S258376

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re OSCAR MANUEL VAQUERA, *On Habeas Corpus.* **ORANGE COUNTY DISTRICT ATTORNEY,** **CALIFORNIA ATTORNEY GENERAL,** **CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,** *Real Parties in Interest.*	**No. _____** Prior Supreme Ct. No. S252593 Court of Appeal No. G056786 Orange County Sup. Ct. No. 12NF0653

PETITION FOR REVIEW

From the Published Opinion of the Court of Appeal
Fourth District, Division Three, Case No. G056786

Orange County Superior Court Case No. 12NF0653

ORANGE COUNTY PUBLIC DEFENDER'S OFFICE

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(California Rules of Court, Rules 8.208 and 8.488)

The potential interested entities or persons to the Petition are:

Interested Entity or Person	Nature of Interest
Oscar Manuel Vaquera	Petitioner: prisoner sentenced below
Court of Appeal, Fourth Appellate District, Division Three	Court below: denied petition for writ of *habeas corpus* and issued opinion to be reviewed
Orange County Superior Court, Honorable David A. Hoffer, Judge presiding	Trial court: issued sentence to Petitioner as challenged herein
Orange County District Attorney	Real Party in Interest ("RPI"): prosecuted Petitioner, made charging decisions at issue herein
Xavier Becerra, California Attorney General	RPI: represents the People of the State of California (Constitutional Issues)
California Department of Corrections and Rehabilitation	RPI: has custody of Petitioner pursuant to the sentence at issue herein

Dated: October 3, 2019

Respectfully submitted,
SHARON PETROSINO
Public Defender

Matthew Darling

MATTHEW DARLING
Senior Deputy Public Defender
Writs and Appeals Unit

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re OSCAR MANUEL VAQUERA, On *Habeas Corpus.* **ORANGE COUNTY DISTRICT ATTORNEY,** **CALIFORNIA ATTORNEY GENERAL,** **CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,** **ORANGE COUNTY SUPERIOR COURT,** *Real Parties in Interest.*	**No. _____** **PETITION FOR REVIEW** From the Published Opinion of the Court of Appeal, Fourth District, Division Three Case no. G056786 O.C. Sup. Ct. No. 12NF0653

TO THE HONORABLE CHIEF JUSTICE OF CALIFORNIA AND THE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Petitioner, Oscar Manuel Vaquera, by and through counsel, hereby petitions this Court for review of the August 28, 2019 decision of the Court of Appeal, Fourth Appellate District, Division Three, denying Petitioner's petition for a writ of *habeas corpus* with respect to his sentence only. By submitting these pleadings, Petitioner does not intend to limit his argument to the propositions contained herein and incorporates by reference his previously filed petition for writ of *habeas corpus*, his previously filed petition for review[1], and the arguments contained in each of them.

A true copy of the Court of Appeals' published opinion is attached hereto as Appendix 1.

[1] This matter has been considered by this High Court once before in S252593.

ISSUES PRESENTED FOR REVIEW

The issue presented here is whether Respondent Court erred when it refused to grant the Petition for writ of *habeas corpus* below. The constituent issues therein include:

i. whether the Court of Appeal wrongly disagreed with the published opinion in *People v. Jimenez* (2019) 35 Cal.App.5th 373 (*Jimenez*), and endorsed as mandatory the very sentencing practice prohibited in *Jimenez*, creating a split in authority;

ii. whether the Court of Appeal erred in its attempt to distinguish this Court's ruling in *People v. Mancebo* (2002) 27 Cal.4th 735 (and several Court of Appeal decisions) on the issue of due process; and

iii. whether the Court of Appeal erred in its refusal to address Petitioner's claims below (per this Court's ruling in *People v. Mancebo* (2002) 27 Cal.4th 735) on the issue of waiver and estoppel.

GROUNDS FOR REVIEW (rule 8.500(b))

Review is necessary to secure uniformity of decision and to settle an important question of law. (Cal. Rules of Court, rule 8.500(b)(1).) As described herein, this issue is important not only to Petitioner herein, but also to numerous other defendants who have been sentenced inconsistently with the People's discretionary charging decisions, as well as potential defendants who may be subject to the same issues concerning notice and due process. The issues presented for review implicate significant due process rights, and basic fairness.

Furthermore, review is sought to secure uniformity of decision. (Cal. Rules of Court, rule 8.500(b)(1).) Respondent Court of Appeal's current opinion denying *habeas corpus* relief in this matter openly disavowed and contradicted the opinion of *People v. Jimenez* (2019) 35 Cal.App.5th 373 (*Jimenez*). Moreover, the opinion to be reviewed herein creates additional

splits in authority by relying upon immaterial points in an effort to distinguish this High Court's opinion in *People v. Mancebo* (2002) 27 Cal.4th 735 (*Mancebo*), and derivative opinions of various Courts of Appeal including *People v. Sawyers* (2017) 15 Cal.App.5th 713 (*Sawyers*) and *People v. Wilford* (2017) 12 Cal.App.5th 827 (*Wilford*).

REHEARING STATUS

No petition for rehearing was filed in this matter.

STATEMENT OF THE CASE AND FACTS

Real Party in Interest (RPI) Orange County District Attorney, in Orange County Superior Court case number 12NF0653, charged Petitioner with multiple crimes, including as Count 2 a violation of Penal Code section 288, subdivision (a)[2], with a "one strike" alternative sentencing scheme per section 667.61, subdivisions (b) [15-Life] and (e)(4) [multiple victims].

The prosecution's election of that particular alternate sentencing scheme remained through preliminary hearing, the information, jury trial, conviction, and even through the People's first sentencing brief 45 days after the verdict.[3] In their second sentencing brief filed more than three months after verdict, the People elected **for the first time** to seek a sentence on Count 2 of 25 years to life, invoking section 667.61, subdivision (j)(2)- a subdivision that had never been pled or found true by the jury. On October 3, 2014, the Orange County Superior Court, the Honorable David A. Hoffer, Judge presiding, accepted the People's

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[2] Further section (§) references herein are to the Penal Code unless otherwise indicated.

[3] In that sentencing brief, the People acknowledged that the applicable sentence for Count 2, with the one-strike allegation pled and proved, was 15 years to life.

position and sentenced Petitioner to 25 years to life on Count 2. Petitioner is currently serving that sentence.

Petitioner is currently being held in state prison by RPI California Department of Corrections and Rehabilitation (CDCR) under CDCR number AU8161; his current anticipated parole eligibility date is in October 2031.[4] This is the sentence challenged by Petitioner, who is in custody and "imprisoned or restrained of his… liberty" for the purpose of demonstrating custodial restraint as a basis for bringing a petition for a writ of *habeas corpus*. (Pen. Code §1473, subd. (a).)

More specifically, in case number 12NF0653, Petitioner was accused by Information of five felonies, including two violations of section 288, subdivision (a) [lewd act on child under 14] as Counts 1 and 2, each with an alternative sentencing scheme allegation per section 667.61, subdivisions (b) and (e) [multiple victims]. The dates of violation on the Information were 2007-2008 for Count 1, and in 2011-2012 for Count 2; the victims alleged were listed as John Doe #1 and John Doe #2, respectively. Petitioner was represented by the Orange County Public Defender.

On June 19, 2014, Petitioner was convicted of all charges and the jury found true the alternate sentencing scheme *as alleged* for counts 1 and 2. On August 5, 2014, the same prosecutor who filed the accusation and litigated the trial filed a People's Sentencing Brief and asserted that each of Counts 1 and 2, as charged and convicted, per the alternative sentencing scheme of section 667.61(b)/(e) carried a sentence of 15 years to life.

On September 22, 2014, the same prosecutor filed a second People's Sentencing Brief in this case, revising the People's position as to Petitioner's exposure on Count 2: the People then and for the first time

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[4] See *https://inmatelocator.cdcr.ca.gov/Details.aspx?ID=AU8161*.

asserted that Petitioner faced 25 years to life on Count 2.[5] On September 26, 2014, the defense filed the Defense Sentencing Brief in this case and revealed the Public Defender's continued understanding that each of Counts 1 and 2, including the same alternative sentencing allegations, carried the same sentence of 15 years to life pursuant to section 667.61(b). The People's position carried the day and Respondent Superior Court sentenced Petitioner to 25 years to life on Count 2, concurrent with 15 years to life on Count 1.

Following conviction and sentence, Petitioner filed a notice of appeal and appointed counsel (not the Public Defender's Office) raised only a single issue: improper introduction of Petitioner's statements to police in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 and *Missouri v. Seibert* (2004) 542 U.S. 600. The Court of Appeal for the Fourth Appellate District, Division Three, affirmed his conviction and sentence. (See case number G050801, unpublished opinion filed October 5, 2016.) On December 21, 2016, this Court denied review (under case number S238348); this Court issued the remittitur on December 23, 2016.

On June 12, 2017, the Court of Appeal for the Fourth Appellate District, Division One, issued the opinion in *People v. Wilford* (2017) 12 Cal.App.5th 827 (*Wilford*) clarifying constitutional Due Process constraints on sentencing in light of the prosecution's charging elections.

On August 25, 2017, Respondent Superior Court received a letter from CDCR as to the 25 years to life sentence imposed on Count 2, inquiring whether this was intended to be 15 years to life. The court

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[5] The People asserted that "[a]lthough Count 2 is a conviction for the same charge and enhancement as Count 1, the sentence is different, due to legislation passed in 2010…", still not directly referencing the new alternate sentencing scheme § 667.61(j)(2) that was added in 2010.

notified the prosecution and the Public Defender and invited the parties to consider the CDCR's correspondence.

On September 26, 2017, the Second Appellate District, Division Three issued *People v. Sawyers* (2017) 15 Cal.App.5th 713 (Sawyers) to similar effect as *Wilford*.[6]

On March 2, 2018, Respondent Superior Court declined to change its sentencing decision. The Court discussed that it was merely addressing the CDCR inquiry into whether the abstract of judgment was erroneous, and indicated that however it ruled that day, it would be "without prejudice to this issue being raised again through appropriate procedures that may exist": the Court specifically anticipated a formal petition to address the *Wilford*/*Mancebo*/Due Process issue.

On September 11, 2018, Petitioner filed a Petition for writ of *habeas corpus* in the Court of Appeal for the Fourth Appellate District, Division Three. That Petition alleged *Wilford-Mancebo* error, including violations based in principals of due process, waiver and estoppel with respect to his sentence. On November 8, 2018, the Court of Appeal for the Fourth Appellate District, Division Three, summarily denied Petitioner's Petition for writ of *habeas corpus*.

Petitioner immediately sought review, and on January 22, 2019, this High Court granted the first petition for review, and transferred the matter back to the Court of Appeal with directions to vacate the denial of the writ of *habeas corpus* and to issue an order to show cause why the writ should not be granted. (See S252593.)

On May 16, 2019, the Court of Appeal for the Sixth Appellate District issued *People v. Jimenez* (2019) 35 Cal.App.5th 373, a case both

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[6] Petitioner's counsel for the appeal did not raise the *Wilford* and *Sawyers* issue as neither case was yet published.

factually and legally directly on point to the Petitioner's issue in this matter. Petitioner requested the Fourth District, Division Three to consider the *Jimenez* ruling in its assessment.

Following briefing, the Court of Appeal heard oral arguments on August 22, 2019, and on August 28, 2019, it denied Petitioner's writ of *habeas corpus* in the published opinion attached as Appendix 1. The Court of Appeal relied on *People v. Thomas* (1987) 43 Cal.3d 818 (*Thomas*) as well as *People v. Tennard* (2017) 18 Cal.App.5th 476 (*Tennard*), while ignoring much of this Court's rationale in *Mancebo* and disagreeing with the recent decision of *Jimenez.*

Petitioner has no other speedy or adequate remedy at law.

No other petition for writ relief has been filed by Petitioner regarding this issue. There are no issues for administrative review.

ARGUMENT

I. The Court of Appeal opinion below created a split in authority by wrongly disagreeing with the published opinion in *People v. Jimenez* (2019) 35 Cal.App.5th 373 (*Jimenez*), endorsing as mandatory the very sentencing practice prohibited in *Jimenez*, by failing to enforce this Court's mandates in *People v. Mancebo* (2002) 27 Cal.4th 735 (*Mancebo*), and by disregarding *People v. Wilford* (2017) 12 Cal.App.5th 827 (*Wilford*) on superficial grounds.

The Court of Appeal below openly acknowledged that "***Jimenez* is directly on point, but … respectfully disagree[d] with" its analysis and conclusions**, and repeatedly referred to the disposition prohibited in *Jimenez* (25 years to life sentence) as "required" under the identical circumstances of this case. (*In re Vaquera* (Aug. 28, 2019, G056786) __Cal.App.5th__ at pp. *11-12 (*Vaquera*).) The court below also sought to discredit *Jimenez* for its failure to distinguish itself on superficial grounds from *Mancebo* and *Wilford*. (*Id*., at p. *14.)

The court below further eroded uniformity of law by seeking to disregard the opinions cutting against it in a partial and superficial manner. The court sought to distinguish the binding authority of the *Mancebo* opinion by reference to pleading requirements alone, and completely ignored Petitioner's further reliance upon the waiver and estoppel portions of the *Mancebo* opinion. The court below went on to distinguish the *Wilford* opinion with a conclusory reference[7] that Petitioner should have known he faced "the possibility" of a 25 year to life sentence. (*Id*., at pp. *11-13.)

The *Jimenez* opinion to the contrary relied upon and followed this Court's ruling in *Mancebo*[8], reasonably holding that the People's failure to specifically allege subdivision (j)(2)'s alternative sentencing scheme within section 667.61 denied Jimenez his due process right to notice of the sentence he would face under that subdivision. The *Jimenez* Court abided what the Court of Appeal in the instant case disregarded: that one must "acknowledge at the threshold that, in addition to the statutory requirements that enhancement provisions be pleaded and proven, a defendant has a cognizable due process right to fair notice of the specific sentence enhancement allegations that will be invoked to increase punishment for his crimes." (*Mancebo, supra* at 562-563.)

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[7] The court below noted that section 667.61, subdivision (b) cross references the alternate sentencing schemes in subdivision (j) [and (a), and (l) and (m)], implying notice to unalleged scheme in subdivision (j)(2) [and (j)(1)]. "Were it not for the section 667.61 subdivision (j)(2) exception, which is noted in subdivision (b), Vaquera's situation would be more closely aligned with *Wilford*. But in this case Vaquera was fairly put on notice[.]" (*Vaquera, supra*, at p. *13.)

[8] This Court indicated that "a defendant has a cognizable due process right to fair notice of the specific sentence enhancement allegations that will be invoked to increase punishment for his crimes." (*Mancebo, supra*, 27 Cal.4th at p. 747.)

The court below has published authority outright refuting the opinion of the *Jimenez* Court, undercutting and unreasonably limiting the opinion of the *Wilford* Court, and very seriously disregarding this High Court's mandates in *Mancebo*. Guidance is needed to unify enforcement of these important questions of Constitutional due process and of statutory and common law waiver and estoppel in California.

II. The Court of Appeal erred in its attempt to distinguish this Court's ruling in *People v. Mancebo* (and several Court of Appeal decisions) on the issue of due process.

In Petitioner's case, the Court of Appeal incorrectly ruled that the charges were sufficiently stated to provide the Petitioner with adequate notice and due process per section 952, *People v. Thomas* (1987) 43 Cal.3d 818 (*Thomas*), and *People v. Tennard* (2017) 18 Cal.App.5th 476 (*Tennard*), despite clear guidance to the contrary in this High Court's *Mancebo* ruling and its progeny in the Courts of Appeal.

The lower court's dependence on *Tennard* was in error, as Petitioner's case is distinguishable from *Tennard*. Mr. Tennard was convicted of a felony domestic violence charge, with the alternate sentencing scheme of section 667, subdivision (e)(2)(A) specifically pled and proved. He was then sentenced under that specific same alternate sentencing scheme: section 667, subdivision (e)(2)(A). The asserted and rejected issue in *Tennard* was not the failure to allege the scheme ultimately sentenced upon, but rather the failure to acknowledge the possible exception to that scheme, and to specifically plead the exception to that exception.[9]

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[9] Said subdivision (e)(2)(A) provides for sentencing per the greatest of certain options [third strike sentencing], *except as provided in subdivision (e)(2)(C)* [which provides for 1-strike-type double-base-term sentencing]. *Subdivision (e)(2)(C)* then contains an *exclusion* [i.e., back to third strike

The lower court's dependence on *Thomas* was also error. The *Vaquera* opinion relied heavily upon *Thomas* for the broad assertion that pleading the specific statute is not required as long as facts pled give the defendant notice; however, this Court actually rejected the People's nearly identical claim in *Mancebo*, announcing "this was not our holding in *Thomas.*" (*In re Vaquera, supra, at* pp. *6-7, 8; *Mancebo, supra* at p. 747.) As explained in *Mancebo*, *Thomas* involved a very different issue: whether a manslaughter allegation included a lesser included or lesser related involuntary manslaughter charge, or permitted consideration of voluntary manslaughter only.

Additionally, the *Vaquera* opinion like *Tennard* and *Thomas* failed to address or even consider this Court's concern in *Mancebo* regarding the People's "discretionary charging decision" and resulting issues of waiver and estoppel. (**See Section III, *infra***.)

A. The "One Strike" alternative sentencing scheme of section 667.61 is neither an enhancement nor an offense.

Section 952 refers to requirements when charging of a public offense to provide notice to an accused. However, section 667.61 is not an offense, nor is it an enhancement. "[T]he One Strike law 'does not fall within [this] definition of an enhancement, because it is not an 'additional term of imprisonment' and it is not added to a 'base term.' … Rather, it 'sets forth an *alternate* penalty for the underlying felony itself, when the jury has determined that the defendant has satisfied the [statute's] conditions....' " (*People v. Acosta* (2002) 29 Cal.4th 105, at 118.)

The One Strike allegation is an alternative sentencing scheme, with

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sentencing] for certain defendants, including those with defined "sexually violent offenses" like Mr. Tennard's forcible rape conviction that was specifically pled and proved as a forcible rape. (§ 667, subd. (e)(2)(C)(iv)(I).)

its own additional specific pleading and proof requirements greater than those applicable to a public offense per section 952. "The People must allege the *specific* One Strike law circumstances it wishes to invoke as to each count it seeks to subject to the One Strike law's heightened penalties." (*People v. Perez* (2015) 240 Cal.App.4th 1218, 1227 (*Perez*) [emphasis added].) The *Perez* court further stated that "under *Mancebo*, what matters is notice by pleading, not actual notice. The defendant in *Mancebo* certainly knew from the counts alleging different victims that a multiple-victim enhancement could be at issue, but the Supreme Court in *Mancebo* found that this knowledge did not satisfy the requirements of section 667.61 or due process." (*Id.*) "Unlike sentencing enhancements, a defendant can only plead guilty to a One Strike law crime if the circumstances necessary to trigger that crime are pled—**that is how the defendant knows the maximum sentence he or she faces and what he or she must admit during the plea**." (*Id.*, emphasis added.) Much like the obvious facts not alleged within the alternate sentencing scheme above, Vaquera's *alternate sentencing scheme allegation* made no mention of the element of the subdivision (j)(2) scheme that a victim was under 14.

B. *People v. Jimenez, People v. Wilford, People v. Sawyers, People v. Nguyen* and *People v. Perez,* with support from earlier *People v. Mancebo,* make clear that sentencing on a sentencing scheme not actually alleged in the information violates notice rights and constitutional Due Process rights.

In this case, the alternate sentencing scheme alleged was pursuant to subdivision (b), by reference to subdivision (e)(4), a complete allegation seeking 15 years to life. Besides specifying that particular subdivision, the allegation itself failed to reference any additional consideration that would bring the allegation into any other alternate sentencing scheme, such as the essential circumstance of a victim under 14 with respect to subdivision (j)(2).

In *People v. Wilford* (2017) 12 Cal.App.5th 827 (*Wilford*), the court concluded that sentencing under a specific subdivision not previously alleged in the Information – even with the facts implicitly pled - violated the defendant's due process rights. (*Id*. at p. 840.) Simply said, that a "defendant has a constitutional due process right to be advised of the charges against him" and "to fair notice of the specific sentence enhancement allegations that will be relied upon to increase punishment for his crimes." (*Id.* at p. 837.) They were right.

In *People v. Sawyers* (2017) 15 Cal.App.5th 713, reliant upon both *Mancebo* and *Wilford*, the court found that "sentencing under the Three Strikes Law was unauthorized because the information failed to allege his [section 667.5, subdivision (b)] prior offense was a strike." (*Sawyers, supra,* at p. 715.) This situation failed to satisfy requirements for due process notice and for statutory pleading and proof.

In *People v. Nguyen* (2017) 18 Cal.App.5th 260, the court barred sentencing as a prior serious felony (Pen. Code § 667, subd. (a)) where the People pled the fact only as a prison prior and strike prior (Pen. Code §§ 667.5, subd. (b) and 667 subd. (d)/(e)).

In *People v. Perez* (2017) 18 Cal.App.5th 598, the People failed to allege premeditation and deliberation in four attempted murder charges. The Court held "the sentence was unauthorized in light of the prosecution's failure to satisfy the express statutory requirement coupled with the failure to advise defendant of the *potential enhanced penalty*." (*Id.* at p. 614, *emphasis* added.)

While various alternate sentencing schemes may exist and may be applicable to the circumstances of a crime or a defendant, the People are not required to invoke a specific one of them, or any of them. (*See People v. Lucas* (1995) 12 Cal.4th 415, 477 ["Prosecutors have broad discretion to decide whom to charge, and for what crime"].) Clearly, the prosecutor here

was entitled to file only the base charges with no alternate sentencing scheme allegation: he should have been able to charge something between the minimum and the maximum allegations *just like he did*, and just like the prosecutor in *Wilford*. The defense is entitled to rely upon the People's exercise of prosecutorial discretion, including elections to forego the harshest punishment possible in a charge. (*People v. Wilford*, *supra*, 12 Cal.App.5th at p. 837 ["[A] defendant has a right to fair notice of the specific sentence enhancement allegations that will be relied upon to increase punishment for his crimes."].)

Charging decisions do matter. Words are important. An election of one possible sentencing scheme should foreclose switching to a harsher sentencing scheme after conviction.[10]

III. The Court of Appeal erred in its refusal to address Petitioner's claims below (per this Court's ruling in *People v. Mancebo*) on the core issue of waiver and estoppel.

Resentencing is required because the prosecution made a discretionary charging decision that triggered the doctrines of waiver and estoppel. Where the prosecution's failure to allege a sentencing allegation in the information, a "discretionary charging decision," doctrines of waiver and estoppel apply. (*Mancebo*, *supra*, 27 Cal.4th at p. 749.) Under the doctrines of waiver and estoppel, where the People fail to plead an allegation in the information, they may fairly be deemed to waive application of that allegation. (*Ibid.*) Even the failure to seek amendment to allege to a greater scheme should itself be deemed another discretionary decision reinforcing estoppel:

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[10] Evidence Code section 623 states, "Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it."

> There is nothing in the record to indicate that the prosecutor ever asked the trial court to amend the information, and the People do not argue on appeal that such a request was ever made. Amendment is certainly permitted. *However, it is up to the prosecution, as part of its power over charging decisions, to so request. Its decision not to do so, as noted above, is "deemed to be a discretionary charging decision."*

(*People v. Perez*, *supra*, 240 Cal.App.4th at p. 1227 [emphasis added, internal citations omitted].)

If the prosecution had wanted to have appellant sentenced under section 667.61, subdivision (j)(2), the government's accusatory pleadings from complaint through the information and verdict should have alleged that specific provision rather than misleading the Petitioner until sentencing. Under *Mancebo* and its progeny, the charging documents failure to do so renders the sentence imposed per subdivision (j)(2) unauthorized.

IV. The *Vaquera* opinion below, if allowed to stand, creates a procedural morass that invites gamesmanship, erosion of standards of transparent pleading in criminal practice, and serves no legitimate purpose.

Under the legal interpretation put forth by the Court of Appeal below, pleading the *subdivision (b) allegation* in the information "should have indicated to Vaquera that he faced the possibility" of any sentencing scheme cross-referenced *in the statute subdivision (b)*, including subdivision (j). (*Vaquera*, *supra*, at pp. 13-14.) Note that the pleading itself failed to cross reference any other scheme. Therefore, he was on notice that after trial he could face sentencing per subdivision (j)(2); logically, he could also face sentencing per subdivision (j)(1), or (a), or (l) or (m), each of which appears in the same statutory cross-referencing phrase.[11]

[11] Taken to an extreme, perhaps Petitioner would be deemed on notice of the *possibility* that he may be punished under some other unspecified

Presumably, being on notice of this broad range of sentencing schemes, Petitioner would need to run a motion per section 995 to protect himself from each of these possibilities or face the risk that some unanticipated evidence comes in at trial to prove a scheme he had no *actual* idea was on the table. That said, it is not entirely clear that a section 995 motion is available to strike unsupported sentencing alternatives not actually appearing *in the charging document*.[12]

No valid purpose would be served by a court endorsing charging decisions and sentencing rulings as occurred here. Petitioner's read of the scheme alleged against him aligned with the understanding of his attorney, and with that of this *sexual assault unit prosecutor* (the very attorney who filed the complaint and information, and conducted the trial and sentencing hearing) until well after the verdict. This is worse because a clear invocation of the scheme in section 667.61, subdivision (j)(1) would never involve any mention of subdivision (b).[13]

Prejudice is unnecessary but apparent. "[W]hen a defendant's due process right to notice has been completely violated," articulating a standard of review and engaging in harmless error analysis are not required.

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section of an unspecified code simply because section 667.61, in subdivision (f), cross references all of California law: "unless another provision of law provides for a greater penalty or the punishment under another provision of law can be imposed in addition to the punishment provided by this section", therein cross referencing subdivisions (a), (b), (j), (l), and (m).

[12] Under some circumstances of failure of proof at preliminary hearing, the People would actually be incentivized to insulate the unproven scheme from section 995 challenge by only indirectly alleging it via subdivision (b).

[13] Were the People to allege every subdivision actually implicated by the sentence actually imposed here, the information would plead "section 667.61, subdivisions (c)(8), (e)(4) and (j)(2)". In context, reference to subdivision (b) would be entirely misleading.

(*People v. Hernandez* (1988) 46 Cal.3d 194, 208-209.) Assuming for purposes of argument that Petitioner was not actually on notice of the "possibility" that his sentencing would be entirely divorced from the subdivision (b) scheme actually alleged, he would make strategic decisions ranging from discovery requests to plea bargaining negotiations and even the decision to commence trial when he did based upon the fact that the People had charged an alternative sentencing scheme that was less than the maximum available under the law. Following reliance upon moderate current charges, the court allowed the People to undo their decision after jeopardy attached, and even verdict and discharge of the jury.

Charging decisions should be clear.

The opinion below is treacherous.

CONCLUSION

The decision below openly refutes by name and logic another published Court of Appeal opinion (*Jimenez*), and undermines this court's opinion in *Mancebo* and several other published Court of Appeal decisions. The charging decision and sentencing practice at issue here violated Petitioner's right to Due Process and notice of the punishment sought against him. Moreover, the ultimate sentencing decision violated principals of waiver and estoppel that had been triggered by the People's discretionary charging decision, an issue argued in the Court of Appeal, but conspicuously absent from the opinion below. As concerns policy, if allowed to stand, the opinion below may engender gamesmanship and opaque charging decisions, and injustice without any clear remedy or means for defendants to protect themselves. There is no good reason to allow the rule of law endorsed below to stand.

As such, and for the foregoing reasons, Petitioner humbly requests that this Honorable Court again grant his Petition for Review and remedy this illegal sentence.

Dated: October 3, 2019

Respectfully Submitted,
SHARON PETROSINO
Public Defender

Matthew Darling
MATTHEW DARLING
Senior Deputy Public Defender

CERTIFICATE OF COMPLIANCE

(Rule 8.504(d)(1))

The undersigned hereby certifies that this brief has been prepared using 13 point Times New Roman typeface. In its entirety, Petitioner's Brief consists of 5,410 words as counted by Microsoft Word word processing program, up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on October 3, 2019.

Matthew Darling
MATTHEW DARLING
Senior Deputy Public Defender

DECLARATION OF SERVICE

In re OSCAR MANUEL VAQUERA, on Habeas Corpus.

STATE OF CALIFORNIA)
) ss
COUNTY OF ORANGE)

I, Cristal Sanchez, declare that I am a citizen of the United States, over the age of 18 years, not a party to the above-entitled action, and have a business address at 801 Civic Center Drive West, Suite 400, Santa Ana, California 92701. That on October 4, 2019, I personally served copies of the Petition for Review (with Appendix 1) in the above-entitled action by depositing a copy thereof in a sealed envelope, postage thereon fully prepaid, in the United States Mail at Santa Ana, California. Said envelopes were addressed as follows:

Court of Appeal, 4th Appellate District, Division 3, Attn: Hon. Eileen C. Moore, Hon. Raymond J. Ikola and Hon. David A. Thompson, 601 W. Santa Ana Blvd., Santa Ana, California 92701 [714-571-2600]

Orange County Superior Court, Attn: Hon. David A. Hoffer, c/o Court Clerk, 700 Civic Center Drive W., Santa Ana, CA 92701 [657-622-5242]

Orange County District Attorney, 401 Civic Center Drive W., Santa Ana, CA 92701 [714-834-3952]

Office of the Attorney General, 110 West A Street, Suite 1100, San Diego, CA 92101 [619-645-2001]

California Department of Corrections and Rehabilitation, Office of Legal Affairs, P.O. Box 942883, Sacramento CA, 94283-0001 [(916) 445-0495]

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

Executed on October 4, 2019, at Santa Ana, California.

Cristal Sanchez
Cristal Sanchez
Title: Secretary, Writs and Appeals

APPENDIX 1

Court of Appeal Opinion
G056786

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re OSCAR MANUEL VAQUERA on Habeas Corpus.	G056786 (Super. Ct. No. 12NF0653) O P I N I O N

Original proceedings; petition for a writ of habeas corpus to challenge an order of the Superior Court of Orange County, David A. Hoffer, Judge. Petition denied.

Sharon Petrosino, Public Defender, Miles David Jessup and Matthew Darling, Deputy Public Defenders for Petitioner.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting, Paige B. Hazard and James M. Toohey, Deputy Attorneys General for Respondent.

* * *

Penal Code section 667.61 (the "One Strike" law) provides that if a defendant is convicted of a designated sex offense, and there is a finding of one or more aggravating circumstances, then the court shall impose a sentence of either 15 or 25 years

to life.[1] If a designated sex offense is committed against multiple victims, the default sentence is 15 years to life. (§ 667.61, subd. (b).) But if multiple victims are under 14 years of age, the sentence must then be 25 years to life. (§ 667.61, subd. (j)(2).)

Here, the People filed an information alleging petitioner Oscar Manuel Vaquera committed a lewd or lascivious act against John Doe number one and John Doe number two, who were both children under 14 years of age. (§ 288, subd. (a).) These are designated offenses under the One Strike law. (§ 667.61, subd. (c)(8).) As to each count, the People alleged that Vaquera committed the crime "against more than one victim." The jury convicted Vaquera of both counts and found true the multiple victim allegations. The court imposed a concurrent sentence of 25 years to life.

There are pleading and proof requirements under the One Strike law. (§ 667.61, subd. (f).) Here, the information complied with the statute. But at issue in this habeas corpus proceeding is a due process question: whether the information gave Vaquera fair notice of the possibility of a 25-year-to-life sentence. The multiple victim allegations in the information referred to section 667.61, subdivision (b), which designates the 15-year-to-life default sentence, rather than subdivision (j)(2), which designates the 25-year-to-life exception when the victims are under 14 years of age.

We find no due process violation. The facts alleged in the information, as well as the 25-year-to-life exception under section 667.61, subdivision (j)—which is specifically mentioned within section 667.61, subdivision (b)—gave Vaquera fair notice that he was subject to a sentence of 25 years to life.

Thus, we deny Vaquera's petition for a writ of habeas corpus.

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[1] Further undesignated statutory references are to the Penal Code.

I

FACTS AND PROCEDURAL BACKGROUND

In March 2012, during a child pornography investigation, police executed a search warrant at an Anaheim apartment. A family with two teenage boys lived in the apartment. Vaquera lived there as a friend of the family. The police discovered that Vaquera had repeatedly videotaped the boys while they were in the bathroom. The police interviewed Vaquera; he made several incriminating admissions.

The Information

In October 2012, the People filed an information. Count one alleged that Vaquera committed a lewd and lascivious act upon John Doe number one, "a child under the age of fourteen (14) years," sometime between October 18, 2007, and October 17, 2008. (§ 288, subd. (a).) Count two alleged that Vaquera committed a lewd and lascivious act upon John Doe number two, "a child under the age of fourteen (14) years," sometime between May 1, 2011, and March 1, 2012. (§ 288, subd. (a).) Counts three, four, and five alleged child pornography charges. (§ 311.4, subd. (d).)

The information stated: "As to Count(s) 1, it is further alleged pursuant to Penal Code sections 667.61(b)/(e)(5), that in the commission of the above offense, [Vaquera] committed an offense specified in Penal Code section 667.61(c) against more than one victim." The information stated: "As to Count(s) 2, it is further alleged pursuant to Penal Code sections 667.61(b)/(e)(4), that in the commission of the above offense, [Vaquera] committed an offense specified in Penal Code section 667.61(c) against more than one victim."[2] The information further alleged that Vaquera engaged in substantial sexual contact with a child. (§ 1203.66, subd. (a)(8).)

[2] In 2011, the multiple victim allegation changed from section 667.61, subdivision (e)(5), to subdivision (e)(4). (Stats. 2011, ch. 361, § 5.)

Trial Court Proceedings

In June 2014, a jury found defendant guilty of the five charged crimes and found true the three sentencing allegations.

In August 2014, the People filed a sentencing brief recommending that Vaquera receive a sentence of 30 years to life. The People argued that the two multiple victim allegations each provided for a mandatory sentence of 15 years to life. The People urged the court to run the terms on counts one and two consecutively.

In September 2014, the People filed a second sentencing brief this time recommending that Vaquera receive a sentence of 40 years to life. The People argued that the multiple victim allegation as to count one provided for a mandatory sentence of 15 years to life. The People now argued that the multiple victim allegation as to count two provided for a mandatory sentence of 25 years to life. The People urged the court to run the terms on counts one and two consecutively.

On September 26, 2014, the trial court sentenced Vaquera to a total prison term of 25 years to life. The court imposed a 25-year-to-life sentence as to count two. The court imposed a 15-year-to-life sentence as to count one, to run concurrent to count two. The court stayed (§ 654), or ran concurrent, the prison terms for the three child pornography counts, as well as the substantial sexual conduct allegation.

Subsequent Proceedings

On October 5, 2016, this court filed an opinion affirming the judgment. (*People v. Vaquera* (Oct. 5, 2016, G050801) [nonpub. opn.].)

On August 25, 2017, the California Department of Corrections and Rehabilitation (CDCR) sent a letter to the trial court indicating that the abstract of judgment may be in error or incomplete: "Penal Code Section **667.61(a) and (b)** are for **Sex Offenders** and section (**a**) shall be punished by imprisonment in the state prison for 25 years to Life and section (**b**) shall be punished by imprisonment in the state prison for

15 years to Life. As the terms in Counts 1 and 2 coincide with being sentenced pursuant to PC 667.61(b) we have recorded Counts 1 and 2 as such. If this is not in accordance with the Court's intent, please advise this office."

On March 2, 2018, the trial court conducted a hearing regarding the CDCR letter. After hearing arguments, the court issued a ruling that "declines to change the sentencing minute order or the abstract of judgment in the case." The court ruled: "The minute order correctly states the sentence to be 25 years to life. The Information alleged that count one occurred on or about and between October 18, 2007 and October 17, 2008. At that time the sentence prescribed by law for the crime and allegation was 15 years to life. The Information alleges that count two occurred on or about and between May 1, 2011 and March 1, 2012. By this time the law had changed. Pursuant to Penal Code section 667.61(j)(2) (added in 2010), the sentence prescribed by law for the crime and allegation was 25 years to life. The Court correctly sentenced defendant to [the] sentences prescribed by law - 15 years to life on count 1 and 25 years to life on count 2. Because the Court sentenced defendant concurrently on those counts, the total sentence on counts 1 and 2 was 25 years to life."

On September 11, 2018, Vaquera filed a petition for a writ of habeas corpus in this court, arguing that his 25-year-to-life sentence violates due process. Vaquera's prayer for relief requested that the sentence be vacated and that he be resentenced to a 15-year-to-life prison term. (§ 667.61, subd. (b).) We summarily denied the habeas corpus petition.

On November 16, 2018, Vaquera filed a petition for review. The California Supreme Court granted the petition and later transferred the matter back to this court with directions to vacate our "order denying the petition for writ of habeas corpus, and to issue an order directing respondent to show cause in that court why petitioner is not entitled to the relief requested." (See Cal. Rules of Court, rule 8.385(d) ["order to show cause does not grant the relief sought"].)

II

DISCUSSION

Vaquera argues that his due process rights were violated because the trial court imposed a 25-year-to-life sentence under section 667.61, subdivision (j)(2), which was not specifically alleged in the information. The Attorney General argues that Vaquera's claim is barred on waiver and timeliness grounds. Alternatively, the Attorney General argues that the information gave Vaquera fair notice of a possible 25-year-to-life sentence because the information referred to section 667.61, subdivision (b), which includes an exception for a 25-year-to-life sentence under subdivision (j)(2).

We reject the Attorney General's waiver and timeliness objections because Vaquera is claiming that the court imposed an unauthorized sentence; Vaquera can essentially raise that claim at any time, so long as he remains in custody. (See *People v. Scott* (1994) 9 Cal.4th 331, 354; *In re Harris* (1993) 5 Cal.4th 813, 838-841.) However, we agree with the Attorney General on the merits. The information gave Vaquera fair notice of a possible 25-year-to-life sentence under section 667.61, the One Strike law.

A. The information complied with due process principles.

It is a fundamental rule of due process that a defendant must be given fair notice of any alleged crimes in order to mount a possible defense. (U.S. Const., 6th Amend. ["the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation"]; U.S. Const., 14th Amend.; Cal. Const., art. I, § 15.) A defendant's right to fair notice applies equally to "allegations that will be invoked to increase the punishment for his or her crimes." (*People v. Houston* (2012) 54 Cal.4th 1186, 1227.)

California law provides that: "In charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified." (§ 952.) The accusatory pleading does not have to state the number of the statute, it may be "in any words sufficient to give

the accused notice of the offense of which he is accused." (§ 952; *People v. Thomas* (1983) 43 Cal.3d 818, 826 ["a valid accusatory pleading need not specify by number the statute under which the accused is being charged"].) Similarly, the number of an enhancement statute does not have to be alleged, so long as the accusatory pleading apprises the defendant of the potential for the enhanced penalty and alleges every fact and circumstance necessary to establish its applicability. (*Ibid*.)

Indeed, even if the People allege the wrong numbered statute, the pleading is still valid if it alleges facts sufficient to give the defendant fair notice of the alleged crime and/or sentence enhancement and the defendant was not prejudicially misled. (*People v. Neal* (1984) 159 Cal.App.3d 69, 73 (*Neal*).) In *Neal*, the information alleged defendant used a deadly weapon during the commission of a rape and an oral copulation, within the meaning of section 12022, subdivision (b), which allowed an additional one-year term of imprisonment. The jury found weapon enhancements true. However, the trial court increased defendant's imprisonment to three years per crime, relying on section 12022.3, which provides an enhancement for using a dangerous weapon during the commission or attempted commission of certain sex crimes. (*Neal*, at p. 72.)

On appeal, defendant argued the three-year enhancements should be modified to one year because the information relied on section 12022, subdivision (b), rather than section 12022.3. (*Neal*, *supra*, 159 Cal.App.3d at p. 72.) The Court of Appeal disagreed, holding that "where the information puts the defendant on notice that a sentence enhancement will be sought, and further notifies him of the facts supporting the alleged enhancement, modification of the judgment for a misstatement of the underlying enhancement statute is required only where the defendant has been misled to his prejudice." (*Id*. at p. 73.) Because defendant made no prejudice argument—such as the preparation of his defense would have been different had the prosecution alleged the imposed weapons enhancement—the court did not reduce the sentence. (*Id*. at p. 74.)

The California Supreme Court later held that the *Neal* court "engaged in the proper analysis." (*People v. Thomas* (1987) 43 Cal.3d 818, 830 (*Thomas*).) In *Thomas*, the Supreme Court also disapproved of the analysis of the Court of Appeal in *People v. Bergman* (1984) 154 Cal.App.3d 30 (*Bergman*). The *Bergman* court came to a contrary conclusion under essentially the same facts as in *Neal*, *supra*, 159 Cal.App.3d 69.

"The flaw in *Bergman's* analysis is the court's failure to recognize the language of the pleading itself—irrespective of the statutory specification—should have alerted the defendant he faced the increased enhancement term. Thus, it is not true the defendant in *Bergman* was given 'no notice' since the wording of the information shows he must have been cognizant he was called on to refute an allegation he used a firearm during the commission of the charged felonies. Since we have seen *it is the language of the accusatory pleading which is controlling and not the specification of the statute by number* [citation], the proper inquiry in *Bergman* should have been whether the defendant was misled to his prejudice by the notation in the information that he was charged with an enhancement under section 12022.5 rather than 12022.3. Since, as in *Neal*, *supra*, 159 Cal.App.3d 69, it did not appear the defendant in *Bergman* would have prepared his defense any differently . . . , he suffered no prejudice and reversal on this ground was unwarranted." (*Thomas*, *supra*, 43 Cal.3d at p. 831, italics added.)

Here, the same rationale as in *Thomas* applies. The information notified Vaquera that he would be subject to a One Strike life sentence under section 667.61, by virtue of the two qualifying crimes alleged under subdivision (c),[3] and the two multiple victim aggravating circumstances alleged under subdivision (e).[4] That is, the information

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[3] "This section shall apply to any of the following offenses: [¶] . . . [¶] (8) Lewd or lascivious act, in violation of subdivision (a) of Section 288." (§ 667.61, subd. (c)(8).)

[4] "The following circumstances shall apply to the offenses specified in subdivision (c): [¶] . . . [¶] (4) The defendant has been convicted in the present case or cases of committing an offense . . . against more than one victim." (§ 667.61, subd. (e)(4).)

properly alleged that Vaquera committed lewd and lascivious acts against John Doe one and John Doe two, who were both alleged to be under 14 years of age, and a section 667.61 multiple victim allegation as to each crime.

It is true that the information referenced section 667.61 subdivision (b), which requires a default 15-year minimum parole eligibility period.[5] But the information also put Vaquera on notice that he would be subject to a 25 year minimum parole eligibility period by virtue of the facts alleged in the information: two lewd and lascivious acts against John Doe one and John Doe two, who were both children under 14 years of age.[6] As stated by the California Supreme Court, "the language of the pleading itself—irrespective of the statutory specification—should have alerted the defendant he faced the increased enhancement term." (*Thomas*, *supra*, 43 Cal.3d at p. 831.)

Our conclusion that the People provided adequate notice of the possibility of a 25-year-to-life sentence is further supported by *People v. Tennard* (2017) 18 Cal.App.5th 476 (*Tennard*). In *Tennard*, the prosecution filed an information charging defendant with a nonstrike offense (inflicting corporal injury to a spouse/cohabitant). The information charged two prior strike allegations, including a forcible rape. (*Id*. at p. 482.) Under the "Three Strikes" law Reform Act of 2012, a forcible rape is a "super strike," which makes a defendant ineligible for sentencing as a second strike offender. (*Id*. at pp. 483-484.) The jury found defendant guilty. The court found the two strike

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[5] "Except as provided in subdivision (a), (j), (l), or (m), any person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for 15 years to life." (§ 667.61, subd. (b).)

[6] "[A] person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony . . . ." (§ 288, subd. (a).)

allegations true and imposed a 25-year-to-life sentence. (*Id*. at p. 482.) On appeal, defendant claimed "the court had no authority to impose the 25-year-to-life term." Defendant argued that "the prosecution erroneously failed to specifically 'plead and prove' that his prior forcible rape conviction was a super strike which disqualified him or rendered him ineligible to be sentenced as a second strike offender . . . ." (*Id*. at p. 481.)

The Court of Appeal rejected defendant's claim: "The allegation of the forcible rape conviction, which was identified by its code section number . . . and as 'RAPE BY FORCE,' sufficiently notified defendant that the prosecution would seek to disqualify him from second strike sentencing eligibility . . . based on the forcible rape conviction. Although Penal Code section 667, subdivision (e)(2)(C) was not referenced in the information, it was not required to be. It was effectively noted by the reference to Penal Code section 667, subdivision '(e)(2)(A),' which specifically references, in its introductory clause, section 667, subdivision (e)(2)(C) as an exception to its provisions." (*Tennard*, *supra*, 18 Cal.App.5th at pp. 487-488.)

Here, similar to the rationale in *Tennard*, *supra*, 18 Cal.App.5th 476, although the 25-year-to-life exception for victims under 14 years of age, was not referenced in the information charging Vaquera, it was not required to be. (§ 667.61, subd. (j)(2).)[7] The 25-year-to-life exception was effectively noted in the information by reference to section 667.61, subdivision (b), which specifically references, in its introductory clause, section 667.61, subdivision (j), as an exception to its provisions.

Further, Vaquera has not shown that he suffered any prejudice. That is, Vaquera has not shown that he would have prepared or defended his case any differently had the People alleged the One Strike sentencing enhancement under section 667.61,

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[7] "Any person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e), upon a victim who is a child under 14 years of age, shall be punished by imprisonment in the state prison for 25 years to life." (§ 667.61, subd. (j)(2).)

subdivision (j)(2), rather than under section 667.61, subdivision (b). Thus, Vaquera's 25-year-to-life sentence does not violate his constitutional right to due process of law.

B. Vaquera's legal citations and arguments are not persuasive.

Vaquera argues that two published opinions compel a different result: *People v. Mancebo* (2002) 27 Cal.4th 735 (*Mancebo*), and *People v. Wilford* (2017) 12 Cal.App.5th 827 (*Wilford*). We find *Mancebo* and *Wilford* to be distinguishable. Vaquera also argues that another recent published opinion should be followed. (*People v. Jimenez* (2019) 35 Cal.App.5th 373 (*Jimenez*).) *Jimenez* is directly on point, but we respectfully disagree with the appellate court's legal analysis in that opinion.

In *Mancebo*, *supra*, 27 Cal.4th 735, defendant kidnapped a victim at gunpoint and committed multiple sex crimes. Defendant later committed sex crimes against a second victim, again using a firearm. (*Id*. at p. 740.) The People filed an information charging defendant with 10 sex crimes. The information further alleged three aggrevating circumstances: kidnapping, gun use, and "tying or binding" the victim. However, "the information never alleged the multiple victim circumstance . . . nor was its numerical subdivision . . . ever referenced in the pleadings." (*Ibid*.) Nevertheless, the trial court substituted the multiple victim circumstance for the two gun use allegations and imposed two consecutive 25-year-to-life sentences. (*Ibid*.) The court held defendant's sentence violated the statute's own pleading requirements. (*Id.* at p. 743.) The court reasoned: "The provisions of the One Strike law, taken as a whole, require that subdivision (e) qualifying circumstances be 'pled and proved' [citation], and as elsewhere provided, 'be alleged in the accusatory pleading and either admitted by the defendant in open court or found true by the trier of fact.'" (*Id*. at p. 751.)

In this case, unlike *Mancebo*, the information properly alleged the two multiple victim aggravating circumstances under their numerical subdivision, section 667.61, subdivision (e). The information stated: "As to Count(s) 1, it is further alleged

pursuant to Penal Code sections 667.61(b)/(e)(5), that in the commission of the above offense, [Vaquera] committed an offense specified in Penal Code section 667.61(c) against more than one victim." The information also stated: "As to Count(s) 2, it is further alleged pursuant to Penal Code sections 667.61(b)/(e)(4), that in the commission of the above offense, [Vaquera] committed an offense specified in Penal Code section 667.61(c) against more than one victim." Therefore, the information complied with the pleading requirements listed under section 667.61, as interpreted by the California Supreme Court in *Mancebo*, *supra*, 27 Cal.4th 735. And further, because the jury found Vaquera guilty of count two, and the jury found the corresponding multiple victim aggravating circumstance as pleaded in the information to be true, the trial court properly imposed the required 25-year-to-life sentence.

In *Wilford*, *supra*, 12 Cal.App.5th at pages 829, 835-836, the defendant was charged with and convicted of two counts of corporal injury to a cohabitant, which ordinarily carries a sentence of two, three, or four years. However, section 273.5 also provides that if the defendant had a prior conviction for the same offense within the previous seven years, the sentencing triad becomes two, four, or five years under subdivision (f)(1), and if the court grants probation, it has to impose a minimum 15-day jail sentence under subdivision (h)(1). (*Id.* at pp. 835-836, fns. 6 & 7.) The information included an allegation of the prior conviction with reference to section 273.5, subdivision (h)(1), but made no mention of subdivision (f)(1). (*Id.* at p. 838.) The court concluded that Wilford could not be sentenced under the triad provided in section 273.5, subdivision (f)(1) because: "The amended information specified that, for counts 5 and 6, Wilford faced a sentence of two, three, or four years with the possibility of an additional 15 days under section 273.5, subdivision (h)(1) for each count. There was *no indication whatsoever* that Wilford faced the possibility of a sentence of two, four, or five years for each of those same offenses under section 273.5, subdivision (f)(1)." (*Id.* at p. 840, italics added.)

In this case, unlike *Wilford*, the pleading should have indicated to Vaquera that he faced the possibility of a 25-year-to-life sentence. Again, the information stated: "As to Count(s) 2, it is further alleged pursuant to Penal Code sections *667.61(b)*/(e)(4), that in the commission of the above offense, [Vaquera] committed an offense specified in Penal Code section 667.61(c) against more than one victim." (Italics added.) And section 667.61, subdivision (b), states in pertinent part: "*Except as provided in subdivision . . . (j) . . .* any person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for 15 years to life." Were it not for the section 667.61 subdivision (j)(2) exception, which is noted in subdivision (b), Vaquera's situation would be more closely aligned with *Wilford*. But in this case Vaquera was fairly put on notice that: "Any person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e), *upon a victim who is a child under 14 years of age*, shall be punished by imprisonment in the state prison *for 25 years to life*." (§ 667.61, subd. (j)(2), italics added.)

In *Jimenez*, *supra*, 35 Cal.App.5th 373, the People charged defendant with 19 sex crimes against three children. As to 13 counts, the information alleged that defendant committed the crimes against more than one victim under section 667.61, subdivisions (b) and (e). The trial court imposed consecutive 25-year-to-life sentences under section 667.61, subdivision (j)(2). (*Jimenez*, at pp. 377, 394.) Relying on *Mancebo*, *supra*, 27 Cal.4th 735, the Court of Appeal concluded: "Here, the information only informed Jimenez he could be sentenced to terms of 15 years to life under Penal Code section 667.61, subdivisions (b) and (e), for committing the alleged offenses against multiple victims. The information did not put him on notice that he could be sentenced to terms of 25 years to life under section 667.61(j)(2) for committing those offenses upon multiple victims, *at least one of whom was under 14 years of age*. Under these

circumstances, imposition of sentence under section 667.61(j)(2) violated Jimenez's constitutional right to due process." (*Jimenez,* at p. 397, fn. omitted.)

We respectfully disagree with the legal analysis in *Jimenez*, *supra*, 35 Cal.App.5th 373. The *Jimenez* court never considered the fact that the 25-year-to-life exception under section 667.61, subdivision (j)(2), is specifically provided for within section 667.61, subdivision (b). Further, the *Jimenez* court did not distinguish its facts (an information with multiple victim sentencing allegations) from that in *Mancebo*, *supra*, 27 Cal.4th 735 (an information with no multiple victim sentencing allegations). Nor did the *Jimenez* court contrast its case with *Wilford*, *supra*, 12 Cal.App.5th 827.

C. The court imposed a mandatory 25-year-to-life sentence.

Finally, Vaquera's argument is essentially based on the notion that the People could have elected to pursue a prison term of 15 years to life under section 667.61, subdivision (b), rather than a prison term of 25 years to life under section 667.61, subdivision (j)(2). Vaquera states: "There is no reason to believe the People *could not* select prosecution and sentencing under section 667.61, subdivision (b), as that subdivision is still current law and clearly fits the facts of this case."

Vaquera is fundamentally mistaken. Section 667.61, subdivision (b), *requires* a sentence of 15 years to life "*[e]xcept as provided* in subdivision . . . (j) . . . ." (Italics added.) And section 667.61, subdivision (j)(2), *requires* that any person coming under its provisions "*shall be punished* by imprisonment in the state prison for 25 years to life." (Italics added.) Because the Legislature used the word "shall," and because the prosecution properly pleaded and proved multiple victim allegations for qualifying sex offenses in which the victims were under 14 years of age, the trial court was *required* to impose a 25-year-to-life sentence under section 667.61, the One Strike law.

III

DISPOSITION

Vaquera's petition for a writ of habeas corpus is denied.

MOORE, ACTING P. J.

WE CONCUR:

IKOLA, J.

THOMPSON, J.

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **VAQUERA, OSCAR**
Case Number: **TEMP-9L7P0R6M**
Lower Court Case Number:

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

2. My email address used to e-serve: **Matthew.Darling@pubdef.ocgov.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

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PETITION FOR REVIEW	Petition for Review - Sup Ct - DCA Habeas (VAQUERA)

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Date

/s/CRISTAL SANCHEZ
Signature

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Last Name, First Name (PNum)

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Law Firm