IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re OSCAR MANUEL VAQUERA, *On Habeas Corpus.*	**No. S258376** **Prior Supreme Ct. No. S252593** **Court of Appeal No. G056786** **Super. Ct. No. 12NF0653**
ORANGE COUNTY DISTRICT ATTORNEY, **CALIFORNIA ATTORNEY GENERAL,** **CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,** *Real Parties in Interest.*	

PETITIONER'S OPENING BRIEF ON THE MERITS

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

Orange County Superior Court Case No. 12NF0653

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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 brief 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: January 22, 2020

Respectfully submitted,
SHARON PETROSINO
Public Defender
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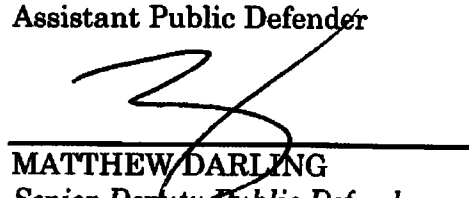

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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,
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No. S258376

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

Super. 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 submits the following opening brief on the merits of this matter. 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 petitions for review[1], the arguments contained in each of them as well as the statements of the case and facts.

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

ISSUES PRESENTED

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 erred by disagreeing with *People v. Jimenez* (2019) 35 Cal.App.5th 373 (*Jimenez*), and endorsed as mandatory the very sentencing practice prohibited in *Jimenez*;

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 failure to address Petitioner's claims below on the issues of waiver and estoppel.

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 by the Court of Appeal is incorrect and was based 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 and *People v. Wilford* (2017) 12 Cal.App.5th 827 (*Wilford*). The Court of Appeal also erred when it failed to address petitioner's claims of waiver and estoppel.

STATEMENT OF THE CASE AND FACTS

As the most salient facts of this matter are procedural, Petitioner offers the following combined statement of the case and

facts. For the Court's convenience the more salient facts are fully and fairly noted herein. For a complete rendition of procedural history, this Court is referred to the original Petition for writ of *habeas corpus* and the exhibits thereto.

At all stages of this matter prior to actual imposition of sentence[2], the same sexual assault prosecutor pursued the same child molestation charges with the same "one strike" alternative sentencing scheme specifically-elected per Penal Code section[3] 667.61, subdivision (b) [15-Life] by way of subdivision (e)(5) or (e)(4) [multiple victims].[4] The Public Defender filed a Defense Sentencing Brief demonstrating defense counsel's agreement with the People that each of Counts 1 and 2 (each including the alternative sentencing scheme allegation per section 667.61 subdivision (b)) carried a mandatory sentence of 15 years to life in prison.

For the first time, *more than three months after verdict and jury discharge*, that same prosecutor changed his mind and filed a second sentencing brief to seek punishment on Count 2 under

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[2] These stages included the filing of the complaint, the actual preliminary examination hearing, the filing of and arraignment on the information, the jury trial with its resulting conviction and true finding by the jury, and the discharge of the jury. Even in their first sentencing brief well after conviction and jury discharge, the People's counsel continued to acknowledge the People's election of the one strike allegation specified that carried a mandatory 15 years to life prison sentence.

[3] All further section (§) references are to the Penal Code unless otherwise specified.

[4] The People actually alleged subdivision (b) by way of subdivision (e)(5) [multiple victims] for Count 1, while alleging subdivision (b) by way of subdivision (e)(4) [multiple victims] for Count 2; this reflected the 2010 amendments to § 667.61, renumbering the circumstances in subdivision (e). That *same amendment* added subdivision (j)(2) as an additional option, a 25-Life alternate sentencing scheme.

section 667.61, subdivision (j)(2) [25-Life]. The People never sought to amend the charging document to reflect this change in charging decision.

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. In October 2014, Petitioner appealed his conviction, solely raising purported error in failure to suppress statements under *Miranda v. Arizona* (1966) 384 U.S. 436 and *Missouri v. Seibert* (2004) 542 U.S. 600; in October 2016 that judgment was affirmed in an unpublished opinion. (Fourth Appellate Dist., Div. 3, case no. G050801)

In September 2018, Petitioner herein filed a petition for writ of *habeas corpus* in the Court of Appeal below. (Fourth Appellate Dist., Div. 3, case no. G056786.) The Court of Appeal summarily denied Mr. Vaquera's petition for *habeas corpus* in this matter, then on remand from this High Court (case no. S252593) denied the petition by published opinion (*In re Vaquera* (2019) 39 Cal.App.5th 233), necessitating this grant of Review.

ARGUMENT

I. The Court of Appeal below erred by disagreeing with *People v. Jimenez* (2019) 35 Cal.App.5th 373 (*Jimenez*), in that it endorsed as mandatory the very sentencing practice *Jimenez* prohibited, thereby 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 declared the disposition prohibited in *Jimenez* (25-years-to-life sentence) was "required"

under the identical circumstances of this case. (*In re Vaquera* (2019) 39 Cal.App.5th 233, 242 (*Vaquera*).)

In its refutation of *Jimenez* the court below reduced the *Mancebo* opinion to the section 667.61(f) pleading requirement issue, then evaded all applicable portions of the *Mancebo* opinion. While the post-conviction machinations of the trial court and prosecutor in *Mancebo* violated section 667.61(f)'s express pleading requirements, this High Court *also* pointed out the manner in which this violated Mancebo's due process right to fair notice of the actual sentence enhancements sought to be imposed against him and implicated doctrines of waiver and estoppel to bar prosecution under the theories foregone by the People at trial.[5] Here, the *Vaquera* Court reframed the due process question to avoid brushing against *Mancebo*, ignored the *Jimenez* Court's discussion of due process/notice concerns and simply ignored the portions of *Mancebo* most problematic for the result below. The *Vaquera* Court was dismissive of the due process/notice issue, unconvincingly seeking to distinguish the *Wilford* decision on immaterial points, then totally ignored this Court's concerns of waiver and estoppel as raised by Petitioner.

The court below also sought to discredit *Jimenez* for its failure to distinguish itself on superficial grounds from *Mancebo* and *Wilford*. (*Vaquera*, *supra*, at pp. 243-244.) The court sought to distinguish the binding authority of the *Mancebo* opinion by reference to pleading requirements alone, and completely ignored Petitioner's *sole* reliance upon the notice/due process and waiver

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[5] The due process issue will be more fully discussed in part II below, and the waiver and estoppel issues will be discussed in part III below.

and estoppel bases of the *Mancebo* opinion. (*Id.*, at pp. 242-243.) The court below further distinguished the *Wilford* opinion from the *Vaquera* case with a conclusory reference that Petitioner should have known he faced "the possibility" of a 25 year to life sentence from the subdivision (b) statutory cross reference.[6] (*Id.*, at p. 243.)

The *Jimenez* opinion, to the contrary, relied upon and followed this Court's ruling in *Mancebo*[7], reasonably holding that the People's specific selection of the sentencing scheme under section 667.61 subdivision (b), and failure to allege subdivision (j)(2)'s alternate sentencing scheme, denied Jimenez his due process right to notice of the sentence he would face under the latter scheme. 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,* 27 Cal.4th at p. 747.)

The court below wrongly refuted the opinion of the *Jimenez* Court, undercutting and unreasonably limiting the opinion of the

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[6] 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 the 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. 244.)

[7] 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.)

Wilford Court on a razor thin distinction, and wholly disregarding this High Court's opinions regarding due process, and the application of waiver and estoppel doctrines from the *Mancebo* opinion.

II. The Court of Appeal decision below was incorrect under this Court's opinion in *People v. Mancebo* (and several Courts of Appeal decisions) on the issue of due process.

In Petitioner's case below, the Court of Appeal incorrectly denied relief as mandated in *Mancebo* and its progeny in the Courts of Appeal, applying too lenient a notice requirement to satisfy due process, and failing to address the doctrine of waiver and estoppel at all.

On the issues of *fair* notice and due process, the Court below ruled that the charging document provided more than "no indication whatsoever" of "the possibility" of the ultimate 25-years to life sentence. On this basis, the *Vaquera* Court found *fair* notice, sufficient to provide the Petitioner due process, despite contrary guidance from this High Court in *Mancebo*.

On the limited issue of due process, *Mancebo* made clear that separate and apart from section 667.61(f)'s statutory pleading requirement [to allege any 'circumstance' relied upon under subdivision (e)] "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. 748 [emphasis added].) Here, the People plainly invoked subdivision (b), not subdivision (j)(2); the charging document made no mention of any alternate sentencing scheme except subdivision (b).

The *Vaquera* Court dramatically diluted this issue, reasoning that the information's actual allegation of the subdivision (b) sentencing scheme implicitly provided some notice of the possible statutory exceptions to that sentencing scheme, even where the charging document itself made no cross reference. Thus, reasoned the *Vaquera* Court, this charging document (combined with the language of the underlying statute) provided more than "*no indication whatsoever* that [the defendant] faced the possibility of a sentence" of 25-years-to-life. (*Vaquera*, *supra*, at p. 243; quoting *Wilford*, *supra*, 12 Cal.App.5th at p. 480 [emphasis added by *Vaquera* Court].[8]) Thus "the pleading should have indicated to Vaquera that he faced the possibility of a 25-year-to-life sentence." (*Ibid.*)

A. Good policy does not support this interpretation of *Mancebo*.

The *Vaquera* Court's endorsement of this tenuous notice sets a dangerous precedent, where allegation of section 667.61(b) puts Mr. Vaquera on fair notice that the People sought sentencing under another subdivision having nothing to do with subdivision (b). If Mr. Vaquera was on notice that after trial he could face sentencing per subdivision (j)(2), then logically he was on notice he could also face sentencing per subdivision (j)(1), or (a), or (l) or (m), each of which

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[8] To satisfy the notice requirement, the *Vaquera* Court reasoned that in Vaquera's section 667.61 allegation, the prosecutor had alleged application of the alternate sentencing scheme of subdivision (b), and that the statute defining that sentencing scheme provides for the 15-Life sentence except as provided in four other subdivisions, including (j). Note that the entirety of the information itself (like the complaint before it) failed to cross-reference § 667.61(j)(1) or any alternate sentencing scheme other than § 667.61(b).

appears in the same statutory cross-referencing phrase.[9] 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 or foreclose unsupported sentencing alternatives *not actually appearing in the charging document* (except by reference to exceptions listed in the language of statute charged).[10]

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 the *sexual assault prosecutor,* the very attorney who conducted the case from filing until well after the verdict. This is egregious because a *clear or direct invocation* of the scheme in section 667.61, subdivision (j)(2) would not mention subdivision (b) at all.[11]

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

[10] 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).

[11] Were the People to allege every subdivision actually implicated by the sentence actually imposed here, the information would plead "section 667.61, involving a victim under 14 per subdivision (j)(2) [25-Life] by

B. Cases relied upon, *People v. Tennard* (2017) 18 Cal.App.5th 476 (*Tennard*) and *People v. Thomas* (1987) 43 Cal.3d 818 (*Thomas*), do not support the lower court's rationale.

The lower court's dependence on *Tennard* is puzzling, as Petitioner's case is distinguishable. Mr. Tennard was convicted and sentenced on felony domestic violence charges, and the alternate sentencing scheme of section 667, subdivision (e)(2)(A) that was specifically pled. The issue asserted by Tennard and rejected in the *Tennard* opinion was not the failure to allege the scheme ultimately sentenced upon, but rather the failure to acknowledge a possible exception to that scheme, and to specifically plead the exception to that exception.[12] Unsurprisingly, the *Tennard* court found sufficient notice.

The lower court's depended upon an interpretation of *Thomas*, which was specifically disclaimed in *Mancebo*, is equally unsound. The *Vaquera* opinion relied heavily upon *Thomas* for the broad assertion that pleading the specific statute is not required as long as the facts pled give the defendant notice (*Vaquera, supra*, at pp. 239-241); however, this Court explicitly rejected the People's claim in *Mancebo*, announcing "this was not our holding in

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reference to subdivisions (c)(8) [listed crime: § 288(a)] and (e)(4) [listed circumstance: multiple victims]." In context, reference to subdivision (b) would be entirely misleading.

[12] 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 sentencing] for certain defendants, including those with defined prior convictions for "sexually violent offenses" like Mr. Tennard's forcible rape conviction that was specifically pled and proved *as a forcible rape* prior. (See § 667, subd. (e)(2)(C)(iv)(I), Welf. & Inst. Code § 6600, subd. (b).)

Thomas." (*Mancebo, supra*, 27 Cal.4th at p. 747.) As explained in *Mancebo*, *Thomas* involved a very different issue: whether a general manslaughter allegation using the word "willfully" permitted jury consideration of a voluntary manslaughter charge only, or also permitted consideration of a lesser included or related *involuntary* manslaughter charge supported by the facts at preliminary hearing and at trial and assented to by the defense. *Thomas* (unlike in *Mancebo, Jimenez, Wilford* and here) did not involve a trial where the People sought imposition of a harsher sentence after verdict than had been alleged through the trial.

The *Vaquera* opinion did however follow *Tennard* and *Thomas* in their failure to address or consider the People's "discretionary charging decision" and resulting issues of waiver and estoppel, as discussed by this Court's opinion in *Mancebo*. (See Section III, *infra*.)

C. *People v. Jimenez*, *People v. Wilford*, *People v. Sawyers*, *People v. Nguyen* and *People v. Perez*, with support from *People v. Mancebo*, make clear that sentencing on an alternative scheme not actually alleged violates notice rights and constitutional Due Process.

In this case, the People alleged the alternate sentencing scheme pursuant to section 667.61(b), by reference to subdivision (e)(4), a complete allegation seeking 15 years to life. No other scheme appeared.

In *People v. Wilford* (2017) 12 Cal.App.5th 827 (*Wilford*), the court concluded that sentencing under a specific sentencing scheme subdivision not previously alleged in the Information – even with the facts supporting that scheme pled and proven in support of a different alternate sentencing scheme – 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* statutory pleading and proof.

In *People v. Nguyen* (2017) 18 Cal.App.5th 260, the court barred sentencing on a prior serious felony enhancement (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, "[p]rosecutors have broad discretion to decide whom to charge, and for what crime." (*People v. Lucas* (1995) 12 Cal.4th 415, 477.) The People are not required to invoke all, the most impactful, or *any* specific allegation to increase a sentence. Clearly, the prosecutor here was entitled to file only the base charges with no alternate

sentencing scheme allegation: barring some statutory authority to the contrary, he should have been able to charge something between the minimum and the maximum allegations *just like he did* – just as the prosecutor did in *Wilford*. Moreover, 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."].)

D. Prejudice is apparent.

Prejudice is unnecessary but apparent here. Inherent in the decision to go to trial when one does, in the state of preparedness one then experiences, is the decision to face the charges levelled against oneself at that time. One does not go to trial in the abstract, but rather one confronts the charges then standing, and *faces the sanctions in connection with such allegations that the People can prove.* Vaquera went to trial against two charges, as alleged carrying a maximum sanction of 15 years to life each. Here, the People changed the amount of the bet after Vaquera had cast his dice, and after the results of that effort were determined.

"[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. (*People v. Hernandez* (1988) 46 Cal.3d 194, 208-209.) Assuming for purposes of argument that Petitioner was actually on notice of that he could face punishment under section 667.61(j)(2), but not the "possibility" that his sentencing would be entirely divorced from the subdivision (b) scheme actually alleged, he would have made 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. After defense reliance upon moderate current charges through trial and verdict and discharge of the jury, the court allowed the People to unravel their decision.

Prosecutorial charging decisions matter. Words are important. An election of one possible sentencing scheme should foreclose transforming to a harsher sentencing scheme after conviction, just as this High Court ruled in *Mancebo* and as a matter of fundamental fairness.[13]

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 core issues of waiver and estoppel.

Resentencing is required since the prosecution made a discretionary charging decision that triggered the doctrines of waiver and estoppel. Where the prosecution selects one sentencing scheme structure from available options in the information, that is a "discretionary charging decision" and doctrines of waiver and estoppel apply. (*Mancebo*, *supra*, 27 Cal.4th at p. 749.) In *Mancebo*, the People chose to utilize a firearm use as an element of their one strike allegation under section 667.61, thereby foreclosing its independent imposition as a stand-alone enhancement (also charged); after conviction, the People sought to restructure their

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[13] 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."

charging decisions (without addition of any new facts) to enable imposition of the gun use enhancement previously foreclosed. The People waived that more effective charging structure, and were estopped from that amendment.

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:

> 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* (2015) 240 Cal.App.4th 1218, 1227 [emphasis added, internal citations omitted].) Just as in *Perez,* the prosecution has to this day never requested to amend the information to charge the requested sentencing scheme of (j)(2).

The People sought sentencing under section 667.61, subdivision (b), and they specifically selected that sentencing scheme in every accusatory pleading from complaint through the information at trial and verdict: the People have waived application of any other alternate sentencing scheme.

Having waived any alternate sentencing scheme but section 667.61, subdivision (b), the People should be estopped from seeking imposition of sentence under subdivision (j)(2). Under *Mancebo* and its progeny, the sentence imposed per section 667.61, subdivision (j)(2), was unauthorized.

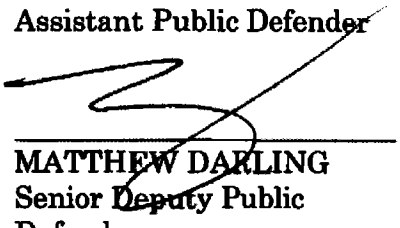
CONCLUSION

The decision below was wrong and must be reversed. It improperly refutes the correct decision in *People v. Jimenez* (2019) 35 Cal.App.5th 373, and purports to mandate the result correctly deemed unauthorized in the *Jimenez* opinion. It undermines this Court's opinion in *Mancebo*, encouraging gamesmanship, and disregard for the minimum notice standards for due process and for basic fairness in doctrines of waiver and estoppel.

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

Dated: January 22, 2020

Respectfully Submitted,
SHARON PETROSINO
Public Defender
SARA ROSS
Assistant Public Defender



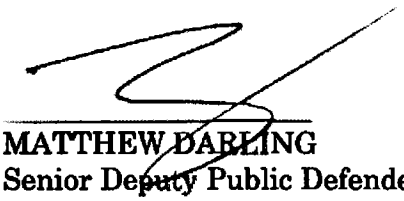
MATTHEW DARLING
Senior Deputy Public Defender
Writs and Appeals Unit

CERTIFICATE OF COMPLIANCE

(Rule 8.504(d)(1))

The undersigned hereby certifies that this brief has been prepared using 13 point Century Schoolbook typeface. In its entirety, Petitioner's Brief consists of 5,253 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 January 22, 2020.



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 January 22, 2020, I personally served copies of the **Petitioner's Opening Brief on the Merits** 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]

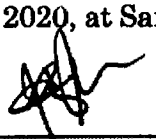
Orange County Superior Court, Attn: Hon. David A. Hoffer, c/o Court Clerk, 700 Civic Center Drive W., Santa Ana, CA 92701 [657-622-5242]

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

Office of the Attorney General, 600 West Broadway, Suite 1800, San Diego, CA 92101 [619-738-9053]

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 January 22, 2020, at Santa Ana, California.



Cristal Sanchez
Title: Secretary, Writs and Appeals