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Supreme Court of California
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

DEANDRE LYNCH,

Defendant and Appellant.

S274942

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

APPELLANT'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page

APPELLANT'S REPLY BRIEF ON THE MERITS 1

TABLE OF CONTENTS 2

TABLE OF AUTHORITIES 4

ARGUMENT 7

I. In Every Case Involving Error under Section 1170, Subdivision (b), As Amended By SB 567, The First Step Must be To Determine Whether Any Facts Underlying the Aggravating Circumstances Were Proved True as Statutorily Required. 9

   A. Before SB 567, California has never had a sentencing scheme that requires a jury trial before imposition of the upper term. 10

   B. Under amended section 1170, subdivision (b), an upper term without any properly proven aggravating facts is an unauthorized sentence; an unproven fact that raises the statutory maximum is not "merely" an unproven element. 14

II. The Error In This Case Was Not Harmless. 18

   A. The unanimity instruction cannot be used to show a jury finding of appellant's use of a weapon. 19

   B. The error should be examined for prejudice under the *Chapman,* not *Watson,* standard. 22

   C. Even under the *Watson* standard of prejudice, the error is not harmless. 26

      1. The reviewing court may not engage in judicial factfinding. 26

      2. If review for prejudice is under *Watson,* and if the reviewing court may engage in judicial factfinding, the prosecution cannot show that a jury would have found all six of the

remaining aggravating factors true beyond a reasonable doubt. 28

3. If review for prejudice is under *Watson*, the reviewing court should solely determine whether there is a reasonable probability that the trial court would have imposed a sentence other than the upper term with the properly proved factors. 31

CONCLUSION 33

CERTIFICATE OF LENGTH 34

DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY PLACEMENT AT PLACE OF BUSINESS FOR COLLECTION AND DEPOSIT IN MAIL 35

TABLE OF AUTHORITIES

Page

CASES

Apprendi v. New Jersey (2000) 530 U.S. 466 .... passim

Blakely v. *Washington* 542 U.S. 296 24

Chapman v. California (1967) 386 U.S. 296 .... passim

Cole v. Arkansas (1948) 333 U.S. 196 .... 17, 25

Cunningham vs. California (2007) 549 U.S. 270 .... passim

Descamps v. United States (2013) 570 U.S. 254 27

In re Birdwell (1996) 50 Cal.App.4th 926 15

Mathis v. United States (2016) 579 U.S. 500 27

Neder v. United States (1999) 527 U.S. 1 .... 14, 15, 16, 28

Patterson v. New York (1977) 432 U.S. 197 23

People v. Anderson (2020) 9 Cal.5th 946 21

People v. Berdoll (2022) 85 Cal.App.5th 159 12

People v. Black (2007) 41 Cal.4th 799 .... passim

People v. Breverman (1998) 19 Cal.4th 142 17

People v. Dunn (2022) 81 Cal.App.5th 394 .... 13, 26

People v. Epps (2001) 25 Cal.4th 19 30

People v. Flood (1998) 18 Cal.4th 470 14

People v. Flores (2022) 75 Cal.App.5th 495 12

People v. Gallardo (2017) 4 Cal.5th 120 27

People v. Hernandez (1988) 46 Cal.3d 194 .... 15, 17, 21

People v. Lewis (2023) 88 Cal.App.5th 1125 .... 13, 32

People v. Lopez (2022) 78 Cal.App.5th 459 12

People v. Merritt (2017) 2 Cal.5th 819 14

People v. Mil (2012) 53 Cal.4th 400 14

People v. Milosavljevic (2010) 183 Cal.App.4th 640 21

People v. Pantaleon (2023) 89 Cal.App.5th 932 27

People v. Rivera (2019) 7 Cal.5th 306 23

People v. Ross (2022) 86 Cal.App.5th 1346 13

People v. Sandoval (2007) 41 Cal.4th 825 ....passim

People v. Scott (1994) 9 Cal.4th 331 20

People v. Seel (2004) 34 Cal.4th 535 .... 16, 17

People v. Sengpadychith (2001) 26 Cal.4th 316 25

People v. Towne (2008) 44 Cal.4th 63 27

People v. Wandrey (2022) 80 Cal.App.5th 962 13

People v. Watson (1956) 46 Cal.2d 818 ....passim

People v. Whitmore (2022) 80 Cal.App.5th 116 13

People v. Zabelle (2022) 80 Cal.App.5th 1098 13

Rita v. United States (2007) 551 U.S. 338 23

State v. Ahearn (1983) 307 N.C. 584 32

State v. Butterfield (2019) 10 Wn. App. 2d 399 15

United States v. Martin Linen Supply Co. (1977) 430 U.S. 564 ....17, 25

STATUTES

Penal Code § 1170 ....passim

Penal Code § 273.5 20

OTHER AUTHORITIES

Senate Bill 567 ....passim

RULES

California Rules of Court Rule 4.421 .... 26, 29, 30

CONSTITUTIONAL PROVISIONS

US Constitution 6th Amendment ....passim

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

APPELLANT'S REPLY BRIEF ON THE MERITS

ARGUMENT

Senate Bill No. 567 ("SB 567") (2021 Stats. ch. 731 § 1.3) made two dramatic changes to California's Determinate Sentencing Law ("DSL"). First, it once again made the middle term the presumptive maximum term, requiring imposition of the upper term to be supported by aggravating facts beyond the elements of the offense of conviction. (Pen. Code,[1] § 1170, subd. (b)(1)-(2).) Second, SB 567 amended the DSL so that, for the first time in its history, the DSL prohibits the sentencing court from finding the facts, other than the fact of a prior conviction, needed to impose the upper term, in the absence of the waiver of a right to a jury trial. (§ 1170, subd. (b)(1)-(3).)

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

Respondent's brief is based on the theory that SB 567 simply returned the DSL to what it was before it was found to be unconstitutional by the United States Supreme Court in *Cunningham vs. California* (2007) 549 U.S. 270. (See *Respondent's Answer Brief on the Merits* (*RABM*), pp. 8-9, 25 [asserting "[t]here is no material distinction between the former and current governing statutes"].)

This contention ignores the second of the two fundamental changes made to section 1170: the right to a jury trial on aggravating facts, other than prior convictions, used to impose the upper term. (§ 1170, subd. (b)(2).)

If the trial court relied only on facts that violate section 1170, the upper term sentence is plainly unauthorized by the terms of the statute and must be reversed.

Additionally, since the use of unproven aggravating facts violates not only amended section 1170, subdivision (b), but also the defendant's Sixth Amendment right to a jury trial, the question of prejudice in cases in which the trial court relies on both proper and improper factors in imposing the upper term must be analyzed under *Chapman v. California* (1967) 386 U.S. 296 (*Chapman*). (See *In re Lopez* (2023) 14 Cal.5th 562, 580.) Moreover, in assessing prejudice from the imposition of an upper-term sentence in which the trial court which relied upon on unproven facts, the reviewing courts may not then use those unpled and unproven facts in its analysis. The question of whether resentencing is required must rest on the facts, if any, that section 1170, subdivision (b)(2) *allows* the courts to use in

imposing the upper term. Use of improper facts in assessing prejudice is a perpetuation of the very error committed by the sentencing court.

If it is not clear beyond a reasonable doubt that the trial court would have imposed the upper term solely on the basis of the facts *permitted* by the current version of section 1170, the sentence must be reversed and the case remanded for a resentencing that complies with amended section 1170, subdivision (b). (See *Lopez*, *supra*, 14 Cal.5th at pp. 591-592..)

Since, in this case, it is not clear beyond a reasonable doubt that the trial court would have imposed the upper term solely on the properly-proven facts under the current version of section 1170, appellant's sentence must be reversed with directions that the trial court resentence appellant in compliance with section 1170 as amended by SB 567.

I. In Every Case Involving Error under Section 1170, Subdivision (b), As Amended By SB 567, The First Step Must be To Determine Whether Any Facts Underlying the Aggravating Circumstances Were Proved True as Statutorily Required.

Whether the trial court may impose an upper term without any properly-proven facts in aggravation (i.e., proven to a jury on proof beyond a reasonable doubt) is not an extraneous issue, as suggested by respondent. (*RABM,* pp. 9-10, 42.). This must be the first issue addressed in every case involving error under section 1170, subdivision (b), as amended by SB 567.

It is only when one or more facts were properly proved as required by statute, that a defendant is "eligible" for the upper

term, and only then that a reviewing court may consider whether the trial court's reliance on unproven factors was harmless beyond a reasonable doubt under *Chapman, supra,* 386 U.S. 18.

A. Before SB 567, California has never had a sentencing scheme that requires a jury trial before imposition of the upper term.

As made clear from the plain language of amended section 1170, and from its legislative history, SB 567 made two significant changes to California's DSL. One, it made the middle term the presumptive term, and two, for the first time in the DSL's history, section 1170 prohibited the sentencing court from finding the facts, other than a prior conviction, used to impose an upper term sentence, absent a jury waiver. (§ 1170, subd. (b); 2021 Stats. ch. 731 § 1.3; and see Policy Committee Analysis of Sen. Bill 567 (2020-2021 Reg. Sess.), June 29, 2021, p. 3 ["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* [(2007) 549 U.S. 270]."]) As amended, section 1170 now expressly requires that the aggravating facts required to impose the upper term be found true by a jury, unless the defendant knowingly, intelligently, and voluntarily waives this right.

Respondent's argument is based on the premise that California has "revert[ed]," or "returned" to the sentencing scheme which was in place prior to 2007. (*RABM*, pp. 8, 17.) Because of this, respondent argues, the analysis for error under current section 1170, as amended by SB 567, is the same in all

material respects as the analysis in *People v. Black* (2007) 41 Cal.4th 799, 805-807 (*Black II*), and *People v. Sandoval* (2007) 41 Cal.4th 825 (*Sandoval*). (*RABM*, p. 9, 25.)

Respondent posits that, despite the plain language of the current DSL prohibiting such findings, trial judges *may* find and use facts (other than prior convictions) to impose an upper-term sentence even when those facts were neither pled nor proven to the jury, as long as a reviewing court, applying a *Chapman* standard of prejudice, finds that it is clear beyond reasonable doubt that the jury would have found those facts true had they been pled and proven to them. (*RABM*, pp. 41-46.)

Respondent's premise entirely passes over the second change SB 567 made to section 1170: the requirement that the facts underlying aggravating circumstances, other than prior convictions, must be found true beyond a reasonable doubt at trial by a jury. (§ 1170, subd. (b)(2).) Again, this requirement was not part of section 1170 prior to 2007, before the United States Supreme Court decided *Cunningham v. California*, *supra,* 549 U.S. 270 (*Cunningham*). Indeed, it was never part of California law prior to the enactment of SB 567. (See *Appellant's Opening Brief on the Merits* (*AOBM*), pp. 16-21.)

Black II and *Sandoval* analyzed a statutory scheme which, while setting the middle term as the presumptive term, also expressly permitted judicial factfinding to select the upper term. (*AOBM,* pp. 16-17, 21, 30-32; *Black II, supra,* 41 Cal.4th at p. 808 ["California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move

from that term only when *the court* finds *itself* and places on the record facts—whether related to the offense or the offender—beyond the elements of the charged offense," emphasis added].) The only way to "save" sentences imposed under this unconstitutional scheme after *Cunningham v. California*, *supra,* 549 U.S. 270 (*Cunningham*), was the method adopted under *Black II* and *Sandoval.* Under *Black II,* the upper term was "the *statutory* maximum sentence to which defendant was exposed by the jury's verdict," if at least one aggravating circumstance was established by means that satisfied the constitutional requirements of the Sixth Amendment. (*Black II, supra,* 41 Cal.4th at p. 816.) In *Black II,* this 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.) And, at the time, neither did section 1170 or the California Rules of Court. (See *AOBM,* pp. 16-17.) This Court found a Sixth Amendment "floor" in the pre-2007 sentencing scheme and analyzed the imposed upper term sentence for harmless error. (See *RABM,* p. 29.) If the Sixth Amendment floor was met, the statute in place prior to 2007 permitted broad judicial factfinding in setting the upper term, and the upper term could be properly imposed. (*Black II, supra,* 41 Cal.4th at p. 816.)

Respondent's position is supported by published cases on the subject to date. (See, e.g., *People v. Flores* (2022) 75 Cal.App.5th 495, 500-501; *People v. Berdoll* (2022) 85 Cal.App.5th 159, 164; *People v. Lopez* (2022) 78 Cal.App.5th 459, 465; *People*

v. Dunn (2022) 81 Cal.App.5th 394, 408; *People v. Zabelle* (2022) 80 Cal.App.5th 1098, 1114; *People v. Ross* (2022) 86 Cal.App.5th 1346, 1354; *People v. Whitmore* (2022) 80 Cal.App.5th 116, 128; *People v. Lewis* (2023) 88 Cal.App.5th 1125, 1137; *People v. Wandrey* (2022) 80 Cal.App.5th 962, 982.)

However, as explained in the opening brief on the merits, these cases were decided incorrectly. They rely on this Court's jurisprudence regarding a very different version of the DSL that did not expressly require that aggravating facts (other than prior convictions) be found by juries rather than judges. (See *AOBM*, pp. 21-38.) And, like respondent's position in the answering brief on the merits, these cases all ignore the plain language of amended section 1170, subdivision (b), prohibiting the use of such facts in imposing the upper term.

The current version of section 1170 expressly precludes the courts from using aggravating facts other than prior convictions unless they have been found true by the jury. (§ 1170, subd. (b)(2).) Discretion to impose an upper term based on the sentencing court's findings of aggravating facts is expressly no longer permitted; the legislature specifically and purposefully took away this discretion by enacting SB 567.

Now, as explained in detail in the opening brief on the merits, a sentence exceeding the middle term may be imposed ***only*** *when* the facts justifying the upper term "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." (*AOBM,* p. 22, quoting amended § 1170, subd. (b)(2).) The

judge's sentencing discretion is limited to consideration only of the properly proven facts.

Because California has never before had a statutory scheme that requires a jury verdict on the aggravating facts needed to impose an upper term sentence, the cases relied upon by respondent are inapplicable to the current sentencing scheme.

B. Under amended section 1170, subdivision (b), an upper term without any properly proven aggravating facts is an unauthorized sentence; an unproven fact that raises the statutory maximum is not "merely" an unproven element.

Respondent argues that even if no facts underlying the aggravating circumstances have been stipulated to by the defendant or found true beyond a reasonable doubt at trial, as required by section 1170, the underlying aggravating fact is merely an "element" of an aggravated term, and the absence of that element may be analyzed for harmless error. (*RABM*, pp. 44-45, citing *Neder v. United States* (1999) 527 U.S. 1, 8-15 (*Neder*); *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.)

Neder, and similar cases cited by respondent (*RABM,* p. 46), do not involve the same issue as the issue presented here. A correct application of the *Chapman* standard is not the same thing as a court substituting its own finding under the beyond-a-reasonable-doubt standard for that of a jury's (*In re Lopez*, *supra,* 14 Cal.5th at p. 581 ["A reviewing court making this harmless-error inquiry does not, as Justice Traynor put it, 'become in effect a second jury to determine whether the defendant is guilty.'"])

However, using the *Chapman* standard to make findings on uncharged aggravating circumstances legally essential to increase punishment is not the same thing as providing the defendant with a trial by jury as to those circumstances. As argued in the opening brief, no decisions, including *Sandoval*, *Black II,* or *Neder,* 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. (*AOBM,* pp. 32-33; compare *People v. Hernandez* (1988) 46 Cal.3d 194.)

As argued in the opening brief on the merits, an unauthorized sentence is not subject to a harmless error analysis, because it may not be imposed in any circumstance. (*AOBM,* pp. 29-30, citing *In re Birdwell* (1996) 50 Cal.App.4th 926, 930; see also *State v. Butterfield* (2019) 10 Wn.App.2d 399, 404 [Under Washington state law, because of errors in the jury instructions on aggravating facts, the sentencing court exceeded its authority in imposing an exceptional sentence and no harmless error analysis is applicable].)

When *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), discussed the difference between a "sentence enhancement" and an "element," the Court emphasized that "the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" (*Id.* at p. 494.) "[W]hen the term 'sentence enhancement' is used to describe 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." (*Id.* at p. 494, fn. 19, emphasis added.) Here, this is not a case covered by *Neder, supra,* 527 U.S. 1, where one element of the jury's verdict is merely missing. Instead, it is a question of whether the trial court may impose a sentence for a *greater offense* than the jury's verdict allows. And the answer is no.

In *People v. Seel* (2004) 34 Cal.4th 535, decided after *Neder, supra,* 527 U.S. 1, this Court noted that without a "willful, deliberate, and premeditated" finding by the jury, the trial court did not have statutory discretion to sentence defendant beyond a determinate term of five, seven, or nine years. In determining whether the "premediated" finding was subject to retrial, this Court examined *Apprendi, supra,* 530 U.S. 466. The Court applied the reasoning in *Apprendi* that when the term "sentence enhancement" was used to describe an increase beyond the maximum authorized sentence, it was the functional equivalent of an element of a *greater offense*. (*Id.* at p. 542.) Because there was insufficient evidence of the greater offense, the defendant could not, on remand, be tried on the greater offense under due process principles. (*Id.* at p. 550.)

Because the Legislature has expressly required that aggravating facts, other than prior convictions, be pled and found true by the jury, this Court's jurisprudence concerning the right to pleading, proof, and jury findings on sentence enhancing facts legally essential to punishment is more pertinent to a proper interpretation of section 1170, subdivision (b)(2), than is this

Court's jurisprudence in the immediate aftermath of *Cunningham* (e.g., *Black II, supra,* 41 Cal.4th 799; *Sandoval, supra,* 41 Cal.4th 825). A trial court cannot impose a sentence enhancement as to which the defendant has the right to pleading and proof to a jury, if those rights have not been provided to the defendant. If a sentencing enhancement has not been pled and proven to a jury as required by statute, the enhancement may not be imposed. (See *Hernandez, supra*, 46 Cal.3d at p. 197; *Seel, supra,* 34 Cal.4th at p. 541.) United States Supreme Court jurisprudence is in accord; the Court has long recognized that a court verdict is not a constitutionally permissible substitute for a jury verdict. (*Cole v. Arkansas* (1948) 333 U.S. 196, 200; *United States v. Martin Linen Supply Co.* (1977) 430 U.S. 564, 572-573.)

In cases 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, an upper term is a greater offense under *Apprendi.* The trial court does not have statutory discretion to impose the greater offense, and the error may not be examined for harmless error.

Appellant primarily argues that the upper term in such cases is unauthorized, and not "structural error," as proposed by respondent. (See *RABM,* pp. 9, 45, 46.) However, the error may also be viewed as structural. Structural error occurs where there are "fundamental structural defects" in a criminal proceeding, such as the complete denial of the right to a jury, or to an impartial judge. (*People v. Breverman* (1998) 19 Cal.4th 142,

174.) In such cases, "it may be impossible, or beside the point, to evaluate the resulting harm by resort to the trial record, and a miscarriage of justice may arise regardless of the evidence." (*Ibid.*) Since amended section 1170, and by extension the Sixth Amendment, require jury verdicts on all aggravating facts used to impose the upper term, the complete failure to provide an adversarial proceeding before a fair and impartial jury is a fundamental structural defect, or a structural error.

Therefore, in every case where there is error under the amendments made by SB 567, the first question always must be: Were *any* facts underlying the aggravating circumstances proved true as required by amended section 1170, subdivision (b)(1) through (3)? The appellant's opening brief did not raise an extraneous argument. The defendant is statutorily "eligible" for the upper term only if one or more underlying facts has been proved as required by statute. Only then may the reviewing court proceed to review harmlessness.

II. The Error In This Case Was Not Harmless.

In this case, where the trial court relied on the fact of prior convictions, but also relied on multiple impermissible factors, the reviewing court may proceed to determine whether the sentencing error was harmless under *Chapman, supra,* 386 U.S. 18. (*AOBM,* p. 38.)

Respondent concedes that six out of eight aggravating circumstances were not proven in conformance with amended section 1170, subdivision (b). (*RABM,* p. 36.) Yet, respondent

argues that this was harmless error under *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*). (See *RABM,* p. 37.)

Respondent improperly relies on unproven facts in order to justify the imposition of the upper term, as expressly prohibited by amended section 1170. In addition, since the trial court's use of unproven aggravating facts violated not just amended section 1170, subdivision (b), but also appellant's Sixth Amendment right to a jury trial, the question of prejudice must be analyzed under the *Chapman* standard. Even under *Watson,* however, reversal is required.

A. The unanimity instruction cannot be used to show a jury finding of appellant's use of a weapon.

Respondent argues that the trial court correctly relied upon use of a weapon as an aggravating circumstance. (*RABM,* pp. 33-34.) As evidence that the jury must have found that the defendant acted with a weapon, the People point to the unanimity instruction given in this case. (*RABM,* pp. 33-34.)

The instruction stated:

> **3502. Unanimity: When prosecution elects one act among many.**
>
> You must not find the defendant guilty of inflicting injury on a person in a dating relationship resulting in a traumatic condition in Counts 3, 4 and 5 unless you all agree that the People have proved specifically that the defendant committed that offense. The People have alleged the following assaults:

- Count 3: A violation of Penal Code section 273.5(a) domestic violence assault, on or about May 24, 2020, resulting from the use of a wooden table.
- Count 4: A violation of Penal Code section 273.5(a) domestic violence assault, on or about May 21, 2020, resulting from the use of a metal handled broom.
- Count 5: A violation of Penal Code section 273.5(a) domestic violence assault, on or about May 17, 2020, resulting from the use of an extension cord.

> Evidence that the defendant may have committed the alleged offense on another day or in another manner is not sufficient for you to find him guilty of the offense charged.

(1CT 252.)

Notably, harmless error analysis in cases involving retroactive application of SB 567 is particularly ill-suited for case-specific facts. If use of a weapon was an element of the convicted crimes (which it is not), that would still only expose appellant to the middle term under section 1170. (*People v. Scott* (1994) 9 Cal.4th 331, 350) [a sentencing court generally cannot "use a fact constituting an element of the offense ... to aggravate ... a sentence."])

Since use of a weapon was not an element of the convicted crimes, respondent's argument requires the jury's verdict to be dissected for facts which the jury was not specifically told must be proved, and of which appellant was given no notice. Use of a weapon was only alleged against appellant in the information in count 1, which resulted in a mistrial, and count 2, where the jury found the lesser included offense. (See 1CT 177-180.) Appellant had no reason at the time of trial to contest that aspect of the unanimity jury instruction for counts 3 through 5. A trial court's

reliance on use of a weapon in this circumstance to impose a greater sentence, therefore, presents serious due process concerns. (See *People v. Anderson* (2020) 9 Cal.5th 946, 956; *Hernandez, supra*, 46 Cal.3d at p. 208.)

Additionally, given the tenuous connection between the allegations in the unanimity instruction and the jury's verdict, the record here is insufficient to find that the jury's verdict necessarily included use of a weapon. (See, e.g., *In re Lopez*, *supra*, 14 Cal.5th at p. 591 ["The reviewing court examines what the jury necessarily did find and asks whether it would be impossible, on the evidence, for the jury to find *that* without *also* finding the missing fact as well."]

A unanimity instruction is intended to eliminate the danger that the defendant will be convicted even though there is no *single offense* which all the jurors agree the defendant committed. (*People v. Milosavljevic* (2010) 183 Cal.App.4th 640, 645.) In this case, the People alleged continuing abuse beginning in February 2020 (*RABM*, p. 37), and trial also focused on an uncharged incident on June 9, 2020 (6RT 505-516). Yet appellant was only charged with and convicted of conduct occurring on May 17, 21, and 24, 2020. Under such circumstances, a unanimity instruction is required to ensure the defendant's constitutional right to a unanimous verdict. (*Milosavljevic*, *supra,* 183 Cal.App.4th at p. 645.) Use of a weapon was a helpful way of distinguishing between the different alleged incidents. (See 7RT 649-650.) However, ultimately, the unanimity instruction did not require use of a weapon, but only that the jury all agree

unanimously as to the facts of each of the charges in counts 3, 4 and 5. The instructions for the elements themselves for counts 3, 4 and 5 did not require use of a weapon. (2CT 247-248.)[2]

Given the tenuous connection between the allegations in the unanimity instruction and the jury's verdict, the record does not adequately support respondent's contention that the jury's verdict necessarily included use of a weapon.

B. The error should be examined for prejudice under the *Chapman,* not *Watson,* standard.

Respondent argues that because the Sixth Amendment does not prohibit an upper term, even if no aggravating facts are properly proved by statute, any error in imposing an upper term is solely state error, and may be analyzed under *Watson, supra,* 46 Cal.2d 818. (*RABM*, p. 30.) As discussed in Argument I above, respondent and appellant fundamentally disagree on how and when the Sixth Amendment jury trial protections apply to upper term sentences under the current statutory scheme.

---

[2] Additionally, the People argue that the jury *could* have found appellant not guilty of the greater offense in count 2, as opposed to the lesser included offense of simple battery, because of the way that the weapon was used, possibly deciding the use of the weapon did not rise to the level of assault with a deadly weapon. (*RABM,* p. 35, citing 7RT 719.) The People do not address the fact, raised in the opening brief, that the prosecutor also stated that "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." (*AOBM*, p. 39, citing 9RT 789.)

Respondent argues that appellant's position confuses state statutory requirements that exceed federal constitutional standards with what the Sixth Amendment requires as a constitutional floor. (*RABM,* p. 29.) Not so. Instead, it is respondent's argument that does not recognize that the Sixth Amendment analysis is necessarily tied to the statutory jury requirements in selecting the determinate term. As articulated by respondent, the question is: At what minimum point does the statutory scheme authorize an upper term sentence for constitutional purposes? (*RABM,* p. 29.) The Sixth Amendment right to a jury trial is directly tied to the maximum sentence permitted by statute. (*Apprendi, supra,* 530 U.S. 466, 490.) The federal right to a jury trial "has always been dependent on how a State defines the offense that is charged in any given case." (*Patterson v. New York* (1977) 432 U.S. 197, 211, fn.12; see *People v. Rivera* (2019) 7 Cal.5th 306, 333 [federal constitutional right to jury determination on each element charged].) Even though it is state law that now requires jury findings on aggravating factors, the failure to submit those factors to a jury is not merely state law error.

Under former section 1170, the "Sixth Amendment cases [did] not *automatically* forbid a sentencing court to take account of factual matters not determined by a jury and to increase the sentence in consequence." (*Rita v. United States* (2007) 551 U.S. 338, 352.) The Sixth Amendment question, the United States Supreme Court has said, is whether the *law forbids* a judge to increase a defendant's sentence *unless* the judge finds facts that

the jury did not find and the offender did not concede. (*Ibid.,* citing *Blakely* v. *Washington* (2004) 542 U.S. 296, 303-304.)

To use respondent's terms, a defendant is "eligible" for the upper term, by statute, only when at least one aggravating fact has been found true beyond a reasonable doubt by a jury. (§ 1170, subd. (b)(2).) In other words, "the statutory maximum sentence to which defendant was exposed by the jury's verdict" is not the upper term, under the Sixth Amendment analysis, unless one factor has been proved as *statutorily* required. (See *Black II, supra,* 41 Cal.4th at p. 816.)

As noted before, the Sixth Amendment analysis is different here than under *Black II* or *Sandoval*, because amended section 1170 forbids the sentencing court from considering aggravating factors which were not properly proven. While a properly proven lone prior conviction may serve as a basis for imposing the upper term, that aggravating fact does not then open the door for the trial court to rely on factors other than prior convictions to support the upper term. Instead, such reliance is expressly prohibited by section 1170, subdivision (b)(2). This is not a case where, as asserted by respondent, "any additional factfinding and weighing of aggravating and mitigating circumstances does not implicate the federal Constitution." (*RABM*, p. 29.) Judges are proscribed by statute and also by the Sixth Amendment jury-trial guarantee from imposing a sentence based on a fact not found by a jury or admitted by the defendant. (*Apprendi*, *supra*, 530 U.S. at p. 496.) And when the Legislation expressly requires a jury verdict on a fact legally essential to punishment, the judicial

branch cannot satisfy that requirement with a court verdict, unless the defendant waives his right to a jury. (*Cole, supra,* 333 U.S. at p. 200; *Martin Linen Supply Co., supra,* 430 U.S. at pp. 572-573.)

Therefore, only once one factor has been proved as required may the reviewing court analyze whether the error in relying on unproven factors was harmless beyond a reasonable doubt under *Apprendi*, *supra*, 530 U.S. 466. (See, *AOBM,* pp. 43-44, citing *People v. Sengpadychith* (2001) 26 Cal.4th 316.) As argued in the opening brief, cases where there is reliance on both permissible and impermissible factors, are 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. (*AOBM,* p. 44; see *In re Lopez*, *supra,* 14 Cal.5th 562.) The harmless-beyond-a-reasonable-doubt standard under *Chapman, supra,* 386 U.S. 18, should be applied in these cases.

Appellant will not reiterate his argument that the error in this case was not harmless beyond a reasonable doubt under *Chapman*; these arguments are laid out thoroughly in the appellant's opening brief on the merits. (*AOBM*, pp. 46-50.)

C. Even under the *Watson* standard of prejudice, the error is not harmless.

Even under *Watson, supra,* 46 Cal.2d 818, respondent's argument must be rejected, and the case must be remanded for resentencing.

1. The reviewing court may not engage in judicial factfinding.

First, this Court should reject respondent's suggestion that a reviewing court should analyze "whether there is a reasonable probability that the jury would have found any remaining aggravating circumstance(s) true beyond a reasonable doubt." (*RABM*, p. 30, citing *People v. Dunn* (2022) 81 Cal.App.5th 394, 410, review granted Oct. 12, 2022, S275655.)

Amended section 1170, subdivision (b), expressly forbids such judicial factfinding. Again, the court may impose a sentence exceeding the middle term only based on facts that justify the upper term that 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).) Section 1170 does not permit an upper term to be imposed based on a reviewing court's determination that a jury *would have* found the fact true beyond a reasonable doubt.

It is worth noting that respondent does not contend that the trial court could have relied upon the properly-proven prior convictions in order to prove that appellant previously served prior prison terms (rule 4.421(b)(3)); that appellant was on parole at the time he committed the present offenses (rule 4.421(b)(4)); or that appellant performed unsatisfactorily while on parole (rule

4.421(b)(5)). (*RABM,* p. 36; see, *contra*, *People v. Pantaleon* (2023) 89 Cal.App.5th 932, citing *People v. Towne* (2008) 44 Cal.4th 63, 80-82 [the fact of a prior conviction encompasses a finding that prior convictions are numerous or of increasing seriousness, and a finding that defendant was on probation or parole at the time the crime was committed].) Respondent's implicit concession is correct. The prior conviction exception under *Apprendi* only authorizes sentencing courts to identify the fact of a prior conviction, including the elements that a jury necessarily found in rendering a guilty verdict. (See *People v. Gallardo* (2017) 4 Cal.5th 120, 132-136, citing *Descamps v. United States* (2013) 570 U.S. 254, 269 [the judicial factfinding permitted under the prior conviction exception does not extend "beyond the recognition of a prior conviction"], and *Mathis v. United States* (2016) 579 U.S. 500, 511 ["a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense"].) Additional factfinding concerning facts related to or about a prior conviction – including the sentence imposed, the length of the sentence, or the release date – violates the Sixth Amendment when used to increase a defendant's maximum sentence, insofar as those facts have never been submitted to a jury and proved beyond a reasonable doubt.

For the same reasons, the reviewing courts should not apply the harmless error standard to find these facts. There is a point at which the courts' application of the harmless error standard to find the denial of the right to a jury trial on facts essential to punishment can render the right illusory. (See *Neder,*

supra, 527 U.S. at pp. 38-39, diss. op. of Scalia, J.) That is what the position advocated by respondent, and taken in published decisions to date, does. The Legislature requires jury findings beyond a reasonable doubt, not findings by the bench beyond a reasonable doubt.

As noted in the opening brief, 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. (*AOBM,* p. 43, citing Policy Committee Analysis of Sen. Bill 567 (2020-2021 Reg. Sess.), June 29, 2021, p. 3.) It is for a jury in the first instance to decide whether these factors were proved.

Therefore, permitting a reviewing court to make these determinations pursuant to a *Watson* harmless error analysis would violate both section 1170 and Sixth Amendment principles.

2. If review for prejudice is under *Watson,* and if the reviewing court may engage in judicial factfinding, the prosecution cannot show that a jury would have found all six of the remaining aggravating factors true beyond a reasonable doubt.

The case-specific facts in this appeal provide an excellent example of why judicial factfinding on review should not be permitted under the amended statute. Despite respondent's confidence that the jury would have found all of the remaining aggravating factors true beyond a reasonable doubt (*RABM,* pp. 36-40), the record – including the verdict, the subjectiveness of

many of the factors, and the state of the evidence – indicates otherwise.

The aggravating factors listed in rule 4.421, particularly in subdivisions (a), (b)(1), and (c), are meant to punish defendants more harshly for facts related to the underlying incident that make it comparatively more egregious than other incidents that would be punished under the same statute. (*Black II, supra*, 41 Cal.4th at p. 817 ["An aggravating circumstance is a fact that makes the offense 'distinctively worse than the ordinary.' [Citation.]."])

Notably, in this case, the jury rejected the more serious charge of aggravated assault against the victim in count 2, finding appellant guilty of a lesser included charge of simple assault. (1CT 257.) This verdict alone raises a reasonable probability that the jury may not have found the facts of this case to be more serious than other cases involving domestic violence. (See *Sandoval, supra*, 41 Cal.4th at p. 841 [jury's verdict of a lesser included offense indicated it rejected the prosecution's view of the evidence, so the Court could not conclude with any degree of confidence that the jury would find the aggravating factors true].)

Respondent argues that there is "no reasonable probability that the jury would have rejected" that appellant committed a crime of great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness (rule 4.421(a)(1)); that appellant engaged in violent conduct that indicates a serious danger to

society (rule 4.421(b)(1)); or that the victim was "particularly vulnerable" (rule 4.421(a)(3)). (*RABM*, pp. 37-38.)

However, these are inherently subjective aggravating circumstances. "Many of the aggravating circumstances described in the rules require an imprecise quantitative or comparative evaluation of the facts." (*Sandoval, supra*, 41 Cal.4th at p. 840 [examples of inherently vague and subjective potential aggravating circumstances include whether "'[t]he victim was *particularly* vulnerable,' whether the crime 'involved a[ ] . . . taking or damage of *great* monetary value' ..."].) These factors were also contested at sentencing. (See *AOBM,* p. 52, citing 9RT 790-793, and *People v. Epps* (2001) 25 Cal.4th 19, 40.)

In this case, defense counsel argued that where the injuries to the victim were solely bruises, which is one of the least traumatic conditions that can be inflicted, there was not *great* violence, or a high degree of cruelty, viciousness or callousness. (9RT 791.) Additionally, while defense counsel admitted appellant was in a violent relationship with the victim, counsel disputed whether this indicated a serious danger to society. (9RT 793.) And, finally, while the victim was pregnant at the time, defense argued that this should not be considered in selecting the upper term. (9RT 792-793.) It was never established that the defendant knew that the victim was pregnant at the time of the underlying conduct in May 2022. (See generally 5RT 381.) Absent evidence the defendant knew the victim was pregnant, it would have been inappropriate for the jury to find that this fact showed greater culpability on the behalf of the defendant. Therefore, it is

reasonably probable that a jury would not have found the foundational facts for these aggravating factors proven beyond a reasonable doubt.

Under amended section 1170, these are questions properly put first to a finder of fact, to be proved beyond a reasonable doubt. (§ 1170, subd. (b)(2).) But even if the reviewing court may properly engage in factfinding after SB 567, the prosecution cannot show that there is no reasonable probability that the jury would not have found all six of the remaining aggravating factors true beyond a reasonable doubt.

3. If review for prejudice is under *Watson*, the reviewing court should solely determine whether there is a reasonable probability that the trial court would have imposed a sentence other than the upper term with the properly proved factors.

If this Court determines that review for prejudice should be under the standard set forward by *Watson, supra,* 46 Cal.2d 818, then under amended section 1170, appellant argues that the reviewing court should only proceed under the second question posed by respondent: 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. (See *RABM*, pp. 31, 40.)

In this case, it is reasonably probable that the trial court might not have imposed the upper term without the plethora of unproven allegations. (*AOBM*, pp. 51-52.)

Respondent relies on the sentencing court's following statement: "I do believe that [appellant] deserves the sentence recommended by probation. The upper term I think is appropriate." (*RABM*, p. 41, citing 9RT 800.) But this statement was made *with* all of the unproven allegations. It is no answer to what the trial court would have done if it only had the aggravating circumstances that it could properly consider under the new statutory scheme.[3]

Additionally, since this case also involves the retroactive application of SB 567, the trial court's new discretion is another factor in favor of remand. Respondent seemingly argues that the amendments to section 1170 have not changed the trial court's sentencing discretion, but merely the procedural requirements before it may exercise that discretion. (See *RABM*, pp. 31-32, footnote 7, citing *People v. Lewis* (2023) 88 Cal.App.5th 1125.) Respondent entirely discounts from its prejudice analysis both the new presumption in favor of the middle term, and the new requirement that the upper term be "justified." (See *ibid.*) The

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[3] In similar cases, the North Carolina Supreme Court has held "it must be assumed that every factor in aggravation measured against every factor in mitigation, with concomitant weight attached to each, contributes to the *severity* of the sentence -- the quantitative variation from the norm of the presumptive term. It is only the sentencing judge who is in a position to re-evaluate the severity of the sentence imposed in light of the adjustment. For these reasons, we hold that in every case in which it is found that the judge erred in a finding of findings in aggravation and imposed a sentence beyond the presumptive term, the case must be remanded for a new sentencing hearing." (*State v. Ahearn* (1983) 307 N.C. 584, 602, 300 S.E.2d 689, 701.)

combination of the new presumption and the requirement that the upper term be "justified" (§ 1170, subd. (b)(2)), necessarily creates a higher standard.

Appellant is entitled to have a sentencing court determine in the first instance whether the presumptive middle term is appropriate, or whether the upper term is "justified" under the new sentencing structure, in light of properly proven facts under section 1170, as amended by SB 567.

CONCLUSION

For these reasons, appellant 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: May 2, 2023

Respectfully submitted,

/s/Jacquelyn Larson
JACQUELYN LARSON
Attorney for Appellant

CERTIFICATE OF LENGTH

I, Jacquelyn Larson, counsel for Deandre Lynch, certify pursuant to the California Rules of Court, that the word count for this document is 6,714 words, excluding the cover, tables, this certificate, and any attachment permitted under rule 204(d). This document was prepared in Microsoft Word, the word count generated by the program for this document. I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed, at Sacramento, California, on May 2, 2023.

/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, rules 8.71(f) and 8.77)

I, Kimberly M. Quinn, declare as follows:

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On May 2, 2023, I served the persons and/or entities listed below by the method checked. For those marked "Served Electronically," I transmitted a PDF version of **APPELLANT'S REPLY BRIEF ON THE MERITS** by TrueFiling electronic service or by e-mail to the e-mail service address(es) provided below. Transmission occurred at approximately **12:00 PM** For those marked "Served by Mail," I enclosed a copy of the document identified above in an envelope or envelopes, addressed as provided below, and placed the envelope(s) for collection and mailing on the date and at the place shown below, following the Central California Appellate Program's ordinary business practices. I am readily familiar with this business's practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in sealed envelope(s) with postage fully prepaid.

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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 May 2, 2023, at Sacramento, California.

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

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 5/2/2023 by Karissa Castro, Deputy Clerk

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Larson, Jacquelyn (264712)
Last Name, First Name (PNum)