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SUPREME COURT NO.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. NORMAN SALAZAR, Defendant and Appellant.	Court of Appeal No. B309803 Superior Court No. 2018027995

Appeal From The Judgment Of The
Superior Court of Ventura County
The Honorable Anthony J. Sabo, Judge

PETITION FOR REVIEW

After the Published Decision of the Court of Appeal, Second Appellate District, Division Six, Affirming the Court's Order

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TOPICAL INDEX

PAGE(S)

TABLE OF AUTHORITIES

CASES

STATE STATUTES

Penal Code sections:

CALIFORNIA RULES OF COURT

LEGISLATIVE MATERIALS

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TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to Rule 8.500 of the California Rules of Court, petitioner, Norman Salazar ("Salazar"), respectfully requests that this Court review the decision of the Court of Appeal, Second Appellate District, Division Six, denying Salazar's request to

remand the case for resentencing in light of the amendments to Penal[1] Code section 1170(b).

The published opinion, consisting of a majority and a dissenting opinion (as to this issue[2]), was filed on June 28, 2022. (*People v. Salazar* (June 28, 2022) 2022 Cal. App. LEXIS 560.) The slip opinion is appended to this petition and is cited herein as "Opn."

The majority concluded that the "record 'clearly indicates' the trial court would not have imposed the low term had it been aware of its discretion to do so under S.B. 567" (Maj. Opn., p. 12) and that remand for resentencing was, therefore, not required (Maj. Opn., p. 10).

The Dissenting Justice would have remanded the case to the trial court to allow it to exercise its discretion in light of the intervening legislation. (Dis. Opn. of Tangeman, J., p. 3.) The Dissenting Justice found that "Because Senate Bill 567 was not enacted until after sentencing, the sentencing court had no opportunity to consider this new requirement or the necessary findings to overcome it." (*Id.* at p. 1.) Further, no showing was made that the trial court would have imposed the same sentence if it had been aware of its new discretion. (Dis. Opn., p. 2.) Finally the Dissenting Justice noted that "the majority's approach of substituting its judgment for that of the trial court" is a departure from the duties of a reviewing court. (*Ibid.*)

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[1]All further statutory references are to the Penal Code unless otherwise specified.

[2]The Dissenting Justice concurred on the other two issues.

No petition for rehearing was filed.

ISSUES PRESENTED

1) Whether a reviewing court can substitute its own judgment for that of the lower court and conclude that the sentencing court would not have imposed a lower term even though after the sentence was imposed, new legislation (Senate Bill 567 and Assemble Bill 124) changed the scope of sentencing discretion;

2) What is the correct standard for determining prejudice for failure to apply amended section 1170(b) retroactively to a case that was not final when the new law became effective; and

3) Whether, pursuant to section 654, a defendant can be punished twice for acts that are incidental to each other.

NECESSITY FOR REVIEW

This case presents two important questions of law regarding the changes to sentencing discretion in the new legislation, Senate Bill 567 and Assembly Bill 124.

First, whether a reviewing court can substitute its own judgment for that of the sentencing court and conclude that a sentencing court would not have imposed a lower term even though after the sentence was imposed, new legislation (Senate Bill 567 and Assemble Bill 124) changed the requirements for choosing a sentencing term. "An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge." (*People v. Carmony* (2004) 33 Cal.4th 367, 377, citing *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 978.)

The Dissent found that "Because Senate Bill 567 was not enacted until after sentencing, the sentencing court had no opportunity to consider this new requirement or the necessary findings to overcome it." (Dis. Opn., p. 1.) The Dissent further found that "the majority's approach of substituting its judgment for that of the trial court" is a departure from the duties of a reviewing court. (*Ibid.*)

Second, whether failure to apply newly-enacted section 1170(b) can be deemed harmless error if a reviewing court concludes that the jury would have found true beyond a reasonable doubt one aggravating factor justifying the higher term. There is a split of opinion on this issue, which the majority referenced. (Maj. Opn., p. 13.) The First Appellate District found

that such a situation would be harmless error. (*People v. Flores* (2022) 75 Cal.App.5th 495, 500, request for depublication denied on June 15, 2022.) The Fourth Appellate District disagreed, holding that the question of prejudice "involves a two-step process, neither of which includes a determination as to whether the trial court relied on a single, or even a few, permissible factors in selecting an upper term." (*People v. Lopez* (2022) 78 Cal. App. 5th 459, 457, fn 11.)

This case also presents an important issue of law regarding whether, pursuant to section 654, a defendant can be punished for two acts that occurred at the same time and are incidental to each other. Further, Assembly Bill 518 gives the trial court discretion (it did not have at the sentencing hearing) to stay any of the sentences encompassed in a section 654 stay, including the longest sentence.

Petitioner requests this Court grant review of these issues in order to secure uniformity of decision and settle important questions of law. (Cal. Rules of Court, rule 8.500(b)(1).)

STATEMENT OF THE CASE AND FACTS

Petitioner adopts the statement of case and facts as set forth in the opinion from the Court of Appeal for the purposes of this petition. (Opn., pp. 2-4.)

Additional facts relevant to the specific issues are cited in the Argument section.

ARGUMENT

I

Review should be granted to clarify that a reviewing court cannot substitute its own judgment for that of the lower court – particularly when new legislation changes the sentencing court's original scope of discretion.

Petitioner argued below that his case should be remanded in light of the changes to sentencing discretion that occurred since petitioner was sentenced in November of 2020.

The majority disagreed, finding the "record 'clearly indicates' the trial court would not have imposed the low term had it been aware of its discretion to do so under S.B. 567[3]." (Maj. Opn., p. 12.)

In so doing, the majority substituted its own judgment and speculated as to what the lower court would have decided had it been aware of its new discretion. For example, the majority stated, "the current offenses were aggravated, sadistic, and extended over the course of 20 hours" (Maj. Opn., p. 12.) The majority also opined, "For what appellant did over the course of two days, an aggregate unstayed sentence of seven years and four months is lenient." (Maj. Opn., p. 13.) The majority went on to state that Salazar "could easily have been sentenced to the upper term." (*Ibid.*)

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[3]The majority appears to be confusing Senate Bill 567 (factors than be considered when imposing an aggravated term) with Assembly Bill 124 (factors to be considered when considering whether to impose the lower term).

Substituting its own judgment for that of the sentencing court was an error.

"An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge." (*Carmony, supra,* 33 Cal.4th at p. 377, citing *Alvarez, supra,* 14 Cal.4th at p. 978.) "We depart from our duties as a court of review when we unilaterally conclude that some crimes are sufficiently 'horrendous,' or some sentences so 'lenient,' that any lesser sentence would be 'contrary to the interests of justice' '[a]s a matter of law.'" (Dis. Opn., pp. 2-3.)

1. Amended 1170(b) created extensive new sentencing discretion that did not exist when the court imposed sentence on Salazar.

The version of section 1170 in effect when petitioner was sentenced provided that, when a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term rested within the sound discretion of the court. (Former § 1170, subd. (b).) That version of section 1170 allowed the trial court judge to make findings of fact based on evidence presented informally at the sentencing hearing. (*Ibid.*)

The new version of section 1170 is very clear: the upper term cannot be selected unless the facts supporting the aggravation are 1) stipulated to by the defendant, or 2) found true beyond a reasonable doubt at trial by the jury or by the judge in a court trial. (§ 1170, subd. (b)(2), as amended by Stats. 2021, ch. 731, § 3.1.) This aspect of the amendment to section 1170 thus

requires formal proof beyond a reasonable doubt of additional elements in order to impose the upper term.

The new version of section 1170 also allows defendants to have certain evidence relating to their personal backgrounds considered by the trial court in support of the selection of the lower term:

> Notwithstanding paragraph (1), and unless the court finds that the aggravating circumstances outweigh the mitigating circumstances that imposition of the lower term would be contrary to the interests of justice, the court shall order imposition of the lower term if any of the following was a contributing factor in the commission of the offense:
>
> (A) The person has experienced psychological, physical, or childhood trauma, including, but not limited to, abuse, neglect, exploitation, or sexual violence.
>
> (B) The person is a youth, or was a youth as defined under subdivision (b) of Section 1016.7 at the time of the commission of the offense.
>
> (C) Prior to the instant offense, or at the time of the commission of the offense, the person is or was a victim of intimate partner violence or human trafficking.

(§ 1170, subd. (b)(6), as amended by Stats. 2021, ch. 731, § 3.1.) This aspect of the new legislation thus provides defendants with a new right at the sentencing hearing to present evidence that will lessen the potential length of their prison term.

2. Review should be granted to clarify that an appellate court cannot substitute its own judgment for that of the sentencing court and that remand is the best option when the scope of the sentencing court's discretion has changed since sentence was imposed.

Amended section 1170(b) was not effective when the court sentenced Salazar in November of 2020 (2 CT 576); the court was, therefore, unaware of the scope of its new discretion. As the dissent correctly stated, "Because Senate Bill 567 was not enacted until after sentencing, the sentencing court had no opportunity to consider this new requirement or the necessary findings to overcome it." (Dis. Opn., p. 1; see also *Lopez, supra,* 78 Cal. App. 5th at p. 466.)

A court which is unaware of the scope of its discretionary powers can no more exercise that 'informed discretion' than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record." (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.) Where a trial court cannot have acted with "informed discretion," "the appropriate remedy is to remand for resentencing unless the record 'clearly indicate[s]' that the trial court would have reached the same conclusion 'even if it had been aware that it had such discretion.' [Citations.]" (*Ibid.*)

The majority concluded that "the record 'clearly indicates' the trial court would not have imposed the low term had it been aware of its discretion to do so under [amended section 1170(b)]." (Maj. Opn., p. 12.)

This conclusion is incorrect.

The lower court sentenced appellant to the middle term based on the evidence and the fact that the last seven years or so appellant's criminal history has been drug-related. (11 RT 1532.) "By selecting the middle term, the trial court impliedly found the aggravating factors were not sufficient to warrant imposition of the high term." (Dis. Opn., p. 2, citing § 1170, subd. (b)(2) (former subd. (b).) The court also noted that a lot of Salazar's criminal history "may be because of suffering from you father's death, and . . . you mother's death." (Dis. Opn., p. 2; 11 RT 1531.)

However, there is no evidence the court considered appellant's psychological and childhood trauma as potential mitigating factors, as required under the amended statute. (§1170, subd. (b)(6).) In fact, the sentencing court was not required to do so until the January 1, 2022, when the law became effective.

At sentencing, Salazar presented evidence of violence and abuse in the home where he grew up (2 CT 507) and evidence he suffered from anxiety and depression from the age of six or seven (2 CT 534). Salazar's father was an alcoholic. (2 CT 504.) Salazar's parents were divorced when he was a teenager, and Salazar feared his mother's new boyfriend would harm him. (2 CT 504.)

Salazar's mother and sister were diagnosed with Bipolar disorder, and his father was diagnosed with Paranoid Schizophrenia. (2 CT 505, 529, 551.) Salazar's father would place mirrors around the family home so he could see around corners and built a high fence with spikes sticking out of the top of it to prevent others from entering. (2 CT 505, 529.)

In 2006, Salazar was diagnosed with Paranoid Schizophrenic Disorder, Anxiety, and Claustrophobia. (2 CT 505, 534, 546.) In 2009, he was admitted to the Ventura County Psychiatric Unit. (2 CT 506.) According to the Intake Evaluation, Salazar stated he had tried to kill himself and he thought his mother's boyfriend was trying to kill him. (2 CT 506, 518, 523.)

Therefore, contrary to the majority's finding (Maj. Opn., p. 12), the record here does not establish that the sentencing court would not have found trauma was a contributing factor had it been aware of its discretion to do so. (Diss. Opn., p. 1, *Gutierrez, supra,* 58 Cal.4th at p. 1391.)

Further, the majority based its conclusion on factors not supported by the law or the record. First, the majority stated that an aggravating factor was that the jury made a true finding of violence as to count 1. (Maj. Opn., pp. 11-12.) Count 1 was a conviction for violating sections 236/237. It appears the majority is referring to an element of section 237(a) that raised it to a felony – that the false imprisonment was effected by violence, menace, fraud, or deceit. "A fact that is an element of the crime on which punishment is being imposed may not be used to impose a particular term." (Cal. Rules of Court, rule 4.420(h).)

Second, the majority speculated that the court's denial of the *Romero*[4] motion indicates it would not have imposed a lower term. (Opn., p. 12.) However, the sentencing court used an entirely different and much stricter standard when denying the *Romero* motion. "In deciding to strike a prior, a sentencing court is

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[4] *People v. Superior Court* (*Romero*) (1996)13 Cal.4th 497

concluding that an exception to the scheme should be made because, for articulable reasons which can withstand scrutiny for abuse, this defendant should be treated as though he actually fell outside the Three Strikes scheme." (*People v. McGlothin* (1998) 67 Cal.App.4th 468, 474.) In contrast, by requesting remand in light of the new sentencing law, Salazar was not asking that the court apply an exception to him; he was simply asking the court to apply the amended law to his sentence.

Third, the majority speculated that "the imposition of consecutive sentences shows the court's reluctance to impose the lower term." (Opn., p. 12.) But in deciding whether to impose consecutive terms, unlike in determining whether to impose an aggravated sentence, "there is no requirement . . . that the court find that an aggravating circumstance exists." (*People v. Black* (2007) 41 Cal.4th 799, 822.) Rather, sentencing courts need only cite reasons, as opposed to factual findings, when imposing consecutive sentences. (*Ibid.*)

Finally, the majority stated that the current offenses were aggravated and the probation report showed Salazar had a record of violence against other women (Opn., p. 12) – factors that were not admitted by Salazar or proven to a jury beyond a reasonable doubt (§1170(b)(2)).

Review should be granted to secure uniformity of decision and to clarify that a reviewing court cannot substitute its own judgment for that of the lower court – particularly when new legislation changes the court's original scope of discretion. (Cal. Rules of Court, rule 8.500(b)(1).)

II

Review should be granted to settle an important question of law: what is the standard for determining prejudice under retroactive application of amended section 1170(b).

The majority identified a split of opinion as to the correct standard for determining whether a defendant was prejudiced by the trial court's failure to apply amended section 1170(b) to his sentence. (Opn., p. 13; see *Flores, supra,* 75 Cal.App.5th 495; *Lopez, supra,* 78 Cal.App.5th 459.)

The dissent is correct that the majority decided whether the sentencing court would have imposed the lower term pursuant to section 1170(b)(6) and that the split of opinion addresses a different issue – regarding factors in aggravation to impose the upper term (1170(b)(2). (Diss. Opn., p. 3, fn 2.)

Nevertheless, the majority seems to indicate that *Flores* has articulated the correct standard of appellate review (Maj. Opn., pp. 13-14), and there is a split of opinion as to this issue.

The *Flores* Court found that failure to submit aggravating factors (besides a record of conviction) to the jury could result in harmless error – even in light of the new law. (*Flores, supra,* at p. 500.) "[I]f a reviewing court concludes, beyond a reasonable doubt, that the jury, applying the beyond-a-reasonable- doubt standard, unquestionably would have found true at least a single aggravating circumstance had it been submitted to the jury," the error is harmless. (*Ibid.*)

The Fourth Appellate District disagreed, noting that under the old law, the prosecution was not required to present evidence at trial directly related to the aggravating factors; nor would a defendant have any reason to present evidence that might have contradicted evidence in support of the aggravating factors. (*Lopez, supra*, at p. 466.) Therefore, the *Lopez* Court concluded, "[i]t would be entirely speculative for us to presume, based on a record that does not directly address the aggravating factors, what a jury would have found true in connection with these factors." (*Ibid.*)

The *Flores* Court failed to address this issue.

The *Lopez* Court also found that,

> In order to conclude that the trial court's reliance on improper factors that were not found true by a jury or admitted by Lopez was not prejudicial, we would have to conclude beyond a reasonable doubt that a jury would have found true beyond a reasonable doubt every factor on which the court relied, because the amended statute requires that every factor on which a court intends to rely in imposing an upper term, with the exception of factors related to a defendant's prior conviction(s), have been admitted by the defendant or proven to a jury.

(*Lopez, supra,* at pp. 465-466; see also *People v. Wandrey* (2022) 2022 Cal.App. LEXIS 595, *27-28.)

The *Lopez* Court articulated a two-step process to determine prejudice under retroactive application of the revised triad system. (*Lopez, supra*, at p. 467, fn 11.) "[T]he initial relevant question for purposes of determining whether prejudice resulted from failure to apply the new version of the sentencing law is whether the reviewing court can conclude beyond a reasonable doubt that a

jury would have found true beyond a reasonable doubt all of the aggravating factors on which the trial court relied in exercising its discretion to select the upper term. If the answer to this question is 'yes,' then the defendant has not suffered prejudice from the court's reliance on factors not found true by a jury in selecting the upper term." (*Ibid.*)

"However, if the answer to the question is 'no,' we then consider the second question, which is whether a reviewing court can be certain, to the degree required by *People v. Watson* (1956) 46 Cal.2d 818, 836, that the trial court would nevertheless have exercised its discretion to select the upper term if it had recognized that it could permissibly rely on only a single one of the aggravating factors, a few of the aggravating factors, or none of the aggravating factors, rather than all of the factors on which it previously relied. If the answer to both of these questions is 'no,' then it is clear that remand to the trial court for resentencing is necessary." (*Lopez, supra*, at p. 467, fn 11; see also *People v. Zabelle* (2022) 2022 Cal.App. LEXIS 599, *21-22 [prejudice should be analyzed under both *Chapman*[5] and *Watson* before concluding the error is harmless].)

[5] *Chapman v. California* (1967) 386 U.S. 18

The Fifth Appellate District articulated another standard that is different from *Flores*.

> The reviewing court determines (1)(a) beyond a reasonable doubt whether the jury would have found one aggravating circumstance true beyond a reasonable doubt and (1)(b) whether there is a reasonable probability that the jury would have found any remaining aggravating circumstance(s) true beyond a reasonable doubt. If all aggravating circumstances relied upon by the trial court would have been proved to the respective standards, any error was harmless. If not, the reviewing court moves to the second step of *Lopez*, (2) 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 provable from the record as determined in the prior steps. If the answer is no, the error was harmless. If the answer is yes, the reviewing court vacates the sentence and remands for resentencing consistent with section 1170, subdivision (b).

(*People v. Dunn* (2022) 2022 Cal.App. LEXIS 635, *22.)

The majority found that denial of the request for depublication in *Flores* is a "cue that *Flores* is the standard governing appellate review." (Maj. Opn., p. 14.) The majority also found support for its conclusion in *People v. Sandoval* (2007) 41 Cal.4th 825, 839 and *Black, supra,* 41 Cal.4th 799. (Opn., p. 14.) *Flores* also relied on *Sandoval*. (*Flores, supra*, at p. 500.)

However, in a concurring statement to the denial of the request for depublication in *Flores*, Justice Liu noted the disagreement between *Flores* and *Lopez* and issued a statement indicating that in the appropriate case, review should be granted.

Justice Liu also noted that the holding in *Sandoval* was based on this Court's interpretation of the language of the

determinate sentencing law as it existed at the time. At that point, the law instructed in relevant part that when a statute specifies three possible terms of imprisonment, "the court shall order imposition of the middle term, unless there are circumstances in aggravation." (Former § 1170, subd. (b).) Because of that language, this Court reasoned in *Black, supra,* at p. 813 that "the existence of a single aggravating circumstance is legally sufficient to make the defendant eligible for the upper term." On that basis, this Court held that findings of additional aggravating circumstances by the sentencing court do not increase the penalty for the defendant's offense and therefore do not violate *Apprendi*[6]. (*Ibid.*) Accordingly, this Court determined in *Sandoval* that if "a single aggravating circumstance" would unquestionably have been found by the jury, any further finding of aggravating circumstances by the sentencing court is harmless. (*Sandoval, supra*, 41 Cal.4th at p. 839.)

However, Senate Bill 567 altered the language on which *Black* and *Sandoval* relied. The determinate sentencing law now says that a sentence higher than the middle term may be imposed "only when there are circumstances in aggravation of the crime that justify the imposition of a term of imprisonment exceeding the middle term." (§ 1170, subd. (b)(2).) As a result of this change, it may no longer be true that "the existence of a single aggravating circumstance is legally sufficient to make the defendant eligible for the upper term." (*Black, supra*, at p. 813.) Instead, it appears a defendant is subject to an upper term sentence only if the

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[6] *Apprendi v. New Jersey* (2000) 430 U.S. 466

aggravating circumstances are sufficient to "justify the imposition" of that term under all of the circumstances, which may include evidence both in aggravation and in mitigation. (§ 1170, subds. (b)(2), (b)(4), and (b)(6).)

This Court should grant review to settle an important question of law: the standard for determining prejudice under retroactive application of the revised triad system. (Rule 8.500(b)(1).)

III

Review should be granted to clarify that pursuant to section 654, a defendant cannot be punished twice for acts that are incidental to each other.

Salazar argued below that, pursuant to section 654, he could not be punished for both the false imprisonment (§§236/237) and the domestic violence (§273.5(a)) as the acts constituting those charges are indivisible and had the same objective and intent. (AOB at pp. 14-16.) Specifically, Salazar argued that the domestic violence was incidental to the false imprisonment charge, that is, Salazar committed the domestic violence for the purpose of preventing Jane Doe from escaping. (*Ibid.*; Reply at p. 5.)

The Court of Appeal disagreed, finding that "substantial evidence supports the trial court's finding of multiple objectives." (Maj. Opn., p. 5.) It did not specifically address Salazar's argument that one charge was incidental to another.

Section 654 precludes multiple punishment for offenses with a single intent arising out of the same transaction. "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).) Section 654 prohibits multiple sentences where a single act violates more than one statute, and where the defendant commits different acts that violate different statutes but the acts comprise an indivisible course of conduct with a single intent and objective. (*People v. Vu* (2006) 143 Cal.App.4th 1009, 1033.)

The purpose of section 654 is to ensure that punishment is commensurate with a defendant's culpability. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1211.) "[S]ection 654 applies not only where there was but one act in the ordinary sense, but also where there was a course of conduct which violated more than one statute but nevertheless constituted an indivisible transaction." (*People v. Perez* (1979) 23 Cal.3d 545, 551.)

1. The acts constituting domestic violence are incidental to the false imprisonment and have the same objective.

Conduct which is incidental to or the means of accomplishing a single criminal objective can only be punished once. (*Latimer, supra*, 5 Cal.4th at pp. 1207-1208; *People v. Hester* (2000) 22 Cal.4th 290, 294.) "[I]f an offense is committed as a means of committing another offense, it is generally held that the defendant had one criminal intent or objective or that his criminal intent or objective in regard to one of the offenses was incidental to his intent in committing the other offense." (*People v. Ratcliffe* (1981) 124 Cal.App.3d 808, 817; *People v. Quinlan* (1970) 8 Cal.App.3d 1063, 1065 ["the assaults . . . were done for the purpose of compelling them to accompany the defendants in the escape and, thus, were inherent parts of the kidnapings."]; see also *People v. Galvan* (1986) 187 Cal.App.3d 1205, 1218-1219 ["the kidnaping had no independent purpose, but was definitely connected with one or another or all of the crimes that followed it."].)

"If, on the other hand, the defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.'" (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

Here, the false imprisonment had no purpose independent of the domestic violence charge. In other words, the charges were

interrelated – Salazar's intent in inflicting physical injury was to prevent Jane Doe from escaping. "A continuous course of conduct has been held to exist where the wrongful acts were successive, compounding, and interrelated." (*People v. Rae* (2002) 102 Cal.App.4th 116, 123.) In fact, the prosecutor argued during closing that "this case is about power and control" and that Salazar "used violence upon her to control her, to manipulate her and to humiliate her." (10 RT 1343-1344). Further, in its sentencing brief, the prosecution connected the two offenses, noting, "The jury found beyond a reasonable doubt that Defendant inflicted physical injury on her and prevented her from escaping." (2 CT 568.)

Further, the acts comprising each of the charges occurred at the same time. The felony false imprisonment charge encompassed the moment Jane Doe entered Salazar's hotel room until Salazar was arrested in the bank. Jane Doe testified that the actions constituting domestic violence occurred throughout that same time period. (6 RT 571-618.)

Review should be granted to secure uniformity of law and to clarify that pursuant to section 654, a defendant can be punished twice for acts that occurred at the same time and are incidental to each other. (Rule 8.500(b)(1).)

2. The case should be remanded pursuant to Assembly Bill 518.

Since Salazar was sentenced in November of 2020, Assembly Bill 518 amended section 654, so that as of January 1, 2022, it provides, in pertinent part:

> (a) An act or omission that is punishable in different ways by different provisions of law may be punished under either of such provisions, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other. The amendment will become effective on January 1, 2022.

Assembly Bill 518 gives the trial court discretion to stay any of the sentences encompassed in a section 654 stay, including the longest sentence. When the trial court sentenced appellant in this case, it had no discretion to stay the longest sentence, the domestic violence conviction. Now it does.

Assembly Bill 518 applies retroactively to cases, like this one, which were not final at the time the law became effective. (Resp. Brief at p. 4.)

CONCLUSION

For the reasons stated above, this petition for review should be granted.

Dated: August 1, 2022

Respectfully Submitted,

/s

Arielle Bases,
Attorney for Petitioner,
NORMAN SALAZAR

CERTIFICATION OF WORD COUNT

I certify in accordance with California Rules of Court, rule 8.504(d) that this brief contains 4,993 words as calculated by the Corel Word Perfect software in which it was written.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: August 1, 2022 /s

ARIELLE BASES

APPENDIX

Opinion of Court of Appeal

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. NORMAN THOMAS SALAZAR, Defendant and Appellant.	2d Crim. No. B309803 (Super. Ct. No. 2018027995) (Ventura County)

The Goddess of justice is not wearing a black arm-band today weeping for the California Constitution. (See *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 299 (dis. opn. of Mosk, J.).) Instead, she is, perhaps, applauding our application of it where there has been no miscarriage of justice in the Superior Court. It is our Constitutional obligation to affirm a judgment, where a more favorable outcome will not result upon reversal.

Norman Thomas Salazar appeals from the judgment after the jury found him guilty of false imprisonment by violence or menace (count 1, Pen. Code, §§ 236, 237, subd. (a))[1] and

[1] Statutory references are to the Penal Code.

infliction of corporal injury on a person with whom he had a current or former dating relationship (count 3, § 273.5, subd. (a)). He admitted a prior strike (§§ 667, subds. (c)(1), (e)(1), 1170.12, subds. (a)(1), (c)(1)). The trial court sentenced him to state prison for seven years, four months.

Appellant contends the trial court erred when it did not: (1) stay the sentence for count 1, and (2) strike his prior strike conviction. He also contends that Senate Bill No. 567, which added a procedural change to section 1170, mandates resentencing. We affirm.

Factual History

Appellant and M.Q. previously had a dating relationship. One afternoon, after their dating relationship had ended, she went to his motel room. He opened the door and pulled her inside. His greeting also included punching her in the forehead, causing her to bleed profusely.

Appellant pushed a desk in front of the door to prevent her escape, took M.Q.'s car keys, and disabled her cell-phone. He said it would be funny to try bear spray (pepper spray) on her. He sprayed her in the face, laughed, and said "that's what [you] get." During the next several hours, he punched her five to ten times and sprayed her five to ten times. He kicked her inner thigh, knocking her to the ground. This resulted in a large bruise. He laughed and said she deserved it.

Appellant announced that he was going to kill M.Q. Although she could see his motorcycle in the parking lot, he claimed she stole it and sold it to someone, who replaced it with a different bike. He said the substituted bike didn't work, and she "owe[d] him a bike."

Appellant ingested methamphetamine in the room.

At about 8:00 p.m., he spoke to a woman on the telephone and was angry to learn that a drug deal was cancelled. He then insisted that M.Q. accompany him in her car to purchase drugs.

For two hours, appellant and M.Q. sat in her car in the motel parking lot. He continued to punch and spray her resulting in her clothes becoming wet. Appellant refused her request to open the windows because he "wanted [her] to feel not being able to breathe."

From about 11:00 p.m. until about 9:00 the next morning, appellant drove M.Q.'s car while she sat in the passenger seat. He continued to punch and spray her with pepper spray and glass cleaner. He told M.Q. she needed to withdraw $3,000 from the bank to pay for a new bike. She replied that she could not withdraw $3000 from the ATM and needed to go inside the bank. She knew she had no money in her account. At about 9:00 a.m., they returned to the motel room and waited for the bank to open. While waiting, he continued punching her face.

At about 10:00 a.m., appellant drove M.Q.'s car to a park. He made her follow him in his truck. He became angry that she did not park his truck correctly and bit her face, drawing blood.

Appellant retrieved his bike from the motel and rode to the bank with M.Q. sitting behind him. When they went inside the bank, she lifted her sunglasses to show the teller her black eye and asked her to call the police. Police responded and arrested appellant.

M.Q.'s cheek bone was fractured. She had a closed head injury, swelling around her scalp and eye, and a bite mark on her face.

The Verdict and Sentencing

The jury acquitted appellant of kidnapping (count 1), but found him guilty of the lesser included offense of false imprisonment by violence or menace. (§§ 236, 237, subd. (a).) He was also acquitted of attempted robbery (count 2). (§§ 664, 211). The jury found appellant guilty of count 3, inflicting corporal injury (count 3). (§ 273.5, subd. (a).) The trial court dismissed the great bodily injury allegation as to count 3 after the jury was unable to reach a verdict on this allegation.

Appellant admitted he had suffered a prior strike conviction for attempted carjacking (§§ 664, 215).

The trial court denied appellant's request to dismiss the prior strike conviction and place him on probation. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).) The court found that appellant committed divisible acts of false imprisonment and domestic violence and, consequently, denied his request to stay sentencing on count 1 pursuant to section 654. The court also denied the defense request to impose concurrent sentences on counts 1 and 3. The court imposed the middle term of three years on count 3, doubled for the prior strike, plus a consecutive eight months on count 1 (one-third the middle term), doubled to 16 months, for a total prison sentence of seven years and four months. The court also issued a criminal protective order against appellant for ten years.

Multiple Punishment

Appellant contends his consecutive sentence for false imprisonment is barred by section 654 and must be stayed. This contention lacks merit.

"An act or omission that is punishable in different ways by different provisions of law" shall not "be punished under

more than one provision." (§ 654, subd. (a).) A "course of conduct encompassing several acts" may result in multiple punishment if it reflects "multiple intents and objectives." (*People v. Corpening* (2016) 2 Cal.5th 307, 311 (*Corpening*).) "If . . . defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.'" (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

When the facts are undisputed, the application of section 654 is a question of law we review de novo. (*Corpening*, *supra*, 2 Cal.5th at p. 312.) The trial court has "broad latitude" to determine whether section 654 is factually applicable to a series of offenses. (*People v. DeVaughn* (2014) 227 Cal.App.4th 1092, 1113.) "A trial court's express or implied determination that two crimes were separate, involving separate objectives, must be upheld on appeal if supported by substantial evidence." (*People v. Brents* (2012) 53 Cal.4th 599, 618.)

Substantial evidence supports the trial court's finding of multiple objectives. Appellant inflicted corporal injury to inflict pain on a former girlfriend. His laughter supported the conclusion he beat her for the purpose of amusement. He falsely imprisoned her in order to obtain money at her bank.

The trial court concluded that the offenses did not come within section 654 because it was not "an ongoing singular continuous course of conduct" but was divisible in time with breaks in the conduct. Several hours passed between appellant's initial assault of M.Q. in the motel room and her false imprisonment to accompany appellant in his quest to purchase

drugs and withdraw money from her account. Multiple punishment was thus permitted because the acts "were separated by periods of time during which reflection was possible." (*People v. Surdi* (1995) 35 Cal.App.4th 685, 689 [punishment for kidnapping and mayhem not barred by § 654]; *People v. Louie* (2012) 203 Cal.App.4th 388, 399 [15-minute gap between threats and arson].) Section 654 did not bar punishment for both crimes.[2]

Romero Motion

Appellant contends the trial court abused its discretion in declining to strike his prior strike conviction in the interests of justice pursuant to *Romero*, *supra*, 13 Cal.4th 497. We disagree.

A trial court has discretion to dismiss a prior violent or serious felony conviction pursuant to the Three Strikes law. (*Romero*, *supra*, 13 Cal.4th at p. 504.) In deciding whether to grant a *Romero* motion, the trial court must "'consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.'" (*People v. Carmony* (2004) 33 Cal.4th 367, 377

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[2] The parties submitted supplemental briefs regarding the effect of Assembly Bill No. 518 (2021-2022 Reg. Sess.) on appellant's sentence. Because the trial court did not stay imposition of sentencing on count 1 and we affirm that determination, AB 518 has no application to this appeal.

(*Carmony*), quoting *People v. Williams* (1998) 17 Cal.4th 148, 161.)

Trial court rulings on *Romero* motions are reviewed under the deferential abuse of discretion standard. (*Carmony*, *supra*, 33 Cal.4th at p. 374.) "[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at p. 377.)

Here, the trial court's ruling was not irrational or arbitrary. The court, in great detail, explained the reasons for denying the *Romero* motion. It acknowledged that the strike was 19 years old, but noted it was a "serious offense." The court stated that appellant has "a long and continuous criminal history." Indeed, according to the probation report, appellant's criminal history spans nearly thirty years, from 1991 through 2020, and includes four prior prison commitments and multiple failures on probation. After he committed the current offenses, he was charged with additional and numerous offenses including a battery with serious bodily injury.

The current crimes were serious. Appellant sadistically terrorized M.Q. for two days, during which he repeatedly beat her and sprayed her with pepper spray. He threatened to kill her, bit her face, and hit her with such force that it fractured her cheek bone.

The prior strike for attempted carjacking (§§ 664, 215, subd. (a)), committed in 2001, was also serious. There, appellant and two others attacked a man in a parking lot. Appellant then grabbed a woman and attempted to take her car keys. He was sentenced to prison for four years, six months.

Appellant's thirty-year criminal record includes domestic violence committed against two former girlfriends,

assault with a deadly weapon, resisting arrest, and violations of probation and parole. He has additional prison commitments in 2010 for receiving stolen property, and in 2012 and 2014 for evading peace officers with willful or wanton disregard for the safety of others. He was released on parole just seven months before committing the current offenses, and was on post-release community supervision when the offenses occurred. Appellant's conduct in pretrial custody shows that he has little regard for rules: multiple possession of altered razor blades, multiple possession of contraband, multiple batteries on fellow inmates, multiple failures to obey a directive, as well as lesser jail infractions.

In a *Romero* motion, a trial court may consider the age of the prior offenses. (*People v. Avila* (2020) 57 Cal.App.5th 1134, 1141 (*Avila*).) But remoteness in time is an insufficient basis to dismiss the strike here because appellant did not have "a crime-free cleansing period of rehabilitation" but instead "led a continuous life of crime after the prior." (*People v. Humphrey* (1997) 58 Cal.App.4th 809, 813 (*Humphrey*) [reversing dismissal of 20-year-old strike]; *People v. Pearson* (2008) 165 Cal.App.4th 740, 749-750 [strikes 24, 15, and 10 years old properly imposed].)

Avila, *supra*, 57 Cal.App.5th 1134, relied upon by appellant, does not compel a different result. The prior offenses there were committed 26 to 28 years earlier, when the defendant was under the age of 21, and he committed only minor offenses in the seven years before the current offenses. (*Id.* at pp. 1141, 1143.) In contrast, appellant was sentenced to prison three times after committing his strike offense, and reoffended each time shortly after his release. In light of appellant's continuing criminal conduct, "there is simply nothing mitigating" about the

age of his prior strike. (*Humphrey*, *supra*, 58 Cal.App.4th at p. 813.)

Appellant contends the trial court failed to properly consider his mental health and substance abuse issues. There is a presumption that the trial court considered all relevant factors, even if it did not mention them all. (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.) And here, the record shows that the trial court did consider appellant's life-long history including his mental health history and drug history.

Nor is relief warranted by *People v. Garcia* (1999) 20 Cal.4th 490, also cited by appellant. There, the trial court dismissed strikes because "defendant's prior convictions all arose from a single period of aberrant behavior for which he served a single prison term . . . and his criminal history does not include any actual violence." (*Id.* at p. 503.) Appellant's criminal record includes violent crimes that spanned decades.

Senate Bill No. 567 – Consideration of Trauma

During the pendency of this appeal, Senate Bill No. 567 (2021-2022 Reg. Sess.) (S.B. 567), was enacted. It amended section 1170, effective January 1, 2022 (Stats. 2021, ch. 731, § 1.3). We asked for and received supplemental briefing on the applicability, if any, of S.B. 567 to appellant's sentence, and the standard for determining whether a remand is necessary.

When appellant was sentenced, section 1170, subdivision (b), gave the trial court discretion to choose whether to impose the lower, middle, or upper prison term in the interest of justice. S.B. 567 added subdivision (b)(6) to section 1170 to require that the trial court select the low term if, among other things, the defendant "has experienced psychological, physical, or childhood trauma" that was a contributing factor in the

commission of the offense, "unless the court finds that the aggravating circumstances outweigh the mitigating circumstances [so] that imposition of the low term would be contrary to the interests of justice." (§ 1170, subd. (b)(6)(A)-(B).)

The Attorney General concedes that S.B. 567 qualifies as an ameliorative change in the law applicable to all nonfinal convictions on appeal. (See *People v. Superior Court (Lara*) (2018) 4 Cal.5th 299, 306-308, citing *In re Estrada* (1965) 63 Cal.2d 740, 745; *People v. Flores* (2022) 75 Cal.App.5th 495, 500 (*Flores*), depublication and review denied (June 15, 2022).)

Appellant contends he must be resentenced pursuant to the amended statute because the trial court did not exercise an "informed discretion" in selecting the middle term. (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391 (*Gutierrez*).) The Attorney General disagrees. We agree with the Attorney General that remand for resentencing is not here required.

The California Constitution admonishes our appellate judiciary not to reverse any trial court judgment unless there has been a miscarriage of justice. There should only be a reversal where it is reasonably probable that a more favorable outcome will result upon reversal. (Cal. Const. art. VI, § 13; *People v. Watson* (l956) 46 Cal.2d 818, 836; but see p. 13, *post*, [proof beyond a reasonable doubt standard for an aggravating sentencing factor].) This rule, or its precursors, have been with us since statehood. By its enactment of S.B. 567, the Legislature did not purport to, and could not, by statute, alter the California Constitution.

We apply the standard set forth in *Gutierrez, supra,* 58 Cal.4th 1354, to determine whether a remand is required for resentencing under the new legislation. "'Defendants are entitled

to sentencing decisions made in the exercise of the "informed discretion" of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that "informed discretion" than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record.' [Citation.] In such circumstances, we have held that the appropriate remedy is to remand for resentencing unless the record 'clearly indicate[s]' that the trial court would have reached the same conclusion 'even if it had been aware that it had such discretion.' [Citations.]" (*Id*. at p. 1391.)

At sentencing, the trial court considered the defense sentencing memorandum, the People's statement in aggravation, and the probation report. Appellant has a history of mental illness, has previously been diagnosed with Paranoid Schizophrenia, and suffers from auditory hallucinations. His sentencing memoranda suggested he had experienced "trauma," including a difficult childhood, the "devastating" death of his parents when he was 38 and 40 years old, he was beaten and stabbed in prison, and that mental illness and chemical dependency may have played a role in the commission of the offenses." His lengthy sentencing memorandum brought to the trial court all of these matters which appellant characterized as "mitigating."

We apply the California state constitutional mandate. There are several reasons for our opinion that there has been no miscarriage of justice here.

First, the probation report identified multiple aggravating factors, including one admitted by appellant (the prior strike conviction) and one found true by the jury (the

finding of violence on count 1). (See California Rules of Court, rule 4.421(b); 1170, subd. (b)(6).)

Second, the trial court denied appellant's *Romero* motion and request for probation, highlighting his continuous 30-year criminal history and the fact that he continued to commit crimes after his arrest in this case. This was appellant's fifth commitment to state prison since 2001. He committed the current offenses less than one year after being released on parole. While on local supervision, he failed to comply with probation multiple times. In denying the *Romero* motion, the trial court necessarily found that appellant was not outside the spirit of the Three Strikes Law and continued to pose a danger to the public.

Third, the trial court denied appellant's request to impose concurrent sentences, stating: "Based on everything I've said, I'm not going to do that. I'm going to make them consecutive." The imposition of consecutive sentences shows the court's reluctance to impose the lower term.

Fourth, the current offenses were aggravated, sadistic, and extended over the course of 20 hours. This was akin to torture.

Fifth, the trial court imposed a criminal protective order against defendant to protect the victim in this case for the maximum period of ten years. The probation report showed that appellant had a record of violence against other women.

We conclude the record "clearly indicates" the trial court would not have imposed the low term had it been aware of its discretion to do so under S.B. 567. (*Gutierrez*, *supra*, 58 Cal.4th at p. 1391.) Remand for resentencing would be an idle

act.[3] The offenses committed by appellant in this case were horrendous. For what appellant did over the course of two days, an aggregate unstayed sentence of seven years and four months is lenient. He could have easily been sentenced to the upper term. As a matter of law, (1) the aggravating circumstances are overwhelming and outweigh any theoretical mitigating circumstances, and (2) selection of the low term would be "contrary to the interests of justice."

Appellant also relies upon the rule of "lenity" (*People v. Jones* (2001) 25 Cal.4th 98, 107), arguing he is entitled to the benefit of the newly enacted statute. This argument, like the ones preceding it, is not persuasive here. It does not "trump" the duty of an appellate court to follow the California Constitutional mandate to only reverse where there is a miscarriage of justice.

The Flores Cue

Nevertheless, appellant insists the trial court's failure to apply the new statute cannot be deemed "harmless error." He points out two recent court of appeal opinions that reached differing conclusions as to whether remand for resentencing is required under S.B. 567. (Compare *People v. Lopez* (2022) 78 Cal.App.5th 459 (review pending, S274856) [remand for resentencing required, concluding any error was not harmless] with *Flores*, *supra,* 75 Cal.App.5th 495 (review den. June 15, 2022, request for depublication denied) [remand for resentencing not required, concluding any error was harmless].) *Lopez*, *supra,* is factually distinguishable and even it recognizes

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[3] We, ourselves, have applied the "clear indication" rule and reversed to allow a resentencing where the standard had not, in our opinion, been met. (*People v. Yanaga* (2020) 58 Cal.App.5th 619, 628.)

that this type of sentencing error is subject to a harmless error analysis. The Attorney General relies on *Flores,* arguing that any error is harmless. The Supreme Court's order of June 15, 2022, denying the request for depublication and review is a cue that *Flores* is the standard governing appellate review.

We also observe that the California Supreme Court precedents cited in *Flores* dictate affirmance. (*People v. Sandoval* (2007) 41 Cal.4th 825, 839 ["if a reviewing court concludes, beyond a reasonable doubt, that a jury, applying the beyond-a-reasonable-doubt-standard, unquestionably would have found true at least a single aggravating circumstance had it been submitted to the jury, the [error is] harmless"]; see also *People v. Black* (2007) 41 Cal.4th 799, 813.) These precedents are not "fairly distinguishable" in the presenting case, are binding upon us, and we follow them. (*People v. Triggs* (1973) 8 Cal.3d. 884, 891, disapproved on other grounds in *People v. Lilienthal* (1978) 22 Cal.3d 891, 896, fn. 4.)

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PUBLICATION.

YEGAN, Acting P. J.

I concur:

PERREN, J.

TANGEMAN, J., Concurring and Dissenting:

I concur in the opinion insofar as it affirms the consecutive sentence for count 1 and the denial of the Romero[1] motion. But I dissent from the denial of appellant's request for a remand for resentencing pursuant to Senate Bill No. 567.

As the majority acknowledges, Senate Bill No. 567 (2021-2022 Reg. Sess.) (Senate Bill 567) added subdivision (b)(6) to Penal Code section 1170 to require that the sentencing court select the low term under the factual circumstances appellant contends exist here, "unless the court finds that the aggravating circumstances outweigh the mitigating circumstances [so] that imposition of the lower term would be contrary to the interests of justice." (Stats. 2021, ch. 731, § 1.3, italics added.) The amendment applies to appellant's case because it potentially reduces the punishment. (*People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299, 303-304; *People v. Banner* (2022) 77 Cal.App.5th 226, 240.)

Because Senate Bill 567 was not enacted until after sentencing, the sentencing court had no opportunity to consider this new requirement or the necessary findings to overcome it. As the majority recognizes, "the appropriate remedy is to remand for resentencing unless the record 'clearly indicate[s]' that the trial court would have reached the same conclusion 'even if it had been aware that it had such discretion.' [Citations.]" (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.)

That showing has not been made here. The record does not establish that the trial court would have found trauma was not a contributing factor. For example, in discussing appellant's criminal history, the trial court noted that "a lot of it

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[1] *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

may be because of suffering from your father's death, and . . . your mother's death." Nor is the record clear that the court would have found "the aggravating circumstances outweigh the mitigating circumstances [so] that imposition of the lower term would be contrary to the interests of justice." (Pen. Code, § 1170, subd. (b)(6).) By selecting the middle term, the trial court impliedly found the aggravating factors were not sufficient to warrant imposition of the high term. (Pen. Code, § 1170, subd. (b)(2) (former subd. (b).) Accordingly, a remand for full resentencing is warranted. (See *People v. Buycks* (2018) 5 Cal.5th 857, 896, fn. 15.)

It is true that the trial court understood that it had the discretion to sentence appellant within the sentencing triad. But it was unaware of the subsequently enacted changes in Senate Bill 567 which further defined and limited its discretion. Thus, this case is like those that remanded for resentencing where "the trial courts . . . understood that they had some discretion in sentencing, [but] the records do not clearly indicate that they would have imposed the same sentence had they been aware of the full scope of their discretion." (*People v. Gutierrez*, *supra*, 58 Cal.4th at p. 1391.)

The majority's approach of substituting its judgment for that of the trial court contravenes our Supreme Court's holding that remand is required "unless the record 'clearly indicate[s]' that the trial court would have reached the same conclusion 'even if it had been aware that it had such discretion.'" (*People v. Gutierrez, supra*, 58 Cal.4th at p. 1391.) The court below made no such pronouncements. We depart from our duties as a court of review when we unilaterally conclude that some crimes are sufficiently "horrendous," or some sentences so

"lenient," that any lesser sentence would be "contrary to the interests of justice" "[a]s a matter of law." (Italics added.) I would remand to the trial court to exercise its discretion based on the intervening legislative directives.[2]

CERTIFIED FOR PUBLICATION.

TANGEMAN, J.

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[2] The majority discusses a split of authority regarding Senate Bill 567, but those cases involve a different provision regarding factors in aggravation to impose the high term. (Pen. Code, § 1170, subd. (b)(2).) That provision implicates the Sixth Amendment right to a jury determination of facts that increase the statutory maximum, an issue that is not involved in this middle term case. (*Cunningham v. California* (2007) 549 U.S. 270; see *People v. Flores* (June 15, 2022, S274232 [2022 Cal. Lexis 3127, 2022 WL 2159020] (conc. statement by Liu, J., on den. of review).) The majority relies upon *People v. Flores* (2022) 75 Cal.App.5th 495, which ruled that the failure of the jury to find aggravating factors was harmless because the appellate court was "satisfied, beyond a reasonable doubt, the jury would have found true at least one aggravating circumstance." (*Id.* at p. 501.) The court there did not discuss remand to determine if the trial court would have exercised its discretion differently. In *People v. Lopez* (2022) 78 Cal.App.5th 459, 467-468, the appellate court was unwilling to affirm a high term sentence based on "a single permissible aggravating factor" because the record did not "clearly indicate" the trial court would have made the same decision without considering the other factors. (See *People v. Sandoval* (2007) 41 Cal.4th 825 [reliance on unproven aggravating factors not harmless error].)

Anthony J. Sabo, Judge

Superior Court County of Ventura

Bases & Bases, Arielle Bases, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Snr. Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, David F. Glassman, Deputy Attorney General, for Plaintiff and Respondent.

DECLARATION OF SERVICE

Re: People of the State of California v. Norman Salazar
Court of Appeal Case No. B309803
Superior Ct. No. 2018027995

I, Natalie Alas, declare that I am over 18 years old, and not a party to the within action; my business address is 16633 Ventura Blvd., Suite 500, Encino, CA 91436. I am employed by a member of the bar of this court.

On August 1, 2022, I served the within:

PETITION FOR REVIEW

on each of the following:

X by transmitting to each of the following using service through TrueFiling:

Court of Appeal,
Second Appellate District, Div. 6
(*per Supreme Court TrueFiling policy*)

Ventura County District Attorney's Office
appellateda@ventura.org

Office of the Attorney General,
Los Angeles, CA 90013-1230
docketingLAawt@doj.ca.gov

X by email upload to:

California Appellate Project
Los Angeles, CA 90071
CAPdocs@lacap.com

Ms. Sandra Bisignani,
Deputy Public Defender
sandra.bisignani@ventura.org

X by placing true copies thereof in envelopes addressed respectively, as follows, and depositing them in the United States Mail at Encino, California:

Ventura County Superior Court
800 S. Victoria Avenue
Ventura, CA 93009
Attn: Hon. Anthony Sabo, Judge

Mr. Norman Salazar
(*Address on file*)

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 1, 2022, at Encino, California.

/s
Natalie Alas

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **People of the State of California v. Norman Salazar**
Case Number: **TEMP-HKVDMXN6**
Lower Court Case Number:

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

2. My email address used to e-serve: **relbases@gmail.com**

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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.

8/1/2022
Date

/s/Arielle Bases
Signature

Bases, Arielle (175480)
Last Name, First Name (PNum)

Bases & Bases, APC
Law Firm