IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

PETITIONER'S REPLY BRIEF

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

Orange County Superior Court Case No. 12NF0653

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

Petitioner, Oscar Manuel Vaquera, by and through counsel, hereby replies to the Respondent's Answer Brief on the Merits. By submitting these pleadings, petitioner does not intend to limit his argument to the propositions contained herein and incorporates by reference his previously filed petitions for writ of *habeas corpus*, his previously filed multiple petitions for review, his answer brief on the merits and the arguments contained in each of them.

REPLY TO GOVERNMENT'S ANSWER BRIEF

The government has highlighted facts from the case and played fast and loose with the law in order to marginalize petitioner and his arguments without adequately addressing the issues requested of this Court. The government's relied upon citations do not support their arguments.

The People continue to try to duck the issues of waiver and estoppel, hiding behind whatever requirements they managed to comply with *while they were making the discretionary charging decision*: rather than *either* the minimum sentencing scheme available in ordinary determinate sentencing (declining application of the one strike law and calling for up to 2 years consecutive per charge) or the maximum scheme available (25 years to life for Count 2 per section 667.61, subdivision (j)(2)), the People selected the middle ground, pleading a one-strike allegation, but selecting the 15 years to life scheme in subdivision (b). The defense then answered ready and commenced trial, cutting off further opportunities for investigation and other preparation, but perhaps decreasing the risk that the People would seek and a judge would grant any amendment to the information.

The People's discretionary charging decision clearly led them to seek sentencing under section 667.61, subdivision (b), and not under subdivisions (j)(1), (j)(2), (a), (l), or (m). To this day, the People offer no explanation why any honest and forthright prosecutor would seek application of the subdivision (j)(2) alternate sentencing scheme by charging the scheme in subdivision (b). The prosecutor typed "(b)" on purpose, because that was the subdivision he invoked. That subdivision is entirely appropriate to the charges, and the remainder of the charging document was entirely consistent with that decision. The defense relied upon it and was made to be a sucker at sentencing.

ARGUMENT

I. The Information Does Not Satisfy "The More Onerous Pleading Requirements of the One Strike Law."

Respondent continues to allege that the Information provided petitioner with adequate notice such that he should have been aware that the prosecution was seeking the alternate sentencing scheme of Penal Code

section[1] 667.61, subdivision (j)(2) and a minimum of 25 years to life. These theories remain erred.

Respondent has claimed compliance with "the more onerous pleading requirements"[2] mandated by *Mancebo*, i.e. "*expressly pled and proved*." (*People v. Mancebo* (2002) 27 Cal.4th 735, 745 (emphasis added).) Interestingly, respondent argues both that the pleading requirements of the One Strike law are "onerous", but that they permit pleading by implication: so allegations of alternate scheme subdivision (b) was sufficient to place petitioner on notice of any other potential scheme within section 667.61, particularly subdivision (j)(2) (and (j)(1), (a), (l) and (m)… and (b)).

The prosecutor has never made a request to amend the charging documents to comply with this Court's mandated pleading requirements per *Mancebo*-not from the complaint filed in 2012, preliminary hearing, information, trial, verdict and the jury's true finding, their first sentencing brief[3] nor their second sentencing brief or arguments at sentencing in 2014. The prosecution has never complied with the "onerous" pleading requirements when the court sentenced petitioner pursuant to (j)(2) rather than (b).

Respondent's reliance on *People v. Houston* (2012) 54 Cal.4th 1186 is distinguishable from the events of this case. The trial court in *Houston* advised the defendant "if convicted, would be sentenced to life imprisonment, and the court asked the parties to say if there was a problem with the proposed jury instructions and verdict forms." (*Id.* at p. 1227.) The proposed instructions and verdicts were for unalleged special findings

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[1] All further references are to the Penal Code unless cited otherwise.
[2] Respondent's Opening Brief (hereinafter ROB) p. 19.
[3] The first sentencing brief complied with these onerous requirements.

of premeditation and deliberation for ten attempted murders but were discussed by the parties and the court prior to verdict. The defense did not object to the unalleged premeditation allegations, instructions or verdicts. As a result, this Court found defendant had forfeited his claim. (*Id.* at 1226.) This Court stated in *Houston*,

> Had defendant raised a timely objection to the jury instructions and verdict forms at any of these stages of the trial on the ground that the indictment did not allege that the attempted murders were deliberate and premeditated, the court would have heard arguments on whether to permit the prosecutor to amend the indictment. (*Id.* at 1227.)

In petitioner's case, the special finding instructions and verdict forms presented to the jury cited subdivision (b) *only* – nothing as to (j), or more specifically as to (j)(2). (2CT 331, 347.) There are no statements in the record from the trial court, nor the sexual assault prosecutor prior to sentencing indicating that the prosecution was seeking 25 years to life on count 2, nor a potential of 40 years to life if run consecutively by the court. Respondent's reliance on *Houston* is inapplicable to this matter as there was no notice of the intended increase.

Equally, respondent's reliance on *People v. Jennings* (1991) 53 Cal.3d 334, *People v. Jones* (1990) 51 Cal.3d 294, *Burns v. United States* (1991) 501 U.S. 129 and *People v. Thomas* (1987) 43 Cal.3d 818 fail to address due process as it applies to petitioner's case. *Burns v. United States, supra,* discussed a federal judge unilaterally departing upwards from the sentencing range established in the United States Sentencing Commission's Guidelines after the defendant's plea agreement. As this case was based on a plea agreement and considered federal sentencing Guidelines and Federal Rule of Criminal Procedure Rule 32, *Burns* has no application to this matter.

People v. Jennings, supra, addressed the defense failure to demur to the information that lacked dates and places of the alleged offenses. In this matter, petitioner did not have a basis to demur to the alleged One Strike scheme as it was filed per subdivision (b). The alternate sentencing scheme in petitioner's matter had nothing to do with notice of the dates or places or the allegations, once again elucidating respondent's failure to appropriately address these issues.

In *People v. Jones, supra,* the High Court stated, "In this child molestation case, we are presented with difficult questions regarding the extent to which the *defendant's due process rights are implicated by the inability of his young accuser to give specific details regarding the time, place and circumstances of various alleged assaults.*" (*Id.* at p. 299, emphasis added.) None of the above factors apply in petitioner's matter and further illustrate respondent's use of mined quotes to support their untenable position.

Respondent's continued dependence on *People v. Tennard* (2017) 18 Cal.App.5th 476 is in error, as petitioner's case is clearly distinguishable. Mr. Tennard was convicted of a felony domestic violence charge, with the alternate sentencing scheme of section 667, subdivision (e)(2)(A) specifically pled, proved and specifically sentenced upon. The asserted and rejected issue in *Tennard* was not the failure to allege the scheme ultimately sentenced upon, but rather the failure to acknowledge the possible exception to that scheme, and to specifically plead the exception to that exception.[4]

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

Respondent's continued dependence on *People v. Thomas, supra* is also error. Respondent relies heavily upon *Thomas* for the broad assertion that pleading the specific statute is not required as long as facts pled give the defendant notice; however, this Court rejected the government's nearly identical claim in *Mancebo,* announcing "this was not our holding in *Thomas.*" (*Mancebo, supra* at p. 747.) As explained in *Mancebo, Thomas* involved a very different issue: whether a manslaughter allegation included a lesser included/lesser related involuntary manslaughter charge, or permitted consideration of voluntary manslaughter only. The "One Strike" alternate sentencing scheme of section 667.61 is not an enhancement nor a lesser included/related offense. As stated by this Court in *Mancebo, Thomas, supra,* provides respondent no support in this matter.

Respondent has tenuously claimed per *People v. Valladoli* (1996) 13 Cal.4th 590 that "post-verdict amendment is permissible" so there was no due process violation in this case. (ROB p. 23.) That argument might hold water if the sexual assault prosecutor had ever requested the trial court to amend the pleading at any time in this matter in order for petitioner to have appropriate notice and the opportunity to prepare and defend against it. As has been clearly shown the prosecutor *has never requested to amend to properly plead subdivision (j)(2).* This argument is further weakened by the fact that the prosecutor only argued for enhanced sentencing in the second sentencing brief, months after the jury had been excused, which would negate the further citation to *People v. Tindall* (2000) 24 Cal.4th 767 and

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

section 969 as petitioner has not forfeited or waived the right to have the same jury that decided guilt also decide the specific further allegation. (*Id.*)

Respondent's citation to *Lankford v. Idaho* (1991) 500 U.S. 110, that a defendant has a "due process right to defend against *facts* to be used against him" misses the entire basis of the United States Supreme Court's ruling and in truth supports petitioner's standpoint. (ROB p. 23-24.) The Court's holding was not concerning the facts used against him, but "whether, at the time of petitioner's sentencing hearing, he and his counsel had adequate notice that the judge might sentence him to death." (*Lankford v. Idaho, supra,* 500 U.S. at p.1725.) The Court demonstrated that no court or prosecutor may unilaterally decide to change punishment that is not properly and fairly noticed.

> The question, however, is whether it can be said that counsel had adequate notice of the critical issue that the judge was actually debating. Our answer to that question must reflect the importance that we attach to the concept of **fair notice as the bedrock of any constitutionally fair procedure**." (*Lankford v. Idaho, supra,* 500 U.S. at 121, emphasis added.)

Lankford is a resounding example of the risks inherent in failure to properly plead and prove an alternate sentencing scheme.

The One Strike alternate sentencing scheme contains its own additional specific pleading and proof requirements greater or "more onerous" than those applicable to a public offense per section 952. "The People must allege the *specific* One Strike law circumstances it wishes to invoke as to each count it seeks to subject to the One Strike law's heightened penalties." (*People v. Perez* (2015) 240 Cal.App.4th 1218, 1227 (*Perez*), emphasis added.) The *Perez* court further stated that "under *Mancebo*, what matters is notice by pleading, not actual notice. The defendant in *Mancebo* certainly knew from the counts alleging different victims that a multiple-victim enhancement could be at issue, but the

Supreme Court in *Mancebo* found that this knowledge did not satisfy the requirements of section 667.61 or due process." (*Id.*) "Unlike sentencing enhancements, a defendant can only plead guilty to a One Strike law crime if the circumstances necessary to trigger that crime are pled—*that is how the defendant knows the maximum sentence he or she faces and what he or she must admit during the plea*." (*Id.*, emphasis added.) Much like the obvious allegations not alleged above, Vaquera's *alternate sentencing scheme allegation* made no mention of the necessary element of subdivision (j)(2)- that the victims were under 14.

According to respondent's theory, the sexual assault prosecutor, Mr. Vaquera and his trial counsel all had notice upon the filing of the complaint that petitioner was facing a potential 40 years to life if consecutively sentenced in this matter because of subdivision (o) and the exclusion listed in (b) that refers to (j) (as well as (a), (l) and (m)). Yet none of the parties received that notice and conclusion through the preliminary hearing, the filing of the information, trial, jury instructions, verdict, release of the jury, and the first sentencing brief. This clearly indicates that none of the parties -including the sexual assault prosecutor- had appropriate notice as required by *Mancebo* and its descendant cases.

II. Respondent's Claims of No Prejudice and No Waiver or Estoppel Have No Basis in Fact.

Respondent has further claimed that "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)." (ROB p. 11.) The sexual assault prosecutor that filed and prosecuted this case from beginning to end, and filed the original sentencing brief did exactly that- he requested the trial court sentence petitioner to 30 years to life (count 1 and 2, 15 years to life each, consecutively). (2CT 356-357.)

Respondent has further claimed that "there is no evidence the prosecutor sought to pursue anything but the maximum sentence in this case." (ROB p. 41.) This is undeniably incorrect. As repeatedly stated, the prosecutor requested 30 years to life in the first sentencing brief and 40 years to life in the second. The prosecutor did not request that the trial court sentence petitioner additionally to the available determinate sentence in the first brief, but stated "the People respectfully ask that Defendant be sentenced to a minimum of 30 years to life." (2CT 361.) In the second sentencing brief the first heading within the prosecutor's argument states, "**DEFENDANT SHOULD BE SENTENCED TO *AT LEAST* 40 YEARS TO LIFE**" and in the final sentence of the mitigation factors section stated "the People respectfully ask that Defendant be sentenced to a *minimum* of 40 years to life." (2CT 365, 369, emphasis added.) Neither of those requests are the maximum possible sentence in this matter.

Respondent has further claimed that Mr. Vaquera was not prejudiced because the trial court stated that if the sentence on count 2 was imposed as it was alleged per subdivision (b) for 15 years to life instead of 25 to life per subdivision (j)(2), then the trial court might have added "consecutive time. . . for the other counts for which Mr. Vaquera faced a determinate sentence." Based on that statement respondent apparently believes that the trial court would have given him more time. Regardless of the respondent's conjecture, the maximum possible consecutive determinate time petitioner could have received (in addition to the 15 years to life) per either prosecution sentencing brief was another 3 years and 8 months at 85%- several years less than 25 to life. (2CT: 356-357, 364-365.) Even under the respondent's theory, the additional 10 year sentence petitioner was given is clear prejudice.

In addition, respondent has claimed that "the prosecutor *expressly alleged the applicable multi-victim circumstance* and referenced section

667.61." (ROB p. 43, emphasis added.) The prosecutor expressly alleged subdivision (b), believed in his first brief that he was seeking the sentence required in subdivision (b) and argued in his brief accordingly. That is the "the express allegation" the prosecutor chose. Instead, respondent asks this Court to speculate that it "appears to have resulted from an inadvertent failure to consider the 2010 amendment and not a discretionary choice." (ROB p. 43.) There is no evidence to support this claim.

Respondent further compounds this conjecture by arguing "that the prosecutor consistently sought the maximum sentence" in the first sentencing brief that respondent is claiming was an error. The previously cited sections of both of the prosecutor's sentencing briefs where there was no request for the determinate sentence prior to the life sentence spoils this claim.

Respondent can call the prosecutor's charging decisions and briefs as inadvertent, errors or mistakes, without anything to substantiate those claims, but in the end the only party harmed due to that choice was the petitioner. If the prosecution had wanted appellant sentenced per subdivision (j)(2), the government's accusatory pleadings, from complaint through verdict and special finding should have alleged that specific provision rather than misleading petitioner until sentencing. Under *Mancebo* and its progeny, the charging documents failure to do so renders the sentence imposed per subdivision (j)(2) unauthorized and prejudicial only to petitioner.[5]

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[5] Mr. Vaquera, whether sentenced to 15-life, 25-life or any other sentence to life, may never be released from custody and end up serving his natural life, well beyond the 25 years he has illegally been sentenced to. Even if he was sentenced to 15 to life the government will still get their pound of flesh.

CONCLUSION

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. (*Cole v. Arkansas* (1948) 333 U.S. 196, 201.)

The charging decision and sentencing practice at issue here violated Petitioner's right to Due Process and notice of the punishment sought against him. Moreover, the ultimate sentencing decision violated principals of waiver and estoppel that had been triggered by the prosecution's discretionary charging decision. If allowed to stand, the opinion below may engender gamesmanship, opaque charging decisions, and injustice without any clear remedy or means for defendants to protect themselves. There is no good reason to allow the rule of law endorsed below to stand.

As such, and for the foregoing reasons, Petitioner humbly requests that this Honorable Court remedy this illegal sentence.

Dated: May 27, 2020

Respectfully Submitted,
SHARON PETROSINO
Public Defender

Matthew Darling
MATTHEW DARLING
Senior Deputy Public Defender

CERTIFICATE OF COMPLIANCE

(Rule 8.504(d)(1))

The undersigned hereby certifies that this brief has been prepared using 13 point Times New Roman typeface. In its entirety, Petitioner's Reply Brief consists of 2,693 words as counted by Microsoft Word word processing program, up to the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on May 27, 2020.

Matthew Darling
MATTHEW DARLING
Senior Deputy Public Defender

DECLARATION OF SERVICE

In re OSCAR MANUEL VAQUERA, on Habeas Corpus.

STATE OF CALIFORNIA)
) ss
COUNTY OF ORANGE)

I, Cristal Sanchez, declare that I am a citizen of the United States, over the age of 18 years, not a party to the above-entitled action, and have a business address at 801 Civic Center Drive West, Suite 400, Santa Ana, California 92701. That on May 27, 2020 I personally served copies of the Petitioner's Reply Brief in the above-entitled action by depositing a copy thereof in a sealed envelope, postage thereon fully prepaid, in the United States Mail at Santa Ana, California. Said envelopes were addressed as follows:

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

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

Executed on May 27, 2020, at Santa Ana, California.

Cristal Sanchez
Cristal Sanchez
Title: Secretary, Writs and Appeals

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**

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Law Firm