In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **DARLENE A. VARGAS,** **Defendant and Appellant.**	Case No. S203744

Second Appellate District, Division Eight, Case No. B231338
Los Angeles County Superior Court, Case No. KA085541
The Honorable Bruce F. Marrs, Judge

RESPONDENT'S ANSWER BRIEF ON THE MERITS

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
LAWRENCE M. DANIELS
Supervising Deputy Attorney General
NOAH P. HILL
Deputy Attorney General
KIM AARONS
Deputy Attorney General
State Bar No. 213480
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2270
Fax: (213) 897-6496
Email: DocketingLAAWT@doj.ca.gov
Email: Kim.Aarons@doj.ca.gov
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

COURT RULES

ISSUES PRESENTED

1. Did appellant's two prior strike convictions arise from separate criminal acts as a matter of law in light of her guilty pleas to the prior strikes pursuant to a plea agreement, her express stipulation to the factual basis for the pleas, her acknowledgment that the two offenses constituted two separate strikes, and her acceptance of bargained-for concurrent sentences that could only be imposed for separate criminal acts?

2. If appellant's two prior strikes arose from one criminal act, is there a rule requiring dismissal of one of the strikes even though the legislative history and statutory language of the Three Strikes Law expresses the electorate's clear intention that all qualifying prior serious and/or violent felony convictions are deemed strikes without qualification or exception?

3. If there is no rule requiring dismissal of prior strikes arising from the same act, did the trial court properly exercise its discretion by denying appellant's motion to dismiss the prior strikes as to the residential burglary count, and granting appellant's motion to dismiss as to the remaining felony counts?

STATEMENT OF THE CASE

This appeal involves the issue of whether appellant's two prior serious and/or violent ("strike") convictions arose from one criminal act, and if so, whether the trial court was required to dismiss one of the strikes pursuant to a mandatory rule, or alternatively, in the exercise of discretion. In the present case, a Los Angeles County jury convicted appellant of first degree residential burglary (count 1; Pen. Code, § 459),[1] grand theft of personal

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

property (count 2; § 487, subd. (a)), conspiracy to commit theft (count 3; § 182, subd. (a)(1)), and giving false information to a police officer (count 7; § 148.9, subd. (a)). (*Vargas I*, 1CT 65-66, 157-164, 216-217.)[2] The trial court made true findings as to one prior serious felony conviction allegation (§ 667, subd. (a) (1)), and two prior strike allegations (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). (*Vargas I*, 1CT 65-66, 73-78.) Pursuant to the Three Strikes Law, appellant was sentenced to 30 years to life for count 1, consisting of 25 years to life, plus five years for the prior serious felony conviction. She received concurrent two-year terms for counts 2 and 3, and a concurrent six-month term for count 7. (*Vargas I*, 1CT 216-223.)

Appellant's prior strikes are based upon an incident that occurred on January 22, 1999. According to the preliminary hearing transcript, at approximately 11:30 p.m., appellant drove a truck to the parking lot of a doughnut shop in Pomona with a male companion, where she parked next to Brandon Charles Roberts, who was alone in his car. Appellant got out of the truck, asked Roberts if the store was open, and went inside. A short time later, appellant came out and asked Roberts if he wanted to buy methamphetamine. (*In re Vargas*, Pet., Exh. C at 3.[3]) Roberts replied, "No." Appellant began yelling, "Come on, come on, buy it, buy it." While she was yelling, her male companion got into the back seat of Roberts's car and held the blade of a butterfly knife to the back of Roberts's neck. (*In re*

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[2] "*Vargas I*" refers to the record from the first appeal in case number B215690. "*Vargas II*" refers to the record from the second appeal in case number B231338. "*In re Vargas*" refers to the record from appellant's habeas corpus proceedings in case number B219896. Respondent is filing a motion, concurrent with this answer brief, requesting judicial notice of the records and files in *Vargas I* and *In re Vargas*.

[3] Respondent refers to the preliminary hearing transcript attached to appellant's habeas corpus petition as Exhibit C in *In re Vargas*.

Vargas, Pet., Exh. C at 3-5, 11.) Appellant told Roberts that she had a gun. Roberts was afraid. (*In re Vargas*, Pet., Exh. C at 4, 6.)

Roberts further testified that "they checked to see if I had any money," and appellant took his keys out of the ignition. (*In re Vargas*, Pet., Exh. C at 4.) Roberts did not clarify whether appellant or her companion took any money. Roberts stated that appellant then opened the driver's side door and pulled Roberts out while her companion used the knife to push Roberts out. (*In re Vargas*, Pet., Exh. C at 4-5.) Appellant got in Roberts's car and started it while appellant's companion returned to the truck. Appellant then drove out of the parking lot followed by the truck. (*In re Vargas*, Pet., Exh. C at 5.) Roberts had never before seen appellant or her companion, and he did not give them permission to take his car. (*In re Vargas*, Pet., Exh. C at 6.)

The next day, Roberts received a phone call from the police department instructing him that they had recovered his car at the intersection of Toby Way and Commercial Street. Roberts went to that location and found his car smashed into a chain link fence. (*In re Vargas*, Pet., Exh. C at 6-7.)

Based upon the foregoing incident, the Los Angeles County District Attorney filed an information charging appellant with carjacking (count 1; §215, subd. (a)), second degree robbery (count 2; § 211), and unlawful driving or taking of a vehicle (count 3; Veh. Code § 10851, subd. (a)). (*Vargas I*, 1CT 172-173.) With regard to the robbery count, the information alleged that appellant took "personal property," but did not specify what property was taken. (*Vargas I*, 1CT 173.) The information further alleged that both offenses were serious felonies within the meaning of section 1192.7, subdivision (c). (*Vargas I*, 1CT 172-173.) The

maximum possible sentence that appellant faced for the charges was ten years.[4] (*Vargas I*, 1CT 172-173.)

Appellant subsequently pled guilty to the carjacking and robbery offenses pursuant to a negotiated plea agreement, and the unlawful driving charge was dismissed. (JN,[5] Exh. A.) The plea agreement provided that appellant would be sentenced to state prison for the low term of three years for the carjacking offense, and the midterm of three years for the robbery offense, ordered to run concurrent. (JN, Exh. A at 3.) At the plea hearing, appellant acknowledged that she was pleading guilty to two strikes, and in the event she was convicted of a subsequent felony offense, she would receive a sentence of 25 years to life. (JN, Exh. A at 6.) After appellant pled guilty, her counsel stipulated that there was a factual basis for the plea, and the trial court sentenced appellant to concurrent three-year terms pursuant to the plea agreement. (JN, Exh. A at 7-9; *Vargas I*, 4RT 1811.)

In the current case, appellant's trial counsel filed a motion requesting that that the trial court dismiss one of the 1999 strikes in the interest of justice, pursuant to section 1385 and *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. In support of the motion, counsel argued that both convictions arose out of the same act and involved the same victim. (*Vargas I*, 1CT 168; 4RT 1811-1812.) Appellant's counsel attached the information that had been filed in appellant's 1999 case to the motion, but

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[4] The sentencing range for the carjacking offense was three, five, or nine years (§ 215, subd. (b)); and the sentencing range for the robbery offense was two, three, or five years (§ 213, subd. (a)(2)). Thus, appellant faced a ten year sentence, consisting of nine years for the carjacking offense, and a consecutive one-year term (one-third the midterm) for the robbery offense. (See § 1170, subds. (a)(2), (b); § 1170.1, subd. (a) [one-third the midterm for each consecutive term].)

[5] "JN" refers to respondent's motion for judicial notice.

did not produce the preliminary hearing transcript or otherwise elaborate on the facts of the prior offenses. (*Vargas I*, 1CT 171-174; RT 1812; *Vargas II*, CT 18.) The prosecutor responded that, because appellant received concurrent sentences for the two prior strikes, she committed separate criminal acts. The trial court agreed that appellant had been "legally sentenced" for the prior strikes. (*Vargas I*, 4RT 1814-1815.) The trial court then denied the *Romero* motion as applied to the residential burglary count and sentenced appellant to 25 years to life for that count. However, the court granted the *Romero* motion as to the remaining felony counts and dismissed both strikes as to those counts. (*Vargas I*, 4RT 1815-1816; see *Vargas II*, CT 13-14.) In doing so, the court noted that appellant did not "fall totally within the Three-Strikes scheme" so "the imposition of 75 years to life would be . . . overkill." (*Vargas I*, 4RT 1815.)

On appeal, appellant argued that the imposition of a 25-year-to-life sentence for the residential burglary offense based on the two prior strikes was an abuse of the trial court's discretion. (*Vargas II*, CT 6-7.) Concurrent with that appeal, appellant filed a habeas corpus petition alleging that she received ineffective assistance of counsel because her attorney failed to produce the preliminary hearing transcript from her 1999 case at the sentencing hearing. (*Vargas II*, CT 7; *In re Vargas*, Pet.)

The Court of Appeal found that the trial court did not abuse its discretion in declining to dismiss one of the prior strikes. Nevertheless, the appellate court found that appellant's trial counsel was ineffective for failing to produce the preliminary hearing transcript at the sentencing hearing because that document might have affected the trial court's decision. (*Vargas II*, CT 18.) Specifically, the Court of Appeal found that the preliminary hearing transcript revealed that the carjacking and robbery were both of the same object—the victim's car. The appellate court failed to address the trial court's finding that appellant's sentences for the 1999

offenses were concurrent—reflecting that she was convicted of more than one criminal act. (*Vargas II*, CT 14-16, 18.) The Court of Appeal then remanded the matter for resentencing and reconsideration of appellant's *Romero* motion based on a complete record. (*Vargas II*, CT 19-20.)

The trial court held a resentencing hearing after it reviewed the preliminary hearing transcript from appellant's 1999 case. (*Vargas II*, RT 1.) Relying on *People v. Benson* (1998) 18 Cal.4th 24, the trial court determined that appellant remained within the spirit of the Three Strikes Law and, as such, she was eligible for up to 75 years to life in prison, consisting of 25-year-to-life terms for each felony conviction. The trial court explained that, in *Benson*, the strike convictions both stemmed from "a single act with a single victim at the same time with single intent." (*Vargas II*, RT 6.) The trial court noted that the defendant in *Benson* had argued that one of his prior strike convictions should have been stricken based on the "same act" circumstances, but that the *Benson* court disagreed because, for the purpose of the Three Strikes law, "the central focus is not on the single act single victim, same time same intent, it's on the defendant's status as a repeat felon." (*Vargas II*, RT 6.)

The trial court also relied on *Benson* for the proposition that the defendant in *Benson* received the benefit of section 654 when he was sentenced for his prior felonies, and he was placed on notice that he had two prior strikes. It was only after the defendant reoffended that he faced prolonged incarceration. The trial court concluded that these facts were similar to appellant's circumstance because she received a concurrent sentence for her 1999 case as part of a negotiated plea agreement, and it was only after she reoffended that she was facing a long sentence. (*Vargas II*, RT 6.) The trial court then reviewed appellant's criminal history and current offenses, and reached the same conclusion as it had before—denying the *Romero* motion as to the residential burglary count, and

granting the motion as to the remaining felony counts. The court then resentenced appellant to 30 years to life in state prison. (*Vargas II*, RT 8.)

Appellant filed a second appeal, asserting that case law required automatic dismissal of one of the prior strikes because both convictions arose from a single act, and even if that rule did not apply, the trial court abused its discretion by failing to dismiss one of the prior strikes. (*Vargas II*, Slip Opn. at 5.) The Court of Appeal rejected appellant's claims, holding that there was no rule requiring a trial court to dismiss one of two prior strike convictions where the two convictions stem from the same act. (*Vargas II*, Slip Opn. at 12-16.) The court then followed the reasoning in *People v. Benson*, *supra*, 18 Cal.4th 24, and *People v. Scott* (2009) 179 Cal.App.4th 920, which rejected *People v. Burgos* (2004) 117 Cal.App.4th 1209, to hold that the "same act" circumstance arising from convictions for robbery and carjacking was just another factor for the trial court to consider when determining whether to dismiss a prior strike allegation. (*Vargas II*, Slip Opn. at 12-16.) The court concluded that the trial court did not abuse its discretion in declining to dismiss one of appellant's prior strikes because the record reflected that appellant had a long history of criminal offenses. (*Vargas II*, Slip Opn. at 16-17.)

SUMMARY OF ARGUMENT

Courts may not look beyond a defendant's guilty plea to evidence from earlier proceedings for the purpose of questioning whether that evidence supports the conviction or sentence. Where a defendant makes an express stipulation as to the factual basis for a guilty plea, acknowledges that his or her offenses constituted separate strikes, and receives a sentence that could only be imposed for separate criminal acts pursuant to the specified sentence in the negotiated plea agreement, the trial court is not free to look beyond the plea to consider allegations of fact that are inconsistent with the factual basis for the plea and sentence imposed. The

rationale is that defendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process. Appellant's prior strikes arose from separate criminal acts as a matter of law because she expressly stipulated to the factual basis for her pleas of guilty to the strike offenses, she acknowledged that the offenses constituted separate strikes, and she received separate concurrent sentences for each strike—as specified in her plea agreement—that could only be imposed for separate criminal acts.

Even assuming that appellant's prior strikes arose from the same criminal act, there is no rule requiring mandatory dismissal of a prior strike based on a "same act" circumstance. The plain language, legislative history, and underlying purpose of the Three Strikes Law unequivocally demonstrate the electorate's intention that all prior serious or qualifying felony convictions are deemed to be strikes without qualification or exception. The plain meaning of the terms "shall" and "notwithstanding any other provision of law," in section 1170.12 evidence this intent. Further, the purpose of providing increased punishment for repeat offenders necessarily encompasses offenders who have violated multiple criminal statutes based on one criminal act because such offenders pose a qualitatively higher risk to public safety by invading more than one societal interest that the Legislature has designated for protection.

The trial court also did not abuse its discretion in denying appellant's *Romero* motion as to her residential burglary offense, and in granting the motion as to the remaining felony counts. The trial court properly considered the nature and circumstances of appellant's prior strike offenses, her present felonies, her two parole violations, and her conviction for trespass to conclude that she was within the spirit of the Three Strikes Law as to one felony count.

ARGUMENT

I. APPELLANT'S PRIOR STRIKE CONVICTIONS AROSE FROM SEPARATE CRIMINAL ACTS AS A MATTER OF LAW BECAUSE SHE PLED GUILTY AND WAS SENTENCED FOR SEPARATE CRIMINAL ACTS PURSUANT TO A NEGOTIATED PLEA AGREEMENT

As a threshold issue, respondent disagrees with appellant's assertion that her two prior convictions for carjacking and robbery arose from the same criminal act. (AOB 27-32.) Appellant fails to acknowledge the circumstance that she pled guilty to both offenses pursuant to a plea agreement for which she was sentenced for two separate acts. Thus, as further set forth below, her two prior strike convictions arose from separate criminal acts as a matter of law, and as such, she may not relitigate the facts.[6]

As a general rule, courts may not look beyond a defendant's guilty plea to evidence from earlier proceedings for the purpose of questioning whether that evidence supports the conviction. In *People v. Wallace* (2004) 33 Cal.4th 738, this Court found that the trial court erred in dismissing a prior strike allegation based on the trial court's finding that there was insufficient evidence of his guilt for the strike offense notwithstanding the

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[6] The prosecutor raised the issue at appellant's first sentencing hearing (*Vargas I*, 4RT 1813); and at the second sentencing hearing, the trial court based its decision to deny appellant's *Romero* motion, in part, on the fact that appellant received the benefit of her previous bargain when she pled guilty to the two prior strikes (*Vargas II*, RT 8). Contrary to the Court of Appeal's finding, respondent never conceded that appellant's prior strikes arose from a single act. (See *Vargas II*, Slip Opn. at 7 [stating "[r]espondent concedes that Vargas's robbery and carjacking convictions arose from a single act."].) Rather, respondent asserted, without conceding, that "*even if* this case involved the 'same act' circumstances" there was no mandatory rule requiring the trial court to dismiss one of appellant's prior strikes." (*Vargas II*, Respondent's Brief at p. 17, emphasis added.)

fact that he pled no contest to the offense. (*Id.* at pp. 749-750.) Specifically, the defendant was initially charged with willful discharge of a firearm. However, a magistrate judge dismissed that charge after the preliminary hearing, finding the evidence was insufficient. (*Id.* at p. 749.) Subsequently, the charge was refiled and the defendant pled no contest. In a later prosecution, the defendant's prior conviction for discharging a firearm was alleged as a prior strike. The trial court dismissed the strike allegation based upon the magistrate's conclusion in the prior case that the evidence presented at the preliminary hearing had been insufficient to support the charge. (*Id.* at p. 749.) This Court reversed, holding that the trial court improperly considered the magistrate's findings for the purposes of determining whether to dismiss a prior strike under section 1385. (*Id.* at pp. 749-750.)

Wallace explained the reasons for this conclusion, explaining that a "preliminary hearing is not a trial." (*People v. Wallace*, *supra*, 33 Cal.4th at p. 749, citing *People v. Uhlemann* (1973) 9 Cal.3d 662, 667; see also *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 251.) "A deficiency of proof at the preliminary hearing frequently reflects a temporary state of affairs. The prosecution may discover and proffer additional proof by the time a second preliminary hearing is held or by the time the case proceeds to trial. The defendant's culpability may be established through the introduction of evidence at trial or, alternatively, by the defendant's plea of guilty or no contest. Such a plea ordinarily includes an admission that there is a factual basis for the plea, and when the plea represents a negotiated disposition as—it did in the present case—the court must satisfy itself that a factual basis for the plea exists." (*People v. Wallace*, *supra*, at p. 749, citing § 1192.5; *People v. Holmes* (2004) 32 Cal.4th 432, 438; *People v. Hoffard* (1995) 10 Cal.4th 1170, 1181.)

Wallace further explained that a guilty plea "admits every element of the crime charged . . . ." (*People v. Wallace*, *supra*, 33 Cal.4th at pp. 749-750, citing *People v. Thomas* (1986) 41 Cal.3d 837, 844, fn. 6.) It "is the legal equivalent of a verdict [citation] and is tantamount to a finding [citations]." (*People v. Statum* (2002) 28 Cal.4th 682, 688, fn. 2.) Moreover, a guilty plea waives any right to raise questions about the evidence, including its sufficiency. (*People v. Thomas*, *supra*, at p. 844, fn. 6 [defendant's admission of a prior conviction was binding even if all of the elements of a serious felony were not actually present]; *People v. Stanworth* (1974) 11 Cal.3d 588, 604-605 [on appeal defendant cannot argue the sufficiency of the evidence as to a count to which he pled guilty]; *People v. Fulton* (2009) 179 Cal.App.4th 1230, 1237; see also *People v. French* (2008) 42 Cal.4th 36, 54 [when a defendant pleads guilty, "the record generally does not contain a full presentation of evidence concerning the circumstances of the offense."].)

The appellate court's decision in *People v. Ellis* (1987) 195 Cal.App.3d 334, further illustrates this reasoning. There, the defendant was sentenced pursuant to a plea agreement in which she admitted that she suffered a prior serious felony conviction. She later sought to raise a claim of error regarding her admission of the prior serious felony, contending that the facts of the prior indicated that it did not qualify as a serious felony. (*Id.* at 345-347.) The *Ellis* court rejected the defendant's claim on public policy grounds, explaining that, on the one hand, "[t]he law . . . has an interest in [e]nsuring that, even where a defendant has committed some criminal act, his criminal conduct matches up with a statute that proscribes the conduct. Only in this way can the judicial system [e]nsure that a defendant's criminal conduct will receive the punishment the Legislature intended . . . . [¶] We therefore have no doubt that strong public policy

countenances against allowing defendants to plead guilty to crimes they did not commit." (*Id.* at p. 345.)

On the other hand, "the presence of a plea bargain injects other policy considerations into the calculus. Just as the law has no interest in punishing defendants more severely than has been ordained by the Legislature, the law also has a strong interest in seeing to it that defendants do not unfairly manipulate the system to obtain punishment far less than that called for by the statutes applicable to their conduct." (*People v. Ellis*, *supra*, 195 Cal.App.3d at p. 345.)

In performing its analysis, the *Ellis* court found that the defendant's case was far from the situation where an innocent person was convicted, or where the alleged legal mistake was of a magnitude of unfairness that vacating the plea agreement was the only equitable solution. (*People v. Ellis*, *supra*, 195 Cal.App.3d at p. 344.) The court also noted that the defendant received a significant reduction in sentence because 11 of the 13 counts were dropped, and the maximum sentence was reduced by three years. The defendant also had plausible tactical reasons for admitting the serious felony, and the record contained no indication the prosecution could not have proved all of the charges, implying that the balance of the plea agreement was in favor of the defendant. Thus, the court rejected the claim based on public policy considerations. (*Id.* at pp. 346–347.)

The same public policy considerations apply where a defendant challenges the facts supporting imposition of a sentence that has been imposed pursuant to the terms of a negotiated plea agreement. More specifically, there is a presumption that, when a court imposes a concurrent sentence rather than imposing a stay pursuant to section 654,[7] the defendant

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[7] Section 654, subdivision (a), provides that "[a]n act or omission that is punishable in different ways by different provisions of law shall be (continued...)

had multiple intents or objectives in committing the offenses, or the course of conduct was divisible in time and thus section 654 was inapplicable. (*People v. Osband* (1996) 13 Cal.4th 622, 730-731; *People v. Garcia* (2008) 167 Cal.App.4th 1550, 1564-1565; *People v. Jones* (2002) 103 Cal.App.4th 1139, 1147.) And when a defendant pleads guilty in exchange for a specified sentence, he or she is barred from later claiming that the sentence violates the prohibition against double punishment set forth in section 654. (*People v. Hester* (2000) 22 Cal.4th 290, 295; Cal. Rules of Court, rule 4.412(b).[8]) In such circumstances, appellate courts will not find error—even when the trial court acted in excess of jurisdiction in imposing the sentence, so long as the trial court did not lack fundamental jurisdiction. (*People v. Hester*, *supra*, at p. 295.)

The rationale behind this policy is that defendants who have received the benefit of their bargain "should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process." (*People v. Hester*, *supra*, 22 Cal.4th at 295, citing *People v. Couch* (1996) 48 Cal.App.4th 1053, 1056-1057; *People v. Nguyen* (1993) 13 Cal.App.4th

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punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Section 215, subdivision (c), contains a similar provision, stating that a person may be charged with both carjacking and robbery, but no defendant may be punished for both offenses based on the same act.

[8] Rule 4.412(b) (formerly rule 412(b)) provides: "By agreeing to a specified prison term personally and by counsel, a defendant who is sentenced to that term or a shorter one abandons any claim that a component of the sentence violates section 654's prohibition of double punishment, unless that claim is asserted at the time the agreement is recited on the record."

114, 122-123; *In re Griffin* (1967) 67 Cal.2d 343, 347-348.) "When a defendant maintains that the trial court's sentence violates rules which would have required the imposition of a more lenient sentence, yet the defendant avoided a potentially harsher sentence by entering into the plea bargain, it may be implied that the defendant waived any rights under such rules by choosing to accept the plea bargain." (*People v. Couch*, *supra*, at p. 1057.)

Applying these principles to the present case, appellant's preliminary hearing transcript cannot be lawfully considered as dispositive evidence regarding her "same act claim." Appellant pled guilty to the two strike offenses, stipulated to the factual basis of the pleas, and acknowledged that she was pleading guilty to two separate strikes. (JN, Exh. A at 6.) By virtue of the concurrent sentences that she received, the sentencing court found that the two strikes arose from separate criminal acts. (*People v. Osband*, *supra*, 13 Cal.4th at 730-731.) Appellant additionally acknowledged that her plea agreement specified that she would receive concurrent three-year terms for each offense. Thus, appellant is precluded from relying on the preliminary hearing transcript to relitigate the factual basis of her pleas.[9] (*People v. Hester*, *supra*, 22 Cal.4th at 295; *People v. Wallace*, *supra*, 33 Cal.4th at 749-750.)

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[9] Even assuming that the preliminary hearing transcript could be considered, it does not provide dispositive evidence. Rather, it demonstrates that appellant initially attempted to sell methamphetamine to the victim, and subsequently checked to see if he had any money—both of which suggest that appellant initially had the intent to steal cash. (*In re Vargas*, Pet., Exh. C at 3-4.) The transcript provides no indication as to whether any cash or other property aside from the victim's car was actually taken. Nor does the record indicate that the prosecution would have been unable to prove its case.

Appellant is also precluded from relitigating the facts because she received the benefit of her bargain. (See *People v. Ellis*, *supra*, 195 Cal.App.3d at pp. 346-347.) She avoided a ten-year sentence by accepting the plea agreement, and she suffered no fundamental unfairness because she acknowledged that she was pleading guilty to two separate strikes that would be used to impose a 25-year-to-life sentence if she committed another felony in the future. (JN, Exh. A at 6.)

In sum, appellant avoided a harsher sentence in her prior strike case by entering into a plea bargain for which she stipulated to the factual basis for sentences that could only be imposed for separate criminal acts. As such, appellant's prior strikes arose from separate acts as a matter of law.

II. THE LANGUAGE, LEGISLATIVE HISTORY, AND UNDERLYING PURPOSE OF THE THREE STRIKES LAW UNEQUIVOCALLY DEMONSTRATE THAT EACH PRIOR QUALIFYING FELONY CONVICTION IS DEEMED TO BE A SEPARATE STRIKE WITHOUT QUALIFICATION OR EXCEPTION

Even assuming that appellant's prior strikes arose from one criminal act, there is no rule requiring mandatory dismissal of one of the prior convictions. As further set forth below, the language, legislative history, and underlying purpose of the Three Strikes law unequivocally demonstrate an intent that each prior conviction qualify as a separate strike without qualification or exception. Appellant nevertheless contends that the trial court's failure to dismiss one of her strikes based on the "same act" circumstance violated the prohibition against multiple punishment set forth in section 654.[10] (AOB 1, 27-37.) Appellant also relies on footnote 8 of

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[10] The extent to which appellant relies on a section 654 analysis is unclear. Appellant's opening brief states that "a section 654 analysis has less significance here because appellant's punishment in the earlier action was not stayed." (AOB 3.) However, as stated above, if appellant's prior strikes had arisen from one act, one of the sentences should have been

(continued...)

People v. Benson, *supra*, 18 Cal.4th at p. 36, for the proposition that a trial court is automatically deemed to abuse its discretion when it fails to dismiss one of two prior strikes based on the act. (AOB 30.) Last, appellant suggests that the imposition of two strikes for the same act is an "arbitrary or capricious" application of California's sentencing laws that violates federal due process. (AOB 17.) These contentions are without merit.

A. Background

1. The Three Strikes Law

The intent behind the enactment of the Three Strikes law was clearly stated by the electorate in the initiative measure by which section 1170.12 was adopted: "It is the intent of the People of the State of California in enacting this measure to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses." (Ballot Pamp., Gen. Elec. (Nov. 8, 1994) text of Prop. 184, p. 64 et seq; see JN, Exh. B.)

Section 1170.12, subdivision (d)(1),[11] provides: "*Notwithstanding any other provision of law*, this section *shall* be applied in every case in which a defendant has a prior felony conviction as defined in this section." (Emphasis added.)

Section 1170.12, subdivision (b), further provides: "*Notwithstanding any other provision of law* and for the purpose of this section, a prior

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stayed pursuant section 654, and thus, a section 654 analysis applies. In addition, appellant relies extensively on case law addressing section 654. (AOB 22-25.) Thus, respondent assumes that appellant relies on section 654 in support of her contentions.

[11] Respondent quotes from the previous version of section 1170.12, effective from November 9, 1994, through November 6, 2012, which applied to appellant's prior and current offenses.

serious and/or violent felony conviction *shall* be defined as follows: (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. The determination of whether a prior conviction is a prior serious and/or violent felony conviction for purposes of this section shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor. None of the following dispositions shall affect the determination that a prior serious and/or violent conviction is a serious and/or violent felony for purposes of this section:

(A) The suspension of imposition of judgment or sentence.

(B) The stay of execution of sentence.

(C) The commitment . . . as a mentally disordered sex offender following a conviction of a felony.

(D) The commitment to the California Rehabilitation Center . . . ." (Emphasis added.)

2. The Offenses of Carjacking and Robbery

Both carjacking (§215) and robbery (§ 211) are enumerated strikes, neither of which is converted to a misdemeanor automatically upon sentencing. (§§ 667.5, subd. (c)(9) & (17); 1170.12, subd. (b)(1); 1192.7, subd. (c)(19) & (27).) Section 215 defines carjacking as the taking by force or fear of a motor vehicle, with the intent to permanently deprive the victim of the vehicle. Section 211 defines robbery as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear."

A carjacking conviction can be based on the intent to permanently or temporarily deprive the victim of a car, whereas a robbery conviction requires the intent to permanently deprive a person of property. (*People v.*

Dominguez (1995) 38 Cal.App.4th 410, 417-419; see *People v. Ortega* (1998) 19 Cal.4th 686, 700, overruled on another point in *People v. Reed* (2006) 38 Cal.4th 1224, 1228-1229.) Thus, a person can be convicted of both carjacking and robbery because robbery is not a necessarily included offense.[12] (*People v. Dominguez* (1995) 38 Cal.App.4th 410, 419 [because person can commit a carjacking by forcibly taking a vehicle with the intent to joyride, robbery is not a lesser included offense of carjacking]; see also *People v. Pearson* (1986) 42 Cal.3d 351, 355 [the test in California of a necessarily included offense is, where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense].)

This conclusion is further evidenced by section 954, which provides that "[a]n accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses . . . . The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but *the defendant may be convicted of any number of the offenses charged* . . . ."[13] (Emphasis added.)

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[12] However, as already noted in Argument I at footnote 7, above, section 215, subdivision (c), provides that a defendant may not be punished more than once for the same act which constitutes a violation of both carjacking and robbery.

[13] Prior to 1915, section 954 prohibited a defendant from suffering two or more convictions arising from the same criminal act, providing as follows: "The indictment or information may charge . . . different statements of the same offense . . . . The prosecution is not required to elect between the different offenses or counts set forth in the indictment or information, but *the defendant can be convicted of but one of the offenses charged*, and the same must be stated in the verdict." (Stats. 1905, ch. 574, p. 772, § 1.) This restriction was removed, however, when the statute was amended in 1915. (Stats. 1915, ch. 452, p. 744, § 1.)

The difference in the required intent between carjacking and robbery was no accident. According to the author of the bill that created the offense of carjacking, the new offense was needed because "Under current law there is no carjacking per se and many carjackings cannot be charged as robbery because it is difficult to prove the intent required of a robbery offense . . . ." (Assem. Com. on Pub. Safety analysis of Sen. Bill No. 60 (1993-1994 Reg. Sess.) July 13, 1993, p. 1; see JN, Exh. C.)

3. Relevant Case Law

In *People v. Benson*, *supra*, 18 Cal.4th 24, this Court issued a seminal decision addressing the question of whether a prior conviction for which sentencing was stayed under section 654 may nevertheless constitute a strike under the Three Strikes law. In *Benson*, the defendant had prior felony convictions for residential burglary, and assault with intent to commit murder based on a single incident in which he had entered the victim's apartment on a pretext, grabbed her, and stabbed her approximately 20 times. (*People v. Benson*, *supra*, at p. 27.) The sentence on the assault conviction was stayed pursuant to section 654. (*Id.* at p. 26.) Each conviction individually would have qualified as a strike. The question before this Court was "whether defendant has one strike or two." (*Ibid.*) The defendant contended that the Three Strikes law could not properly be interpreted to permit separate strikes to be imposed for offenses that, in a prior proceeding, were determined to have been committed as part of an indivisible transaction, against a single victim, and as to which it was concluded that imposition of separate punishment would run afoul of section 654. (*Id.* at p. 28.)

This Court concluded that the language of the Three Strikes Law "unequivocally establishes that the electorate intended to qualify as separate strikes *each* prior conviction that a defendant incurred relating to the commission of a serious or violent felony, notwithstanding the

circumstance that the trial court, in the earlier proceeding, may have stayed sentence on one or more of the violent felonies under compulsion of the provisions of section 654." (*People v. Benson*, *supra*, 18 Cal.4th at p. 31, emphasis in original.) *Benson* found that the Three Strikes Law included terms that overrode section 654, such as the provision stating that a strike for the purposes of the Three Strikes Law "shall be defined" as set forth in section 1170.12, subdivision (b), "notwithstanding any other provision of law . . . ." (*Ibid.*) This Court further stated that the Three Strikes Law "also provides explicitly that a stayed or suspended sentence is not exempt from qualifying as a strike (§ 1170.12, subd. (b)(1)(B)), *a provision that is not limited to sentences stayed or suspended* for purposes other than those set forth in section 654." (*Ibid*, emphasis added.)

Although the "stay of execution of sentence" language from section 1170.12, subdivision (b)(1)(B), provided additional support for the conclusion in *Benson*, this Court nevertheless found the phrase "notwithstanding any other provision of law" means what it says. (*People v. Benson*, *supra*, 18 Cal.4th at p. 32; *see also People v. Garcia* (2001) 25 Cal.4th 744, 757 [holding that "the plain and unambiguous language of the Three Strikes law discloses an intent to impose the enhanced, doubled sentence despite a possible "dual use" of defendant's prior conviction"].) Thus, this Court held that the defendant had two strikes, not one. (*Id.* at p. 27.)

Benson further addressed the defendant's claim that this conclusion would create "dramatic and harsh results" by pointing out that "a trial court retains discretion in such cases to strike one or more prior felony convictions under section 1385 if the trial court properly concludes that the interests of justice support such action." (*People v. Benson*, *supra*, 18 Cal.4th at pp. 35-36.) The Court then made the following observation in footnote 8: "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; see also *People v. Sanchez* (2001) 24 Cal.4th 983, 993 [indicating that the Court left this question open for another day].)

More recently, this Court addressed a similar issue in *People v. Palacious* (2007) 41 Cal.4th 720. There, the defendant argued that imposition of sentence for three section 12022.53 enhancements violated section 654's bar against multiple punishment because the three enhancements were imposed based on a single gunshot fired at a single victim. (*People v. Palacios*, *supra*, at p. 725.) The defendant was convicted of attempted premeditated murder, kidnapping for robbery, kidnapping for carjacking, carjacking, and robbery. (*Id.* at p. 724.) The crimes occurred when the defendant carjacked the victim, took his car and other property, drove him to a park, and shot him once. (*Ibid.*) The jury found that the defendant discharged a firearm and personally inflicted great bodily injury in the commission of these offenses pursuant to section 12022.53, subdivision (d), and section 12022.7, subdivision (a). (*Ibid.*) The trial court imposed section 12022.53, subdivision (d), enhancements of 25 years to life for the attempted murder and the two kidnapping convictions. (*Ibid.*)

Palacious held that the imposition of sentence for three section 12022.53 enhancements did not violate the prohibition against multiple punishment even though the enhancements were based on one act against

one victim. (*People v. Palacios*, *supra*, 41 Cal.4th at pp. 725, 734.) In support of this conclusion, this Court relied upon the same statutory language in section 12022.53 that the *Benson* court relied upon in section 1170.12. Specifically, *Palacios* cited language from section 12022.53, which stated that enhancements "*shall*" "*be applied*" "*[n]otwithstanding any other provision of law*" as "an additional and consecutive term of imprisonment." (*Id.* at pp. 725-726, 728-730.) *Palacious* found, as the Court in *Benson* found, that "'notwithstanding any other provision of law' means what it says." (*Id.* at p. 728, quoting *People v. Benson*, *supra*, 18 Cal.4th at p. 32.) *Palacious* concluded that "in enacting section 12022.53, the Legislature made clear that it intended to create a sentencing scheme unfettered by section 654." (*Id.* at pp. 727-728.)

Shortly after the *Benson* decision, the *Burgos* case held that a prior strike must be dismissed where it stems from the same act as another prior strike. (*People v. Burgos*, *supra*, 117 Cal.App.4th 1209, 1211-1212 & fn. 3.) In *Burgos*, the defendant was convicted of robbery and assault by means likely to produce great bodily injury with the personal infliction of bodily injury. (*Id.* at p. 1211.) He had been previously convicted of attempted robbery and attempted carjacking, "where [the defendant] 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. [The defendant] and his companions were frightened off before they took the victim's car." (*Id.* at p. 1212, fn. 3.) The defendant moved for dismissal of one of the prior strike convictions and the trial court denied the motion. (*Id.* at pp. 1212-1214.)

Burgos held that where the prior convictions involved a single act, and "the failure to strike one of the two priors convictions that arose from a single act constitutes an abuse of discretion." (*People v. Burgos*, *supra*, 117 Cal.App.4th at p. 1214.) The court relied on footnote 8 of *People v.*

Benson, *supra*, 18 Cal.4th at p. 36, stating "Here, appellant's two prior convictions, attempted carjacking and attempted robbery, were, in the language of *Benson*, 'so closely connected,' having arisen from the same single act, that failure to strike one of them must be deemed an abuse of discretion." (*People v. Burgos*, *supra*, at p. 1216.) The court additionally discussed the unique sentencing limitation provided by section 215, subdivision (c), which bars the imposition of punishment for both carjacking and robbery when the offenses arise from the same act. The court noted: "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." (*Ibid.*)

In reaching its decision, *Burgos* then made what appeared to be an ordinary analysis regarding the trial court's exercise of discretion pursuant to section 1385 and *People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at p. 497 by discussing the defendant's mild criminal history and the relative severity of the 50-years-to-life term the defendant would serve if the trial court did not dismiss one of the prior strike convictions. (*People v. Burgos*, *supra*, 117 Cal.App.4th at pp. 1216-1217.) The court concluded that "in view of the particular offenses that constituted the two prior strike convictions in this case, it was an abuse of discretion to fail to strike one of those convictions in furtherance of justice under [*Romero*] and section 1385." (*Id.* at p. 1216.)

In sum, *Burgos* initially held that the "same act" circumstance was dispositive, but then treated it as one factor in a *Romero* analysis, stating that the nature of "the particular offenses that constituted the two prior strike convictions in this case" is what compelled striking one strike—again strongly indicating that the court was announcing a rule that the "same act"

circumstances mandated dismissing a prior strike in such cases. (*People v. Burgos*, *supra*, 117 Cal.App.4th at pp. 1216-1217.)

People v. Scott (2009) 179 Cal.App.4th 920, took issue with *Burgos* in considering whether a rule required dismissal of one of two prior strike convictions (for robbery and carjacking) based on the "same act" circumstance. The *Scott* court concluded, based on *Benson*, that the trial court did not abuse its discretion in failing to dismiss one of the convictions based on the "same act" circumstance alone. The *Scott* court began by pointing out that even though portions of *Burgos* seemed to require an automatic rule of dismissal in such circumstances, the *Burgos* court's use of a standard section 1385 analysis made the true nature of the decision doubtful. (*People v. Scott*, *supra*, at p. 930.) *Scott* then noted that the *Burgos* court had failed to address the statutory definition of a strike as something unaffected by the sentence imposed unless the felony was converted to a misdemeanor at that time. *Scott* concluded that this failure "negates a broad reading of *Burgos*." (*Ibid.*)

Scott additionally faulted *Burgos* for its reliance on section 215, subdivision (c), which, as stated above, bars the imposition of punishment for both carjacking and robbery when the offenses arise from the same act. *Scott* noted that reliance on this language was misplaced because *Benson* found that a defendant convicted of both offenses was put on notice that both would be treated as strikes should he reoffend. (*People v. Scott*, *supra*, 179 Cal.App.4th at p. 931.) In sum, *Scott* held that the "same act" circumstance that could arise from convictions of both robbery and carjacking was just another factor for the trial court to consider when determining whether to exercise its discretion to dismiss a prior strike allegation. (*Id.* at p. 930.)

B. A "Same Act" Circumstance of Two Prior Strikes Has No Effect in Defining What Constitutes a Prior Strike Under the Three Strikes Law

The electorate made it clear, based on the underlying purpose and statutory language of the Three Strikes Law, that the prohibition against double punishment has no effect in defining what constitutes a prior strike for purposes of sentencing under the Three Strikes Law—even where two prior strikes are the product of "an indivisible transaction" against a single victim. (*People v. Benson*, *supra*, 18 Cal.4th at 74.) The same conclusion applies where two strikes are the product of a "same act" circumstance against a single victim. In defining those prior convictions that are considered strikes, section 1170.12 places no limitations where multiple prior convictions arise from the same criminal act and involve one victim. On the contrary, each subdivision of section 1170.12 declares that the relevant sentencing provisions "*shall*" be applied "*[n]otwithstanding any other provision of law.*" As this Court found in *Benson* and *Palacious*, "notwithstanding any other provision of law" means what it says. (*People v. Palacios*, *supra*, 41 Cal.4th at p. 728; *People v. Benson*, *supra*, 18 Cal.4th at p. 32; see also *People v. Johnson* (2006) 38 Cal.4th 717, 723-724 [the plain language of the statute establishes what was intended by the Legislature; where statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it].)

Moreover, it is relevant to note that the only sentencing limitation that the Three Strikes Law places on sentences involving multiple convictions arising from the same act is found in section 1170.12, subdivision (a)(6), which provides that "[i]f there is a current conviction for *more than one felony count not committed on the same occasion, and not arising from the same set of operative facts*, the court shall sentence the defendant consecutively on each count pursuant to this section." (Emphasis added.)

This language is significant because the electorate expressly placed a limitation on the punishment for multiple *current* felony convictions arising from the one act, but declined to apply the same limitation to multiple *prior* qualifying felony convictions arising from one act.

It is a well settled principle of statutory construction that, where particular language is included in one section of a statute, but omitted from another section of the same statute, it is generally presumed that the Legislature acted intentionally and purposely in the disparate inclusion or exclusion. (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349; *Wells Fargo Bank v. Superior Court* (1991) 53 Cal.3d 1082, 1096-1097, citing *Russello v. United States* (1982) 464 U.S. 16, 23 [104 S.Ct. 296, 78 L.Ed.2d 17].) Thus, courts "must assume that the Legislature knew how to create an exception if it wished to do so . . . ." (*City of Ontario v. Superior Court* (1993) 12 Cal.App.4th 894, 902.) Courts cannot insert qualifying language where it is not stated or rewrite the statute to conform to a presumed intention that is not expressed. (Code Civ. Proc., § 1858; *California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 633; *California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349.) Consequently, given the plain language of section 1170.12, the electorate made it clear that it intended to create a sentencing scheme unfettered by the prohibition against double punishment.

The reasoning of *People v. Burgos*, *supra*, 117 Cal.App.4th at page 1216, does not compel a different conclusion. Although the "same act" circumstances posed by robbery and carjacking cases can provide a factor for a trial court to consider in exercising discretion, such circumstances do not remove that discretion and mandate striking a strike. *Burgos* failed to consider the express language of section 1170.12, which provides that the question of whether an offense is a strike "is not affected by the sentence

imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor." (§ 1170.12, subd. (b)(1).)

In addition, although it was not viewed as dispositive, *Burgos* used the sentencing limitation provided by section 215, subdivision (c), to "reinforce[ ]" its conclusion. (*People v. Burgos*, *supra*, 117 Cal.App.4th at p. 1216.) However, *Benson* undermines this view, because the defendant "was on notice that the three strikes law would treat both convictions as strikes, and therefore that he "would be treated as a recidivist if he reoffended." (*People v. Benson*, *supra*, 18 Cal.4th at p. 35.) In *People v. Nguyen* (2009) 46 Cal.4th 1007, this Court upheld the use of juvenile adjudications as strikes, partly because such an adjudication puts the person on notice that upon reoffense, she or he will be punished as a recidivist. (*Id.* at p. 1024 ["Sentence enhancement based on recidivism flows from the premise that the defendant's current criminal conduct is more serious because he or she previously was found to have committed criminal conduct and did not thereafter reform"].)

To the extent that appellant relies on footnote 8 of *Benson* for the proposition that a mandatory rule requires dismissal of one her strikes, this contention is also unavailing. (*See* AOB 21-22.) Footnote 8 followed the statement that a trial court retains discretion to strike one or more prior felony convictions under section 1385 if the trial court properly concludes that the interests of justice support such action. (*People v. Benson*, *supra*, 18 Cal.4th at p. 36.) When placed in context, the language of footnote 8 indicated that it was unnecessary for this Court to determine whether a trial court would abuse its discretion by failing to dismiss a strike allegation arising from a single act because trial courts are already required to consider the particulars of a defendant's past and current criminal conduct. (*Id.* at p. 36, fn. 8.)

This footnote cannot be read as stating, much less signaling, that a trial court automatically abuses its discretion by failing to dismiss a prior strike that arose from a single act that yielded another strike conviction. Such a rule does not involve discretion at all. Instead, it strips the trial court of discretion. Thus, when read in context, the exercise of discretion under *People v. Superior Court (Romero)*, *supra*, 13 Cal.4th 497, 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 the 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. (*People v. 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.*)

The statement of intent in enacting the Three Strikes law provides additional support for this conclusion. The purpose of the law is to ensure longer prison sentences for recidivist offenders. (Ballot Pamp., Gen. Elec. (Nov. 8, 1994) text of Prop. 184, p. 64 et seq.) The electorate may deem offenders who have simultaneously violated more than one criminal statute to pose a qualitatively higher risk to public safety than those who have not. This is because such offenders invade more than one societal interest that the Legislature has designated for distinct protection by the enactment of more than one statute. Thus, in keeping with the statutory language and purpose of the Three Strikes law, it logically follows that the electorate intended to make no exception for "same act" circumstances in defining what constitutes a prior serious or violent felony convictions.

Appellant also relies on the dissenting opinion in *People v. Benson*, *supra*, 18 Cal.4th at pages 45-46, which expressed the view that a stay of sentence for one of two prior convictions prohibited future use of the prior

conviction for purpose of punishment under the Three Strikes Law. (AOB 22.) The dissent relied on the language of section 1170.12, subdivision (b)(1), and (b)(1)(B), which provides that "a prior conviction of a felony shall be defined as: [¶] (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:" "(B) The stay of execution of sentence." (*People v. Benson*, *supra*, 18 Cal.4th at p. 41.)

The dissent noted that this language did not expressly refer to section 654, but rather to a "stay" of execution of sentence, and section 654 does not expressly require a stay of execution of sentence. Rather, the stay requirement is a judicially created rule. (*People v. Benson*, *supra*, 18 Cal.4th at pp. 41-42.) Thus, the dissent reasoned, nothing in the subdivision (b)(1)(B)'s language "'explicitly declares' that a conviction for which section 654 prohibits punishment can be a separate strike." (*Ibid.*, citing *People v. Pearson* (1986) 42 Cal.3d 351, 361.)

However, as the majority explained, courts have repeatedly upheld the Legislature's power to override section 654 by enactments that do not expressly mention the statute. (*People v. Benson*, *supra*, 18 Cal.4th 24, 32-33.) For example, in *People v. Hicks* (1993) 6 Cal.4th 784, 791-792, this Court held that the Legislature, in enacting section 667.6, subdivision (c), was not required to cite section 654 to demonstrate its intent to create an exception to its provisions. The appellate courts in *People v. Ramirez* (1995) 33 Cal.App.4th 559, 573, and *People v. Powell* (1991) 230 Cal.App.3d 438, 441, reached the same conclusion with regard to other statutes creating an exception to section 654's provisions.

Furthermore, there is no plausible reason why the Legislature would require itself to set out in a single statutory provision all the various

provisions of law that prohibit multiple punishment for one course of criminal conduct. As the majority in *Benson* found, the term "stay" arises in a number of contexts other than stays granted under section 654. (*People v. Benson*, *supra*, 18 Cal.4th at 32, citing § 1170.1, subd. (d); Cal. Rules of Court, rule 4.447 [stay permitted where term imposed exceeds statutory limits]; *People v. Karaman* (1992) 4 Cal.4th 335, 341 [temporary stay of sentence to permit defendant to assist his family in moving to a new residence].) This circumstance emphasizes "the great significance [courts] should accord to the use of broad language by the electorate and the Legislature to exclude all stays of execution of sentence, without qualification or exception." (*People v. Benson*, *supra*, at p. 32.)

In sum, the statement of intention, and the plain language of Three Strikes Law removes any doubt that the electorate clearly intended that all qualifying prior serious or violent felony offenses be deemed strikes without qualification or exception. Thus, there is no rule requiring mandatory dismissal of prior strikes arising from the same act.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTION TO DISMISS AS TO THE RESIDENTIAL BURGLARY COUNT, AND GRANTED THE MOTION AS TO THE REMAINING FELONY COUNTS

Appellant makes an alternative argument that, even if the "same act" circumstance does not require a trial court to dismiss a prior strike, the trial court nevertheless abused its discretion in denying her *Romero* motion to dismiss based on the "single act" circumstance. (AOB 33-37.) She additionally contends that the trial court committed reversible error because it considered a falsely noted prior conviction. (AOB 34.) Appellant has failed to meet her burden of proof in demonstrating an abuse of discretion.

A trial court's discretion to strike prior felony conviction allegations in furtherance of justice is limited. Its exercise must proceed in strict compliance with section 1385, subdivision (a). (*People v. Superior Court*

(Romero), *supra*, 13 Cal.4th at p. 530.) A trial court's denial of a defendant's motion to dismiss his or her prior conviction allegations under section 1385 is subject to review for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 374-375.) Discretion is abused where the trial court's decision is "irrational or arbitrary." (*Id.* at p. 377; *People v. Myers* (1999) 69 Cal.App.4th 305, 310.) The burden is on the party attacking the decision to clearly show that it was irrational or arbitrary. (*People v. Carmony*, *supra*, at p. 376.) "In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." (*Id.* at p. 377.)

This Court has explained that the "[T]hree [S]trikes law not only establishes a sentencing norm, it carefully circumscribes the trial court's power to depart from this norm and requires the court to explicitly justify its decision to do so. In doing so, the law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper. [¶] In light of this presumption, a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances . . . . [¶] But '[i]t is not enough to show that reasonable people might disagree about whether to strike one or more' prior conviction allegations. [Citation.] . . . '[w]here the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance' [citation]." (*People v. Carmony*, *supra*, 33 Cal.4th at p. 378.)

A reviewing court should consider the Legislature's decision to protect the public by requiring longer incarceration of criminals who have already committed at least one violent or serious crime. (*Ewing v. California* (2003) 538 U.S. 11, 29-30 [123 S.Ct. 1179, 155 L.Ed.2d 108].)

"[T]he Three Strikes initiative, as well as the legislative act embodying its terms, was intended to restrict courts' discretion in sentencing repeat offenders." (*People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at p. 528.) To achieve this end, "the Three Strikes law does not offer a discretionary sentencing choice, as do other sentencing laws, but establishes a sentencing requirement to be applied in every case where the defendant has at least one qualifying strike, unless the sentencing court 'conclud[es] that an exception to the scheme should be made because, for articulable reasons which can withstand scrutiny for abuse, this defendant should be treated as though he actually fell outside the Three Strikes scheme.'" (*People v. Carmony*, *supra*, 33 Cal.4th at p. 377, quoting *People v. Strong* (2001) 87 Cal.App.4th 328, 337-338.) In exercising its discretion whether to strike a prior conviction for purposes of sentencing, the trial court must consider the following:

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

(*People v. Carmony*, *supra*, at p. 377, internal quotation marks omitted.)

In balancing the appropriate factors, "no weight whatsoever may be given to factors extrinsic to the scheme, such as the mere desire to ease court congestion or, a fortiori, bare antipathy to the consequences for any given defendant. [Citation.]" (*People v. Williams* (1998) 17 Cal.4th 148, 161; accord, *People v. Carmony*, *supra*, 33 Cal.4th at p. 378.) "Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, [the reviewing court] shall affirm the trial court's ruling, even if [it] might have

ruled differently in the first instance." (*People v. Myers*, *supra*, 69 Cal.App.4th at p. 310; accord, *People v. Carmony*, *supra*, 33 Cal.4th at p. 378.)

In this case, the record reveals that the trial court considered appellant's argument and the relevant sentencing factors before denying appellant's *Romero* motion as to one count and granting it as to the remaining counts. Appellant has not shown the court's decision was arbitrary or irrational. Put another way, "It is not enough to show that reasonable people might disagree about whether to strike one or more of [appellant's] prior convictions. Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, [the reviewing court] shall affirm the trial court's ruling . . . ." (*People v. Myers*, *supra*, 69 Cal.App.4th at p. 310.)

The record shows that appellant is a repeat offender with two failed attempts at parole, and an escalating pattern of criminal conduct. She was 19 years old at the time of her 1999 strike offenses. (JN, Exh. A at 6.) In denying appellant's *Romero* motion, the trial court noted that appellant was very active in committing those offenses, making the initial contact with the victim, yelling at him to get out of his car, and threatening that she had a gun. Although appellant did not display a gun, her companion did have a knife and pressed it to the victim's neck. (*Vargas II*, RT 6-7.)

Appellant was released on parole while serving her sentence for the 1999 offenses, but violated parole twice. After she was discharged from parole in September 2006, she was convicted of trespass one year later and placed on three years of probation. (*Vargas I*, CT 205.) Sixteen months after that, she committed the current offenses while still on probation. (*Vargas I*, CT 210-211.)

In the current case, appellant and her co-defendant broke into a house, ransacked it, and stole numerous items including a desktop computer, two laptop computers, a scanner, a printer, Christmas gifts, toys, clothes, two video cameras, two still cameras, a trash bin, a knitting bag, a backpack, a large suitcase, a recycling bin, a jewelry box, checks, DVDs, shoes, and more than $400 in cash. (*Vargas I*, 2RT 621-631, 649-679, 733-747.) The following day, appellant and her co-defendant returned to the same neighborhood in preparation to break into another house, but their plans were thwarted by a police officer who recognized the two as matching the description of the burglary suspects from the previous day. The officer subsequently recovered a backpack from the area where appellant was detained, and found that it containing several items of the stolen property from the previous day. (*Vargas I*, 2RT 691; 3RT 957-969, 1001-1017, 1031-1039, 1001-1017.) In addition, appellant and her co-defendant were positively identified by a neighbor who had witnessed the burglary of the first house. (*Vargas I*, 2RT 740-749, 754-755; 3RT 1042-44.)

After appellant was arrested, appellant falsely told arresting officers that her name was Patricia Gonzalez. (*Vargas I*, 3RT 1030-1031.) She also gave the police an address and phone number which belonged to her mother and claimed it as her own. (*Vargas I*, 3RT 1045.) One of the officers spoke with appellant's mother, who indicated that appellant stayed with her "from time to time," but that she had not seen appellant "for a while." (*Vargas I*, 3RT 1045.)

The probation report noted three aggravating factors. (*Vargas I*, 1CT 210-211) First, the burglary victims were vulnerable because appellant entered their house when they were absent. (Cal. Rules of Court, rule 4.421(a)(3).) Second, the manner in which the crime was carried out indicated planning, sophistication, or professionalism. (Rule 4.421(a)(8).) And third, the crime involved an attempted or actual taking or damage of

great monetary value, including three computers, additional electronics, jewelry, and over $400 in cash. (Rule 4.421(a)(9); see, e.g., *Vargas I*, 2RT 630-631, 649-652, 670.)

In taking into account the nature of appellant's current offenses, her criminal history, and the facts relating to the prior strike case, the trial court found that appellant was "squarely within the spirit of Three Strikes." (See *Vargas I*, 4RT 1815, 1CT 205, 210-211; *Vargas II*, RT 8.) Based on everything presented to the court in both cases, the court denied the *Romero* motion as to the residential burglary count, but granted it as to the remaining felony counts by dismissing both strikes as to those counts. (*Vargas II*, RT 8.)

The trial court did not abuse its discretion in reaching this decision. As discussed, appellant has a history as a repeat offender with two prior strikes, a pattern of theft-related offenses, and a history of failed attempts at parole and probation. Therefore, as the trial court properly concluded, she was clearly within the spirit of the Three Strikes law. "[L]onger sentences for career criminals who commit at least one serious or violent felony certainly goes to the heart of the statute's purpose—or spirit." (*People v. Strong* (2001) 87 Cal.App.4th 328, 338.) Given appellant's substantial number of convictions over a relatively long period of time, she has demonstrated that she is "the kind of revolving-door career criminal for whom the Three Strikes law was devised." (*People v. Gaston* (1999) 74 Cal.App.4th 310, 320.) With regard to appellant's "same acts" claim, the trial court considered the circumstances of appellant's two prior strikes and exercised its discretion not to impose the prior strikes to all but one felony count. Thus, the trial court properly exercised its discretion by doing precisely what it was supposed to do pursuant to *Benson*. (See *People v. Benson*, *supra*, 18 Cal.4th at pp. 35-36.)

Appellant nevertheless contends that the trial court erred by considering a falsely noted prior because the prosecutor advised the trial court that appellant was charged with robbery while she was a juvenile, which was reduced to receiving stolen property, a violation of section 496, pursuant to a plea agreement. (*Vargas II*, RT 3.) Appellant's counsel clarified that the crime referred to by the prosecutor did not belong to appellant, and after some discussion, the prosecutor agreed. (RT 4-5.) The trial court subsequently made reference to the "section 496" conviction in summarizing its decision to deny appellant's *Romero* motion as to count 1. (RT 8.)

Based on the limited record regarding appellant's 1999 case, it does not appear that the court's reference to a prior section 496 conviction was in error because it appears that appellant did, in fact, suffer a conviction of section 496 as a juvenile. According to the 1999 plea hearing transcript, the trial court noted that her plea deal was favorable given the fact that she had suffered a prior conviction "which was a robbery reduced to a 496[]" (JN, Exh. A at 6.) As such, the trial court here did not err.

Moreover, even assuming that an error occurred, it was harmless. (*People v. Watson* (1956) 46 Cal.2d 818; see also *People v. Seldomridge* (1984) 154 Cal.App.3d 362, 365 [where no indication in the record that the result of a resentencing proceeding would be different, reversal for further proceedings would be "a useless and futile act and would be of no benefit to appellant."].) The trial court denied appellant's *Romero* motion based primarily on appellant's two prior strikes, her parole violations, and the circumstances of the current offense. (*Vargas II*, RT 6-7.) In light of the seriousness of appellant's 1999 strikes and current offenses, it is not likely that the trial court would have reached a different decision in the absence of any reference to a section 496 conviction. Accordingly, appellant has not met her burden in demonstrating an abuse of discretion.

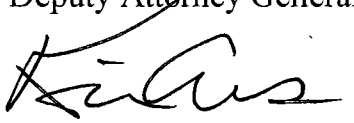
CONCLUSION

For these reasons, respondent requests that this Court affirm the Court of Appeal's decision affirming appellant's judgment.

Dated: March 6, 2013

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
LAWRENCE M. DANIELS
Supervising Deputy Attorney General
NOAH P. HILL
Deputy Attorney General



KIM AARONS
Deputy Attorney General
Attorneys for Respondent

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 10,948 words.

Dated: March 6, 2013

KAMALA D. HARRIS
Attorney General of California

KIM AARONS
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***PEOPLE* v. *DARLENE A. VARGAS*** Case No.: **S203744**

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 March 6, 2013, 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 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Melanie K. Dorian
Attorney at Law
P.O. Box 5006
Glendale, CA 91221-5006
Counsel for Appellant

John A. Clarke
Clerk of the Court
Los Angeles County Superior Court
111 N. Hill Street
Los Angeles, CA 90012

The Honorable Steve L. Cooley
Los Angeles County District Attorney's Office
18000 Foltz Criminal Justice Center
210 West Temple Street, 18th Floor
Los Angeles, CA 90012
Attn.: Gerald Ferris, Deputy District Attorney

For Delivery To:
Hon. Bruce F. Marrs, Judge

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 March 6, 2013, at Los Angeles, California.

Vanida S. Sutthiphong
Declarant

Signature

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