**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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| **PEOPLE OF THE STATE OF CALIFORNIA,**<br><br>Plaintiff and Respondent,<br><br>v.<br><br>**DEANDRE LYNCH**,<br><br>Defendant and Appellant. | **S274942** |

Third Appellate District No. C094174
Sacramento County Superior Court No. 20FE009532
Honorable Geoffrey A. Goodman, Judge

# APPELLANT'S OPENING BRIEF ON THE MERITS

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## ISSUE PRESENTED

What prejudice standard applies on appeal when determining whether a case should be remanded for resentencing in light of newly-enacted Senate Bill No. 567 (Stats. 2021, ch. 731)?

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

With Senate Bill No. 567 (S.B. 567), the Legislature has limited the trial court's discretion to impose an upper term sentence unless the facts underlying the aggravating factors, with the exception of prior convictions, are proven to a jury beyond a reasonable doubt. The statutory maximum is now the middle term.

The amendments made by S.B. 567 to Penal Code[1] section 1170, subdivision (b), apply retroactively to this case as an ameliorative change in the law applicable to all nonfinal convictions on appeal. (*People v. Lynch,* C094174, slip op. at p. 5, citing *In re Estrada* (1965) 63 Cal.2d 740, 745; *People*

[1] All undesignated statutory references are to the Penal Code.

*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 S.B. 567 applies retroactively to nonfinal convictions on appeal].)

While the parties and the Court of Appeal agreed that amended section 1170 applies retroactively, the issue remains what standard of prejudice should be applied to determine whether remand is necessary when a trial court has imposed a sentence that does not comply with amended section 1170, subdivisions (b)(1) through (b)(3).[2]

In determining the prejudice standard to apply, California Courts of Appeal have created no less than four different rules or variations of the standard of prejudice necessary to determine whether remand is required when sentencing did not comply with amended section 1170. Generally, most of these follow a two-step process. First, relying on *People v. Sandoval* (2007) 41 Cal.4th 825 (*Sandoval*), the reviewing court determines whether the jury *would have found* the aggravating factors true beyond a reasonable doubt under the *Chapman*[3] standard. (See, e.g., *People v. Dunn* (2022) 81 Cal.App.5th 394, 408; *Flores*, *supra*, 75 Cal.App.5th 495; *People v. Lopez* (2022) 78 Cal.App.5th 459, 465; *People v. Zabelle* (2022) 80 Cal.App.5th 1098,

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[2] This brief will refer to section 1170, as recently amended and in place from January 1, 2022, to the present, as "amended section 1170" or "section 1170, as amended by S.B. 567."

Additionally, section 1170, as enacted and in place between 2007 and 2022, will be referred to as "former section 1170."

Finally, section 1170, as originally enacted and in place between 1977 and 2007, will be referred to as "original section 1170."

[3] *Chapman v. California* (1967) 386 U.S. 18.

1114.) Several courts have also found that the reviewing court must then, second, also determine whether the trial court would nevertheless have imposed the upper term based on the remaining unproven aggravating circumstances. (*Lopez, supra,* 78 Cal.App.5th at pp. 465-466; *Dunn*, *supra*, 81 Cal.App.5th at p. 408; *Zabelle*, *supra*, 80 Cal.App.5th at pp. 1114-1115.)

The appellate courts' analyses are flawed. The history of the determinative sentencing law and the federal jurisprudence related to the right to a jury trial on sentencing factors demonstrate why *Sandoval* is inapposite. *Sandoval* involved a comprehensively different sentencing scheme than the one created by S.B. 567. Instead of a sentencing scheme which permitted trial courts to exercise discretion in selecting the lower, middle or upper term, as was at issue in *Sandoval*, S.B. 567 sets the statutory maximum at the middle term. Only a jury finding, not judicial factfinding, can statutorily permit an upper term, other than the fact of a prior conviction. (Amended § 1170, subd. (b)(1)-(3).) Additionally, because recent S.B. 567 cases involve only retroactive applications of amended section 1170, these cases failed to consider that the standard of prejudice should be the same for retroactive violations as it will be for prospective violations of the statute.

To comply with statutory mandates of section 1170 and constitutional requirements, the reviewing court must first determine whether any aggravating factors have been proven in accordance with section 1170. If not, an upper term sentence is statutorily unauthorized, as well as unconstitutional. No showing of prejudice needs to be established. The only time that remand is permitted under these circumstances is if the case involves the retroactive application of S.B. 567, to permit the parties the opportunity to present evidence at a new full resentencing hearing. (*People v. Figueroa* (1993) 20 Cal.App.4th 65, 71-72.)

If one or more aggravating factors are proven in accordance with amended section 1170, the reviewing court may proceed to determine whether the sentencing error was harmless. Because amended section 1170 was intended to comply with the federal constitutional requirements, errors related to the failure to provide a jury trial require the *Chapman* standard to be applied. If the trial court relied on facts were which not proven in a constitutionally-permissible manner, then the case must be remanded for resentencing if the People cannot establish, beyond a reasonable doubt, that the upper term would have been imposed in the absence of the error. In no event, however, can the reviewing court engage in judicial factfinding to determine whether any of the aggravating factors *would have been* proven in order to support the upper term had a jury trial been accorded to the defendant.

In this case, the fact of several of appellant's prior convictions was proven in accordance with amended section 1170. (Slip op., pp. 6-7.) However, the Court of Appeal erred in engaging in judicial factfinding in holding that other facts, not found by a jury, were properly relied upon in setting the upper term. (Slip op., pp. 5-6.) Here, the People cannot prove beyond a reasonable doubt under *Chapman* that the trial court would have imposed the upper term under amended section 1170, where the trial court relied upon seven impermissible aggravating factors, some of which were subjective and contested. Reversal is required. Even if the prejudice standard under *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*) is applied, the case must be remanded.

## STATEMENT OF THE CASE

Appellant Lynch was charged by an amended information with one count of assault with a deadly weapon on Joseph Carter (§ 245, subd. (a)(1),

count 1), one count of assault with a deadly weapon on Jasmine Doe (§ 245, subd. (a)(1), count 2), and three counts of domestic violence upon Jasmine Doe (§ 273.5, subd. (a), counts 3-5). (1CT 177-180.) Counts 2 and 3 were based on the same act on the same date. As to each domestic violence count, the information also alleged that appellant had a prior domestic violence conviction. (§ 273.5, subd. (f)(1).) It was further alleged that appellant had previously been convicted of a serious felony within the meaning of section 667, subdivisions (b)-(i). (1CT 178-180.)

During trial, the court granted appellant's motion to bifurcate the hearing on the prior strike conviction, and appellant waived his right to have that determination made the jury. (4RT 307, 6RT 606; 1CT 176.)

On March 30, 2021, the jury announced that it was deadlocked on count 1, assault with a deadly weapon against Joseph Carter. (1CT 256-259.) That count was later dismissed. (1CT 37.)

On count 2, the jury found appellant not guilty of assault with a deadly weapon on Jasmine Doe, but guilty of the lesser included offense of simple assault. (1CT 257.) The jury additionally found appellant guilty of the three counts of domestic violence, counts 3 through 5. (1CT 257-258.)

The trial court found true the prior domestic violence conviction, resulting in a higher sentencing triad (§ 273.5, subd. (f)(1)). (9RT 786.) Additionally, the trial court found true the prior serious felony conviction, which resulted in doubling appellant's sentence under section 667, subdivisions (b)-(i). (9RT 786.)

Appellant was sentenced to an aggregate term of 15 years and four months. This consisted of the upper term of five years on count 3 (§ 273.5, subd. (f)(1)), doubled due to the prior strike to 10 years. The trial court relied on eight aggravating factors in imposing the upper term. (9RT 799-800.) The

court then imposed two years and eight months, or one-third the middle term, each, to be served consecutively, on counts 4 and 5. (9RT 801; 1CT 300.) The sentence on count 2, misdemeanor battery, was stayed pursuant to section 654. (9RT 801.)

Appellant filed a timely notice of appeal on May 20, 2021. (1CT 299.)

S.B. 567 went into effect on January 1, 2022, while appellant's appeal was pending.

On May 27, 2022, a divided panel of the Court of Appeal affirmed the judgment in an unpublished opinion. (*People v. Lynch,* C094174.) The court held that S.B. 567 applied retroactively, but found harmless the trial court's reliance on six aggravating factors which were not established consistent with the new requirements of amended section 1170. (Slip op., p. 13.) One justice dissented. (Slip op., dis. op. of Renner, J.)

This Court granted review on August 10, 2022. (S274942.)

## FACTUAL BACKGROUND

On May 24, 2020, Joseph Carter, brother of Jasmine Doe, drove to the house where Jasmine Doe and appellant lived together to pick up Jasmine Doe for a family barbecue. (5RT 384-385.) Carter and appellant got into a physical altercation, and the police were called. (5RT 412.)

While talking to police, Jasmine Doe described three different incidents of domestic violence. (6RT 642; 650-651.) One incident occurred earlier on the same day and related to appellant hitting Jasmine Doe with a table leg. (Count 3; 1CT 178; 6RT 650.) The assault count was premised on the same incident. (Count 2; 1CT 178; 6RT 650.) Another incident occurred approximately three days earlier and related to appellant hitting Jasmine Doe with a broom handle. (Count 4; 1CT 178; 6RT 51.) In addition, Doe related third incident which occurred approximately a week earlier and involved to

appellant hitting Jasmine Doe with an extension cord. (Count 5; 1CT 179; 6RT 51; see also 7RT 716, 720.) The police officers took photographs of Jasmine Doe's bruises. (7RT 651.) While testifying at trial, Jasmine Doe had difficulty remembering or describing the incidents with any accuracy. (See, e.g., 5RT 439-440, 444-446.)

Count 1, the assault involving Joseph Carter, was dismissed after the jury deadlocked. (1CT 37, 256-259.)

## LEGAL BACKGROUND

### The Determinate Sentencing Law and the United States Supreme Court's Evolving Jurisprudence Regarding the Sixth Amendment Right to a Jury Trial.

The Legislature's sentencing scheme under S.B. 567 was specifically designed to correspond with the constitutional right to a jury trial on all facts that allow imposition of a sentence in excess of the statutory maximum, as laid out in *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*).[4]

California's Determinate Sentencing Law (DSL), and more specifically, section 1170, has been influenced and modified to reflect federal constitutional requirements regarding due process and the right to a jury trial in sentencing. This history must be examined in order to determine whether a trial court's sentence complies with constitutional mandates and the standard to apply when it does not.

This jurisprudence makes clear that a court may not sentence a defendant for an offense greater than the one found true by the jury. When

[4] This brief will refer to "the right to a jury trial," acknowledging that this includes the right to waive a jury trial, and then to either make admissions or elect a court trial. (*People v. Ernst* (1994) 8 Cal.4th 441, 444–445; Cal. Const., art. I, § 16.)

the statutory maximum is the middle term, as it is now, the court lacks jurisdiction to impose a sentence greater than the middle term without mandated jury findings, except for the fact of a prior conviction. (*Cunningham, supra,* 549 U.S. at p. 288-289.) Because these protections have been codified into amended section 1170, an offense with an aggravated upper term becomes similar to an aggravated offense; the Legislature has essentially added an additional element which must be proved by jury trial.

Because courts of appeal may not engage in judicial factfinding, if no facts have been proven in conformity with amended section 1170, the middle term is the maximum sentence that may be imposed. When a sentence is authorized because one or more factors were properly found, imposition of an upper term sentence which relies upon facts not proven to a jury is federal law error, as amended section 1170 was enacted to codify the right to a jury trial under *Cunningham, supra,* 549 U.S. at p. 288-289. Therefore, these errors must be examined under *Chapman, supra,* 386 U.S. 18.

### A. As Originally Enacted, The DSL Permitted Sentencing Courts To Rely on Aggravating Facts Not Found True by A Jury.

California's DSL originally became operative on July 1, 1977, replacing a prior system under which most offenses carried an indeterminate sentence. (*People v. Black* (2005) 35 Cal.4th 1238, 1246 (*Black I*), overruled in *Cunningham, supra,* 549 U.S. 270.)

Under the DSL as enacted, three terms of imprisonment were specified by statute for most offenses. The judge's discretion in selecting among these options was guided by original section 1170, subdivision (b), which stated that "the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." (*Black I, supra,* 35 Cal.4th at p. 1247.) To promote uniformity in sentencing, the Judicial Council

was directed to adopt rules providing criteria for the judge to consider in deciding which term to impose. (*Ibid.,* citing original § 1170.3.) Under these rules, "[s]election of the upper term [wa]s justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation." (*Ibid.,* citing Cal. Rules of Court, rule 4.420(b).)

Under the DSL at that time, the trial court was permitted to rely on aggravating facts that had not been found true by a jury. (*Black I, supra*, 35 Cal.4th at p. 1247.) The facts relevant to the choice of term were to be determined by the trial court, which could "consider the record in the case, the probation officer's report, other reports ... and statements in aggravation or mitigation, ... and any further evidence introduced at the sentencing hearing." (*Ibid.*, citing original § 1170, subd. (b).) Unless the trial court imposed the middle term, the court was required to give reasons for its sentencing choice. (*Ibid.*)

### B. The United States Supreme Court's Evolving Jurisprudence on the Sixth Amendment Right to Jury Trial on Every Fact That Increases the Penalty for a Crime Beyond the Statutory Maximum: *Apprendi* and *Blakely*.

The federal Constitution's Fifth Amendment right to due process, made applicable to the states through the Fourteenth Amendment, proscribes the deprivation of liberty without "due process of law." (U.S. Const., 5th & 14th Amends.) Additionally, the Sixth Amendment guarantees that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." (U.S. Const., 6th Amend.)

Taken together, these two rights "indisputably" entitle a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." (*Apprendi v. New*

*Jersey* (2000) 530 U.S. 466, 490; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278 [Sixth Amendment right to jury trial requires the prosecution to prove to a jury beyond a reasonable doubt every element of a crime]; *In re Winship* (1970) 397 U.S. 358, 364 ["... the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."])[5]

In *Apprendi v. New Jersey, supra*, 530 U.S. 466, the Court held that under these federal constitutional guarantees, any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, "must be submitted to a jury, and proved beyond a reasonable doubt." (*Id.* at p. 490.) Moreover, the jury-trial guarantee proscribes a sentencing scheme that allows a *judge* to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant. (*Id.* at p. 496.)

Next, in *Blakely v. Washington* (2004) 542 U.S. 296, the Supreme Court made clear that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. [Citations]." (*Id.* at p. 303, italics in original.) "In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When 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,' . . .

[5] The California Constitution also guarantees the right to due process and the right to a jury trial. (Cal. Const., art. I, §§ 7, 16.)

and the judge exceeds his proper authority." (*Id.* at pp. 303-304, italics in original.)

### C. Applying Federal Constitutional Mandates, *Cunningham v. California* (2007) 549 U.S. 270, Found the Original DSL Unconstitutional.

Applying *Apprendi* and *Blakely,* the Supreme Court in *Cunningham v. California*, *supra,* 549 U.S. 270, held that California's original determinate sentencing law, as it existed from 1977 to 2007, violated the Sixth Amendment right to a jury trial, because it permitted a trial judge to determine facts, other than a prior conviction, that would allow imposition of a sentence in excess of the statutory maximum. (*Id.* at pp. 275–276.)

As in *Blakely*, the Court emphasized that the federal Constitution does not allow a sentencing scheme that permits a judge to impose a sentence above the *statutory maximum* based on a fact, other than a prior conviction, not found by a jury. (*Cunningham, supra*, 549 U.S. at pp. 274-275.)

Under the original DSL, where the middle term was the presumptive sentence, the middle term and not the upper term was the relevant statutory maximum. (*Id.* at p. 288.) Because circumstances in aggravation were found by the judge, not the jury, and needed to be established only by a preponderance of the evidence, not beyond a reasonable doubt, the original DSL violated *Apprendi*'s bright-line rule that, except for the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. (*Id.* at pp. 288-289.)

The Supreme Court provided direction as to what steps the California Legislature could take to address the constitutional infirmities of the original determinate sentencing law.

First, California could retain determinate sentencing by "calling upon the jury – either at trial or in a separate sentencing proceeding – to find any fact necessary to the imposition of an elevated sentence." (*Cunningham, supra,* 549 U.S. at p. 294.)

Or, in the alternative, the Legislature could choose "to permit judges genuinely to exercise broad discretion ... within a statutory range, which, everyone agrees, encounters no Sixth Amendment shoal." (*Ibid.*; see also *Apprendi, supra*, 530 U.S. at p. 481 [nothing "suggests that it is impermissible for judges to exercise discretion -- taking into consideration various factors relating both to offense and offender -- in imposing a judgment *within the range* prescribed by statute....[J]udges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case."]

### D. California's Former DSL (2007) after *Cunningham*, until the enactment of S.B. 567 (2022).

The California Legislature initially chose the latter option offered by *Cunningham*. Within two months of the issuance of *Cunningham* in 2007, as urgency legislation, the Legislature amended the determinate sentencing law specifically to make the choice of lower, middle, or upper terms within the sound discretion of the court. (See Sen. Bill 40, Romero (2007) & Sen. Bill 150, Wright (2007).) The amendment removed the requirement that the trial court impose the middle term unless there were circumstances in mitigation or aggravation, thereby making the upper term the relevant statutory maximum under *Apprendi*. (Sen. Bill 40, Romero (2007).) The urgency legislation had an initial sunset date of January 1, 2009, which was extended multiple times. This sentencing scheme remained in place until S.B. 567 took effect on January 1, 2022.

It was under this pre-S.B. 567 sentencing scheme that *People v. Black* (2007) 41 Cal.4th 799, 812 (*Black II*), and *People v. Sandoval*, *supra*, 41 Cal.4th 825 were decided. Those cases held that "so long as a defendant is *eligible* for the upper term by virtue of facts that have been established consistently with Sixth Amendment principles, the federal Constitution permits the trial court to rely upon any number of aggravating circumstances in exercising its discretion to select the appropriate term by balancing aggravating and mitigating circumstances, regardless of whether the facts underlying those circumstances have been found to be true by a jury." (*Black II, supra,* 41 Cal.4th at p. 813.)

Thus, when appellant was sentenced on April 30, 2021, the trial court had broad discretion under former section 1170, to decide which of the triad of terms to impose. Any one aggravating factor was sufficient to support the imposition of the upper term. (*Sandoval*, *supra*, 41 Cal.4th at p. 846–847.) Moreover, the aggravating factor had to be proved only by a preponderance of the evidence. (*Id.* at p. 836.) The sentencing court needed only to state reasons for its decision so that the choice would be subject to appellate review for abuse of discretion. (*Id.* at p. 847.)

### E. S.B. 567's Amendments To Section 1170 Made the Middle Term the Statutory Maximum, Requiring that Aggravating Factors Be Proved Beyond a Reasonable Doubt To Jury Trial.

With S.B. 567, effective January 1, 2022, the Legislature chose to move from one Sixth Amendment-approved sentencing structure to an entirely different Sixth Amendment-approved sentencing structure.

S.B. 567 amended section 1170 in several fundamental ways. (See Sen. Bill 567 (2020–2021 Reg. Sess.); Stats. 2021, ch. 731, § 1.3; Assem. Bill No. 124 (2020–2021 Reg. Sess.); Stats. 2021, ch. 695, § 5.)

Relevant here, under S.B. 567, the maximum term now allowable under amended section 1170 is the middle term, absent constitutionally found aggravating factors, or the fact of a prior conviction. (Stats. 2021, ch. 731, § 1.3, adding amended § 1170, subds. (b)(1) & (b)(2).)

Specifically, the new law states:

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

(Amended § 1170, subds. (b)(1) & (b)(2), emphasis added.)

The Legislature specifically intended for this sentencing structure to comply with the requirements of *Cunningham, supra,* 549 U.S. 270. (Policy Committee Analysis of Sen. Bill 567 (2020-2021 Reg. Sess.), June 29, 2021, p. 3.) The author stated: "It is important, proper, and constitutionally conforming to change the law to ensure that aggravating facts are presented to the jury before a judge imposes a maximum sentence as decided in *Cunningham v. California*." (*Ibid.*)

The one exception to a jury trial in section 1170 permits the trial court to consider the defendant's prior convictions based on a certified record. (§ 1170, subd. (b)(3).) This reflects *Apprendi*'s exception to the Sixth Amendment jury trial requirements, permitting the trial court to rely on the fact of a prior conviction. (See *Apprendi, supra,* 530 U.S. at p. 488.)

Now, after S.B. 567, the middle term is again the "maximum sentence" that a judge may impose unless further additional facts are found, beyond a reasonable doubt, by a jury. (See amended § 1170, subd. (b)(1); *Cunningham, supra*, 549 U.S. at pp. 283.)

### F. The California Courts of Appeal Applying S.B. 567 Retroactively Have Erroneously Relied on *Sandoval*.

The California courts of appeal which have issued published opinions applying S.B. 567 retroactively have created a prejudice framework that sanctions judicial factfinding in order to impose a sentence above the statutory maximum, and therefore runs afoul of the Sixth Amendment jury requirements.

In the first published opinion finding S.B. 567 retroactive, *People v. Flores* (2022) 75 Cal.App.5th 495, the First District Court of Appeal found that to the extent the aggravating circumstances were not found true as required under amended section 1170, any error was harmless. Citing *Sandoval*, *supra*, 41 Cal.4th 825, the court held that the "denial of the right to a jury trial on aggravating circumstances" is reviewed under the harmless beyond a reasonable doubt standard set forth in *Chapman*. (*Flores*, *supra*, 75 Cal.App.5th at p. 500.) 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 error was harmless. (*Id.* at pp. 500-501.) Based largely on the probation report, the Court was satisfied, beyond a reasonable doubt, that the jury would have found true at least one aggravating circumstance. Therefore, the court affirmed the sentence. (*Id.* at p. 501; see also *People v. Berdoll* (2022) 85 Cal.App.5th 159 [same analysis].)

After *Flores,* the courts of appeal continued to use *Sandoval* to determine whether a jury would have found the aggravating factors true beyond a reasonable doubt under the *Chapman* standard. (See, e.g., *Dunn*, *supra*, 81 Cal.App.5th at p. 408; *Lopez, supra,* 78 Cal.App.5th at p. 465 [not citing *Sandoval,* but applying the same analysis]; *Zabelle*, *supra*, 80 Cal.App.5th at p. 1114.) Several courts created a second step in their analysis, requiring the reviewing court to also determine whether the trial court would have imposed the upper term based on the remaining unproven aggravating circumstances. (*Lopez, supra,* 78 Cal.App.5th at pp. 465-466; *Dunn*, *supra*, 81 Cal.App.5th at p. 408; *Zabelle*, *supra*, 80 Cal.App.5th at pp. 1114-1115.) The courts' analyses varied at each step on whether to apply the harmless-error analysis under *Chapman* or *Watson*. (*Ibid.*)

As discussed below, the courts' reliance on *Sandoval* is misplaced, because the sentencing law as modified by S.B. 567 now clearly requires that, aside from the fact of prior convictions, the jury must find all facts supporting the aggravating circumstances by proof beyond a reasonable doubt; now, permitting the reviewing court to determine the existence of facts supporting the aggravating circumstances results impermissible judicial factfinding at the appellate-court level.

### G. Courts Have Never Been Permitted to Enter a Sentence For an Offense Greater Than that Returned by the Jury's Verdict.

Where the legislature has stated a maximum sentence for a conviction, a trial court may not engage in judicial factfinding to go above that sentence. "A court cannot impose a greater penalty than that fixed by the statute violated." (*In re Howard* (1945) 69 Cal.App.2d 164, 165.)

"The doctrine of separation of powers is firmly entrenched in the law of California, and a court should not lightly encroach on matters which are

uniquely in the domain of the Legislature." (*People v. Wingo* (1975) 14 Cal.3d 169, 174, superseded by statute on other grounds.) Foremost among these are "the definition of crime and the determination of punishment." (*Ibid.*) Fixing appropriate penalties for crimes is a distinctly legislative determination, implicating sensitive questions of policy and values that "are in the first instance for the judgment of the Legislature [or the people] alone." (*In re Palmer* (2021) 10 Cal.5th 959, 967-968.)

When a statutorily-created sentence enhancement describes an increase beyond the maximum authorized statutory sentence, "it is the *functional equivalent* of an element of a greater offense than the one covered by the jury's guilty verdict." (*Porter v. Superior Court* (2009) 47 Cal.4th 125, 134, italics in original, quoting *Apprendi*, *supra*, 530 U.S. at p. 494, fn. 19, and *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326; see also *People v. Betts* (2005) 34 Cal.4th 1039, 1054 ["A fact that increases the maximum permissible punishment for a crime is the functional equivalent of an element of the crime, regardless of whether that fact is defined by state law as an element of the crime or as a sentencing factor."])

The constitutional right to a jury trial, and all of the due-process rights that go with it, apply to such facts, just as the right applies to an element of an offense. (See *Apprendi*, *supra*, 530 U.S. at p. 476-477; *id.* at pp. 499-500, conc. opn. of Thomas, J.; see also *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 111, plurality opn. of Scalia, J.; *People v. Seel* (2004) 34 Cal.4th 535, 540-548 [recognizing that *Apprendi* also defines the parameters of the federal Double Jeopardy Clause].)

Importantly, in a jury trial, a trial judge is prohibited from entering a judgment on the conviction or on sentencing enhancements "regardless of how overwhelmingly the evidence may point in that direction." (*United States v.*

*Martin Linen Supply Co.* (1977) 430 U.S. 564, 572-573; see also *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 277; *People v. Kobrin* (1995) 11 Cal.4th 416, 423 ["Thus, although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence."]) "To sustain a conviction on grounds not charged in the information and which the jury had no opportunity to pass upon, deprives the defendants of a fair trial and a trial by jury, and denies the defendants that due process of law guaranteed by the 14th Amendment to the United States Constitution." (*Cole v. Arkansas* (1948) 333 U.S. 196, 200.)

**ARGUMENT**

Based on this jurisprudence, in determining whether error under S.B. 567 is reversible, a reviewing court must first determine whether any aggravating factors have been proven in accordance with amended section 1170. If not, an upper term sentence is statutorily unauthorized and unconstitutional, and the middle term is the maximum term that may be imposed. Despite court of appeal holdings to the contrary, no showing of prejudice needs to be established.

If one or more aggravating factors are proven in accordance with amended section 1170, the reviewing court may then proceed to analyze under the *Chapman* harmless-error standard the trial court's error in considering aggravating factors which were not found true by the jury beyond a reasonable doubt. But the court of appeal may not engage in judicial factfinding to determine whether any of the aggravating factors would have been proven in order to support the upper term.

Here, the fact of appellant's prior convictions was properly proven under amended section 1170. However, before continuing to the *Chapman* analysis,

a thorough discussion is necessary to determine the proper analytic framework, why *Sandoval* is inapposite, and which aggravating factors were properly relied upon by the trial court.

## I. When Determining Whether a Case Should be Remanded for Resentencing Under S.B. 567, The Reviewing Court Must Initially Determine Whether Any Aggravating Factors were Proved Properly; If Not, No Prejudice Needs to Be Shown.

Under amended section 1170, if the trial court sentences the defendant to an upper term relying solely on factors not proven to the jury beyond a reasonable doubt, there are no statutorily-permissible facts supporting an aggravated sentence for a court of appeal to review under a harmless error standard. Purporting to use *Chapman* to allow judicial factfinding at this stage, as the courts of appeal have done in relying on *Sandoval*, where no facts have been found beyond a reasonable doubt by the jury, is unauthorized by the current sentencing scheme, which requires a jury finding. Additionally, the sentence violates the defendant's federal constitutional right to a jury trial. In such cases, the maximum term that may be imposed is the middle term. The only exception to this is where S.B. 567 is being applied retroactively; then remand is permissible to allow the parties a full resentencing hearing.

### A. Where No Facts Supporting Aggravating Factors Have Been Proved to a Jury Beyond a Reasonable Doubt, A Sentence Above the Middle Term is An Unauthorized Sentence.

A sentence is unauthorized when it cannot be lawfully imposed under any circumstance in the particular case. (*People v. Smith* (2001) 24 Cal.4th 849, 852.) A court exceeds its sentencing jurisdiction when it imposes an unauthorized or legally impossible sentence; this "commonly occurs where the court violates mandatory provisions governing the length of confinement."

(*People v. Scott* (1994) 9 Cal.4th 331, 354.) This includes imposition of a sentence in excess of that provided by statute, as opposed to where the trial court exercised its otherwise lawful authority in an erroneous manner under the particular facts. (*Id.* at p. 355; *People v. Rivera* (2019) 7 Cal.5th 306, 348-349.)

Now, under amended section 1170, where the middle term is again the statutory maximum, a court's imposition of an aggravated sentence on the basis of court-found facts is analogous to a court sentencing a defendant for an offense greater than the offense for which the defendant was tried and found guilty by the jury. (See *Cunningham, supra,* 549 U.S. at pp. 274-275.) This is because the Legislature has essentially added an element which must be proved by jury trial to exceed the statutory maximum. It is the equivalent of distinguishing between a lesser and a greater offense. (See *Apprendi*, *supra*, 530 U.S. at p. 494 [the difference between a "sentencing factor" and an element of an offense is whether the required finding exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict]; *Seel*, *supra*, 34 Cal.4th at pp. 540-548 [same]; *Alleyne v. United States* (2013) 570 U.S. 99, 114-115.)

Denial of the right to a jury trial on aggravating circumstances is a violation of a defendant's right to due process under these circumstances. A defendant may not be convicted of a crime that is neither charged nor necessarily included in a charged offense, except by his admissions. (See *Cole v. Arkansas, supra,* 333 U.S. at p. 201 ["It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made"]; *People v. Birks* (1998) 19 Cal.4th 108, 128 ["Unless the defendant agrees, the prosecution cannot obtain a conviction for any uncharged, nonincluded

offense"]; *People v. Lohbauer* (1981) 29 Cal.3d 364, 368 ["When a defendant pleads not guilty, the court lacks jurisdiction to convict him of an offense that is neither charged nor necessarily included in the alleged crime."]) Nor may a defendant be sentenced for such an offense. (*People v. Hernandez* (1988) 46 Cal.3d 194, 197, criticized on other grounds in *People v. King* (1993) 5 Cal.4th 59, 78, fn. 5.)

Even before *Apprendi*, California courts applied this due-process rule to enhancement allegations as well as crimes. (*Hernandez*, *supra,* 46 Cal.3d 194; see also *People v. Haskin* (1992) 4 Cal.App.4th 1434, 1438.) In *Hernandez*, *supra*, 46 Cal.3d 194, this Court held that a judge could not impose an additional three-year sentence under former section 667.8 (kidnapping for purpose of rape) when the defendant's violation of that section was neither pleaded nor proven, and the facts supporting that violation were only mentioned for the first time in a probation report. (*Id.* at p. 197.) The jury's kidnapping verdict simply did not make the three-year term available to the sentencing judge to impose, because the section's essential requirement, that the kidnapping was perpetrated for the purpose of committing a specified sex offense, had not been established by the trier of fact. (*Id.* at p. 205; see also *Seel*, *supra*, 34 Cal.4th at p. 541 [without a "willful, deliberate, and premeditated" finding by the jury, the court only has discretion to sentence defendant to a determinate term of five, seven, or nine years.]) As in *Hernandez*, under amended section 1170, where no facts supporting an aggravated term have been properly found, imposition of the upper term punishes the defendant for sentence-aggravating facts that he was not charged with violating, he did not stipulate to, and were not found true by a jury beyond a reasonable doubt.

An unauthorized sentence is not subject to a harmless error analysis. (*In re Birdwell* (1996) 50 Cal.App.4th 926, 930.) "An unauthorized sentence is just that. It is not subject to a harmless error analysis. Nor does it ripen into a sentence authorized by law with the passage of time. Imposition of an unauthorized sentence is an act which is in excess of a court's jurisdiction ...." (*Ibid.*)

Now when a court (as opposed to a jury) makes a finding, other than a prior conviction, required for the imposition of an upper term sentence, it is acting in direct contravention of amended section 1170 and is sentencing the defendant for an aggravated version of the charged offense of which he was never charged or convicted.

For this reason, cases involving the application of S.B. 567 are distinguishable from the errors in *Sandoval*, *supra*, 41 Cal.4th 825 and *Black II,* 41 Cal.4th 799. At the time of those cases, the statutory scheme permitted judicial factfinding to impose the upper term, and therefore the error permitted review for prejudice. The defendants in *Sandoval* and *Black II* were sentenced under the original version of the DSL, which permitted the judge to rely on aggravating facts not found true by the jury. (*Black II, supra*, 41 Cal.4th 799; original § 1170, subd. (b).) Although the original section 1170 was unconstitutional in permitting trial courts the discretion to make the findings needed for an upper term, both the pre- and post-*Cunningham* versions of the DSL statutorily *authorized* the trial court to impose the upper term upon a jury verdict on the charged offense alone. As discussed above, after *Cunningham,* the revised sentencing scheme removed the middle-term requirement and gave broad discretion to the trial court to engage in factfinding to determine which term in the *statutory range* to impose. This is in direct contrast to S.B. 567, which expressly reinstated *Apprendi*'s jury

requirements to the DSL, requiring jury findings of the underlying facts and rendering court-found aggravating acts unauthorized.

In *Black II,* "[t]he Sixth Amendment question, the [U.S. Supreme] Court has said, is whether the law *forbids* a judge to increase defendant's sentence *unless* the judge finds facts that the jury did not find (and the offender did not concede)." (*Black II, supra,* 41 Cal.4th at p. 812, italics in original, citing *Rita v. United States* (2007) 551 U.S. 338, 352.) "[S]o long as a defendant is *eligible* for the upper term by virtue of facts that have been established consistently with Sixth Amendment principles," the federal Constitution permits the trial court to rely upon any number of aggravating circumstances in exercising its discretion to select the appropriate term, "regardless of whether the facts underlying those circumstances have been found to be true by a jury." (*Id.* at p. 813.)

This conclusion was based on a sentencing scheme that permitted factfinding by the sentencing court, and no longer exists under amended section 1170. Under former section 1170, as discussed above:

> Judicial factfinding in the course of selecting a sentence within the authorized range does not implicate the indictment, jury-trial, and reasonable-doubt components of the Fifth and Sixth Amendments." [Citation.] Facts considered by trial courts in exercising their discretion within the statutory range of punishment authorized for a crime "have been the traditional domain of judges; they have not been alleged in the indictment or proved beyond a reasonable doubt. There is no reason to believe that those who framed the Fifth and Sixth Amendments would have thought of them as the elements of the crime." ([Citation]; see *Rita v. United States*, *supra*, 551 U.S. at p. [352] [the "Sixth Amendment cases do not automatically forbid a sentencing court to take account of factual matters not determined by a jury and to increase the sentence in consequence"].)

> The facts upon which the trial court relies in exercising discretion to select among the terms available for a particular offense "do not pertain to whether the defendant has a legal *right* to a lesser sentence—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned." (*Blakely, supra*, 542 U.S. at p. 309.) Under California's determinate sentencing system, the existence of a single aggravating circumstance is legally sufficient to make the defendant eligible for the upper term. [Citation] Therefore, if one aggravating circumstance has been established in accordance with the constitutional requirements set forth in *Blakely*, the defendant is not "legally entitled" to the middle term sentence, and the upper term sentence is the "statutory maximum."

(*Black II*, *supra,* 41 Cal. 4th 799, 813.)

This reasoning is no longer valid under amended section 1170. The law now *forbids* a judge to increase a defendant's sentence from the middle term based on facts not found by the jury. Now, in amending section 1170, the Legislature has found that a defendant is *not* eligible for the upper term unless the jury finds true additional facts beyond the guilty verdict. The defendant now *is* "legally entitled" to the middle term sentence, and the upper term sentence is no longer the "statutory maximum." (Amended § 1170, subds. (b)(1) & (b)(2).)

Now, with the middle term as the statutory maximum, the sentencing judge has *no discretion* to select the upper term based on the jury verdict on the charged count alone; instead, now "[f]actfinding to elevate a sentence from [the middle term] to [the upper term] ..., falls within the province of the jury employing a beyond-a-reasonable-doubt standard, not the bailiwick of a judge determining where the preponderance of the evidence lies." (*Cunningham, supra*, 549 U.S. at p. 292.)

None of this Court's decisions, including *Sandoval* and *Black II,* permit a court of review to apply *Chapman* in order to impose a sentence for a

conviction greater than the statutory maximum of the conviction returned by the jury. (Compare *People v. French* (2008) 43 Cal.4th 36, 52; *Washington v. Recuenco* (2006) 548 U.S. 212; *Neder v. United States* (1999) 527 U.S. 1.) Where facts supporting aggravating circumstances are not found true by the jury and the existence of prior convictions has not been determined in accordance with 1170 as amended, the statutory maximum sentence is the middle term. Therefore, the analysis of the standard of prejudice in those cases, including *Sandoval* and *Black II,* are inapposite.

Instead, when the trial court pronounces a sentence which is unauthorized by statute, that sentence must be vacated and a proper sentence imposed. (*People v. McGee* (1993) 15 Cal.App.4th 107, 117.) Nor, when applied prospectively, should the prosecution be permitted to retry the aggravating factors. (*Seel*, *supra*, 34 Cal.4th at pp. 540-548 [*Apprendi* defines the parameters of the federal Double Jeopardy Clause].) Therefore, where none of the factors relied upon by the trial court were proven in conformity with S.B. 567's amendments, the sentence must be vacated and the case must be remanded for resentencing, without a showing of prejudice, and no greater than the middle term may be imposed. (*In re Howard*, *supra*, 69 Cal.App.2d at p. 165; see also, e.g., *Seel, supra,* 34 Cal.4th at p. 541.)

### B. Where No Facts Supporting Aggravating Factors Have Been Found by the Jury Beyond a Reasonable Doubt, Application of the Harmless-Error Standard Sanctions the Very Judicial Factfinding that Amended Section 1170 and the Constitution Expressly Prohibit.

That this issue is not to subject to harmless-error analysis is supported by federal considerations prohibiting judicial factfinding.

Not only is a directed verdict for the upper term expressly unauthorized under amended section 1170, but it is a violation, not just of the defendant's

right to a jury finding on all facts essential to conviction, but also of the defendant's right not to be sentenced by a court for an offense greater than the one of which he was charged and convicted. The error is greater than the error that occurs when the defendant is convicted of an offense on which the jury has not properly been instructed. (See, e.g., *Neder v. United States* (1999) 527 U.S. 1, 19.) It is the imposition of a court verdict, which the Sixth Amendment has never allowed.

Where the trial court does not have the statutory authority to select the upper term, application of a harmless-error standard to justify the sentence results in judicial factfinding prohibited by the statute and the Sixth Amendment. In this instance, using *Chapman* to allow judicial fact finding is akin to a directed verdict for a greater offense than that for which the defendant was tried and found guilty by the jury.

The United States Supreme Court has found that "harmless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury. ... '[A] trial judge is prohibited from entering a judgment of conviction . . . regardless of how overwhelmingly the evidence may point in that direction.'" (*Rose v. Clark* (1986) 478 U.S. 570, 578.) The Supreme Court has noted that "where the right [to a jury trial] is altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that *the wrong entity judged the defendant guilty*." (*Rose, supra,* 478 U.S. at p. 578; *People v. Molina* (2000) 82 Cal.App.4th 1329, 1333.)

In *Sullivan v. Louisiana*, *supra*, 508 U.S. 275*,* explaining why *Chapman* harmless-error analysis cannot be applied when the trial court gives a constitutionally deficient reasonable-doubt instruction, the Court stated:

> "Harmless-error review looks . . . to the basis on which 'the jury *actually rested* its verdict.' [Citation.] The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered--no matter how inescapable the findings to support that verdict might be--would violate the jury-trial guarantee.' [Citation.] Because a constitutionally defective reasonable doubt instruction renders it impossible for the jury to return a verdict of guilty beyond a reasonable doubt, 'there is no *object*, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt--not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough. [Citation.] The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty.' [Citation.]"

(*Sullivan, supra*, 508 U.S. at pp. 279-280, italics in original; see also *Neder v. United States* (1999) 527 U.S. 1, 27 (conc. opn. of Stevens, J.) [harmless-error review "'may enable a court to remove a taint from proceedings in order to *preserve* a jury's findings, but it cannot constitutionally *supplement* those findings'"]; *Yates v. Evat* (1991) 500 U.S. 291, 404 [harmless-error inquiry is not directed at what a reviewing court believes a jury *would have done in the absence of the error*, but on whether *the jury's verdict actually rested* on evidence establishing the presumed fact beyond a reasonable doubt, independently of the presumption.])

This is the error that the courts of appeal have recently engaged in since the passage of S.B. 567, in attempting to determine whether "beyond a reasonable doubt, ... 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." (See, e.g., *People v. Zabelle* (2022) 80 Cal.App.5th 1098, 1114.) In *Zabelle,* none of the aggravating factors relied upon by the trial court in selecting the upper term were found true in accordance with amended section 1170. The Third District applied a two-step process, first evaluating for *Chapman* error under *Sandoval*'s framework, and then determining whether there was prejudice under *People v. Watson* (1956) 46 Cal.2d 818, 836. Examining the record, specifically the testimony and video evidence presented at trial, the court found that four of the trial court's listed factors in aggravation appeared to be indisputable, and therefore the Sixth Amendment error was plainly harmless. (*Ibid.*)

Because trial courts are now statutorily unauthorized from imposing an upper term without an additional jury finding on facts supporting aggravating circumstances, this falls directly under "hypothesiz[ing] a guilty verdict that was never in fact rendered" and is in direct opposition to Sixth Amendment jury requirements. (*Sullivan, supra*, 508 U.S. at p. 279.) This is impermissible judicial factfinding, and has no place in the current analysis.

In permitting review of these unauthorized sentences under the *Chapman* harmless-error analysis, the courts of appeal implicitly authorize *prospective* violations of the new law's express requirement that aggravating facts be found true by a jury, not by a court. (See e.g., *Flores, supra,* 75 Cal.App.5th 495; *Zabelle, supra,* 80 Cal.App.5th 1098.) It is axiomatic that courts are not allowed to rewrite legislation. (*People v. Franklin* (2016) 63 Cal.4th 261, 289; *Napa Valley Wine Train, Inc. v. Public Utilities Com.* (1990) 50 Cal.3d 370, 381.) Yet, by substituting a judicial determination that a jury *would* have made that finding for the defendant's right to a jury trial under S.B. 567, the courts of appeal have done exactly that.

The courts of appeals' erroneous analysis in these decisions may have resulted from the fact that the cases all concern retroactive violations of the statute, a situation that is superficially analogous to the post-DSL-amendment at issue in *Sandoval* and *Black II*.

Viewing the issue prospectively, it is clear any court that imposes an upper term sentence on the basis of an aggravating fact found by the court, as opposed to a jury (following notice and application of the beyond-a-reasonable-doubt standard), is violating the express directive of the Legislature. The right to a jury trial cannot be satisfied by a court's finding that the fact underlying an aggravating circumstance is true, under the *Chapman* standard or otherwise. Moreover, in such circumstances, when no jury trial was provided as to facts as to which the defendant was entitled to a jury trial, those facts cannot be used *at all* in assessing the propriety of the imposition of an upper term sentence. When those are the only facts cited by the trial court in imposing an upper-term sentence, that sentence is unauthorized and unconstitutional, and no prejudice needs to be shown. The sentence must be vacated and no term greater than the middle term may imposed.

Moreover, in such cases, the double jeopardy clause forbids retrial after a reversal is ordered because the evidence introduced at trial was insufficient to support the verdict. (*People v. Shirley* (1982) 31 Cal.3d 18, 71, reversed by statute on other grounds as stated in *People v. Alexander* (2010) 49 Cal.4th 846, 879.) As discussed above, *Apprendi* requirements also define the parameters of the federal double jeopardy clause. (*Seel, supra,* 34 Cal.4th 535, 540-548.) The only exception to this rule is when the prosecution properly made its case under the law as it then stood. (*Shirley*, *supra*, 31 Cal.3d 18, 71; *Figueroa*, *supra*, 20 Cal.App.4th at pp. 71-72.) Therefore, rehearing is only permitted when amended section 1170 is being applied retroactively, because

the facts were not required to be proven to these standards at the time of sentencing. In such a case, the parties ought to be permitted a full resentencing hearing. (*Ibid.*)

## II. In this Case, Where The Trial Court Relied On The Fact of Prior Convictions, But Also Relied On Multiple Impermissible Factors, The Court May Proceed To Determine Whether the Sentencing Error Was Harmless.

Under amended section 1170, and *Apprendi* and *Cunningham,* the trial court could properly rely upon the fact of a prior conviction that is proven by certified records or admitted. Because of that, appellant's sentence was arguably not unauthorized.

However, the Court of Appeal in this case, and the California courts of appeal generally, engaged in judicial factfinding in order to determine whether any other facts could be relied upon by the trial court in the initial step of evaluating whether the term was properly imposed under amended section 1170. This is error. It is important to determine exactly which facts a trial court may properly rely on in order to evaluate prejudice.

Here, the parties and the Court of Appeal agreed that the trial court improperly relied on many now-impermissible factors when it sentenced appellant under former section 1170. (Slip op., pp. 8-9.) The Court of Appeal held that six of the eight aggravating factors considered by the trial court were not based on facts found in compliance with S.B. 567, stating:

> 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.

(Slip op., pp. 8-9.) The majority opinion found that the trial court did not err in weighing appellant's weapon use and numerous prior convictions in selecting the upper term. (Slip op., pp 6-8.).

However, as explained below, only the fact of his prior convictions was arguably properly proven in compliance with amended section 1170.

### A. Under Amended Section 1170, Neither the Trial Court nor the Court of Appeal Could Properly Find, Beyond a Reasonable Doubt, that Appellant Used a Weapon.

Under section 1170 as amended, where the record does not reflect a jury finding on weapon use, the trial court could not properly find that appellant used a weapon at the time of the commission of the crimes. The Court of Appeal engaged in impermissible factfinding to hold this a valid aggravating factor. (See slip op., p. 6.; compare dissent op., p. 1.)

As alleged in this case, appellant's crimes did not include a weapon, with the exception of count 2, assault with a deadly weapon, "to wit, a wooden table leg." (See 1CT 178.) The jury found appellant "not guilty" of count 2, and instead convicted him of the lesser included offense of simple battery. (1CT 265, 266.) At the sentencing hearing, the prosecution agreed that this verdict meant that the conviction in count 2 could not establish that the jury found a weapon was used, stating "I think in the finding of the lesser, it's the jury's finding that they couldn't specify an act with the table leg itself." (9RT 789.)

The remaining verdicts, including count 3 based on the same incident as count 2, did not have a weapon inherent in the crime as charged. (1CT 178-179, 267-269.) The record of conviction solely shows that the appellant willfully inflicted a physical injury, and that the injury resulted in a traumatic

condition. (§ 273.5, subd. (a); 1CT 247-248 [CALCRIM 840].) The victim's statements regarding the incidents were conflicting, and at trial she denied being hit with an extension cord or a table leg. (5RT 439, 440.) Moreover, the jury simply may not have believed the victim's prior statements or testimony regarding the weapons allegedly used; the verdicts may have been based on the victim's bruises alone (7RT 651), regardless of what caused them.

As set forth in the dissent, the use of a weapon is not an element of the crime of inflicting injuries resulting in traumatic conditions on a dating partner (§ 273.5, subd. (a)). (Slip op., dissenting op., p. 1.) As it is, the jury's verdict, with the one exception of the judicially-found fact of appellant's prior convictions as discussed below, only authorized the statutory maximum term of the middle term. The majority's finding that the use of a weapon was true beyond a reasonable doubt is an example of impermissible judicial factfinding, expressly prohibited by amended section 1170.

### B. Under Amended Section 1170, The Trial Court Could Properly Rely on the Fact of Appellant's Prior Convictions.

Section 1170, as amended by S.B. 567, permits the trial court to consider the defendant's prior convictions in determining sentencing based on certified records without submitting the prior convictions to a jury. (Amended § 1170, subd. (b)(3).) As noted above, this echoes the holding in *Apprendi, supra,* 530 U.S. 466, 490, permitting a trial judge to determine whether a defendant suffered a prior conviction.

In this case, certified records were provided as to certain prior felony convictions: (i) 2011 convictions for one count of possession of a controlled substance for sale, and one count of failure to appear (2CT 309-313); (ii) a 2016 conviction for corporal injury on a cohabitant (2CT 314-317); and (iii) 2018 convictions for one count of assault with a firearm and two counts of

resisting an officer (2CT 318-322). The trial court found true beyond a reasonable doubt that appellant suffered the January 28, 2016, domestic violence conviction, and the October 23, 2018, assault conviction. (9RT 786.)

The determination under rule 4.421(b)(2), whether a defendant's convictions are "numerous," requires consideration of only the number, dates, and offenses of the prior convictions alleged. (*Black II, supra,* 41 Cal.4th at p. 818.) Since the trial court made this finding based on facts supported by certified records, this aggravating factor was adequately supported by facts proven in conformity with amended section 1170 and *Apprendi*. (§ 1170, subd. (b)(3); 1CT 307-322.)[6]

### C. Under Amended Section 1170, The Trial Court Could Not Properly Rely on Facts Supporting the Remaining Six Factors.

The remaining factors relied upon by the trial court were not proven in conformity with amended section 1170. (Slip op., pp. 8-9.) Appellant does not anticipate that respondent will argue that under amended section 1170, the trial court properly considered (1) that appellant's crimes involved a high degree of cruelty, viciousness, and callousness (rule 4.421(a)(1)); (2) that the victim was particularly vulnerable (rule 4.421(a)(3)); or (3) that appellant's conduct and prior record indicated he was a serious danger to society (rule 4.421(b)(1)). These are inherently subjective factors, which appellant contested at sentencing. (9RT 790-793.) These factors were not stipulated to by the appellant nor found true by a jury beyond a reasonable doubt.

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[6] As argued below, however, that does not end the evaluation, nor does this mean that this factor is not to be considered in the prejudice analysis. There is no indication that the trial court here limited its consideration only to the convictions proved by the certified records, as opposed to the probation report, in reaching its conclusion.

Additionally, the Court of Appeal properly found that the trial court could no longer rely on the factors that appellant had just been released from prison and was on parole at the time he committed the crimes, or that appellant's prior performance on parole was unsatisfactory, based on the probation report. (Slip op., pp. 6-7.) Section 1170, as amended, permits the trial court to consider "the defendant's prior convictions" in determining sentencing based on a certified record. (Amended § 1170, subd. (b)(3).) The statute does not permit judicial consideration of facts related to a defendant's recidivism without violating the Sixth Amendment. (Slip. op., p. 7, citing *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].) Section 1170, as amended, therefore does not permit the trial court to consider parole status, or the defendant's performance on parole, based on these records.[7]

Therefore, only one aggravating factor cited by the trial court was based on facts established under section 1170 as amended: the finding that appellant had prior convictions.

[7] In addition, "if the record is insufficient to support a trial court's findings about a defendant's criminal history, the reviewing court should not presume the existence of extrarecord materials to address this insufficiency." (*Zabelle*, *supra*, 80 Cal.App.5th at p. 1115, fn. 6.)

## III. Where One or More, But Not All, Aggravating Factors Have Been Properly Proven, the Appellate Court May Review for Harmless Error under *Chapman*, and Must Remand Unless The Record Affirmatively Demonstrates Beyond a Reasonable Doubt that the Improper Factors Were Not Determinative For the Sentencing Court's Decision.

Once it has been determined that the upper term could still be legally imposed, the second question becomes whether a trial court would still impose an upper term sentence.

As noted above, the Legislature specifically amended section 1170 to comply with *Cunningham, supra,* 549 U.S. 270, to safeguard a defendant's Sixth Amendment constitutional right to a jury trial on all facts used to impose an aggravated sentence. (Policy Committee Analysis of Sen. Bill 567 (2020-2021 Reg. Sess.), June 29, 2021, p. 3.) The Legislature has statutorily implemented the federal jury requirements into this statutory law. An error under amended section 1170 is a violation of federal constitutional law, and there is no independent overarching state error that is being examined. [8] "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." (*Chapman, supra*, 386 U.S. at p. 24.)

Therefore, the *Chapman* rule must be applied in cases like this, where the trial court has used both constitutionally permitted and constitutionally-prohibited facts to impose an upper term sentence. This situation is similar to the application of the *Chapman* analysis to instructional error when the trial

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[8] As noted above, like the federal constitution, the California Constitution also guarantees the right to due process and the right to a jury trial. (Cal. Const., art. I, §§ 7, 16.) However, since the errors discussed are violative of federal Sixth Amendment jury requirements, *Chapman,* and not *Watson* is implicated.

court fails to properly instruct on an element of a sentencing enhancement which increases the punishment for an offense. (E.g., *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326-327; *People v. Scott* (2001) 91 Cal.App.4th 1197, 1211.) As with sentences imposed pursuant to amended section 1170, in such cases the statutory scheme and federal Constitution require a jury to find, beyond a reasonable doubt, the existence of every element of a sentence enhancement that increases the penalty for a crime beyond the "prescribed statutory maximum" punishment for that crime. (*Sengpadychith*, *supra*, 26 Cal.4th at p. 326, quoting *Apprendi*, *supra*, 530 U.S. at p. 490.) A trial court's failure to instruct the jury on an element of a sentence enhancement is federal constitutional error if the provision increases the penalty for the underlying crime beyond the statutory maximum; the error is reversible under *Chapman*, unless it can be shown "beyond a reasonable doubt" that the error did not contribute to the jury's verdict. (*Ibid.*)

This case, where there is reliance on both permissible and impermissible factors, is also analogous to cases in which a jury has been instructed on both legally valid and legally invalid theories. In those cases, the error violates the defendant's constitutional right to a jury trial and requires reversal unless it is clear beyond a reasonable doubt that the error did not affect the verdict. (See, e.g., *People v. Guiton* (1993) 4 Cal.4th 1116; *People v. Chun* (2009) 45 Cal.4th 1172; *People v. Aledemat* (2019) 8 Cal.5th 1.) In such cases, to find the error harmless, a reviewing court must conclude, beyond a reasonable doubt, that the jury *in fact* based its verdict on a legally valid theory. (*Chun, supra,* 45 Cal.4th at p. 1203.)[9]

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[9] In *Guiton*, *supra*, 4 Cal.4th 1116, this Court distinguished between two categories of incorrect theories. Under a "'*factually* inadequate theory,'" the theory is incorrect only because the evidence does not support it. (*Id.*, at p.

To prove harmless error under the *Chapman* standard, the inquiry is not whether the same term would surely have been rendered without the error, but whether the term actually imposed in *this* sentencing was "surely unattributable to the error." (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 279.) Therefore, in such mixed cases, remand is necessary unless it can be determined, beyond a reasonable doubt, that the trial court would have imposed the upper term based solely on the constitutionally permissible factors under *Chapman.*

It is important again to distinguish this analysis from *Sandoval* and *Black II*. Under the *Chapman* analysis here, the question is *not* whether, "if the question of the existence of an aggravating circumstance or circumstances had been submitted to the jury, the jury's verdict would have authorized the [trial court's] upper term sentence." (*Sandoval*, *supra*, 41 Cal.4th at p. 838; *Black II, supra*, 41 Cal.4th at p. 812.) As discussed above, in *Sandoval* and *Black II,* the trial judge had the statutory authority to use its broad discretion to select the upper term. But now, under amended section 1170, this is *no longer* a circumstance where "the federal Constitution permits the trial court to rely upon any number of aggravating circumstances in exercising its discretion to select the appropriate term by balancing aggravating and

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1128.) Under a "'*legally* inadequate theory,'" the theory is incorrect because it is contrary to law. (*Ibid*.) An example of this second category "is a case where the inadequate theory 'fails to come within the statutory definition of the crime." (*Ibid*.) The trial court's choice of the upper term based on aggravating factors not proved beyond a reasonable doubt to a jury is not a factually inadequate theory, i.e., it is not a question of whether sufficient evidence was adduced to support the theory. Instead, it is a legally inadequate theory, because it relied on factors which are insufficient as a matter of law because they have not been found true beyond a reasonable doubt by a jury as constitutionally and statutorily required.

mitigating circumstances, regardless of whether the facts underlying those circumstances have been found to be true by a jury." (*Sandoval, supra*, 41 Cal.4th at p. 838, quoting *Black II, supra,* 41 Cal.4th at p. 813.) Instead, the trial court is now expressly *prohibited* from relying on aggravating factors if the facts underlying those circumstances have not been found true by a jury.[10]

Therefore, the relevant prejudice question is whether the Court can be assured, beyond a reasonable doubt, that the trial court would have imposed the upper term based on one or more permissible aggravating factors when the court originally relied on both permissible and impermissible factors in selecting the upper term (see *Lopez, supra,* 78 Cal.App.5th at p. 467), without engaging in judicial factfinding.

**A. On this record, The Trial Court's Reliance on Multiple Statutorily and Constitutionally Impermissible Aggravating Factors Affirmatively Demonstrates the Error Affected the Result**.

The reviewing court may examine the record to determine whether the factfinder might have based its decision on an invalid theory. (*Aledamat,*

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[10] In footnote 3 of the Court of Appeal's opinion in this case, the Court stated that the *Chapman* standard did not apply because "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." (Slip op., p. 9, fn. 3.) As explained above, amended section 1170, subdivision (b) was modified specifically to comply with federal constitutional Sixth Amendment jury requirements pursuant to *Cunningham*. (Policy Committee Analysis of Sen. Bill 567 (2020-2021 Reg. Sess.), June 29, 2021, p. 3.) The two cannot be so easily separated, and the current application, using statutorily-prohibited facts to impose the upper term is a violation of appellant's federal right to a jury trial.

*supra,* 8 Cal.5th at p. 13.) But the reviewing court must not rest a harmless-error ruling on its own reweighing or reinterpretation of the evidence. (*People v. Flood* (1998) 18 Cal.4th 470, 513.) A reviewing court must *only* ground its analysis in what the error's likely effect was on the factfinder, not how the reviewing court believes the factfinder should have analyzed the evidence before it. (*Ibid.*, citing *Breverman, supra*, 19 Cal.4th at p. 177.)

Similarly, it is error to review "the strength of the prosecution's case" in making such a prejudice determination. (*People v. Aranda* (2012) 55 Cal.4th 342, 368.) As in cases applying *Chapman* to the erroneous failure to instruct on an element of the offense, the reviewing court must not infringe on a defendant's constitutional rights by "becom[ing] in effect a second jury to determine whether the defendant is guilty." (*Ibid.*) "[I]f a reviewing court were to rely on its view of the overwhelming weight of the prosecution's evidence to declare there was no reasonable possibility that the jury based its verdict on a standard of proof less than beyond a reasonable doubt, the court would be in the position of expressing its own idea 'of what a reasonable jury would have done. And when [a court] does that, "the wrong entity judge[s] the defendant guilty."'" (*Ibid.*, quoting *Sullivan, supra*, 508 U.S. at p. 281.) "No matter how overwhelming a court may view the strength of the evidence of the defendant's guilt, that factor is not a proper consideration on which to conclude" harmlessness. (*Ibid.*) Thus, the majority opinion below erred in weighing whether "any of the facts underlying the six improperly found aggravating circumstances would have been found true beyond a reasonable doubt if submitted to the jury[.]" (Slip op., pp 10-11.)

In this case, the record affirmatively demonstrates the trial court's reliance on multiple impermissible factors in reaching its decision. Three of the factors rested on subjective facts which were contested at sentencing. (9RT

798.) Specifically, the trial court determined that: (1) appellant's crimes involved a high degree of cruelty, viciousness, and callousness; (2) appellant's conduct and prior record indicated a serious danger to society; and (3) the victim was particularly vulnerable. Defense strongly contested the underlying facts of these three factors. (9RT 790-793.) The prosecution heavily relied upon these factors to urge the trial court to select the upper term. (1CT 278-279 [People's sentencing memorandum]; 9RT 796-797 [People's sentencing arguments].) The prosecutor's argument at sentencing was replete with storytelling and unproven allegations, which included uncharged behavior and the dismissed count. (1CT 278, 280; 9RT 798.) The trial court's ruling affirmatively established that it relied upon these factors. (9RT 799-800.)

Appellant's *failure* to contest other facts at the sentencing hearing should not carry much weight. Under former section 1170, any one aggravating factor, proved only by a preponderance of the evidence, was sufficient to support the imposition of the upper term. (*People v. Hicks* (2017) 17 Cal.App.5th 496, 512.) Defense counsel's decision whether to argue certain facts were not proven beyond a reasonable doubt is a much different decision than the decision whether to argue those facts were not proven by a preponderance of the evidence. (See *Sandoval, supra*, 41 Cal.4th at p. 840 ["a reviewing court cannot always be confident that the factual record would have been the same had aggravating circumstances been charged and tried to the jury"].) "[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" (*id.* at p. 839), since the standard of proof was lower and defense counsel may have adopted a

different strategy with a jury. The Court of Appeal acknowledged this rule, but did not apply it. (Slip. op., p. 11-12.)

Finally, the fact of appellant's priors, and whether they are numerous, might not be weighed the same by the trial court after the changes made by S.B. 567. The trial court in this case relied on the probation report (9RT 787), which contained reports of several prior convictions which were not based on certified records. (Compare 1CT 287 [probation report], to 1CT 307-322 [certified record of only the 2011, 2016, and 2018 felony convictions].) The probation report is not a certified record of conviction. (See *Dunn*, *supra*, 81 Cal.App.5th 394; see also Evid. Code, §§ 452.5, subd. (b)(1), 1530, subd. (a)(2) [listing requirements for a certified record of conviction].) There was no indication that the trial court here limited its consideration to only the certified records provided in reaching its conclusion that appellant had "numerous" prior convictions.

Here, the trial court gave no particular weight to any of the aggravating circumstances it relied upon. (9RT 799-800; and see *Zabelle, supra,* 80 Cal.App.5th at p. 1115.) On this record, the Court cannot be assured beyond a reasonable doubt that the trial court would have imposed the upper term based on a single permissible aggravating factor, when the court originally relied on contested and impermissible factors in selecting the upper term. (See *Lopez, supra,* 78 Cal.App.5th at p. 467.)

**B. The Intent of the Legislative in Amending Section 1170 Favors Finding the Error Affected the Result**.

The fact that the Legislature changed the sentencing scheme to make a midterm sentence the maximum term might cause a trial court to exercise its discretion to impose a lesser sentence. (*People v. Francis* (1969) 71 Cal.2d 66, 77.) "When the choice between two sentences must be made by weighing

intangible factors, a presumption in favor of one sentence can be decisive in many cases." (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1382.) As amended, section 1170 now requires that a sentence in excess of the middle term may be imposed "only when there are circumstances in aggravation of the crime *that justify the imposition of a term of imprisonment exceeding the middle term*." (§ 1170, subd. (b)(2), italics added.)

According to the author of S.B. 567, the former version of section 1170, subdivision (b), enacted in 2007, "led to individuals serving maximum prison sentences without the opportunity to effectively refute alleged aggravating facts." (Assem. Floor Analysis of Sen. Bill 567 (2020-2021 Reg. Sess.), Sept. 3, 2021, p. 2.) Thus, former section 1170 contributed to a "mass incarceration" trend in California as "part of the policy framework of" a decades-long "carceral system." (*Ibid.*)

S.B. 567 implemented "a small step in the right direction of creating" a more humane criminal justice system. (*Ibid.*) The bill's changes to section 1170, subdivision (b) were intended to "help prevent individuals from serving maximum sentences when lower terms are more appropriate based on the facts." (*Ibid.*)

Therefore, in cases where S.B. 567 is being applied retroactively, reconsideration of sentencing is required "unless the record shows that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion" differently. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 426, citing *People v. Gutierrez* (1996) 48 Cal.App.4th 1894.)

Given this, the Court cannot find beyond a reasonable doubt that the trial court would have selected the upper term under amended section 1170.

### C. Even If the *Watson* Standard is Applied, Remand is Required In this Case, Because It Is Reasonably Probable That a More Favorable Sentence Would Have Been Imposed Absent The Trial Court's Error in Relying on Impermissible Factors in Aggravation.

As argued above, the failure to accord appellant a jury trial as to aggravating factors is federal law error, since amended section 1170 was specifically intended to codify Sixth Amendment jury requirements. (Policy Committee Analysis of Sen. Bill 567 (2020-2021 Reg. Sess.), June 29, 2021, p. 3.) However, reversal is still required in this case if this Court concludes that the error is one of state law, i.e., that the amended statute gives more protection than the federal right to a jury trial on these facts, and that additional state protection alone was violated in this case. Under *Watson*, *supra*, 46 Cal.2d 818, state law error is reversible if 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. Epps* (2001) 25 Cal.4th 19, 936.) This Court has made clear that such a "probability" "does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility." (*People v. Hendrix* (2022) 13 Cal.5th 933, 948, 944.)

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 determinative. (*People v. Avalos* (1984) 37 Cal.3d 216, 233; *Gutierrez*, *supra*, 58 Cal.4th at p. 1391.) In this case, amended section 1170 circumscribes the sentencing court's discretion to exceed a middle term, similar to the manner described in *People v. Gutierrez, supra,* 58 Cal.4th 1354, 1382 [a statutory preference in favor of a particular sentence circumscribes a court's discretion, and is reviewable under *Watson*].)

As under *Chapman,* the reviewing court should focus solely on whether "the error affected the outcome," not on whether the reviewing court personally believes that outcome was correct or likely to be reimposed. (*Hendrix*, *supra*, 13 Cal.5th at p. 948, citing *Breverman, supra,* 19 Cal.4th at p. 165.) The reviewing court must reverse "*where it cannot determine whether the improper factor was determinative for the sentencing court*. [Citation.]" (*Hendrix*, *supra*, 13 Cal.5th at p. 233, italics added.) This includes where there are contested factual questions. (See *Epps*, *supra*, 25 Cal.4th 19, 40 [where there are no contested factual questions, the defendant could not show under *Watson* a reasonable probability the error affected the result].)

Here, because of the contested and subjective nature of multiple sentencing factors, the Court cannot be *assured* that the trial court would have exercised its discretion to impose the upper term based on a single permissible aggravating factor. (See Slip op., dissenting op., p. 1 ["We must reverse when, as is the case here, we 'cannot determine whether the improper factor was determinative for the sentencing court'"], quoting *Avalos*, *supra*, 37 Cal.3d at p. 233.) Additionally, the mere fact that the Legislature changed the sentencing scheme to be more favorable toward midterm sentences might cause a trial court to exercise its discretion to impose a lesser sentence. (*Francis*, *supra*, 71 Cal.2d at p. 77; *Gutierrez, supra,* 58 Cal.4th at p. 1382.)

A full resentencing is required under either harmless error standard, to permit the parties the opportunity to present additional evidence, and to permit the trial court to sentence appellant under amended section 1170.

## CONCLUSION

Appellant therefore respectfully requests that this Court reverse the judgment of the Court of Appeal, and order this case remanded for resentencing under amended section 1170.

Dated: December 14, 2022

Respectfully submitted,

*/s/Jacquelyn Larson*
Jacquelyn Larson

**CERTIFICATE OF APPELLATE COUNSEL PURSUANT TO RULE 8.204(C)(1) AND RULE 8.360(B) OF THE CALIFORNIA RULES OF COURT**

I, Jacquelyn Larson, appointed counsel for appellant, certify pursuant to rule 8.204 of the California Rules of Court, that I prepared this Opening Brief on the Merits on behalf of my client, and that the word count for this brief is 13,197 words.

I certify that I prepared this document in Microsoft Word and that this is the word count generated for this document.

Dated: December 14, 2022

Respectfully submitted,

*/s/Jacquelyn Larson*
Jacquelyn Larson
Attorney for Appellant

**Re: *The People v. Lynch,* Case No. S274942**

**DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY PLACEMENT AT PLACE OF BUSINESS FOR COLLECTION AND DEPOSIT IN MAIL**

(Code Civ. Proc., § 1013a, subd. (3); Cal. Rules of Court, rule 8.78(f))

I, *Kimberly M. Quinn*, declare as follows:

I am, and was at the time of the service mentioned in this declaration, over the age of 18 years and am not a party to this cause. My electronic service address is eservice@capcentral.org and my business address is 2150 River Plaza Dr., Ste. 300, Sacramento, CA 95833 in Sacramento County, California.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **December 14, 2022**, at Sacramento, California.

/s/ *Kimberly M. Quinn*
Kimberly M. Quinn

**STATE OF CALIFORNIA**
Supreme Court of California

## *PROOF OF SERVICE*

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Supreme Court of California

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