IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

People of the State of California, Plaintiff and Respondent vs. Deandre Lynch, Defendant & Appellant	Case No.: S274942 Court of Appeal No.: C094174 Superior Court No.: 20FE009532

AMICUS CURIAE APPLICATION FOR PERMISSION TO FILE AMICUS BRIEF AND BRIEF OF THE CALIFORNIA PUBLIC DEFENDER'S ASSOCIATION IN SUPPORT OF APPELLANT LYNCH

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AMICUS CURIAE APPLICATION FOR PERMISSION TO FILE AMICUS BRIEF IN SUPPORT OF APPELLANT LYNCH AND BRIEF OF AMICUS CURIAE

Pursuant to Rule 8.520 of the California Rules of Court, the California Public Defenders Association (CPDA), the Santa Clara County Public Defender (SCPD), the Alternate Defender for Santa Clara (ADSC), and the Contra Costa County Public Defender (CCPD) respectfully apply for permission to file the attached amicus brief in support of Appellant Lynch.

APPLICATION OF CPDA TO APPEAR AS AMICUS CURIEA ON BEHALF OF APPELLANT

Identification of CPDA and Its Interest

The California Public Defenders Association is the largest association of criminal defense attorneys and public defenders in the State of California. With a membership of more than 4,000 criminal defense attorneys and associated professional. CPDA is an important voice of the criminal defense bar.

CPDA has been a leader in continuing legal education for defense attorneys for a half century, it is an approved provider of Mandatory Continuing Legal Education and Criminal Law Specialization Education and is one of only two organizations deemed by the Legislature to be an "automatically" approved legal education provider. (Bus. & Prof. Code, § 6070, subd. (b).)

Courts have granted CPDA leave to appear as *Amicus Curiea* in nearly fifty California cases that culminated in published opinions. (See, e.g., *People v. Alibillar* (2010) 51 Cal.4th 47 [sufficiency of evidence in a gang-related prosecution]; *Barnett v. Superior Court* (2010) 50 Cal.4th 890 [post-trial discovery]; *Galindo v. Superior Court* (2010) 50 Cal.4th 1 [preliminary hearing discovery]; *People v. Lenix* (2008) 43 Cal.4th 602 [comparative juror analysis for the first time on appeal]; *People v. Nelson* (2008) 43 Cal.4th 1242 [DNA evidence in a cold hit case].)

CPDA has also served as *Amicus Curiea* in the United States Supreme Court. (See e.g., *California v. Trombetta* (1984) 467 U.S. 479 [the duty to preserve evidence is limited to evidence that might be expected to play a significant role in the suspect's

defense); *Monge v. California* (1998) 524 U.S. 721 [double jeopardy clause does not bar retrial of a prior conviction allegation after an appellate finding of evidentiary insufficiency).]

CPDA, the Santa Clara County Public Defender and Alternate Defender, and the Contra Costa County Public Defender are familiar with the briefing and issues in this case. We believe that additional briefing would be beneficial, particularly regarding the practical and constitutional problems inherent in the prosecution's attempt to aggravate sentences based on the vague language found in the California Rules of Court, rule 4.421.

CPDA has both a general and specific interest in the subject matter of this litigation. Our members represent the majority of indigent defendants facing aggravated sentences under the newly amended Penal Code section 1170(b). Because prosecutors are now charging Section 1170(b) aggravating factors based on the vague, broad, and imprecise factors outlined in the California Rules of Court rule, 4.421, our members are unable to determine what their clients are actually accused of doing and to adequately advise them regarding their defenses or pretrial offers. Furthermore, trial counsel is unable to adequately identify the evidence or appropriate lines of investigation necessary to prepare trial offers, to identify the evidence or appropriate lines of investigation necessary to prepare a defense, or to properly defend them at trial.

This case presents three key questions of import to criminal defendants. First, what is the standard of review on appeal when

a trial court imposes an aggravated term though the prosecution did not prove the aggravating factors beyond a reasonable doubt to a jury or court or admitted by the defendant? Second, what is the standard of review on appeal when the trial court relies on one properly pled and proved aggravating factor, but also relies on aggravating factors that the government has not properly plead and proved?

Ruling that an appellate court does not need to reverse an upper-term sentence when the prosecution does not properly prove aggravating factors based on harmless error review will deprive a defendant of their right to a jury trial, to notice, and to the effective assistance of counsel. Doing so will allow trial judges to impose aggravated sentences without requiring the government to prove any fact that may increase the defendant's sentence. Thus, significant issues surrounding the jury trial right implicated by this Court's decision. The attached brief addresses the trial-level impacts of the Court's decision and will assist this Court by providing the perspective of criminal defendants in the trial court.

A defense attorney has a duty to inform their client of the minimum and maximum terms of imprisonment that a court may impose after conviction. (*In re Alvernaz* (1992) 2 Cal.4th 924, 936.) Furthermore, a defendant has a right to reasonable notice of charges. (*In re Oliver* (1948) 333 U.S. 257, 273-274.) This right to notice extends to fair notice of factors that may increase the ultimate penalty they may suffer. (*People v. Anderson* (2020) 9 Cal.5th 946, 956-957.) The Court of Appeal's holding in *Lynch*

permits a reviewing court to apply a harmless-error analysis and thereby permits trial judges to make factual determinations that the law reserves for juries without proper notice to the defendant.

Authors and Absence of Monetary Contribution

Brian Matthews, Deputy Alternate Defender for Santa Clara County and Gilbert Rivera, Deputy Public Defender for Contra Costa County, as members of CPDA, authored the attached brief. No one has made a monetary contribution intended to fund the preparation or submission of this brief.

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AMICUS CURIAE BRIEF OF THE CALIFORNIA PUBLIC DEFENDER'S ASSOCIATION IN SUPPORT OF APPELLANT LYNCH

INTRODUCTION

In *People v. Lynch* (2022) WL 1702283, the Court of Appeal for the Third District held, applying a harmless error analysis, that the trial court could impose the upper term when it relied on a prior conviction and unproved aggravating factors.

Amici addresses the holding of *Lynch* from a trial level defense attorney's perspective. The case concerns a criminal defendant's federal and state Due Process Rights to notice of charges and notice to sentencing allegations. If the government

does not formally accuse the defendant of a particular sentencing allegation, the court does not instruct the jury on the allegation, and the jury does not find the allegation true beyond a reasonable doubt, can the defendant be lawfully subjected to an aggravated term of imprisonment?

Penal Code section 1170(b)(1) requires that a court impose a middle term of imprisonment unless the prosecution meets the requirements of 1170(b)(2). Section 1170(b)(2) requires that any circumstance used to enhance a defendant's punishment above the middle term be either admitted by the defendant or be found true beyond a reasonable doubt by a jury or by a judge in a court trial. This language implicates the U.S. Constitution's right to due process under the Fifth Amendment as applied to the states through the Fourteenth Amendment. (U.S. Const., 5th & 14th Amends.) The change also concerns the Sixth Amendment's right to a public trial by an impartial jury. (U.S. Const., 6th & 14th Amends.)

Any fact that increases punishment for a crime "must be submitted to a jury and proved beyond a reasonable doubt." (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.) According to *Blakely v. Washington* (2004) 542 U.S. 296, 303, "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely for the basis on the facts reflected in the jury verdict or admitted by the defendant. [Citations]." The statutory maximum "is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." (*Id*. at 303-304.)

Therefore, California's statutory maximum term of imprisonment for any offense subject to determinate sentencing is the middle term. A court may impose a sentence above the middle term only if facts or circumstances are found true beyond a reasonable doubt by a jury or judge at trial or are admitted by the defendant. Furthermore, the government must give a defendant notice of facts it seeks to use to aggravate their sentence. (*People v. Anderson* (2020) 9 Cal.5th 946, 956-957.)

One of the issues raised in the briefing is if the use of aggravating factors that the prosecution did not properly prove is structural error, requiring per se reversal or is it subject to a harmless error analysis. CPDA and the accompanying defense offices submit that a harmless-error analysis is insufficient to protect a defendant's jury trial and sentencing rights under the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution.

ARGUMENT

I. A TRIAL COURT'S USE OF SENTENCE AGGRAVATORS THAT ARE NOT PROPERLY PROVED IS STRUCTRUAL ERROR NOT SUBJECT TO A HARMLESS ERROR TEST

The Fifth Amendment rights to due process and notice and the Sixth Amendment rights to a jury trial and counsel require that any fact, other than a prior conviction, which increases the maximum penalty for a crime, be charged in the indictment, submitted to a jury, and proved beyond a reasonable doubt. (*Apprendi, supra,* 530 U.S. at p. 490.) The relevant statutory maximum is that which a judge may impose solely on the facts

that are reflected in the jury verdict or admitted by the defendant. (*Blakely, supra,* 542 U.S. at p. 303.)

Under current California law, a judge cannot impose the aggravated term unless the defendant has suffered a prior conviction, or the government has proved aggravating factors to a jury the defendant has admitted the factors. (Pen. Code, § 1170, subd. (b)(1) and (2).) Thus, the maximum sentence in California is the middle term and the government must provide the defendant with notice of the aggravating circumstances it intends to use to seek an aggravated sentence. The defendant is entitled, under most circumstances, to a bifurcated jury trial. This point is not in dispute.

A. ENHANCING A SENTENCE BEYOND THE STATUTORY MAXIMUM USING UNCHARGED SENTENCING FACTORS VIOLATES DUE PROCESS.

The disagreement at issue involves how a court should review a circumstance where the government did not prove aggravators, but the trial judge nonetheless imposed the upper term. Should a reviewing court use a per se reversal rule or apply a harmless error analysis? The ultimate question, therefore, is if a trial judge can substitute their judgment for that of a jury? A harmless error test would permit a trial judge to impose an aggravated term because of their belief that a jury would have found an uncharged aggravator true had the defendant been given his right to a jury determination.

Using an uncharged aggravator that the government does not prove to increase a defendant's sentence deprives the person

of the notice guaranteed by the due process clause. "No principle of due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." (*Cole v. Arkansas* (1948) 333 U.S. 196, 201.)

Cole presents facts that are like a defendant facing uncharged aggravated factors that the government never proved. An information had charged Cole with violating section two of a statute. That section, unlike section one, did not include an element that the accused acted with force or violence. The trial judge instructed the jury that they were to determine if Cole was guilty of violating section two. The jury convicted him of violating section two. Nonetheless, the state Supreme Court affirmed the conviction as though Cole had been tried for violating section one, an offense for which he was neither tried nor convicted. Thus, it upheld the conviction under an offense the government had not charged, and for which it had not provided him notice. Recognizing this problem, the Supreme Court held that "it is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." (*Cole v. Arkansas, supra*, 333 U.S. at p. 201.) The Court held that Cole had been denied ". . . safeguards guaranteed by due process of law—safeguards essential to liberty in a government dedicated to justice under law." (*Id*. at p. 202.)

The right to notice described in *Cole* is a fundamental principle of procedural fairness. (*Presnell v. Georgia* (1978) 439 U.S. 14, 16.) Courts have not subjected to unnoticed allegations to harmless error review. (*Id*.) For example, the California Supreme Court has held that the government may not convict a person of an offense which is neither charged in the accusatory pleading nor necessarily included within a charged offense. (*People v. Lohbauer* (1981) 29 Cal.3d 364, 367.) In so doing, it did not review the evidence to determine if a jury, or judge in a bench trial, would have found Lohbauer guilty of a crime that was not charged and was not a necessarily included offense of a charged crime. (*Id*.) Indeed, it refused to adopt the test suggested by the State, that the Court evaluate if the defendant had suffered prejudice. (*Id*.)

This Court has ruled that a harmless error analysis is inappropriate when a defendant has not been given notice that he will have to defend against an uncharged enhancement. (*People v. Hernandez* (1988) 46 Cal.3d 194 (abrogated on other grounds in *People v. King* (1993) 5 Cal.4th 59, 78 (fn. 5).) The defendant in *Hernandez* was convicted of rape, assault, and kidnapping. The government did not charge the Penal Code section 667.8 enhancement, applicable when the person kidnapped another to commit rape. Indeed, the pre-sentence report raised the enhancement for the first time. Nonetheless, the trial court used the uncharged enhancement to increase Mr. Hernandez's sentence. This Court recognized that due process requires that an accused be advised of the specific charges against him so that he

may adequately prepare his defense and that an enhanced term cannot be imposed without proof of each fact that it requires. (*Id.* at p. 208.)

The U.S. Supreme Court recognized that permitting a judge to select a higher sentenced based on uncharged aggravators not found by a jury can implicate serious due process and Sixth Amendment concerns when it decided *Blakely v. Washington* (2004) 542 U.S. 296. The State had charged Blakely with first-degree kidnapping, but the parties agreed to a plea bargain wherein Blakely plead to second-degree kidnapping. (*Id.* at298-299.) That offense carried a sentence not exceeding ten years. But the statutes permitted a court to exceed that sentence based on certain factors. Pursuant to the bargain, the State sought a sentence within the standard range of 49-53 months. Nonetheless, the judge imposed an exceptional sentence of 90 months on the grounds that Blakely had acted with deliberate cruelty. "Faced with an unexpected increase of more than three years in his sentence, petitioner objected." (*Blakely v. Washington, supra*, 542 U.S. at p. 300 (emphasis added).) The Court found that the trial court's use of uncharged and unproved aggravating factors violated the Sixth Amendment. (*Id.* at p. 305.)

The failure to provide notice by permitting sentencing factors to be subject to harmless error review allows trial judges to enhance sentences above the statutory maximum when they believe that a jury would have found the aggravator true—even though the defendant had no chance to present a defense. Doing

so implicates fundamental constitutional rights, including due process, the right to a jury trial, and the right to counsel. Notice is necessary to allow defense counsel to effectively advise his client of his or her maximum permissible sentence, to assess the risk of exercising their Sixth Amendment right to a jury trial, and to decide how to present their case in a way that gives them a reasonable opportunity to be heard.

Trial counsel would be placed in an impossible position if this Court were to permit the trial judge to substitute their judgment for that of the jury. Without knowing what the prosecution or court will use to enhance the sentence, how can counsel effectively advise his client about their risk? Is the maximum sentence the mid-term? Or is it the aggravated term, contingent on the prosecution or court's decision to use aggravating factors after trial? Without the defendant knowing the maximum potential sentence, how do they make an intelligent decision about going to trial—especially given the widespread practice of courts imposing longer sentences after trial.

Furthermore, what must counsel investigate when preparing the case? Must they investigate all potential aggravating factors, even though the prosecution may never attempt to use them? How should they construct their argument or present their case when they may be subjected to the unexpected attempt to increase their client's sentence?

Playing the argument to its logical conclusion, a harmless error standard would authorize a trial court to impose sentence

for a more serious offense than the crime charged. It would subject a defendant to the absurd result of a court sentencing them for murder based on a judge's findings when they were only convicted of possessing a firearm. (*See Blakely*, *supra*, 542 U.S. at p. 306.) Indeed, a judge could, under this theory, be sentenced for murder if the trial judge decided that a jury would have found malice had it been given the issue. A harmless error analysis of aggravating factors would liberate trial judges to impose sentence for greater offenses than were charged, without any notice that it could happen—or even when or under what circumstances it could happen.

B. USING UNCHARGED SENTENCING FACTORS TO ENHANCE A DEFENDANT'S SENTENCE IS STRUCTURAL ERROR

It is well-settled that the Sixth Amendment entitles a defendant to have a jury decide beyond a reasonable doubt any factor that may be used to increase his sentence beyond the statutory maximum. (*Apprendi, supra*, 530 U.S. 466.) If the sentencing court imposes an enhanced sentence based on an uncharged sentencing factor that is, of course, not decided by a jury, the error is structural and should result in per se reversal.

The uncharged nature of the sentencing factor is an important fact. A different analysis may be appropriate when the factor is charged in the charging document. Indeed, the Supreme Court has held that the "failure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error." (*Washington v. Recuenco* (2006) 548 U.S. 212.) Thus, a jury instruction that omits an element of the offense is

subject to harmless error analysis (i.e., is not structural error).) (*Neder v. U.S.* (1999) 527 U.S. 1.) Indeed, *Recuenco* relied on *Neder* to achieve its result. These cases do not control the situation where one of California's aggravating factors is not charged.

Recuenco and *Neder* involved charged offenses or enhancements. For example, the information in *Recuenco* charged him with being armed with a deadly weapon at the time of the assault, 'to-wit: a handgun . . ..' (*State v. Recuenco* (2003) 117 Wash.App. 1079.) The court only instructed the jury that it had to find Recuenco guilty of using a deadly weapon, not necessarily a firearm. (*Washington v. Recuenco*, supra, 548 U.S. at pp. 214-215.) Nonetheless, the trial judge imposed the 3-year enhancement for a firearm in lieu of the 1-year enhancement for using another type of deadly weapon. (*Id*.) The Supreme Court held that, under these circumstances, the failure to submit a sentencing factor to the jury would not always invalidate a conviction. (*Id*. at p. 222.) Unlike the question presented in this case, the government had charged *Recuenco* and gave him notice that he faced the greater enhancement.

Similarly, the government charged Neder with tax fraud and the trial court left one element out of the jury instructions. (*Neder v. U.S.*, supra, 527 U.S. 1.) The *Neder* Court applied the harmless error analysis because the omission of an element will not always render a trial unfair. (*Id*. at p. 9.) Considered with the factual context in mind, the decision must be understood to apply harmless error when the offense is charged.

Based on *Neder* and *Recuenco*, the harmless error standard applies when the offense or the sentencing factor is charged. It is a quite different context when the sentencing enhancement factor or element is not charged. No one would argue that *Recuenco* and *Neder* would permit a person to be convicted of an offense that is entirely uncharged. If that were true, the government could convict a person of capital murder even if they were only charged with disturbing the peace. Such a rule would eviscerate the Sixth Amendment jury trial right, a right that is fundamental to our constitutional system. It is a right that "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." (*Blakely v. Washington, supra*, 542 U.S. at p. 306.)

Justice Stevens dissented in *Recuenco* partly because the Court did not address "the strongest argument in respondent's favor...that *Blakely* errors are structural because they deprive criminal defendants of sufficient notice regarding the charges they must defend against[.]" (*Recuenco*, *supra*, 548 U.S. at p. 223, J. Stevens, dissenting.) Lack of notice implicating due process is exactly the CPDA's concern in applying a harmless error analysis. While *Recuenco* reversed the Washington Supreme Court's holding that *Blakely* error is always structural, it did not address the due process arguments based primarily on lack of notice. Indeed, *Recuenco* did not address the Court's concerns in *Cole* of insufficient notice violating due process.

Justice Ginsburg, in dissent, summarized the structural problems in *Recuenco*, including in the due process context:

> In sum, Recuenco, charged with one crime (assault with a deadly weapon), was convicted of another (assault with a firearm), sans charge, jury instruction, or jury verdict. That disposition, I would hold, is incompatible with the Fifth and Sixth Amendments, made applicable to the States by the Fourteenth Amendment.

(*Id*. at 229, J. Ginsburg dissenting.)

C. APPLYING A HARMLESS ERROR STANDARD IS CONTRARY TO THE LEGISLATIVE PURPOSE BEHIND SENATE BILL 567.

Applying a harmless error analysis in upholding upper term sentences absent a plea or jury trial to prove aggravating factors directly contradicts the California Legislature's purpose in abating mass incarceration by limiting a court's use in imposing the upper term. Indeed, the Assembly Committee on Appropriations report on S.B. 567, the law that required aggravating circumstances to be proved to a jury, explained that "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*." (Sen. Com. On Appropriations, Rep. on S.B. 567 (2021-2022 Reg. Sess.), April 27, 2021, p. 2. (emphasis added).)

The Legislative intent is clear and does not support a harmless error analysis. In passing S.B. 567, the Legislature wanted to ensure that aggravating factors were either proved to a

jury or admitted by a defendant before the trial court could impose an aggravated term. Employing a harmless error standard would allow trial judges to do exactly what the Legislature sought to avoid, to replace a jury's judgment with their own.

CONCLUSION

Adopting a harmless error standard of review will have a profound impact on the trial courts. It will allow trial judges to impose aggravated sentences without properly proved aggravators, so long as their decision is deemed harmless. This would subject defendants to longer sentences without proper notice and could leave them surprised by aggravated sentences based on uncharged allegations. Such a result is inconsistent with the constitutional rights to due process, a jury trial, and the effective assistance of counsel. Amicus CPDA asks this Court to adopt a rule of per se reversal for trial court errors in imposing the aggravated term in the absence of properly proved aggravated factors.

Date:

Respectfully submitted,

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Certification of Word Count

I, Brian Matthews, hereby certify that the above-included brief consists of 3,982 words, according to the Microsoft Word word count function.

Brian Matthews

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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Proof of Service

I am a citizen of the United States and am employed in Santa Clara County. I am over the age of eighteen years and am not a party to this action. My business address is 2305 Bering Dr., San Jose, CA 95131.

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I declare under penalty of perjury that the foregoing is true and correct. Executed on this 31st day of May 2023 at San Jose, California.

Brian Matthews

Brian Matthews
Deputy Alternate Defender
Santa Clara County

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. LYNCH**
Case Number: **S274942**
Lower Court Case Number: **C094174**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

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5/31/2023
Date

/s/Brian Matthews

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