

CERTIFIED FOR PARTIAL PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ALBERTO LUCATERO,

Defendant and Appellant.

F053221

(Super. Ct. No. VCF169223)

**ORDER MODIFYING OPINION
AND DENYING PETITION FOR
REHEARING
[NO CHANGE IN JUDGMENT]**

THE COURT:

The motion for rehearing filed in the above matter on September 30, 2008, is denied. An unauthorized sentence is one that “could not lawfully be imposed under *any* circumstance in the particular case.” (*People v. Scott* (1994) 9 Cal.4th 331, 354, italics added.) Sentences which, though otherwise permitted by law, are imposed in a procedurally or factually flawed manner do not fall within the narrow unauthorized-sentence exception to the rule that only those sentencing errors properly raised and preserved by the parties in the trial court are reviewable on appeal. (*Ibid*; see also *People v. Stowell* (2003) 31 Cal.4th 1107, 1117-1118 (conc. opn. of Baxter, J.); *Smith v. Superior Court* (1981) 115 Cal.App.3d 285, 293 [failure to state reasons for exercising discretion granted in sentencing by Pen. Code, § 1385 is procedural defect which may be waived by prosecutor].)

On the court's own motion, the opinion filed in the above-captioned matter on September 15, 2008, is hereby modified so that the last sentence of the first full paragraph on page 12 reads as follows:

“At the change-of-plea hearing, the prosecutor confirmed for the court that the plea was based on an indicated sentence of five years eight months, which the Attorney General admits is only available if the prior strike conviction is dismissed. (Pen. Code, § 667, subd. (e)(1); Health & Saf. Code, § 11370.2, subd. (c).)”

Except for the modification set forth, the opinion previously filed remains unchanged. The modification does not alter the judgment.

Wiseman, Acting P. J.

WE CONCUR:

Levy, J.

Kane, J.