No. S275788

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

NORMAN SALAZAR,
Defendant and Appellant.

Second Appellate District, Division Six, Case No. B309803
Ventura County Superior Court, Case No. 2018027995
The Honorable Anthony J. Sabo, Judge

ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

COURT RULES

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

INTRODUCTION

Senate Bill No. 567 (2021-2022 Reg. Sess.) recently added subdivision (b)(6) to Penal Code section 1170.[1] The new provision requires that a sentencing court select the lower term when the defendant "has experienced psychological, physical, or childhood trauma" that contributed to the commission of the offense, "unless the court finds that the aggravating circumstances outweigh the mitigating circumstances that [*sic*] imposition of the lower term would be contrary to the interests of justice." (Stats. 2021, ch. 731, § 1.3.) The parties agree that this ameliorative change in the law applies to appellant's nonfinal case. (See *In re Estrada* (1965) 63 Cal.2d 740, 745.) The parties also agree that remand is not required for application of the new statutory terms if the record "clearly indicates" that the trial court would have reached the same sentencing conclusion even if it had been aware of the new provision. (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.) The parties disagree, however, on the application of that standard.

Here, remand is not warranted because the record clearly indicates that the sentencing court would have imposed the same middle-term sentence even under the amendments to section 1170.[2] Appellant submitted a thorough statement in mitigation before sentencing, and the record clearly indicates that his

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

[2] Because the same judge who presided over trial also sentenced appellant, this brief refers to the trial court and the sentencing court interchangeably.

showing would have been no different even had the amended statute been in effect at the time. Properly considering all of appellant's mitigating evidence, the court rejected appellant's requests to dismiss a prior strike conviction and to impose concurrent sentences. Although the court imposed a middle term on the relevant count, it expressly did so in lieu of an upper term, never indicating that it considered a lower term to be a potentially appropriate punishment in this case. The court's statements and choices at sentencing, along with the record before it, clearly indicate that the court believed a middle term was in the interests of justice. Thus, even had it applied the lower-term presumption, that presumption would have been overcome under the terms of the amended statute and the court would have imposed the same middle-term sentence.

STATEMENT OF THE CASE

A. The trial

Appellant was charged with: kidnapping, in violation of section 207, subdivision (a); attempted second degree robbery, in violation of sections 211 and 664; and infliction of corporal injury on a person with whom he had a former dating relationship, in violation of section 273.5, subdivision (a). (1CT 272-274.) As to each offense, it was alleged that appellant had previously suffered a felony conviction within the meaning of the Three Strikes Law (§§ 667, subds. (a)(1), (c)(1), (e)(1), 1170.12, subds. (a)(1), (c)(1)). (1CT 272-274.) As to the corporal injury charge, it was also alleged that appellant personally inflicted great bodily injury, within the meaning of section 12022.7, subdivision (e).

(1CT 274.) The following facts were presented at appellant's jury trial.

M.Q. had previously dated appellant, but they were no longer in a dating relationship by April 2018. (6RT 562.)[3] On the afternoon of April 12, 2018, appellant was staying at a motel in Oxnard. M.Q. went to appellant's room and knocked on his door. (6RT 571.) Appellant pulled her into his room by her shirt and punched her in the head, causing her to bleed profusely. (6RT 571.) He accused her of being followed and trying to get him "gaffed." (6RT 572.)

For hours that followed, appellant repeatedly punched M.Q. and repeatedly sprayed her with pepper spray. (6RT 575.) He also kicked her in her thigh, causing a large bruise. (6RT 578, 581, 582.) He slid a desk in front of the motel room door (6RT 577) and took M.Q.'s car keys from her purse and removed the battery from her cell phone so she could not call for help (6RT 592-594).

At about 8:00 p.m., appellant insisted on taking M.Q.'s car to drive to a drug deal, and he demanded she come with him. (6RT 585.) Appellant drove until daybreak, with M.Q. in the passenger seat. (6RT 597, 599.) During this time, appellant was laughing, calling M.Q. names, accusing her of stealing his bike, punching her, and spraying her with pepper spray. (6RT 597.) At one point when a police car coincidentally appeared, appellant

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[3] Consistent with appellant's opening brief and the opinion below, this brief will refer to the victim by her initials.

threatened to kill M.Q. if she said anything to the officers. (6RT 632-633.) Appellant told a passerby that M.Q. was a bitch and, as the man watched, appellant pepper sprayed and punched M.Q. multiple times. (6RT 699-700.) Appellant made her yell that she was a "snitch bitch." (6RT 635.)

They returned to the motel around 9:00 a.m. on August 13, and waited in appellant's room until around 10:00 a.m., when the bank opened. (6RT 604.) While they were in the motel, appellant repeatedly punched M.Q. in the face. (6RT 603.)

Appellant drove M.Q.'s car to a park, with M.Q. following him in his truck. (6RT 606.) Appellant became angry that M.Q. did not park his truck correctly and bit her on her face, drawing blood. (6RT 607-608.) After driving back to the motel, appellant held a screwdriver to M.Q.'s back and made her tell the manager she was a prostitute and did drugs. (6RT 608-609, 610.)

Appellant then rode to a Chase Bank branch on his bicycle with M.Q. sitting behind him. (6RT 612.) M.Q. told appellant she could not withdraw $3,000 from the ATM and needed to go inside the bank. (6RT 614.) In fact, she had no money in her account. Once inside the bank, M.Q. contacted an employee, lifted her sunglasses, said she needed help, and asked the employee to call the police. (6RT 619.) The employee saw that M.Q. had a swollen, purple eye (6RT 512-513) and observed that appellant was "aggressive" and "controlling" (6RT 508, 511). Another employee called the police. (6RT 512.) The police arrived soon after and arrested appellant. (6RT 494, 623.)

M.Q. had 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. (6RT 420-421.)

At the conclusion of appellant's trial, the jury acquitted him of kidnapping, but found him guilty of the lesser included offense of felony false imprisonment (§§ 236, 237, subd. (a)), and it also acquitted him of attempted robbery. The jury convicted appellant of inflicting corporal injury on a former dating partner (§ 273.5, subd. (a)). (2CT 484-488.) It did not reach a verdict as to the great bodily injury allegation, which was subsequently dismissed pursuant to section 1385. (2CT 497; 10RT 1432, 1441.) Appellant thereafter admitted the prior strike allegation. (2CT 498; 10RT 1442.)

B. The sentencing hearing

At appellant's sentencing hearing in November 2020, the trial court considered a probation report, a defense sentencing memorandum, and the People's statement in aggravation. (11RT 1515; 2CT 502-570.)[4]

The probation report described appellant's "basic demographic information," including that he was 45 years old at the time of the offense. (Prob. Rpt. 1-2.)[5] The report noted that

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[4] Because the same judge who presided over trial also sentenced appellant, this brief refers to the trial court and the sentencing court interchangeably.

[5] The confidential probation report was included in the record on appeal separately from the clerk's transcript.

appellant had started using alcohol and marijuana at age 14 and methamphetamine at age 27, and it described appellant's current health as "good." (Prob. Rpt. 2.) After summarizing the facts of appellant's offenses, the probation report stated that appellant was on postrelease community supervision at the time of the offense and that, while in the Sheriff's custody on the current case, he had received several "major write-ups" for possession of an altered razor (three times), possession of contraband (two times), battery on a fellow inmate (two times), failing to obey a-directive (two times), unauthorized communication, passing contraband, creating a disturbance, possession of a "rat line," and theft. (Prob. Rpt. 5.)

The probation report listed five aggravating factors: (1) the crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness; (2) appellant has engaged in violent conduct which indicates a serious danger to society; (3) appellant's prior convictions and/or sustained petitions are numerous; (4) appellant was on post-release community supervision when he committed the current offense; and (5) appellant's performance on either probation or parole was unsatisfactory. (Prob. Rpt. 6.) The report stated that there did not appear to be any factors in mitigation. (Prob. Rpt. 6.)

The probation report noted that appellant was ineligible for probation but did not recommend any specific term of imprisonment. It stated: "The defendant has an extensive prior criminal record, which dates back nearly thirty years. Despite

serving numerous custody stays at the local and state levels, the defendant continuously reverts back to a pattern of violence, often toward women he is romantically involved with. The defendant is statutorily ineligible for a grant of probation. Given the defendant's ineligibility for probation and his continued violent behavior, a prison commitment is warranted in order to ensure the safety of the community." (Prob. Rpt. 7.)

Appended to the probation report was a summary of appellant's juvenile and adult criminal history as well as several pending criminal matters. (Prob. Rpt. attachment.) The summary listed several prior adult misdemeanor convictions for battery, as well as individual convictions for assault, drug use, and receiving stolen property, resulting in unsuccessful probation terms and consequent jail time. (Prob. Rpt. attachment.) The summary also listed prior felony convictions for attempted carjacking and fleeing from police in a vehicle with willful or wanton disregard for safety on two occasions, resulting in prison commitments. (Prob. Rpt. attachment.)

Appellant's sentencing memorandum set out a "developmental history" which stated, among other things, that appellant was raised in a "strained" home with a strict, alcoholic father, and his parents divorced when he was a teenager. (2CT 503-504.) Appellant's mother was "good to him." (2CT 503.) And although his father was "hard on him," that was because he "demanded the best," and he was appellant's "best friend." (2CT 504.) The memorandum identified two "significant life events": the deaths of appellant's father and mother in 2011 and 2013,

respectively. (2CT 504-505.) Under the category, "psycho-social history," the memorandum stated that appellant had been using alcohol and drugs since the age of 13. It reported that appellant's health was "good," though he had been beaten and stabbed in the past while incarcerated. (2CT 505.) A "mental health history" section of the memorandum described various psychological assessments appellant had undergone, reflecting that he had a history of mental illness as far back as 2006 and had been diagnosed with schizoaffective disorder. (2CT 505-508.)

Appended to the defense memorandum were several exhibits relating to appellant's psychiatric history. One of those—a 2009 evaluation by Ventura County Behavioral Health—stated: "No childhood trauma or abuse reported." (2CT 529.) Another—a 2013 assessment by the Ventura County Medical Center—noted that appellant "alleged no physical or sexual abuse." (2CT 551.) A third, however—a 2011 evaluation by Ventura County Behavioral Health—stated that "there was a lot of violence and abuse going on" in appellant's childhood home and that his father was "physically abusive." (2CT 534, 541.)

The defense sentencing memorandum went on to discuss the relevant sentencing factors. Addressing the applicable aggravating circumstances, appellant acknowledged that he had inflicted injury on the victim, that he "has not been successful on prior supervision," and that "he has a long history of criminal activity and incarceration." (2CT 509-510.) Appellant, however, argued that the prior strike conviction—the attempted carjacking from 2001 (see 1CT 273)—was remote in time, that his criminal

conduct was "decreasing in severity" because he had committed only misdemeanors and non-violent felonies since the prior strike conviction, and that his multiple drug offenses and his pending case for driving under the influence showed that he suffered from chemical dependency and could benefit from treatment. (2CT 509-510.) As to the mitigating circumstances, appellant argued that he suffered from "mental illness and chemical dependency," and that his criminal conduct was "caused by drug abuse and mental illness." (2CT 511-512.)

The defense sentencing memorandum requested that the trial court dismiss the prior strike conviction (see *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497) and sentence appellant to a term of probation that included a residential treatment program, arguing that "he has demonstrated a pattern of declining violence, and has worked on self-improvement" in the 19 years after his strike conviction. (2CT 513, 515.) The defense further argued in the memorandum that, if the court declined to grant the *Romero* motion and sentence appellant to probation, it should select the lower term. (2CT 516.) The defense also asserted that section 654 precluded multiple punishment, and that concurrent sentences were warranted because the offenses were part of a single course of conduct. (2CT 515-516.)

The prosecution's statement in aggravation requested that the trial court impose the maximum sentence of nine years, four months, consisting of the upper term of four years on the conviction for infliction of corporal injury on a former dating partner, the doubling of the term to eight years because of the

prior strike conviction, and a consecutive sentence of 16 months on the false imprisonment conviction. (2CT 558-569.) As to the applicable aggravating circumstances, the prosecution argued that appellant "inflicted great violence and a high degree of cruelty, viciousness, and callousness toward the victim," that the victim was particularly vulnerable and appellant took advantage of a romantic relationship to commit the offense, and that appellant's criminal history and the facts of the present case showed that "he has repeatedly engaged in violent conduct that indicates he is a serious danger to society." (2CT 568-569.)

At the sentencing hearing, the prosecutor argued that the maximum sentence was appropriate because appellant committed violence against the victim for the purpose of his own amusement, the victim suffered multiple injuries, the duration of the offense was extended, and appellant's criminal history showed "an unbroken chain of criminal conduct since 2010." (11RT 1517-1521.) Addressing the mitigation arguments in the defense sentencing memorandum about appellant's developmental history and significant life events, the prosecutor argued that appellant's admitted use of controlled substances contributed to his mental health issues, that appellant was 38 to 40 years old at the time of his parents' deaths and had already committed multiple felonies by then (including the prior strike conviction), and that his prior offenses included incidents of domestic violence. (11RT 1522-1524.)

Defense counsel responded that appellant's drug use should not be held against him. (11RT 1525.) After counsel noted that

she did not have "much more to add" than what had already been included in the sentencing memorandum, she focused primarily on the *Romero* motion and the request for probation. (11RT 1525-1526.) Counsel explained that probation would include a "lengthy drug rehabilitation program," and such a disposition would be the most effective means of preventing appellant's recidivism because it would "finally treat the underlying condition that he suffers from . . . ." (11RT 1526.) Defense counsel lastly argued that, if the court were not inclined to grant the *Romero* motion, section 654 precluded multiple punishment for both convictions. (11RT 1526-1527.)

Following the parties' arguments, the trial court noted that it had reviewed the "very thorough statement in mitigation" from the defense, which included a "very thorough history of [appellant's] background." (11RT 1528.) The court further explained that the defense "laid out a very well-drafted and informative argument for a *Romero* motion," but the court was "simply [] unable to" grant the motion in this case for several reasons. (11RT 1530.)

The court first observed that appellant had been arrested six times for offenses that were committed after the offenses in the present case, and that appellant had a "long and continuous criminal history," including a 23-year adult criminal history between 1995 and 2018. (11RT 1530-1531.) The court agreed with defense counsel's argument that "a lot of [appellant's criminal history] was drug related, and a lot of it may be suffering from" the deaths of appellant's parents, but the court

explained that it "simply cannot, based on that history, strike the strike." (11RT 1531.)

The court sentenced appellant on the corporal injury conviction to the middle term of three years, doubled to six years because of the prior strike, plus a term of eight months (one-third the middle term) on the false imprisonment conviction, doubled to 16 months because of the prior strike, for a total prison sentence of seven years and four months. (11RT 1532-1533; 2CT 576.)

C. The appeal and intervening legislation

Appellant appealed. While his appeal was pending, the Legislature passed Senate Bill No. 567, affecting criminal sentencing proceedings including by amending section 1170. (Stats. 2021, ch. 731, § 1.3.) As relevant here, under section 1170, former subdivision (b), the choice of the lower, middle, or upper term rested "within the sound discretion of the court," allowing the court to "select the term which, in the court's discretion, best serves the interests of justice." Effective January 1, 2022, however, section 1170, subdivision (b)(6) requires a sentencing court to impose the lower term if, as a contributing factor in the commission of the offense, the defendant "has experienced psychological, physical, or childhood trauma, including, but not limited to, abuse, neglect, exploitation, or sexual violence," was under age 26 at the time of the offense, or "was a victim of intimate partner violence or human trafficking." The requirement of a lower term under these circumstances may be overcome, however, if the court "finds that the aggravating

circumstances outweigh the mitigating circumstances that [*sic*] imposition of the lower term would be contrary to the interests of justice." (§ 1170, subd. (b)(6).)[6]

At the Court of Appeal's request, the parties submitted briefs addressing the effect of the new legislation on appellant's case. The Court of Appeal affirmed in a divided opinion.

The court agreed with the parties that the new legislation applies to appellant's nonfinal judgment. (Opn. 10.) The majority concluded, however, that remand was not required because the record "clearly indicates" that the trial court would have imposed the same sentence had section 1170, subdivision (b)(6) been in effect at the time of the sentencing hearing. (Opn. 10-11.) The majority stated that appellant's sentencing memorandum "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." (Opn. 11.) The "lengthy sentencing memorandum" thus "brought to the trial court all of these matters which appellant characterized as 'mitigating.'" (Opn. 11.) The majority

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[6] An early version of a bill that was later incorporated into Senate Bill No. 567 required the sentencing court to find that "the aggravating circumstances *so far* outweigh the mitigating circumstances that imposition of the lower term would be contrary to the interests of justice." (See Assem. Bill No. 123 (2021-2022 Reg. Sess.), as amended April 15, 2021.) The phrase "so far" was deleted from the bill's language before final passage.

then pointed to several aspects of the record relevant to the question of whether remand was required: (1) the probation report identified multiple aggravating factors; (2) the trial court denied appellant's *Romero* motion because of his lengthy and continuous criminal history; (3) the trial court denied appellant's request to impose concurrent sentences; (4) appellant's current offenses were "aggravated, sadistic, and extended over the course of 20 hours," such that they were "akin to torture"; and (5) the trial court had imposed a criminal protective order in light of appellant's history of violence against other women. (Opn. 11-12.)

The majority concluded that remand was not warranted, and would amount merely to an "idle act," because the record clearly indicates that the trial court would not have imposed a lower term under the new legislation. (Opn. 12-13.) The majority further observed that "[a]s a matter of law, (1) the aggravating circumstances are overwhelming and outweigh any theoretical mitigating circumstances, and (2) selection of the lower term would be 'contrary to the interests of justice.'" (Opn. 13.)

One justice dissented. He observed that the trial court "had no opportunity to consider this new requirement or the necessary findings to overcome it." (Dis. Opn. 1.) And he concluded that the record did not clearly indicate that the trial court would have reached the same result under the new sentencing provision. (Dis. Opn. 1.) The dissenting justice reasoned that the trial court had acknowledged that the social-

history factors described in appellant's sentencing memorandum may have contributed to his commission of the current offenses, and the court had imposed the middle term rather than the upper term. (Dis. Opn. 2.) He concluded that the trial court's awareness of its discretion under the former version of the sentencing statute was not sufficient to indicate how it would have ruled under the new version, which "further defined and limited its discretion." (Dis. Opn. 2.) And he asserted that the majority's approach improperly substituted its own sentencing judgment for the trial court's. (Dis. Opn. 2-3.)

ARGUMENT

THE RECORD CLEARLY INDICATES THAT THE TRIAL COURT WOULD HAVE IMPOSED THE SAME MIDDLE-TERM SENTENCE EVEN IF IT HAD APPLIED CURRENT SECTION 1170, SUBDIVISION (B)(6)

Appellant contends that his case must be remanded for resentencing under amended section 1170. (OBM 12-26.) The parties agree that the amendment applies retroactively to appellant's nonfinal case. (See *Estrada, supra,* 63 Cal.2d at p. 745; see also *People v. Stamps* (2020) 9 Cal.5th 685, 699.) The parties also agree that remand is not required if the record clearly indicates that the sentencing court would have imposed the same middle-term sentence had it been aware of its discretion under newly added subdivision (b)(6) of section 1170. Under that standard, remand is unwarranted.

A. The *Gutierrez* standard

Where, as here, a sentencing court was unaware of the scope of its sentencing discretion under later-enacted law, or a later judicial interpretation of a sentencing law, "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*, 58 Cal.4th at p. 1391.) *Gutierrez* concerned the proper interpretation of section 190.5, subdivision (b), which permitted trial courts to sentence certain juvenile offenders who committed special circumstance murder to prison for life without the possibility of parole (LWOP) or for 25 years to life. Although longstanding appellate authority had construed the statute's language as creating a presumption in favor of LWOP, this Court concluded that the statute conferred discretion on trial courts to impose either sentence, with no such presumption. (*Gutierrez,* at p. 1360.)

In determining the proper disposition, this Court observed:

> Defendants are entitled to sentencing decisions made in the exercise of the "informed discretion" of the sentencing court. 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. In such circumstances, we have held that the appropriate remedy is to remand for resentencing unless the record "clearly indicates" that the trial court would have reached the same conclusion even if it had been aware that it had such discretion.

(*Gutierrez, supra*, 58 Cal.4th at p. 1391, quotation marks, citations, and alterations omitted.)

The *Gutierrez* court remanded the two cases before it for resentencing, because in one the trial court had expressly acknowledged the presumption and framed the pertinent

question as whether it should deviate from the statutory requirement of LWOP, while in the other the trial court did not expressly refer to the presumption, but the presumption had been undisturbed for over 20 years. *(Gutierrez*, *supra*, 58 Cal.4th at p. 1390.) This Court explained: "Although the trial courts in these cases understood that 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 life without parole, we cannot say with confidence what sentence they would have imposed absent the presumption." (*Id.* at p. 1391.)[7]

B. Remand is not required

The record here clearly indicates that the trial court would have imposed the same middle-term sentence even if it had been fully aware of the new lower-term presumption under subdivision (b)(6) of section 1170.

1. Appellant's showing of "trauma" within the meaning of the new sentencing provision

To trigger the new lower-term presumption, a sentencing court must find that the defendant experienced trauma that "was

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[7] The *Gutierrez* standard thus applies in the specific circumstance where a sentencing court could not have been aware of the scope of its discretion because of a change in the law affecting that discretion after the sentence was imposed. Other types of error under the amended statute, occurring either before or after its enactment, would be subject to the usual standards for assessing prejudice.

a contributing factor in the commission of the offense." (§ 1170, subd. (b)(6).) Qualifying trauma within the meaning of the statute is "psychological, physical, or childhood trauma, including, but not limited to, abuse, neglect, exploitation, or sexual violence." (§ 1170, subd. (b)(6)(A).)[8] The record here discloses that appellant may have suffered childhood abuse (2CT 534, 541) which would appear to meet the statute's threshold requirement for triggering the lower-term presumption. At least for purposes of applying the intervening statutory change to this nonfinal case, it appears that reversal would not be precluded for failure to meet the threshold requirement. (See *People v. Frahs* (2020) 9 Cal.5th 618, 637 [holding in part that the appellant was not precluded from invoking benefit of intervening mental-health diversion statute because "the record affirmatively discloses that the defendant appears to meet" one of the threshold requirements for diversion].)

In its opinion below, however, the Court of Appeal majority stated that appellant's sentencing memorandum "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." (Opn. 11.) And appellant relies in

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[8] Appellant does not argue that the other triggers of the lower-term presumption identified in the statute—youth at the time of the offense or status as a victim of intimate partner violence or human trafficking—would apply in his case.

part on the same mitigating circumstances as evidence of trauma under the amended statute. (OBM 18-22.) It is not clear that those experiences would amount to the kind of "trauma" that the statute is intended to account for.

In establishing the new lower-term presumption, the Legislature appears to have been focused in particular on addressing the effect of certain physical and sexual abuse that is likely to contribute to later criminality. The author of the legislation reported that "as many as 94% of certain female prison populations have a history of physical or sexual abuse before being incarcerated." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill 124 (2021-2022 Reg. Sess.) as amended Sept. 3, 2021, p. 5.) The author further noted that Black, Latinx, and indigenous women, as well as transgender, lesbian, bisexual, LGBT, and gender non-conforming women, are "disproportionately survivors of violence and overrepresented in prisons." (*Id.* at p. 6.) According to the author, because of the criminal justice system's failure to account for "the effect of trauma and abuse," "abusers are shielded from accountability, and the trauma that is the underlying cause of the behavior is not addressed." (*Ibid.*) Moreover, "judges often lack the discretion to dismiss charges, reduce harsh sentences, and strike sentence enhancements to tailor court responses to adequately serve vulnerable populations and the interest of justice." (*Ibid.*) The legislation therefore was designed "to correct unjust outcomes of the past, provide full context of the experiences that might impact a person's actions, and use a more

humanizing and trauma-informed response to criminal adjudication." (*Ibid*.)

The statute is not expressly limited to the vulnerable populations discussed by the legislation's author, nor to specific forms of abuse, neglect, exploitation, or sexual violence. But much of the personal history put forward by appellant at sentencing, though certainly proper to consider in the context of evaluating mitigating circumstances, appears to fall outside the scope of the "trauma" that the amended statute was designed to address.

For example, appellant's sentencing memorandum described significant drug addiction and mental health issues that may have contributed to his offenses. Such conditions do not appear to be "trauma," as they are qualitatively different from the physical and sexual abuse that are the statute's more specific focus. And those conditions are accounted for in criminal proceedings by other means. (See, e.g., §§ 1000 et seq. [drug diversion]; 1001.35 et seq. [mental health diversion].) It is doubtful, moreover, that such ongoing conditions qualify as "trauma" even as a matter of plain language. (See Webster's 3d New Internat. Dict. (1981) p. 2432, col. 3 [defining "trauma" as "an injury or wound" or a "psychological or emotional stress or blow" or "the state or condition of mental or emotional shock produced by such a stress or by a physical injury"]; but see *People v. Banner* (2022) 77 Cal.App.5th 226, 240 240 [psychological trauma "stemming from" or "based on" mental illness requires remand for resentencing]; *id*. at p. 246 (conc. & dis. opn. of Detjen,

acting P.J.) [remand for resentencing under § 1170, subd. (b)(6)(A) unwarranted "when there is evidence of mental illness, but no evidence of psychological trauma"].)

It is similarly unclear whether the deaths of one's parents during one's adulthood, as difficult as that might be, is akin to the kind of trauma to which the statute is geared. Nor is it clear that the incidents of violence appellant experienced while incarcerated are the type of trauma that the statute contemplates, or that they contributed to his later, unrelated offenses. A definition of "trauma" that would include the conditions and life experiences emphasized by appellant at his sentencing would likely result in wide-ranging application of the low-term presumption. But the language of the statute, and the legislative history behind it, do not suggest that it was intended to sweep so broadly.[9]

It is unnecessary, however, for the Court to reach the question whether those aspects of appellant's background would have supported application of the lower-term presumption under

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[9] Indeed, the statute's purpose was in part to correct a system under which "abusers are shielded from accountability." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill 124 (2021-2022 Reg. Sess.) as amended Sept. 3, 2021, p. 6.) Appellant's current offenses and criminal history show a pattern of violence against women. (11RT 1523-1524; see also Prob. Rpt. attachment.) And his sentencing memorandum acknowledged that the victim in this case suffered trauma as a result of appellant's actions. (2CT 503.) Application of the lower-term presumption under such circumstances would, at the very least, seem to be in tension with the purpose of the amended statute.

section 1170, subdivision (b)(6). As appellant points out, the record contains an indication that he experienced physical abuse as a child. (2CT 534, 541.) Although there is other evidence in the record that appellant disclaimed any history of physical abuse (2CT 529, 551), and there could be a question whether any childhood abuse appellant did experience was a "contributing factor" in the crimes he committed when he had reached the age of 45, there remains at least an affirmative indication to the contrary and the record does not clearly indicate which is correct. For purposes of applying the later-enacted statute to this nonfinal case, the record would not preclude remand on the basis that appellant fails to meet the prerequisites for triggering the lower-term presumption, since the record discloses that he "appears to meet" the trauma requirement. (See *Frahs*, *supra*, 9 Cal.5th at p. 637.)

2. The record clearly indicates that the court would have imposed the middle term even applying the new lower-term presumption

Remand is nonetheless unwarranted because the record clearly indicates that the court would still have imposed the same middle-term sentence even had it applied section 1170, subdivision (b)(6).

Section 1170's lower-term presumption may be rebutted if the "aggravating circumstances outweigh the mitigating circumstances that [*sic*] imposition of the lower term would be contrary to the interests of justice." (§ 1170, subd. (b)(6).) In this case, the record shows that the evidence of aggravating and mitigating circumstances before the sentence court would not

have changed in light of the intervening law. The relative weight of those factors is apparent on this record. And the court's comments at sentencing show that it believed a lower term was not in the interests of justice, a determination that is "uniquely addressed to the broad discretion of the trial court." (*People v. Stuckey* (2009) 175 Cal.App.4th 898, 916.)[10]

Appellant's sentencing memorandum to the trial court comprehensively discussed his background and what the defense contended were mitigating factors in this case. As the trial court noted, and as the record confirms, appellant filed a "very thorough statement in mitigation," which included a "very thorough history of [appellant's] background." (11RT 1528.) Even before the statute was amended, appellant had a strong incentive to include any mitigating evidence of "trauma" in his sentencing memorandum and to argue that it contributed to his offenses. (See Cal. Rules of Court, rules 4.408(a), 4.423(c); see *People v. Vaughn* (2022) 77 Cal.App.5th 609, 627.) And indeed,

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[10] Rule 4.423 of the California Rules of Court, addressing sentencing factors in mitigation, was amended by the Judicial Council effective March 14, 2022, while appellant's case was on appeal. The amendment added a number of new mitigating factors relating to the defendant for courts to consider in selecting a sentence, including one factor mirroring the "trauma" prerequisite for the lower-term presumption in amended section 1170, subdivision (b)(6)(A). Because the court in this case properly took into account all of appellant's proffered mitigating circumstances, the new language in rule 4.423 would not have played any significant role in the trial court's sentencing determination. Appellant has not argued otherwise, either in this Court or in the court below.

counsel comprehensively discussed appellant's personal history and the potentially mitigating circumstances. Appellant nonetheless argues that "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." (OBM 20.) But given appellant's thorough presentation to the trial court, there is no reason to conclude on this particular record that appellant would have presented any further evidence in that regard even had the amended statute been in effect at the time of his sentencing.

The record clearly indicates that the aggravating factors in this case outweighed the mitigating factors. As reflected in the record, and as emphasized by the trial court, appellant had a "long and continuous criminal history," including a 23-year adult criminal history between 1995 and 2018. (11RT 1531; see Cal. Rules of Court, rule 4.421(b)(2).) The current offense was consistent with appellant's history of domestic violence. (Prob. Rpt. attachment.) The court also recognized that appellant's criminal behavior was ongoing, noting that appellant had been arrested for six additional offenses after the commission of the present offenses. (11RT 1530-1531.) Indeed, appellant's lengthy criminal history was the primary reason for the trial court's denial of appellant's *Romero* motion and request for concurrent sentences. (11RT 1530-1533.) Appellant's probation report further indicated that he was on postrelease community supervision at the time of the offense (Cal. Rules of Court, rule 4.421(b)(4)) and that he had served prior prison terms (Cal. Rules

of Court, rule 4.421(b)(3)) as well as unsuccessful probation terms (Cal. Rules of Court, rule 4.421(b)(5)). (Prob. Rpt. 5 & attachment.)

Moreover, the facts of the present offenses were particularly aggravated. (See Cal. Rules of Court, rule 4.421(a)(1), (b)(1).) Appellant repeatedly struck and terrorized the victim over the course of 20 hours, resulting in several injuries that included a fractured cheek bone. As the Court of Appeal majority aptly summarized below, appellant's conduct was "akin to torture." (Opn. 12.) And as the prosecution noted, appellant used a chemical spray during the attack (Cal. Rules of Court, rule 4.421(a)(2)), took advantage of M.Q.'s vulnerability and relationship with him (Cal. Rules of Court, rule 4.421(a)(3), (a)(11)), and dissuaded her from reporting the attack (Cal. Rules of Court, rule 4.421(a)(6)). (2CT 568.)

On the other hand, the two principal factors in mitigation highlighted by the defense were appellant's history of drug use and his mental health issues. (See 11RT 1522-1531.) The defense sentencing memorandum described other aspects of appellant's background as well, including his "strained" upbringing and the violence he experienced while incarcerated. (2CT 502-557.) And it also contained an indication that he may have been physically abused as a child. (2CT 534, 541.) But those factors were not particularly emphasized. To be sure, the court considered all of the background material it was presented with. (11RT 1528.) As the parties and the court below acknowledged, however, appellant's criminality appeared to be

primarily bound up with his drug addiction and mental health issues, and possibly the effects of losing his parents several years before the current offenses. (See 11RT 1522-1531.)

Properly taking into account all of appellant's proffered mitigation evidence (see 11RT 1515, 1517, 1522-1525, 1530-1531; Cal. Rules of Court, rule 4.423(b)(2), (c)), the trial court made three key determinations during sentencing, reflecting its thinking about the case. First, the court denied appellant's *Romero* motion. The court acknowledged the age of the strike, appellant's history of drug-related crime, and the deaths of his parents. (11RT 1531.) But it ruled that, despite those circumstances, it would not dismiss the prior strike given appellant's extensive criminal history. (11RT 1531.) Second, the court, in setting appellant's term on the principal count, stated: "I'm going to select not the high term, but the mid term, and that's based on having heard the evidence, and based on the fact that the last seven years or so, the defendant's criminal history has been drug related." (11RT 1532.) The court did not indicate that it was ever contemplating the lower term as an appropriate sentence in this case. And third, the court rejected appellant's request that it exercise discretion to impose concurrent sentences (see 2CT 515-516), explaining: "Based on everything that I've said, I'm not going to do that. I'm going to make them consecutive." (11RT 1533.)[11]

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[11] As relevant here, the court could consider aggravating circumstances in deciding whether to impose consecutive sentences, as well as other factors relating to whether the crimes

(continued…)

These statements and sentencing decisions by the trial court clearly indicate that it would have exercised its discretion under section 1170, subdivision (b)(6) by again imposing the middle term because the imposition of the lower term "would be contrary to the interest of justice." (See *People v. Franks* (2019) 35 Cal.App.5th 883, 892 [in determining whether the trial court would have reached the same conclusion if it had been aware of the full scope of its discretion, the reviewing court considers the trial court's statements and sentencing decisions].) Indeed, under the version of section 1170 in effect at the time, the trial court's choice reflected that it believed the middle term "best serves the interest of justice." (See § 1170, former subd. (b).) The court's evaluation of the same aggravating and mitigating evidence it would have considered even under the amended statute led it to deny appellant's *Romero* motion and his request for concurrent sentences. And although the court imposed a middle term sentence, rather than the upper term, the court's comments in doing so clearly indicate that a lower term was never under consideration as an appropriate punishment in this case.

The dissenting Court of Appeal Justice below concluded that, because section 1170, subdivision (b)(6) was not enacted until after appellant was sentenced, "the sentencing court had no

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(…continued)

were independent of each other or involved separate acts of violence. (See Cal. Rules of Court, rule 4.425.)

opportunity to consider this new requirement or the necessary findings to overcome it." (Dis. Opn. 1.) Similarly, the dissent concluded that the record did not support affirmance because the trial court made no "pronouncements" that it would have reached the same conclusion had it been aware of the new lower-term presumption. (*Ibid.*) The dissent, however, takes an overly narrow view of the *Gutierrez* standard that would require reversal in nearly every case where a court did not anticipate a sentencing change and show on the record its consideration of the relevant future standard. *Gutierrez* does not require such prescience; rather, it reasonably requires only a clear indication that, as the majority below put it, remand would be "an idle act" (Opn. 12-13) because it is clear the court's decision would be no different even in light of the new law. (*Gutierrez, supra*, 58 Cal.4th at p. 1391.) That may be established in a given case, like this one, by indicia in the record other than express pronouncements precisely corresponding to the later-enacted standard. (See, e.g., *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 [declining to remand where trial court indicated defendant was "the kind of individual the law was intended to keep off the street as long as possible"].)

In light of the record here, although the trial court did not expressly state that the middle term rather than the lower term was required in the "interests of justice," it can be said with confidence that this was its view on consideration of all the aggravating and mitigating factors and in light of its other sentencing rulings. Because in this case the evidence relevant to

the aggravating and mitigating circumstances, and the court's weighing of them, would have been unaffected by the intervening statute, the same result would follow even had it applied the lower-term presumption, and therefore remand is unwarranted.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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March 10, 2023

CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF ON THE MERITS uses a 13 point Century Schoolbook font and contains 7,089 words.

ROB BONTA
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/s/ David F. Glassman
DAVID F. GLASSMAN
Deputy Attorney General
Attorneys for Plaintiff and Respondent

March 10, 2023

DECLARATION OF ELECTRONIC SERVICE
AND SERVICE BY U.S. MAIL

Case Name: **People v. Norman Salazar**
No.: **S275788**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On March 10, 2023, I electronically served the attached **ANSWER BRIEF ON THE MERITS** by transmitting a true copy via this Court's TrueFiling system to:

Arielle N. Bases, Relbases@gmail.com
(Attorney for Appellant)

I also caused the attached document to be electronically served to the California Court of Appeal by transmitting a true copy via the Court's TrueFiling system.

I also served the attached document by transmitting a true copy via electronic mail using my e-mail address as irene.rangel@doj.ca.gov to:

David Barnes
Deputy District Attorney

California Appellate Project
CapDocs@lacap.com

Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on March 10, 2023, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013-1230, addressed as follows:

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Court Clerk
Ventura County Superior Court
Hall of Justice
for delivery to: Hon. Anthony J. Sabo, Judge
P.O. Box 6489
Ventura, California 93006

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on March 10, 2023, at Los Angeles, California.

I. Rangel	/s/ I. Rangel
Declarant	Signature

DFG:ir
LA2022603558

STATE OF CALIFORNIA
Supreme Court of California

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3/10/2023
Date

/s/Irene Rangel
Signature

Glassman, David (115664)
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