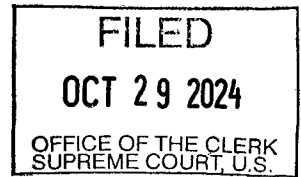


24-6765  
No. \_\_\_\_\_



\_\_\_\_\_  
IN THE  
SUPREME COURT OF THE UNITED STATES  
\_\_\_\_\_

Keshawn Thomas — PETITIONER  
(Your Name)

vs.

People of the state of California — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Supreme Court of the state of California  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Keshawn Thomas  
(Your Name)

P.O BOX ~~11111~~ 5102  
(Address)

Delano, Ca 93216  
(City, State, Zip Code)

559-776-1083  
(Phone Number)

## Questions Presented

1. Did the Court abuse its discretion by failing to impose a lesser-included firearm enhancement in light of amended Penal Code section 1385?

2. Did Counsel's declaration, coupled with a corroborative email from prison staff, demonstrate that appellant was inadvertently denied the right to be present at his resentencing hearing because the speaker phone broadcast only "hold music"?

## LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE  
SUPREME COURT OF THE UNITED STATES  
  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

The opinion of the United States district court appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☒ is unpublished.

The opinion of the Fifth Appellate court appears at Appendix A to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☒ is unpublished.

## JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was \_\_\_\_\_.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_ A \_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was 8-14-2024.  
A copy of that decision appears at Appendix C.

☒ A timely petition for rehearing was thereafter denied on the following date: 8-14-2024, and a copy of the order denying rehearing appears at Appendix C.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_ A \_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## STATEMENT OF THE CASE

On the night of September 26 to 27, 2014, Mario De la Fuente stayed at the house of his friend, Miguel Ramirez. After Ramirez went to bed around 1:30 am, Mr. De la Fuente did a line of Cocaine and decided to hire a prostitute. His internet search led to a text agreement for "30 minutes" for "\$100"

Within an hour, Erica Johnson arrived. Mr. De la Fuente pointed to a \$100 bill on the table then led her into the living room where Ms. Johnson began performing fellatio. Feeling uncomfortable, Mr. De la Fuente stopped her after a few minutes and retreated to the bathroom to collect himself and to decide how to ask her to leave. When he emerged Ms. Johnson was gone as was his \$100 bill.

Mr. De la Fuente quickly dressed, ran out the door jumped in his pickup truck and gave chase intending to get his money back. He spotted Ms. Johnson through the window of a white Mercedes Sedan. He flashed his lights to get the driver's attention then followed the car as it pulled into a parking lot. Dupree Evans exited the driver's seat and asked what he wanted. De la Fuente lowered his passenger window and told Evans he wanted his money back.

Appellant exited the Mercedes. He approached Mr. De la Fuente's truck locked a firearm, said,

1 "Oh, you gonna keep following us?" then pointed the  
2 firearm at De la Fuente through the open passenger  
3 window and said "Give me all your stuff." De la  
4 Fuente shifted his transmission to drive and hit  
5 the gas. He heard a "Pop" and felt a pain in his  
6 arm. He reversed and drove away and the  
7 back window shattered as he fled.

8 De la Fuente got a ride to the hospital. He  
9 had been shot through his right triceps into his  
10 chest. His doctors removed a .25 caliber bullet  
11 from his heart.

12 On October 22, 2014 Appellant was stopped  
13 and took into custody. One year and two mon-  
14 ths later On December 7, 2015 an information  
15 was filed in Fresno County Superior Court  
16 (F15907476) charging appellant with attempted  
17 murder (Count 1); assault with a semiautomatic  
18 firearm (Count 2); and attempted robbery (Count 3).  
19 Appellant was alleged as to have personally used  
20 a firearm (Count 2) and discharged a firearm  
21 causing great bodily injury (Counts 1 and 3).

22 On April 13, 2016 the Court sentenced Appella-  
23 nt to 5 years plus 25 years to Life. Sentences  
24 on Count 2 and 3 were stayed and run con-  
25 current respectively.

26 On September 13, 2018 the Court of Appeal  
27 affirmed the judgment but remanded for the  
28 trial court to exercise new discretion to strike

1 the firearm enhancement.

2 On January 3, 2019, the Court declined to  
3 Strike the Section 12022.53(d) enhancement  
4 in favor of the 10-year enhancement alleged  
5 under Section 12022.5(a). The Court believed  
6 it had no discretion to impose the lesser-  
7 included enhancement.

8 On June 21, 2022, the Court of Appeal  
9 again remanded for the trial Court to exercise  
10 its discretion to impose a lesser-included  
11 enhancement under people v. Tirado (2022) 12  
12 Cal.5th 688.

13 On April 7, 2023, appellant filed a  
14 resentencing memorandum asserting factors  
15 in mitigation including his youth and childhood  
16 trauma.

17 On April 12, 2023, a different Judge  
18 presided over resentencing. Appellant purpor-  
19 tedly made an audio appearance. The Court  
20 denied the request for resentencing.

21 On May 4, 2023, appellant filed a  
22 memorandum requesting a new hearing because  
23 the Zoom application failed to connect depriving  
24 appellant of his right to be present.

25 On May 18, 2023 appellant timely filed  
26 a notice of Appeal. On June 3, 2024, the Court  
27 of appeal affirmed.  
28

# Reasons for Granting Petition

A grant of review and resolution of this issue by this Court is necessary to settle an important question of law pursuant to California Rules of Court, rule 8.500(b)(1).

## Reason 1

The Court abused its discretion by failing to impose a Lesser-included firearm enhancement in light of Amended Penal Code Section 1385.

On remand defense Counsel urged the Court to impose a lesser-included firearm enhancement under amendments to Section 1385. The trial Court declined to alter the Sentence finding that doing so would be a danger to public Safety. Appellant argued that the Court abused its discretion in finding that the risk of public Safety outweighed mandatory mitigating factors, i.e., the enhancement increased appellant's Sentence from 5, 7 or 9 years to 30-years to Life. Nothing indicates that appellant poses a special risk of future violence such that reduction of the Life Sentence would endanger public Safety.

The Court of Appeal held that appellant failed to demonstrate Childhood trauma Contributed to the Crime. (Ex. A at 12.) Although the Court Commended appellant on his post-Judgment growth and achievements, it found the Circumstances of the Crime Supported the trial Courts discretion under the

1 deferential standard of review. (Ex. A at 16-18.)  
2 Appellant maintains that the Circumstances require  
3 reduction of the enhancement.

### 4 A. Amended Section 1385

5 Section 1385 formerly provided discretion for the  
6 Sentencing Court to dismiss an "action," including an  
7 enhancement. (Stats 2018, Ch. 1013 (S.B. 1393), 2 eff.  
8 Jan. 1, 2019.) The statute provided no specific direction  
9 on the exercise of discretion.

10 Effective January 1, 2022, Senate Bill 81 amended  
11 Section 1385 to add a Section with specific direction  
12 regarding the exercise of the discretion to dismiss  
13 enhancements:

14 (C)(1) Notwithstanding any other law the Court shall  
15 dismiss an enhancement if it is in the furtherance  
16 of justice to do so except if dismissal of that  
17 enhancement is prohibited by any initiative statute.

18 (2) In exercising its discretion under this subdivision,  
19 the Court shall consider and afford great weight  
20 to evidence offered by the defendant to prove  
21 that any of the mitigating circumstances in Sub-  
22 paragraphs (A) to (I) are present. Proof of the  
23 presence of one or more of these circumstances  
24 weighs greatly in favor of dismissing the enhancement  
25 unless the Court finds that dismissal of  
26 the enhancement would endanger public safety.  
27 "Endanger public safety" means there is a  
28 likelihood that the dismissal of the enhancement

1 would result in physical injury or other serious  
2 danger to others.

3 (C) The application of an enhancement could  
4 result in a sentence of over 20 years. In this  
5 instance, the enhancement shall be dismissed.

6 (E) The current offense is connected to  
7 prior victimization or childhood trauma

8 (1385, subd. (C))

9 The requirements "shall apply to sentencing  
10 s occurring after the effective date." (People v.  
11 Sek (2022) 74 Cal. App. 5th 657 674.) Any resen-  
12 tencing that takes place after January 1, 2022,  
13 the effective date of the changes, "the Court must  
14 apply the new law in any such proceeding."  
15 Senate Bill 81 specifically states the changes "shall  
16 apply to sentences occurring after the effe-  
17 ctive date" of January 1, 2022. (Stats. 2021 ch. 721  
18 (S.B. 81), 1.) Appellant's resentencing hearing occurred  
19 on April 12, 2023, well after the effective date.

### 20 **B. Proceedings at the Resentencing Hearing**

21 The resentencing hearing occurred on April 12, 2023.  
22 Appellant filed a memo for resentencing invoking the  
23 new standard of discretionary consideration under  
24 amended Section 1385.

25 "There are many considerations that were not review-  
26 ed with the scientific knowledge of how young men's  
27 brains develop. Mr. Thomas was 25 years old at the  
28 time of the crime. Mr. Thomas also suffered many

traumas as a child that we now <sup>know</sup> caused serious effects on one's behavior. Mr. Thomas's parents passed away and he was put in foster care. His father's death was drug related. His mother was in and out of prison and suffered from drug addiction and ultimately died from complications of AIDS. PC 1385 mentions public safety. Mr. Thomas has used his time in prison to understand his past behavior and has excelled in pursuing his academic goals and is not the same man as he was in 2014. (CT.69)

Appellant authored a letter to the Court describing the lack of guidance that led to his crime. "I was never taught the right way to live." (CT 71.) He also described the change of heart he achieved over the nine years he spent in custody.

I've changed my way of thinking and I understand my triggers. I will make sure something like this will never happen again. I hurt myself and the people that love me and everyone involved and I'm truly sorry for my actions and the harm I caused. I understand what I did was wrong and if I am given a chance to return to society I will not pose a risk to public safety. I want to be there for my son who was born 2 months after I went to jail. Now being a father is the most

1 important thing to me... I want to be the  
2 father to my son that I've never had.

3 (CT 71-72) He "built inner strength" despite  
4 the "stress and chaos" of prison designed to  
5 wear you down to break your spirit." (CT 73.)

6 The Court of Appeal agreed with the trial  
7 Court's finding that appellant "wrote eloquen-  
8 tly on his own behalf." (Ex. A at 14)

9 Appellant provided proof of Classes and  
10 and Counseling including the Rational Beha-  
11 vior and Decision Making Group My Healthy Thi-  
12 nking Curriculum, and START NOW Curriculum.  
13 (CT 77-84.) He was observed to be "actively listen-  
14 ing" in his initial participation, eventually becom-  
15 ing "invested in the treatment process" where he  
16 actively participated during discussions." (CT-79)  
17 Appellant thoughtfully outlined a relapse preve-  
18 ntion plan (CT-74-75.)

19 At the hearing the prosecutor did not explic-  
20 itly argue against a reduction in sentence. Rather,  
21 he argued that the trial Judge indicated that a  
22 29-year determinate term was the "Only acceptable  
23 resentencing," which would require appellant to  
24 stipulate to aggravating factors supporting the  
25 upper term.

26 Understanding that this Court does have the  
27 discretion if it were so inclined, to reduce the 25 to  
28 life down to a lesser firearm enhancement, I think

1 Judge Hamlin who did again hear the evidence  
2 in the trial felt that the 29-year determinate term  
3 would be to him the only acceptable resentencing.  
4 Unfortunately I think 29 years would require...  
5 20 years on the gun and an aggravated term  
6 of 9 years on the attempted murder... That  
7 would require... Mr. Thomas... to stipulate  
8 to aggravating circumstances... I think if Mr.  
9 Thomas were asking the court to come off of the  
10 25 to life on the firearm enhancement he should  
11 be willing and must be willing to stipulate to  
12 aggravating factors and I would submit on that.  
13 (III RT 605-606)

14 Appellant's Counsel noted that since the origi-  
15 nal sentencing new mitigating factors have come to  
16 light.

17 We have learned a great deal as far as neuroscience  
18 and the brain of young men and now these things  
19 are considered. They are mitigating factors, and also  
20 how the trauma - of childhood trauma is part of  
21 the evaluation in sentencing... I did outline just  
22 a few things, you know both parents died, had died,  
23 you know slow deaths especially his mother was  
24 she wasn't taking medication because she was  
25 using and she was - she suffered greatly. It is  
26 just by chance that he ended up with these won-  
27 derful people that call themselves his parents now.  
28 Just by chance And he was very fortunate. He has

1 Support from them.

2 Usually, to be honest, if a Client writes a  
3 letter to a Judge I'm like well let me put that  
4 in the in the back of the file but I included it  
5 because - as always - it's important to hear from  
6 him, as he is now.

7 I think the facts of this case are interesting  
8 he was not the initial aggressor. I think that's  
9 significant. Especially when you have Childhood  
10 trauma because you're always, always, on the  
11 highest level of just anxiety and being aware;  
12 right? And it's shown through test as far as  
13 their Cortisol levels and everything. This is  
14 true... I would hope that the Court would consider  
15 the 19 years due to his growth his willingness to  
16 to accept responsibility the situation that he was  
17 in, and the triggers that made him react in the  
18 way he did.

19 He's now had all this time. He's taken a lot  
20 of classes to learn about how to control him-  
21 self and how to deal with situations that may  
22 trigger him... When I looked into it you know  
23 he hadn't had write-ups or had problems or is  
24 not a gang member or anything...

25 And, you know, understandably, yes, he's being  
26 punished for what he did but we are asking again  
27 for either 27, 19 Your Honor, just something to  
28 allow him to get back to life and be productive

1 Once he is a middle-aged man.  
2 (III RT-606-607)

3 The Court noted that it "was not the Judge  
4 that did the trial and was going off of what  
5 is in the Court file." (III RT. 608) The Court  
6 acknowledged its discretion to substitute a lesser  
7 firearm enhancement (III RT. 608) However, the  
8 Court found significant the "miraculous" fact "that  
9 this was not a homicide," Considering the victim's  
10 injury. (III RT. 608)

11 The Court finds that dismissing or reducing  
12 the firearm enhancement would be a danger  
13 to public safety given the egregious nature  
14 and violent nature of the defendant's conduct  
15 and I am finding a dismissal or the reduction of  
16 the enhancement would result in physical injury or  
17 other serious danger to others.

18 I do believe that he is in a position where  
19 he will be able to see the parole board under  
20 the youthful offender correct because I think he  
21 will be able to or he was 26 or younger when it  
22 occurred? "MS. BOULGER: Yes" "MR. WRIGHT:  
23 Yes" THE COURT: So I think the conduct that  
24 he's engaging in now still can bode well from  
25 him getting out not having to serve that full time  
26 but for the reasons previously stated I'm not  
27 going to be either striking or reducing- well, not  
28 reducing striking or substituting lesser enhance-

nts for the 12022.53(b)

(III RT 608-609) The Court did not reference appellant's childhood trauma or the fact that the enhancement resulted in a life sentence.

### C. The Meaning of the "Great Weight" Requirement is Pending Review in the SUPREME COURT OF THE STATE OF CALIFORNIA

Court of Appeal split as to impact of new language in Section 1385 that requires the Court to give "great weight" to the various listed factors. (People v. Walker (2022) 86 Cal. App. 5<sup>th</sup> 386, 391, rev. gtd. Mar. 22, 2023 (5278309); People v. Ortiz (2023) 87 Cal. App. 5<sup>th</sup> 1087, 1096-1098, rev. gtd. Apr. 12, (2023) (5278894).) The Court of Appeal in this case found it unnecessary to choose from the competing interpretations because appellant's claim would still fail under any of the various interpretations of Section 1385, Subdivision (c) (Ex. A at 16)

The bill intended that specified circumstances "weigh greatly in favor of dismissing the enhancement, unless the Court finds that dismissal of the enhancement would endanger public safety." (Senate Rules Committee, Office of Senate Floor Analysis, S.B. No. 81 (2021-2022 Reg. Sess.) as amended August 30, 2021, p. 3.)

1 "Endanger public safety" means "there is a like-  
2 likelihood that the dismissal of the enhancement would  
3 result in physical injury or other serious danger  
4 to others."

### 5 D. The Record Does Not Support the 6 Court's Finding that Reducing the 7 Enhancement Would Endanger 8 Public Safety

9 The firearm enhancement applied in this  
10 Case increased appellant's sentence over 20  
11 years. Indeed, it resulted in a life sentence,  
12 with a minimum term of 25 years not including  
13 the 5 years determinate sentence on the  
14 underlying felony. As the Court of Appeal  
15 pointed out appellant's post-judgment conduct  
16 in custody is one of the many factors relevant  
17 to the inquiry and appellant's has been commensurate  
18 (Ex. A at 18) Appellant was youthful (25 years  
19 old) at the time of the crime.

20 Moreover appellant offered evidence of  
21 childhood trauma connected to his commission of  
22 the offense. The Court of Appeal held that the  
23 childhood trauma provision is not applicable here  
24 because counsel's unsworn statements failed to  
25 meet legal definitions of physical or emotional  
26 abuse or neglect based on credible evidence.  
27 (Ex. A at 13) However, appellant was purportedly  
28 present by audio. Had the people objected to

1 Counsel's statements, or the Court doubted their  
2 truth, it could have questioned appellant, undeniably  
3 a witness with personal knowledge.

4 The Court of Appeal also held that the defense  
5 failed to show that his childhood substantially  
6 contributed to his involvement in the crime (Ex. A  
7 at 14). However, is common knowledge that children  
8 are a product of their early environments. Living  
9 with drug addicted parents that slowly died  
10 would impact the character of any child. The law  
11 deems "substantial" to be more than slight or  
12 moderate. While a psychological report identify-  
13 ing appellant's childhood trauma as the predomi-  
14 nant reason for the offense would be the best  
15 evidence the circumstances themselves are not  
16 rendered irrelevant without it.

17 Against these factors the trial court was  
18 required to determine whether dismissing an  
19 enhancement would endanger public safety. If  
20 not, two listed mitigating facts weigh greatly in  
21 favor of reducing the enhancement. Here, the  
22 record does not support the trial court's finding  
23 that reducing the enhancement would likely  
24 result in physical injury or other serious danger  
25 to others. The few published cases that have  
26 addressed this issue evaluated the trial court's  
27 ruling in light of the defendant's prior record,  
28 personal history and facts of the crime.

1 In Ortiz, the Court of Appeal held the trial Court  
2 properly acknowledged one mitigating factor's great  
3 weight but found other factors collectively weigh-  
4 tier (People v. Ortiz, supra, 87 Cal.App.5th at p. 1099.)  
5 Specifically, the Court cited Ortiz's past convictions  
6 and violations, assaultive behavior in jail, his  
7 history of assaulting jail staff, his gang ties, his  
8 drug use, failure to dedicate himself to treatment  
9 or employment, and the specific facts of the  
10 charged offense (breaking a stranger's window  
11 because he was "pissed off" after arguing with  
12 his mother.) (Id., at p. 1092)

13 In People v. Mendoza (2023) 88 Cal.App.5th 287,  
14 the Court of Appeal upheld the trial court's refusal  
15 to dismiss the enhancement because to do so  
16 would result in the defendant's immediate release.  
17 There the defendant discharged a gun with victims  
18 present during a home invasion robbery. A  
19 person who "commits this type of an offense  
20 is a serious threat to society and a relatively  
21 long prison sentence is necessary to protect  
22 the public... and to provide time for the defendant  
23 to become rehabilitated." (Id. at p. 299) The less-  
24 than-six years he spent in custody was  
25 insufficient to support rehabilitation.

26 In this case, there was no evidence that  
27 appellant had a prior record drug use gang tie  
28 s history of assaulting jail staff or other

1 inmates or failure to seek treatment for his  
2 issues. There was also no danger of an  
3 inappropriately short prison sentence. The  
4 Court could impose 5, 7 or 9 years on the attempt-  
5 ed murder charge (664 subd. (a)) and dismiss  
6 or impose 10 or 20 years on the enhancement  
7 (12022.53 subds. (c) & (d)). Thus the Court could  
8 replace the 30-to-life term with a determi-  
9 nate sentence of 5, 7, 9, 15, 17, 19, 25, 27 or 29  
10 years.

11 The crime occurred on September 27, 2014  
12 and appellant has served approximately  
13 10 years in custody. If the Court imposed a  
14 29 year sentence appellant would still have to  
15 serve another 15 years in custody. If he earned  
16 all credits, ~~he~~ would result in appellant's release  
17 at the age of 49. A 19 year sentence would result  
18 in appellant's release in roughly seven-and-one-  
19 half years at age 41. A 15-year sentence would  
20 put his release in approximately four years around  
21 age 38. None of those options would result  
22 in immediate release or an insignificant sentence.

23 The Court found that even reducing the firearm  
24 enhancement would endanger public safety "given  
25 the egregious... and violent nature" of appellant's  
26 crime (III RT 608.) Thus the Court necessarily concluded  
27 based solely on the facts of the crime, that  
28 appellant is likely to be violent upon his release

1 13 to 25 years after the offense. In essence, the  
2 ~~the~~ Court judged appellant to be virtually irredeem-  
3 mable.

4 The Court of Appeal pointed out that the  
5 circumstances of the offense alone may support  
6 the courts finding (Ex. A at 17.) However, this sweeping  
7 conclusion is not supported by the record in this case.  
8 The crime was certainly serious. However unlike  
9 the offense in Ortiz, it was not an unprovoked  
10 attack; Mr. De la Fuente was "an instigator or  
11 aggressor." (Ex. A at 18) Mr. De la Fuente's conduct  
12 was confrontational. He had ingested methamphet-  
13 amine a stimulant. Although there was no  
14 indication he was armed, he was driving a deadly  
15 weapon.

16 Appellant's reaction was exaggerated and  
17 wrong but in context does not reflect a depraved  
18 and incorrigible character. Appellant was 25  
19 years old at the time. (CT 69) As his counsel stated,  
20 the law now recognizes the scientific evidence  
21 of neurological immaturity at that age. (CT 69;  
22 III RT 606-607.) Counsel also indicated that appe-  
23 llant landed in foster care after losing both his  
24 parents to drug addiction-related deaths. (CT 69;  
25 III RT 606-607.) Fueled by childhood trauma and the  
26 lack of appropriate role models or guidance, it is  
27 not surprising that he or the youth and immaturity  
28 would overreact to a potentially threatening situation.

1 Appellant offered compelling evidence, that he  
2 had matured significantly in the nine years  
3 since his offense. Documents support his ongoing  
4 attendance at character-building classes and group  
5 therapy where he was noted to have begun with  
6 interest and grew to admirable participation  
7 and increased insights. (CT 77-84) He also prepared a  
8 relapse prevention plan (CT 74-75) He expressed  
9 sincere remorse (CT 71-72.) He had no write-ups.  
10 (III RT 606-607) He was not a gang member. (III RT 606  
11 607.) Appellant's conduct is consistent with a  
12 Change of Character.

13 Thus the record does not present a compelling  
14 case of public endangerment even if the Court  
15 dismissed the enhancement outright and imposed  
16 a nine year term resulting in appellant's immediate  
17 release. Nothing suggests that a life sentence  
18 is necessary to rehabilitate appellant.

19 Significantly, the people did not object to  
20 reduction of the sentence. (III RT 605-606.) The pro-  
21 secutor seemed to acquiesce at least to a  
22 29-year determinate sentence by arguing  
23 that was the term the trial judge was inclined  
24 to impose. (III RT 605-606.) Of course, the trial  
25 judge did not have the benefit of amended sec.  
26 1385's list of mitigating factors entitled to great  
27 weight.

28 Appellant sought great weight reduction

1 of his sentence to 19 years, which is consistent  
2 with the legislative preference for sentences  
3 under 20 years while also providing a lengthy  
4 sentence that would not result in immediate  
5 release. Nothing in the record supports a finding  
6 that appellant poses a danger to society now,  
7 let alone in seven years.

8 The legislative history reflects a concern that  
9 the ~~discretion~~ discretion to dismiss enhancements  
10 was "underused." (Senate Committee on Public  
11 Safety Analysis of S.B. No. 81 (2021-2022 Reg.  
12 Sess.) p. 2.) In this case, appellant's childhood  
13 trauma, his earnest efforts to reform, and  
14 the enhancement's effect of transforming a  
15 single-digit sentence into a life term must  
16 be given great weight in the analysis. The facts  
17 of the offense do not reasonably counterbalance  
18 those mitigating facts. Under the facts of this  
19 case the court abused its discretion by  
20 failing to substitute a lesser firearm  
21 enhancement.

## 2<sup>nd</sup> Reason The Court Must Grant Petition

The Case Must be Remanded for a New Resentencing Hearing Because Technical Failure Prevented Appellant's Presence.

Appellant had a Constitutional right to be present at his resentencing hearing which he sought to attend via Zoom. The day of the hearing, however it was established that video was unavailable and appellant agreed to audio only. Counsel later provided evidence that technical issues resulted in a failed connection and appellant neither heard nor participated in the proceeding. Appellant has argued that this error requires remand for a new resentencing hearing.

The Court of Appeal held that appellant failed to substantiate this claim, offering only Counsel's speculation based on ambiguous third-party hearsay. (EX. A at 6) Appellant disagrees. Counsel submitted her sworn declaration and a corroborative email from prison staff that after agreeing to audio-only presence appellant was placed on hold. (I.C.T. 90-92.) Staff confirmed that nothing besides "hold music" was heard for the next two hours. This evidence adequately shows that appellant was not present for the actual hearing.

## A. Criminal Defendants Have a Constitutional Right to Be Present at Resentencing.

The Sixth and Fourteenth Amendments entitle a criminal defendant to be personally present at all critical stages of trial including sentencing. (People v. Blacksher (2011) 52 Cal.4th 769, 798-799; People v. Rodriguez (1998) 17 Cal.4th 253, 260; People v. Doolin (2009) 45 Cal.4th 390, 453.) The right also extends to resentencing hearing. (People v. Cutting (2019) 42 Cal.App.5th 344, 348.) Counsel may represent that a defendant has waived the right, but such a representation must be authorized by the client.

Proceeding with resentencing in a defendant's absence without a waiver is reversible error unless harmless beyond a reasonable doubt. (Ibid; Chapman v. California (1967) 386 U.S. 18, 23.) Error "may be deemed harmless only if we can conclude beyond a reasonable doubt that the deprivation did not affect the outcome of the proceeding." (People v. Cutting supra 42 Cal.App.5th at p. 348, citations omitted.)

In Cutting, the Court of Appeal found the defendant's absence was not harmless.

Here, Cutting may have offered mitigating factors that arose after his original sentencing; he may have expressed remorse; he may have made

1 a plea for leniency. [Citation omitted] While the  
2 trial court may or may not have chosen to believe  
3 what Cutting might have said if he said anything,  
4 we cannot conclude beyond a reasonable doubt  
5 that his presence at the hearing would not have  
6 affected the outcome.

7 (People v. Cutting, supra, 42 Cal. App. 5<sup>th</sup> at p. 350.)

8 Similarly, in People v. Basler (2022) 80 Cal. App.  
9 5<sup>th</sup> 46, the Court of Appeal held the defendant's  
10 absence at the evidentiary hearing to determine  
11 eligibility for resentencing was not harmless,  
12 as the defendant may well have offered testi-  
13 mony regarding factual issues relevant to the  
14 determination. (Id., at pp. 58-60)

15 In People v. Guerrero (2022) 76 Cal. App. 5<sup>th</sup> 329,  
16 the trial court not only improperly excluded the  
17 defendant from the resentencing hearing, it also  
18 gave short shrift to youth-related mitigation factors.  
19 (Id., at pp. 336-337.) The Court of Appeal rejected the  
20 people's assertion that remand was fruitless because  
21 the judge would not reduce the sentence in any  
22 event.

23 The court stated it was "never inclined to  
24 consider resentencing her to something less than  
25 what the court originally imposed." But that  
26 statement - made without evaluating the full range  
27 of youth-related mitigating factors this court  
28 directed be considered - hardly means we can

1 Conclude a Court properly exercising its well-  
2 informed sentencing discretion, rather than adamantly  
3 adhering to its initial determination, might not  
4 reach a different Conclusion. Guerrero is entitled  
5 to no less than a thoughtful well-considered decision.  
6 (*Id.*, at p. 337.) The Court not only remanded for a new  
7 hearing so the defendant could be present, it also  
8 ordered a different Judge to preside over resenten-  
9 cing to protect the defendants' right to a "fair and  
10 unbiased hearing." (*Id.*, at p. 338)

### 11 B. Counsel Sufficiently Demonstrated 12 Appellant's Absence

13 Counsel submitted a declaration and supporting  
14 document that appellant was never connected to  
15 the Court during the proceeding. (CT 87-92.) That  
16 information provided sufficient detail to conclude  
17 that appellant was not present for the resenten-  
18 cing hearing.

19 Counsel stated that appellant was heard only  
20 when asked to consent to audio-only presence. (I CT 90)  
21 The Court stated that this interaction occurred  
22 "off the record right before we called the matter."  
23 (III RT 604.) The reporter's transcripts is corroborative;  
24 it reflects no question to appellant nor any input  
25 from him.

26 Counsel confirmed with prison Staff Officer  
27 Shannon Lozano, who was present with appe-  
28 llant during the incident that the "Phone was

1 left on speaker" for "approximately two hours,"  
2 but all she heard was "hold music at one point." (ICT 92)

3 Since the Court Confirmed that the hearing occurred  
4 immediately after the Connection and Officer Lozano  
5 Confirmed that the Speaker broadcast nothing but  
6 hold music it can be inferred that the hearing was  
7 not audible.

8 Had the hearing been audible Officer Lozano  
9 would have mentioned hearing more than hold music  
10 at one point." (ICT 92) Moreover, there would be no  
11 reason to wait on hold for two hours. As respondent  
12 Concedes the hearing was "relatively short." (RB 27.)

13 The Court of Appeal notes that the minute order  
14 does not undermine Counsel's assertion. The Court  
15 did not intentionally exclude appellant; it appears  
16 that both the Court and the parties assumed  
17 that he was on the line and able to hear. Defense  
18 Counsel did not express a doubt until after the  
19 hearing. Since the Court was unaware of appellant's  
20 absence it would not have included it in the minutes.

21 The record contains sufficient evidence that  
22 appellant was denied his constitutional right to be  
23 present at the hearing.

### 24 C. Appellant's Absence at the Hearing 25 Was Not Harmless

26 Not only did the appellant miss what occurred, he  
27 was unable to advocate for himself. This is particular-  
28 ly important in light of the Court of Appeal

1 finding that Counsel's statements failed to adequately  
2 demonstrate Childhood trauma Substantially  
3 Contributed to appellant's Crime. Had appellant  
4 been present even solely by audio he could have  
5 addressed the Court personally and by his  
6 demeanor and expression given substance to  
7 Counsel's offer of proof and his own sentiments  
8 delivered on paper.

9 Perhaps appellant's oral input would not have  
10 moved the Court but this Court cannot say beyond  
11 a reasonable doubt that it would have had no effect.  
12 Appellant is entitled to a new resentencing hearing  
13 at which he may appear and fully participate.  
14

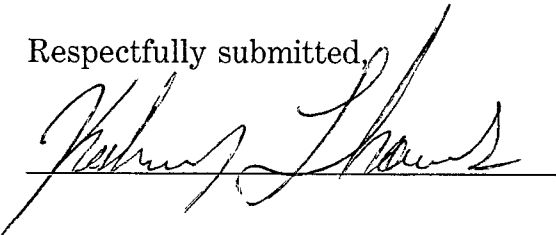
### 15 Conclusion

16 Appellant respectfully request this Court  
17 grant review to decide this case and issue.  
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## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Anthony Lewis", is written over a horizontal line.

Date: October 25, 2024