In the Supreme Court of the State of California

In re **OSCAR MANUEL VAQUERA,** On Habeas Corpus.	Case No. S258376

Fourth Appellate District Division Three, Case No. G056786
Orange County Superior Court, Case No. 12NF0653
The Honorable David A. Hoffer, Judge

ANSWER BRIEF ON THE MERITS

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ISSUES PRESENTED

1. Whether the Court of Appeal erred by disagreeing with *People v. Jimenez* (2019) 35 Cal.App.5th 373, and endorsed as mandatory the very sentencing practice prohibited in *Jimenez*;
2. 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;
3. Whether the Court of Appeal erred in its failure to address Vaquera's claims below on the issues of waiver and estoppel?

INTRODUCTION

Petitioner Vaquera was convicted of, inter alia, two sex offenses falling within the scope of the One Strike law (Pen. Code, § 667.61; counts 1 and 2).[1] The trial court sentenced Vaquera to 15 years to life in prison on count 1, pursuant to subdivision (b), and 25 years to life in prison on count 2, pursuant to subdivision (j)(2).[2] The court imposed the sentences concurrently, even though Vaquera had committed the offenses on separate occasions.

Vaquera now seeks collateral relief from the sentence of 25 years to life in prison on count 2. He argues that language in the accusatory pleading, which referred to subdivision (b) but not to subdivision (j)(2), led him to believe that he faced a sentence of no more than 15 years to life in prison per count. And he suggests that the prosecution's original sentencing memorandum, which recommended an aggregate term of 30

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

[2] Citations to subdivisions are to those in section 667.61 unless otherwise indicated.

years to life in prison, corroborated his misunderstanding by similarly describing his sentencing exposure as 15 years to life per count.

Vaquera is not entitled to collateral relief. The totality of the allegations contained in the accusatory pleading satisfied his constitutional right to notice of the charges. The accusatory pleading also included the additional allegations required under state statutory law, particularly those required under the One Strike law. (See § 667.61, subd. (*o*).) To the extent that there was a defect in the accusatory pleading, Vaquera fails to show that "he was actually misled to his prejudice." (*People v. Thomas* (1987) 43 Cal.3d 818, 830.)

Moreover, neither the accusatory pleading nor the original sentencing memorandum suggested a prosecutorial election to forego a sentence of 25 years to life on count 2 pursuant to subdivision (j)(2). Once the People properly plead and prove the existence of an aggravating circumstances under the One Strike law, imposition of the maximum available sentence is mandatory. The People are without discretion to elect a particular sentence under the statute. Thus, when pleading and proof requirements are met, the doctrines of waiver and estoppel do not obviate the need for the defendant to show that he was misled to his prejudice.

BACKGROUND ON AMENDMENTS TO PENAL CODE SECTION 667.61

Vaquera's claim centers on certain amendments that the Legislature made to section 667.61 as part of the Chelsea King Child Predator Prevention Act of 2010 (Chelsea's Law) (Stats. 2010, ch. 219, § 16).

As originally enacted in 1994, section 667.61 mandated prison terms of either 25 years to life, under subdivision (a), or 15 years to life, under subdivision (b), for the commission of sex offenses listed in subdivision (c), under one or more aggravating circumstances described in subdivisions (d) or (e). (See *People v. Wutzke* (2002) 28 Cal.4th 923, 929–930.) But the

mandatory terms applied "only if the existence of any circumstance specified in subdivision (d) or (e) is alleged in the accusatory pleading pursuant to this section . . . ." (§ 667.61, former subd. (i), now subd. (*o*).)

In *People v. Mancebo* (2002) 27 Cal.4th 735, this Court held that a trial court may not sentence a defendant to a term under the One Strike law based on an aggravating circumstance that was not identified as such in the accusatory pleading. But this Court observed that a prosecutor could satisfy the statute's pleading requirement—along with the defendant's due process right to notice—by simply including in the accusatory pleading a "description of the qualifying circumstance (e.g., kidnapping, tying or binding, gun use) in conjunction with a reference to section 667.61 . . . ." (*Id*. at p. 754.) Notably, this Court did not suggest that a prosecutor was also obliged to specify whether the aggravating circumstances would trigger a sentence of 25 years to life in prison under subdivision (a), as opposed to 15 years to life in prison under subdivision (b).

Chelsea's Law subsequently amended section 667.61 to mandate even greater sentences in subdivisions (j), (*l*), and (m) for violations of the One Strike law involving juvenile victims. Indeed, the pre-existing sentencing provisions in subdivisions (a) and (b) now apply "[e]xcept as provided in subdivision (j), (*l*), or (m)." (§ 667.61, subd. (a); see *id*. at subd. (b).) For example, an offense that would otherwise carry a term of 15 years to life under subdivision (b) is now punishable by a mandatory term of 25 years to life under subdivision (j) if the offense is committed "upon a victim who is a child under 14 years of age." (§ 667.61, subd. (j)(2).) And an offense that would otherwise carry a term of 25 years to life under subdivision (a) is now punishable by a mandatory term of life in prison without the possibility of parole under subdivision (j) if the offense is committed by an adult upon a child under 14 years of age. (§ 667.61, subd. (j)(1).) The same is generally true under subdivisions (*l*) and (m) for a narrower range

of forcible offenses listed in subdivision (n) committed against "a victim who is a minor 14 years of age or older." (§ 667.61, subds. (*l*), (m).)

Chelsea's Law also moved the pleading requirement in section 667.61 from former subdivision (i) to current subdivision (*o*). But it did not amend the pleading requirement to include the new age-based sentencing provisions in subdivisions (j), (*l*), and (m). The statute still provides that "[t]he penalties provided in this section shall apply only if the existence of any circumstance specified in subdivision *(d) or (e)* is alleged in the accusatory pleading pursuant to this section . . . ." (§ 667.61, subd. (*o*), italics added.)

STATEMENT OF THE CASE

A. Vaquera Possesses Child Pornography and Commits Lewd Acts Against Two Boys Under 14 Years of Age

As part of a child pornography investigation, officers searched Vaquera's bedroom and found a laptop computer that contained videos and images of young boys engaged in sex acts. (1RT 154–155, 175–176.)[3] Vaquera admitted that he accessed child pornography on the internet and that he took pictures and videos of naked boys. (3CT 545, 593, 613, 677–680, 722–724; 1RT 200.) He further admitted molesting his godsons, who also lived in the apartment, and their cousin. (1RT 123–124, 126–127, 209.) Police interviewed the boys who described multiple incidents of sexual abuse that occurred when they were about 11 years old. (1RT 135, 141, 157; 2RT 256–257, 295–296; 3CT 710–715.)

[3] The facts and transcript citations are taken from the record of appellant's direct appeal, case number G050801. Respondent has filed a separate motion for judicial notice of that record.

B. Vaquera Is Charged with Committing One Strike Offenses That Occurred Both Before and After Chelsea's Law

In 2012, the Orange County District Attorney's Office filed an information charging Vaquera with five counts: committing a lewd and lascivious act upon "John Doe #1, a child under the age of fourteen (14) years," between October 18, 2007, and October 17, 2008 (§ 288, subd. (a); count 1); committing a lewd and lascivious act upon "John Doe #2, a child under the age of fourteen (14) years," between May 1, 2011, and March 1, 2012 (§ 288, subd. (a); count 2); and three counts of possessing child pornography (§§ 311.1, subd. (a), 311.11, subd. (a); counts 3, 4, 5). (Petition for Writ of Habeas Corpus, filed September 11, 2018 [G056786] ("CoA Petn."), Exh. 3 at pp. 37–38; 1CT 217–218.) Under the special allegations heading, the information alleged that counts 1 and 2 were One Strike offenses as follows:

> 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, defendant Oscar Manuel Vaquera committed an offense specified in Penal Code section 667.61(c) against more than one victim.
>
> 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, defendant Oscar Manuel Vaquera committed an offense specified in Penal Code section 667.61(c) against more than one victim.

(CoA Petn., Exh. 3 at pp. 38–39; 1CT 218–219.)[4] The information did not expressly reference section 667.61, subdivision (j), and it did not specify the length of any prison term sought by the People.

[4] Section 667.61, subdivision (e)(5), was renumbered as subdivision (e)(4) as part of Chelsea's Law. (Stats. 2010, ch. 219, § 16.)

C. Vaquera Is Convicted of Two One Strike Offenses and Sentenced to 25 Years to Life in Prison

At trial, the court instructed the jury that if it found Vaquera guilty of "two or more sex offenses, as charged in counts one and two, you must then decide whether the People have proved the additional allegation that those crimes were committed against more than one victim." (2CT 331.) The jury convicted Vaquera on all counts and found the allegations true. (1CT 217–219; 2CT 344–350; 2RT 439–443.) The verdicts show that it found Vaquera guilty "of the crime of lewd act upon a child under 14 years (violation of Penal Code section 288(a))" as charged in counts 1 and 2, and found it "to be TRUE . . . that the defendant committed the charged offense against multiple victims, a special allegation to Count 2 of the Information, to wit: Violation of section 667.61(b)/(e)(4) of the Penal Code . . . ." (2CT 347.)

The Orange County Probation Department later interviewed Vaquera and filed a probation and sentencing report with the trial court. (2CT 376–396.) During that interview, Vaquera said that he "understood he was looking at a very long sentence, and his attorney said he could serve 25 years to life." (2CT 386.)

A few weeks later, in anticipation of sentencing, the People filed a sentencing brief seeking an aggregate sentence of 30 years to life in prison, consisting of consecutive terms of 15 years to life for counts 1 and 2. (2CT 356–357.) The brief specified the "multiple victim 'One Strike' enhancement under Penal Code section 667.61(b)/(e)(4) and (5)" as the source for the 15 year-to-life terms on each count. (*Id.* at p. 364.)

Prior to the rescheduled sentencing hearing, the People filed a new sentencing brief asking for imposition of "at least 40 years to life." (2CT 364–365, capitalization omitted; CoA Petn., Exh. 4 at p. 58.) The People explained that, as relevant here, Chelsea's Law increased punishment for a

One Strike multiple-victim enhancement if the victim was under 14 years old, from 15 years to life to 25 years to life. Because the crime underlying count 2 occurred after Chelsea's Law took effect, Vaquera was subject to the increased punishment on that count. (2CT 363–365.) The People still sought 15 years to life on count 1 because that crime occurred prior to the 2010 amendment. (*Id.* at p. 365.) The brief did not explain the reasoning behind the People's change of position.

The court sentenced Vaquera to an aggregate term of 25 years to life in prison. (2CT 512–515; 2RT 452, 462–463.) Over defense counsel's objection on ex post facto and notice grounds, the court imposed 25 years to life on count 2, pursuant to subdivision (j)(2). (2CT 514; 2RT 451–452, 461.) As to count 1, the court imposed a concurrent term of 15 years to life in prison, pursuant to the pre-2010 version of section 667.61. (2CT 514; 2RT 465.) As to counts 3 and 4, the court imposed concurrent middle terms of two years in prison. (2CT 512; 2RT 466.) The court stayed the sentence on count 5 pursuant to section 654. (*Ibid.*)

D. Following an Unsuccessful Appeal, Vaquera Challenges His Sentence on Collateral Review

Vaquera appealed, asserting that the trial court erred in denying his motion to suppress the statements he made to police. The Fourth District Court of Appeal, Division Three, affirmed the judgment; and this Court denied review. (*People v. Vaquera* (October 5, 2016, G050801) [nonpub. opn.]; CoA Petn. at p. 4 [case number S238348].)

The following year, the California Department of Corrections and Rehabilitation (CDCR) sent a letter to the trial court stating that the abstract of judgment appeared to be incorrect. The CDCR questioned why the court sentenced Vaquera differently on counts 1 and 2, even though both convictions were for violating section 288, subdivision (a). (CoA Petn., Exh. 4 at p. 59.)

The court held a hearing to address the CDCR's concern that the 25-year-to-life sentence on count 2 was an error. (CoA Petn., Exh. 10.) During the hearing, defense counsel reiterated his earlier argument that the 25-year-to-life sentence on count 2 was improper because the information referred to subdivision (b), and not to subdivision (j). (CoA Petn., Exh. 10 at pp. 10, 21.) As a result, counsel argued, Vaquera was on notice only that he could receive a 15-year-to-life sentence on count 2.

The court denied the defense request to reduce the sentence on count 2, concluding that the particular sentence provision does not need to be specifically alleged in the information "as long as the pleading apprises the defendant of the potential for an enhanced penalty and alleges every fact and circumstance necessary to establish its applicability." (CoA Petn., Exh. 10 at pp. 8, 22.) It found that the People apprised Vaquera of the applicable sentence by referencing section 667.61, subdivision (b), which contains an express exception for circumstances set forth in subdivision (j). Accordingly, the information appropriately provided Vaquera notice that he faced the greater sentence. (CoA Petn., Exh. 10 at pp. 22–24.)

In September 2018, Vaquera filed a new petition for writ of habeas corpus in the Court of Appeal, claiming that his due process and notice rights were violated because he was sentenced pursuant to subdivision (j), but that this subdivision was not alleged in the information. (CoA Petn. at pp. 16–28.) On November 8, 2018, the Court of Appeal summarily denied his petition.

In January 2019, this Court granted Vaquera's petition for review and transferred the matter back to the Court of Appeal. (S252593.) The Court of Appeal then issued an order for respondent to show cause why Vaquera is not entitled to relief.

E. During the Pendency of Collateral Review, the Sixth Appellate District Holds That Minimal Compliance with Statutory Pleading and Proof Requirements Is Insufficient by Itself to Satisfy a Defendant's Due Process Right to Notice

While the present case was pending, the Sixth Appellate District decided *People v. Jimenez* (2019) 35 Cal.App.5th 373, which addressed the same issue on similar facts. In *Jimenez*, a jury found the defendant guilty on 15 counts of sexually molesting three victims over a two-year period, and it found true allegations that he had committed the offenses against multiple victims. Pursuant to section 667.61, subdivision (j), the court sentenced him to multiple terms of 25 years to life. (*Jimenez*, at p. 378.) The information cited section 667.61, subdivisions (b) and (e), but not subdivision (j). (*Jimenez*, at p. 393.) Even though the pleading complied with the requirements of subdivision (*o*), the appellate court concluded the defendant's due process rights were violated because he was sentenced under an "uncharged sentencing enhancement." (*Jimenez*, at p. 394.)

F. The Court of Appeal Disagrees with the Sixth Appellate District and Holds That Vaquera Had Adequate Notice of the Applicable Sentence

In a unanimous published decision, the Court of Appeal denied Vaquera relief after concluding there was no due process violation. (*In re Vaquera* (2019) 39 Cal.App.5th 233.) The court held that the information complied with the pleading and proof requirements outlined in the One Strike law, as interpreted by this Court in *Mancebo*, *supra*, 27 Cal.4th 735, because it notified Vaquera he would be subject to a One Strike sentence by virtue of the qualifying crimes alleged under subdivision (c) and the multiple-victim aggravating circumstances alleged under subdivision (e). (*Vaquera*, at pp. 240–241, 243.) Those same facts—that he committed two lewd and lascivious acts against John Does 1 and 2, who were both under

the age of 14—also put Vaquera on notice that he would be subject to a 25-year-to-life sentence on count 2. The information's reference to subdivision (b) also provided notice of the 25-year-to-life exception under subdivision (j), because that subdivision is specifically referenced in the introductory clause of subdivision (b). (*Vaquera*, at p. 242.)

The court acknowledged its holding departed from that of *Jimenez*, *supra*, 35 Cal.App.5th 373, and rejected the reasoning of that decision for two reasons: (1) *Jimenez* failed to consider that subdivision (j) "is specifically provided for within section 667.61, subdivision (b);" and (2) *Jimenez* failed to recognize that its facts were distinguishable from those in *Mancebo* because the information in *Jimenez* referenced the multiple victim sentencing allegation. (*Vaquera*, 39 Cal.App.5th at p. 244.) Finally, the court concluded that any possible error was harmless because the trial court was required to impose the 25-year-to-life sentence and the People could not have elected a lesser sentence. (*Id.* at pp. 244–245.)

ARGUMENT

I. THE INFORMATION SATISFIED CONSTITUTIONAL AND STATUTORY PLEADING REQUIREMENTS GIVING RISE TO AN ENHANCED SENTENCE UNDER THE ONE STRIKE LAW

The information's reference in count 2 to section 667.61 and the specific circumstance in subdivision (e) calling for increased punishment under that statute satisfied Vaquera's constitutional right to due process by putting him on notice that the People sought enhanced punishment for his crime under the One Strike law. It also complied with the more onerous pleading requirements found in the One Strike law. Because the information met statutory pleading requirements, the Court of Appeal properly distinguished the facts of this case from *Mancebo*, which involved imposition of an enhanced sentenced based on an unpled aggravating circumstance.

Mancebo held that due process requires compliance with the pleading and proof requirements of section 667.61 in order to invoke enhanced sentencing under that statute. This Court should reject Vaquera's attempt to expand that holding to require that a defendant also be afforded notice of the precise punishment he faces. *Mancebo* did not suggest that due process or the language of section 667.61 requires specification of potential penalty. Even so, reference to section 667.61, subdivision (b), here, which in turn references subdivision (j), provided Vaquera notice of the penalties he faced.

Appellate decisions applying *Mancebo* provide further support for the conclusion that a defendant's due process rights are met when an information provides notice as required by the One Strike law prior to imposition of an enhanced sentence under that statute. In *Jimenez*, *supra*, 35 Cal.App.5th 373, the court held otherwise, but in reaching its decision it failed to recognize the distinction between *Mancebo* and cases where pleading and proof requirements are met. The Court of Appeal appropriately rejected *Jimenez*.

A. An Information Complies with Due Process by Giving the Defendant a Reasonable Opportunity to Defend Against and Object to the Circumstances Triggering an Enhanced Sentence

"Both the Sixth Amendment of the federal Constitution and the due process guarantees of the state and federal Constitutions require that a criminal defendant receive notice of the charges adequate to give a meaningful opportunity to defend against them." (*People v. Seaton* (2001) 26 Cal.4th 598, 640; U.S. Const., 5th, 6th, & 14th Amends.) This notice requirement extends to "allegations that will be invoked to increase the punishment for his or her crimes." (*People v. Houston* (2012) 54 Cal.4th 1186, 1227; see *Gardner v. Florida* (1977) 430 U.S. 349, 358 (plur. opn. of

Stevens, J.) ["the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause"].)

"Under modern pleading procedures, notice of the particular circumstances of an alleged crime is provided by the evidence presented to the committing magistrate at the preliminary examination, not by a factually detailed information." (*People v. Jennings* (1991) 53 Cal.3d 334, 358.) The information has only "a 'limited role' of informing defendant of the kinds and number of offenses[;] 'the time, place, and circumstances of charged offenses are left to the preliminary hearing transcript,' which represents 'the touchstone of due process notice to a defendant.'" (*People v. Jones* (1990) 51 Cal.3d 294, 312.)

Constitutional principles of due process are satisfied when the information apprises the defendant of the potential for an enhanced penalty and alleges all facts necessary to establish its applicability. (*Thomas*, *supra*, 43 Cal.3d at p. 826; see *Burns v. United States* (1991) 501 U.S. 129, 138 [noting that a failure to give a defendant advance notice of facts that would result in a higher sentence might raise serious due process concerns and requiring "reasonable notice" to a defendant of the specific grounds upon which the court is contemplating the upward departure].) This requirement provides the defendant a reasonable opportunity to prepare and present a defense and ensures he is not taken by surprise by the evidence offered at trial. (*Thomas*, at p. 823; *Mancebo*, *supra*, 27 Cal.4th at p. 747 ["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"].) Codifying these principles, California law requires that enhancements be alleged in the accusatory pleading and either admitted by the defendant or found true by a trier of fact. (§ 1170.1, subd. (e).)

Due process does not require that an information specify the applicable penalty or even the correct provision under which an accused is being charged. (*Thomas*, *supra*, 43 Cal.3d at p. 826.) For example, in *Thomas*, this Court addressed whether the defendant was improperly convicted of involuntary manslaughter after being charged specifically with only voluntary manslaughter. (*Id.* at p. 824.) This Court held that the language of the pleading, charging him with voluntary manslaughter and alleging that he "willfully, unlawfully, and with/o[ut] malice aforethought" killed his victim," "adequately notified defendant he faced a general charge of manslaughter and he should have been prepared to defend against proof showing commission of either a voluntary or involuntary manslaughter." (*Id.* at pp. 827–828.) In resolving that dispute, *Thomas* looked to constitutional and statutory pleading requirements, and noted that due process does not require pleadings to specify the number of the statute being charged. (*Id.* at pp. 826, 831.)

Under California law, "a valid accusatory pleading need not specify by number the statute under which the accused is being charged," and is "'sufficient if it contains[,] in substance, a statement that the accused has committed some public offense therein specified' and if it can be understood '[t]hat the offense charged therein is triable in the court in which it is filed'. [citations]" (*People v. Carrington* (2009) 47 Cal.4th 145, 182, quoting §§ 952, 959; see *People v. Neal* (1984) 159 Cal.App.3d 69, 73–74, cited with approval in *Thomas*, *supra*, 43 Cal.3d at pp. 830–831 [modification of judgment was not required to reduce sentence where the information put the defendant on notice that a sentence enhancement would be sought under section 12022, subdivision (b), and notified him of the facts supporting the enhancement, even though the information did not specify the length of the term ultimately imposed under section 12022.3]; see also *People v. Ortega* (1998) 19 Cal.4th 686, 696 [when charging a

crime divided into degrees, e.g., robbery or burglary, which carry increasing penalties, it is not necessary to allege the particular degree or the facts establishing the degree].) As the Legislature has made clear by passing section 948, nothing more is required. (§ 948 ["All the forms of pleading in criminal actions, and the rules by which the sufficiency of pleadings is to be determined, are those prescribed by [the Penal] Code."].)

Support for the rule that pleadings need not contain a statement of penalty is found in this Court's opinion in *People v. Valladoli* (1996) 13 Cal.4th 590. In *Valladoli*, this Court held that section 969a permits post-verdict but pre-sentencing amendment of an information to charge previously known prior-felony-conviction allegations and that this practice comports with due process. (*Valladoli*, at pp. 605–607; see also *People v. Tindall* (2000) 24 Cal.4th 767, 782 [post-verdict amendment permissible after a jury has been discharged so long as defendant has forfeited or waived right to have same jury that decided issue of guilt also decide truth of alleged prior convictions]; see also § 969 [in charging a previous conviction of a felony, a pleading is sufficient if it states the court where the conviction was had and the crime].) Because post-verdict amendment is permissible, holding that a defendant has a due process right to be advised of the specific sentencing term sought by the People would be irreconcilable with *Valladoli*.

An exception to this rule is that a defendant in a capital case must have adequate notice that he could receive a death judgment. However, consistent with general due process principles, that rule is rooted in a defendant's due process right to defend against *facts* to be used against him. (*Lankford v. Idaho* (1991) 500 U.S. 110, 126.) For example, in *Lankford* the prosecution notified the court and defendant through a pre-sentencing order that it was not seeking the death penalty. Relying on that representation at the sentencing hearing, defense counsel argued the merits

of different prison terms and did not address or argue against aggravating circumstances that could support a death judgment. Nevertheless, the trial court, *sua sponte*, decided to sentence the defendant to death. (*Id.* at p. 122.) The United States Supreme Court reversed the death judgment because the defendant was taken by surprise and was deprived of an opportunity to defend against relevant facts supporting the death judgment. (*Ibid.*)

B. The One Strike Law Includes Unique Pleading Requirements Beyond Those Otherwise Required Under California Law

Section 667.61 includes additional pleading and proof requirements. Subdivision (*o*), states, "The penalties provided in this section shall only apply if the existence of any circumstances specified in subdivision (d) or (e) is alleged in the accusatory pleading pursuant to this section, and is either admitted by the defendant in open court or found to be true by the trier of fact." (§ 667.61, subd. (*o*).) Another provision, subdivision (f), reiterates that the circumstances must be "pled and proved." (See *Mancebo*, *supra*, 27 Cal.4th at pp. 744–745.) Thus, a charging document sufficiently notifies a defendant of enhanced sentencing under the One Strike statute by referencing the "circumstances" that will justify the increased punishment in conjunction with reference to section 667.61. (*Id.* at pp. 749, 753–754.)

In *Mancebo*, *supra*, 27 Cal.4th 735, this Court interpreted the One Strike law pleading and proof requirements strictly. (*Id.* at p. 753.) In that case, the jury convicted the defendant of various sex offenses against multiple victims, found that he personally used a firearm under section 12022.5, and found true a firearm enhancement allegation under section 667.61. (*Mancebo*, at pp. 739–740.) Realizing the firearm finding could support only a single enhancement, the prosecutor sought at sentencing to

dismiss the gun-use allegation under the One Strike law and substitute a multiple-victim circumstance (§ 667.61, former subd. (e)(5)). (*Mancebo*, at p. 740.) But, even though the information had charged the defendant with multiple qualifying sex acts against different victims, it did not specifically plead a multiple-victim circumstance under the One Strike law. (*Ibid.*) The court substituted the unpled circumstance and imposed two consecutive 25-year-to-life sentences. (*Ibid.*)

This Court reversed the judgment, concluding that the trial court erred when it used an unpled multiple-victim circumstance to support an enhanced sentence under section 667.61. (*Mancebo*, 27 Cal.4th at pp. 742–745.) Looking to the "straightforward and plain" language of the statute, this Court held that the "express pleading requirements of section 667.61, subdivisions (f) and (i), read together, require that an information afford a One Strike defendant fair notice of the qualifying statutory circumstance or circumstances that are being pled, proved, and invoked in support of One Strike sentencing." (*Mancebo*, at pp. 749, 753–754; § 667.61, subd. (f) & former subd. (i).) "Substitution of that unpleaded circumstance for the first time at sentencing as a basis for imposing the indeterminate terms violated the explicit pleading provisions of the One Strike law." (*Mancebo*, at p. 743.) The defendant's due process rights were violated because the People failed to comply with the express pleading and proof requirements of section 667.61, even though the defendant received actual notice of the facts leading to the increased sentence. (*Mancebo*, at pp. 753–754.) Because its holding rested on a failure to comply with statutory pleading requirements, this Court cautioned that "our holding is limited to a construction of the language of section 667.61 . . . . We have no occasion in this case to interpret other statutory provisions not directly before us." (*Mancebo*, at p. 745, fn. 5.)

C. By Referencing Section 667.61, Subdivisions (c) and (e), and the Qualifying Multiple-Victim Circumstance, the Information Satisfied One Strike Law Pleading Requirements

Here, the information satisfied Vaquera's due process rights because it complied with the pleading and proof requirements of section 667.61. Specifically, it alleged that he committed two enumerated sex offenses against children under 14 years of age that qualified for One Strike sentencing and connected those crimes to the One Strike law by reference to section 667.61, subdivision (c). (1CT 217–219; §§ 288, subd. (a), 667.61, subd. (c)(8).) It also described the aggravating circumstance that the crimes were committed against more than one victim and referenced section 667.61, subdivision (e). (1CT 217–219; § 667.61, subd. (e)(4).) This language satisfied the pleading and proof requirements of section 667.61, subdivisions (*o*) and (f), and his due process right to notice. (*Mancebo*, *supra*, 27 Cal.4th at pp. 753–754, [adequate notice conveyed by "the qualifying circumstance . . . in conjunction with a reference to section 667.61"].)

Thereafter, the jury found him guilty of all charges and specifically found the aggravating circumstances true. (2CT 344–350.) Nothing more was required.

D. The Due Process Concerns of *Mancebo* Are Not Implicated in this Case

Because the information complied with statutory pleading requirements, the Court of Appeal properly distinguished the facts of this case from *Mancebo*, which involved a due process violation resulting from imposition of an unpled One Strike aggravating circumstance. Vaquera does not contest that the circumstances pled and proved qualified for sentencing under subdivision (j)(2). Nevertheless, Vaquera argues that

even though the information referenced subdivision (b), which in turn references subdivision (j), he had no notice of the possibility of a 25-year-to-life term on count 2. (OBM at 10.) But, because subdivision (b) references subdivision (j), the two subdivisions must be read together to give meaning to each word, as principles of statutory construction require.

1. Under *Mancebo*, due process prohibits imposition of a One Strike sentence based on unpled aggravating circumstances

The Court of Appeal properly recognized the distinction between *Mancebo*, which addressed an enhanced sentence resulting from an *unpled* One Strike circumstance, and this case. *Mancebo* stands for the proposition that the prosecution must allege in the accusatory pleading "which qualifying circumstance or circumstances are being invoked for One Strike sentencing." (*Mancebo*, *supra*, 27 Cal.4th at p. 752.) The holding rested on the explicit pleading and proof requirements of section 667.61, which were "breached" in that case. (*Mancebo*, at p. 751.) The due process violation resulted directly from the failure to comply with the pleading and proof requirements of section 667.61, even though it was uncontested the defendant had notice of the facts underlying the enhanced sentence. *Mancebo*, at p. 747.) In contrast, and as recognized by the Court of Appeal, the information in this case complied with the One Strike law pleading and proof requirements. (*In re Vaquera*, *supra*, 39 Cal.App.5th at p. 235.) Thus, the due process concerns of *Mancebo* are not implicated.

This Court should reject Vaquera's attempt to expand the holding of *Mancebo.* Contrary to Vaquera's contention, this Court's statement in *Mancebo* that a defendant has a due process right to notice of the "specific sentence enhancement allegations" (*Mancebo*, *supra*, 27 Cal.4th at p. 747) does not mean that an information must specify the numerical provision denoting penalty or even the potential penalty itself. (OBM at 11–13, citing

Mancebo, at p. 748.) In *Mancebo*, this Court held that to comport with statutory pleading requirements under section 667.61, "reference to the description of the qualifying *circumstance* . . . in conjunction with a reference to section 667.61 *or*, more specifically, 667.61, subdivision (e)" constituted adequate notice. (*Mancebo*, at pp. 753–754, italics added.) This Court clarified that "we do not here hold that the specific numerical subdivision of a qualifying One Strike circumstance under section 667.61, subdivision (e), necessarily must be pled." (*Mancebo*, at p. 753.) If the information need not specify the numerical subdivision of the aggregating circumstance, it follows a fortiori that the information need not specify the numerical subdivision denoting penalty. This reading comports with due process notice requirements because it has long been established that, under due process, "a valid accusatory pleading need not specify by number the statute under which the accused is being charged," and "'even a reference to the wrong statute has been viewed of no consequence.'" (*Thomas*, *supra*, 43 Cal.3d at p. 826, quoting *People v. Marshall* (1957) 48 Cal.2d 394, 404; § 952.)

Vaquera faults the Court of Appeal for "rel[ying] 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." (OBM at 14–15, citing *In re Vaquera*, *supra*, 39 Cal.App.5th at pp. 239–241.) This argument misconstrues the Court of Appeal's opinion and its reliance on *Thomas*. As stated *ante*, this Court held in *Thomas* that the defendant received proper notice despite a variance between pleading and proof. (*Thomas*, *supra*, 43 Cal.3d 818.) This Court explained that the "specific enumeration" of a statute "is not controlling if the specific language in the accusatory pleading is sufficient to inform the defendant of the charges...." (*Id.* at p. 827.) Notably, the statutes at issue (§ 192.1, and former § 192, subds. (1), (2)), did not contain additional pleading and proof requirements

beyond those generally required by the Penal Code. Accordingly, *Thomas* looked to general constitutional and statutory pleading requirements, and held that due process does not require pleadings to specify the number of the statute being charged. (*Thomas*, at pp. 826, 831.)

Recognizing the distinction between the notice issues presented in *Mancebo* and this case—namely, that the information here complied with the One Strike law's pleading and proof requirements—the Court of Appeal properly looked to the language and reasoning of cases such as *Thomas* to consider the intersection between due process and general pleading requirements. (*In re Vaquera*, *supra*, 39 Cal.App.5th at p. 235.) The court did not suggest that *Thomas* held that an information can satisfy due process requirements if it fails to comply with pleading requirements created by the Legislature.

2. Although not required, the information's reference to section 667.61, subdivision (b), which explicitly references subdivision (j), provided notice to Vaquera of the specific penalties he faced

Although due process does not require that an information inform a defendant of the applicable penalty, in this case, the information's reference to section 667.61, subdivision (b), which explicitly references exceptions to the default sentence, provided Vaquera notice of the punishment he faced in counts 1 and 2. Vaquera argues that he did not receive adequate notice of the possibility of a 25-year-to-life parole eligibility period on count 2 because the information did not specifically reference subdivision (j). He claims that a direct invocation of that penalty required reference to subdivisions (c)(8), (j)(2), (e)(4) and reference to the "multiple victim" circumstance. (OBM 13–14, 13 fn. 11.) Consideration of principles of statutory construction, and of the record, establish that Vaquera was given notice of the 25-year-to-life exposure he faced on count 2.

General rules of statutory construction do not permit the reading that Vaquera urges because "statutes 'must be read as a whole.'" (*United States v. Atlantic Research Corp.* (2007) 551 U.S. 128, 135 [applying that maxim, the United States Supreme Court reached its holding by considering two subdivisions of the same statute together: "the language of subparagraph (B) can be understood only with reference to subparagraph (A)," and "[t]he provisions are adjacent and have remarkably similar structures"].) In construing a statute, a reviewing court's "first task is to look to the language of the statute itself." (*Mancebo*, *supra*, 27 Cal.4th at p. 743.) The language under scrutiny must be considered "in the context of the entire statute . . . and the statutory scheme of which it is a part." (*Ibid.*; *People v. Hammer* (2003) 30 Cal.4th 756, 762–763.) "It is a settled principle of statutory construction that courts should 'strive to give meaning to every word in a statute and to avoid constructions that render words, phrases, or clauses superfluous.'" (*In re C.H.* (2011) 53 Cal.4th 94, 103, citations omitted.)

A complete reading of the One Strike statute, and specifically subdivision (b), laid plain the penalties Vaquera faced. Subdivision (b) is one sentence and must be read in conjunction with the subdivisions it expressly references; thus giving effect to each of the relevant provisions of the statute. (See *Ste. Marie v. Riverside County Regional Park & Open–Space Dist.* (2009) 46 Cal.4th 282, 289 ["[w]e must of course read statutes as a whole so that all parts are harmonized and given effect"].) Since the 2010 amendment, subdivision (b) mandates a sentence of 15 years to life "*[e]xcept as provided in subdivision (a), (j), (l), or (m)*." (§ 667.61, subd. (b), italics added.) Section 667.61, subdivision (j)(2), states that any person convicted under an enumerated offense provided in "subdivision (c) under one of the circumstances specified in 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.)

Because subdivision (b) specifically references subdivision (j), the two subdivisions must be read together. (*Mancebo*, 27 Cal.4th at pp. 743, 751; see also *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476 [where two statutes touch upon a common subject, they must be construed with reference to each other and harmonized in such a way that neither becomes surplusage]; *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 779 [two statutes must be read together and so construed to give effect to all the provisions of each statute]; cf. *People v. Sweeney* (2016) 4 Cal.App.5th 295, 301 [information alleging elevated sentence under § 186.22, subd. (d), did not provide adequate notice of enhancement under § 186.22, subd. (b), when the two provisions were mutually exclusive].)

Reading section 667.61, subdivision (b), in its entirety, as is required, Vaquera knew he faced a 25-year-to-life sentence on count 2. The offense underlying that crime occurred after the amendment, and the information alleged the applicable circumstances and subdivisions under section 667.61. (See *People v. Grant* (1999) 20 Cal.4th 150, 159–160, 162 [defendant was properly convicted of violating section 288.5 when the abuse of the victim began before the effective date of the enactment of that statute and continued after the date]; see also 3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, § 252, p. 335.)

Vaquera argues that deeming him to have been on notice of every subdivision referenced in section 667.61, subdivision (b), results in a "dangerous precedent." (OBM 12–13.) He suggests that "[t]aken to an extreme" such a holding requires him to be on notice of every provision in the Penal Code. (OBM 13, fn. 9.) This Court should reject Vaquera's slippery-slope argument. The entirety of section 667.61 is contained within a page and a half of the Penal Code, and the provisions sufficient to

determine Vaquera's sentence are set forth in two paragraphs. (Cal. Penal Code [Thomson Reuters 2020].) Holding a defendant is on notice of the exposure applicable to the statute he or she was charged with violating and, thus, tasking him or her to read that statute is not too burdensome a task, especially when the relevant provisions are explicitly cross-referenced. (See *People v. Tanner* (1979) 24 Cal.3d 514 (conc. opn. of Newman, J.) ["Sentences, sections, and whole statutes must be read from beginning to end."], called into doubt on other grounds in *People v. Clancey* (2013) 56 Cal.4th 562, 585–586.)

3. Appellate decisions applying *Mancebo* in other statutory contexts further highlight that Vaquera received adequate notice

Even though this Court cautioned that its holding in *Mancebo* was limited to the One Strike law, numerous courts have applied its holdings to other statutes. As highlighted in *People v. Tennard* (2017) 18 Cal.App.5th 476, enhanced sentences imposed after compliance with statutory pleading and proof requirements comport with due process even without specific reference to penalty. Vaquera's reliance on cases reaching a different result, including *People v. Wilford* (2017) 12 Cal.App.5th 827, *People v. Sawyers* (2017) 15 Cal.App.5th 713, *People v. Nguyen* (2017) 18 Cal.App.5th 260, and *People v. Perez* (2017) 18 Cal.App.5th 598, is misplaced because the defendants in those cases were subjected to unpled sentence enhancements.

In *Tennard*, *supra*, 18 Cal.App.5th 476, Division Two of the Fourth District Court of Appeal applied *Mancebo* in a case involving the Three Strikes law, which contains pleading and proof requirements similar to those in the One Strike law. (§§ 667, subd. (c), 1170.12, subd. (a).) The Court of Appeal rejected the defendant's claim that his due process right to notice was violated and that the court was unauthorized to sentence him to

an indeterminate term under the Three Strikes law. (*Tennard*, at pp. 487–488.) Under the Three Strikes law, a defendant with two or more prior strikes, convicted of a new nonstrike felony, will be sentenced under section 667, subdivision (e)—or twice the term otherwise provided for—unless the defendant had been previously convicted of a super strike, in which case the defendant will be sentenced to at least 25 years to life in prison. (§ 667, subd. (e)(2)(C).) Convictions for forcible rape are classified as superstrikes. (§ 667, subd. (e)(2)(C)(iv).)

The charged offense in *Tennard* was not serious or violent, but one of his prior convictions was for forcible rape. (*Tennard*, *supra*, 18 Cal.App.5th at pp. 480–481.) The information referenced sections 667, subdivisions (c) and (e)(2)(A), and 1170.12, subdivision (c), subsection (2)(a), and alleged he had two "serious and violent" felony convictions within the Three Strikes law, and described those convictions. It did not reference section 667, subdivision (e)(2)(C). (*Tennard*, at pp. 482, 485.) It also did not specifically allege that Tennard's prior forcible rape conviction disqualified him from second-strike sentencing under section 667, subdivision (e)(1), or state that the prosecution intended to seek an indeterminate 25-year-to-life term for his current nonstrike offense. (*Tennard*, at p. 483.)

Similar to the circumstances of the present case, Tennard argued that without a specific reference to the subdivision of section 667 that disqualified or rendered him ineligible for a second-strike sentence, the pleading requirement was not satisfied. (*Tennard*, *supra*, 18 Cal.App.5th at p. 481.) The Court of Appeal rejected Tennard's assertion that the precise subdivision containing the disqualification for a second-strike sentence had to be alleged. (*Id.* at pp. 485–488.) Because the information complied with the pleading requirements of section 667, subdivision (e)(2)(C), and described the applicable convictions, it sufficiently notified Tennard of the

Three Strikes sentence. (*Tennard*, at p. 487.) Again looking to the language of the statute, the court noted that "[b]y its terms, subdivision (e)(2)(A) applies '[e]xcept as provided in subparagraph (C),' and subparagraph (C) requires the defendant to be sentenced as a second strike offender . . . unless an exception applies." (*Tennard*, at p. 487.)

The reference to the disqualifiers within the subdivision that was pled makes the accusatory pleading in *Tennard* analogous to the one in this case. It also distinguishes it from the other cases cited by Vaquera where the information did not include any reference to the sentencing scheme or subdivision upon which the enhancement or penalty provision was based.

In *Sawyers*, *supra*, 15 Cal.App.5th 713, cited by Vaquera in support of his claim (OBM at 16), the Second District Court of Appeal reversed an enhanced Three Strikes sentence because the People failed to comply with mandatory pleading and proof requirements. In that case, the defendant was convicted of murder, attempted murder and shooting at an occupied dwelling. (*Sawyers*, at p. 715.) The information alleged that he had suffered two prior convictions, one for first degree burglary (a strike) and one for receiving stolen property, but did not make any reference to the Three Strikes law or its sentencing scheme. (*Id.* at p. 718.) Instead, it specified that the burglary conviction constituted a "serious felony described in Penal Code section 1192.7 or a violent felony described in Penal Code section 667.5(c) . . . ." (*Sawyers*, at p. 718.) After the jury returned guilty verdicts, the defendant admitted his burglary conviction was a violent felony under section 667.5, which defines "violent felony" in the context of prior convictions. (*Sawyers*, at pp. 719–720.) The Three Strikes law was raised for the first time in the People's post-trial sentencing memorandum, and the defendant was sentenced in accordance with the sentencing memorandum. (*Id.* at p. 719.)

Recognizing the similar pleading and proof requirements present in both the One Strike law and the Three Strikes law, the Court of Appeal reversed. (*Sawyers*, *supra*, 15 Cal.App.5th at p. 726.) Relying on *Mancebo*, the court concluded the sentence was improper because even though the defendant had notice of the factual allegations underlying Three Strikes sentencing, "neither the information nor the court proceedings gave Sawyers fair notice that his sentence would be doubled under the Three Strikes law." (*Id.* at p. 723, 726.) Like *Mancebo*, the holding rested on the failure of the prosecution to properly plead the factual circumstances underlying the strike allegations as dictated by the Penal Code. (*Id.* at p. 727.) *Sawyers* did not hold that specific provisions need to be pled. Thus, *Sawyers* does not advance Vaquera's argument.

In *Wilford*, *supra*, 12 Cal.App.5th 827, the Fourth District Court of Appeal, Division One, applied the principles of *Mancebo* to the domestic violence statute (§ 273.5). Vaquera relies on *Wilford* to expand the holding of *Mancebo*. (OBM at 15–16.) This Court should reject *Wilford* because it is distinguishable on the facts and its reasoning is unsound.

In *Wilford*, the defendant was charged with domestic violence in violation of section 273.5, subdivision (a), which carries a sentence range of two, three, or four years in prison. (*Wilford*, *supra*, 12 Cal.App.5th 827, 835–836.) Section 273.5, subdivision (f)(1), provides that a defendant who has suffered specified prior convictions within seven years of the charged offense may be punished with a two-, four-, or five-year term. Section 273.5, subdivision (h)(1), provides that if such a person is granted probation, he or she must serve at least 15 days in jail. The information included a subdivision (h)(1) allegation and stated that the effect of the allegation was a minimum of 15 days in jail. It did not contain a subdivision (f)(1) allegation. (*Wilford*, at p. 836.) The trial court found the

subdivision (h)(1) allegations true but later sentenced Wilford to an aggravated sentence under subdivision (f)(1).

The Court of Appeal reversed because Wilford "was not appraised of the possible prison sentence he was facing." (*Wilford*, *supra*, 12 Cal.App.5th at p. 838.) It noted that "[n]othing in the amended information gave any hint that the prosecution . . . sought to make [the defendant] subject to the provisions of section 273.5, subdivision (f)(1), which would increase the applicable sentencing range." (*Wilford*, at pp. 838, 840.) Looking to *Mancebo*, the court concluded that even though the facts necessary to impose the increased sentence under the domestic violence statute were alleged, the failure to reference section 273.5, subdivision (h)(1), and the possibility of the enhanced sentencing range was a "critical shortcoming" where the defendant was offered and rejected a plea bargain prior to trial. (*Wilford*, at p. 840.)

The notice concerns of *Wilford* are not present in this case. The information here cited section 667.61, subdivision (b), which in turn referenced subdivision (j) and, thus, notified Vaquera of the penalty he faced in both counts 1 and 2. Conversely, the subdivision pled in *Wilford*, section 273.5, subdivision (h)(1), did not reference subdivision (f) as an exception to the sentence provided. Moreover, unlike the defendant in *Wilford*, there is no evidence that Vaquera relied to his detriment on promises of a lesser sentence. The record does show, however, that Vaquera had actual notice of the possibility of a 25-year-to-life sentence. Indeed, his comments to the probation officer show that he was aware of his sentencing exposure. (2CT 386.)

In any event, this Court should reject the reasoning of *Wilford.* The fact that section 273.5 contains no pleading and proof requirements sufficiently distinguishes it from the One Strike law; thus *Mancebo*'s limited holding is not applicable. As discussed, *Mancebo* did not hold that

an information must allege the possible penalty. Nevertheless, *Wilford* determined that the defendant's due process rights were violated because he "was not informed of the potential of the enhanced penalty" before he rejected a plea bargain. (*Wilford*, *supra*, 12 Cal.App.5th at p. 840.) *Wilford*'s holding is also at odds with this Court's holding in *Valladoli* that post-verdict but pre-sentencing amendment of an information to charge previously known felony conviction allegations comports with due process. (*Valladoli*, *supra*, 13 Cal.4th at pp. 605–607.)

Vaquera's reliance on *Nguyen*, *supra*, 18 Cal.App.5th 260, a case addressing pleading of a serious felony conviction enhancement, is similarly misplaced. (OBM at 15.) In that case, the information alleged a prior burglary conviction as a strike prior, referring to section 667, subdivisions (b) through (i), as well as a prior prison term enhancement, referring to section 667.5, subdivision (b). "However, it never specifically alleged—either in so many words or by citing the relevant statute—a prior serious felony conviction enhancement" under section 667, subdivision (a). (*Nguyen*, at pp. 262–264.) As a result, the trial court never found a serious felony allegation to be true, and the defendant never admitted it. (*Id.* at pp. 262, 265.) The Fourth District Court of Appeal, Division Two, thus reversed the five-year serious-felony enhancement because it had not been properly pled or proven. (*Id.* at pp. 267, 271.) Vaquera did not face similar surprise when faced with imposition of a One Strike sentence because the information accurately pled the One Strike law.

Finally, *Perez*, *supra*, 18 Cal.App.5th 598, turned on the People's failure to follow the express statutory pleading and proof requirements under section 664, subdivision (a). (*Perez*, at pp. 617–618.) Under that statute, attempted murder is punishable with five, seven, or nine years in prison, unless it is pled and proved that the attempt was willful, deliberate, and premeditated, in which case it is punishable with a life sentence. (*Id.* at

p. 614.) The prosecution failed to allege premeditated attempted murder as required by law; and at no time in the proceedings did the court or prosecutor provide the information to the defendant that the accusatory pleading lacked. (*Id.* at p. 618.) Thus, the Third District Court of Appeal concluded the life terms were unauthorized and struck them. (*Ibid.*)

Vaquera attempts to compare the facts of this case to *Wilford*, *Sawyers*, *Nguyen* and *Perez*—cases where the charging documents utterly failed to reference the applicable sentencing schemes—by asserting that the applicable One Strike scheme was "not actually alleged" in his case. (OBM 15.) To make this argument, he unpersuasively asserts that the One Strike law consists of multiple "alternate sentencing schemes." (OBM 15–16.) But the One Strike law is, in actuality, a single sentencing scheme outlined in section 667.61. (See also §§ 667, subds. (b)–(j), 1170.12 [the two statutes setting forth the Three Strikes law].) As set forth above, the information's citation to subdivisions (c) and (e)(4) sufficiently put Vaquera on notice that the prosecution would seek to use the circumstances of his offenses to authorize a sentence of 25 years to life under subdivision (j)(2). The information's reference to subdivision (b) provided additional, though unnecessary, information pointing Vaquera to the penalties applicable in his particular case.

4. The Court of Appeal properly rejected the unsound reasoning in *Jimenez*

The Court of Appeal rightly rejected the holding of *Jimenez*, *supra*, 35 Cal.App.5th 373, because, contrary to Vaquera's assertions (OBM 8–10), that decision failed to adhere to principles of statutory construction or note distinctions between the facts of that case and *Mancebo.* The facts of *Jimenez* are similar to this case. The defendant was convicted of 15 counts related to sexual offenses committed against three minor victims. (*Jimenez*, at p. 377–378.) The jury found true One Strike multiple-victim

enhancement allegations (i.e., § 667.61, subds. (b), (e)), which were specifically pled in the information. (*Jimenez*, at pp. 378, 393.) The information did not reference section 667.61, subdivision (j). The court sentenced Jimenez to an aggregate term of 175 years to life in prison, which included 25-year-to-life terms for each of the One Strike enhancements. (*Jimenez*, at pp. 378, 393.)

On appeal, Jimenez argued that the trial court erred by sentencing him under subdivision (j)(2) because the information's reference to subdivisions (b) and (e) reflected a decision by the prosecutor to pursue a 15-year-to-life sentence for each enhancement allegation. (*Jimenez*, *supra*, 35 Cal.App.5th at pp. 393, 395.) Without mention of the opening clause in subdivision (b), the Court of Appeal concluded that the "failure to plead the enhancement under section 667.61(j)(2) precluded sentencing based on that provision." (*Jimenez*, at p. 394, 397.) The court recognized that the information met the pleading requirements outlined in subdivision (*o*) but, nonetheless, concluded that those requirements were insufficient to meet the defendant's due process right to notice. (*Jimenez*, at p. 397.)

The Court of Appeal here appropriately disagreed with *Jimenez.* (*In re Vaquera*, *supra*, 39 Cal.App.5th at p. 244.) First, "*Jimenez* overlooked a critical fact," outlined above, that section 667.61, "subdivision (b) itself refers to subdivision (j), identifying it as an *exception* to the shorter 15-year-to-life term." (*People v. Zaldana* (2019) 43 Cal.App.5th 527, 535 [agreeing with *Vaquera* and rejecting the reasoning of *Jimenez*], emphasis added.) The *Jimenez* court's failure to give meaning to every word in that subdivision, essentially eviscerating the opening clause of subdivision (b), violated basic principles of statutory construction. (*Hammer*, *supra*, 30 Cal.4th at pp. 762–763 [to understand a statute, courts must give meaning to each word and harmonize various parts by """"considering the particular

clause or section in the context of the statutory framework as a whole,'"'" quoting *People v. Acosta* (2002) 29 Cal.4th 105, 112].)

Second, *Jimenez* failed to address the fact that because the information pled section 667.61, subdivision (e), and described the multiple-victim circumstance, its facts differed crucially from those of *Mancebo*, where the information did not reference the One Strike law in connection with a multiple-victim circumstance. (*In re Vaquera*, *supra*, 39 Cal.App.5th at p. 244.)

Third, the holding in *Jimenez* resulted in an unauthorized sentence. As noted by the Court of Appeal in this case, when the defendant is convicted of offenses outlined in subdivision (c), and the facts and circumstances specified in subdivisions (d) and (e) are alleged and found true, the One Strike law mandates specific penalties (§ 667.61, subd. (*o*)). (*In re Vaquera*, *supra*, 39 Cal.App.5th at pp. 244–245; see *People v. Jones* (2001) 25 Cal.4th 98, 103 ["section 667.61 mandates an indeterminate sentence of either 25 years (*id.*, subd. (a)) or 15 years to life (*id.*, subd. (b)) when a defendant is convicted of certain forcible sex offenses committed under specific aggravating circumstances"].) Because the facts and circumstances were appropriately pled and proven as required in subdivision (*o*), the trial court was required to impose 25 years to life for the enhancements. The reviewing court in *Jimenez* erred in reducing it. (*In re Vaquera*, at pp. 244–245.)

Finally, *Jimenez* erred because it assumed—without reference to any supporting evidence from the record—that the prosecution elected to plead the enhancements under subdivision (b), rather that subdivision (j). (*Jimenez*, *supra*, 35 Cal.App.5th at p. 395.) That argument 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." (*In re Vaquera*, *supra*, 39 Cal.App.5th at p. 245; accord *Zaldana*, *supra*, 43 Cal.App.5th at p. 536.) The prosecution exercises discretion in choosing which circumstances to allege to invoke One Strike sentencing. Once the circumstances are pled and proven, however, there is no discretion as to penalty.

II. ANY POSSIBLE ERROR WAS HARMLESS BECAUSE VAQUERA WAS NOT MISLED TO HIS PREJUDICE

To avoid a harmless error analysis, Vaquera argues that the doctrines of waiver and estoppel apply. Relying on *Mancebo*, he asserts that the prosecutor exercised discretion to pursue a 15-year-to-life penalty on count 2 and, thus, waived any chance to later argue for the 25-year-to-life sentence. But there is no evidence the prosecutor sought to pursue anything but the maximum sentence in this case. To the extent that the information's reference to subdivision (b) constituted error, it resulted from a clerical mistake and was harmless. Vaquera was not misled to his prejudice because the 25-year-to-life term imposed on count 2 was mandatory and any other sentence would have been unauthorized. In addition, the aggregate 25-year-to-life term imposed by the court was less than that sought by the prosecutor even before discovering the error in his original sentencing brief. Most importantly, the record reveals that Vaquera knew he faced a sentence of 25 years to life.

A. The Doctrines of Waiver and Estoppel Do Not Apply Because the People Complied with Pleading and Proof Requirements

Vaquera argues that under *Mancebo* this Court is precluded from examining whether any error prejudiced his case. Again, *Mancebo* is distinguishable. The *Mancebo* Court held that where a prosecutor exercises charging discretion and fails to expressly allege a specific One Strike circumstance in the charging document, the People are estopped from claiming error did not affect the outcome of the case. (*Mancebo*, *supra*, 27 Cal.4th at p. 749.) Due to the resulting "complete lack of notice," the doctrines of waiver and estoppel apply. (*Id.* at p. 748, quoting *People v. Garcia* (1998) 63 Cal.App.4th 820, 833.) For example, in *People v. Hernandez* (1988) 46 Cal.3d 194, 208–209, this Court held that automatic reversal was required for pleading error because "no notice whatsoever, not just of the code section but of the mens rea required by section 667.8, was given either in the information, arguments of counsel, or evidence produced at trial." (*Mancebo*, at pp. 747, 749, citing *Hernandez*, at pp. 208–209.) Similarly in *People v. Najera* (1972) 8 Cal.3d 504, this Court did not conduct a harmless error analysis, concluding that the People "waived" application of a section 12022.5 enhancement allegation, because it was neither alleged in a pleading nor found true by the jury. (*Mancebo*, at p. 746, citing *Najera*, at p. 512.) Where notice is provided, however, courts appropriately engage in a harmless error analysis for cases involving pleading and proof errors. (*Mancebo*, at pp. 748–749.)

With those principles in mind and looking to the circumstances of the case before it, this Court reversed the sentence in *Mancebo* without engaging in a harmless error analysis. (*Mancebo*, *supra*, 27 Cal.4th at p. 749.) This Court concluded that, like *Najera*, the prosecution deliberately chose not to allege the multiple-victim circumstance under the

One Strike law. (*Ibid*.) It was because of this "discretionary charging decision" by the prosecution in *Mancebo* and the complete lack of notice afforded to the defendant that the multiple-victim circumstance would be used to invoke One Strike sentencing that *Mancebo* held conventional harmless-error analysis inapplicable. (*Ibid*.) "Under these circumstances, the doctrines of waiver and estoppel, rather than harmless error, apply." (*Ibid.*)

A harmless error analysis is appropriate in this case because the information specifically pled the One Strike enhancement allegation. (See *Mancebo*, *supra*, 27 Cal.4th at pp. 748–749; *People v. Marshall* (1996) 13 Cal.4th 799, 850.) Unlike in *Mancebo*, the prosecutor expressly alleged the applicable multiple-victim circumstance in the information and referenced section 667.61. Once the People elected to pursue a One Strike sentence and alleged the relevant circumstances, they were without discretion to request a sentence other than that prescribed by section 667.61.

There is simply no evidence that the People made a discretionary charging decision to seek a 15-year-to-life sentence on count 2 as Vaquera contends. (OBM at 10, 18–19.) The record supports the opposite finding. The prosecutor's initial sentencing brief asking for a 15-year-to-life sentence on count 2 appears to have resulted from an inadvertent failure to consider the 2010 amendment and not a discretionary choice. Upon realizing the error, the prosecutor informed the court. (CoA Petn., Exh. 6 at p. 72.) The fact that the prosecutor consistently sought the maximum sentence (i.e., consecutive sentences on both counts 1 and 2) supports a finding that asking for a 15-year-to-life sentence in the first sentencing brief was an error. Plus, during the hearing to address the CDCR's letter, the prosecutor accurately framed the sentencing as mandatory and never suggested the People elected a lesser sentence before trial. (Cf. *Mancebo*, *supra*, 27 Cal.4th at p. 749 [pleading deficiency deemed a discretionary

charging decision because no evidence suggested it was based on a mistake or other excusable neglect].) The People did not exercise charging discretion and then substitute one circumstance for an unpled circumstance like in *Mancebo*. Thus waiver and estoppel do not apply.

B. Vaquera Was Not Misled to His Prejudice

Even assuming error, it was harmless. When the information gives notice of the sentence enhancement and the facts supporting it but also "included some extraneous and possibly misleading information," the question is whether the defendant has been "misled to his prejudice." (*Thomas*, *supra*, 43 Cal.3d at pp. 830–831; see also § 960 ["No accusatory pleading is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits"]; Cal. Const., art. VI, § 13 ["No judgment shall be set aside, . . . for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice"].)

Vaquera speculates that he was prejudiced because, had the information cited to subdivision (j)(2), he would have made different unspecified discovery requests, strategic decisions, or plea negotiations. (OBM at 17–18.) But Vaquera's assertions alone do not establish prejudice. (Cf., *In re Alvernaz* (1992) 2 Cal.4th 924, 938 ["a defendant's self-serving statement—after trial, conviction, and sentence—that with competent advice he or she *would* [or would not] have accepted a proffered plea bargain, is insufficient in and of itself to sustain the defendant's burden of proof as to prejudice, and must be corroborated independently by objective evidence"].)

Even if the information was mistaken in referencing subdivision (b), Vaquera was motivated to defend against the possibility of two consecutive One Strike sentences. There is no evidence that his defense would have changed knowing he faced a 25-year-to-life parole eligibility date on count 2, as opposed to a 15-year-to-life parole eligibility date. The charges and aggravating circumstances never changed. Since the initial filing of the complaint, Vaquera had ample reason and opportunity to defend against charges that he committed lewd acts against two young boys. There is also no evidence that Vaquera was offered and rejected any plea bargains leading up to trial. (Cf. *Wilford*, *supra*, 12 Cal.App.5th at p. 840 [the failure of the information to indicate a possibility of the increased punishment was a "critical shortcoming" because the defendant was offered and rejected a plea bargain]; *In re Alvernaz*, *supra*, 2 Cal.4th at pp. 928, 933–936 [a defendant could show prejudice due to ineffective assistance of counsel if he was not told accurately before trial about a plea offer that he would have accepted and ultimately received a less favorable sentence].)

The record shows only that *after* trial, the prosecution inadvertently asked for imposition of a 15-year-to-life term on count 2, but there is no evidence of resulting prejudice. The prosecutor's error in initially seeking a lesser sentence on count 2, made after trial and before the initial sentencing hearing, had no effect on Vaquera's right to notice. Upon realizing the error, the prosecutor filed a new sentencing brief in anticipation of the continued sentencing hearing, thus, giving Vaquera time to respond. That Vaquera did not request a continuance after the prosecutor asked for the 25-year-to-life term on count 2 further supports a finding of no prejudice. (See *Houston*, *supra*, 54 Cal.4th at p. 1227 [if the defendant believed he had lack of notice of possible life sentence, he could have sought a continuance to prepare a defense].)

In fact, Vaquera's statement to the probation officer months before sentencing indicates he had actual notice of the possibility of a 25-year-to-life sentence. (2CT 386 [probation officer recounted that Vaquera "understood he was looking at a very long sentence, and his attorney said he could serve 25 years to life"].) Thus, not only is the 25-year-to-life sentence the court ultimately imposed less than the punishment recommended by the People, it was exactly the sentence that Vaquera expected. His sentence is less than the 30-year-to-life term sought by the prosecutor at the initial sentencing hearing (before realizing that subdivision (j), mandated a longer sentence on count 2), and much less than the 40-year-to-life term the prosecutor sought at the second sentencing hearing. The trial court's statements at sentencing further reflect that Vaquera was not prejudiced. The trial court commented that if the sentence on count 2 were still 15 years to life, the "court might well be adding consecutive time . . . for the other counts for which Mr. Vaquera faced a determinate sentence." (2RT 463–464.)

Finally, overwhelming evidence, including videos, testimony by the victims and Vaquera's own admissions, supported the convictions and established the circumstances supporting enhancement: namely, that he committed lewd and lascivious acts against two children under the age of 14 as described in section 667.61, subdivisions (c) and (e)(4). Any pleading error, if it occurred, was harmless because the facts showed that he was ineligible for the 15-year-to-life term outlined in section 667.61, subdivision (b).

Vaquera does not contest that he was on notice of the facts and circumstances triggering application of the One Strike law. He, therefore, could not have been surprised by proof of such circumstances. Although it may have been more clear to initially specify Vaquera was facing a 25-

year-to-life sentence on count 2 under subdivision (j)(2), any error did not result in prejudice.

CONCLUSION

The circumstances here do not rise to the level of a due process violation because Vaquera and his counsel were aware during both trial and sentencing proceedings that the One Strike allegation applied, and thus there was no surprise, inability to prepare a defense, or evidence that Vaquera or his counsel were misled. The judgment should be affirmed.

Dated: April 21, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF ON THE MERITS uses a 13-point Times New Roman font and contains 11,349 words.

Dated: April 21, 2020

XAVIER BECERRA
Attorney General of California

/S/ Paige B. Hazard

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **In re Vaquera**
No.: **S258376**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On April 21, 2020, I served the attached **ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Clerk of the Court
County of Orange
Superior Court of California
700 Civic Center Drive West
Santa Ana, CA 92702-1994

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 21, 2020, at San Diego, California.

Y. Hunt	/s/Y. Hunt
Declarant	Signature

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **VAQUERA (OSCAR MANUEL) ON H.C.**
Case Number: **S258376**
Lower Court Case Number: **G056786**

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

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4/21/2020
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/s/Tammy Larson
Signature

Hazard, Paige (234939)
Last Name, First Name (PNum)

Department of Justice, Office of the Attorney General-San Diego

Law Firm