ACLU
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Northern California

February 7, 2024

Honorable Chief Justice Patricia Guerrero
and Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *People v. Wiley*, No. S283326
Amicus Letter in Support of Petition for Review

Dear Chief Justice Patricia Guerrero and Associate Justices of the Court:

The American Civil Liberties Union Foundation of Northern California ("ACLU NorCal") respectfully submits this letter in support of the petition for review in *People v. Wiley*, No. S283326. As explained below, the petition presents two important criminal-sentencing issues that merit this Court's review.

First, the decision below deepens an existing and open split in the courts of appeal over whether Penal Code section 1170 requires a jury to find aggravating circumstances that *relate to* a prior conviction before a court can impose an upper-term sentence. Acknowledging that the courts are "divided" over this question, the Court of Appeal here affirmed the trial court's imposition of an upper-term sentence based solely on the trial court's independent fact-finding that petitioner Eric Wiley performed poorly on probation and that his prior convictions successively increased in seriousness. (*People v. Wiley* (2023) 97 Cal.App.5th 676 (*Wiley*).) The decision below was wrong on the merits: The statute's plain text require that a jury find beyond reasonable doubt all aggravating factors except the *fact of* "prior convictions." (Pen. Code, § 1170, subd. (b)(3).) Even setting this legal error aside, however, this Court's review is necessary to resolve the conflict in the courts of appeal—which will otherwise continue to widen.

Second, the petition presents an opportunity for this Court to decide a more fundamental question about the scope of the prior-conviction exception to the Sixth Amendment's jury-trial right. Members of this Court have expressed that it is long past time to revisit this jurisprudence. (See *People v. McDaniel* (2021) 12 Cal.5th 97, 158 (Liu, J., concurring) [observing that "we have not fully grappled with the analytical underpinnings of the *Apprendi* rule and the totality of the high court's 20-year line of decisions"].) The key cases on which the decision below relied—*People v. Towne* (2008) 44 Cal.4th 63 (*Towne*), and *People v. Black* (2007) 41 Cal.4th 799 (*Black*

II)—have been seriously undercut by this Court's more recent precedent. (See *People v. Gallardo* (2017) 4 Cal.5th 120, 124–125 (*Gallardo*).) Numerous commentators, including multiple justices on the U.S. Supreme Court, have cast doubt on whether the exception for even "the fact of prior conviction" is consistent with *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and its progeny. Although that is ultimately a question for the high court to resolve, these cautions suggest—at a minimum—that the prior-conviction exception should not be widened to encompass nearly *any* factor relating to recidivism. To the extent this Court's prior decisions have adopted that impermissibly broad reading of the exception, they should be overruled.

I. Interests of *amicus curiae*.

ACLU NorCal is an affiliate of the national ACLU, a nonpartisan, nonprofit organization with nearly two million members dedicated to defending the guarantees of individual liberty secured by the state and federal Constitutions. ACLU NorCal has long engaged in litigation and advocacy to protect the constitutional and civil rights of the criminally accused and to end excessively harsh criminal-sentencing policies that result in mass incarceration.

II. This Court must resolve the conflict over the proper application of Penal Code section 1170, subdivision (b)(3).

The legislature enacted Senate Bill 567 in 2022 to make significant changes to California's criminal-sentencing regime. As relevant here, the bill amended Penal Code section 1170, subdivision (b) to mandate a default rule: "When a sentencing court chooses a term from a statutory triad, the chosen term shall not exceed the middle term." (*People v. Jones* (2022) 79 Cal.App.5th 37, 44; see § 1170, subd. (b)(1).)

The legislature also crafted narrow exceptions to that default rule. First, it provided that the court may impose an upper-term sentence "only when there are circumstances in aggravation of the crime that justify the imposition of a term of imprisonment exceeding the middle term and the facts underlying those circumstances have been stipulated to by the defendant or have been found true beyond a reasonable doubt at trial by the jury or by the judge in a court trial." (§ 1170, subd. (b)(2).) Next, it provided that the sentencing court "may consider the defendant's prior convictions in determining sentencing based on a certified record of conviction without submitting the prior convictions to a jury." (§ 1170, subd. (b)(3).)

Notably, section 1170 does not specify any "circumstances in aggravation." The lower courts have filled this gap by incorporating the aggravating factors set out in California Rule of Court 4.421. These factors include, among other things, that "[t]he defendant's prior convictions . . . are numerous or of increasing seriousness," that "[t]he defendant was on probation, mandatory supervision, postrelease community

supervision, or parole when the crime was committed," and that "[t]he defendant's prior performance on probation, mandatory supervision, postrelease community supervision, or parole was unsatisfactory." (Cal. Rules of Court, rule 4.421(b)(2), (4) & (5).)[1]

Several courts of appeal have held that section 1170, subdivision (b)(3)'s exception for "prior convictions" does not permit the trial court to make findings on some or all of these aggravating factors. (See, e.g., *People v. Butler* (2023) 89 Cal.App.5th 953, 959–61, *review granted* May 31, 2023, S279633; *People v. Falcon* (2023) 92 Cal.App.5th 911, 953, *review granted* Sept. 13, 2023, S281242; *People v. Dunn* (2022) 81 Cal.App.5th 394, 404–405, *review granted* Oct. 12, 2022, S275655.)[2] In *Butler*, for instance, the court explained that the aggravating factors found by the trial court—in particular, "that Butler's prior convictions were of increasing seriousness"—had not been "prove[n] to a jury beyond a reasonable doubt." (89 Cal.App.5th at p. 959.) And the court strongly suggested that this aggravating factor (and perhaps others) could not be established in *any* case simply by reference to a defendant's "certified record of conviction"; the factor *must* instead be submitted to the jury under the statute. (*Id.* at 959–961.)

By contrast, other courts, like the decision below, have held that *any* of the aggravating factors that somewhat relate to prior convictions fall within subdivision (b)(3)'s exception. (See, e.g., *Wiley*, *supra*, 97 Cal.App.5th at pp. 685–686; *People v. Pantaleon* (2023) 89 Cal.App.5th 932, 938 (*Pantaleon*); *People v. Ross* (2022) 86 Cal.App.5th 1346, 1353, *review granted* Mar. 15, 2023, S278266; *People v. Flowers* (2022) 81 Cal.App.5th 680, 685–686, *review granted* Oct. 12, 2022, S276237.) These decisions have not independently analyzed the statutory text. Instead, they assume that section 1170, subdivision (b)(3) should be interpreted to have the same effect as this Court's understanding of the *constitutional* prior-conviction exception to the

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[1] ACLU NorCal has previously argued that it is unconstitutional, on both separation-of-powers and void-for-vagueness grounds, for the government to use Rule 4.421's aggravating circumstances to increase a maximum criminal sentence. (See, e.g., Amicus Ltr. in Support of Pet. for Rev., *Rebong v. Superior Court*, No. S278303, Feb. 6, 2023; Amicus Br. in Support of Petrs., *Zepeda v. Superior Court*, No. A166159, March 17, 2023.) Although we continue to hold that position, we assume for purposes of the issues presented here that these non-statutory aggravating factors may properly serve as the basis for imposing upper-term sentences.

[2] Many of the decisions cited here have been granted and held for *People v. Lynch*, No. S274942, which presents the question of what prejudice standard applies on appeal when determining whether a case should be remanded for resentencing in light of Senate Bill No. 567. Because the Court of Appeal held that there was no error at all here, it did not reach the question of which prejudice standard should apply.

Sixth Amendment's jury-trial right. (See *Pantaleon*, *supra,* 89 Cal.App.5th at p. 938 [holding that the statute "preserves this distinction"].)

As explained below, this Court's broad articulation of the Sixth Amendment's prior-conviction exception is questionable on its own terms. Regardless, there is no evidence that the legislature intended for subdivision (b)(3) to be read as broadly. The statutory text states that a trial court "may consider the defendant's prior convictions in determining sentencing based on a certified record of conviction without submitting the prior convictions to a jury"; it does not authorize trial courts to make findings about aggravating factors that *relate* to but are not necessarily proven by those prior convictions.

Furthermore, the entire purpose of Senate Bill 567 was to provide "defendants the opportunity to have *a jury* review and determine the truthfulness of alleged aggravating facts." (Sen. Com. on Public Safety, Analysis of Sen. Bill No 567 (2021–2022 Reg. Sess.) April 13, 2021, p. 2, italics added.) And the legislative history indicates that subdivision (b)(3) was meant to preserve only the U.S. Supreme Court's narrow exception for "the fact of prior conviction." (See *id.* at pp. 3–4 [citing the high court's *Apprendi* precedent and noting that Senate Bill 567's requirement that aggravating factors be submitted to the jury "would not apply to *proving prior convictions*" (italics added)].) Indeed, the legislative history doesn't even mention this Court's decisions extending that narrow exception to cover all recidivism-related facts.

In sum, the decision below joined other courts of appeal in adopting an interpretation of section 1170, subdivision (b)(3) that is contrary to the statute's text and purpose. In doing so, it deepened a split in the lower courts that has serious consequences for criminal sentencing throughout the state. This Court's intervention is needed to bring uniformity to the law—and to honor the legislature's decision to prohibit upper-term sentences absent jury findings beyond a reasonable doubt.

III. This case presents the Court with an excellent opportunity to revisit its broad understanding of *Apprendi*'s exception for "the fact of prior conviction."

The statutory question discussed above is reason enough to grant the petition for review. But this case also presents a serious question of constitutional magnitude: Whether this Court's precedent holding that the Sixth Amendment's jury-trial right does not extend to *any* factors *merely relating* to prior convictions should be overruled.

1. As this Court is well-aware, the U.S. Supreme Court's line of decisions starting with *Apprendi*, *supra*, 530 U.S. 466, " 'worked a sea change in the body of sentencing law.' " (*Black II*, *supra*, 41 Cal.4th at p. 812, quoting *United States v.*

Ameline (9th Cir. 2004) 376 F.3d 967, 973.) In *Apprendi*, the high court held that "[o]ther than the fact of a prior conviction, *any* fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." (530 U.S. at p. 490, italics added.) The exception for the "fact" of prior convictions derived from the high court's earlier decision in *Almendarez-Torres v. United States* (1998) 523 U.S. 224 (*Almendarez-Torres*).

Even in *Apprendi* itself, however, the high court cautioned that it was "arguable that *Almendarez-Torres* was incorrectly decided," and that its exception might not apply "if the recidivist issue were contested." (*Apprendi*, *supra*, 530 U.S. at pp. 489–490.) The high court declined to decide that question, but it made clear that the exclusion for prior convictions was "a narrow exception to the general rule" that "represent[ed] at best an exceptional departure from the historic practice." (*Id.* at p. 487–490; see also *McDaniel*, *supra*, 12 Cal.5th at p. 161 (Liu, J., concurring).) Multiple justices of the high court have since cast doubt on whether *Almendarez-Torres*'s exception can be reconciled with the *Apprendi* line of cases. (See, e.g., *Sessions v. Dimaya* (2018) 138 S.Ct. 1204, 1253 (Thomas, J., dissenting in part) ["The exception recognized in *Almendarez–Torres* for prior convictions is an aberration, has been seriously undermined by subsequent precedents, and should be reconsidered."]; *Shepard v. United States* (2005) 544 U.S. 13, 27–28 (Thomas, J., concurring in part and in the judgment) [noting that "a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided"]; Jennifer Lee Barrow, *The Return of the Jury: Conduct-Based Sentencing for Recidivism* (2022) 2022 Wis. L. Rev. 785, 802 ["Ironically, all of the Justices in the *Almendarez-Torres* majority have since rejected such an exception."].)

Nevertheless, the U.S. Supreme Court has not revisited *Almendarez-Torres* and so its exception for the "fact of a prior conviction" remains good law. The question presented here is: how far does that exception extend?

2. This Court first considered that question in *Black II*, *supra*, 41 Cal.4th 799. There, like here, the trial court found as an aggravating circumstance that the defendant's prior convictions were " 'numerous or of increasing seriousness.' " (Cal. Rules of Court, rule 4.421(b)(2).) The defendant argued that "he was entitled to a jury trial on the aggravating circumstance of his prior criminal history because, even if the trial court properly may decide whether a defendant has suffered a prior conviction, a jury must determine whether such convictions are numerous or increasingly serious." (*Black II*, *supra*, at p. 819.) This Court rejected this argument as "read[ing] the 'prior conviction' exception too narrowly." (*Ibid.*) The Court's holding was premised explicitly on its earlier decision in *People v. McGee* (2006) 38 Cal.4th 682 (*McGee*), which "interpreted the *Almendarez-Torres* exception to include not only the fact that a prior conviction occurred, but also other related issues that may be

determined by examining the records of the prior convictions." (*Black II*, *supra*, at p. 819, citing *McGee*, *supra*, at pp. 703–706.)

In *Towne*, *supra*, 44 Cal.4th 63, this Court extended *Black II*'s reasoning to the other "recidivism-related aggravating factors listed in California Rules of Court, rule 4.421(b)—that is, the factors of service of a prior prison term, commission of the current offense while on probation or parole, and unsatisfactory performance on probation or parole." (*Towne*, *supra*, 44 Cal.4th at p. 76.) Again, the defendant in *Towne* urged this Court to construe "the [*Almendarez-Torres*] exception as narrowly as possible." (*Id.* at p. 77.) This Court recognized that the high court used "narrow language" to describe the prior-conviction exception, and that it provided "limited guidance as to whether it would apply the *Almendarez-Torres* exception to the circumstance that a defendant was on probation or parole at the time of the offense, or that a defendant has served a prison term." (*Id.* at p. 79.) Nevertheless, it again decided to read the exception broadly—again, relying heavily on *McGee*. (See *id.* at pp. 79–80.)

In reaching its holding, the Court highlighted the fact that "the majority of state and federal decisions" had interpreted *Almendarez-Torres*'s exception to extend more broadly than the mere fact of a prior conviction. (*Towne, supra*, 44 Cal.4th at pp. 77–79 [citing cases].) But the Court also acknowledged that a minority of courts, including the Ninth Circuit, had adopted the narrower understanding urged by the defendant. (See *ibid.*; see also *Butler v. Curry* (9th Cir. 2008) 528 F.3d 624, 641 [holding "that whether the defendant was on probation at the time of commitment of a crime does not come within the narrow *Almendarez-Torres* exception to the fact-finding requirements established in the *Apprendi* line of cases and so cannot suffice to make Butler's sentence constitutional"].)

In short, the effect of this Court's holdings in *Towne* and *Black II* was clear: "[A] judge may make factual findings on a variety of issues that are related to a defendant's recidivism" without offending the Sixth Amendment's right to a trial by jury. (See *Towne*, *supra*, 44 Cal.4th at p. 77.)

3. The foundation for these holdings have been weakened, if not eliminated altogether, by this Court's more recent Sixth Amendment jurisprudence. In 2017, this Court expressly overruled *McGee*—the primary basis for its holdings in *Towne* and *Black II*. (See *Gallardo*, *supra*, 4 Cal.5th at pp. 123–25.)

In *Gallardo*, this Court reviewed several then-recent decisions by the U.S. Supreme Court that indicated that "the *Almendarez-Torres* exception is narrower than *McGee* had supposed." (*Gallardo*, *supra*, 4 Cal.5th at p. 132, discussing *Descamps v. United States* (2013) 570 U.S. 254, and *Mathis v. United States* (2016) 579 U.S. 500.) Although those high-court decisions were statutory, rather than

constitutional, they "drew on Sixth Amendment principles." (*Gallardo*, *supra*, 4 Cal.5th at pp. 133.) And, this Court explained, the high court's decisions made clear that "[t]he judicial factfinding permitted under the *Almendarez-Torres* exception does not extend 'beyond *the recognition* of a prior conviction.' " (*Id.* at p. 136, quoting *Descamps*, *supra*, 133 S.Ct. at p. 2288, italics added.) That cast fatal doubt on *McGee*'s central premise: that "identifying the 'fact of a prior conviction' . . . necessarily entails a limited inquiry into the 'nature or basis of the crime of which the defendant was convicted.' " (*Id.* at p. 130, quoting *McGee*, *supra*, 38 Cal.4th at p. 691.)

To be sure, *Gallardo* (and *McGee*) concerned whether the defendant's prior conviction qualified as a "serious felony" under Penal Code section 667, subdivision (a)—not the aggravating circumstances set out in Rule 4.421(b). So *Gallardo* did not discuss *Towne* or *Black II*. But, as the Fifth District recently observed, "[w]hether *Gallardo*'s basis for disapproving *McGee* undercuts the reasoning in *Towne* [and] *Black II* . . . with respect to the scope of the prior conviction exception may be debatable." (*People v. Falcon* (2023) 92 Cal.App.5th 911, 954, fn. 13, as modified (July 13, 2023).) As a result, there is serious question as to whether those holdings remain good law.

This Court should grant the petition to resolve this uncertainty. And if it does grant review of the constitutional issue, this Court should overrule *Towne* and *Black II*. As discussed above, it is not even clear that the *Almendarez-Torres* exception is consistent with *Apprendi* and its progeny. Thus, at the very least, this Court should read that exception as narrowly as the high court intended: It applies only to the "fact of a prior conviction"—and nothing more.

4. Finally, we note that the constitutional issue presented here is neither abstract nor academic. The Sixth Amendment's guarantee that a jury determine, beyond a reasonable doubt, all facts that increase the penalty for a crime beyond its statutory maximum is "no mere procedural formality, but a fundamental reservation of power in our constitutional structure." (*Blakely v. Washington* (2004) 542 U.S. 296, 306; see *Apprendi*, *supra*, 530 U.S. at p. 477 (describing the Sixth Amendment jury-trial right as a "constitutional protection[] of surpassing importance"].) As the high court has explained, "those who wrote our Constitution considered the right to trial by jury 'the heart and lungs, the mainspring and the center wheel' of our liberties, without which 'the body must die; the watch must run down; the government must become arbitrary.' " (*United States v. Haymond* (2019) 139 S.Ct. 2369, 2375 (plurality), internal citation omitted.) So "[w]hen a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' . . . and the judge exceeds his proper authority." (*Blakely*, *supra*, at p. 304.)

Mr. Wiley's case highlights these constitutional concerns. Under section 1170, subdivision (b), Mr. Wiley should have been sentenced to no more than a midterm sentence unless a jury found aggravating circumstances beyond a reasonable doubt. Instead, the trial court imposed an upper-term sentence based solely on its own assessment of the nature of Mr. Wiley's prior convictions, as listed on his "certified rap sheet." (*Wiley*, *supra*, 97 Cal.App.5th at pp. 681–682.) The trial court's findings were highly debatable: It found, for example, that Mr. Wiley's current conviction for making a criminal threat was more serious than his previous drug convictions—even though, as the petition explains (at pp. 30–31), the statutory sentence for the drug convictions is *higher* than the sentence for criminal threats. It also found that Mr. Wiley's performance on probation had been unsatisfactory even though there was evidence that "he successfully completed probation or post-release community supervision (PRCS) on some occasions but not others." (*Wiley*, *supra*, 97 Cal.App.5th at p. 688.)

But whether or not the trial court's findings were correct is beside the point. What is critical is that they are not questions about the mere "fact" of prior conviction. They require normative assessment of the relative *nature* of those prior convictions, how the different convictions should be evaluated in combination, and, in the case of the probation-related aggravating factors, the subjective question of whether the defendant performed "satisfactorily." (See *Butler*, *supra*, 528 F.3d at p. 644 [noting that the prior conviction "exception does not extend to qualitative evaluations of the nature or seriousness of past crimes, because such determinations cannot be made solely by looking to the documents of conviction"]. These are, in other words, precisely the kind of questions that the Sixth Amendment requires the jury to decide. This Court should grant review to bring California's sentencing law in line with that critical constitutional guarantee.

Respectfully submitted,

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PROOF OF SERVICE

I, Sara Cooksey, declare that I am over the age of eighteen and not a party to the above action. My business address is 39 Drumm Street, San Francisco, CA 94111. My electronic service address is scooksey@aclunc.org. On February 7, 2024, I served the attached:

Amicus Letter in Support of Petition for Review in *People v. Wiley*, No. S283326

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused to be transmitted to the following case participants a true electronic copy of the document via this Court's TrueFiling system:

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BY MAIL: I mailed a copy of the document identified above to the following case participants by depositing the sealed envelope with the U.S. Postal Service, with the postage fully prepaid:

Clerk of the Superior Court
Humboldt County Courthouse
For: Hon. Kaleb V. Cockrum, Department 2
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Trial Court, Case Nos. CR2101049 and CR1902147B

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 7, 2024, in Fresno, CA.

Sara Cooksey

Sara Cooksey, Declarant