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.	No. S275788 Court of Appeal No. B309803 Ventura County Superior Court No. 2018027995

APPELLANT'S
REPLY BRIEF ON THE MERITS

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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 REPLY BRIEF ON THE MERITS

INTRODUCTION

The issue here is whether the Court of Appeal erred 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. (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391 (*Gutierrez*).)

Respondent concedes: 1) the amended statute applies retroactively to cases like the present one that were not final at the time the law became effective (Answer Brief, p. 20); 2) the statute created a "lower-term presumption" that can only be

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

rebutted if the "aggravating circumstances outweigh the mitigating circumstances that imposition of the lower term would be contrary to the interests of justice" (*id.* at p. 27); and 3) appellant "'appears to meet' the trauma requirement" identified in subdivision (b)(6)(A) of the statute (*id.* at p. 27).

Nevertheless, respondent argues the weighing of the aggravating and mitigating circumstances under the new statute would have resulted in the same sentence the court imposed under the former law and, therefore, concludes remand is not required. (Answer Brief, pp. 6, 27-28.)

Respondent's argument fails because it ignores both the changes in the law regarding what factors can be used to support an aggravated term and the new statutory mandate to consider certain mitigating factors and impose the lower term if those factors apply. (§1170, subds. (b)(2), (3), and (6).) Further, respondent's conclusions are not supported by the record and necessarily require the reviewing court to impermissibly substitute its judgment for that of the sentencing court.

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.

Respondent argues "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." (Answer Brief, p. 6.)

Respectfully, appellant disagrees.

The record here does not "clearly indicate" the trial court 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. (OBM, p. 12.)

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." (*People v. Salazar* (2022) 80 Cal.App.5th 453, 466 (dis.opn.).)

1. *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.

Respondent argues that the "clear indication" standard articulated in *Gutierrez* stands for the proposition that remand is not required if the record "clearly indicates" the sentencing court would have reached the same conclusion had it been aware of the amendments to the statute. (Answer Brief, pp. 6, 20-21.)

This argument ignores an important aspect of the *Gutierrez* standard – that remand is usually required and can 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.) In other words, a finding that no remand is necessary is the exception.

Requiring remand in most cases makes sense in the context of defendant's constitutional right to sentencing exercised with the proper discretion. An arbitrary deprivation of a defendant's right to have the court properly apply state law at sentencing violates the Due Process Clause of the Fourteenth Amendment. (*People v. Vega-Hernandez* (1986) 179 Cal.App.3d 1084, 1100, citing *People v. Arbuckle* (1978) 22 Cal.3d 749, 755; U.S. Const., Amend. XIV; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [100 S.Ct. 227, 65 L.Ed.2d 175].)

If, as here, the sentencing discretion has changed, and/or there are factors the sentencing court did not consider because it was not required to do so under the old law, remand is the

appropriate remedy to avoid a sentence imposed in violation of the defendant's constitutional rights and to allow the sentencing court to exercise the proper discretion when imposing the sentence. (*Gutierrez, supra*, at p. 1391.)

2. Respondent failed to address how the requirement to consider certain mitigating circumstances and the presumption to impose the lower term mandated by amended section 1170, subdivision (b)(6) would have affected the sentencing court's decision.

Respondent recognizes that the statute creates "a new lower-term presumption" (Answer Brief at p. 27; see also p. 17 ["section 1170, subdivision (b)(6) requires a sentencing court to impose the lower term . . ."]), but fails to address how this change in discretion would have affected the sentencing decision.

Respondent argues that at sentencing, the court was already presented with all of the mitigating factors it would be required to consider under the new statute, and that the weighing of those factors would not have changed under the new law. (Answer Brief, pp. 27-29.) Absent from respondent's analysis is the effect of the changes in sentencing discretion under the amended statute. At the time of sentencing, the sentencing court was not mandated to consider those mitigating factors and, more important, was not mandated to impose the lower term if any of those circumstances applied. It's difficult to see how the changes in sentencing discretion brought about by the amended statute would not have affected the sentencing court's weighing of the mitigating circumstances against the aggravating circumstances.

In *Gutierrez*, this Court also considered a retroactive change in the trial court's sentencing discretion and the mandate to consider additional sentencing factors. (§190.5, subdivision (b); *Gutierrez, supra*, at pp. 1360-1361.) This Court held:

> 1) 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"(*id.* at p. 1387); and
>
> 2) "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 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 reached that conclusion even though aggravating circumstances deemed supportive of LWOP (such as, the degree of violence involved, resulting harm to the victim's family and surrounding community, and defendant's

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

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

unsatisfactory record while in custody) would remain unchanged on remand, and had "absolutely convinced" the trial court LWOP was the only sentence that could redress the violence inflicted in that case. (*Gutierrez, supra,* at p. 1367.) The *Gutierrez* trial court's consideration of these aggravating circumstances could not transform the LWOP sentence into one reflecting an exercise of informed discretion, and it did not amount to a clear indication the trial court would have imposed LWOP without the presumption. (*Id.* at p. 1391.)

The same is true in this case.

There is no way to determine that the record here "clearly indicates" the sentencing court would have imposed the same sentence despite the changes in the statute; the reviewing court can only speculate the sentencing court would have done so.

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

3. A determination that the sentencing court would have imposed the middle term, even under the amended statute, requires impermissible speculation by the reviewing court.

Respondent's argument that despite the discretionary changes, the sentencing court would have found the aggravating factors outweigh the mitigating factors such that a lower term would be contrary to the interests of justice requires multiple levels of speculation by a reviewing court. (Answer Brief at pp. 27-28; see also *Salazar, supra*, 80 Cal.App.5th at p. 464 (maj. opn).)

First, the reviewing court would have to speculate as to what aggravating factors the sentencing court would have considered. This is problematic because 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. (Former §1170, subd. (b).)

Second, the reviewing court would have to speculate that the sentencing court only relied on aggravated factors permissible under the amended statute – those that were 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 based on certified records of prior convictions. (§ 1170, subds. (b)(2) and (3).) This is problematic here because the sentencing court was presented with many factors that could not be used to impose the aggravated term 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; the defendant took advantage of his romantic relationship to commit the offense (2 CT 568 [prosecution sentencing brief]); and the nature, seriousness, and circumstances of the crime as compared to other instances of the same crime (11 RT 1517 [prosecution's argument at sentencing hearing]).

Respondent suggests the sentencing court was presented with aggravating factors it could have relied on under the amended statute. (Answer Brief, p. 29.) But even if the trial court could have relied on permissible aggravating factors, the reviewing court would have to speculate that the sentencing court relied only on those aggravating factors – as opposed to the above impermissible ones – in weighing the aggravating and mitigating factors to determine the appropriate sentence.

Third, a reviewing court would have to speculate that, even though the new statute mandates consideration[4] of appellant's psychological and childhood trauma and imposition of the lower term if that trauma was a contributing factor to the offense, the sentencing court would have reached the same sentence under the amended statute that it did under the former law. (§1170, subd. (b)(6)(A)). (See *Gutierrez, supra*, at pp. 1390, 1391.)

Finally, a reviewing court would have to speculate that under the new requirements and mandates in the amended

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[4] Former section 1170, subdivision (b) allowed consideration of psychological and childhood trauma but did not mandate it. (Former §1170, subd. (b).)

statute, the sentencing court would have made a finding that the lower term sentence was not in the interest of justice. (Answer Brief, p. 28.)

4. Appellant suffered trauma as described in subdivision (b)(6)(A) of section 1170. There is no "clear indication" that the sentencing court would have imposed the same sentence had it considered this trauma in light of the amended statute.

Appellant presented evidence of compelling mitigating circumstances that would require a different sentencing analysis and different exercise of discretion under the amended statute. (Subd. (b)(6)(A).)

Respondent concedes appellant suffered qualifying trauma within the meaning of section 1170, subdivision (b)(6) (Answer Brief, pp. 23, 27) but suggests that appellant's mental health and substance abuse issues are not "the kind of 'trauma' that the statute is intended to account for." (*Id.* at pp. 24, 25.)

Respectfully, respondent's suggestion is incorrect.

The language in the statute clearly covers appellant's physical abuse, childhood abuse, and documented mental health issues – in addition to the "certain physical and sexual abuse" respondent identified. (§1170, subd. (b)(6)(A).) Moreover, the Legislative history indicates that the broader category of psychological, physical or childhood trauma was included **in addition** to the physical and sexual abuse respondent references. (Answer Brief, pp. 24, 25; see, e.g., AB 124, Sen. Committee on Public Safety (July 6, 2021), p. 4.) Even the California District

Attorneys' Association recognized that "the amendments also include any childhood trauma." (AB 124, Assembly Committee on Appropriations (May 5, 2021), p. 3.)

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 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, he was diagnosed with Paranoid Schizophrenic Disorder, Anxiety, and Claustrophobia. (2 CT 505, 534, 546.) In 2009, appellant 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), and 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).

There is also extensive evidence that the delusions and hallucinations caused by appellant's mental health issues contributed to the current offenses. (2 CT 526-527, 535, 544, 550.)

Finally, the record 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.) In fact, 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.)

There is no "clear indication" that had the sentencing court considered all of this mitigating evidence in light of the amended statute with its lower-term mandate, it would have imposed the same middle term it did under the former law.

5. Respondent relied on assumptions, not supported by the law or the record, to support the conclusion that the sentencing court would have imposed the same sentence under the newly-amended statute.

Respondent argues appellant has an extensive criminal history which ostensibly could be a weighing factor to support the ultimate decision to impose a middle term. (Answer Brief, p. 29.) However, appellant's criminal history is a nuanced issue for the sentencing court to determine under the proper discretionary standard – not the reviewing court.

Since his prior strike (attempted carjacking in 2001 (2 CT 564)), appellant has had one felony conviction in 2009 for possessing a stolen vehicle (§469d, subd. (a)), and two felony convictions for willful evasion of a police officer (2012 and 2014).

(2 CT 565-566.) Since then, as trial counsel pointed out, appellant has suffered no felony convictions (apart from the present offense); his misdemeanor convictions were caused by his drug abuse. (11 RT 1526.) Trial counsel also pointed out that "the most likely way to prevent recidivism by [appellant] is to finally treat the underlying condition that he suffers from [substance abuse] as well as imposing some mental health terms." (11 RT 1526.)

The sentencing court agreed that much of appellant's criminal history since the prior strike was drug-related and may have been as a result of his suffering after his parents' deaths. (11 RT 1531.) The court selected the middle term "based on the fact that the last seven years or so, the defendant's criminal history has been drug related. (11 RT 1532.) There is no "clear indication" the sentencing court would have imposed the same sentence, even considering appellant's criminal history, under the amended statute.

In addition, respondent speculates that the court's denial of the *Romero*[5] motion indicates it would not have imposed a lower term. (Answer Brief at p. 31.) 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 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*

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

v. McGlothin (1998) 67 Cal.App.4th 468, 474.) Section 1170, subdivision (b)(6) does the opposite; it requires the sentencing court to impose the lower term unless there is an exception.

Respondent also speculates that "the imposition of consecutive sentences shows the court's reluctance to impose the lower term." (Answer Brief, p. 31.) 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.*)

Further, respondent suggests the sentencing court never indicated it "considered a lower term to be a potentially appropriate punishment in this case." (Answer Brief, p. 7.) However, the trial court was not required to state whether it considered the lower term (former §1170, subd. (b)); its failure to do so has no bearing on the issue here – whether the record "clearly indicates" that the court would still have imposed the middle term under the amended statute.

Finally, respondent mischaracterizes the analysis of the appellate court. For example, respondent states that the Dissent relied on the trial court's failure to make any "pronouncements" that it would have reached the same conclusion had it been aware of the lower term presumption. (Answer Brief, p. 33, citing *Salazar, supra*, at p. 466 (dis. opn.).) However, the Dissent did not require any "pronouncements" from the sentencing court; rather,

it did the appropriate analysis and explained valid reasons why the record does not support a "clear indication" finding here, such as the trial court's recognition that a lot of appellant's criminal history may be attributed to his suffering because of his parents' deaths. (*Salazar, supra*, at p. 466 (dis. opn.).)

In fact, the Dissent correctly found that the "clear indication" showing has not been made here and that "[t]he record does not establish that the trial court would have found trauma was not a contributing factor." (*Salazar, supra*, at p. 466, (dis. opn.).)

6. The Majority erred when it substituted its own judgment for the sentencing court's discretionary decision; respondent's argument validates that improper approach.

Respondent argues "the facts of the present case are particularly aggravated" and "as the Court of Appeal aptly summarized below, appellant's conduct was 'akin to torture.'" (Answer Brief, p. 30.)

But the respondent's (and the Majority's) opinions about the circumstances of the offense are not proper grounds for an upper term sentence; the amended statute only allows an upper term sentence if 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); see also *People v. Lopez* (2022) 78 Cal. App. 5th 459, 466.)

In fact, respondent's argument simply validates the approach taken by the Majority which is to substitute its judgment for that of the sentencing court. For example, the Majority opined that appellant's offenses were "aggravated" and "sadistic." (*Salazar, supra*, at p. 464 (maj. opn.).)

The Majority also found,

> Remand for resentencing would be an idle act. The offenses committed by appellant in this case were horrendous. For what appellant did over the course of two days, an aggregated unstayed sentence of seven years and four months is lenient. He could easily have 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.

(*Ibid.*)

Yet, as the Dissent appropriately noted, "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.'" (*Salazar, supra*, at pp. 466-467 (dis. opn.).)

The analysis in *People v. Hendrix* (2022) 13 Cal.4th 933 is instructive here. In *Hendrix*, the Court of Appeal decided that erroneous jury instructions regarding mistake of fact constituted harmless error. (*Id.* at p. 936.) This Court reversed the Court of Appeal's decision, stating,

> In finding the instructional error at Hendrix's trial harmless, the Court of Appeal leaned heavily on its own view of the facts, rather than focusing its analysis on the

> error's likely effect on the jury's consideration of those facts. The majority opined that "the story [Hendrix] told the police was a fabrication." [Citation] In reaching that conclusion, the majority stepped into the role of the jury, weighing competing evidence before coming to its own conclusions about disputed facts in the case.

(*Id.* at pp. 948-949.)

Here, the Majority improperly stepped into the role of the sentencing court. "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.)

Further, according to the author, "AB 124 is an opportunity 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." (Assembly Bill 124, Sen. Committee on Public Safety (July 6, 2021), p. 9.) That purpose is thwarted if reviewing courts deprive defendants of the opportunity to have lower courts make sentencing decisions considering those factors.

CONCLUSION

For all of these reasons, and those raised in the opening brief, the "clear indication" showing has not been made here. (*Guiterrez, supra*, at p. 1391.)

The appropriate remedy is to remand this case 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).

Dated: March 27, 2023

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 3, 839 words.

Dated: March 27, 2023

/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 March 27, 2023, I served the within:

APPELLANT'S REPLY BRIEF ON THE MERITS

on each of the following:

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

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I declare under penalty of perjury that the foregoing is true and correct. Executed on March 27, 2023, 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 March 27, 2023, I served the within:

APPELLANT'S REPLY 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 March 27, 2023, 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**

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3/27/2023
Date

/s/Arielle Bases
Signature

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

Bases & Bases, APC
Law Firm