IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,)	
Plaintiff and Respondent,	) No. S203744
v.	) 2d Crim. B231338
DARLENE A. VARGAS,	) Los Angeles County) Case No. KA085541
Defendant and Appellant.	)

APPELLANT'S OPENING BRIEF ON THE MERITS

Appeal from the Judgment of the Superior Court
of the State of California for the County of
Los Angeles

Honorable Bruce F. Marrs, Judge

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ISSUES PRESENTED FOR REVIEW

1. Was the trial court required to dismiss one of appellant's two prior convictions under the Three Strikes law, when they arose from the same prior incident and were based on the same act?

2. If dismissal of one prior conviction was not mandatory, did the trial court abuse its discretion by failing to dismiss one?

INTRODUCTION

Following her convictions for residential burglary, grand theft and conspiracy to commit grand theft, the trial court sentenced appellant to 30 years to life pursuant to the Third Strikes law. The sentencing record showed that appellant's two prior convictions for carjacking and robbery stemmed from the same case and involved the same victim. However, it

was unclear whether they arose from the same act. Without the benefit of this information, the court declined to dismiss one of the prior convictions.

In the original appeal, appellant showed that the two prior convictions were the result of the single act of taking a car by force. The Second District agreed that trial counsel had rendered ineffective assistance by failing to provide this information to the trial court and remanded for resentencing. The trial court then, once again, declined to exercise its discretion to dismiss one of the prior convictions, and the Court of Appeal found no error.

More than a decade ago, in *People v. Benson* (1998) 18 Cal.4th 24, 30-33 ("*Benson*"), this Court decided that a trial court was not required to dismiss one of two prior convictions arising from the same case, as this was within the discretion of the trial court. Nonetheless, in a footnote, this Court cited two convictions arising from "a single act" as an example of where a trial court would abuse its discretion not to dismiss one such prior. (*Id.* at p. 36, fn. 8.)

There is currently a split of authority as to the scope and meaning of this footnote and whether a failure to dismiss one of two prior strikes stemming from a single act constitutes an abuse of discretion. (*People v. Scott* (2009) 179 Cal.App.4th 920; *People v. Burgos* (2004) 117 Cal.App.4th 1209.) The instant case produced yet another published opinion, where no

such abuse of discretion was found. (*People v. Vargas* (2012) 206 Cal.App.4th 971.)

Appellant recognizes that the focus of the Three Strikes law is the repeat offender, and that two prior convictions may qualify as separate strikes regardless of whether the sentence for one of the prior convictions was stayed under Penal Code section 654[1]. However, a section 654 analysis has less significance here, because appellant's punishment in the earlier action was not stayed; she served concurrent sentences for both the carjacking and robbery. Rather, the main inquiry is whether the circumstances of the prior convictions fell within the narrow exception that this Court suggested in *Benson*.

The majority and dissent in *Benson* may have parted ways in their analysis. However, they seemingly agreed that multiple acts and objectives and/or additional acts of violence committed on the same occasion would justify treating each prior conviction as a separate strike, whether under section 654 or consistent with the legislative and electoral intent to punish such offenders more harshly than others for posing a higher risk to public safety. Here, the evidence showed a single act and objective to take the victim's car by force, and there were no additional acts of violence

[1] Unless otherwise noted, all statutory references are to the Penal Code.

committed against the victim or any other person beyond the force or threat of force used to accomplish this objective.

Even if the failure to dismiss one of the prior strikes was not an abuse of discretion based on the single act factor *alone*, given appellant's minimal and non-violent criminal history, the trial court still abused its discretion when it declined to dismiss one of the two prior convictions that occurred ten years prior. Without minimizing her culpability, it is still important to mention that appellant's current offenses did not involve any acts of violence. Reversal is thus required.

STATEMENT OF THE CASE

Appellant was convicted of residential burglary (§ 459; count 1), grand theft (§ 487, subd. (a); count 2), and conspiracy to commit grand theft (§ 182, subd. (a)(1); count 3), but acquitted of receiving stolen property (§ 496, subd. (a); count 4). (1 C.T. pp. 4, 6.) Appellant was tried jointly with Oscar Velazquez, who was similarly convicted and acquitted of the same offenses. (1 C.T. pp. 4, 6.)

The information alleged two 1999 felony convictions for carjacking and robbery, qualifying under the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). (1 C.T. p. 11.) Appellant moved to dismiss one of the two prior strikes on the ground that both convictions arose from a single case. (1 C.T. pp. 6, 11-12.) The trial court denied the motion on that basis

and sentenced appellant to 25 years to life in count 1. (1 C.T. pp. 6, 11-12.) Appellant received a combined state prison sentence of 30 years to life, and Velasquez received 6 years. (1 C.T. p. 6.)

On appeal, appellant, in part, challenged the trial court's denial of her motion, and additionally sought relief by way of a writ, based on ineffective assistance of her counsel for failing to introduce evidence that the two prior strikes involved a single criminal act. (1 C.T. pp. 3-4, 6-7.) The Court of Appeal granted the petition and remanded for a new sentencing hearing. (1 C.T. pp. 4, 18-20.) In all other respects, the court affirmed the judgment.[2] (1 C.T. pp. 4, 18-20.)

At resentencing on March 2, 2011, the trial court, once again, denied appellant's request to dismiss one of the prior strikes, and re-imposed the 30-year to life sentence, which included 5 years for the prior serious felony conviction enhancement (§ 667, subd. (a)(1)). (1 C.T. pp. 22-23, 26; 1 R.T. p. 8.) The trial court also stayed the 2-year sentence in count 2, as ordered by the appellate court. (1 C.T. pp. 17, 23, 28; 1 R.T. p. 8.) Appellant then filed a second appeal. (1 C.T. p. 30.)

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[2] Appellant also argued there was insufficient evidence to support her convictions, that her convictions were obtained as a result of suggestive identification, and that her sentence for grand theft must be stayed. (1 C.T. pp. 4, 6.) The Court of Appeal agreed as to the sentencing error, but rejected appellant's remaining claims. (1 C.T. pp. 4, 7-11, 17.)

On June 4, 2012, the Court of Appeal affirmed the judgment. (*People v. Vargas*, *supra*, 206 Cal.App.4th at p. 987.) The court found it was not abuse of discretion to not dismiss one of the prior strikes based on the single act factor or appellant's criminal history. (*Id.* at pp. 982-986.) It also concluded that appellant's sentence was not unconstitutionally cruel or unusual. (*Id.* at p. 986.) On September 12, 2012, this Court granted review, limited to the issues described above.

STATEMENT OF FACTS

Current Offenses

On December 29, 2008, at approximately 2 p.m., Lynn Burrows returned home and discovered that numerous items were missing from the house she shared with Williams Alves and their two sons, including computer equipment, cameras, a jewelry bag, cash, checks, a suitcase, a trash can, and a backpack belonging to her son, Spencer. (1 C.T. p. 4.) Later, neighbor Gabriela Jimenez told the police that she saw a man and woman walking nearby earlier.

According to Jimenez, the woman was rolling a suitcase, and later, she was dragging a large gray trashcan filled with "bags [] of stuff," while the man was carrying a large box. Jimenez described the man as either Caucasian or a light-skinned Hispanic, about 5 feet 10 inches tall, with a thin build and short hair. She described the woman as being Hispanic,

approximately 5 feet 5 inches tall, weighing 150 pounds, and stated that she had black hair with bleached stripes running through it.

Around noon the next day, Claremont Police Officer James Hughes was on patrol in the same neighborhood when he saw appellant and Velasquez near the front door of the Chavez house. (1 C.T. p. 5.) Since the two matched the description of the man and woman Jimenez had seen the day prior, Hughes called for back-up. The officer made a U-turn and detained appellants and Velasquez who had begun to walk down the street. Hughes knocked on the front door of the Chavez house to speak with the owner. At the same time, he noticed a backpack on the ground nearby.

When John Chavez came to the door, he told Hughes that he did not know appellant or Velasquez, and did not know who owned the backpack by his door. Another officer who had arrived to assist Hughes opened the backpack. There, he found a blue IKEA bag, a green duffel bag, a knife, a hammer, several gloves, and $31 in change. A search of Velasquez turned up methamphetamine and a glass smoking pipe.

Later that day, Jimenez went to the police station. After reading and signing an admonition that she should not be influenced by the photos or make any assumptions, she identified appellant and Velasquez from photographic "six-pack" lineups. A police officer took the backpack found

at the Chavez house and showed it to Spencer Burrows. He identified the backpack as his, but did not immediately recognize the items found inside.

At trial, Alves and Spencer identified the backpack as belonging to Spencer. (1 C.T. p. 6.) They also identified the hammer as theirs, even though they had not previously reported it missing. Alves recognized it mostly by the tape he had placed on the handle several years earlier and the first three letters of his name which he had written on the tape. Burrows recognized the IKEA bag she later found missing from the garage, and also identified as hers a tin box found in the backpack.

Jimenez identified appellant and Velasquez at trial, and reconfirmed her earlier photo identification of them. However, she admitted on cross-examination, that despite the admonition she had read and signed, since the police were showing her the lineups, she presumed the six packs included the photos of the man and woman.

Appellant and Velasquez were convicted of burglary and grand theft in connection with the Alves/Burrows house, and conspiracy to commit theft based on their presence in front of the Chavez house. (1 C.T. pp. 5-6.) The jury acquitted them of receiving stolen property in the Alves/Burrows incident. (1 C.T. p. 6.)

Prior Strikes

According to the preliminary transcript in the earlier action, appellant approached a car and began to converse with the driver. (1 R.T. pp. 6-7.) Her male companion jumped into the car and held a knife to the driver's neck. (1 C.T. p. 18.) Appellant told the driver she had a gun and took the keys out of the car. (1 C.T. p. 18; 1 R.T. p. 6.) Appellant and her companion then pulled the driver from his car and drove off with it. (1 C.T. p. 18; 1 R.T. p. 6.)

In an information, the prosecution charged appellant with carjacking and robbery committed on the same day against the same victim. (1 C.T. p. 13.) Appellant pleaded in both counts and received a three-year concurrent sentence. The Court of Appeal found, "We agree with Vargas that the transcript shows that the carjacking and robbery convictions were based on the same act—taking the victim's car by force." (1 C.T. p. 18.)

ARGUMENT

I.

THE TRIAL COURT ABUSED ITS DISCRETION IN NOT DISMISSING ONE OF APPELLANT'S TWO 1999 FELONY CONVICTIONS, BECAUSE THE TWO PRIOR STRIKES WERE THE RESULT OF THE SINGLE ACT OF TAKING A CAR BY FORCE, AND BECAUSE THE LENGTHY SENTENCE DID NOT SERVE THE INTEREST OF JUSTICE

In *Benson*, this Court left open the question of whether it would be an abuse of discretion for a trial court to fail to dismiss a prior conviction under the Three Strikes law, where, for instance, the priors arose from a single act. Appellant believes that her case presents such situation, and the trial court's failure to dismiss one of her two prior convictions was an abuse of discretion, if not based on the single act factor alone, but in light of the circumstances of her prior and current offenses, as well as her minimal criminal history.

A. Relevant Proceedings

On March 2, 2011, appellant appeared for resentencing and renewed her request to dismiss one of the prior convictions arising from the same act. (1 R.T. pp. 1-2.) She pointed out that, since her 1999 convictions which occurred when she was 19 years old, she had only had two cases, neither of which had been serious or violent. (1 R.T. p. 2.) Therefore, she argued that she did not fall within the spirit of the Three Strikes law, regardless of

whether dismissal of one of the priors under the circumstances was a discretionary act or mandatory.

In opposition, the prosecution described appellant's role in the prior strike case as extending beyond that of a mere aider and abettor. (1 R.T. p. 3.) Referencing the probation reports from the prior case, the prosecution mentioned a juvenile robbery arrest which had been reduced to a violation of section 496. The prosecution also cited appellant's "two parole violations" and the 2003 conviction for narcotics possession noted in the probation report, although, as appellant pointed out, that case had ultimately been dismissed. (1 R.T. pp. 3-5.)

The court denied appellant's motion and re-imposed the 30 years to life sentence previously ordered in count 1. (1 R.T. p. 8.) In doing so, the court opined that, for purposes of Three Strikes laws, whether the two convictions arose from a single act or involved a single intent was not the issue, but that the central focus was appellant's "status as a repeat felon." (1 R.T. p. 6.)

Based on the preliminary hearing transcript which the court had before it this time, the court discussed the facts of the prior case, including appellant approaching the victim and conversing with him, then, taking the car keys and pushing the victim out of the car. (1 R.T. pp. 6-7.) The court felt that appellant had had a "very active" role during that incident, yet had

received the "benefit" of a plea agreement, resulting in a three-year concurrent sentence. (1 R.T. pp. 7-8.)

The court then concluded as follows:

> And looking at her entire package, as I did before, although I did at the time piously opine that I thought 75 years to life was more than the series of crimes warranted. I concluded at that time, and I conclude today, based on everything she has presented in the new case, in the old case, the two parole violations, the robbery that was reduced to a 496 for a plea in her background, she falls squarely within the spirit of 3 strikes. So motion to strike on this record will be denied, as it was before. Now that we have the benefit of the preliminary hearing transcript, *Benson* clearly applies.

(1 R..T. p. 8.)

The Court of Appeal affirmed the judgment and found no abuse of discretion in the trial court's failure to dismiss one of the prior convictions. (*People v. Vargas*, *supra*, 206 Cal.App.4th at p. 987.) In doing so, the court interpreted *Benson*'s footnote, as follows:

> We do not read this as stating, much less signaling, that a trial court automatically abuses its discretion by failing to dismiss a Three Strikes allegation that was part of a single act that yielded another Three Strikes conviction. Such a rule does not involve discretion at all. Instead, it strips the trial court of discretion. But the exercise of discretion under Romero is the whole point of footnote 8 and the text it follows. This is especially so given Benson's conclusion, which rejected the defendant's proposed rule as untenable because it would prevent certain convictions on which sentence had been stayed from ever being treated as a strike, a result that violated both the language and intent of the Three Strikes law. (*Benson*, *supra*, 18 Cal.4th at p. 36.) Instead, the stay of sentence was a factor for the trial court to consider when determining whether to dismiss a strike allegation. (*Ibid.*)

(*People v. Vargas*, *supra*, 206 Cal.App.4th at p. 983.)

The court added that the single act was "just one more factor, albeit an *important one*, for a trial court's *Romero* analysis." (*Id.* at p. 984, emphasis added.) The court ruled that not dismissing one of the two prior convictions was not required, but within the discretion of the trial court. (*Id.* at pp. 982-985.) The court found no such abuse of discretion, based on the circumstances of the prior and current offenses and appellant's criminal history. (*Id.* at pp. 985-986.)

In a footnote, the Court of Appeal wrote that the trial court had not considered the unproven juvenile robbery "conviction," and that regardless, any such error was harmless. (*Id.* at p. 986, fn. 6.) It also concluded that the trial court had not considered a 2003 narcotics conviction that had belonged to a person other than appellant. (*Ibid.*)

B. Governing Law

1. Three Strikes Law

In 1994, the Legislature enacted the Three Strikes law, as codified at section 667, subds. (b) through (i). (Stats. 1994, ch. 12, (Assembly Bill No. 971), § 1, eff. Mar. 7, 1994.) The same year, the voters passed their own version of the law by approving Proposition 184, which added section 1170.12 to the Penal Code. (Prop. 184, as approved by voters, Gen. Elec. (Nov. 8, 1994.)

The purpose of the Three Strikes law is to increase punishment based on recidivism. (*People v. Acosta* (2002) 29 Cal.4th 105, 127.) Where there is a single qualifying prior conviction, the sentence is doubled. (§§ 667, subd. (e)(1), 1170.12, subd. (c)(1); *People v. Nguyen* (1999) 21 Cal.4th 197, 202-207.) A defendant who has suffered two or more prior strikes will receive an indeterminate life sentence with a minimum term of 25 years. (§§ 667, subd. (e)(2), 1170.12, subd. (c)(2); *People v. Williams* (2004) 34 Cal.4th 397, 404.)

Recently, voters approved Proposition 36, titled "Three Strikes Reform Act of 2012." (Ballot Pamp., Gen. Elec. (Nov. 6, 2012) text of Prop. 36, p. 105.) Proposition 36 amended relevant portions of sections 667 and 1170.12, to require that, with certain exceptions, the indeterminate life sentence be imposed only where the current offense is a serious or violent felony. (Ballot Pamp., Gen. Elec. (Nov. 6, 2012) text of Prop. 36, §§ 2, 4, pp. 105-110; §§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C).)

The voters reaffirmed their original intent and understanding of the Three Strikes law, which was to punish repeated offenders with current convictions for serious or violent felonies. (Ballot Pamp., Gen. Elec. (Nov. 6, 2012) text of Prop. 36, § 1, p. 105.) Proposition 36 additionally provides, "This act is an exercise of the public power of the people of the State of California for the protection of the health, safety, and welfare of the people

of the State of California, and shall be liberally construed to effectuate those purposes." (*Id.* at § 7, p. 110.)

2. *Romero*

Section 1385 provides, in relevant part: "(a) The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. ... [P] (c) (1) If the court has the authority pursuant to subdivision (a) to strike or dismiss an enhancement, the court may instead strike the additional punishment for that enhancement in the furtherance of justice in compliance with subdivision (a)."

In *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 531 ("*Romero*"), the court held that a prior conviction may be stricken in the interest of justice after the judge has weighed numerous factors, including the defendant's background, the nature of the present offenses, and other individualized considerations. (See *People v. Dent* (1995) 38 Cal.App.4th 1726, 1731; § 1385.) The decision to dismiss a strike allegation is subject to review for abuse of discretion. (*People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at p. 531; *People v. Carmony* (2004) 33 Cal.4th 367, 374.)

Subsequent decisions have further examined the proper criteria for dismissing a prior conviction as a strike, and have unanimously agreed:

> The touchstone for that determination is whether "in light of the nature and circumstances of [a defendant's] present

> felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [Three Strikes] scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies."

(*People v. Cluff* (2001) 87 Cal.App.4th 991, 997-998, quoting *People v. Williams* (1998) 17 Cal.4th 148, 161; *People v. Garcia* (1999) 20 Cal.4th 490, 498-499.) A defendant's "recidivist status," while relevant, should not be "singularly dispositive" when deciding whether a prior conviction should be stricken. (*People v. Alvarez* (1997) 14 Cal.4th 968, 973, 979.)

The purpose of the Three Strikes law; to ensure lengthy prison sentences, should not be the dominant factor, and is likewise not defeated, where the circumstances support a decision to dismiss a strike. (*Id.* at pp. 974-975, 979; *People v. Deloza* (1998) 18 Cal.4th 585, 590-591.) Accordingly, the court retains the power to strike a prior to and reduce the sentence to a level that is consistent with a defendant's individual culpability and society's interests in punishing and deterring criminal behavior. (See *People v. Williams*, *supra*, 17 Cal.4th at pp. 160-161.)

Ultimately, the court's decision must fall within the 'bounds of reason' in light of "applicable law and the relevant facts," free of bias or prejudice. (*People v. Garcia*, *supra*, 20 Cal.4th at p. 503, quoting *People v. Williams*, *supra*, 17 Cal.4th at p. 162; *People v. Cluff*, *supra*, 87 Cal.App.4th at p. 998.) More importantly, the consideration must be an individualized

one. (*People v. McGlothin* (1998) 67 Cal.App.4th 468, 474.) Clearly, there would be an abuse of discretion if the trial court's findings were not supported by evidence. (*People v. Cluff, supra*, 87 Cal.App.4th at p. 998.)

Apart from the state habitual offender provisions and applicable judicial precedent, misapplication of state sentencing laws that are "arbitrary or capricious" may violate federal due process. (See *Richmond v. Lewis* (1992) 506 U.S. 40, 50 [113 S.Ct. 528, 121 L.Ed.2d 411].) Similarly, sentencing errors that result in "fundamental unfairness" constitute a due process violation. (*Christian v. Rhode* (9th Cir. 1994) 41 F.3d 461, 469.)

3. *Benson*

In *People v. Benson, supra*, 18 Cal.4th at p. 27, the defendant was convicted of petty theft with a prior for shoplifting a carton of cigarettes, and was sentenced to 25 years to life. The two prior strikes that occurred in 1979, involved residential burglary and assault with intent to commit murder, both of which arose from the same case and same set of facts. (*Id.* at p. 26.)

The defendant went to his neighbor's apartment to borrow a vacuum cleaner. (*Id.* at p. 27.) After returning the vacuum cleaner, he returned again to the apartment, stating he had left his keys there. (*Ibid.*) Once inside, the defendant grabbed his neighbor from behind, struggled with her, forcing her to the floor and displaying a knife. (*Ibid.*) He then stabbed her multiple

times. (*Ibid.*) He was convicted of residential burglary and assault with intent to commit murder, and his sentence on the assault count was stayed pursuant to section 654. (*Ibid.*)

The trial court denied the defendant's request to dismiss one of the prior convictions, erroneously believing it lacked discretion to do so. (*Id.* at p. 28.) The case was remanded to the trial court for a proper exercise of its discretion to strike one of the priors under section 1385. (*Id.* at pp. 28, 36-37.) However, this Court declined to interpret the Three Strikes law as *requiring* a trial court to dismiss a prior strike where the two prior offenses had been committed "as part of an indivisible transaction" and against the same victim. (*Id.* at pp. 28, 30-33; § 1170.12, subd. (b).)

Rather, this Court found that, regardless of whether the two prior convictions involved a single victim and occurred at the same time with a single intent, or whether the sentence for one conviction was stayed pursuant to section 654, each felony conviction qualified as a prior strike under the Three Strikes law. (*People v. Benson, supra*, 18 Cal.4th at pp. 30-33; § 1170.12, subd. (b).) In so concluding, this Court relied on the plain language of then-section 1170.12, which provided in pertinent part:

> Notwithstanding any other provision of law and for the purposes of this section, a prior conviction of a felony shall be defined as: [P] (1) Any offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state... None of the following dispositions shall affect the

> determination that a prior conviction is a prior felony for purposes of this section: [P] ... (B) The stay of execution of sentence.

(*People v. Benson, supra*, 18 Cal.4th at pp. 30-31, citing § 1170.12, subd. (b)(1)(B); see also § 667, subd. (d)(1)(B) [same].)[3]

This Court reasoned that the statutory language was unambiguous and clearly reflected the electoral, and in turn, legislative intent that each prior conviction qualify as a separate strike, regardless of whether the sentence was stayed pursuant to section 654. (*People v. Benson, supra*, 18 Cal.4th at pp. 30-32.) This Court reached the same conclusion by examining the ballot initiative and assembly bill behind the law, which contained no exception where punishment for one of the two prior strikes was stayed pursuant to section 654. (*Id.* at pp. 33-34, citing Ballot Pamp., argument in favor of Prop. 184, as presented to the voters, Gen. Elec. (Nov. 8, 1994) p. 36, and Sen. Com. on Judiciary, Analysis of Assem. Bill No. 971 (1993-1994 Reg. Sess.) as amended Jan. 26, 1994, pp. 9-10.)

In particular, this Court referenced an analysis of the assembly bill, prepared by the staff of the Senate Committee on Judiciary, which expressly stated that the two prior convictions may be based on a single act of robbing three victims and need not arise from separate occasions.

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[3] The Three Strikes Law Reform Act of 2012 added the words "serious and/or violent" to "a prior conviction" in both sections 667 and 1170.12 (Ballot Pamp., Gen. Elec. (Nov. 6, 2012) text of Prop. 36, § 4, pp. 105-108.)

(*People v. Benson, supra*, 18 Cal.4th at p. 33-34, citing Analysis of Assem. Bill No. 971 (1993-1994 Reg. Sess.) as amended Jan. 26, 1994, pp. 9-10.)

Finally, this Court distinguished the two situations where two crimes were part of a single act for purposes of punishment under section 654, and where they constituted two strikes for purposes of punishment under the Three Strikes law:

> Whether defendant formed the intent to assault his victim prior to his felonious entry into his victim's residence, or after he encountered her, is less significant for purposes of the Three Strikes law than the fact that his prior criminal conduct yielded two convictions. In contrast to section 654, which is concerned with the appropriate punishment for "[a]n act or omission that is punishable in different ways," the Three Strikes law has, as its central focus, the status of the defendant as a repeat felon--i.e., whether the defendant proceeded to commit a subsequent felony after already having been convicted of one or more serious or violent felonies. Thus, there clearly was a rational basis upon which the electorate and the Legislature could direct the courts, in cases involving a defendant with two prior felony convictions who thereafter commits a subsequent felony, to count each prior felony conviction as a strike, in effect declining to extend the leniency previously afforded the defendant when sentence on a prior felony conviction was stayed under section 654. In the present case, defendant received the benefit of section 654 when he was sentenced for the felonies he committed in 1979; *it was only when defendant reoffended after the enactment of the Three Strikes law that he faced the prolonged incarceration of which he now complains.*

(*Id.* at pp. 34-35, emphasis in original.)

This Court also rejected what it described as the "inflexible" rule proposed by the defendant in declaring two prior convictions a single strike,

whenever they stemmed from the same case involving the same victim. (*Id.* at pp. 35-36.) This Court explained:

> Defendant was convicted of having committed two serious or violent felonies in 1979; the electorate and the Legislature rationally could have determined that he therefore posed a greater threat to public safety than a defendant who had committed only one such offense, such as residential burglary, without the ensuing assault to commit murder. In our view, the electorate and the Legislature rationally could--and did--conclude that a person who committed additional violence in the course of a prior serious felony (e.g., shooting or pistol-whipping a victim during a robbery, or assaulting a victim during a burglary) should be treated more harshly than an individual who committed the same initial felony, but whose criminal conduct did not include such additional violence. The facts of the present case provide a classic illustration of the wisdom of that distinction: In stabbing his victim approximately 20 times, this defendant demonstrated that he posed a far greater threat to public safety than a defendant who has committed a residential burglary without committing such gratuitous violence.

(*Id.* at p. 35.)

In conclusion, while this Court maintained that an automatic dismissal of one of the two prior strikes would be contrary to the legislative and electoral intent, it recognized that the trial court retained discretion to dismiss one such prior in the interest of justice. (*Id.* at p. 36.) In doing so, this Court refrained from expressing an opinion as to the manner in which the lower court should exercise this discretion. (*Ibid.*) Instead, in a footnote, this Court made the following observation:

> Because the proper exercise of a trial court's discretion under section 1385 necessarily relates to the circumstances of a

> particular defendant's current and past criminal conduct, we need not and do not determine whether there are some circumstances in which two prior felony convictions are so closely connected - for example, when multiple convictions arise out of a single act by the defendant as distinguished from multiple acts committed in an indivisible course of conduct - that a trial court would abuse its discretion under section 1385 if it failed to strike one of the priors.

(*Id.* at p. 36, fn. 8.)[4]

In his dissenting opinion, Justice Chin disagreed with the majority's interpretation of the legislative and electoral intent and expressed the contrary view that a stay of sentence for one of the two prior convictions prohibited future use of that prior conviction for purposes of punishment under the Three Strikes law. (*Id.* at pp. 37-46 (dis. opn. of Chin, J.).) While Justice Chin agreed that by virtue of the prior convictions the defendant was a repeat offender, he proposed that he be punished pursuant to two strikes. (*Id.* at pp. 45-46 (dis. opn. of Chin, J.).)

Justice Chin explained:

> Multiple strikes may result from the same incident. Section 654 prohibits multiple punishment for "An act or omission that is punishable in different ways . . ."; it does not prohibit multiple punishment for all crimes committed on one

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[4] A few years later, this Court reiterated footnote 8 in *People v. Sanchez* (2001) 24 Cal.4th 83, 993, as it observed: "...[W]e believe it is appropriate and prudent to note that in this court's decision in *Benson*, we observed that a trial court may strike a prior felony conviction under section 1385, and that we left open the possibility that "there are some circumstances in which two prior felony convictions are so closely connected . . . that a trial court would abuse its discretion under section 1385 if it failed to strike one of the priors."

> occasion. Courts have permitted multiple punishment for multiple sex crimes against the same victim, for both a robbery and an assault of the same victim, for multiple shots fired at the same victim, and, most pertinent here, for both burglary and rape when the burglary was for the purpose of theft. (See *People v. Latimer* [1993] 5 Cal. 4th 1203, 1212, and cases there cited.) In each of these situations, under [*People v.*] *Fuhrman* [(1997) 16 Cal.4th 930], multiple strikes would be allowed. In this case, the prior burglary was for the purpose of the assault, not for a different purpose such as theft. There was no criminal intent separate from the assault itself and no "additional" violence. My proposed holding is narrow, limited to those convictions, like these, that section 654 controls. [P] ... A single act that may be punished only once may generate one strike, not two. Defendant was punished for his serious criminal behavior in 1979. He is properly being punished today as a recidivist. However, he has one strike against him, not two.

(*People v. Benson*, 18 Cal.4th at pp. 45-46 (dis. opn. of Chin, J.).)

Six years later, in *People v. Burgos*, *supra*, 117 Cal.App.4th at p. 1212, Division Two of the Second District was faced with a similar situation, where the trial court had refused to strike one of the two prior felony convictions for attempted robbery and attempted carjacking stemming from the same case. One issue on appeal was whether the two priors were brought and tried separately within the meaning of section 667, subdivision (a). (*Ibid.*) As the court held that they were not, it agreed that one of the five-year prior serious felony conviction enhancements under section 667, subdivision (a), had to be stricken. (*Ibid.*)

The defendant also claimed ineffective assistance by his counsel who did not request that the court exercise its discretion to strike of the

prior convictions which arose from a single act. (*Id.* at p. 1212.) The Court of Appeal opined that the trial court had considered the issue and decided against it despite the fact that his counsel had not raised it. (*Id.* at pp. 1212-1213.) Nevertheless, since the court remanded for resentencing under section 667, subdivision (a), it also directed the trial court to exercise its discretion to strike one of the prior convictions if deemed appropriate under *Benson*. (*People v. Burgos*, *supra*, 117 Cal.App.4th at p. 1213.)

On remand, the trial court once again declined to strike one of the priors, claiming it had already exercised its discretion and there was no basis for doing so again. (*Ibid.*) The defendant appealed again, and this time, the court held that while it had previously analyzed and rejected the issue in the context of ineffective assistance of counsel, it would now consider the issue in terms of whether the failure to strike of the priors constituted an abuse of discretion. (*Id.* at p. 1214.)

In a footnote, the court took judicial notice of the complaint, the information, and the transcript of the preliminary hearing in the case that produced the two prior convictions. (*Id.* at p. 1212, fn.3.) The court found, "These documents demonstrate that the attempted carjacking and attempted robbery convictions arose from a single criminal act, where appellant and two companions approached a man at a gas station and appellant demanded the victim's car while one of the companions told the victim that he had a

gun. Appellant and his companions were frightened off before they took the victim's car." (*Ibid.*)

Having determined that the two priors had arisen from a single act, citing *Benson*'s footnote 8, the court held that the case before it presented such circumstances justifying the dismissal of one of the priors based on a single act. (*Id.* at p. 1216.) It reasoned that the attempted carjacking and attempted robbery, which arose from a single act, were 'so closely connected,' that the failure to strike one of them "must be deemed an abuse of discretion." (*Ibid.*, quoting *People v. Benson*, *supra*, 18 Cal.4th at p. 36, n.8.)

The court concluded:

> In the case of these particular offenses, not only did the two prior convictions arise from the same act, but, unlike perhaps any other two crimes, there exists an express statutory preclusion on sentencing for both offenses. Section 215, subdivision (c) permits the prosecution to charge a defendant with both carjacking and robbery under section 211, but expressly states that "no defendant may be punished under this section and Section 211 for the same act which constitutes a violation of both this section and Section 211." While this provision does not refer to the use of the convictions as priors in a later prosecution such as the one before us, it reinforces our belief that infliction of punishment in this case based on both convictions constitutes an abuse of discretion.

(*People v. Burgos*, *supra*, 117 Cal.App.4th at p. 1216.)

The court's analysis, however, did not end there, as the court also noted the defendant's criminal history, which otherwise consisted primarily

of misdemeanor and drug offenses. (*Ibid.*) The court also pointed out that one of the priors was sufficient to cause the defendant to receive a lengthy sentence of up to 20 years, including the upper term for the robbery and a consecutive term for assault, both doubled under the Three Strikes law, with a great bodily injury enhancement and a serious felony enhancement under section 667, subdivision (a). (*Ibid.*)

In view of the nature of the prior offenses and the lengthy sentence, the court held that it was abuse of discretion to fail to strike one of the two convictions in "furtherance of justice." (*Id.* at pp. 1216-1217, citing *People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at p. 497.) As such, the court, once again, remanded for resentencing, directing the court to strike one of the priors and to resentence the defendant pursuant to the second strike only. (*People v. Burgos*, *supra*, 117 Cal.App.4th at p. 1217.)

Later, in *People v. Scott*, *supra*, 179 Cal.App.4th at p. 931, the trial court properly noted that the 1998 prior convictions for carjacking and robbery had in fact stemmed from a single act. It also noted that while this did not "*mandate*" that it strike one of these prior convictions, the single act was one such factor it could consider in exercising its discretion to do so. (*Id.* at pp. 930-931, citing *People v. Burgos*, *supra*, 117 Cal.App.4th at pp. 1216-1217, emphasis in original.) Still, the court declined to strike one of

the priors, finding that the defendant fell within the spirit of the Three Strikes law. (*People v. Scott, supra*, 179 Cal.App.4th at pp. 923-925.)

The Third District found no error. (*Id.* at p. 931.) The court recognized that the defendant "was entitled to [] consideration by the trial court of the closeness of the two strikes in determining whether, *in the exercise of discretion,* one should be stricken." (*Ibid.*, emphasis in original.) However, the court added, "[t]he trial court considered that factor, but, in the exercise of its discretion, did not find that his violent record justified treating those two strikes-albeit arising from the same act-as one." (*Ibid.*)

This violent record consisted of the 1998 convictions for carjacking and robbery, a juvenile history for robbery and assault with a deadly weapon, numerous adult convictions, including an in-prison stabbing, many sustained discipline cases in prison involving violence, and the current 2005 offense for assault with a deadly weapon and possession of a sharp instrument for stabbing another inmate. (*Id.* at pp. 923-924.)

C. Analysis

1. *Benson*

A trial court is not required to dismiss one of multiple prior convictions arising from the same case in every instance. Contrary to the Court of Appeal's apparent interpretation of appellant's position, appellant has never advocated or proposed such rule. *In this particular situation,*

however, the circumstances of appellant's prior case involving a single act and objective and no additional acts of violence were such that not dismissing one of the prior strikes was an abuse of discretion. No remand is necessary. This conclusion is consistent with both the majority and the dissenting opinion in *Benson*.

This Court has consistently held that the Legislature need not expressly reference section 654, in order to override its application. (*People v. Jones* (2012) 54 Cal.4th 350, 353; *People v. Palacios* (2007) 41 Cal.4th 720, 730.) For this reason, *Benson* held that stay of sentence for one of two prior convictions did not prevent a court from imposing a life sentence pursuant to the two prior strikes. (*People v. Benson*, *supra*, 18 Cal.4th at pp. 31-32.)

Here, in the earlier action, appellant served concurrent sentences for the carjacking and robbery, even though the two convictions arose from the same act. (1 C.T. p. 13.) Therefore, appellant is not necessarily claiming that one of her prior strikes should be dismissed because her sentence for one of the multiple convictions was previously stayed. That was not the case.

Still, *Benson* did consider the "leniency" the defendant had previously received as a result of the stay of his sentence for one of the prior convictions, as a factor in not extending said leniency once the

defendant had reoffended. (*Id.* at pp. 34-35.) In that sense, appellant deserves leniency, because she previously served concurrent sentences for a single act. Concurrent sentences, while served simultaneously, are not the same as a stayed sentence under section 654. (*People v. Jones, supra*, 54 Cal.4th at p. 353; *People v. Miller* (1977) 18 Cal.3d 873, 887.) The trial court's finding to the contrary was incorrect. (1 R.T. p. 6.)

Regardless, the undisputed fact that appellant's prior convictions arose from the same act of taking the victim's car by force, *as the Court of Appeal found*, made her less of a public safety risk than the defendant did in *Benson*. This Court in *Benson* emphasized the circumstances of the prior case, where the defendant entered the victim's home for a second time while armed, then struggled with the victim, forced her to the floor and stabbed her approximately 20 times, as compared to a residential burglary that could have been committed without "such gratuitous violence." (*People v. Benson, supra*, 18 Cal.4th at p. 35.)

Here, the evidence showed a single act and objective to steal the victim's car. Even though the carjacking was accomplished by force or at the very least the threat of force that involved appellant's companion placing a knife to the victim's neck and appellant claiming to have a gun, neither appellant nor her companion engaged in any "gratuitous violence" once they took the car. (*Ibid.*) They did not strike or stab the victim. They

did not threaten his life. They did not steal any other personal property. There was also no evidence that appellant herself was armed.

The carjacking and robbery were not only "closely connected," but they were the result of the single act of taking the victim's car by force. (*People v. Benson*, *supra*, 18 Cal.4th at p. 36, fn. 8.) This is what appellant believes this Court contemplated as a limited circumstance, where not dismissing one of the two prior strikes would be an abuse of discretion. (*Ibid.*; see also *People v. Sanchez*, *supra*, 24 Cal.4th at p. 993.)

The majority in *Benson* referenced the analysis for the assembly bill behind the Three Strikes law, which stated that two prior convictions could still qualify as separate strikes, where the offenses had been committed, for instance, against different victims or been a part of the same case. (*People v. Benson*, *supra*, 18 Cal.4th at pp. 33-34, citing Analysis of Assem. Bill No. 971 (1993-1994 Reg. Sess.) as amended Jan. 26, 1994, pp. 9-10.) Justice Chin agreed that where multiple victims or gratuitous acts of violence were involved, "multiple strikes would be allowed." (*People v. Benson*, *supra*, 18 Cal.4th at pp. 45-46 (dis. opn. of Chin, J.).)

Here, none of these circumstances described by the majority or the dissent were present in the carjacking case. There were not multiple victims. There were no additional acts of violence or multiple intents or acts. More importantly, as the court in *Burgos* notably observed, section

215, subdivision (c) prohibited punishment for both carjacking and robbery. (*People v. Burgos*, *supra*, 117 Cal.App.4th at p. 1216.) The court did not mention this for purposes of a section 654 analysis, but to point out that the nature of the two offenses was such that punishing a defendant pursuant to both strikes would constitute an abuse of discretion." (*Ibid.*)

In *People v. Scott*, *supra*, 179 Cal.App.4th at p. 924, the carjacking and robbery involved more than the act of taking the car, since, inside the vehicle, there were 'numerous items belonging to the victim, including clothing.' That was not the case here, as the victim's testimony in the prior case clearly established that the only property stolen was his car. (1 C.T. p. 18.) In other words, there was no evidence that appellant and her companion were looking to steal other property belonging to the victim, but, instead, took his car.

Furthermore, in *People v. Scott*, *supra*, 179 Cal.App.4th at pp. 928-929, in deciding whether the two offenses of carjacking and robbery were two strikes, the court seemingly reasoned that, unlike robbery where the intent was to *permanently* deprive the owner of his personal property, carjacking could be accomplished by *temporarily* depriving the owner of the possession of the car for joyriding. (See e.g., *In re Travis W.* (2003) 107 Cal.App.4th 368, 373; §§ 211, 215.) Whether this distinction is important is immaterial here, because there was no evidence that appellant and her male

companion were attempting to simply take the car for joyriding. (1 C.T. p. 18.)

Finally, it is important to note a crucial fact regarding the trial court's ruling. The Court of Appeal deemed the single act an "important" one to keep in mind when deciding whether one of the two prior strikes should be dismissed. (*People v. Vargas*, *supra*, 206 Cal.App.4th at p. 984.) Appellant maintains that under *Benson*, this should be the sole factor in dismissing one of her two prior convictions. (*People v. Benson*, *supra*, 18 Cal.4th at p. 36, fn. 8; see also *People v. Sanchez*, *supra*, 24 Cal.4th at p. 993.)

Even if this Court agrees with the appellate court's interpretation of *Benson* in that regard, here, the trial court did not appear to have even considered this as a factor at all, as it commented that, under *Benson*, "the central focus [was] not on the single act single victim, same time same intent," but "the defendant's status as a repeat felon." (1 R.T. p. 6.) The court then proceeded to discuss the circumstances of the prior case and her criminal history. (1 R.T. pp. 6-7.)

A failure to exercise discretion has been deemed "an abuse of discretion," warranting automatic reversal and remand. (See, e.g., *People v. Crandell* (1988) 46 Cal.3d 833, 861; see also *People v. Benn* (1972) 7 Cal.3d 530, 535.) This is the reason this Court in *Benson*, remanded the

case to the trial court to properly exercise its discretion under section 1385. (*People v. Benson*, *supra*, 18 Cal.4th at pp. 28, 36-37.) The same should be ordered here if this Court decides to remand for resentencing.

2. *Romero*

Should this Court disagree that the failure to dismiss one of the prior strikes was an abuse of discretion based on the single act factor, appellant submits that the trial court's decision was still error. The individualized considerations articulated in *Romero* compel the conclusion that appellant should be punished for one prior strike, not two.

At the outset, the Court of Appeal agreed with the trial court that appellant had been "very active" during the carjacking. (*People v. Vargas*, *supra*, 206 Cal.App.4th at p. 986.) Past offenses, alone, however, do not justify imposing an enhanced sentence for the current offense, because this amounts to punishment for prior, rather than current offenses. (*People v. Carmony* (2005) 127 Cal.App.4th 1066, 1080; see *Duran v. Castro* (2002) 277 F.Supp.2d 1121, 1130.)

With respect to appellant's criminal history, as the Court of Appeal noted, appellant's prison records reflected two parole violations and a 2007 misdemeanor trespass conviction. (*People v. Vargas*, *supra*, 206 Cal.App.4th at p. 986.) Although the prosecution also mentioned a juvenile robbery reduced to receiving stolen property, the probation report did not

show any such arrest or adjudication. (*Id.* at p. 986, fn. 6.) There was also a narcotics conviction that the prosecutor conceded did not belong to appellant. (1 R.T. p. 5.)

The Court of Appeal found any error in considering the unproven juvenile robbery to be harmless. (*People v. Vargas*, *supra*, 206 Cal.App.4th at p. 986, fn. 6.) However, an abuse of discretion occurs where the sentencing court considered impermissible factors. (*People v. Scott*, *supra*, 179 Cal.App.4th at p. 926.) The Court of Appeal also opined that the trial court did not consider the falsely noted prior. (*People v. Vargas*, *supra*, 206 Cal.App.4th at 986, fn. 6.) To the extent that the trial court may have, however, this made the court's decision improper and arbitrary. (*People v. Scott*, *supra*, 179 Cal.App.4th at p. 926.)

A defendant has the Fifth, Sixth and Fourteenth Amendment right to a jury determination of every fact supporting an enhanced sentence. (U.S. Const., amends. V, VI, IVX; *Cunningham v. California* (2007) 549 U.S. 270, 288-289 [127 S.Ct. 856, 166 L.Ed.2d 856]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].) Therefore, by relying on any erroneously listed arrest and/or conviction, the trial court also violated appellant's federal due process rights. (*Ibid.*)

Based on an individualized consideration of all relevant factors, including appellant's current offenses and criminal past, appellant fell

outside the spirit of the Three Strikes law. Apart from her 1999 convictions which involved a single act of carjacking and where she herself was not armed, appellant had a minimal criminal history that included a misdemeanor trespass. There was also no indication that her two parole violations were for serious or violent offenses.

The purpose of the Three Strikes law is to ensure public safety. (Ballot Pamp., Gen. Elec. (Nov. 6, 2012) text of Prop. 36, § 7, p. 110.) It is to "... to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time." (*Rummel v. Estelle* (1980) 445 U.S. 263, 284-285 [100 S.Ct. 1133, 63 L.Ed.2d 382].) This objective can be accomplished here without punishing appellant with an indeterminate life sentence.

Even with one prior strike, appellant's maximum exposure would involve a lengthy sentence of 13 to 17 years, including the mid-term of 4 years or high term of 6 years on the burglary count (§§ 460, 461), doubled pursuant to the Three Strikes law (§ 667, subd. (e)(1), 1170.12 , subd (c)(1), plus the already-imposed 5-year enhancement (§ 667, subd. (a)(1). In light of all the aforementioned factors, the interest of justice requires that one of the prior convictions be dismissed. (§ 1385; *People v. Burgos*, *supra*, 117

Cal.App.4th at p. 1217; *People v. Romero*, *supra*, 13 Cal.4th at p. 497; *Christian v. Rhode*, *supra*, 41 F.3d at p. 469.)

In *People v. Scott*, *supra*, 174 Cal.App.4th at pp. 923-924, the court referred to the defendant's "violent" record, which involved numerous convictions for assault, robbery and stabbing, as well as prison disciplinary actions. In contrast, appellant's past and present offenses do not reveal any acts of violence, and even in the prior strike case, appellant was not armed.

With respect to the current case, appellant and her companion entered the first residence and attempted to enter the second one at a time when the homes were unoccupied. (1 C.T. pp. 4-5.) Based on the record, there was every indication that the sole intent was to take the property, without causing harm to any person.

Appellant acknowledges her two parole violations and the misdemeanor trespass conviction in the past decade. However, similar to her current convictions, none of these demonstrated any propensity toward violence or a person who was dangerous, thus, deserving of isolation from society for 30 years to life. (*Rummel v. Estelle*, *supra*, 445 U.S. at pp. 284-285.)

Appellant's sentence included the determinate term of 30 years, which must be served first, without any credit to be applied toward eligibility for parole. (§§ 669, 3046.) Appellant's post-sentence worktime

custody credits are also limited to 20 percent. (§ 1170.12, subd. (a)(5).) As such, appellant will not become eligible for parole for at least 24 years since she was sentenced.

In sum, appellant served concurrent sentences for the single act of taking a car by force. Ten years later, she was punished twice for that single act. This alone was an abuse of discretion under *Benson*. Appellant's criminal record does reveal that she is a repeat offender and she should be punished accordingly. However, her punishment should be limited to that which is prescribed for one prior strike, not two. (*People v. Benson*, *supra*, 18 Cal.4th at pp. 45-46, (dis. opn. of Chin, J.).)

CONCLUSION

For the foregoing reasons, appellant urges this Court to find that the failure to dismiss one of appellant's prior strikes was error, to issue an order directing the trial court to dismiss one such prior and to remand for resentencing.

Dated: December 3, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.520(c)(1) of the California Rules of Court, I, Melanie K. Dorian, appointed counsel for Darlene A. Vargas, hereby certify that I prepared the foregoing Opening Brief on the Merits on behalf of my client, and that the word count for this brief is 8,809, excluding the tables and cover.

This brief therefore complies with the rule which limits a computer-generated brief to 14,000 words. I certify that I prepared this document in Word, and that this is the word count Word generated for this document.

Melanie K. Dorian
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DARLENE A. VARGAS

PROOF OF SERVICE

Re: People v. Darlene A. Vargas
No. S203744

I, Melanie K. Dorian, declare that I am over 18 years old; my business address is P.O. Box 5006, Glendale, California 91221-5006.

On December 3, 2012, I served a true copy of APPELLANT'S OPENING BRIEF ON THE MERITS, by first class mail, on the following parties:

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Hon. Bruce F. Marrs, Judge

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

Executed on December 3, 2012, at Glendale, California.

MELANIE K. DORIAN