S274942

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DEANDRE LYNCH, Defendant and Petitioner.	No. _____ Court of Appeal No. C094174 San Joaquin County Superior Court No. 20FE009532

PETITION FOR REVIEW

AFTER DECISION BY THE COURT OF APPEAL,
THIRD APPELLATE DISTRICT,
OF MAY 27, 2022

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By appointment of the
Court of Appeal under
the Central California
Appellate Program
Independent Case
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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DEANDRE LYNCH, Defendant and Petitioner.	No. _____ Court of Appeal No. C094174 San Joaquin County Superior Court No. 20FE009532

PETITION FOR REVIEW

TO: THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE OF CALIFORNIA, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Petitioner and appellant Deandre Lynch, by and through counsel, hereby petitions for review, pursuant to California Rules of Court, rule 8.500, following the decision of the Court of Appeal for the Third District filed May 27, 2022 and attached to this Petition as Exhibit 1. The modification of the opinion issued June 2, 2022, consisting of the deletion of a single word, is attached immediately after Exhibit 1.

STATEMENT OF ISSUE PRESENTED

Whether after the passage of Senate Bill 567, the Court of Appeal erred in refusing to remand this case for re-sentencing even though four of the seven factors relied upon by the trial court in

imposing the upper-term sentence would not be found beyond a reasonable doubt if presented to a jury.

WHY THE PETITION SHOULD BE GRANTED

The trial court in this domestic violence case, acting before the passage of Senate Bill 567 ("SB 567"), imposed the upper-term sentence on the principal term. It relied upon seven factors in imposing the upper term:

1) The crime involved great violence;
2) The defendant has engaged in violent conduct which indicates a serious danger to society;
3) The victim was particularly vulnerable;
4) The defendant was armed;
5) The defendant's prior performance on parole was unsatisfactory, and/or he was on parole at the time of this offense;
6) The defendant's prior convictions are numerous;
7) The defendant has served prior prison terms.

(9RT 799-800.) None of these factors was supported by facts found by the jury beyond a reasonable doubt.

The Court of Appeal agrees with petitioner that the first three of these factors cannot survive scrutiny upon the retroactive application of SB 567, because it cannot be said that the underlying facts would have been found beyond a reasonable doubt by a jury, to wit, that (1) the crime involved great violence, (2) the defendant has engaged in violent conduct creating a

serious danger to society, or (3) the victim was particularly vulnerable. (Op. at pp. 10-12.)

As to the remaining factors upon which the trial court relied, the majority of the Court of Appeal errs in its analysis. First, as the dissenting justice notes, it is not at all clear that the jury would have found facts to support the fourth factor, that is, that petitioner was armed with a weapon during the offenses. The jury acquitted petitioner of assault with a deadly weapon. The jury instructions on domestic violence do not mention the use of a weapon. The verdicts do not mention the use of a weapon. "The use of a weapon is not an element of the crime of inflicting injuries resulting in traumatic conditions on a dating partner." (Dis. opn. of Renner, J. at p. 1.)

The majority of the Court of Appeal finds, however, that the unanimity instruction, which is designed only to make certain that the jurors all agreed on the specific three incidents that were alleged, somehow represents a finding by the jury that a weapon was in fact used in any or all of the three incidents. (CALCRIM No. 3502 at 1CT 252; Op. at p. 6.) The fact that the unanimity instruction was worded so as to describe the three incidents in a manner including the various weapons that were alleged to have been used does not mean that the jury necessarily found that those weapons were used, particularly in light of the jury's refusal to convict petitioner of assault with a deadly weapon and in light of the fact that the use of a weapon is not an element of the offenses of which he was convicted. Accordingly,

the fourth factor of seven, above, was also improperly used in imposing the upper-term sentence.

As to the fifth factor listed above, i.e., the defendant's prior performance on parole was unsatisfactory, the Court of Appeal incorrectly counts this single factor as two factors – both that the petitioner was on parole at the time of this offense, and that his prior performance on parole was unsatisfactory.

In reality, the trial court stated only as follows, regarding petitioner's parole status: " . . . his prior performance on parole was unsatisfactory. He was on parole when he committed this, so clearly that is true." (9RT 800, emphasis added.) The trial court's language makes clear that it believed that the fact petitioner was on parole at the time of this offense proved that his prior performance on parole was unsatisfactory. The trial court plainly viewed petitioner's parole status as one aggravating factor, not two.

Arguably, then, there were only three factors that were properly used to impose the upper term sentence, i.e.,

- The defendant's prior convictions are numerous;
- The defendant has served prior prison terms; and
- The defendant's performance on parole was unsatisfactory.

Even the numerosity of the prior convictions is a questionable factor here, given that (1) a prior conviction of domestic violence was already used by the trial court to impose the enhanced sentencing triad in Penal Code section 273.5, subdivision (f), (2) a prior strike was already used by the trial court to double the base sentence, and 3) all the prior convictions presumably contributed

to the trial court's decision to deny petitioner's *Romero* motion. (See 9RT 794-800; *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.) Use of the prior convictions to impose the upper term, in addition to these other consequences, constitutes improper dual use of the prior convictions.

In contrast to the two or three permissible factors, there were four factors relied upon by the trial court that are now improper after the passage of SB 567, i.e.,

- The crime involved great violence;
- The defendant has engaged in violent conduct which indicates a serious danger to society;
- The victim was particularly vulnerable; and
- The defendant was armed.

Three of these factors are acknowledged as improper by the majority of the Court of Appeal; the dissenting justice agrees with petitioner that the fourth factor ("defendant was armed") was also improper and should not have been considered.

The Court of Appeal refers to the *Watson* standard in determining whether the consideration of the improper factors was prejudicial: whether "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. Watson* (1956) 46 Cal.2d 818, 836; Op. at p. 9.) But as this Court has noted, "a probability in this context does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility." (*People v. Sandoval* (2015) 62 Cal.4th 394, 422, citations and internal quotation marks omitted; Dis. opn. of Renner, J. at p. 1.)

There is certainly a reasonable chance that, upon remand, the trial court would choose a lower- or middle-term sentence if it did not consider the four improper factors outlined above. Accordingly, the Court of Appeal was required to remand the case to the trial court for resentencing under the new law.

These issues raise important questions of law requiring review in this Court. (Calif. Rules of Court, rule 8.500(b).) On the above grounds and those argued below, petitioner asks that his petition be granted.

STATEMENT OF THE CASE

Petitioner Deandre Lynch was charged by amended information filed March 24, 2021 with assault with a deadly weapon on Joseph Carter (Pen. Code, § 245, subd. (a)(1)), assault with a deadly weapon on Jasmine Doe (Pen. Code, § 245, subd. (a)(1)), and three counts of domestic violence upon Jasmine Doe (Pen. Code, § 273.5, subd, (a)). (1CT 177-180.) It was further alleged that petitioner had previously been convicted of domestic violence, and that he had previously been convicted of assault with a firearm, a serious felony within the meaning of Penal Code section 667, subdivision (a). (1CT 178-180.) Petitioner pled not guilty and denied the special allegations. (1CT 175.)

Trial began on March 22, 2021. (1CT 140.) The court granted petitioner's motion to bifurcate the hearing on the prior strike conviction, and petitioner agreed that that determination would be made by the court rather than the jury. (4RT 307, 6RT 606; 1CT 176.) The parties stipulated before the jury that

petitioner had previously been convicted of two felony violations of Penal Code section 273.5, subdivision (a). (7RT 668.)

On March 30, 2021, the jury announced that it was deadlocked on Count 1, the assault with a deadly weapon on Joseph Carter, and the court declared a mistrial as to that count. (1CT 256-259.) The jury found petitioner not guilty of the assault with a deadly weapon on Jasmine Doe in Count 2, but guilty of the lesser included offense of simple assault. (1CT 257.) The jury found petitioner guilty of the three counts of domestic violence, Counts 3 through 5. (1CT 257-258.)

On April 30, 2021, the court found true the prior serious felony conviction. (9RT 786.) The trial court sentenced petitioner to the upper term of five years on Count 3, doubled due to the prior strike for 10 years, and one-third the middle term, to be served consecutively, on each of Counts 4 and 5 (one-third of four years, or one year and four months, doubled to two years and eight months for each count) for an aggregate term of fifteen years and four months. (9RT 801; 1CT 300.) The sentence on Count 2, misdemeanor battery, was stayed pursuant to Penal Code section 654. (9RT 801.) Petitioner filed a timely notice of appeal on May 20, 2021. (1CT 299.) On May 27, 2022, a divided panel of the Court of Appeal affirmed the judgment. (See Exhibit 1, attached.)

STATEMENT OF FACTS

The information alleged three incidents of domestic violence (all dates refer to the year 2020): Count 3 on May 24,

Count 4 on May 21, and Count 5 on May 17. (1CT 178-179.) The prosecutor argued to the jury that the May 24 incident (Count 3) related to petitioner beating Jasmine Doe with a table leg; that the May 21 incident (Count 4) involved a metal broom, and that the May 17 incident (Count 5) involved an extension cord. (7RT 716, 720.)

JASMINE DOE'S TESTIMONY

Jasmine Doe was the mother of petitioner's child, and his former girlfriend. They met in March of 2020, and started dating. The relationship was good at first, but then petitioner began to be violent with Doe. (5RT 433-434.) He was abusive to her about three or four times a week. (5RT 451.)

Petitioner sometimes hit Doe with objects other than his hands, but Doe did not recall what they were. (5RT 439.) She stated that she did not remember being hit with an extension cord, then later stated she did remember being hit with an extension cord. (5RT 439, 457-459.) She remembered petitioner hitting her with a metal broom or mop, but also testified she had never been hit with a metal broom handle. (5RT 439, 455.) Doe remembered petitioner beating her with a wooden table, but then stated she did not remember petitioner beating her with the table. (5RT 439-442, 460-470.) She did not remember any specific incident in which Mr. Lynch assaulted her, or any details of any of the incidents. (5RT 449, 459.)

OTHER WITNESSES' TESTIMONY

Joseph Carter, Doe's brother, had a number of telephone conversations with Doe between February and March in which she told him that petitioner had assaulted her. (5RT 361-379, 6RT 524-529.) In one of these conversations at the end of February or early March, she said petitioner had hit her in the face and on her shoulder with an extension cord. (6RT 532.)

As Carter approached Doe's home on May 24 to take her to a barbecue, he heard crashing, banging and screaming. (5RT 393.) As he entered, he saw his sister on the floor with her hands up in a defensive position, and petitioner standing over her, holding one of her arms, "drawing back from the next hit [sic]." (5RT 403.)

Deputy Sheriff Melissa Propps met and interviewed Ms. Doe on May 24, 2020. (1CT 209-231.) Propps observed multiple bruises on Doe's body. (7RT 636.) Doe told Propps that domestic violence was an ongoing, regular occurrence at her house, at the hands of petitioner. (7RT 649.) Doe said petitioner had hit her with a table that day, May 24. (1CT 220.) She told Propps that petitioner had hit her with an extension cord about a week before May 24, and with a metal broom about three days before May 24. (1CT 226, 7RT 650-651; 1CT 220 [the transcript of the recorded interview actually shows that Doe stated she was beaten with a broom "like, three weeks ago"].) Some of the bruises on Doe's body were consistent with being hit with a broom handle, an extension cord, and a table leg. (7RT 659-660, 662.) Propps observed Doe's residence, and found and photographed a wooden

table with its leg broken off, a broom and a mop -- both broken, with metal handles, and similar in appearance -- and a power cord. (7RT 655-658.)

Propps spoke to Doe again after the May 24 interview, and found her to be less forthcoming and less willing to assist in petitioner's prosecution as time went by. (7RT 648-649.)

After May 24, Doe stayed with Carter at his house until June 9, when he dropped her back off at her house. (6RT 507.) He didn't think it was a good idea for her to go back to the house, but she said she missed her home, and he felt that if he didn't take her there, she would go there on her own. (6RT 595.) Later on June 9, Carter got a call from a store clerk who said a woman had asked the clerk to call Carter and tell him to come pick her up because she did not feel safe. (6RT 505-506.) He then got a call from someone who put Doe on the phone. (6RT 512-513.)

Doe said that after Carter had dropped her off at home earlier that day, she had awakened from a nap to see petitioner standing over her bed in an ominous manner. Petitioner had lifted up his shirt to reveal a handgun. (6RT 513-514.) Carter called 911 because he was in Roseville and was not able to get to Doe quickly. (6RT 507-508.) The recording of the 911 call was played for the jury. (1CT 198-203.)

Two other calls to 911 on June 9 were also played for the jury. (6RT RT 509-510.) In the first, Naomi Gutierrez reported at 5:57 p.m. that a couple was arguing in the street, and that it seemed like he had pushed her down because "he was telling her 'get the fuck up.'" (1CT 195.) In the second, Gary Hill reported at

6:02 p.m. that "there's a guy over here just beatin' the hell out of this lady." (1CT 196.)

ARGUMENT

THE PETITION SHOULD BE GRANTED AND THE SENTENCE REVERSED BECAUSE RECENTLY ENACTED SENATE BILL NO. 567 APPLIES RETROACTIVELY UNDER *IN RE ESTRADA,* REQUIRING REMAND FOR A NEW SENTENCING HEARING.

A. Introduction

A new California law effective January 1, 2022 requires remand of this matter to the trial court for further proceedings. Senate Bill No. 567 ("SB 567"), signed into law on October 8, 2021, amends Penal Code section 1170, subdivision (b) ("section 1170(b)") to require the trial court to impose the middle term of the sentencing triad unless the facts underlying circumstances in aggravation have been either stipulated to, or have been found true beyond a reasonable doubt by a jury in a jury trial like that in the instant case.

The trial court applied the upper term in this case, but there was no finding by the jury as required by the new law. Although petitioner did stipulate to certain prior offenses for purposes of Evidence Code section 1109, these were not facts justifying an upper term under the new law.

Since the new law is ameliorative, and thus applies to any case that is not final on January 1, 2022, it applies to the instant case and requires remand.

B. Procedural background

The trial court imposed the upper term of five years on the base count, Count 3, which was doubled to ten years due to a prior strike. (9RT 801.) The middle term would have been four years (doubled to eight years). (See Pen. Code, § 273.5, subd. (f)(1).) The aggregate prison sentence was 15 years, four months. (9RT 801.)

The trial court explained that it chose the upper term because, in its view:

- the crime involved great violence or a high degree of cruelty (see Cal. Rules of Court, rule 4.421(a)(1));
- the defendant had used weapons in the commission of the offenses (rule 4.421(a)(2));
- his conduct indicated a serious danger to society (rule 4.421 (b)(1));
- he had numerous prior convictions (rule 4.421(b)(2));
- he had served prior prison terms (rule 4.421(b)(3));
- he was on parole at the time of the offenses (rule 4.421(b)(4); and
- the victim was particularly vulnerable (rule 4.421(a)(3)).

(9RT 799-800.)

The jury did not find any facts to support the upper-term sentence. Petitioner entered into one stipulation concerning the facts:

> The defendant, Deandre Lynch, has previously been convicted of felony violations of Penal Code section 273.5(a), otherwise known as domestic violence, on April 9th, 2015, and February 25th, 2016.

(7RT 668.)

C. The enactment of Senate Bill No. 567

Section 1170(b) delineates the trial court's authority to impose one of three statutory terms of imprisonment, known as the lower, middle, and upper terms. Section 1170(b) was amended in 2020 to read as follows. (Stats. 2020, ch. 29, § 14.) It provided:

> (b) When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. . . . The court shall select the term which, in the court's discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected and the court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law. A term of imprisonment shall not be specified if imposition of sentence is suspended.

(Pen. Code, § 1170(b).)

In 2021, the Legislature passed SB 567, which amended section 1170 again. Effective January 1, 2022, the statute as amended by SB 567 currently provides, in relevant part:

> (b)(1) When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall, in its sound discretion, order imposition of a sentence not to exceed the middle term, except as otherwise provided in paragraph (2).
>
> (2) <u>The court may impose a sentence exceeding the middle term 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</u>

> the defendant, or have been found true beyond a reasonable doubt at trial by the jury or by the judge in a court trial.

(Pen. Code, § 1170, subd. (b)(1)–(2), as amended by SB 567, emphasis added.)

The legislative history of SB 567 includes the author's statement of the bill's purpose. (See, e.g., Assem. Floor Analysis of Sen. Bill 567 (2020–2021 Reg. Sess.), Sept. 3, 2021, pp. 1–3.) According to the bill's author, the current version of section 1170(b) was enacted in 2007 "during [a] period of mass incarceration." (Id. at p. 2.) Since it became operative, the law "has led to individuals serving maximum prison sentences without the opportunity to effectively refute alleged aggravating facts." (*Ibid*.) Thus, current section 1170(b) has contributed to a "mass incarceration" trend in California as "part of the policy framework of" a decades-long "carceral system." (*Ibid*.)

SB 567 implements "a small step in the right direction of creating" a more humane criminal justice system. (Assem. Floor Analysis of Sen. Bill 567 (2020–2021 Reg. Sess.), Sept. 3, 2021, p. 2.) It responds to "the reality and interconnectedness of racism and inequality, which has allowed injustices to permeate our institutions and deprive people of liberty and the ability to exercise their human potential for good." (*Ibid*.) Because studies "show that long sentences do not deter people from committing crime and are counter-productive to rehabilitating people," there is a "need to ensure that the harshest sentences receive the greatest scrutiny and justification." (Assem. Floor Analysis of Sen. Bill 567 (2020–2021 Reg. Sess.), Sept. 3, 2021, p. 2.).) SB 567 is intended to respond to that need. (*Ibid*.) Its changes to section

1170(b) "will help prevent individuals from serving maximum sentences when lower terms are more appropriate based on the facts." (*Ibid*.)

D. Standard of review concerning retroactivity

Retroactivity of a statute is a question of law subject to de novo review. (*People v. Lopez* (2020) 56 Cal.App.5th 835, 841.)

E. *In re Estrada*'s inference of retroactivity apples to Senate Bill No. 567 because it is an ameliorative change in the law that makes lighter punishment possible.

Because the Legislature ordinarily makes laws that apply to future events, new statutes presumptively apply prospectively only. (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1224.) But the presumption is not a constitutional mandate; rather, it is a canon of statutory interpretation. (*Ibid*.) Where the Legislature intends a new law to apply retroactively, "either explicitly or by implication," the courts must honor the Legislature's intent. (*People v. Superior Court* (2018) 4 Cal.5th 299, 307 (*Lara*).)

In 1965, in *In re Estrada*, this Court held that defendants are "entitled to the ameliorating benefits" of punishment-reducing statutes. (*In re Estrada* (1965) 63 Cal.2d 740, 744.) By amending a statute "to lessen the punishment," the Legislature has "determined that its former penalty was too severe and that a lighter punishment is proper." (*Id*. at p. 745.) "It is an inevitable inference that the Legislature must have intended that the new

statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply." (*Ibid*.)

Thus, under *Estrada*, punishment-reducing statutes apply to all cases that are not final, unless the inference of retroactivity is rebutted. (*Estrada*, *supra*, 63 Cal.2d at p. 745.) The inference may be rebutted "where the Legislature clearly signals its intent to make the amendment prospective, by inclusion of either an express savings clause or its equivalent." (*People v. Nasalga* (1996) 12 Cal.4th 784, 793.)

In the 56-year period following *Estrada*, this Court has broadly applied its retroactivity rule. Although *Estrada* involved a new law that mandated lighter punishment (*Estrada*, *supra*, 63 Cal.2d at pp. 743–744), the Court has applied its rule to new laws that only make lighter punishment possible. In *People v. Francis* (1969) 71 Cal.2d 66, 75–76, the Court considered a statutory amendment that turned marijuana possession from a straight felony to a wobbler (i.e., treatable as a felony or a misdemeanor). (*Id*. at p. 75.) Applying the *Estrada* rule, the Court inferred that the Legislature intended retroactive application since it implicitly "determined that the former penalty provisions may have been too severe in some cases," requiring that sentencing judges "be given wider latitude in tailoring" sentences in every case. (*Id*. at p. 76.)

Here, SB 567 is an ameliorative criminal law that makes lighter punishment possible, and it is therefore entitled to *Estrada*'s inference of retroactivity. (*Estrada*, *supra*, 63 Cal.2d at

pp. 744–745; *Francis*, *supra*, 71 Cal.2d at pp. 75-76; see *People v. Frahs* (2020) 9 Cal.5th 618, 624.)

Several Courts of Appeal have ruled in published opinions that SB 567 applies retroactively to all cases not yet final on appeal, and none have ruled to the contrary, at the time of this writing. (See, e.g., *People v. Lopez* (2022) 78 Cal.App.5th 459, 465; *People v. Flores* (2022) 75 Cal.App.5th 495, 500; *People v. Jones* (2022) 2022 Cal.App.LEXIS 451.)

F. Under the circumstances here, petitioner is entitled to a new sentencing hearing consistent with the law as amended by Senate Bill No. 567.

The retroactive application of SB 567 to Mr. Lynch requires a new sentencing hearing. The trial court imposed the upper term on Count 3, and it stated that it chose the upper term based on a variety of factors. (9RT 799-800.) However, the jury did not find any facts beyond a reasonable doubt to support the upper term.

Further, petitioner did not stipulate to any of the facts that would justify imposition of the upper term. He stipulated to two prior convictions of domestic violence, as required by Evidence Code section 1109 (see 7RT 668), but this stipulation does not justify the imposition of an upper term sentence under the new law. Petitioner did not stipulate that his prior convictions were "numerous or of increasing seriousness," or that he had served a prior term in prison, or that he was on parole when the crime was committed. (Cal. Rules of Court, rule 4.421, subd. (b).) All the

stipulation evinces is that Mr. Lynch had two prior convictions of domestic violence: nothing more.

The aggravating circumstances mentioned by the trial court in the sentencing hearing may very well not have been found by the jury beyond a reasonable doubt. As the defense attorney pointed out, the violence perpetrated by petitioner was not necessarily "great violence" under rule 4.421(a)(1), since there was no evidence it ever resulted in any broken bones or even broken skin to Ms. Doe. Nor was there any evidence that any assault by petitioner ever prompted or required Ms. Doe to seek medical attention. (8RT 791.) The Court of Appeal agrees with petitioner that the jury might not find facts to support this factor beyond a reasonable doubt. (Op. at p. 12.)

Additionally, it is not clear that the judge's finding that the victim was particularly vulnerable was correct, or that it would be found true by the jury. As explained by the Ninth Circuit Court of Appeals,

> a victim must be not only vulnerable, but "particularly" vulnerable in relation to other victims of the same crime. The particularly vulnerable victim aggravating factor was applied to Butler's conviction for domestic violence under Cal. Penal Code section 273.5. In interpreting section 273.5, the California Court of Appeal has noted that it was the purpose of the legislature in criminalizing domestic violence to protect individuals who are in a vulnerable position. In other words, it is in the nature of domestic violence that its victims are vulnerable, because of their close relationship with their attacker, their attacker's typically greater physical strength, and their isolation in their homes.

(*Butler v. Curry* (9th Cir. 2008) 528 F.3d 624, 650, internal citations omitted.) The Court of Appeal agrees with petitioner that the jury might not find facts to support this factor beyond a reasonable doubt. (Op. at p. 12.)

Neither is it clear that the defendant has engaged in violent conduct which indicated a serious danger to society; as the Court of Appeal acknowledges in its opinion, "whether defendant poses a *serious* danger to society" is a complicated, subjective determination, and the reviewing court "cannot say with confidence that the jury would have found the facts underlying these circumstances true beyond a reasonable doubt." (Op. at p. 12, emphasis in original.)

Moreover, as discussed in greater detail above at pages 6-7, it is not at all clear that the jury would find, beyond a reasonable doubt that the defendant used a weapon or was armed during the offenses.

In summary, the new law is retroactive and applies to this case. The trial court imposed an upper-term sentence without a jury finding or a stipulation to the facts underlying any aggravating circumstances. Although there may be a couple of factors that were proper for the trial court to rely on in imposing the upper-term sentences, there are more factors that were improperly relied upon. On appellate review, the appellate court "cannot determine whether the improper factor was determinative for the sentencing court." (*People v. Avalos* (1984) 37 Cal.3d 216, 233; Dis. opn. of Renner, J. at p. 1.)

Accordingly, under SB 567's retroactive application, petitioner's upper-term sentence is unlawful. The petition should

be granted, the sentence vacated, and this case remanded for a new sentencing hearing consistent with the law as amended by SB 567.

CONCLUSION

The petition should be granted, and the sentence should be vacated and the case remanded for re-sentencing in the trial court.

Date: June 8, 2022

Respectfully submitted,

LAW OFFICES OF JOY MAULITZ

By: _____

Joy A. Maulitz
Attorney for Petitioner
DEANDRE LYNCH

CERTIFICATE OF COMPLIANCE WITH THE CALIFORNIA RULES OF COURT, RULE 8.360(b)

I certify this document was prepared on a computer using Microsoft Word, and that, according to that program, this document contains 6,082 words.

Date: June 8, 2022

Respectfully submitted,

LAW OFFICES OF JOY MAULITZ

By: _____

Joy A. Maulitz

DECLARATION OF SERVICE

Re: *People v. Lynch* No. C094174

I, Joy A. Maulitz, declare that I am over 18 years of age, and not a party to the within cause; my business address is P.O. Box 170083, San Francisco, California 94117. I served a true copy of the attached:

PETITION FOR REVIEW

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Deandre Lynch

District Attorney
901 G Street
Sacramento, CA 95814

Charles Barnes
717 K St. #520
Sacramento, CA 95814

Superior Court
720 9th Street
Sacramento, CA 95814

Each envelope was then, on June 8, 2022 sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the first-class postage thereon fully prepaid.

Service was made upon the Central California Appellate Program electronically on June 8, 2022, at: eservice@capcentral.org.

Service was made upon the Attorney General electronically on June 8, 2022, at: SacAWTTrueFiling@doj.ca.gov
Service was made upon the Court of Appeal via True Filing on June 8, 2022.

I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California, this June 8, 2022.

/s/
Joy Maulitz

Filed 5/27/22 P. v. Lynch CA3

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. DEANDRE LYNCH, Defendant and Appellant.	C094174 (Super. Ct. No. 20FE009532)

A jury found defendant Deandre Lynch guilty of three counts of domestic violence and one count of simple assault. The trial court imposed an upper term sentence on the principal domestic violence count. Defendant contends that Senate Bill No. 567 (2021-2022 Reg. Sess.) (Stats. 2021, ch. 731) (Senate Bill 567), which took effect while his appeal was pending, applies retroactively to his case and requires reversal of his sentence and remand for resentencing. The People agree Senate Bill 567 applies retroactively but argue the trial court sufficiently complied with the new law in selecting an upper term

sentence and any error was harmless. We agree with the parties that Senate Bill 567 applies retroactively. We further conclude that the trial court's consideration of aggravating circumstances that are inconsistent with the new statutory standard was harmless error.

We also find that the trial court erred by imposing a one-year sentence for simple assault, a crime with a maximum sentence of six months imprisonment. Neither party has raised this issue, but we can and will correct this unauthorized sentence on appeal.

Accordingly, we will modify the sentence for simple assault and affirm the judgment as modified.

BACKGROUND

The People charged defendant with two counts of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)—counts one & two)[1] and three counts of inflicting injuries resulting in traumatic conditions on a dating partner (§ 273.5, subd. (a)—counts three-five). As to each domestic violence count, the information also alleged that defendant had previously been convicted of domestic violence, which, if found true, increases the sentencing triad for a domestic violence conviction to two, four, or five years. (§ 273.5, subd. (f)(1).) The information also alleged that defendant had previously been convicted of a serious felony, assault with a firearm, which constitutes a strike under California's Three Strikes law. Defendant waived his right to a jury trial on these two prior convictions.

To ensure unanimous verdicts, the trial court instructed the jury on the specific date and manner of each domestic violence incident: for count three, the use of a wooden table on or about May 24, 2020; for count four, the use of a metal-handled broom on or about May 21, 2020; and for count five, the use of an extension cord on or about May 17,

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[1] Undesignated statutory references are to the Penal Code.

2020. This instruction explained: "Evidence that the defendant may have committed the alleged offense on another day or in another manner is not sufficient for you to find him guilty of the offense charged." Defense counsel did not object to this unanimity instruction.

The jury found defendant guilty of all three counts of domestic violence. On count two, the jury found defendant not guilty of assault with a deadly weapon for the May 24, 2020 incident, but found defendant guilty of the lesser included offense of simple assault (§ 240). Count one resulted in a mistrial and is not at issue in this appeal.

In bifurcated proceedings, the trial court reviewed certified records of defendant's prior domestic violence conviction and prior strike conviction and found both the alleged prior convictions true beyond a reasonable doubt. In addition, the prosecution submitted certified records for two felony convictions from 2011 for possession of a controlled substance for sale and failure to appear on a felony charge, and two misdemeanor convictions from 2018 for resisting an executive officer. The certified records and the probation report showed that defendant had served multiple prior prison terms, had absconded three times while on parole following the most recent prison term, and had committed the present offenses while on parole.

At the sentencing hearing, the trial court explained eight aggravating circumstances it considered in deciding whether to select an upper term sentence for the principal count: (1) defendant's crimes involved a high degree of cruelty, viciousness, and callousness because defendant had struck the victim with a table leg, an extension cord, and a broomstick; (2) based on those same facts, defendant was armed or used a weapon at the time of the commission of the crimes; (3) defendant's conduct and prior record indicated a serious danger to society; (4) defendant's prior convictions were numerous; (5) defendant had served prior prison terms; (6) defendant had just been released from prison and was on parole at the time he committed the crimes; (7) defendant's prior performance on parole was unsatisfactory; and (8) the victim was

particularly vulnerable. Defense counsel argued extensively that defendant's actions did not rise to the level of a "high degree of cruelty, viciousness, or callousness"; that the victim was not particularly vulnerable; and that defendant was not a "serious danger to society," but defendant did not object to any of the information about his criminal history in the certified records or the probation report.

The trial court did not find any circumstances in mitigation. Considering these factors, and emphasizing that defendant was on parole when the crimes were committed and had numerous prior convictions, the trial court sentenced defendant to an aggregate term of 15 years 4 months in prison, consisting of the upper term of five years on count three, doubled because of defendant's prior strike conviction, and consecutive terms of one year four months (one-third of the middle term) on both count four and count five, each doubled due to the strike. On count two, the trial court sentenced defendant to one year in county jail, stayed pursuant to section 654. Defendant timely appealed.

Approximately two months after the sentencing hearing, the Legislature enacted Senate Bill 567, which took effect on January 1, 2022. Among other things, the bill amended section 1170, subdivision (b) to prohibit trial courts from considering aggravating circumstances when selecting an upper-term sentence unless the facts underlying each aggravating factor have been established by one of three prescribed methods. (See Stats. 2021, ch. 731, § 1.3.)

DISCUSSION

I

Defendant's Upper Term Sentence

Defendant contends Senate Bill 567 applies retroactively to require reversal of his sentence and remand for resentencing because the jury did not find any facts to support the aggravating circumstances the trial court relied on when it selected an upper term sentence on count three and the defendant did not stipulate to a sufficient number of prior convictions to constitute an aggravating circumstance. The People argue we should

affirm defendant's sentence because the trial court relied on defendant's criminal history in imposing the upper term, which the new law permits, and because any errors were harmless. We conclude that the trial court did not err in finding two aggravating circumstances to support an upper term sentence, and that its consideration of six aggravating circumstances that did not meet the requirements of the amended statute was harmless error.

A. *Retroactive application of Senate Bill 567*

Senate Bill 567 amended section 1170, subdivision (b) so that, among other things, aggravating circumstances now only justify the imposition of an upper term sentence if "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), as amended by Stats. 2021, ch. 731, § 1.3.) The amended statute also adds a third acceptable method of factfinding, permitting courts to "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).)

The People correctly concede that the amended version of section 1170, subdivision (b) applies retroactively in this case as an ameliorative change in the law applicable to all nonfinal convictions on appeal. (See *In re Estrada* (1965) 63 Cal.2d 740, 745; *People v. Conley* (2016) 63 Cal.4th 646, 657 ["in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible"]; *People v. Flores* (2022) 73 Cal.App.5th 1032, 1039 [holding Senate Bill 567 applies retroactively to nonfinal convictions on appeal].)

B. *Underlying facts found true by the jury beyond a reasonable doubt*

The trial court selected the upper term sentence in part because defendant "was armed or used a weapon at the time of the commission of the crime." (Cal. Rules of

Court, rule 4.421(a)(2).)[2] Defendant contends that the jury did not find any facts beyond a reasonable doubt to support this factor. We disagree.

The trial court instructed the jury that it could only find defendant guilty of each domestic violence count if it found that he caused the victim's injuries with specific weapons: a wooden table for count three, a metal-handled broom for count four, and an extension cord for count five. We presume the jury heard and followed the unanimity instruction and found beyond a reasonable doubt that defendant committed each domestic violence count using the specified weapon. (See *People v. Rojas* (2015) 237 Cal.App.4th 1298, 1305-1306.) Because this aggravating circumstance was based on underlying facts found by the jury beyond a reasonable doubt, as permitted by the amended section 1170, subdivision (b)(2), the trial court did not err in weighing defendant's weapon use as a fifth aggravating circumstance when selecting an upper-term sentence.

C. *Prior convictions*

The trial court found four aggravating circumstances based on defendant's criminal history: (1) numerosity of defendant's prior convictions (rule 4.421(b)(2)); (2) defendant had served prior prison terms (rule 4.421(b)(3)); (3) defendant had just been released from prison and was on parole at the time he committed the crimes (rule 4.421(b)(4)); and (4) defendant's prior performance on parole was unsatisfactory (rule 4.421(b)(5)).

The People contend that these four aggravating circumstances were properly established and may be considered under the amended law because the trial court relied upon defendant's stipulation and certified records of defendant's prior convictions, as permitted by section 1170, subdivision (b)(3). Initially, we disagree that section 1170, subdivision (b)(3) allows the trial court to find any underlying facts other than the prior

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[2] Undesignated rule references are to the California Rules of Court.

convictions themselves. Subdivision (b)(3) specifies repeatedly that the only exception created is for prior convictions: "the 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).) The statute clearly does not codify the much broader exception described in *People v. Towne* (2008) 44 Cal.4th 63, 79-84, which allows judicial consideration of facts related to a defendant's recidivism without violating the Sixth Amendment. (See also *People v. Gallardo* (2017) 4 Cal.5th 120, 124-125 [disapproving Sixth Amendment precedent and limiting judicial factfinding about the facts underlying a defendant's prior conviction].) This means that only one of the four aggravating circumstances rooted in defendant's criminal history—that defendant's prior convictions are numerous—satisfies the requirements of Senate Bill 567. We address the other three in our harmless error analysis below.

Defendant did not address the application of section 1170, subdivision (b)(3) in his opening brief, but in his reply brief concedes that the new law allows the trial court to consider his prior convictions based on certified records, even if the convictions have not been found true beyond a reasonable doubt. Despite acknowledging this permissible use of his prior convictions, defendant contends that the prior convictions established by the certified records were not "numerous." We disagree both with defendant's arithmetic and with his conclusion.

Rule 4.421(b)(2) specifies that an aggravating circumstance exists when a defendant's prior convictions are "numerous," which can be as few as three prior convictions, including misdemeanors. (*People v. Black* (2007) 41 Cal.4th 799, 818 (*Black*); *People v. Searle* (1989) 213 Cal.App.3d 1091, 1098 [three prior driving while intoxicated convictions are " 'numerous' "]; see *People v. Stuart* (2008) 159 Cal.App.4th 312, 314 [six prior misdemeanors, though not mentioned by the trial court, were " 'numerous' " and sufficient to affirm the sentence].) A trial court can properly decide whether prior convictions are numerous as long as the underlying facts of the prior

convictions are found in a permissible manner. (§ 1170, subd. (b)(3); see *Black, supra,* at pp. 819-820.)

Defendant inaccurately counts only *three* prior convictions by combining two 2011 convictions and ignoring the misdemeanors. In fact, the trial court reviewed certified records of four of defendant's prior felony convictions and two prior misdemeanor convictions, then determined that defendant's prior convictions were numerous.

Defendant further contends the 2016 domestic violence conviction was already used to enhance his sentence under section 273.5, subdivision (f)(1), so the trial court should not have counted that conviction when deciding whether defendant's prior convictions are numerous. (See § 1170, subd. (b)(5); rule 4.420.) Even accepting defendant's argument that the trial court should have ignored the prior domestic violence conviction, the trial court still considered certified records of three prior felony convictions and two prior misdemeanor convictions. These five convictions qualify as numerous, so the trial court did not err in weighing defendant's numerous prior convictions as an aggravating circumstance.

D. *Aggravating circumstances not properly established*

Unlike the two aggravating circumstances discussed above, the six additional aggravating factors considered by the trial court were not based on facts found in compliance with Senate Bill 567. Specifically, the aggravating circumstances that defendant's crimes involved a "high degree of cruelty, viciousness, and callousness" (rule 4.421(a)(1)); that "defendant has engaged in violent conduct that indicates a serious danger to society" (rule 4.421(b)(1)); that "[t]he victim was particularly vulnerable" (rule 4.421(a)(3)); that defendant had served prior prison terms (rule 4.421(b)(3)); was on parole at the time he committed the crimes (rule 4.421(b)(4)); and had performed poorly on parole (rule 4.421(b)(5)) were not established based on underlying facts found true beyond a reasonable doubt or stipulated to by the defendant. Accordingly, applying

Senate Bill 567 retroactively, it was error to consider those factors as supporting the imposition of an upper term sentence.

E. *Prejudice*

Because the error is purely one of state law, the harmless error test in *People v. Watson* (1956) 46 Cal.2d 818, 836 applies. (*People v. Epps* (2001) 25 Cal.4th 19, 29.)[3] The test is whether, " 'after an examination of the entire cause, including the evidence,' [the reviewing court] is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Watson, supra*, at p. 836; see also Cal. Const., art. VI, § 13; *People v. Price* (1991) 1 Cal.4th 324, 492 (*Price*) ["When a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper"].) A reasonable probability of a more favorable result exists where the improper factor was determinative for the sentencing court or where the reviewing court cannot determine whether the improper factor was

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[3] The People argue that the harmless error analysis in *People v. Sandoval* (2007) 41 Cal.4th 825 (*Sandoval*) applies so that "if a reviewing court concludes, beyond a reasonable doubt, that the jury, applying the beyond-a-reasonable-doubt standard, unquestionably would have found true at least a single aggravating circumstance had it been submitted to the jury, the Sixth Amendment error properly may be found harmless." (*Sandoval*, *supra*, at p. 839.) But *Sandoval* involved the deprivation of the right under the Sixth Amendment to the United States Constitution to have " 'any fact that exposes a defendant to a greater potential sentence . . . found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence.' " (*Sandoval*, at p. 835.) The reasoning in *Sandoval* does not apply here for two reasons. First, defendant contends that his sentence violates section 1170, subdivision (b), as amended by Senate Bill 567, not that his sentence violates the Sixth Amendment. Second, there is no Sixth Amendment violation in this case to which *Sandoval* could apply because at least two aggravating circumstances were found, in compliance with the requirements of the Sixth Amendment. (See also *Black*, *supra*, 41 Cal.4th at pp. 812-813.)

determinative. (*People v. Avalos* (1984) 37 Cal.3d 216, 233 (*Avalos*); cf. *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391 [when sentencing court is unaware of the scope of its discretionary powers, "the appropriate remedy is to remand for resentencing unless the record 'clearly indicate[s]' that the trial court would have reached the same conclusion 'even if it had been aware that it had such discretion' "].)[4]

Applying these standards, we must ask two questions to determine whether the trial court's errors were harmless. First: would any of the facts underlying the six improperly found aggravating circumstances have been found true beyond a reasonable doubt if submitted to the jury? (See *People v. Lopez* (May 10, 2022, D078841) ___ Cal.App.5th ___, ___, fn. 11 [2022 Cal.App. Lexis 398 at *8]; cf. *People v. Epps, supra,*

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[4] This is not a case in which the trial court was unaware of the full scope of discretion granted by the law (cf. *People v. Gutierrez, supra,* 58 Cal.4th at pp. 1387, 1390 [eliminating presumption in favor of life without parole for special circumstance murder committed by 16- or 17-year-old offender]), or where "defendant and his counsel have never enjoyed a full and fair opportunity to marshal and present the case supporting a favorable exercise of discretion." (*People v. Rodriguez* (1998) 17 Cal.4th 253, 258.) Rather, defendant had the same opportunity to submit mitigating evidence and dispute aggravating evidence prior to Senate Bill 567. (Compare former § 1170, subd. (b), added by Stats. 2020, ch. 29, § 14, and amended by Stats. 2021, ch. 731, § 1.3, eff. Jan. 1, 2022, with § 1170, subd. (b)(4).) Likewise, trial courts apply their discretion to the same set of aggravating circumstances to decide whether to impose an upper term sentence, but the facts underlying those circumstances now may only be found in one of the permissible ways. (§ 1170, subd. (b)(2)-(3); compare former § 1170, subds. (a)(3) & (b), added by Stats. 2020, ch. 29, § 14, and amended by Stats. 2021, ch. 731, § 1.3, eff. Jan. 1, 2022 ["In sentencing the convicted person, the court shall apply the sentencing rules of the Judicial Council" and "select the term which, in the court's discretion, best serves the interests of justice"], with § 1170, subds. (a)(3) & (b)(2) ["In sentencing the convicted person, the court shall apply the sentencing rules of the Judicial Council" and "may impose a sentence exceeding the middle term 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"]; see also rule 4.421 [unchanged after passage of Senate Bill 567].)

25 Cal.4th at pp. 29-30 [no reasonable probability of a result more favorable to defendant had the jury, instead of the court, determined that defendant suffered disputed prior convictions].) Second: excluding any factors we cannot conclude would have been found true in a permissible manner, is there a reasonable probability the trial court would have imposed a more lenient sentence? (*Price, supra*, 1 Cal.4th at p. 492; *Avalos, supra*, 37 Cal.3d at p. 233.)

In response to the first question, we conclude that the jury would have found true beyond a reasonable doubt the facts underlying the three aggravating factors related to defendant's criminal history, but there is a reasonable probability the jury would have rejected the other three aggravating factors. In making this determination, we are mindful that we "cannot necessarily assume that the record reflects all of the evidence that would have been presented had aggravating circumstances been submitted to the jury." (*Sandoval, supra*, 41 Cal.4th at p. 839.) "[A]lthough defendant did have an incentive and opportunity at the sentencing hearing to contest any aggravating circumstances mentioned in the probation report or in the prosecutor's statement in aggravation, that incentive and opportunity were not necessarily the same as they would have been had the aggravating circumstances been tried to a jury" because the standard of proof was lower and because defense counsel may have adopted a different strategy with a jury factfinding than with a judge who is both factfinding and sentencing. (*Ibid*.) Finally, "to the extent a potential aggravating circumstance at issue in a particular case rests on a somewhat vague or subjective standard, it may be difficult for a reviewing court to conclude with confidence that, had the issue been submitted to the jury, the jury would have assessed the facts in the same manner as did the trial court." (*Id*. at p. 840.)

Defendant's prior prison terms were established by certified records of prior convictions, and defendant's parole status and poor performance on parole were established by the probation report, based on official records. (See Evid. Code, § 664 [official duty presumed regularly performed].) Defendant did not challenge these facts,

despite having the opportunity to mitigate his sentence by doing so. Had the official records been wrong, there would have been no strategic reason for defendant not to point out the error. Nor are these aggravating circumstances based on vague standards. To the extent that "poor" performance on parole is subjective, defendant's conviction for the four present offenses while on parole, in addition to his repeated absconding, allows us to conclude with confidence that the jury would have found his performance to be poor beyond a reasonable doubt.

On the other hand, whether defendant's crimes involved a *high degree* of cruelty, viciousness, and callousness; whether defendant poses a *serious* danger to society; and whether the victim was *particularly* vulnerable are more complicated, subjective determinations. (See *Sandoval*, *supra*, 41 Cal.4th at p. 840 [determinations like whether victim was " '*particularly*' " vulnerable "require an imprecise quantitative or comparative evaluation of the facts"], original italics.) Defense counsel argued extensively against the application of each of these factors to defendant's actions. Defendant may have introduced additional evidence if given the opportunity to convince a jury that the circumstances did not justify the adjectives "high degree," "serious," and "particularly" beyond a reasonable doubt. Accordingly, we cannot say with confidence that the jury would have found the facts underlying these circumstances true beyond a reasonable doubt.

This analysis means five of the eight aggravating circumstances originally considered by the trial court survive retroactive application of Senate Bill 567. In *Price*, the trial court weighed seven aggravating circumstances in imposing an upper term sentence, but the defendant challenged four of those as improper. (*Price*, *supra*, 1 Cal.4th at p. 491.)[5] Our Supreme Court held that because the defendant conceded the

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[5] In early 1983, at the time of the crimes at issue in *Price*, section 1170, subdivision (b) required, similarly to Senate Bill 567, that an upper term sentence be based on

three unchallenged aggravating circumstances were valid and there were no circumstances in mitigation, it was not reasonably probable the trial court would have chosen a lesser sentence had it known that some or all of the challenged reasons for selecting the upper term were improper. (*Price*, at p. 492; see also *Avalos, supra*, 37 Cal.3d at pp. 232-233 [considering one improper aggravating circumstance was harmless where five aggravating circumstances remained to be weighed against only one mitigating circumstance].)

Here, as in *Price*, the trial court found no mitigating circumstances. Five aggravating circumstances remain, compared to only three in *Price*. And the trial court placed particular emphasis on defendant's poor performance on parole and prior convictions, which it properly considered even under the new law. (See *Avalos, supra*, 37 Cal.3d at p. 233 [sentencing court's remarks emphasizing two particular factors that were not improper makes clear that improper factors were not determinative].) Accordingly, we conclude there is not a reasonable probability that the trial court would have selected a lesser sentence had it known it could not consider three of the aggravating circumstances.

II

Unauthorized Sentence for Simple Assault

Although not raised by defendant on appeal, we have identified a sentencing error which requires correction. The trial court sentenced defendant to one year of imprisonment for the simple assault conviction, stayed pursuant to section 654. Simple

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"circumstances in aggravation" of the crime and limited what facts could establish such aggravating circumstances. (See *Price, supra*, 1 Cal.4th at p. 376; compare Stats. 1981, ch. 1111, § 1(b), p. 4336, with § 1170, subd. (b)(2) & (5).) Likewise, the Rules of Court governing upper term sentences in 1983 placed limits similar to the current rules on what facts could establish aggravating circumstances, particularly which facts could not be used both for selecting an upper-term sentence and for other sentencing purposes. (Compare former rule 441, as amended July 28, 1977 [Bender's Std. Cal. Codes (1983 ed.) pp. 68-69], with rule 4.420.)

assault is punishable by a term of imprisonment not exceeding six months. (§§ 240, 241.) Misdemeanor convictions do not trigger the Three Strikes law (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 975), and no other basis appears in the record for doubling the maximum authorized sentence. Thus, the sentence on count two is unauthorized and may be corrected at any time. (*People v. Smith* (2001) 24 Cal.4th 849, 852.) Accordingly, we will reduce the sentence to the statutory maximum of six months.

DISPOSITION

The judgment is modified to impose a sentence of six months for the lesser included offense of simple assault on count two, stayed pursuant to section 654. The clerk of the trial court is directed to prepare an amended minute order reflecting our modification to the sentence for simple assault. In all other respects, the judgment is affirmed.

KRAUSE, J.

I concur:

BLEASE, Acting P. J.

Renner, J., Concurring and Dissenting.

I concur in Part I.A and Part II of the majority's discussion. As to Part I.B through Part I.E, I dissent.

I agree with the majority's general conclusion that the trial court erred in sentencing defendant to an upper term on count three based on factors that were not found in compliance with Senate Bill No. 567 (2021-2022 Reg. Sess.) (Stats. 2021, ch. 731) (Senate Bill 567). However, I disagree with the majority with respect to the scope of that error and, more importantly, its prejudice. The majority goes to unnecessary effort to support some of the trial court's statements. For instance, the trial court mentioned defendant's alleged use of a table leg with respect to count three and then stated defendant was armed or used a weapon or multiple weapons in the commission of the crimes. The use of a weapon is not an element of the crime of inflicting injuries resulting in traumatic conditions on a dating partner (Pen. Code, § 273.5, subd. (a)). I disagree with the majority's suggestion that the unanimity instruction, which explained count three alleged an assault on or about May 24, 2020, "resulting from the use of a wooden table," meant that the jury necessarily found the facts relied upon by the trial court with respect to arming or use of a weapon. Further, I disagree with the majority's conclusion that it is not reasonably probable that the trial court would have sentenced defendant more favorably under Senate Bill 567. " ' " ' "[A] 'probability' in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*." ' " ' " (*People v. Sandoval* (2015) 62 Cal.4th 394, 422.) Here, the trial court's selection of the upper term rested on multiple statements that were improper. We must reverse when, as is the case here, we "cannot determine whether the improper factor was determinative for the sentencing court." (*People v. Avalos* (1984) 37 Cal.3d 216, 233.)

Accordingly, I would reverse the sentence and remand to allow compliance with the current requirements of Penal Code section 1170.

RENNER, J.

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. DEANDRE LYNCH, Defendant and Appellant.	C094174 (Super. Ct. No. 20FE009532) ORDER MODIFYING OPINION [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on May 27, 2022, be modified as follows:

In the first full paragraph on page six that begins "The trial court instructed," delete the last sentence that begins "Because this aggravating circumstance" and replace it with the following sentence:

Because this aggravating circumstance was based on underlying facts found by the jury beyond a reasonable doubt, as permitted by the amended section 1170, subdivision (b)(2), the trial court did not err in weighing defendant's weapon use as an aggravating circumstance when selecting an upper-term sentence.

This modification does not change the judgment.

BY THE COURT:

Blease, Acting P. J.

Krause, J.

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

MAILING LIST

Re: The People v. Lynch
C094174
Sacramento County
No. 20FE009532

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STATE OF CALIFORNIA
Supreme Court of California

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