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 TO AMICUS CURIAE BRIEF

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September 15, 2023

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INTRODUCTION

The parties' briefing in this case has addressed the question of what standard of reversibility governs when a trial court imposes an upper-term sentence without meeting the new requirements of Penal Code, section 1170, subdivision (b).[1] The amendments to that statute require that a middle-term sentence be imposed unless an upper term is justified by sentence-aggravating circumstances that were, with the exception of prior convictions, either proven to a jury beyond a reasonable doubt or stipulated to by the defendant. The standard of reversibility for a failure to comply with those new requirements has been the subject of debate and division among the Courts of Appeal, and this case provides an opportunity for the Court to settle the question.

The California Public Defenders Association (CPDA), as amicus curiae, devotes its brief almost entirely to a different issue: whether a *lack of notice* regarding aggravating circumstances under the new sentencing scheme amounts to structural error. But no notice issue was raised in the Court of Appeal below or addressed in its opinion. Nor do the other Court of Appeal opinions examining the issue presented here address any separate notice issue. It is not necessary to decide such any question of notice in order to resolve the issue presented. This Court should therefore adhere to the usual rule and decline to

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

consider the notice issue belatedly raised by CPDA in this case. (Cal. Rules of Court, rule 8.500(c).)

In any event, CPDA's notice arguments are unpersuasive. CPDA is mistaken in arguing that *Apprendi v. New Jersey* (2000) 530 U.S. 466 requires formal pleading of any facts necessary to support an upper-term sentence. The *Apprendi* line of authority does not recognize a constitutional pleading requirement applicable in state-court proceedings, much less one that would not be subject to the usual harmless-error analysis that governs *Apprendi* error. Further, to the extent that general due process notice principles governing criminal charges also apply to aggravating circumstances under amended section 1170, subdivision (b), those requirements were satisfied here. Lynch received adequate notice, prior to the sentencing hearing, of the aggravating circumstances that the people sought to invoke in support of an upper term.

Finally, CPDA's argument that review of error under amended section 1170, subdivision (b), for prejudice would contravene legislative intent is also unpersuasive. Nothing about the Legislature's purpose in amending the statute conflicts with the well-settled principles governing the reversibility of trial error.

ARGUMENT

I. THE NOTICE ISSUES RAISED BY CPDA ARE NOT PROPERLY BEFORE THIS COURT AND ARE WITHOUT MERIT

CPDA argues that automatic reversal is required when a defendant is sentenced to the upper term under amended section 1170, subdivision (b), but no adequate notice, either as a matter

of formal pleading or of general due process, was given as to the sentence-aggravating factors relied upon by the trial court. (ACB 13-23.) The Court should decline to consider these issues, which were not raised in, or addressed by, the Court of Appeal. In any event, CPDA's arguments about a lack of notice are without merit.

A. The notice issues are not properly before the Court

No issue about what notice of aggravating circumstances might be required in light of the revisions to section 1170, subdivision (b), or whether Lynch received adequate notice in this case, was litigated in the Court of Appeal below.[2] There is no reason to depart here from the usual rule disfavoring review of such a belatedly raised issue. (Cal. Rules of Court, rule 8.500(c).) The question presented in this case focuses on the standard for reversal when a trial court errs by imposing an upper-term sentence in reliance on aggravating circumstances that were not proved in conformity with the revised statute. It is not necessary to reach any notice issue in order to resolve that question.[3]

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[2] In his opening brief in this Court, Lynch alluded to notice principles as one part of his structural error argument, which the People addressed in the answer brief. (OBM 28-29; ABM 45-46.) His argument is fundamentally premised, however, on a lack of proof of aggravating circumstances to a jury beyond a reasonable doubt, and he did not advance lack of notice as a separate claim in the way CPDA does. (See OBM 27-38.)

[3] One Court of Appeal decision has addressed a pleading argument under amended section 1170, subdivision (b), without also addressing the issue presented here. (See *People v.*

Moreover, resolution of the notice issues raised by CPDA—particularly the due process issue—would depend on the particular facts of this case (see *People v. Cole* (2004) 33 Cal.4th 1158, 1205 [whether defendant received constitutionally adequate notice is mixed question of law and fact, though predominantly legal]), which would not necessarily present any issue of broad importance that would warrant this Court's review. (See Cal. Rule of Court, rules 8.500(b), 8.516; *Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499, 507.) This Court should decline CPDA's invitation to address questions about notice under the amended statute, which would be more properly reserved for a case in which those questions were litigated by the parties in the lower courts. (See Cal. Rules of Court, rule 8.500(c).)

Pantaleon (2023) 89 Cal.App.5th 932, 938-941.) Several appellate courts have issued conflicting decisions on the standard of reversibility that applies to error under the amended statute, none of which addresses any notice question. (See *People v. Falcon* (2023) 92 Cal.App.5th 911, review granted Sept. 13, 2023, S281242; *People v. Lewis* (2023) 88 Cal.App.5th 1125, review granted May 17, 2023, S279147; *People v. Zabelle* (2022) 80 Cal.App.5th 1098; *People v. Wandrey* (2022) 80 Cal.App.5th 962, review granted Sept. 28, 2022, S275942; *People v. Dunn* (2022) 81 Cal.App.5th 394, review granted Oct. 12, 2022, S275655; *People v. Flores* (2022) 75 Cal.App.5th 495; *People v. Lopez* (2022) 78 Cal.App.5th 459.) This Court can resolve the conflict by deciding the standard of reversibility for trial court error under the revised statute without reaching any issue about notice.

B. Formal pleading of aggravating circumstances is not required under *Apprendi*

In any event, CPDA's argument about formal pleading of aggravating circumstances is unavailing. CPDA contends that, under *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, notice of sentence-aggravating factors must be given in the accusatory pleading. (ACB 12-14, 17-19.) The People have acknowledged that, in light of the revisions to section 1170, subdivision (b), an upper-term sentence must now be supported by at least one aggravating circumstance that has been proved in conformity with the constitutional requirements described in *Apprendi*. (ABM 24-29.) But, in Lynch's case, one of the aggravating circumstances relied upon by the trial court was the fact of his prior convictions, a circumstance that is excepted from *Apprendi*'s requirements. (ABM 32-33.) To the extent *Apprendi* stands for any notice rule in addition to its constitutional proof requirements, the prior-convictions factor would be excepted and that factor alone supported the upper term as a constitutional matter. (See *People v. Pantaleon*, *supra*, 89 Cal.App.5th at p. 941.)

More fundamentally, however, CPDA is incorrect in reading *Apprendi* to require formal notice in state-court proceedings of factual findings necessary to support a particular sentence. The *Apprendi* court did not address any such claim, instead noting that no claim had been asserted there regarding the failure to provide notice in an accusatory pleading of sentence-aggravating factors. (*Apprendi, supra*, 530 U.S. at p. 477, fn. 3.) And it observed that the Fifth Amendment right to "presentment or

indictment of a Grand Jury" has not been construed as incorporated by the Fourteenth Amendment's due process clause so as to apply to the States. (*Ibid.*) As this Court has recognized, *Apprendi* "expressly declined to address the constitutional implications, if any, of omitting sentencing factors from accusatory pleadings." (*People v. Contreras* (2013) 58 Cal.4th 123, 148; accord, *People v. Chhoun* (2021) 11 Cal.5th 1, 40-41.)[4]

Subsequently, the high court held that *Apprendi* error is not structural. (*Washington v. Recuenco* (2006) 548 U.S. 212, 219-220.) It reasoned that, for purposes of harmless-error review,

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[4] The *Apprendi* opinion contains language stating that such factors "must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." (*Apprendi*, *supra*, 530 U.S. at 476.) That language reflects that the case arose from a federal criminal prosecution, which must be initiated by indictment. (See U.S. Const., 5th Amend.; *Apprendi*, at p. 476, quoting *Jones v. U.S.* (1999) 526 U.S. 227, 243 fn.6 [also involving federal criminal indictment].) The indictment requirement does not apply to state prosecutions. (*Hurtado v. California* (1884) 110 U.S. 516, 538; see also *Apprendi*, at p. 477, fn. 3.) *Apprendi*'s analysis instead concerned only the Sixth Amendment requirements that apply to jury verdicts. (See *Apprendi*, at p. 469 [framing the issue as whether "a factual determination authorizing an increase in the maximum prison sentence [must] be made by a jury on the basis of proof beyond a reasonable doubt"].) And shortly after *Apprendi*, the court made clear in *United States v. Cotton* (2002) 535 U.S. 625, that there is a fundamental distinction between jury-trial requirements, which apply to all prosecutions, and charging-document requirements, which apply only to federal indictments. (See *id.* at p. 627 [recounting *Apprendi*'s general rule regarding jury findings as to sentence-elevating facts and explaining that "[i]n federal prosecutions, such facts must also be charged in the indictment"].)

Apprendi error is "indistinguishable from" the instructional error that it had determined was amenable to a prejudice assessment in *Neder v. United States* (1999) 527 U.S. 1. (*Recuenco*, at p. 220.) Pointing to two dissenting opinions in *Recuenco*, CPDA asserts that the decision in that case reserved the question whether a separate form of pleading error under *Apprendi* could be subject to harmless-error review. (ACB 19-22.) The dissenters in *Recuenco*, echoing a principal argument made by the defendant there, cited a failure to plead as part of their arguments that *Apprendi* error could not be equated to the instructional error in *Neder*. (See *Recuenco*, at p. 223 (dis. opn. of Stevens, J.); *id.* at pp. 224-229 (dis. opn. of Ginsburg, J.).) But that view did not prevail, and the *Recuenco* majority specifically rejected the defendant's effort "to evade *Neder* by characterizing this as a case of charging error, rather than of judicial factfinding." (*Id.* at p. 220, fn. 3.)

The *Apprendi* line of cases thus does not recognize a separate constitutional charging principle applicable in state-court proceedings, much less one that would be analyzed as structural error apart from other types of *Apprendi* error. Indeed, in federal prosecutions, where a constitutional pleading requirement applies, the United States Supreme Court has assessed pleading violations for prejudice. (*Cotton*, *supra*, 535 U.S. at pp. 632-633.) And in the analogous context of statutory pleading requirements, this Court has similarly treated a pleading violation as subject to harmless-error review. (See, e.g.,

People v. Anderson (2020) 9 Cal.5th 946, 964; see also § 960.)[5] There is no apparent reason why the type of error that CPDA posits would be treated differently, and indeed CPDA cites no authority recognizing the existence of a purported separate variety of *Apprendi* pleading error that would require automatic reversal.

C. Due process notice principles were satisfied in this case

CPDA's broader argument based on general due process notice principles is also unavailing. CPDA contends that, in light of the amendments to section 1170, subdivision (b), due process requires adequate notice of sentence-aggravating factors that will be used to support an upper-term sentence, and that failure to provide such notice warrants automatic reversal. (ACB 14-17.) It is true that this Court has indicated that "[i]t is unnecessary to . . . engage in a harmless-error analysis when defendant's due process right to notice has been . . . completely violated." (*People v. Hernandez* (1988) 46 Cal.3d 194, 208-209.) That is not the case here. Even assuming the general due process notice principles relied upon by CPDA (see *Cole v. Arkansas* (1948) 333 U.S. 196, 200-202) apply in this context, the constitutional standard was satisfied in Lynch's case; at a minimum, it was not "completely violated." (*Hernandez*, at p. 209.) Several days before the April

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[5] CPDA does not make any argument that pleading of aggravating circumstances is required as a statutory matter after the revisions to section 1170, subdivision (b). (See, e.g., *Pantaleon*, *supra*, 89 Cal.App.5th at pp. 938-940; see also ABM 45-46.)

30, 2021, sentencing hearing, the People filed a "Statement in Aggravation Pursuant to Penal Code section 1170 (b)," where the sentence-aggravating circumstances were listed, and facts in support of each aggravating circumstance were provided. (1CT 277-283 [filed April 26, 2021].) This gave Lynch a meaningful opportunity to defend against the aggravating circumstances—or at least to request a continuance to prepare to do so—at the hearing where they were considered by the sentencing court. (See *People v. Williams* (2013) 56 Cal.4th 630, 681 ["'Both the Sixth Amendment of the federal Constitution and the due process guarantees of the state and federal Constitutions require that a criminal defendant receive notice of the charges adequate to give a meaningful opportunity to defend against them'"].) There was no due process violation that would amount to structural error.

II. REVIEW OF ERROR UNDER SECTION 1170, SUBDIVISION (B), FOR PREJUDICE DOES NOT CONTRADICT LEGISLATIVE INTENT

CPDA also makes a more general argument that to review error under section 1170, subdivision (b), for prejudice would contradict the Legislature's purpose and intent in amending that section. CPDA observes that one of the goals of the amendments was to "abat[e] mass incarceration." (ACB 22.) And it points out that the Legislature sought 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." (ACB 22-23.) CPDA argues that harmless-error analysis would thwart these legislative purposes by allowing a court to "replace a jury's judgment with [its] own." (ACB 22-23.)

CPDA conflates the question of error with that of reversibility. "'[N]o legislation pursues its purposes at all costs.'" (*In re Friend* (2021) 11 Cal.5th 720, 736 ["'it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law'"].) Although the Legislature sought to reform upper-term sentencing in certain ways when it amended section 1170, subdivision (b), there is nothing to suggest that it intended to override or limit application of well-settled principles governing the reversibility of trial error. Those principles themselves serve important public policy goals that the Legislature is presumed to have taken into account. (See *People v. Overstreet* (1986) 42 Cal.3d 891, 897 [Legislature is deemed to be aware of existing laws and judicial decisions in effect at the time legislation is enacted and to have enacted and amended statutes in light of those laws]; see also *People v. Cahill* (1993) 5 Cal.4th 478, 508-509 [reversal where the error was unlikely to have affected the outcome "often will have the detrimental effect of eroding the public's confidence in the criminal justice system"]; *id.* at p. 509 [such a rule "may in practice operate to weaken or diminish the basic constitutional right that is sought to be protected"]; *People v. Merritt* (2017) 2 Cal.5th 819, 826 ["'reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it'"].)

Moreover, harmless-error review in this context would not appreciably affect the goal of reducing mass incarceration. The purpose of such review is only to prevent needless and wasteful

appellate reversals where the record shows that the error is *unlikely to have affected the ultimate result*. (See *Cahill*, *supra*, 5 Cal.4th at p. 509.) Nor would harmless-error review improperly supplant the requirement of jury factfinding. Indeed, that view was expressly rejected in *Neder*. (*Neder*, *supra*, 527 U.S. at pp. 11-12 [rejecting argument that harmless-error review cannot properly function without full and proper jury verdict due to omission of element from instructions]; see also *In re Lopez* (2023) 14 Cal.5th 562, 583-584.)

Under well-settled precedent, structural error is a "very limited" category consisting only of those errors that defy assessment for prejudice because they "'infect the entire trial process'" and "'necessarily render a criminal trial fundamentally unfair.'" (*Neder, supra,* 527 U.S. at pp. 8-9.) Error under section 1170, subdivision (b), does not fall into that narrow category. And nothing about the Legislature's purpose or intent in reforming upper-term sentencing is inconsistent with the preservation of judgments where the record shows that an error under the amended statute could not have affected the result in the trial court.

CONCLUSION

The judgment of the Court of Appeal should be affirmed.

Respectfully submitted,

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September 15, 2023

CERTIFICATE OF COMPLIANCE

I certify that the attached **ANSWER TO AMICUS CURIAE BRIEF** uses a 13-point Century Schoolbook font and contains **2,770** words.

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September 15, 2023

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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 September 15, 2023, at Sacramento, California.

M. Latimer	***/s/ M. Latimer***
Declarant for U.S. Mail	Signature

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STATE OF CALIFORNIA
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