IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	No. S275788
Plaintiff and Respondent,	Court of Appeal
v.	No. B309803
NORMAN SALAZAR,	Ventura County Superior Court No.
Defendant and Appellant.	2018027995

APPELLANT'S OPENING BRIEF ON THE MERITS

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APPELLANT'S OPENING BRIEF ON THE MERITS

QUESTION PRESENTED

Did the Court of Appeal err by finding the record clearly indicates the trial court would not have imposed a low term sentence if it had been fully aware of its discretion under newly-added subdivision (b)(6) of Penal Code[1] section 1170? (See *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391 (*Gutierrez*).)

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

STATEMENT OF THE CASE

On October 15, 2020, the jury acquitted appellant of kidnaping (count 1), but found him guilty of the lesser included offense, felony false imprisonment (§§ 236/237, subd. (a)). The jury also acquitted appellant of attempted robbery (count 2) but convicted appellant of count 3, inflicting corporal injury (§273.5, subd. (a).) (2 CT 484-488.) The jury did not reach an agreement as to the section 12022.7, subd. (e) allegation that had been attached to count 3 and was subsequently dismissed pursuant to section 1385. (2 CT 497; 10 RT 1432, 1441.)

Appellant admitted a prior strike allegation for a 2001 attempted car jacking conviction. (2 CT 498; 10 RT 1442.)

On November 17, 2020, at the sentencing hearing, the court declined appellant's request to strike the prior strike and denied probation. (2 CT 576.) The court sentenced appellant on count 3 to the middle term, or three years, doubled because of the prior strike and to a consecutive eight months on count 1 (one-third the middle term) doubled because of the prior strike, for a total prison sentence of 7 years and 4 months. (11 RT 1532-1533; 2 CT 576.)

Appellant appealed. (2 CT 572.) In a Supplemental Letter Brief, appellant argued he was entitled to be resentenced pursuant to the amendments to section 1170, subdivision (b), effective January 1, 2022. On June 28, 2022, the Court of Appeal issued its opinion. The attorney general conceded that the section 1170, subdivision (b) amendments apply retroactively to the present case. (*People v. Salazar* (2022) 80 Cal.App.5th 453, 462.)

The Majority concluded, however, "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." (*Id.* at p. 464 (maj. opn.).) The Dissent would have remanded the case for resentencing in light of the new law. (*Id.* at p. 466 (Tangeman, J., dissenting).)

On August 1, 2022, appellant filed a Petition for Review. Thereafter, on October 12, 2022, this Court granted review. (See California Supreme Court Case Docket in case S275788.)

STATEMENT OF FACTS

1. The Offense

In 2018, M.Q. was in a dating relationship with appellant. (6 RT 531; 7 RT 558-559.) On August 12, 2018, some time after 2:00 p.m., M.Q. knocked on the door of appellant's hotel room. (6 RT 571.) According to M.Q., appellant pulled her into his room by her shirt and punched her in the head, causing her to bleed. (7 RT 571.) Appellant accused her of being followed and trying to get him "gaffed." (7 RT 572.) He also told her it was her fault his bike was stolen even though, at the time, his bike was in the parking lot right outside his room. (7 RT 575-576.) M.Q. testified that appellant subsequently punched her multiple times, sprayed her with bear pepper spray (7 RT 575), and kicked her inner thigh, causing a large bruise (7 RT 578, 581, 582).

M.Q. testified that by 8:00 that night, appellant had used five lines of methamphetamine and that he insisted M.Q. drive with him to a drug deal in her car. (7 RT 584-585.) Around 11:00 p.m., appellant started driving, with M.Q. in the passenger seat, until sunrise. (7 RT 597, 599.) During this time, according to M.Q., appellant was laughing and calling her names, accusing her of stealing his bike, and punching and spraying her with pepper spray. (6 RT 597.)

According to M.Q., appellant planned to have her withdraw $3,000 in cash from Chase Bank to pay for a new bike. (7 RT 599, 600.) Around 9:00 a.m. on August 13th, M.Q. and appellant

returned to the hotel where they waited in appellant's room until around 10:00 when the bank opened. (7 RT 604.)

M.Q. testified that appellant then drove her car, and she followed him, driving his truck, to Durley Park, about twenty minutes from the hotel. (7 RT 606.) According to M.Q., at the park, appellant bit her on her face, under her eye, drawing blood. (7 RT 607-608.)

Eventually, appellant rode to Chase Bank on his bike with M.Q. sitting behind him. (7 RT 612.) M.Q. told appellant she could not withdraw $3,000 from the ATM and needed to go inside the bank. (7 RT 614.) Once inside the bank, M.Q. spoke with the first employee she saw, lifted her sunglasses, and said she needed help and to call the cops. (7 RT 619.)

A bank employee called 9-1-1 from her cell phone. (6 RT 494.) The police arrived soon after and arrested appellant. (7 RT 623.)

Officer Utter, who interviewed M.Q. at St. John's Hospital, noticed swelling under her right eye and abrasions on her face and left forearm. (8 RT 918.) He also suspected M.Q. was under the influence of methamphetamine because she had bloodshot eyes, dilated pupils, rapid speech and was fidgety. (8 RT 919, 920, 933.) M.Q. sustained a fracture of her zygomatic arch, a closed head injury, swelling and soft tissue injury around her eye, and an injury that was consistent with a bite on her face. (6 RT 420-421.)

2. Appellant's Background

Appellant's father was physically abusive since appellant was five years old. (2 CT 541.) Appellant's father was an alcoholic, there was a lot of violence and abuse in his home, and appellant suffered from anxiety and depression from the age of six or seven (2 CT 504, 507, 534, 541). As a child, appellant saw a lot of violence, alcohol, and drug use on the baseball field. (1 CT 503.)

Appellant's mother and sister were diagnosed with Bipolar disorder, and his father was diagnosed with Paranoid Schizophrenia. (2 CT 505, 529, 551.) Appellant'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, 535.)

Appellant began having hallucinations when he was about seven years old. (2 CT 508.) In seventh grade, appellant tried to drop out of school because he was fearful of being around crowds and people. (2 CT 541.) When appellant was a teenager, his parents divorced, and appellant feared his mother's new boyfriend would harm him. (2 CT 504.) From age 13 to 20, appellant used a lot of psychedelic drugs, including LSD, sometimes daily. (2 CT 505.) In 2010, he reported using methamphetamine about once a month. (2 CT 542.)

In 2006, appellant 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, 507.) According to the Intake

Evaluation, appellant stated he had tried to kill himself, he thought his mother's boyfriend was trying to kill him, and he had a history of self-harm and suicidal ideations. (2 CT 506, 518, 521, 523.) In November of 2009, appellant was evaluated at Hillmont Psychiatric Center, where he reported delusions, hallucinations, anxiety, and depression. (2 CT 506, 526, 527, 535.) He was referred to an Alcohol Drug Program. (2 CT 506; 523.)

In 2010, appellant was diagnosed with Schizoaffective Disorder, depressed type. (2 CT 507, 535.) He also had symptoms of PTSD, including flashbacks of rapes/physical assaults while in prison. (2 CT 507, 535.) In 2011, appellant was hospitalized at Ventura County Behavioral Health where he was diagnosed with Schizoaffective Disorder, Major Depressive Disorder, and Dysthmic Disorder and reported he suffered from auditory and visual hallucinations as well as delusions (2 CT 544).

In 2011, appellant's father passed away, and in 2013, his mother died of pancreatic cancer. (2 CT 504.) Appellant had a close relationship with his mother and was devastated by this loss. (2 CT 504-505.)

In 2013, according to a psychiatric assessment by the Ventura County Medical Center, appellant had been prescribed psychiatric medications, including Risperdal and Zoloft, to address his Schizoaffective Disorder and hallucinations. (2 CT 507-508, 552.)

At the sentencing hearing, appellant requested rehabilitation for his drug issues and counseling for his mental health issues. (11 RT 1526; 2 CT 510.)

ARGUMENT

The record does not "clearly indicate" the sentencing court would have imposed the same sentence had it been aware of its discretion under amended section 1170, subdivision (b). Remand is, therefore, required.

In *Gutierrez*, this Court recently considered the standard to apply when assessing whether an ameliorative change in the law requires remand to enable the sentencing court to consider the matter in light of the new statute. This Court concluded that remand would usually be required and could only be avoided if the record "clearly indicates" the trial court would have imposed the same sentence had it been aware of its newly informed discretion. (*People v. Gutierrez, supra,* 58 Cal.4th at p. 1391.)

Here, the Majority failed to recognize that the amended statute limited the court's discretion to impose any term other than the lower term and failed to address what sentence the court would have imposed if it had been aware of this limitation. Rather, without such analysis, the Majority concluded, "the record 'clearly indicates' the trial court would not have imposed the lower term had it been aware of its discretion to do so." (*Salazar, supra,* 80 Cal.App.5th at p. 464 (maj. opn.).)

Respectfully, here, the record does not "clearly indicate" the trial court – which had not imposed the maximum term under then-existing law – would have imposed the same sentence had it understood and applied the newly-created limits on its ability to impose more than the lower term.

The appropriate remedy is to remand this matter for the

sentencing court to exercise its discretion in accordance with amended section 1170, subdivision (b). (*Gutierrez, supra*, at p. 1391.)

1. Amended section 1170, subdivision (b) significantly changes the trial court's sentencing discretion.

From March 30, 2007, through December 31, 2021, California's determinate sentencing law specified that "[w]hen a judgment of imprisonment [wa]s to be imposed and the statute specifie[d] three possible terms, the choice of the appropriate term . . . rest[ed] within the sound discretion of the court." (§1170, former subd. (b).)

This former version of the statute permitted the sentencing court broad discretion to select the appropriate term of imprisonment articulated for the crime committed among three permissible options: low, middle, or upper. The sentencing court was allowed to find and weigh aggravating and mitigating circumstances and, based on the circumstances, was free to select any one of the terms it believed best served the interests of justice. (§1170, former subd. (b).) The court was required to state the reasons for its sentence choice on the record at the time of sentencing. (Former subd. (c).) The sentencing choice was reviewed for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.)

After appellant was sentenced but before his case became final, the Governor signed Senate Bill 567 and Assembly Bill 124. Effective January 1, 2022, these bills amend the sentencing criteria in section 1170 in three significant ways.

First, the new version of section 1170 reduces the trial court's discretion by creating a presumption that the sentence should not exceed the middle term unless there are circumstances in aggravation.

> When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall, in its sound discretion, order imposition of a sentence not to exceed the middle term, except as otherwise provided in paragraph(2).

(§1170, subd. (b)(1); see also *People v. Wandrey* (2022) 80 Cal.App.5th 962, 982 [new law specifies a statutory presumption in favor of the middle term].)

Second, the new version of section 1170 provides that the upper term cannot be selected unless the facts supporting the aggravation are stipulated to by the defendant, found true beyond a reasonable doubt at trial by the jury or by the judge in a court trial, or the court determines the defendant has prior convictions based on certified records of conviction. (§ 1170, subds. (b)(2) and (3).)

Third, and most relevant here, the new version of section 1170 requires courts to impose the lower term if the defendant has experienced trauma which contributed to the offense and is not outweighed by aggravating factors. (§1170(b)(6).)

> 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), emphasis added.)

The legislative amendments to section 1170, subdivision (b) apply retroactively to appellant's case pursuant to *In re Estrada* (1965) 63 Cal.2d 740. (See *People v. Dunn* (2022) 81 Cal.App.5th 394, 402-403; *People v. Flores* (2022) 73 Cal.App.5th 1032, 1038-1039.)

2. *Gutierrez* holds that remand is required unless the record "clearly indicates" the trial court would have imposed the same sentence if it had been aware of its new discretion.

In *Gutierrez*, this Court considered a retroactive change in the trial court's sentencing discretion regarding section 190.5, subdivision (b), which provided that the penalty for 16-to 17-year-old juveniles convicted of special-circumstance murder shall be life without the possibility of parole (LWOP) or 25 years to life at the court's discretion. (§190.5, subdivision (b); *Gutierrez, supra*, at p. 1360.) At that time, appellate and trial courts determined that "LWOP is the presumptive punishment for 16- or 17-year-old special-circumstance murderers, and the court's discretion is concomitantly circumscribed to that extent." (*Gutierrez, supra*, at p. 1370, quoting *People v. Guinn* (1994) 28 Cal.App.4th 1130, 1141-1142.)

This Court held, however, that section 190.5, subdivision (b) "confers discretion on the sentencing court to impose either life without parole or a term of 25 years to life on a 16- or 17-year-old juvenile convicted of special circumstance murder, with no presumption in favor of life without parole." (*Gutierrez, supra*, at p. 1387, disapproving of *Guinn, supra*, 28 Cal.App.4th 1130.) This Court further held that "the trial court must consider all relevant evidence bearing on the 'distinctive attributes of youth' discussed in *Miller*[2] and how those attributes 'diminish the penological justifications for imposing the harshest sentences on

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[2] *Miller v. Alabama* (2012) 567 U.S. 460 [132 S.Ct. 2455, 183 L.Ed. 2d 407]

juvenile offenders.'" (*Id.* at p. 1390.)

In light of these holdings, this Court concluded "neither court[3] made its sentencing decision with awareness of the full scope of discretion conferred by section 190.5, subdivision (b) or with the guidance set forth in *Miller* and this opinion for the proper exercise of its discretion." (*Gutierrez, supra*, at pp. 1390-1391.)

This Court also 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.'" (*Gutierrez, supra*, at p. 1391.)

In the present case, the record does not "clearly indicate" that the trial court would have imposed the same sentence had it been aware of the changes to its discretion under the amended law.

The appropriate remedy here is remand for resentencing.

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[3] *Gutierrez* involved two consolidated cases. (*Gutierrez, supra*, at p. 1361.)

3. Under the amended statute, the sentencing court was required to impose the lower term based on its consideration of the mitigating factors.

Amended section 1170, subdivision (b) requires imposition of the lower term if psychological, physical, or childhood trauma were a contributing factor in the commitment of the offense "unless the court finds that the aggravating factors outweigh the mitigating circumstances such that imposition of the lower term would be contrary to the interests of justice." (Subd. (b)(6).) The word "unless" creates a presumption in favor of the lower term. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 238-239.)

Here, there is ample evidence of appellant's physical, psychological, and childhood trauma. Appellant's father was physically abusive since appellant was five years old. (2 CT 541.) There was a lot of violence and abuse in his home, and appellant suffered from anxiety and depression from the age of six or seven (2 CT 507, 534, 541). Appellant's parents were divorced when appellant was a teenager, and appellant feared his mother's new boyfriend would harm him. (2 CT 504.)

Appellant's mother and sister were diagnosed with Bipolar disorder; his father was diagnosed with Paranoid Schizophrenia. (2 CT 505, 529, 551.)

Appellant began having hallucinations when he was about seven years old. (2 CT 508.) In 2006, appellant was diagnosed with Paranoid Schizophrenic Disorder, Anxiety, and Claustrophobia. (2 CT 505, 534, 546.) Appellant received

inpatient psychiatric care in 2009 and 2011 and outpatient care in 2010. (2 CT 546.) In 2009, he was admitted to the Ventura County Psychiatric Unit. (2 CT 506, 507.)

In 2010, appellant was diagnosed with Schizoaffective Disorder, depressed type. (2 CT 507, 535.) He also had symptoms of PTSD including flashbacks of "rapes/physical assaults" while in prison. (2 CT 507, 535.)

In 2011, he was hospitalized at Ventura County Behavioral Health where he was diagnosed with Schizoaffective Disorder, Major Depressive Disorder, and Dysthmic Disorder and reported he suffered from auditory and visual hallucinations as well as delusions (2 CT 544).

The Majority found that the sentencing court had already considered all of the above mitigating factors. (*Salazar, supra*, at p. 463 (maj. opn.).) However, there is a significant difference between having the discretion to consider these factors (or not consider them) under the old law and being required to consider them and impose the lower term if they are contributing factors to the offense. (§1170, subd. (b)(6).)

Further, the sentencing court here could not have exercised proper discretion as it made its decision without the guidance in newly added subdivision (b)(6). (See *Gutierrez, supra*, at pp. 1390-1391 ["the trial court must consider all relevant evidence bearing on the 'distinctive attributes of youth'" and failure to do so resulted in a sentencing decision made without a full awareness of the scope of the court's discretion].)

Any finding that the trial court would have imposed the

same sentence had it considered the above-mentioned factors in light of the amended statute requires speculation. (See *People v. Lopez* (2022) 78 Cal.App.5th 459, 466 [regarding retroactive application of SB 567, "It would be entirely speculative for [the reviewing court] 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"]; see also *People v. McDaniels* (2018) 22 Cal.App.5th 420,426 [in the context of retroactive application of Senate Bill 620, determining what sentencing choice a trial court is likely to make in the first instance is speculative].)

Finally, it is very likely appellant did not present the full scope of his trauma to the court because the law at the time did not mandate that courts impose a lower term based on such evidence. (See *People v. Banner* (2022) 77 Cal.App.5th 226, 242, citing *People v. Frahs* (2020) 9 Cal.5th 618, 637-638 ["record is likely incomplete relative to statutory factors enacted after judgment pronounced"].) Indeed, the court here recognized that its understanding of appellant was limited. (11 RT 1529.)

For all of these reasons, the appropriate remedy is to remand this matter to the trial court for a new sentencing hearing so appellant can present all evidence of trauma, and the court can properly consider all of the evidence in accordance with the amended statute.

4. Appellant's psychological, physical, and childhood trauma were contributing factors to the offense.

There is extensive documented evidence appellant suffers mental health issues that result in delusions and hallucinations. (2 CT 526-527, 535, 544, 550.) Here, appellant accused M.Q. of being followed, trying to get him "gaffed" or "cautered" (7 RT 572), and bringing people up to his room (7 RT 574). He also told her it was her fault his bike was stolen even though, at the time, his bike was in the parking lot right outside his room. (7 RT 575-576.) These accusations were appellant's motivation for keeping M.Q. from leaving and eventually trying to force her to withdraw money to pay for his bike.

There is also extensive evidence appellant's substance abuse issues contributed to the offenses. M.Q. testified that soon after she entered the hotel room, she saw lines of crystal methamphetamine on the dresser. (7 RT 572.) She further testified that by 8:00 that night, appellant had used five lines of methamphetamine and that he insisted M.Q. drive with him to a drug deal in her car. (7 RT 584-585.) The prosecution asserted that one of the motives of the current offense was appellant's search for drugs. (11 RT 1519; see also 2 CT 511, 512 [appellant's statement in mitigation].) In fact, the court decided not to select the maximum term because "the last seven years or so, defendant's criminal history has been drug-related." (11 RT 1532.)

The record also contains evidence appellant's substance

abuse issues stem from his psychological, physical, and childhood trauma. As a child, appellant saw a lot of violence on the baseball field, including alcohol and drug use. (1 CT 503.) From the age of 13, appellant used a lot of psychedelic drugs, including LSD, sometimes daily. (2 CT 505.) Further, even the prosecutor recognized the connection between substance abuse and mental health issues, stating at the sentencing hearing, "the use of substances, controlled substances, certainly contribute to and exacerbate mental health issues that already exist, if they already existed." (11 RT 1523.)

Finally, the PTSD appellant experienced from the violence he suffered in prison (2 CT 507, 535) may also have been a contributing factor to the crime. However, at the time of sentencing, the court was not required to consider such evidence, and appellant had less incentive to present it. (*Banner*, *supra*, 77 Cal.App.5th at p. 244.)

5. The record here does not "clearly indicate" that the aggravating circumstances outweigh the mitigating circumstances.

The record here does not "clearly indicate" that the trial court would have found "the aggravating circumstances outweigh the mitigating circumstances that imposition of the lower term would be contrary to the interests of justice." (§1170, subd. (b)(6).)

The amended statute limits what aggravated factors the trial court could have considered to those: 1) stipulated to by the defendant, 2) found true beyond a reasonable doubt at trial by the jury or by the judge in a court trial, or 3) based on certified records of prior convictions. (§ 1170, subds. (b)(2) and (3).)

The Majority suggests the trial court could have relied on aggravating factors that would have been permissible under the new law. "[T]he 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). (*Salazar, supra,* at p. 462 (maj. opn.).)

However, the trial court already used the prior strike conviction to double the sentence (11 RT 1532), and "the court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law" (§1170, subd. (b)(5); Cal. Rules of Court, Rule 4.420, subds. (g) and (h); see also *People v. Scott* (1994) 9 Cal.4th 331, 350 ["Although a single factor may be relevant to more than one sentencing choice, such dual or overlapping use is prohibited to some extent."]).

As to the violence finding, the jury did not find the great bodily injury allegation (as to count 3) true beyond a reasonable doubt. (2 CT 497; 10 RT 1432, 1441.) And if the Majority is referring to an element of section 237, subdivision (a) that raised the offense to a felony (that the false imprisonment was "effected by violence, menace, fraud, or deceit"), the court could not have imposed an aggravated term based on an element of the crime. (Cal. Rules of Court, Rule 4.420, subd. (h).)

But even if the trial court could have relied on aggravating factors that would be permissible under the amended law, there is no way to determine from this record that it did.

The trial court did not indicate which aggravating factors it relied on; it was not required to do so as it imposed the middle term under the old law. (§1170, former, subd. (b).) Yet it was presented with many aggravating factors that would have been impermissible under the amended statute – i.e., the defendant engaged in violent conduct which indicates a serious danger to society (probation report, p. 6); defendant inflicted great violence and a high degree of cruelty, viciousness, and callousness toward the victim; the victim was particularly vulnerable; and the defendant took advantage of his romantic relationship to commit the offense (2 CT 568 [prosecution sentencing brief]).

There is no way to determine on this record that the trial court here only considered aggravating factors allowed under the amended law. Nor is there any indication that the lower court would have imposed the same sentence had it weighed those factors against the factors identified in subdivision (b)(6).

Further, the amended law created a new requirement – "the court shall order imposition of the lower term" if appellant's trauma was a contributing factor to the offense "unless the court finds that the aggravating factors outweigh the mitigating circumstances such that imposition of the lower term would be contrary to the interests of justice." (§1170, subd. (b)(6).)

The record certainly does not "clearly indicate" that in light of this new mandatory limitation on the court's discretion, the court would have found an exception to the mandate and still imposed the middle term.

In fact, the record indicates it is more likely the trial court would have imposed the lower term. The trial court noted that much of appellant's criminal history was drug related (11 RT 1531) and ultimately decided not to impose the maximum term, under the former law "based on the fact that the last seven years or so, the defendant's criminal history has been drug related" (11 RT 1532). "By selecting the middle term, the trial court impliedly found the aggravating factors [even under the former version of the statute] were not sufficient to warrant imposition of the high term." (*Salazar, supra*, at p. 466 (Tangeman, J., dissenting).)

In *Gutierrez*, this Court found remand was required because the lower courts had not been aware of the proper sentencing discretion. "Although the trial courts in these cases understood they had some discretion in sentencing, 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. Because the trial courts operated under a governing presumption

in favor of [LWOP], we cannot say with confidence what sentence they would have imposed absent the presumption" (*Gutierrez, supra,* at p. 1391.)

Likewise, here, a reviewing court cannot "say with confidence" that the trial court would have imposed the same term of sentence given the discretionary limitations in the amended statute.

The remedy here, like in *Gutierrez*, is to remand the matter to the trial court for resentencing.

CONCLUSION

"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. [Citations.] In such circumstances, [this Court has] 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]." (*Guiterrez, supra*, at p. 1391.)

The "clear indication" showing has not been made here.

For all of these reasons, this case should be remanded to the trial court for a new sentencing hearing so appellant can present all evidence of trauma, and the court can properly consider that evidence in accordance with amended section 1170, subdivision (b)(6).

Dated: December 2, 2022

Respectfully submitted,

/s/
ARIELLE BASES,
Attorney for Appellant,
Norman Salazar

WORD COUNT CERTIFICATION

People of the State of California v. Norman Salazar

I certify that this document was prepared on a computer using Corel Word Perfect, and that, according to that program, this document contains 4,812 words.

Dated: December 2, 2022

/s/
ARIELLE BASES,
Attorney for Appellant

DECLARATION OF SERVICE

Re: People of the State of California v. Norman Salazar
California Supreme Court Case No. S275788

I, Leo 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 December 2, 2022, I served the within:

APPELLANT'S OPENING BRIEF ON THE MERITS

on each of the following:

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

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

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

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

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

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 2, 2022, at Encino, California.

/s/
Leo Alas

DECLARATION OF SERVICE

Re: People of the State of California v. Norman Salazar
California Supreme Court Case No. S275788

I, Leo 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 December 2, 2022, I served the within:

APPELLANT'S OPENING BRIEF ON THE MERITS

on each of the following:

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

Mr. Norman Salazar
(*Address on file*)

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

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 2, 2022, at Encino, California.

/s/
Leo Alas

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. SALAZAR**
Case Number: **S275788**
Lower Court Case Number: **B309803**

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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This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

12/2/2022
Date

/s/Arielle Bases
Signature

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

Bases & Bases, APC
Law Firm