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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JOSE DEJESUS SANTANA AGUILAR, Defendant and Appellant.	B263935 (Los Angeles County Super. Ct. No. MA061396)

APPEAL from a judgment of the Superior Court of Los Angeles County, Daviann L. Mitchell, Judge. Affirmed in part, reversed in part and remanded with directions.

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr. and Stacy S. Schwartz, Deputy Attorneys General, for Plaintiff and Respondent.

Jose DeJesus Santana Aguilar (Santana) appeals from the judgment entered after his conviction by a jury on multiple counts arising from the lengthy, continuous sexual abuse of his girlfriend's daughter, C. G., from the time C.'s was 12 years old until she moved away from Santana at age 18. Santana contends the trial court improperly instructed the jury on the unanimity requirement applicable to crimes involving generic testimony in resident child molester cases and abused its discretion by refusing to dismiss his 1994 prior strike conviction for a similar crime. We reverse the judgment in limited part to permit the trial court to specify the statutory basis for all fees, fines and assessments imposed, but otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Information*

Santana was charged with 12 counts of sexual abuse of C.: count 1—lewd act upon a child (Pen. Code, § 288, subd. (a))[1] occurring between August 1, 2007 and December 1, 2007; count 2—continuous sexual abuse (§ 288.5, subd. (a)) occurring between January 1, 2008 and July 1, 2008; count 3—continuous sexual abuse (§ 288.5, subd. (a)) occurring between August 1, 2008 and February 14, 2009; count 4—lewd act upon a 14-year-old child by a person at least 10 years older (§ 288, subd. (c)(1)) occurring between February 15, 2009 and February 14, 2010; count 5—lewd act upon a 15-year-old child by a person at least 10 years older (§ 288, subd. (c)(1)) occurring between February 15, 2010 and February 14, 2011; count 6—forcible oral copulation on a minor victim 14 years or older (§ 288a, subd. (c)(2)(C)) occurring between February 15, 2011 and February 14, 2012; count 7—forcible oral copulation on a minor victim 14 years or older (§ 288a, subd. (c)(2)(C)) occurring between February 15, 2012 and June 1, 2012; count 8—sodomy by force on a minor victim 14 years or older (§ 286, subd. (c)(2)(C)) occurring between February 15, 2012 and October 1, 2012; count 9—sodomy by force on a minor victim 14 years or older (§ 286, subd. (c)(2)(C)) occurring between November 1, 2012 and February 14, 2013; count 10—forcible sexual penetration by a foreign object, minor victim

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[1] Statutory references are to this code unless otherwise stated.

14 years or older (§ 289, subd. (a)(1)(C)) occurring between February 15, 2012 and February 14, 2013; count 11—sodomy by force (§ 286, subd. (c)(2)(A)) occurring between February 15, 2013 and September 1, 2013; and count 12—sodomy by force (§ 286, subd. (c)(2)(A)) on October 3, 2013. Santana was also charged with five counts (counts 13-17) of failure to register as a sex offender (§ 290.012, subd. (a)).

The information further alleged as to counts 1 through 10 that Santana had previously been convicted of lewd conduct with a child (§ 288, subd. (a)) within the meaning of section 667.61, subdivisions (a) and (d), and section 667, subdivision (a)(1). As to all counts it was alleged Santana had been convicted of a prior serious and/or violent felony within the meaning of the three strikes law (§§ 667, subds. (b)-(j), 1170.12).

Santana pleaded not guilty and denied the special allegations. Trial began on February 2, 2015. Before testimony began, Santana admitted the prior serious felony conviction for lewd conduct with a child.[2] He also pleaded no contest to the five failure-to-register counts. Sentencing was deferred on those counts until completion of the trial.

2. *The People's Evidence at Trial*

a. *C.'s testimony*

C., who was 19 years old at the time of trial, met Santana when she was 12 years old and in the seventh grade. Her mother was dating Santana, and C.'s and her mother often stayed at his apartment. C. slept in the same bed with her mother and Santana, usually in the middle. On the first night they slept at Santana's apartment, she was awakened by Santana caressing her arm. C. was frightened and moved to the floor to sleep. She did not tell anyone about the touching.

In the middle of her seventh grade year, C. and her mother moved to the Antelope Valley to live with Santana and some of his relatives. C. did not have her own room and continued to share a bed with Santana and her mother, who worked as a housekeeper in

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[2] In 1994 Santana, then 31 years old, was convicted of committing a lewd act upon a child (the daughter of the cousin with whom he was living at the time) and was placed on felony probation. After violating the terms of his probation by continuing to stalk the 13-year-old victim, he was sentenced to six years in state prison.

Los Angeles and was often required to stay over during the week. C. continued to sleep in the same bed with Santana even when her mother was absent from the home. On about four or five occasions during the six months they lived with Santana's relatives, he caressed C.'s legs, breasts, buttocks and vulva[3] through her clothes. C. pretended she was asleep and never told him to stop for fear he would hit her.

When C. was in the eighth grade, the family rented a room in a house in Los Angeles and again shared a bed. Santana continued to touch C.'s breasts, buttocks, legs and vulva, mostly when her mother was at work. The family moved to Gardena when C. was in ninth grade. C. had her own room but her mother did not allow her to lock the door. Santana came into the room at night and caressed her body while C. pretended to sleep. She did not protest or tell her mother because she was afraid. During her 10th grade year she sometimes tried to push Santana away but was too afraid to offer greater resistance. During this time C. told her friend, Joseline Flores, that Santana was touching her. She was too embarrassed to tell anyone else and made Flores promise not to tell anyone.

When C. entered the 11th grade, the family moved in with C.'s grandfather. Although they again shared a bed, Santana did not molest C. while they lived with her grandfather. They moved again that year into a one-bedroom house down the street. On nights C.'s mother was at work, Santana began removing C.'s clothes and stroking her body. He also began forcing her legs open and putting his tongue and fingers into her vagina.

When C. reached the 12th grade, the family moved back to the Antelope Valley. C. had her own room and began locking the door to keep Santana out. One night, however, Santana got into the room, overpowered C. and forced his penis into her anus, ultimately ejaculating. This happened on "more than five but less than 10" occasions.

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[3] C. used the word "vagina" during her testimony. We have opted for the more accurate word "vulva" to clarify the lack of penetration.

On one of the occasions Santana attempted to put his penis into C.'s vagina, but she was able to push him off.

The last time Santana anally raped C. occurred on October 3, 2013 when she was 18. On October 31, 2013 C. told her godmother, Eloisa Espinoza, that Santana had been sexually abusing her. Espinoza accompanied C. to the Los Angeles County Sheriff's Department to report the abuse. A few days later, after she had moved out of the home, C. called Santana and recorded their conversation. C. accused Santana of various incidents of sexual misconduct through the years and asked why he had done it. Santana answered he did not know. Although he stated he was sorry, he told her to forget about it and that he still loved her. He refused to acknowledge specific incidents and, suspicious about her reason for asking the questions, told her he did not want to discuss it on the telephone.

b. *Additional evidence*

Joseline Flores had known C. since sixth grade. When the girls were in the ninth or 10th grade, C. told Flores her mother's boyfriend had touched her vagina. Flores told no one because C., who was afraid of Santana, made her promise to keep it secret. After reporting the abuse to the Sheriff's Department in 2013, C. also told Flores that Santana had "stuck his penis into her."

Espinoza, C.' s godmother, became suspicious something was wrong because C. was always shaking in her presence. On several occasions she asked C. if she was alright. C. always responded she was fine. C. confided to Espinoza she had been abused after Espinoza told her own story of being a victim of molestation. She accompanied C. to the Sheriff's Department to report the abuse.

Detective John Amis testified as an expert witness about the sexual abuse of minors. Amis explained that child molesters typically begin their abuse by touching or caressing the minor to gauge the child's reaction, a process known as grooming. Once confident the minor will not report the touching, the abuser adds more contact over time to include heavy petting, digital and, ultimately, penile penetration.

3. *Santana's Defense*

Santana presented no evidence in his defense. His counsel argued C.' s testimony lacked credibility and was uncorroborated by any evidence other than her own statements.

4. *The Verdicts and Sentencing*

The jury found Santana guilty on counts 1 through 12. The trial court denied Santana's motion to dismiss his prior strike conviction and sentenced him to a determinate term in state prison of 68 years 4 months, plus an indeterminate term of 450 years to life. In addition, Santana was ordered to pay a restitution fine of $10,000 (§ 1202.4, subd. (b)); a court security fee of $680 (§ 1465.8, subd. (a)(1)); a criminal conviction assessment of $510 (Gov. Code, § 70373); and sex offender penalties and fines of $23,780, some of which were imposed pursuant to section 290.3. The court imposed and stayed a parole revocation fine of $10,000 (§ 1202.45).

DISCUSSION

1. *The Instruction of the Jury With CALCRIM No. 3500 Instead of CALCRIM No. 3501 Was Harmless Error*

a. *Governing law*

A criminal defendant's right to a jury trial includes the right to a unanimous verdict, including unanimous agreement on the act constituting the offense charged. (Cal. Const., art. I, § 16; *People v. Russo* (2001) 25 Cal.4th 1124, 1132.) Therefore, when an accusatory pleading charges a single criminal act and the evidence shows more than one such unlawful act, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act beyond a reasonable doubt. (*Russo*, at p. 1132.) "This requirement of unanimity as to the criminal act 'is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.'" (*Ibid.*; see *People v. Arevalo-Iraheta* (2011) 193 Cal.App.4th 1574, 1589 ["[t]he omission of a unanimity instruction is reversible error if, without it, some jurors may have believed the defendant guilty based on one act, while others may have believed him guilty based on another"].)

The trial court has a sua sponte duty to give a unanimity instruction when the prosecution has presented evidence of multiple acts to prove a single count. (*People v. Riel* (2000) 22 Cal.4th 1153, 1199.)[4]

CALCRIM No. 3500, the standard unanimity instruction given in this case with respect to counts 1 and 4 through 11,[5] explains the requirement that jurors agree on the act constituting the offense charged. It provides: "The defendant is charged with <*insert description of alleged offense*> [in Count __] [sometime during the period of _____ to _____]. The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed."

In 1990, prompted by due process concerns about convictions obtained as a result of the generic testimony typical in child molestation cases—the testimony by a victim that repeated, yet undifferentiated, instances of sexual abuse occurred during a particular time frame—the Supreme Court articulated criteria under which such testimony would be sufficient to support a conviction: "The victim, must describe *the kind of act or acts committed* with sufficient specificity, both to assure that unlawful conduct indeed has occurred and to differentiate between the various types of proscribed conduct (e.g. lewd conduct, intercourse, oral copulation or sodomy)[;] . . . the *number of acts* committed with sufficient certainty to support each of the counts alleged in the information or indictment (e.g., 'twice a month' or 'every time we went camping')[; and] . . . *the general time period* in which these acts occurred (e.g., 'the summer before my fourth grade,' or

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[4] Santana's defense counsel did not object to the instruction of the jury with CALCRIM No. 3500 or propose instruction of the jury instead with CALCRIM No. 3501.

[5] Counts 2 and 3 charged Santana with continuous sexual abuse of a child (§ 288.5, subd. (a)), which required the jury to find Santana had committed at least three acts of sexual, lewd or lascivious acts with C. during particular time periods but did not require the jury to agree on which three episodes occurred. Count 12 related specifically to Santana's forcible rape of C. on October 3, 2013. Those counts were not subject to the requirement of a unanimity instruction.

'during each Sunday morning after he came to live with us') to assure the acts were committed within the applicable limitation period. Additional details regarding the time, place or circumstance of the various assaults may assist in assessing the credibility or substantiality of the victim's testimony, but are not essential to sustain a conviction." (*People v. Jones* (1990) 51 Cal.3d 294, 316 (*Jones*).) To safeguard the constitutional requirement of unanimity, the Court directed, "In a case in which the evidence indicates the jurors might disagree as to the particular act defendant committed, the standard unanimity instruction should be given. [Citation.] But when there is no reasonable likelihood of juror disagreement as to particular acts, and the only question is whether or not the defendant in fact committed all of them, the jury should be given a modified unanimity instruction which, in addition to allowing a conviction if the jurors unanimously agree on specific acts, also allows a conviction if the jury unanimously agrees the defendant committed all the acts described by the victim. [¶] . . . [B]ecause credibility is usually the 'true issue' in these cases, 'the jury either will believe the child's testimony that the consistent, repetitive pattern of acts occurred or disbelieve it. In either event, a defendant will have his unanimous jury verdict [citation] and the prosecution will have proven beyond a reasonable doubt that the defendant committed a specific act, for if the jury believes the defendant committed all the acts it necessarily believes he committed each specific act [citations].'" (*Id.* at pp. 321-322; see *People v. Smith* (2005) 132 Cal.App.4th 1537, 1544; *People v. Matute* (2002) 103 Cal.App.4th 1437, 1447-1448.)

In keeping with the *Jones* decision, the Judicial Council adopted CALCRIM No. 3501, which provides: "The defendant is charged with <insert description[s] of alleged offense[s]> [in Count[s] __] sometime during the period of _____ to _____. [¶] The People have presented evidence of more than one act to prove that the defendant committed (this/these) offense[s]. You must not find the defendant guilty unless: [¶] 1 . You all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed [for each offense]; [¶] OR [¶] 2. You all agree that the People have proved that the

defendant committed all the acts alleged to have occurred during this time period [and have proved that the defendant committed at least the number of offenses charged]." CALCRIM No. 3501 differs from CALCRIM No. 3500 in the second paragraph, which addresses the situation in which the victim's testimony describes a series of essentially indistinguishable acts of molestation to support the charged counts. When there is generic testimony about multiple instances of such acts, the jury must either agree on the acts on which it relies or find that all of the charged acts were committed. The jury in this case was not instructed pursuant to CALCRIM No. 3501.

We review the failure to give the proper unanimity instruction de novo. (*People v. Hernandez* (2013) 217 Cal.App.4th 559, 569.) As with all claims of instructional error, we must determine whether "'there was a reasonable likelihood the jury applied the challenged instruction in an impermissible manner.' [Citation.] '[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.' [Citation.] 'Moreover, any theoretical possibility of confusion [may be] diminished by the parties' closing arguments.'" (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1220, disapproved on another ground by *People v. Rangel* (2016) 62 Cal.4th 1192, 1216; accord, *People v. Houston* (2012) 54 Cal.4th 1186, 1229 ["[w]hen considering a claim of instructional error, we review the challenged instruction in the context of the instructions as a whole and the trial record to determine whether there is a reasonable likelihood the jury applied the instruction in an impermissible manner"].)

2. *The Trial Court Erred in Failing To Instruct the Jury With CALCRIM No. 3501 on Counts 1 and 4 Through 11, but the Error Was Harmless*

It is abundantly clear C.' s testimony in support of counts 1 and 4 through 11 was generic in nature and not tied to specific instances of abuse. In other words, it was exactly the type of testimony addressed by the Supreme Court in *Jones* and for which the modified unanimity instruction contained in CALCRIM No. 3501 was drafted. Because there was no basis in the evidence for jurors to determine which particular act Santana committed at any specific time and the only question was whether he committed all of the

acts identified by C. (see *Jones, supra,* 51 Cal.3d at pp. 321-322; *People v. Fernandez* (2013) 216 Cal.App.4th 540, 557), it was error to instruct the jury with CALCRIM No. 3500 instead of No. 3501.[6] The inclusion of CALCRIM No. 3515, which instructs jurors to consider each count separately and return separate verdicts for each count, did not cure this error.

Nonetheless, in light of the jury's clear rejection of Santana's sole defense that C. fabricated her testimony, any error in the use of the incorrect unanimity instruction was harmless beyond a reasonable doubt.[7] As another court has explained in the context of a completely omitted unanimity instruction, when "'the record provides no rational basis, by way of argument or evidence, for the jury to distinguish between the various acts, and the jury must have believed beyond a reasonable doubt that defendant committed all acts if he committed any, the failure to give a unanimity instruction is harmless . . .'" beyond a reasonable doubt. (*People v. Curry* (2007) 158 Cal.App.4th 766, 783; accord, *People v.*

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[6] In *People v. Fernandez, supra,* 216 Cal.App.4th 540 the court concluded the jury had properly been instructed with CALCRIM No. 3501, rather than CALCRIM No. 3500 as the defendant argued on appeal, when two young girls testified about "numerous, repetitive molestation [that] took place over a defined period of time. Each described the distinct types of abuse to which she had been subjected in sufficient detail, was able to identify the locations where it took place, and was able to give a general estimate of the frequency of events. [The defendant] offered no evidence in his defense that might focus doubt as to any specific act of abuse as distinguished from any other act of molestation. Rather, his defense was simply that no molestation ever occurred." (*Id.* at pp. 557-558.) C.' s testimony in this case was comparable.

[7] Appellate courts are divided as to the standard of prejudice to apply to the failure to give a unanimity instruction. (Compare *People v. Vargas* (2001) 91 Cal.App.4th 506, 561 [applying state law standard of *People v. Watson* (1956) 46 Cal.2d 818, 836] with *People v. Smith*, *supra*, 132 Cal.App.4th at p. 1545 [applying federal constitutional standard of *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]; see also *People v. Hernandez, supra*, 217 Cal.App.4th at pp. 576-577 [discussing the split of authority and citing cases].) The majority of courts that have addressed this issue have applied the *Chapman* standard for federal constitutional error, concluding, as do we, that the failure to give the unanimity instruction can result in lowering the prosecution's burden of proof in a criminal case, an error of federal constitutional dimension. (See *People v. Curry* (2007) 158 Cal.App.4th 766, 784; *People v. Wolfe* (2003) 114 Cal.App.4th 177, 186.)

Matute, supra, 103 Cal.App.4th at pp. 1449-1450; see also *People v. Brown* (1996) 42 Cal.App.4th 1493, 1502 [where defendant's only defense to molestation charges was that victim was lying and none of the incidents occurred, and there was no evidence or argument to discriminate between one act of molestation and another, failure to give unanimity instruction, although error, was harmless beyond a reasonable doubt]; *People v. Thompson* (1995) 36 Cal.App.4th 843, 853 ["[w]here the record indicates the jury resolved the basic credibility dispute against the defendant and therefore would have convicted him of any of the various offenses shown by the evidence, the failure to give the unanimity instruction is harmless"].)

3. *The Trial Court Did Not Abuse Its Discretion in Refusing To Strike Santana's Prior Felony Molestation Conviction in the Interest of Justice*

Under the three strikes law, a sentencing scheme is "applied in every case where the defendant has at least one qualifying strike" unless the sentencing court finds an exception should be made. (*People v. Carmony* (2004) 33 Cal.4th 367, 377 (*Carmony*).) Section 1385, subdivision (a), vests the court with discretion to dismiss a prior conviction, including a qualifying strike conviction, "in furtherance of justice." (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 530; accord, *People v. Williams* (1998) 17 Cal.4th 148, 158.) "[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law . . . or in reviewing such a ruling, the court . . . must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [three strikes] scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Williams,* at p. 161.)

We review the trial court's decision not to dismiss a prior strike allegation under section 1385 for abuse of discretion. (*Carmony, supra,* 33 Cal.4th at p. 376.) "[T]he three strikes law not only establishes a sentencing norm, it carefully circumscribes the trial court's power to depart from this norm and requires the court to explicitly justify its

decision to do so. In doing so, the law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper. [¶] . . . [¶] . . . '[I]t is not enough to show that reasonable people might disagree about whether to strike one or more' prior conviction allegations. . . . Because the circumstances must be 'extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack' [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary." (*Id.* at p. 378.) When the record shows the trial court considered relevant factors and acted to achieve legitimate sentencing objectives, the court's decision will not be disturbed on appeal. (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.)

Santana contends the trial court abused its discretion in refusing to strike his prior serious felony conviction under *Romero* by ignoring what he calls the "mitigating factors" that his 13-year-old victim was his girlfriend who, he claims, loved him and wanted to live with him. According to Santana, the sexual intercourse that formed the basis for his lewd conduct conviction was consensual. Other than that felony conviction and a misdemeanor conviction for corporal injury to spouse or cohabitant (§ 273.5, subd. (a)), Santana contends he has no criminal record, no longer abuses drugs and has had fairly steady work as a gardener. This history, he asserts, distinguishes him from the classic pattern of recidivism targeted by the three strikes law.

Santana's theory is utterly unconvincing. Santana was 31 years old at the time of his 1994 conviction and continued to stalk his victim through 1995. He began abusing C. in 2007 when she was 12 years old and continued until 2013, when she was 18 and moved away. Even giving him the benefit of the lack of evidence he abused any other child during the 12 intervening years (for six of which he was incarcerated), he continually abused minors for at least nine of the 18 years before his arrest. The trial court's rejection of the contention his prior conviction was too remote and fell outside the purpose of the three strikes law was not an abuse of discretion. The record reveals the

court properly considered the relevant factors under *Carmony* and concluded Santana fit well within the letter and spirit of the three strikes law.

4. *The Portion of the Judgment Imposing Fines and Assessments Must Be Corrected*

At the sentencing hearing the trial court ordered Santana to pay various fines and assessments but improperly failed to specify the statutory basis for certain of those orders. (See *People v. High* (2004) 119 Cal.App.4th 1192, 1200 [remanding with directions to the trial court to "separately list, with the statutory basis, all fines, fees and penalties imposed on each count" and to prepare a corrected abstract of judgment including the corrected information].) Santana argues, the Attorney General concedes and we agree the matter must be returned to the trial court to correct this omission.

DISPOSITION

The judgment is reversed, and the matter is remanded to the trial court for the limited purpose of determining and specifying the basis for all fees, fines and assessments imposed and for amendment of the abstract of judgment to reflect the proper basis for all imposed fees, fines and assessments. In all other respects, the judgment is affirmed. Once the abstract of judgment is corrected, the trial court is directed to forward a certified copy of the abstract to the Department of Corrections and Rehabilitation.

PERLUSS, P. J.

We concur:

ZELON, J. GARNETT, J.*

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* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.