In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **VERNON ANDERSON,** **Defendant and Appellant.**	Case No. S253227

First Appellate District, Division Three, Case No. A136451
San Francisco County Superior Court, Case No. 206013
The Honorable Anne-Christine Massullo, Judge

ANSWER BRIEF ON THE MERITS

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INTRODUCTION

Vernon Anderson was convicted of 10 crimes in connection with his participation in a robbery, during which one person was shot and killed. At sentencing, the trial court imposed the 25-year-to-life enhancement called for in Penal Code section 12022.53, subdivisions (d) and (e), on five of those crimes, even though the accusatory pleading did not specify that the prosecution intended to seek that enhancement with respect to those counts.[1] The Court of Appeal affirmed Anderson's convictions, but remanded the case to allow him to take advantage of a legislative change that gave trial courts discretion to strike enhancements imposed under section 12022.53. This Court granted review to determine whether these enhancements were properly imposed in light of its decision in *People v. Mancebo* (2002) 27 Cal.4th 735.

The People agree that the operative information in this case did not meet *Mancebo*'s pleading requirements. To seek the enhancement provided for in section 12022.53, subdivision (e) (section 12022.53(e)), the prosecution was required to "ple[a]d and prove[]" certain circumstances. (§ 12022.53, subd. (e).) In *Mancebo*, this Court held that an identical phrase in a separate statutory provision requires the prosecution to identify, in the accusatory pleading itself, the "specific sentence enhancement allegations" it intends to invoke to increase the defendant's sentence. (*Mancebo*, *supra*, 27 Cal.4th at p. 747.) The operative information here did not comply with that requirement with respect to the five counts at issue in this appeal.

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[1] All statutory references in this brief are to the Penal Code. This brief also refers to the enhancements imposed under section 12022.53, subdivisions (d) and (e), at issue in this appeal as the "section 12022.53(e) enhancements."

This Court, however, should still affirm the Court of Appeal's judgment. In this case, the jury instructions and verdict forms gave Anderson notice that the prosecution intended to seek the section 12022.53(e) enhancement with respect to these five counts, and Anderson raised no objection to having the jury decide their truth. *Mancebo* does not address whether sentences must be reversed in that circumstance. And this Court has affirmed convictions and sentences that included crimes or enhancements not specified in the accusatory pleading when the defendant had notice of those crimes or enhancements and raised no objection. In some cases, this Court has understood the jury instructions and verdict forms as informally amending the pleading, and treated the defendant's lack of objection as an implied consent to that amendment. In others, it has concluded that the trial court erred in imposing the unpleaded enhancement, but held that the defendant forfeited his objection by not raising it in the trial court. Nothing in *Mancebo* requires the Court to reach a different result in this case.

Of course, the People recognize that the better practice is to allege the section 12022.53(e) enhancement in the accusatory pleading itself with respect to every count on which the prosecution intends to seek it. But where, as here, the defendant is on notice that the prosecution will seek that enhancement with respect to a specific count and raises no objection, it is both appropriate and fair to affirm his sentence.

BACKGROUND

A. Penal Code Section 12022.53

Section 12022.53 provides an escalating series of sentence enhancements for defendants who use firearms during the commission of certain offenses. (See generally *People v. Brookfield* (2009) 47 Cal.4th 583, 589-590.) Any person who "personally uses a firearm" in the commission

of one of the crimes specified in section 12022.53, subdivision (a), must be punished with an "additional and consecutive term" of 10 years in state prison. (§ 12022.53, subd. (b).) If the defendant "personally and intentionally discharges a firearm" during the commission of the offense, the enhancement increases to 20 years in state prison. (§ 12022.53, subd. (c).) And if the defendant personally and intentionally discharges a firearm and "proximately causes great bodily injury . . . or death," his or her sentence climbs to 25 years to life (unless the victim is an accomplice). (§ 12022.53, subd. (d).) To seek any one of these enhancements, the prosecution must allege the "existence of any fact required" to support the enhancement in the accusatory pleading, and such facts must either be admitted by the defendant in open court or found true by the trier of fact. (§ 12022.53, subd. (j).) If the section 12022.53 enhancement is "admitted or found to be true," the trial court must impose that enhancement instead of a punishment provided for in another law, unless the other provision would impose a greater penalty. (*Ibid.*)[2]

If certain criteria are met, the section 12022.53 enhancements may also be added to the sentences of defendants who did not personally use or discharge a firearm during the commission of a crime. Section 12022.53(e) provides that the enhancements listed in subdivisions (b), (c), and (d), shall be added on to the sentence of a defendant who is the "principal in the commission of an offense," if two things are "pled and proved."

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[2] Until recently, trial courts could not strike section 12022.53 enhancements under section 1385 or any other provision of law. (*People v. Palacios* (2007) 41 Cal.4th 720, 726.) That changed in 2018, after the Legislature amended section 12022.53, subdivision (h), to give trial courts the discretion to "strike or dismiss an enhancement otherwise required" by section 12022.53 "in the interest of justice." (§ 12022.53, subd. (h); see also Stats. 2017, ch. 682, § 2.)

(§ 12022.53, subd. (e).) First, the defendant must have violated section 186.22, subdivision (b), which details the punishment for individuals who commit certain offenses for the benefit of a street gang. (§ 12022.53, subd. (e)(1)(A).) Second, one of the principals of the crime that the defendant is convicted of must have used or discharged a gun in the manner specified by the relevant enhancement (that is, the enhancement specified in in subdivision (b), (c), or (d)). (§ 12022.53, subd. (e)(1)(B).)

B. The Trial Court Proceedings

Vernon Anderson was convicted of several crimes arising out of his participation in a robbery. (Slip Opn. 1-5.) On the evening of September 15, 2006, Anderson and several other young men went to a party in the Ingleside-Lakeview district of San Francisco. (*Id.* at p. 2.) They eventually left, but returned a short time later armed with two handguns and a rifle. (*Id.* at pp. 3-5.) As the party was dispersing, they robbed several of the guests—one of whom was shot and killed. (*Id.* at p. 4.)

Anderson was charged with 10 offenses: first degree murder (count 1); active participation in a criminal street gang (count 2); two counts of second degree robbery (counts 3 and 4); three counts of attempted robbery (counts 5, 6, and 7); one count of conspiracy to commit second degree robbery (count 8); and two counts of discharging a firearm at an inhabited dwelling (counts 9 and 10.) (4 CT 979-985 [first amended information].)[3]

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[3] The first amended information was filed on April 12, 2011—after the jury was sworn but before the case was submitted to the jury. (See 3 CT 640-644 [jury sworn on February 16, 2011]; 5 CT 1290-1291 [case submitted to jury on April 19, 2011].) The only substantive difference between the first amended information and the information filed shortly after the conclusion of the preliminary hearing was to add an additional count of attempted robbery and allegations related to that count (count 7 of the first amended information). (See 4 CT 986-989 [motion to amend information].) The

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The first amended information alleged that during the commission of the murder, one of the principals "personally and intentionally discharged a firearm which proximately caused death to a person other than an accomplice" within the meaning of section 12022.53, subdivisions (d) and (e). (4 CT 980.) With respect to the robberies and attempted robberies (counts 3 through 7), the pleading alleged only that Anderson personally used a firearm within the meaning of section 12022.53, subdivision (b). (4 CT 980-983.)[4] Before trial, the prosecution offered to strike all of the offenses and enhancements if Anderson pleaded guilty to three crimes: second degree murder, robbery, and being an active participant in a street gang. (17 RT 3003-3004.) Anderson was advised of this offer, and informed that if he was convicted of just the first degree murder and one of the robbery counts and the enhancement allegations attached to those two crimes, he would be "looking at 60 years to life or more." (*Ibid.*) Anderson rejected the offer. (*Ibid.*)

A jury was sworn on February 16, 2011. (3 CT 640-644.) As the testimony drew to a close, the parties submitted jury instructions and verdict forms to the trial court. (See 4 CT 965, 1018-1080 [filed jury instructions]; 6 CT 1322-1340 [completed verdict forms].) Included among the instructions was a request that the trial court give CALCRIM No. 1402—the jury instruction corresponding to the enhancement provided for

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two pleadings were otherwise substantively the same. (See also 1 CT 97-103 [original information, filed July 22, 2008].)

[4] The first amended information also alleged that Anderson personally used a firearm "within the meaning of . . . section 12022.5(a)(1)" in the commission of each robbery and attempted robbery. (4 CT 980-983.) That statute provides a separate enhancement for defendants who "personally use[] a firearm in the commission of a felony or attempted felony," unless the "use of a firearm is an element of that offense." (§ 12022.5, subd. (a).)

in section 12022.53(e). (See 4 CT 965.) That instruction was titled "Gang Related Firearm Enhancement CALCRIM 1402," and read:

> If you find the defendant guilty of the crimes charged in Counts 3 and/or 4 . . . and/or the crimes charged in Count 5, 6, and/or 7 . . . and you find that the defendant committed the crime for the benefit of, at the direction of, or in association with a criminal street gang with the intent to promote, further, or assist in any criminal conduct by gang members, you must then decide whether the People have proved the additional allegation that *one of the principals personally and intentionally discharged a firearm during that crime and caused death.*

(4 CT 1073, italics added.)

The trial court told the parties that it planned to give this instruction. (45 RT 8039.) Anderson's trial counsel later told the Court that she had "reviewed the set of jury instructions" and that they "all appear[ed] to be in order and complete." (46 RT 8056.) She also affixed her initials to the instruction. (4 CT 1073.) The verdict forms for counts 3 through 7 included a section titled "**Special Finding 12022.53 PC (d) and (e),**" and instructed the jury to find either "TRUE" or "NOT TRUE" the "allegation under section 12022.53 (d) and (e)" that "a *principal did personally and intentionally discharge*[] *a firearm*, which . . . proximately caused death to a person other than an accomplice" in the commission of the charged offense. (6 CT 1325, bold in original, italics added; see also 6 CT 1327, 1329, 1331, 1333.) Anderson's trial counsel initialed one of those forms as well. (6 CT 1325.) The trial court later gave the instruction and verdict forms to the jury. (46 RT 8095-8096; 47 RT 8323.)

The jury convicted Anderson on each count, and found every special allegation true. (6 CT 1322-1342; 49 RT 8405-8416.) The prosecution initially recommended that Anderson be sentenced to a 48-year determinate term, followed by a consecutive 50-year-to-life indeterminate term. (6 CT 1423-1432.) That recommendation did not mention the section 12022.53(e)

enhancement with respect to counts 3 through 7. (*Ibid.*) At the sentencing hearing, the trial court noted that there were "some omissions" in the prosecutor's recommendations "in terms of what the Court must do to address each and every allegation that was found to the counts." (56 RT 24103.) Among other things, the trial court asked counsel what to do about the fact that jury "found true allegations 12022.53(d) and (e)" in connection with the attempted robberies and robberies. (56 RT 24109, 24114, 24115.) The prosecutor recommended that the trial court "[i]mpose and stay" the enhancement under section 654. (56 RT 24109.) Anderson's trial counsel asked the court to strike the enhancements, based on her understanding that the trial court had to impose those enhancements unless they were stricken. (56 RT 24110-24111.) The trial court then instructed the prosecutor to research the scope of the court's authority to strike the section 12022.53(e) enhancements. (56 RT 24110-24111.)

After a short break in the proceedings, the prosecutor returned and took "a different position than what [he] took in [his] papers" based on his review of several cases. (56 RT 24119.) Citing *People v. Oates* (2004) 32 Cal.4th 1048, *People v. Palacios* (2007) 41 Cal.4th 720, and *People v. Mason* (2002) 96 Cal.App.4th 1, the prosecutor explained that the trial court was required to impose the section 12022.53(e) enhancement "for each robbery victim and each attempted robbery victim." (56 RT 24119-24120.) Anderson's trial counsel acknowledged that she had "looked at some of these cases," as well as another, *People v. Felix* (2003) 108 Cal.App.4th 994, and that the latter case "indicate[d] that the 12022.53 enhancement is mandatory." (56 RT 24121.) The trial court recognized that the prosecutor's view, if correct, would "change the sentencing dramatically," and ordered him to submit a new recommendation. (56 RT 24121-24123.) In his revised memorandum, the prosecutor recommended a

determinate term of 10 years followed by an indeterminate term of 179 years to life. (6 CT 1449-1451.) In opposition, Anderson argued only that a sentence of that length would amount to cruel and unusual punishment, in violation of the state and federal Constitutions. (6 CT 1452-1454; see also 56 RT 24126-24127.) The trial court rejected that constitutional argument, and imposed the sentence recommended by the prosecution. (56 RT 24163-24170; 6 CT 1456-1460.)

C. The Court of Appeal's Decision

On appeal, Anderson's opening brief attacked his convictions on several grounds, but his only challenge to his sentence was that it violated the constitutional prohibition against cruel and unusual punishments. (See Appellant's Opening Brief at 94-97, *People v. Anderson*, No. A136451 (Mar. 21, 2015).) Shortly before oral argument, the Court of Appeal directed the parties to address certain issues not discussed in the briefs. One of those issues was whether Anderson could be "sentenced on Penal Code section 12022.53, subdivisions (d) and (e) enhancements that the jury found true on counts 3, 4, 5, 6, and 7," in light of the fact that those enhancements had not been "alleged in the first amended information filed on April 12, 2011." (See Mem. to Counsel (Aug. 23, 2018).)

In response, the People acknowledged that the first amended information "did not repeat the language of the separate gang allegation" and did not "specifically refer to subdivisions (d) and (e) or allege that a principal 'personally and intentionally discharged a firearm which proximately caused death'" in connection with counts 3 through 7. (People's Supplemental Letter Brief at 9 (Oct. 1, 2018).) The People argued that the trial court did not err in imposing these enhancements, because the "amended information, the evidence presented by the prosecutor, and the instructions given to the jury regarding counts three

through seven put [Anderson] on notice" of the prosecutor's intent to seek the section 12022.53(e) enhancements, and because Anderson's case "did not involve a post-conviction attempt to apply unpleaded sentence enhancements of which he was unaware until sentencing or thereafter." (*Id.* at pp. 9-10.)

The Court of Appeal affirmed Anderson's convictions in an unpublished opinion. (See Slip Opn. 1, 26.) In a footnote, it also held that the section 12022.53(e) enhancements had been properly imposed, citing *People v. Riva* (2003) 112 Cal.App.4th 981. (Slip Opn. 25, fn. 10.) But it remanded the case to the trial court in light of two legislative changes affecting Anderson's sentence. First, the court noted that after Anderson's sentence was imposed, the Legislature amended section 12022.53 to allow trial courts to "'strike or dismiss an enhancement otherwise required to be imposed by this section.'" (*Id.* at p. 24 [quoting § 12022.53, subd. (h)].) Remand was thus necessary to allow the trial court to "exercise its discretion whether to strike" these enhancements in accordance with this change. (*Id.* at p. 25.)[5] Second, the court noted that the Legislature had also adopted Senate Bill 260 after Anderson was sentenced. (*Id.* at p. 23.) That bill entitles certain defendants who commit offenses when they are under the age of 26 to "a parole hearing during or before their 25th year of incarceration." (*People v. Franklin* (2016) 63 Cal.4th 261, 278.) Because Anderson was 21 when he committed his crimes, the Court of Appeal held that Anderson was entitled to remand for the "limited opportunity to augment the sentencing record to include 'information relevant to his eventual youth offender parole hearing.'" (Slip Opn. 23 [quoting *Franklin*, *supra*, 63 Cal.4th at p. 284].)

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[5] The People agreed that this change to section 12022.53 was retroactive. (See Slip Opn. 24.)

This Court granted Anderson's petition for review. It limited its review to the question of whether the section 12022.53(e) enhancements were properly imposed with respect to counts 3 through 7.

ARGUMENT

Section 12022.53(e) requires trial courts to impose a sentence enhancement when two things are "pled and proved"—that a defendant committed a crime for the benefit of a street gang, and that one principal in the offense used a firearm in the manner specified in section 12022.53, subdivisions (b), (c), or (d). Interpreting an identical phrase found in section 667.61, this Court in *People v. Mancebo* (2002) 27 Cal.4th 735, 747 held that the prosecution must specify the enhancement it wishes to seek in the accusatory pleading. Here, the first amended information did not specify that the prosecution was seeking the section 12022.53(e) enhancement with respect to counts 3 through 7. Accordingly, it did not comply with *Mancebo*'s holding regarding pleading requirements.

Despite that shortcoming, this Court should affirm the Court of Appeal's judgment. Under the circumstances of this case, Anderson had notice that the prosecution was seeking these enhancements, and he did not object to having the jury determine their truth. *Mancebo* did not consider whether a trial court may impose unpleaded enhancements when the defendant plainly had advance notice of them. Nor did it hold that trial courts can *never* impose a sentence enhancement that does not appear on the face of the accusatory pleading. Instead, *Mancebo* was primarily concerned with a circumstance in which the defendant did not receive notice of the prosecution's intent to seek an enhancement. Because Anderson received such notice, *Mancebo* does not control the outcome of this case.

In past cases, this Court has affirmed convictions and sentences that

included unpleaded charges or enhancements of which the defendants had notice. On some occasions, it has held that the defendant impliedly consented to an informal amendment of the pleading. On others, it has held the defendant forfeited the claim of lack of notice. The Court could affirm the judgment below in this case based on either rationale. Moreover, because Anderson had notice that the prosecution intended to seek the section 12022.53(e) enhancements, any error resulting from the failure to specifically plead them in the first amended information would be harmless. Although the People did not explicitly frame their argument in the Court of Appeal in terms of informal amendment, forfeiture, or harmless error, each of these grounds for affirmance follow from the argument that the People did expressly make: that the Court of Appeal should affirm the trial court's judgment because Anderson had adequate notice of the prosecution's intent to seek the section 12022.53(e) enhancements.

Of course, the People recognize that "the better practice is to allege the enhancement with respect to every count on which the prosecution seeks to invoke it." (*People v. Riva* (2003) 112 Cal.App.4th 981, 985.) But where the jury instructions and verdict forms put the defendant on notice that the prosecution will seek to invoke the enhancement, the defendant raises no objection, and the jury finds the facts necessary to impose the enhancement, neither fairness nor precedent requires the appellate courts to set aside the resulting sentence. Indeed, a contrary rule would create its own risk of unfairness, by discouraging defendants from bringing these sorts of pleading defects to the trial court's attention in time for the court to remedy them.

I. THE COURT OF APPEAL'S JUDGMENT SHOULD BE AFFIRMED

A. *Mancebo*'s Pleading Requirements

In *Mancebo*, this Court held that the prosecution must identify the "specific sentence enhancement allegations" it intends to invoke to increase a defendant's punishment in the criminal pleading itself. (*Mancebo*, *supra*, 27 Cal.4th at p. 747.) The trial court in that case imposed the 25-year-to-life enhancement provided for in the "One Strike" law (§ 667.61). (*Mancebo*, *supra*, 27 Cal.4th at pp. 739, 742.) At the time that the defendant in *Mancebo* was convicted, the One Strike law required trial courts to impose a 25-year-to-life enhancement on any defendant who committed one of the crimes listed in that statute under two or more specified circumstances. (*Id.* at p. 742 [citing § 667.61].) The statute further directed that the "facts of any specified circumstance" had to be "pled and proved to the trier of fact or admitted by the defendant in open court." (*Ibid.*)

The defendant in *Mancebo* was charged with 10 offenses stemming from the sexual assaults of two victims. (*Mancebo*, *supra*, 27 Cal.4th at pp. 739-740.) The prosecution also alleged that two of the One Strike circumstances applied with respect to eight of those counts. (*Id.* at p. 740.) The jury found the defendant guilty on all counts and found each enhancement allegation to be true. (*Ibid.*) At sentencing, however, the trial court relied on an *unpleaded* circumstance—the fact that there was more than one victim—in imposing the 25-year-to-life enhancement called for in the One Strike law.[6] The Court of Appeal held that the trial court erred in

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[6] It did so because one of the pleaded circumstances (gun use) could be used to support a separate enhancement provided for in section 12022.5, subdivision (a), but only if that circumstance was not being used to support the One Strike enhancement. (See *Mancebo*, *supra*, 27 Cal.4th at p. 742 [under the One Strike law, if "only the minimum number of qualifying

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doing so, and this Court affirmed. (*Mancebo*, *supra*, 27 Cal.4th at pp. 739, 741.) This Court's conclusion was informed both by the text of the One Strike law and by principles of due process. (*Id.* at p. 743.) The statutory mandate that the prosecution "ple[a]d and prove[]" the One Strike circumstance required the prosecution to specify the circumstances it would use to support that enhancement in the accusatory pleading. (*Id.* at pp. 744-745.) And, significantly, because the prosecution had not given the defendant "fair notice of the specific sentence enhancement allegations that [were] invoked to increase punishment for his crime," using the unpleaded circumstance to increase the defendant's sentence "implicated [his] due process rights." (*Id.* at pp. 743, 747.) Indeed, lack of adequate notice sufficient to safeguard a defendant's due process rights was a central concern underlying *Mancebo*. (See *id.* at pp. 744-748.)

B. *Mancebo* Does Not Preclude Trial Courts from Imposing Unpleaded Enhancements for Which the Defendant Has Notice

Like the One Strike Law, section 12022.53(e) requires the prosecution to "ple[a]d and prove[]" certain circumstances in order to seek the enhancement provided for in that subdivision. *Mancebo* held that an enhancement requiring the prosecution to "ple[a]d and prove[]" certain circumstances must be specified in the accusatory pleading. (*Mancebo*, *supra*, 27 Cal.4th at p. 747.) The People do not dispute that this requirement applies to section 12022.53(e). (Accord *People v. Botello* (2010) 183 Cal.App.4th 1014, 1022-1027 [applying *Mancebo* to an

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circumstances required for One Strike sentencing treatment have been pled and proved," those circumstances must be used to impose the One Strike enhancement, and not as the basis for imposing a lesser punishment provided for in a separate statute].)

unpleaded section 12022.53(e) enhancement].) And the People acknowledge that the first amended information in this case did not comply with that requirement with respect to counts 3 through 7. (OBM 18-23.)[7]

Mancebo did not, however, hold that every sentence that includes an unpleaded enhancement must be reversed. Rather, the Court was principally concerned with the fact that the defendant was unaware that the prosecution would rely on an unpleaded circumstance to increase his sentence. (*Mancebo*, *supra*, 27 Cal.4th at pp. 744-748.) As the Court explained, the pleading in *Mancebo* was inadequate because it "failed to put [the] defendant on notice that the People, *for the first time at sentencing*, would seek to use the [unpleaded] circumstance" to secure the 25-year-to-life enhancement provided for in the One Strike law. (*Id.* at p. 745, italics added.) That notice vindicates important values. It can be "critical to the defendant's ability to contest the factual bases and truth of the qualifying

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[7] The People's concession is limited to the section 12022.53(e) enhancement and the facts of this case. As *Mancebo* noted, there are several statutes that require a circumstance to be "pled and proved" or impose a similar requirement. (*Mancebo*, *supra*, 27 Cal.4th at p. 745, fn. 5; see, e.g., §§ 190.05, subd. (c); 667, subd. (c); see generally *Mancebo*, *supra*, 27 Cal.4th at p. 761 (dis. opn. of Brown, J.) [collecting additional statutes].) These statutes "address a variety of topics" that may present their own interpretive questions. (*Mancebo*, *supra*, 27 Cal.4th at p. 745, fn. 5.) For example, this case does not present the question of what the prosecution must plead when seeking enhancements under statutory provisions whose text does not include a "pled and proved" (or similar) requirement—such as the enhancements listed in section 12022.53, subdivisions (b), (c), and (d). (See, e.g., *Riva*, *supra*, 112 Cal.App.4th at p. 1000.) Nor does this case raise the issue of whether an uncharged "lesser included enhancement" may be imposed when the original enhancement allegation is either factually unsupported or "does not apply to the offense of conviction under the applicable statutory provisions." (*People v. Fialho* (2014) 229 Cal.App.4th 1389, 1395.)

circumstance." (*Id.* at p. 752.) It can also play an important role in the decision about whether to plea bargain. (*Ibid.*)

These concerns are not implicated in the same way when a defendant has notice that the prosecution intends to seek an unpleaded enhancement. Even in a case like this one, where notice of the additional enhancements comes towards the end of trial, the defendant will know the facts that the prosecution needs to prove in order to increase his sentence, and can plan his defense accordingly (or ask the trial court for more time for that purpose, if necessary). He will also have the information necessary to ascertain his maximum possible prison sentence, which may inform his decision about whether to try to negotiate a plea deal.[8]

Moreover, as addressed below, courts have not hesitated to affirm convictions and sentences in cases where the defendant had notice of an unpleaded offense or enhancement and raised no objection, either on forfeiture grounds or on the theory that the defendant implicitly consented to an informal amendment of the accusatory pleading. *Mancebo* had no occasion to depart from that precedent, because the defendant in *Mancebo*—unlike the one here—received no such notice.

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[8] *Mancebo* also reasoned that specifying the enhancement in the pleading was necessary to fulfill a separate statutory requirement, which directs that a defendant be allowed to "'admit[]'" the truth of the qualifying circumstance in open court, if he waives his right to have a jury determine that issue. (*Mancebo*, *supra*, 27 Cal.4th at p. 752 [quoting § 667.61, subd. (i)].) That consideration does not provide any basis for holding that an enhancement is invalid in a case like this one, where the defendant has notice of the additional enhancement. In that circumstance, if the defendant chooses to waive a jury's determination of their truth, the trial court will presumably require the defendant to admit the allegations before imposing the enhancement.

C. Because Anderson Had Notice of the Section 12022.53(e) Enhancements, Affirmance Is Proper Under an Informal Amendment, Forfeiture, or Harmless Error Analysis

Because Anderson had ample notice that that the prosecution intended to invoke the section 12022.53(e) enhancement with respect to counts 3 through 7, this Court may affirm the Court of Appeal's judgment under one of three doctrines: informal amendment, forfeiture, or harmless error.

1. Informal Amendment

Typically, the accusatory pleading notifies a defendant of the charges or enhancements he will face. (See *People v. Toro* (1989) 47 Cal.3d 966, 973 [pleading provides "notice of the specific offense[s] charged" but does not provide notice of "nonincluded offenses"], disapproved on another ground in *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3; *Mancebo*, *supra*, 27 Cal.4th at pp. 751-752 [similar with respect to enhancements].) But California courts have long held that a defendant may be convicted of a crime not specified in the pleading when he has notice of those additional charges. (See *Toro*, *supra*, 47 Cal.3d at pp. 973-978.) This "'informal amendment doctrine'" recognizes that the pleading may be "amended without written alterations to it." (*People v. Whitmer* (2014) 230 Cal.App.4th 906, 919.) It reflects the general rule that accusatory pleadings may be amended at "any stage of the proceedings" for "any defect or insufficiency" (§ 1009), and that criminal judgments may not be reversed by "reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits" (§ 960). (See also *People v. Goolsby* (2015) 62 Cal.4th 360, 367-368 [absent prejudice, amendment may be granted "'up to and including the close of the trial'"].)[9]

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[9] The amendment may not add charges "not shown by the evidence taken at the preliminary examination." (§ 1009; see generally *People v. Jones*

(continued...)

In addition, amendments may be made "expressly or impliedly." (*Toro*, *supra*, 47 Cal.3d at p. 973.) California law "does not attach any talismanic significance to the existence of a written information." (*People v. Sandoval* (2006) 140 Cal.App.4th 111, 133.)[10] Thus, when the trial court proceedings put a defendant on notice that he will face charges not specified in the pleadings, his failure to object may be viewed as "an implied consent to treat the information as having been amended" to include the additional offense, and a "waiver of any objection based on lack of notice." (*Toro*, *supra*, 47 Cal.3d at pp. 976-978, citations and quotation marks omitted.)

This Court's decision in *Toro* is instructive. The information in that case charged the defendant with attempted murder and assault with a deadly weapon. (*Toro*, *supra*, 47 Cal.3d at p. 970.) But the jury was also instructed on, and received verdict forms for, battery with serious bodily injury. (*Id.* at p. 971.) The jury convicted the defendant on the battery count and this Court held that the conviction should stand. (*Id.* at pp. 970, 978.) The Court recognized the general requirement that a person may not be convicted of an offense (except a necessarily included one) not charged

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(1990) 51 Cal.3d 294, 312 [observing that the preliminary hearing transcript represents "'the touchstone of due process notice to a defendant'"].) Here, evidence presented at the preliminary hearing supported the jury's ultimate findings that one of Anderson's accomplices used a gun during the commission of the robberies and attempted robberies, and that one of them shot and killed a victim. (See, e.g., 1 Preliminary Hearing Transcript 127-128, 143; 2 Preliminary Hearing Transcript 199-200, 228-229; 3 Preliminary Hearing Transcript 280-287, 396-397.)

[10] See also *Whitmer*, *supra*, 230 Cal.App.4th at p. 919 [trial court proceedings may "'constitute an informal amendment of the accusatory pleadings'" [quoting 4 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Pretrial Proceedings, § 231, p. 418].

in the pleading. (*Id.* at p. 973.) But it also recognized a well-established exception to this rule: a defendant may "expressly or impliedly consent[]" to being tried for offenses not included in the pleading. (*Ibid.*) In that circumstance, the defendant cannot "'legitimately claim lack of notice'" or argue that he was unfairly surprised by the additional charges. (*Id.* at pp. 973, 975.) Nor does it matter that the prosecution did not formally amend the information: there is "no difference in principle" between adding a new offense by filing an amended pleading and adding the charge by "verdict forms and jury instructions." (*Id.* at p. 976 [footnote omitted].) Because the defendant had notice of the battery charge and did not object to it, he "consent[ed] to the new charge," and "waive[d] . . . any objection based on lack of notice." (*Ibid.*)

The same result is appropriate here. As in *Toro*, the jury instructions and the verdict forms in this case made it clear that the prosecution intended to invoke the section 12022.53(e) enhancement with respect to counts 3 through 7. (See *ante*, pp. 11-12.) The jury instructions specified that if the jury found Anderson guilty of the crimes charged in counts 3 through 7, and it found that Anderson committed the crime for the benefit of a street gang, it also had to determine whether the prosecution had proved "the additional allegation that one of the principals personally and intentionally discharged a firearm during that crime and caused death." (4 CT 1073; see also CALCRIM No. 1402 [instruction given for section 12022.53(e) enhancement].) And the verdict forms for each count included a section titled "**Special Finding 12022.53 PC (d) and (e)**", which prompted the jury to find the section 12022.53, subdivision (d) and (e), allegation "NOT TRUE" or "TRUE" with respect to that count. (6 CT 1325, 1327, 1329, 1331, 1333.) Anderson's trial counsel discussed these instructions and forms with the trial court, initialed the instructions and one

of the verdict forms, and confirmed that the instructions "appear[ed] to be in order and complete." (46 RT 8056; see also 45 RT 8039; 47 RT 8306-8308, 8325-8327; 4 CT 965, 1073; 6 CT 1325.)

Anderson thus had "fair notice of the specific sentence enhancement allegations" that the prosecution intended to invoke to increase his punishment. (*Mancebo*, *supra*, 27 Cal.4th at p. 747). He was not "unfair[ly] surprise[d]" by these enhancements. (*Toro*, *supra*, 47 Cal.3d at p. 975). Indeed, Anderson acknowledges in his opening brief that he learned of "his *potential* exposure to an added sentence of 125 years to life at the time he learned of the jury instructions and verdict forms." (OBM 20, fn. 10.) As in *Toro*, this Court should conclude that Anderson impliedly consented to an informal amendment of the pleading, and that he has "waive[d] of any objection based on lack of notice." (*Toro*, *supra*, 47 Cal.3d at p. 975.)

To be sure, at least one Court of Appeal has held that an information may not be informally amended unless it would provide some benefit to the defendant. (See *People v. Arias* (2010) 182 Cal.App.4th 1009, 1020-1021.) In support, it relied on *Toro*'s statement that the informal amendment in that case (which added a lesser offense than the one expressly charged) may have aided the defendant because it "'afford[ed] the jury a wider range of verdict options.'" (*Arias*, *supra*, 182 Cal.App.4th at p. 1021 [quoting *Toro*, *supra*, 47 Cal.3d at p. 976].)[11] Other Courts of Appeal, however, have held informal amendments proper in circumstances where the amendment offered no apparent benefit to the defendant. (See, e.g. *Sandoval*, *supra*,

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[11] See also *Toro*, *supra*, 47 Cal.3d at pp. 974-975 ["fundamental fairness" requires that the trier of fact be instructed on lesser related offenses when the defendant requests those instructions, to avoid the possibility the jury will convict the defendant of the greater charge because it is convinced that the defendant "'is guilty of some crime but not necessarily the one charged'"].

140 Cal.App.4th at pp. 132-134 [prosecution could add prior strike allegation through informal amendment]; *Whitmer*, *supra*, 230 Cal.App.4th at pp. 919-920 [prosecution could add new theory of grand theft that would provide alternative ground for convicting defendant via informal amendment].) And there is no principled reason not apply to the informal amendment doctrine to the addition of greater crimes or additional enhancements—especially when the prosecution may formally amend the accusatory pleading to include them "at any stage of the proceedings" (so long as they are supported by evidence introduced at the preliminary hearing and do not otherwise prejudice the defendant). (§ 1009; see generally *People v. Winters* (1990) 221 Cal.App.3d 997, 1005 ["Section 1009 authorizes amendment of an information at any stage of the proceedings provided the amendment does not change the offense charged in the original information to one not shown by the evidence taken at the preliminary examination"].) Requiring the prosecution to file a written amendment to add the enhancements to counts 3 through 7 would elevate form over substance, without providing any apparent benefit to the defendant.

2. Forfeiture

This Court may also hold that Anderson forfeited his claim of lack of notice regarding the section 12022.53(e) enhancement on counts 3 through 7. Forfeiture doctrine "'encourage[s] parties to bring errors to the attention of the trial court, so that they may be corrected.'" (*In re Sheena K.* (2007) 40 Cal.4th 875, 881; see also *People v. McCullough* (2013) 56 Cal.4th 589, 593.)

This Court held a claim similar to Anderson's forfeited in *People v. Houston* (2012) 54 Cal.4th 1186. The defendant there was charged with 10 counts of attempted murder. But the indictment failed to allege that the

attempts were "willful, deliberate, and premeditated." (*Id.* at p. 1225.) At the time the defendant was indicted, former section 664, subdivision (1) (now section 664, subdivision (a)) provided that attempted murder was punishable by life in prison with the possibility of parole if the accusatory pleading charged that the attempted murder was "'willful, deliberate, and premeditated.'" (*Houston, supra*, 54 Cal.4th at p. 1225 [quoting former § 664, subd. (1)].) Despite the indictment's shortcomings, the trial court imposed the life sentence on the attempted murder counts, after the jury made an "express finding that the attempted murders were willful, deliberate, and premeditated." (*Id.* at pp. 1225, 1228.) The People conceded that the charging documents did not meet former section 664, subdivision (1)'s pleading requirements, but argued that the defendant had forfeited the claim. (*Id.* at p. 1226.)

This Court agreed. (*Houston, supra*, 54 Cal.4th at p. 1226.) It recognized that a defendant has a "due process right to fair notice of the allegations that will be invoked to increase the punishment for his or her crimes," and that the defendant had been given that notice. (*Id.* at p. 1227.) The circumstances that this Court found relevant in *Houston* were that the trial court informed the defendant that he was facing life in prison; that the trial court instructed the jury to determine whether the attempted murders were willful, deliberate, and premeditated; and that the verdict form charged the jury with determining whether the attempted murders were willful, deliberate, and premeditated. (*Ibid.*) Because the defendant had received "notice of the sentence he faced and did not raise an objection [to the pleading] in the trial court," he forfeited his claim. (*Id.* at p. 1228.)

The circumstances here are similar to those in *Houston*. Like the indictment in that case, the first amended information here did not comply with the statutory pleading requirements. (Compare *Houston, supra*, 54

Cal.4th at p. 1226 with 4 CT 979-985; see also §§ 664, subd. (a), 12022.53, subd. (e).) But here, as in *Houston*, the jury instructions and verdict forms put Anderson on notice that the prosecution was seeking the section 12022.53(e) enhancement with respect to counts 3 through 7. (See *ante*, pp. 11-12.)[12]

The principles underlying the forfeiture doctrine also support its application here. Forfeiture is founded on the understanding that it is "'both unfair and inefficient to permit a claim of error on appeal that, if timely brought to the attention of the trial court, could have been easily corrected or avoided.'" (*McCullough*, *supra*, 56 Cal.4th at p. 593.) Had Anderson objected to the addition of the section 12022.53(e) enhancements in the trial court, the court could have "craft[ed] an appropriate remedy" by, for example, considering whether to permit the prosecutor to formally amend the information. (*Houston*, *supra*, 54 Cal.4th at p. 1228.) And had Anderson needed more time to prepare his defense, the trial court could have granted it. (*Id.* at pp. 1227-1228.)

Mancebo does not require a different result. In that case, the Court excused the defendant's failure to object to the trial court's reliance on an unpleaded circumstance because that was a "'legal error resulting in an unauthorized sentence.'" (*Mancebo*, *supra*, 27 Cal.4th at p. 749, fn. 7.) That conclusion, however, turned on circumstances specific to that case: the "One Strike" law required a pleaded circumstance to be used as a basis for imposing the enhancement provided for in that statute and also *prohibited* the trial court from striking the circumstance in order to use it as

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[12] The jury here also "made an express finding" that a principal shot and killed a person during the commission of each robbery and attempted robbery. (*Houston*, *supra*, 54 Cal.4th at p. 1229; see 6 CT 1325, 1327, 1329, 1331, 1333; see also 49 RT 8407-8413; 8421-8435.)

a basis for imposing a lesser enhancement. (*Ibid.*) No similar statutory violation arises here. In any event, this Court held a claim similar to Anderson's forfeited in *Houston*. (See *Houston*, *supra*, 54 Cal.4th at p. 1228.)

3. Harmless Error

This Court could also affirm the judgment below by concluding that any error was harmless. To be sure, *Mancebo* rejected the application of harmless error in that case. (*Mancebo*, *supra*, 27 Cal.4th at p. 749.) But it did so because of the lack of notice. Harmless error, the Court held, was inappropriate where a defendant's "'due process right to notice has been completely violated.'" (*Ibid.*) That reasoning does not apply in a case like this one, where the defendant has the constitutionally-required noticed.

When that notice is present, the normal rules governing harmlessness should apply. Under the California Constitution, "[n]o judgment shall be set aside" for "any error as to any matter of pleading" unless a court concludes that there has been a "miscarriage of justice." (Cal. Const., art. 6, § 13.) And in the typical case, when a defendant establishes error under state law, the defendant must also demonstrate that it is "'reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'" (*People v. Gonzalez* (2018) 5 Cal.5th 186, 195 [quoting *People v. Watson* (1956) 46 Cal.2d 818, 837].) When a defendant is on notice of the enhancements he is facing, neither concerns arises. There is no miscarriage of justice: Anderson was not unfairly surprised by the trial court's decision to impose the section 12022.53(e) enhancements. And it is not reasonably probable that the result in this case would have been different had the prosecution expressly included the section 12022.53(e) enhancements in the first amended information. The notice Anderson received allowed him a "'reasonable

opportunity'" to prepare his defense. (*Toro*, *supra*, 47 Cal.3d at p. 973.) He also had the information required to determine his maximum possible sentence (life in prison), and decided to submit the case to the jury instead of attempting to enter into additional plea negotiations with the prosecution. (*Mancebo*, *supra*, 27 Cal.4th at p. 745.)

D. Anderson's Other Arguments Are Unavailing

Anderson enlists several other cases and arguments in support of his position. None provides any persuasive reason for reversing the Court of Appeal's judgment.

Anderson relies on *People v. Arias*, (2010) 182 Cal.App.4th 1009, which involved circumstances similar to those in *Houston*. (See OBM 25-27.) The defendant there was convicted of two counts of attempted murder, but the charging document did not allege that the attempted murders were willful, deliberate, and premeditated. (*Arias*, *supra*, 182 Cal.App.4th at p. 1017.) The trial court imposed a life sentence on each count; but the Court of Appeal reversed because the information did not meet the statutory pleading requirements. (*Id.* at pp. 1016-1017 [citing § 664, subd. (a)].) The court also rejected the People's assertion that the defendant had forfeited his claim. (*Id.* at pp. 1017-1020.) As this Court explained in *Houston*, however, it was unclear whether the defendant in *Arias* had any notice that the prosecution would seek the longer sentence attached to attempted murders that were willful, deliberate, and premeditated. (*Houston*, *supra*, 54 Cal.4th at pp. 1228-1229.) Although the jury had been instructed to make those determinations, the record did not disclose whether the trial court had "issued its proposed jury instructions and verdict forms to the parties," and whether the possibility of a life sentence had been discussed before trial. (*Houston*, *supra*, 54 Cal.4th at p. 1229.) In contrast, here Anderson's counsel reviewed the jury instructions and the verdict

forms and told the trial court that they "appear[ed] to be in order and complete." (46 RT 8056; see also 4 CT 1073; 6 CT 1325.)[13]

The Ninth Circuit's decision in *Gautt v. Lewis* (9th Cir. 2007) 489 F.3d 993 also involved a case in which the defendant did not have notice of the enhancement he was facing. (See OBM 37-40.) As here, *Gautt* involved a section 12022.53 enhancement. The information there alleged that the prosecution was seeking the 10-year enhancement provided by section 12022.53, subdivision (b); but the trial court imposed the 25-year-to-life enhancement provided for in section 12022.53, subdivision (d). (*Gautt*, *supra*, 489 F.3d at pp. 998-999, 1001.) On habeas review, the Ninth Circuit held that the defendant's "right to be informed of the charges against him was violated." (*Id.* at p. 1014.) The charging documents were deficient and no "other sources" adequately informed the defendant that he was facing the 25-year-to-life enhancement. (*Id.* at pp. 1008-1009.) The jury instructions were "muddled"; the verdict form cited section subdivision (b) instead of subdivision (d); and the prosecutor's closing argument emphasized that the jury did not need to find whether the defendant had "intentionally discharged" a firearm (an element of the section 12022.53, subdivision (d), enhancement). (*Id.* at pp. 1011, 1013-1014.) Here, in contrast, the jury instructions and verdict forms clearly

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[13] The other California authorities that Anderson cites are inapposite for similar reasons. (See *Botello*, *supra*, 183 Cal.App.4th at pp. 1028-1029 [prosecution could not seek section 12022.53(e) enhancement where it was not pleaded, and the prosecution failed to "ensure jury findings under that provision" and failed to "raise the provision at sentencing"]; *People v. Perez* (2017) 18 Cal.App.5th 598, 618 [prosecutor's "brief allusion" to the possibility of an enhanced sentence made "when discussing an unrelated jury instruction did not give defendant fair notice that his sentence could jump from a maximum of nine years to a life term"]; *People v. Perez* (2015) 240 Cal.App.4th 1218, 1225 [rejecting argument that defendant had notice of a One Strike circumstance].)

informed Anderson that the prosecution was seeking the section 12022.53(e) enhancement on counts 3 through 7. (See *ante*, pp. 11-12.)

As Anderson notes (OBM 39-40) *Gautt* suggested that a defendant must receive notice of the charges from the accusatory pleading, and that the required notice cannot be gleaned from "non-charging-document sources." (*Gautt*, *supra*, 489 F.3d at p. 1009.) But not only is *Gautt* not binding on this Court (see, e.g., *People v. Bradford* (1997) 15 Cal.4th 1229, 1292), that observation was not the Ninth Circuit's holding. Instead, the court assumed that "such sources c[ould] be parsed for evidence of notice," and concluded that nothing in the record before it indicated that the defendant had received the constitutionally-required notice. (*Gautt*, *supra*, 489 F.3d at p. 1010.)

What is more, *Gautt*'s reasons for suggesting that unpleaded enhancements cannot be imposed even when the defendant has notice of them are not persuasive. The Ninth Circuit worried that the prosecution would be able to point to "some shred of evidence presented during the trial" as "proof of 'notice' to the defendant." (*Gautt*, *supra*, 489 F.3d at p. 1010.) In the typical case, however, such a meager evidentiary showing will not be enough to satisfy the due process requirement that the defendant be "advised of the charges against him." (*People v. Sloan* (2007) 42 Cal.4th 110, 116, citations and quotation marks omitted; see also *Mancebo*, *supra*, 27 Cal.4th at p. 744 [the "mere fact" that the defendant was convicted of crimes against more than one victim was not enough to put him on notice that the multiple victim circumstance would be used to increase his sentence].) The Ninth Circuit also expressed concern that providing notice via jury instructions or closing argument would impair a defendant's ability to "'prepare his defense,'" because they come after the defendant "has settled on a defense strategy and put on his evidence."

(*Gautt*, *supra*, 489 F.3d at p. 1010.) But California law allows prosecutors to amend an information until the "'close of trial,'" so long as the amendment does not prejudice the defendant. (*Goolsby*, *supra*, 62 Cal.4th at pp. 367-368.) And a timely objection to the addition of new charges or enhancements will normally ameliorate concerns about a defendant's ability to prepare his defense by allowing the trial court to "craft an appropriate remedy"—including, where appropriate, by giving him more time for that purpose. (*Houston*, *supra*, 54 Cal.4th at p. 1228.)

Finally, Anderson suggests that the section 12022.53(e) enhancements cannot be imposed because the prosecution originally recommended that they be imposed but stayed. (See OBM 20, fn. 10, 40-42.) That is not correct. Due process requires only that a defendant be given "fair notice of the allegations that will be invoked to increase the punishment for his or her crimes." (*Houston*, *supra*, 54 Cal.4th at p. 1227.) The prosecution's initial sentencing recommendation was made after the jury delivered its verdict, long after Anderson had been notified of the charges he was facing. When the prosecutor later discovered that the trial court was *required* to impose the section 12022.53(e) enhancement, it of course "change[d] the sentencing dramatically" from the prosecutor's initial recommendation. (56 RT 24121; see also OBM 17.) But his initial misunderstanding about the scope of trial court's discretion did not violate due process. Nor does it provide any other basis for reversing the Court of Appeal's judgment.[14]

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[14] In any event, the Legislature has now amended section 12022.53 to allow trial courts to strike an enhancement imposed under that section. (See § 12022.53, subd. (h); see also Stats. 2017, ch. 682, § 2.) The Court of Appeal remanded this case to the trial court so that the trial court could decide whether to exercise this discretion. (See Slip Opn. 24-25.) The People have not challenged that remand order. Anderson will also be entitled to a parole hearing after serving 25 years under section 3051,

(continued...)

CONCLUSION

The judgment of the Court of Appeal should be affirmed.

Dated: August 14, 2019

Respectfully submitted,

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(...continued)
notwithstanding the imposition of mandatory consecutive life sentences under section 12022.53(e). (See Slip Opn. 23.)

CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 8,469 words.

Dated: August 14, 2019

XAVIER BECERRA
Attorney General of California

/s/ Samuel P. Siegel

SAMUEL P. SIEGEL
Deputy Solicitor General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Anderson**
No.: **S253227**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On August 14, 2019, I served the attached **ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, San Francisco, California 94102, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 14, 2019, at San Francisco, California.

Staci Caston
Declarant

Signature