking at her tablet, when the light in her bedroom flicked on. Then the television flicked on. When Angel walked to the doorway of her bedroom, an arm reached around from behind the bedroom door and

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[1] The court and counsel referred to the victim by her first name and a fictitious last name at trial. (See Pen. Code, § 293.5, subd. (a).)

grabbed her. A hand "went over [her] mouth"; she saw a metal knife.

Angel tried to fight off the intruder; she tried to scream "help." He told her to be quiet. The intruder pushed Angel into the living room. He shoved a cloth into her mouth. Angel couldn't see because the intruder put a sleep mask over her eyes. He began to strangle her with his hands. Angel recognized the intruder's voice as that of Andy Nguyen, a neighbor she had met outside the apartment building several days earlier.

Nguyen pulled the straps of Angel's dress down and her dress up. He fondled her breasts, rubbed her vagina, and told her "to perform oral sex on him." Angel urinated on herself and began to gag when Nguyen put her mouth on his penis. At some point Nguyen bound Angel's hands. Nguyen shoved Angel into the kitchen area and gave her some water to drink. Nguyen forced Angel back to the sofa in the living room. He again told Angel she had to perform oral sex; he said if she "didn't do it right," they would "have to take it into the bedroom." Angel thought if they went into the bedroom "he [was] for sure gonna rape [her], and [she was] not gonna walk out of this apartment," so she complied with Nguyen's demand. Nguyen forced Angel to perform oral sex a third time; she bit his hand, which tasted like rubber. Nevertheless, Nguyen forced Angel's head down onto his penis.

Nguyen asked Angel if he could use her bathroom to wash up. She said yes and she could hear him running water in the bathroom. Nguyen told Angel he would come back and kill her if she called the police.

After Nguyen left, Angel threw her belongings back into her purse, grabbed a kitchen knife, and ran down the stairs and out the door to her car. She drove straight to the police station. Police took Angel to the hospital where a nurse collected swabs.

A comparison of DNA from swabs taken of Angel's left fingernails and right hand with a reference sample taken from Nguyen showed Nguyen was a potential contributor.[2]

The People charged Nguyen with assault to commit a felony during the commission of a first degree burglary in violation of Penal Code section 220, subdivision (b) (count 1)[3]; two counts of forcible oral copulation in violation of section 288a, subdivision (c)(2)(A) (counts 2 and 3); and first degree residential burglary in violation of section 459 (count 4). The People alleged Nguyen used a deadly and dangerous weapon—a knife—in the commission of the assault. On counts 2 and 3, the People alleged Nguyen used a deadly weapon, tied or bound the victim, or committed the crimes during a burglary within the meaning of section 667.61, subdivisions (a), (b), (c)(7), (d)(4), and (e)(3), (5).

Nguyen testified on his own behalf at trial. Nguyen said he never had been in Angel's apartment.[4] He stated he was

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[2] The DNA testing showed a third contributor, in addition to Nguyen and Angel, at one of 15 locations.

[3] Statutory references are to the Penal Code.

[4] When asked on direct examination whether he ever had gone into Angel's apartment, Nguyen answered, "I don't recall. But I believe not." Nguyen's counsel asked him if he had told an investigator he was outside drinking and Nguyen responded, "That sounds correct." On cross-examination, Nguyen admitted he had answered "not that I know of" when a detective asked him if he ever had gone into the apartment. When the prosecutor asked Nguyen whether he would know if he had gone into the apartment or not, he responded, "Well, I mean, it's a pretty straightforward answer. 'Not that I know of' is very similar to 'not that—not that I remember' or 'I'm not sure.' " Nguyen then stated that "not that I know of" means "no."

asleep when Angel was assaulted. The defense also called Nguyen's younger brother Vinny. Vinny testified he and Nguyen played a video game that night sometime before 1:00 a.m. and Nguyen then went outside to smoke. Nguyen came back in, "took a long time in the restroom, like he always does," then lay down on his bed and went to sleep before 2:00 a.m. Vinny had talked with his parents "a lot" about his brother's case.

A defense DNA expert, Blaine Kern, testified DNA can be transferred by touch. In his closing argument, defense counsel suggested Angel—while running downstairs after the attack—could have touched something Nguyen had touched.

The jury convicted Nguyen on all counts and found all of the special allegations true. The trial court sentenced Nguyen to an indeterminate term of life in prison as well as a determinate term of six years. The court imposed consecutive 25 to life sentences on counts 2 and 3. The court found the two acts of forcible oral copulation took place on "separate occasions" within the meaning of sections 667.6, subdivision (d), and 667.61, subdivision (i). On count 1, the court sentenced Nguyen to seven years to life plus one year for the knife use, consecutive to counts 2 and 3, but stayed that sentence under section 654. On count 4, the court imposed the upper term of six years, consecutive to counts 2 and 3.

The court gave Nguyen presentence custody credits of 775 actual days but no good conduct credits. The court ordered Nguyen to pay restitution to the Victim Compensation and Government Claims Board in the amount of $2,000 plus interest under section 1202.4, subdivision (f). The Board had provided Angel with funds to relocate. The court also imposed a restitution fine of $300 under section 1202.4, subdivision (b), a court operations assessment of $160 ($40 per count), and

a criminal conviction assessment of $120 ($30 per count). The court imposed and stayed a $300 parole revocation fine.[5]

DISCUSSION

1. *The trial court must stay Nguyen's sentence on Count 4*

Nguyen contends the trial court should have stayed his sentence on Count 1 as well as Count 4. The Attorney General agrees, noting Nguyen's "intent and objective in committing the burglary was to force Angel to orally copulate him." We agree as well. On remand, the trial court is to stay Nguyen's sentence on Count 4 under section 654.

2. *The trial court determined Nguyen's two acts of forcible oral copulation took place "on separate occasions" under governing law*

Nguyen contends he was entitled to have the jury decide whether his two acts of forcible oral copulation took place "on separate occasions" within the meaning of section 667.61, subdivision (i). Nguyen acknowledges the United States Supreme Court has held "the Sixth Amendment does not inhibit states from assigning to judges, rather than to juries, the finding of facts necessary to the imposition of consecutive, rather than concurrent, sentences for multiple offenses." (See *Oregon v. Ice* (2009) 555 U.S. 160, 168-172; see also *People v. Nguyen* (2009) 46 Cal.4th 1007, 1018, fn. 9 ["It is also now clear that *Apprendi* [*v. New Jersey* (2000) 530 U.S. 466] does not require a jury determination of facts bearing on whether to impose concurrent

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[5] In addition, the court imposed a sex offender fine of $300 "plus penalty assessment and 20 percent state surcharge." The minute order states the total sex offender fine with penalty assessments and the surcharge was $1,810. Nguyen does not mention this fine in his appellate briefing.

or consecutive sentences for separate offenses."].) Nguyen argues the dissenting opinion in *Oregon v. Ice* "is better reasoned," however, and he "invites" us "to record [our] disagreement with [the majority] opinion." We decline Nguyen's invitation.

Nguyen also notes he must raise his objection to the rule announced in *Oregon v. Ice* "to preserve his claims for subsequent review."

3. *Nguyen is entitled to presentence good conduct credits of 15 percent*

Nguyen asserts he is entitled to presentence good time/work time credits of 15 percent under section 2933.1. The Attorney General agrees, citing *People v. Andrade* (2015) 238 Cal.App.4th 1274, 1311. We accept the concession.[6]

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[6] A leading treatise states, "Section[ ] . . . 667.61 (One Strike law) . . . [was] amended in 2006 to eliminate the provision that allowed such crimes to accrue 15% conduct credits, whether before or after sentencing. Now there are no conduct credits allowed against the minimum term." (Couzens & Bigelow, Sex Crimes: Cal. Law and Procedure (The Rutter Group 2018) ¶ 13:16(2), p. 13-92; see also *id*. at ¶ 13:10(4), p. 13-56 ["After an amendment effective September 20, 2006, the defendant is not entitled to any conduct credits against the minimum terms [in a One Strike case], either before or after sentencing to state prison. The amendment eliminated the statutory authorization for credits under section 2930 and 4019 previously contained in section 667.61, subdivision (j)."].) We have not located any statute that so provides. (The treatise's reference to section 2930 may be a typographical error. That statute concerns the government's obligation to inform prisoners of prison rules.) As the parties in this case note, section 2933.1 limits worktime credits for violent felonies to 15 percent of actual credits. The only violent felony exempted from this provision is murder; for that crime the defendant receives no conduct credits at all. (§ 2933.2.)

4. *Nguyen is not entitled to an ability to pay hearing*

In a supplemental brief Nguyen contends he is entitled to a remand to the trial court for a hearing on his ability to pay the restitution fine and court assessments under *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). Nguyen states he "does not here contest the direct victim restitution order of $2,000."

Some courts—including our colleagues in Division Two—have held *Dueñas* was wrongly decided. (*People v. Hicks* (Sept. 24, 2019, B291307) ___ Cal.App.5th ___ [2019 WL 4635156]; see also *People v. Aviles* (2019) 39 Cal.App.5th 1055; cf. *People v. Caceres* (2019) 39 Cal.App.5th 917, 923, 927 ["urg[ing] caution in following [*Dueñas*]"; concluding in any event "the due process analysis in *Dueñas*" does not justify extending its holding beyond the "extreme facts" that case presented].)

In any event, unlike the defendant in *Dueñas*, Nguyen did not object to the imposition of the restitution fine or assessments or assert any inability to pay. Generally, where a defendant has failed to object to a restitution fine based on an inability to pay, he has forfeited the issue on appeal. (*People v. Avila* (2009) 46 Cal.4th 680, 729.) We agree with our colleagues in Division Eight that this general rule applies here as well to the assessments imposed under section 1465.8 and Government Code section 70373. (*People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464; *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153-1155; but see *People v. Jones* (2019) 36 Cal.App.5th 1028; *People v. Castellano* (2019) 33 Cal.App.5th 485.)

Our constitution provides, "It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes for the losses they suffer." (Cal. Const., art. I, § 28, subd. (b),

par. (13)(A).) Our Legislature enacted section 1202.4 to promote and further this intent. The California Victim Compensation and Government Claims Board provides restitution to crime victims from the restitution fund. (See Gov. Code, §§ 13950-13966.)

This case well illustrates the importance of the Board's work. The Board provided the victim here, Angel Doe, with $2,000 for relocation expenses. Not only had Angel been repeatedly violated in her apartment, but Nguyen's family continued to live downstairs. In her victim impact statement, Angel told the court she "will never feel safe again" "[n]o matter how many therapist's sessions attended, pills popped, knowledge of self-defense, weapons, security systems, tears shed, or promises of a loved one." Angel stated the "relief" she once had when coming home—"[t]he one sanctuary we all have"—"was taken [away] from [her] by Andy" and "is lost forever."

Even if forfeiture did not apply to the restitution fine and assessments, *Dueñas* does not apply here. *Dueñas* is based on the due process implications of imposing a fine and assessments on an impoverished defendant. The situation in which Nguyen has put himself—life in prison for at least 50 years—does not implicate the same due process concerns. Nguyen, unlike Dueñas, does not face incarceration because of an inability to pay a restitution fine and assessments. Nguyen is in prison because he hid in the victim's apartment, attacked her, and repeatedly forced her orally to copulate him. Even if Nguyen does not pay the fine and assessments, he will suffer none of the cascading and potentially devastating consequences Dueñas suffered. (*Dueñas*, *supra*, 30 Cal.App.5th at p. 1163.) Nguyen has not faced and never will face additional punishment because he cannot pay the restitution fine or assessments.

Finally, Nguyen has presented no evidence of any inability to pay. When he committed his crimes, Nguyen was employed

as a chef at a Sheraton hotel. He had an iPhone 5. He had been "first in line to get it" the year before. "Not only does the record show [Nguyen] had some past income-earning capacity, but going forward we know he will have the ability to earn prison wages over a sustained period." (*People v. Johnson* (2019) 35 Cal.App.5th 134, 139.) "The idea that he cannot afford to pay [$580] while serving a [50]-year prison sentence is unsustainable." (*Ibid*.) "Thus, even if we were to assume [Nguyen] is correct that he suffered a due process violation when the court imposed this rather modest financial burden on him without taking his ability to pay into account, we conclude that, on this record, because he has ample time to pay it from a readily available source of income while incarcerated, the error is harmless beyond a reasonable doubt." (*Id.* at pp. 139-140, citing *Chapman v. California* (1967) 386 U.S. 18, 24.)

DISPOSITION

We affirm Andy Nguyen's conviction. We remand the matter to the trial court with directions to stay Nguyen's six-year sentence on Count 4 under Penal Code section 654 and to award him 116 days of presentence conduct credits. The court is to prepare an amended abstract of judgment and forward it to the California Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

I concur:

DHANIDINA, J.

LAVIN, Acting P.J., Concurring:

I agree with the majority's conclusion that defendant was not entitled to a jury determination of whether his crimes took place on separate occasions. I also agree that count 4 must be stayed and that defendant is entitled to 15 percent custody credit.

I respectfully disagree with the majority's conclusion that defendant forfeited any challenge to the imposition of the court facilities fee (Gov. Code, § 70373), the court security fee (Pen. Code,[1] § 1465.8), and the restitution fine (§ 1202.4, subd. (b)) by failing to object in the trial court. *People v. Dueñas*, which held that mandatory fines and fees could not constitutionally be imposed on criminal defendants unable to pay them, represented a sea change in the law of fines and fees in California. (*People v. Dueñas* (2019) 30 Cal.App.5th 1157, 1169–1172.) No one saw it coming—and defendant was not required to anticipate it. (*People v. Johnson* (2019) 35 Cal.App.5th 134, 137–138; see *People v. Brooks* (2017) 3 Cal.5th 1, 92 [" '[r]eviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence' "].) On the merits, however, I conclude no error occurred because the court impliedly found defendant had the ability to pay the disputed fine and fees. I therefore concur.

When a defendant is convicted of a sex crime listed in section 290, subdivision (c), the court must impose a fine under section 290.3 unless it "determines that the defendant does not

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[1] All undesignated statutory references are to the Penal Code.

have the ability to pay" it. (§ 290.3, subd. (a).)[2] The fine is $300 for the first offense and $500 for each subsequent offense (*ibid.*) plus penalty assessments and the state surcharge (*People v. Valenzuela* (2009) 172 Cal.App.4th 1246, 1249). The fine applies per count rather than per case. (*People v. O'Neal* (2004) 122 Cal.App.4th 817, 822.) Thus, as defendant was convicted of two eligible sex offenses, the court was required to impose one $300 fine and one $500 fine plus penalty assessments and the surcharge.

Instead, the court imposed a single $300 sex offender fine under section 290.3 plus $870 in penalty assessments and a $60 state surcharge. On a silent record, the failure to impose all required sex offender fines implies a finding that the defendant lacks the ability to pay the fines the court did not impose. (*People v. Stewart* (2004) 117 Cal.App.4th 907, 911.) That is, by ordering defendant to pay $300 rather than $800, the court impliedly found that defendant *could* pay $300 in fines but *could not* pay more than that.

A defendant's ability to pay fines and fees is evaluated in light of his total financial obligations. (*People v. Valenzuela* (2009) 172 Cal.App.4th 1246, 1249.) Total financial obligations include the conviction assessment (Gov. Code, § 70373), the operations assessment (§ 1465.8), the restitution fine (§ 1202.4),

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[2] Although the parties did not address section 290.3 in their briefing, the statute's application is fairly included within defendant's contention that he lacked the ability to pay the disputed fine and fees. (See *People v. Alice* (2007) 41 Cal.4th 668, 679 ["The parties need only have been given an opportunity to brief the issue decided by the court, and the fact that a party does not address an issue, mode of analysis, or authority that is raised or fairly included within the issues raised does not implicate the protections of [Government Code] section 68081."].)

and victim restitution. (*People v. Castellanos* (2009) 175 Cal.App.4th 1524, 1531–1532.) I presume the court accounted for these obligations when it concluded defendant could pay the $300 sex offender fine and $930 in penalty assessments and the state surcharge but could not pay the other required sex offender fine. (*Ibid*.) And, because the court concluded defendant had the ability to pay $1,230 more than the fine and fees he now challenges, it follows that the court found he had the ability to pay the challenged fine and fees as well.

As the court below has already made an ability to pay determination, there is no need to remand for the hearing defendant requests.

LAVIN, Acting P.J.

A P P E N D I X B

Order of the California Supreme Court Denying Review,
filed January 2, 2020

Court of Appeal, Second Appellate District, Division Three - No. B290564

S258923

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

ANDY NGUYEN, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice