No. 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 Appellant.

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

ANSWER BRIEF ON THE MERITS

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ISSUE PRESENTED

When the trial court has relied on aggravating factors that comply with section 1170, subdivision (b), as amended by Senate Bill No. 567 (Stats. 2021, ch. 731, § 1.63), and aggravating factors that do not comply, what prejudice standard applies to the trial court's sentencing error?

INTRODUCTION

At the time of appellant Deandre Lynch's sentencing, California's determinate sentencing law permitted a trial court to exercise its broad discretion to select any sentence from among the upper, middle, and lower terms specified for a given offense based on the interests of justice and its own findings of fact regarding circumstances in aggravation or mitigation. (Former Pen. Code, § 1170, subd. (b).)[1] Applying that version of section 1170, the trial court imposed an upper term sentence. While Lynch's case was still on appeal, however, the Legislature amended the statute. The Legislature chose to revert to a sentencing approach that was in use prior to 2007, under which a middle term sentence is required unless an upper term is justified by circumstances in aggravation. The new legislation also specifies that, except for prior convictions, aggravating circumstances must be proven to a jury beyond a reasonable doubt. The parties agree that this intervening change in law

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

applies to Lynch's nonfinal case, but they disagree about the applicable harmless error standard.

The language of the current version of section 1170, permitting an upper term only when justified by aggravating factors, is the same in all material respects as the language of a prior version of that statute that this Court analyzed in *People v. Black* (2007) 41 Cal.4th 799, 805-807 (*Black II*). As the Court explained in *Black II*, an upper term sentence under such a statute is authorized for federal constitutional purposes once at least one aggravating circumstance has been found true beyond a reasonable doubt or falls within the Sixth Amendment's prior-conviction exception. (*Id*. at p. 812.) As Lynch admits, that is the case here—at least one aggravating circumstance relied upon by the trial court satisfied federal constitutional standards. (OBM 40-41.) Consistent with *Black II*, and contrary to Lynch's assertion in this appeal, any further error under the current version of section 1170—including the failure to submit additional aggravating circumstances to a jury for proof beyond a reasonable doubt—is error of state law only that is assessed for prejudice under the reasonable-probability standard. Applying that standard to the facts of this case, any state-law error was harmless, and reversal is therefore not required.

Lynch raises another issue not presented by the facts of this case: whether imposition of an upper term sentence based on aggravating circumstances that entirely fail to comply with the Sixth Amendment or the terms of amended section 1170 is structural error. The Court need not reach that issue to resolve

this appeal. But, in any event, the argument is meritless. Error of that kind would be akin to the failure to present an element of an offense to the jury, and it is well settled that such error is amenable to harmless-error analysis.

LEGAL BACKGROUND

A. California's determinate sentencing law

In an effort to promote uniform and proportionate punishment, the Legislature enacted California's determinate sentencing law (DSL), which became operative on July 1, 1977.[2] (*People v. Black* (2005) 35 Cal.4th 1238, 1246 (*Black I*), overruled on other grounds by *Cunningham v. California* (2007) 549 U.S. 270, 289-293.) As originally enacted, the DSL allowed trial court judges to choose among three statutorily mandated sentences: the lower term, the middle term, and the upper term. (Former § 1170, subd. (b); see *Cunningham,* at p. 277; *Black I,* at p. 1247.) The DSL required the trial judge to impose the middle term "unless there [were] circumstances in aggravation or mitigation of the crime." (Former § 1170, subd. (b); see *Cunningham,* at p. 277; *Black I,* at p. 1247.)

Nevertheless, a judge had "considerable discretion to identify aggravating factors" and was allowed to rely upon aggravating facts that had not been found true by a jury. (*Black I, supra,* 35 Cal.4th at pp. 1247-1248.) The court could consider "the trial record; the probation officer's report;

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[2] The official name of this legislation is the "Uniform Determinate Sentencing Act of 1976." (*Way v. Superior Court* (1977) 74 Cal.App.3d 165, 169-170, fn. 1.)

statements in aggravation or mitigation, and any further evidence introduced at the sentencing hearing." (Former § 1170, subd. (b); see *Cunningham, supra,* 549 U.S. at p. 277; *Black I,* at p. 1248.)

B. The United States Supreme Court's decision in *Cunningham*

In 2007, the United States Supreme Court held that California's procedure for selecting upper term sentences under former section 1170, subdivision (b), violated a defendant's Sixth Amendment right to jury trial because it gave "to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence." (*Cunningham*, *supra*, 549 U.S. at p. 274.) According to the court, "the Federal Constitution's 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 pp. 274-275.)

In reaching that holding, the *Cunningham* court built on its prior decision in *Apprendi v. New Jersey* (2000) 530 U.S. 466. (*Cunningham*, *supra*, 549 U.S. at pp. 281-288.) In that case, the defendant had been convicted of possession of a firearm for an unlawful purpose, which was punishable by five to ten years imprisonment. (*Apprendi*, *supra,* 530 U.S. at p. 468.) In addition, a separate "hate crime" statute authorized an extended sentence of 10 to 20 years if the trial judge found, by a preponderance of the evidence, that the defendant had "acted with a purpose to intimidate an individual or group of individuals because of race,

color, gender, handicap, religion, sexual orientation or ethnicity." (*Id.* at pp. 468-469.) The trial judge found that the defendant had acted with the requisite purpose to intimidate and sentenced the defendant to an extended term of 12 years. (*Id.* at p. 471.) On appeal, the defendant argued that the federal Constitution required the finding supporting the extended sentence to be proven to a jury beyond a reasonable doubt. (*Ibid.*)

The United States Supreme Court agreed and held that the Sixth Amendment prohibited the sentence. (*Apprendi, supra,* 530 U.S. at pp. 471, 484.) The court reasoned that due process and "associated jury protections extend, to some degree, 'to determinations that [go] not to a defendant's guilt or innocence, but simply [to] the length of his sentence.'" (*Id.* at p. 484.) On this basis, the court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and be proved beyond a reasonable doubt." (*Id.* at p. 490.)

The *Cunningham* court also considered its prior decision in *Blakely v. Washington* (2004) 542 U.S. 296. In *Blakely*, the defendant was convicted of second degree kidnapping, which carried a statutory maximum sentence of 10 years. (*Id.* at pp. 298-299.) Washington's Sentencing Reform Act stated that, if no facts beyond those reflected in the jury's verdict were found by the trial judge, a defendant could not receive a sentence above the standard range of 49 to 53 months. (*Id.* at pp. 299-300.) The Act permitted the court to exceed this standard range if it found "substantial and compelling reasons justifying an exceptional

sentence" based on a list of aggravating facts. (*Id.* at p. 300.) The court sentenced the defendant to 90 months after determining that he had acted with deliberate cruelty. (*Ibid.*)

Applying the *Apprendi* rule, the United States Supreme Court held that the sentence imposed in *Blakely* was unconstitutional. (*Blakely, supra,* 549 U.S. at pp. 303-304.) The court observed that the judge could not have sentenced the defendant above the standard range (49 to 53 months) without making the additional finding of fact that the defendant had acted with deliberate cruelty. (*Ibid.*) The court reasoned that, under the rule articulated in *Apprendi*, this additional fact was subject to the Sixth Amendment jury trial guarantee and should have been submitted to a jury for proof beyond a reasonable doubt. (*Ibid.*)

The state claimed that there was no *Apprendi* violation because the "relevant 'statutory maximum' [was] not 53 months, but the 10-year maximum for class B felonies . . . ." (*Blakely, supra,* 542 U.S. at p. 303.) The high court disagreed, stating, "[o]ur precedents make 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*." (*Ibid.*) Thus, when a court imposes a sentence based on any additional findings that the "verdict alone does not allow," the court exceeds its constitutional sentencing authority. (*Id.* at pp. 303-304.)

With these principles in mind, the *Cunningham* court determined that, in accord with *Blakely*, the middle term under

California's DSL was the relevant statutory maximum for constitutional purposes because the middle term, but not the upper term, could be imposed without the finding of any additional facts. (*Cunningham, supra,* 549 U.S. at p. 288.) The court thus held that the DSL violated the bright-line rule articulated in *Apprendi* because it allowed the imposition of the upper term based upon circumstances in aggravation found by a judge by a preponderance of the evidence and not by a jury beyond a reasonable doubt. (*Id.* at pp. 288-289.)

As a remedy for this constitutional problem, the *Cunningham* court invited California's Legislature either to change the DSL to require that a jury find any fact necessary to impose an upper term sentence or, in the alternative, to permit judges to "genuinely 'exercise broad discretion . . . within a statutory range' which, 'everyone agrees,' encounters no Sixth Amendment shoal." (*Cunningham, supra,* 549 U.S. at p. 294.)

C. California sentencing after *Cunningham*

In response to *Cunningham*, the Legislature passed Senate Bill No. 40 as urgency legislation, which amended section 1170, subdivision (b). The amendment eliminated the requirement of judicial fact finding to support a lower or upper term and granted judges the discretion to select any term within the statutory range that they found to be in the interest of justice. (Stats. 2007, ch. 3, § 2, eff. March 30, 2007.)

Additionally, in the wake of *Cunningham*, this Court considered how reviewing courts should evaluate for constitutional purposes sentences imposed under the previous

version of the DSL. (*Black II*, *supra*, 41 Cal.4th at pp. 805-807.) In *Black II*, this Court observed that the "constitutional requirement of a jury trial and proof beyond a reasonable doubt applies only to a fact that is 'legally essential to the punishment' that is, to 'any fact that exposes a defendant to a greater potential sentence' than is authorized by the jury's verdict alone." (*Id.* at p. 812.) This Court held that "as long as a single aggravating circumstance that renders a defendant *eligible* for the upper term sentence has been established in accordance with the requirements of *Apprendi* and its progeny, any additional fact finding engaged in by the trial court in selecting the appropriate sentence among the three available options does not violate the defendant's right to a jury trial." (*Ibid.*)

In other words, when at least one aggravating circumstance has been found according to Sixth Amendment requirements, the upper term sentence becomes the statutory maximum because the defendant is no longer "legally entitled" to the middle term sentence. (*Black II*, *supra*, 41 Cal.4th at p. 813.) Consequently, "as 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." (*Ibid.*)

This Court also addressed the scope of the "prior conviction exception" to the Sixth Amendment for these purposes, holding that the following facts do not require a jury determination beyond a reasonable doubt before they may support an increased sentence: that the defendant suffered a prior conviction; that the defendant's prior convictions were numerous or increasingly serious; that the defendant was on probation or parole at the time the offense was committed; and that the defendant performed unsatisfactorily while on probation or parole to the extent such unsatisfactory performance is established by the defendant's record of prior convictions. (*Black II, supra*, 41 Cal.4th at pp. 818-820; *People v. Towne* (2008) 44 Cal.4th 63, 80-82.)

Additionally, in *Sandoval*, this Court considered what harmless error standard applies when an upper term sentence was imposed under the former version of the DSL only on the basis of aggravating factors that did not comply with the constitutional requirements identified in *Cunningham*. (*Sandoval, supra,* 41 Cal.4th at pp. 838-839.) This Court held that the denial of a defendant's right to a jury trial in such circumstances was subject to harmless error review under *Chapman v. California* (1967) 386 U.S. 18. (*Sandoval,* at pp. 838-839.) As framed by the Court, the relevant inquiry is "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 upper term sentence." (*Id.* at p. 838.) In other words, "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." (*Id.* at p. 839.)

D. Recent amendments to the determinate sentencing law

Effective January 1, 2022, the Legislature again amended section 1170 by returning to a scheme under which the middle term is the presumptive sentence. (See Stats. 2021, ch. 731 (Senate Bill No. 567), § 1.3, adding § 1170, subd. (b)(1).) As relevant in this case, the statute now provides that "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)." (§ 1170, subd. (b)(1).) Paragraph (2) states that "[t]he 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." (§ 1170, subd. (b)(2).)[3] Notwithstanding that

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[3] The statute also specifies: "Except where evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law, upon request of a defendant, trial on the circumstances in aggravation alleged in the indictment or information shall be bifurcated from the trial of charges and enhancements. The jury shall not be informed of the bifurcated

(continued…)

limitation however, "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).)

STATEMENT OF THE CASE

A. Lynch's trial and sentence

Lynch and Jasmine Doe were in a dating relationship in early 2020. (Opinion 2.) On numerous occasions, Lynch hit Jasmine with his hands and several household objects such as a metal pole, a broom or mop, and a wooden table. (Opn. 2-3.)

Lynch was charged with two counts of assault with a deadly weapon (§ 245, subd. (a)(1); counts 1 & 2) and three counts of domestic violence (§ 273.5, subd. (a); counts 3, 4 & 5). (1CT 177-178; 252.) The assault with a wooden table charged in count 2 and the domestic violence crime charged in count 3 were based on the same act. (1CT 178; 7RT 719.) It was further alleged as to counts 3, 4, and 5 that Lynch had suffered prior convictions, including domestic violence and assault with a firearm (§ 245, subd. (a)(2)). (1CT 178-180.)

A jury convicted Lynch of all three counts of domestic violence (§ 273.5, subd. (a); counts 3, 4 & 5) and one count of the lesser included offense of simple assault (§ 240; count 2). (1CT 266-269.) A mistrial was declared as to count 1 due to a deadlocked jury. (1CT 257, 259, 261-262.)

(…continued)

allegations until there has been a conviction of a felony offense." (§ 1170, subd. (b)(2).)

During trial, Lynch stipulated that he had previously been convicted of two felony violations of domestic violence on April 9, 2015, and February 25, 2016. (1CT 206; 7RT 668.)

In a bifurcated proceeding, the trial court reviewed Lynch's certified prior records and found true that Lynch had suffered a prior conviction in 2016 for domestic violence and a prior strike conviction in 2018 for assault with a firearm. (2CT 314-316; 9RT 785-786.)[4] The prosecutor also submitted certified records for two prior felony convictions from 2011 for possession of a controlled substance for sale and failure to appear on a felony charge, as well as two misdemeanor convictions from 2018 for resisting and obstructing arrest. (2CT 308-376 [certified prior records].) These certified records, along with the probation report, established that Lynch had served multiple prior prison terms, had committed the present offenses while on parole, and had absconded three times while on parole. (1CT 284-297 [probation report]; 2CT 308-376 [certified prior records].)

Applying section 1170 prior to the recent amendment, the trial court sentenced Lynch to an aggregate term of 15 years 4 months. On the principal count, count 3, the court selected the upper term of five years, doubled to ten years under the Three Strikes Law. (1CT 300; 9RT 801.) It also imposed consecutive terms of 32 months each (one-third the middle term, doubled) for counts 4 and 5. (1CT 300; 9RT 801.) The sentence on the simple

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[4] The true finding on the prior domestic violence allegation increased the sentencing triad for Lynch's domestic violence offense to two, four, or five years. (§ 273.5, subd. (f)(1).)

assault charge in count 2 was stayed pursuant to section 654. (9RT 801.)

In imposing an upper term sentence for count 3, the trial court explained:

> I do think the crime involved great violence or other acts disclosing a high degree of cruelty, viciousness, or callousness. I mean, when you start striking people with table legs, extension cords, and other available—and broomsticks, that evidence is a high degree of cruelty and viciousness and callousness. Whether you call it great violence or just moderate violence, I think that's an aggravating characteristic.
>
> The Defendant was armed or used a weapon at the time of the commission of the crimes, multiple weapons that he had available to him.
>
> The Defendant has engaged in violent conduct which indicates a serious danger to society. His record amply evidences that.
>
> The Defendant's prior convictions are numerous.
>
> The Defendant has served prior prison terms. He was, in fact, on parole at the time this was committed. And as [the prosecutor] pointed out, he had just been released.
>
> And his prior performance on parole was unsatisfactory. He was on parole when he committed this, so clearly that is true.
>
> I do think the victim was particularly vulnerable. I won't even consider that she was pregnant but just—she was a vulnerable domestic violence victim. I recall the testimony where a store owner had to call to say this poor woman is out there afraid of getting beaten up. She was in a vulnerable situation, and she was also pregnant, so those are additional factors. I'm not really basing my decision on that, but I think that's clearly evident as well.

> And I don't really see any circumstances in mitigation. And so I do believe that he deserves the sentence recommended by Probation. The upper term I think is appropriate.

(9RT 799-801.)

B. The Court of Appeal's decision

The Court of Appeal affirmed in an unpublished, divided opinion. (Opn. 4-13.) The Court of Appeal agreed with the parties that the intervening amendments to section 1170 applied to Lynch's nonfinal case. (Opn. 5; Dis. Opn. 1.) The majority further concluded that any error under the new sentencing provisions was harmless. (Opn. 5.)

The majority began by observing that the trial court correctly relied upon two aggravating circumstances that complied with amended section 1170, subdivision (b). (Opn. 4-13.) First, the Court of Appeal majority determined that the jury had found true beyond a reasonable doubt the aggravating circumstance that Lynch "was armed or used a weapon" when he committed the domestic violence crimes since the jury instructions required that finding to support the domestic violence convictions. (Opn. 6; Cal. Rules of Court, rule 4.421(a)(2).)[5] Second, the majority concluded that the trial court had properly considered the certified records of Lynch's prior convictions (§ 1170, subd. (b)(3)) to determine that they were

[5] All further undesignated rule references are to the California Rules of Court.

numerous, which was a second aggravating circumstance (rule 4.421(b)(2)). (Opn. 6-8.)

The majority determined that the trial court's reliance upon the remaining six aggravating factors (rule 4.421(a)(1), (a)(3), (b)(1), (b)(3), (b)(4), & (b)(5)) did not comport with amended section 1170, subdivision (b)(2), because they had not been proven beyond a reasonable doubt nor stipulated to by Lynch. (Opn. 8.)

The majority concluded that the error was one of state law only because the Sixth Amendment was satisfied when at least one aggravating factor was found true in compliance with constitutional standards as articulated in *Cunningham*. (Opn. 9, fn. 3.) Applying the harmlessness test of *People v. Watson* (1956) 46 Cal.2d 818, the majority identified two questions relevant to the analysis in this case: whether there was a reasonable probability that the jury would have found true beyond a reasonable doubt any of the six aggravating factors relied upon by the sentencing court that did not comply with the new statute; and, setting aside any factors that it could not say would have been found true by the jury under the new statute, whether it is reasonably probable the sentencing court would have imposed a more lenient sentence. (Opn. 9-11.)

The majority determined that, based on the certified prior records and the probation report, the jury would have found true beyond a reasonable doubt that Lynch had served prior prison terms, that Lynch had just been released from prison and was on parole at the time he committed the crimes, and that Lynch's prior performance on parole was unsatisfactory. (Opn. 11-12.)

But the majority could not conclude that the jury would have found true beyond a reasonable doubt the facts underlying the three remaining aggravating factors: whether Lynch's crimes involved a high degree of cruelty, viciousness, and callousness; whether Lynch posed a serious danger to society; and whether the victim was particularly vulnerable. (Opn. 12.) These factual determinations were "subjective" and had been contested by Lynch at the sentencing hearing. (Opn. 12.)

Thus, the Court of Appeal majority concluded that five of the eight aggravating circumstances relied upon by the trial court had survived retroactive application of the amendments to section 1170, subdivision (b), and weighed in favor of the trial court's decision to impose the upper term. (Opn. 12-13.) The majority also observed that the trial court had placed "particular emphasis" on Lynch's poor performance on parole and prior convictions, "which it properly considered even under the new law." (Opn. 13.) Analogizing to this Court's decision in *People v. Price* (1991) 1 Cal.4th 324, 491-492, the Court of Appeal concluded that there was no reasonable probability that the trial court would have chosen a lesser sentence had it known it could not consider all eight aggravating factors because the improper factors did not appear to be determinative to the trial court's sentencing choice. (Opn. 13.)

In a dissenting opinion, one Court of Appeal justice concluded that the trial jury did not necessarily find beyond a reasonable doubt that Lynch was armed during the domestic violence crimes. (Dis. Opn. 1.) The dissenting justice further

concluded that it was reasonably probable that the sentencing court would have imposed a more favorable sentence. (Dis. Opn. 1.) He reasoned that the court had relied upon "multiple statements that were improper," and reversal is required when a reviewing court "'cannot determine whether the improper factor was determinative for the sentencing court.'" (Dis. Opn. 1.)

ARGUMENT

I. WHEN A TRIAL COURT IMPOSES AN UPPER TERM SENTENCE THAT DOES NOT COMPLY WITH AMENDED SECTION 1170, SUBDIVISION (B), PREJUDICE MUST BE ASSESSED UNDER A COMBINATION OF FEDERAL AND STATE STANDARDS

At the time the trial court sentenced Lynch in 2021, it correctly applied former section 1170, subdivision (b). The parties agree, however, that the subsequent amendments to section 1170, subdivision (b), apply retroactively to defendants, such as Lynch, whose judgments are not final. (See *In re Estrada* (1965) 63 Cal.2d 740, 745; see also *People v. Stamps* (2020) 9 Cal.5th 685, 699.) Thus, the issue in this case is whether any error resulting from a failure to comply with the new upper term sentencing provisions was harmless, so that remand for resentencing is not required. The parties disagree about the appropriate harmless-error standard and about whether the record here shows prejudice.

A sentencing error under amended section 1170, subdivision (b), may derive from federal or state law. Thus, evaluation of any such error must begin with a determination of the type of error at issue.

The first inquiry is whether the alleged sentencing error violates the Sixth Amendment. Except for the fact of a prior

conviction, the Sixth Amendment requires that a sentence be authorized by facts that were found by a jury beyond a reasonable doubt or stipulated to by a defendant. (*Cunningham, supra,* 549 U.S. at p. 274 [jury-trial right forbids sentencing scheme allowing court to impose sentence above statutory maximum "based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant"]; *People v. Towne, supra,* 44 Cal.4th at pp. 80-82 [recidivism-related factors exempt from Sixth Amendment jury-trial guarantee].) Section 1170, subdivision (b)(2), states that "[t]he 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 . . . ." This statutory language governing when an upper term is authorized is the same in all material respects as the statutory language of California's former scheme that stated, "the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." (§ 1170, former subdivision (b); *Cunningham*, at p. 277.) This Court held in *Black II* that, for Sixth Amendment purposes, the former statute authorized an upper term sentence on the basis of at least one aggravating circumstance. (*Black II, supra,* 41 Cal.4th at pp. 812; accord, *Sandoval, supra,* 41 Cal.4th at pp. 838-839; *Towne,* at p. 75.) There is no material distinction between the former and current governing statutes that would require a different result now.

This Court's decision in *Black II* explains why, under a statute like California's, the identification of a single aggravating factor in compliance with the Sixth Amendment satisfies the federal constitution. There, the Court observed that *Apprendi* and its progeny required that any findings "legally essential to the punishment" be made by a jury, but they did not disapprove the role of judicial factfinding within the range that is constitutionally authorized. (*Black II*, *supra*, 41 Cal.4th at pp. 812-813.) "Accordingly, 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." (*Id*. at p. 813.)

The Court observed that, under California's statutory scheme directing that "the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime," the existence of a single aggravating circumstance was constitutionally sufficient to make the defendant eligible for the upper term. (*Black II*, *supra*, 41 Cal.4th at pp. 808, 813.) "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.'" (*Id.* at p. 813)

The Court rejected the defendant's argument that a single aggravating factor did not necessarily authorize an upper term sentence because the sentencing court's ultimate decision would depend on its consideration of all the relevant facts and its weighing of aggravating circumstances against mitigating circumstances. (*Black II*, *supra*, 41 Cal.4th at pp. 814-816.) The Court observed that "*Cunningham* and its antecedents do not prohibit a judge from making the factual findings that lead to the selection of a particular sentence." (*Id.* at p. 814.) It further observed that aggravating factors "serve two analytically distinct functions in California's current determinate sentencing scheme. One function is to raise the maximum permissible sentence from the middle term to the upper term. The other function is to serve as a consideration in the trial court's exercise of its discretion in selecting the appropriate term from among those authorized for the defendant's offense." (*Id.* at pp. 815-816.) For constitutional purposes, the question is "whether the trial court's fact finding increased the sentence that otherwise *could* have been imposed, not whether it raised the sentence above that which otherwise *would* have been imposed." (*Id.* at p. 815.) "The court's factual findings regarding the existence of additional aggravating circumstances may increase the likelihood that it actually will impose the upper term sentence, but these findings do not themselves further raise the authorized sentence beyond the upper term." (*Ibid.*)

The same analysis applies with equal force to California's current scheme under which the sentencing 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 . . . ." (§ 1170, subd. (b)(2).) It is true that the current version of the statute requires that aggravating circumstances "justify" imposition of an upper term, while the prior version mandated a middle term unless "there are" circumstances in aggravation. As this Court explained in *Sandoval*, however, the former scheme required the trial court to state reasons for imposing the upper term, and its sentencing choice was subject to review for abuse of discretion. (*Sandoval*, *supra*, 41 Cal.4th at p. 847.) In other words, under the former statute, at least as judicially interpreted, circumstances in aggravation had to justify imposition of the upper term. But the sentencing court's evaluation of the aggravating and mitigating factors did not, for that reason, implicate the federal Constitution. (*Black II*, *supra*, 41 Cal.4th at pp. 814-816.) Likewise under the current version of the statute, a court's evaluation of aggravating and mitigating factors in determining whether an upper term is "justified" remains a matter of state law so long as at least one aggravating factor satisfies Sixth Amendment requirements. Indeed, Lynch does not argue otherwise.

Instead, without addressing the relevant current statutory language that is parallel to the language addressed in *Black II*, Lynch argues that *Black II*'s analysis does not control here

because section 1170, subdivision (b), now requires that all aggravating factors be proved to a jury beyond a reasonable doubt, whereas the former scheme permitted a court to find aggravating factors on a preponderance standard. (OBM 30-33, 45-46, relying on *People v. Lopez* (2022) 78 Cal.App.5th 459, 467.) Lynch's argument confuses state statutory requirements that exceed federal constitutional standards with what the Sixth Amendment requires as a constitutional floor.

The pertinent question is: At what minimum point does the statutory scheme authorize an upper term sentence for constitutional purposes? For the reasons explained in *Black II*, an upper term is legally authorized in California by the finding of at least one aggravating circumstance. That minimum finding must therefore comply with Sixth Amendment requirements. But any additional factfinding and weighing of aggravating and mitigating circumstances does not implicate the federal Constitution. This is true even if the Legislature chooses, as it has done through Senate Bill No. 567, to impose additional standard-of-proof requirements for findings that a sentencing court may consider. Thus, when at least one aggravating circumstance is found under section 1170, subdivision (b)(2), in accordance with *Apprendi* and its progeny, there is no Sixth Amendment violation. Any further statutory error is evaluated under state law only.[6]

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[6] As will be explained below (see Arg. III, *post*), even if none of the aggravating circumstances relied upon by the trial court satisfied the Sixth Amendment, a reviewing court would apply (continued…)

As to any additional aggravating factors relied upon by the sentencing court in contravention of section 1170, subdivision (b)(2), then, the reviewing court must consider whether the error was prejudicial under the state harmless-error standard. (*Dunn, supra,* 81 Cal.App.5th at p. 409 [though one aggravating circumstance must be reviewed under *Chapman* for Sixth Amendment purposes, remaining aggravating circumstances "involve only a state-created right to a jury trial that must be reviewed pursuant to *Watson*"].) Specifically, the inquiry is "whether there is a reasonable probability that the jury would have found any remaining aggravating circumstance(s) true beyond a reasonable doubt." (*Id.* at p. 410.) If it is reasonably probable that all the additional aggravating circumstances relied upon by the trial court would have been found true if submitted

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(…continued)

the federal harmless-error standard and ask whether the jury would have found true beyond a reasonable doubt at least one aggravating circumstance, or whether at least one aggravating circumstance satisfied the prior-conviction exception. (*People v. Dunn* (2022) 81 Cal.App.5th 394, 409, review granted Oct. 12, 2022, S275655, citing *Washington v. Recuenco* (2006) 548 U.S. 212, 220 [*Chapman* test is compelled when element of offense or sentencing factor allowing sentence above statutory maximum is not presented to jury]; see also *Sandoval*, *supra*, 41 Cal.4th at pp. 838-839; *People v. Zabelle* (2022) 80 Cal.App.5th 1098, 1113.) If so, then again the federal Constitution would be satisfied and any further error would be assessed for prejudice under state law standards. In this case, however, Lynch admits that at least one aggravating circumstance that the trial court used in imposing his upper term sentence satisfied the Sixth Amendment. (OBM 40-41.)

to the jury in accordance with the statute, then imposition of the sentence without following the terms of section 1170, subdivision (b), was harmless. (*Dunn, supra,* 81 Cal.App.5th at p. 410.) If not, the reviewing court must make an additional inquiry: whether there is a reasonable probability that the trial court would have imposed a sentence other than the upper term in light of the aggravating circumstances that it could have properly considered under the new statutory scheme. This follows as a matter of longstanding authority applying the *Watson* standard when a sentencing court has relied on an invalid aggravating circumstance. (See *Price*, *supra*, 1 Cal.4th at pp. 491-492; *People v. Avalos* (1984) 37 Cal.3d 216, 233; see also *Dunn*, at p. 410; *Zabelle, supra,* 80 Cal.App.5th at pp. 1112-1113.)[7]

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[7] Lynch suggests that, at least in cases where an upper term sentence was imposed prior to the statutory amendment, the proper state-law inquiry governing the court's exercise of discretion in selecting the sentence would be the one articulated in *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391: whether the record "clearly indicates" that the trial court would have reached the same sentencing conclusion had been aware of the amendments to section 1170, subdivision (b). (See OBM 50; see also *People v. Lewis* (Mar. 2, 2023, No. E076449) 2023 WL 2325182, at p. *8-9.) The "clearly indicates" standard applies when a court was unaware of later-conferred sentencing discretion because a defendant is entitled to a sentencing decision made with "informed discretion." (*Gutierrez,* at p. 1391.) In the context of the particular error in this case, however, the question is whether the court would have exercised its discretion differently excluding any procedurally infirm aggravating factors. That is not the same sort of lack of awareness of discretion that would call for the "clearly indicates" standard and is materially indistinguishable from other contexts where a sentencing court's

(continued…)

II. THE SENTENCING ERROR WAS HARMLESS IN THIS CASE

Applying the proper harmless-error test, as described above, to the facts of this case, reversal is not required.

A. Lynch's sentence complies with the Sixth Amendment because at least one aggravating circumstance was found in accord with federal constitutional standards

Lynch's upper term sentence comports with the Sixth Amendment because the trial court relied upon the following two aggravating circumstances that were either proven to the jury beyond a reasonable doubt or fell into the Sixth Amendment's prior-conviction exception: (1) Lynch had numerous prior convictions, and (2) Lynch used a weapon during the commission of the crime.

1. Prior convictions

First, as Lynch recognizes (OBM 41-42), he has numerous prior convictions (rule 4.421(b)(2)), including for: domestic violence in 2016; assault with a firearm in 2018; possession of a controlled substance for sale and failure to appear on a felony charge in 2011; and two misdemeanor convictions for resisting and obstructing arrest in 2018. (2CT 308-376; 9RT 785-786.) In making this finding, the trial court permissibly relied upon the certified records of Lynch's prior convictions. (See also *Apprendi,*

(…continued)

reliance on an aggravating factor later determined to be invalid is reviewed under *Watson*. (See *Lewis*, at p. *13 (conc. opn. of Raphael, J.).) In any event, reversal would not be required here even under the "clearly indicates" standard for the reasons discussed in the next argument.

supra, 530 U.S. at p. 490 [other than fact of prior conviction, any fact increasing penalty beyond "prescribed statutory maximum" must be found true beyond reasonable doubt by jury"].)[8] This Court has held that "[t]he determinations whether a defendant has suffered prior convictions, and whether those convictions are 'numerous or of increasing seriousness' ([rule 4.421(b)(2)]), require consideration of only the number, dates, and offenses of the prior convictions alleged" and therefore fall within the Sixth Amendment's prior-conviction exception (*Black II, supra,* 41 Cal.4th at pp. 819-820.) Thus, Lynch's criminal history, as reflected in the certified prior records, established an aggravating circumstance that independently satisfied Sixth Amendment requirements and rendered him ineligible for the upper term. (*Id.* at p. 820.)

2. Lynch used a weapon during the commission of the crime

Second, the jury's verdict establishes that it found true beyond a reasonable doubt that Lynch committed domestic violence in count 3 with the use of a weapon. (Rule 4.421(a)(2).) The trial court therefore permissibly relied upon this aggravating circumstance in accord with federal constitutional requirements.

The jury was given a unanimity instruction (CALCRIM No. 3502) that prohibited it from finding Lynch guilty of domestic violence in count 3 unless all jurors agreed that the People had proved that Lynch "violated section 273.5, subdivision (a) on or

[8] This also satisfied the revised statutory prior-conviction exception under section 1170, subdivision (b)(3).

about May 24, 2020, *resulting from the use of a wooden table* (count 3) . . . ." (1CT 252, italics added.) The instruction further informed the jury that "[e]vidence 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." (1CT 252, italics added.)

It is presumed that jurors understand and follow their instructions. (*People v. Rojas* (2015) 237 Cal.App.4th 1298, 1305-1306.) Considering that presumption, the jury, following the instructions it was given, must have necessarily determined beyond a reasonable doubt that Lynch used the wooden table as a weapon during the commission of the crime. (Rule 4.421(a)(2).) Indeed, the jury was not permitted to find Lynch guilty in count 3 without agreeing that he had committed this crime in the specific manner described—"resulting from the use of a wooden table." (1CT 252.) Consequently, this aggravating factor was proven in compliance with federal constitutional standards.

Lynch claims that his crimes did not involve the use of a weapon and therefore the jury made no such finding beyond a reasonable doubt. (OBM 39-40.) In support of this contention, Lynch argues that a domestic violence crime does not require a finding by the jury that a weapon was used. (OBM 39-40, citing § 273.5, subd. (a); 1CT 247-248 [CALCRIM No. 840].) Lynch also points to the fact that the jury found him not guilty of the related assault-with-a-deadly-weapon charge in count 2 and instead convicted him of simple assault, which also does not require the finding of the use of a weapon. (OBM 39; § 240.)

Lynch's argument fails to consider the instructions that the jury received and presumably followed in this case. Even though section 273.5 does not generically require the use of a weapon as an element of the crime, the CALCRIM No. 3502 instruction given in this case prohibited the jurors from finding Lynch guilty of domestic violence in counts 3, 4, and 5 unless they all agreed that he had committed the crimes in the specific manners described (with an extension cord, metal pole, and wooden table). (1CT 252.) Thus, by convicting Lynch of the three domestic violence charges, the record demonstrates that the jurors necessarily found that Lynch used the weapons described in the jury instruction during the commission of the crimes beyond a reasonable doubt.

The fact that the jury convicted Lynch of simple assault instead of assault with a deadly weapon in count 2 does not demonstrate that the jurors were unable to decide whether a weapon was used. The prosecution explained to the jury that it had charged Lynch with assault with a deadly weapon in count 2 and domestic violence in count 3 based on the same incident with the wooden table because "this particular item in the way that it was being used raises the level" of the offense to assault with a deadly weapon. (7RT 719.) The prosecutor reiterated that the domestic violence and assault with a deadly weapon charge were "two different things, and that's the way charging works." (7RT 719.)

Considering the unanimity instruction, closing argument, and jury verdicts, it is apparent that the jury understood that it

could consistently convict Lynch of domestic violence with the use of the wooden table in count 3 but not of the assault with a deadly weapon in count 2. These verdicts can be reconciled because the jury likely found that the wooden table was not a deadly weapon for purposes of count 2, but that Lynch nonetheless used it to cause a traumatic condition to the victim in count 3. As a result, the record in this case establishes that the jury indeed found beyond a reasonable doubt that Lynch used a weapon (the wooden table) in count 3. The trial court's reliance upon this aggravating factor in making its sentencing choice therefore complied with the federal Constitution.

B. The additional state-law error was harmless because there is no reasonable probability the jury would have rejected the remaining aggravating circumstances

The trial court's reliance upon the two aforementioned aggravating factors when it imposed the upper term sentence eliminated any federal constitutional issue and also satisfied the terms of amended section 1170. The additional six aggravating circumstances, however, were not proven in conformance with amended section 1170, subdivision (b): (1) that the 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)); (3) that Lynch's conduct and prior record indicated that he was a serious danger to society (rule 4.421(b)(1)); (4) that Lynch previously served prior prison terms (rule 4.421(b)(3)); (5) that Lynch was on parole at the time he committed the present offenses (rule 4.421(b)(4)); and (6) that Lynch performed unsatisfactorily while on parole (rule

4.421(b)(5)). This Court must therefore determine whether there is a reasonable probability that the jury would have rejected these aggravating factors had the prosecution sought to prove them to the jury beyond a reasonable doubt under the terms of amended section 1170, subdivision (b). (*Dunn, supra,* 81 Cal.App.5th at pp. 409-410; *Zabelle, supra,* 80 Cal.App.5th at p. 1113.) There is no such reasonable probability.

1. Crime of great violence and violent conduct

First, there is no reasonable probability that the jury would have rejected the aggravating circumstances that Lynch committed a crime of great violence (rule 4.421(a)(1)) and that Lynch engaged in violent conduct (rule 4.421(b)(1)).

The record demonstrates that Lynch physically abused Jasmine on a near-daily basis for months in early 2020. (5RT 451.) In February of that year, Lynch punched Jasmine in the face; he also kicked her and hit her repeatedly with a metal pole used to open and close curtains. (5RT 363-364; 7RT 650.) In that same month, Lynch kicked and hit Jasmine while she was not feeling well and was newly pregnant with Lynch's baby. (5RT 381.) In late February or early March 2020, Lynch kicked Jasmine and hit her repeatedly with an extension cord, leaving a deep, dark bruise on her back and another on her leg. (5RT 371, 457; 7RT 650.) On May 24, 2020, Lynch physically abused Jasmine until he was interrupted by her brother, who had arrived to pick up Jasmine for a barbeque. (5RT 393-394, 403; 6RT 540.) Around mid-May 2020, Lynch beat Jasmine with a metal broom or mop and repeatedly hit her with a wooden table

to the point where the table leg broke off; Lynch continued to hit Jasmine with the leg of the table. (5RT 439-440, 442, 444; 7RT 650-651, 656.) Jasmine had bruises all over her body from these incidents. (7RT 641.) Finally, on June 9, 2020, Jasmine woke up from a nap to find Lynch standing over her. (6RT 514-515.) Lynch took a gun from underneath his shirt and placed it on the nightstand facing Jasmine; he then picked it up and paced around the room. (6RT 514-515.)

Based on these facts, there is no reasonable probability the jury would have rejected the aggravating circumstances that Lynch committed a crime of great violence (rule 4.421(a)(1)) or that Lynch engaged in violent conduct (rule 4.421(b)(1)) had those circumstances been presented to it in accordance with section 1170, subdivision (b). Accordingly, the trial court's error in relying upon these aggravating circumstances without a jury finding under the new statute was harmless.

2. Particularly vulnerable victim

Second, there is no reasonable probability the jury would have rejected that Jasmine was "particularly vulnerable." (Rule 4.421(a)(3).) "'Particularly . . . means in a special or unusual degree, to an extent greater than in other cases. Vulnerability means defenseless, unguarded, unprotected, accessible, assailable, one who is susceptible to the defendant's criminal act.'" (*People v. Loudermilk* (1987) 195 Cal.App.3d 996, 1007.) Jasmine was, emotionally and physically, particularly susceptible to abuse. Jasmine and Lynch lived together, and Lynch had constant access to Jasmine, who became pregnant with his child

in early 2020. (5RT 381.) Indeed, Lynch abused her frequently, even when she tried to talk through the issues. (5RT 392.) Based on this evidence, there is no reasonable probability the jury would have rejected the aggravating circumstance that Jasmine was "particularly vulnerable" (rule 4.421(a)(3)) had that circumstance been presented to it in accord with section 1170, subdivision (b). Accordingly, the trial court's error in relying upon this aggravating circumstance was harmless.

3. Prior prison terms and parole

Third, there is no reasonable probability the jury would have rejected that Lynch had previously served prior prison terms (rule 4.421(b)(3)) or that he was on probation or parole at the time he committed the present offenses (rule 4.421(b)(4)). This information was readily ascertainable from Lynch's prior criminal history and was not contested by Lynch at the sentencing hearing. (9RT 799-801.) The trial court's reliance on this aggravating circumstance was therefore harmless.

4. Prior performance on parole

Fourth, there is no reasonable probability that the jury would have rejected that Lynch's prior performance on parole was unsatisfactory (rule 4.421(b)(5)). That Lynch was previously on parole when he committed new offenses—and was subsequently convicted of them—plainly shows that he performed unsatisfactorily for purposes of this aggravating factor. (See *Towne, supra,* 44 Cal.4th at pp. 82-83.) Lynch did not contest this point at the sentencing. (9RT 799-801.) Accordingly, the

trial court's reliance on this aggravating circumstance was harmless.

C. There is also no reasonable probability the trial court would have imposed a sentence other than the upper term even had it relied on fewer aggravating circumstances

In the event this Court disagrees that the jury would have found all the aggravating circumstances relied upon by the trial court true beyond a reasonable doubt, then the final question must be asked: whether there is a reasonable probability that the trial court would have imposed a sentence other than the upper term in light of the aggravating circumstances that the court could properly consider. Again, the answer is no.

As a baseline, and as explained *ante*, the trial court properly relied upon two of the eight aggravating factors that were proven in conformance with amended section 1170, subdivision (b). First was Lynch's extensive prior convictions, including a variety of felonies and misdemeanors. (9RT 799-801.) Second was the fact that Lynch had used a weapon, a table leg, during the commission of the crime. (9RT 799-801.) The trial court underscored both points during the sentencing hearing. (9RT 799-801.) Even if the trial court could have relied on only some, but not all, of the additional aggravating circumstances it identified—indeed, even if it could have relied only on the two properly proven aggravating circumstances—the record shows that the trial court still would have made the same decision to impose the upper term because, under the new statute, "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).)

There were no factors in mitigation presented by Lynch at the sentencing hearing. (9RT 800.) Although Lynch had the opportunity and incentive to argue mitigating circumstances based on the factors available in rule 4.423, he failed to do so. Moreover, statements made by the trial court at the sentencing hearing demonstrate that it would have imposed the upper term sentence even if it could not consider all eight aggravating circumstances. Specifically, the trial court stated, "I do believe that [Lynch] deserves the sentence recommended by probation. The upper term I think is appropriate." (9RT 800.) These statements reflect the court's view that Lynch deserved the upper term sentence in the interests of justice. (See former § 1170, subd. (b) [choice of the lower, middle, or upper term rested "within the sound discretion of the court," allowing court to "select the term which, in the court's discretion, best serves the interests of justice"].)

Thus, even if one or more of the aggravating circumstances could not have permissibly been relied upon by the trial court, the record here discloses no reasonable probability that its sentencing determination would have been any different. (See *Price*, *supra*, 1 Cal.4th at pp. 491-492 [no reasonable probability of different sentence despite invalid aggravating factors, in light of three remaining "very powerful" aggravating factors and no mitigating factors]; *Avalos*, *supra*, 37 Cal.3d at p. 233 [no reasonable probability of different sentence because improper

dual use of facts "was not determinative" in court's sentencing decision].)[9]

III. IMPOSITION OF AN UPPER TERM SENTENCE WHEN NO AGGRAVATING CIRCUMSTANCES RELIED UPON BY THE COURT WERE PROPERLY FOUND UNDER SECTION 1170, SUBDIVISION (B), IS REVIEWABLE FOR HARMLESS ERROR

Lynch raises an additional issue in his opening brief that is not presented by this case. He advocates for automatic reversal in situations when a trial court has imposed an upper term sentence without the support of any aggravating circumstances that were proved as now required by section 1170, subdivision (b)(2). (OBM 27-42.)

The Court need not reach this issue. As Lynch concedes, the trial court relied on his prior convictions to support his upper term sentence, which complied with amended section 1170, subdivision (b). (OBM 40-41.) The facts in Lynch's case therefore implicate the issue of which harmless error standard applies when only some of the aggravating circumstances relied upon by a sentencing court to support an upper term were found in compliance with section 1170, subdivision (b)(2). And that is the question presented by Lynch's petition for review. It is not necessary for the Court to reach the broader issue advanced by Lynch to resolve this appeal.

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[9] Given the absence of mitigating circumstances and the court's statements at sentencing, it can also be said that the record clearly indicates the court would have imposed the same upper term sentence even had it been permitted to rely on fewer aggravating circumstances. (See fn. 7, *ante*.)

In any event, Lynch's argument is unsound. He argues that a sentence based on aggravating factors that entirely fail to comply with the new jury-trial requirement is "unauthorized." (OBM 27-30.) The "unauthorized sentence" doctrine is an exception to waiver or forfeiture. (*In re G.C.* (2020) 8 Cal.5th 1119, 1129-1130.) To the extent the doctrine is relevant to Lynch's harmless-error argument, such a sentence is not unauthorized as that term has been used in the forfeiture context. "[A] sentence is generally 'unauthorized' when it could not lawfully be imposed under any circumstance in the particular case. Appellate courts are willing to intervene in the first instance because such error is 'clear and correctable' independent of any factual issues presented by the record at sentencing." (*People v. Scott* (1994) 9 Cal.4th 331, 354.) That is different from a sentence that is designated by statute but that was imposed in violation of statutory or constitutional procedure. An upper term sentence is within statutory bounds under section 1170, subdivision (b); Lynch's complaint focuses only on the procedure a court must follow in imposing that sentence. The scenario is not one in which the sentence "could not lawfully be imposed under any circumstance in the particular case." (See, e.g., *People v. Anderson* (2020) 9 Cal.5th 946, 961-962 [imposition of unpleaded sentence enhancement not "unauthorized sentence"]; *People v. Rivera* (2019) 7 Cal.5th 306, 348 [fines imposed in excess of statutory cap].)

In any event, whether or not labeled "unauthorized," it is well established that the particular type of error of which Lynch

complains is subject to review for prejudice. Constitutional error in failing to submit essential facts to a jury under the *Apprendi* line of cases has long been held amenable to harmless-error analysis. (*Recuenco, supra,* 548 U.S. at pp. 219-220.) Lynch nonetheless analogizes the lack of a jury finding on an aggravating circumstance necessary to support an upper term sentence to the lack of a jury finding on an element of a charged offense. (See OBM 25, 28, 33-37.) And, appearing to rely on the requirement in section 1170, subdivision (b), that all aggravating factors be submitted to a jury (or fall into the exception for prior convictions) (OBM 30-31), he suggests that imposition of an upper term when no aggravating circumstances have been found in compliance with the new statutory requirements would amount to a directed verdict (OBM 25, 33-34).

It is true that, for Sixth Amendment purposes, the *Apprendi* line of cases rejects any analytical distinction between the "elements" of a crime and other facts that are essential to authorize a particular sentence. (See *Recuenco*, *supra*, 548 U.S. at pp. 219-220.) But precisely because elements and aggravating factors are on equal footing for Sixth Amendment purposes, even the complete failure to use permissibly-found aggravating factors would mean that only *some* of the constitutionally required facts necessary to support the sentence were missing—the remaining facts having been found by the jury in returning its guilty

verdict.[10] And it is well settled that the absence of a jury finding on one or more elements of an offense is subject to harmless error review. (See *Neder v. United States* (1999) 527 U.S. 1, 8-15; *People v. Merritt* (2017) 2 Cal.5th 819, 830; *People v. Mil* (2012) 53 Cal.4th 400, 417; *People v. Flood* (1998) 18 Cal.4th 470, 490.)[11]

Lynch further alludes to a lack-of-pleading theory of structural error, arguing that "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." (OBM 29, italics added.) He relies in particular on *People v. Hernandez* (1988) 46 Cal.3d 194. The reliance is misplaced. (OBM 29.) *Hernandez* centrally involved a failure to satisfy pleading-and-proof requirements for enhancement allegations. (See *Hernandez*, *supra*, 46 Cal.3d at p. 207; see also *Anderson*, *supra*, 9 Cal.5th at p. 953 [as a rule, sentence enhancements "'shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of

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[10] This would be true even if the Constitution, rather than state statutory law, compelled *every* aggravating circumstance to be found in conformity with the Sixth Amendment.

[11] There is no merit to Lynch's argument that such harmless-error review would impermissibly supplant required jury factfinding with judicial factfinding. (OBM 33-35.) That view was expressly rejected by the United States Supreme Court in *Neder*. (See *Neder*, *supra*, 527 U.S. at p. 11; see also *id*. at pp. 37-39 (dis. opn. of Scalia, J.).)

fact"']; § 1170.1, subd. (e).) Section 1170, subdivision (b), though requiring aggravating circumstances to be proved to a jury beyond a reasonable doubt, contains no similar pleading requirement. More to the point, however, a failure to properly plead is subject to harmless error analysis. (See Pen. Code, § 960; *Anderson*, *supra*, 9 Cal.5th at p. 965.) So the argument does not advance Lynch's structural-error claim even if a pleading requirement applied to aggravating circumstances.

Insofar as *Hernandez* also held that the removal of an essential element of a charge from the jury's consideration—as distinguished from misinstruction on an element—is not amenable to harmless-error review (*Hernandez*, *supra*, 46 Cal.3d at p. 210), that holding cannot be squared with later authority on the same point. (See *Neder*, *supra*, 527 U.S. at pp. 8-15; *Merritt*, *supra*, 2 Cal.5th at p. 830; *People v. Mil*, *supra*, 53 Cal.4th at p. 417.)

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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March 14, 2023

CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF ON THE MERITS uses a 13 point Century Schoolbook font and contains 9,819 words.

ROB BONTA
Attorney General of California

/S/ ERIN DOERING

ERIN DOERING
Deputy Attorney General
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March 14, 2023

DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: **People v. Lynch**
No.: **S274942**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On March 14, 2023, I electronically served the attached ANSWER BRIEF ON THE MERITS by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on March 14, 2023, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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(1) Courtesy Copy for Counsel's Client

See Next Page

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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on March 14, 2023, at Sacramento, California.

C. D'Arcangelo	***/s/ C. D'Arcangelo***
Declarant	Signature

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STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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Case Number: **S274942**
Lower Court Case Number: **C094174**

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