IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

APPELLANT'S REPLY BRIEF ON THE MERITS

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

Honorable Bruce F. Marrs, Judge

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SUPREME COURT
FILED

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Deputy

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APPELLANT'S REPLY BRIEF ON THE MERITS

INTRODUCTION

Much of respondent's brief comprises discussions that are not in response to appellant's claims, but are either the product of respondent's misunderstanding or misconstruction of appellant's arguments or an attempt to raise new claims respondent has previously failed to litigate in the trial or appellant court or in an answer to appellant's petition for review, despite several opportunities to have done so. Appellant's arguments, on the other hand, are rather simple.

Under *Romero*, a trial court may take into account the individual circumstances of the current and prior offenses, as well as the defendant's background, among other factors, to determine whether the interests of justice would be served by dismissing a prior strike conviction. Under

Benson and as reaffirmed in *Sanchez*, where a single criminal act gave rise to two prior felony convictions or where the two prior strikes were closely connected, the circumstances of the prior offenses are sufficient to warrant dismissal of one such prior strike in the interests of justice, and it is not necessary to look further. This conclusion neither violates the legislative history nor defeats the purpose of the Three Strikes law.

Appellant's prior convictions for robbery and carjacking were for the single act of forcibly taking the victim's car, and respondent's efforts to extract multiple acts or intents from the record of the prior case are unavailing. The trial court did not even consider the single act factor, but focused on appellant's status as a repeat offender. However, appellant's recidivism cannot be the sole reason for isolating her from society for 25 years to life, given that appellant received concurrent; thus, multiple sentences for committing a single criminal act in the prior case and her minimal criminal history does not otherwise indicate a propensity toward violence. Appellant should be punished as a repeat offender; just not as a "3-Striker."

ARGUMENT

I.

APPELLANT'S PRIOR CONVICTIONS FOR ROBBERY AND CARJACKING AROSE FROM THE SINGLE ACT OF TAKING THE VICTIM'S CAR, AND NOTHING IN THE RECORD OF THE PRIOR CASE, THE STIPULATION TO THE FACTUAL BASIS OR THE TERMS OF THE PLEA BARGAIN DICTATES A CONTRARY CONCLUSION, AS A MATTER OF LAW OR OTHERWISE

Respondent's first contention is not in response to any of appellant's arguments, but a new claim not previously presented by respondent in the Court of Appeal or at resentencing. Respondent argues that since appellant pleaded guilty to both robbery and carjacking in the prior case *and* because she was purportedly "sentenced for two separate acts" by virtue of receiving concurrent sentences, then, presumably, she admitted committing two distinct acts, *as a matter of law*. (RBM, p. 9, ¶ 1.)[1] For these reasons, respondent argues appellant may not "relitigate the facts." (*Ibid.*)

These assertions have no merit. Not only has respondent forfeited these new claims by failing to raise them in the trial or appellate court or address them in an answer to appellant's petition for review, but they also fail for lacking factual support in the record of the prior case.

[1] Since the instant case involves two appeals and an original writ proceeding in the Court of Appeal, to avoid any confusion, appellant will refer to the record in the appellate court in the same manner as respondent has in its brief. Additionally, RJN refers to respondent's request for judicial notice.

A. Respondent May Not Argue for the First Time in this Court that Appellant's Two Prior Convictions Arose from Separate Criminal Acts.

In the original appeal, respondent claimed appellant could not show that her two prior convictions arose from the same act, in part, because, as the prosecutor had pointed out at sentencing, appellant had received a concurrent; thus, separate sentences in the prior case. (*Vargas I*, 2 R.T. p. 3, RB, p. 22.) Appellant then filed a petition for a writ of habeas corpus, which included a partial transcript of the preliminary hearing in the prior case, showing that the robbery and carjacking had been for the taking of the victim's car. (*In re Vargas*, Pet., Ex. C.)

At that time, respondent offered no argument as to why the two convictions arose from two distinct acts, *as a matter of law* or on some other basis. (*In re Vargas*, Informal Response, Return.) Nor did it deny the allegation concerning the single act, as established by the preliminary hearing transcript, or object to the introduction of the transcript. (*In re Vargas*, Pet., § V, Gr. 2, pp. 6-13, Informal Response, Return.) Instead, it simply argued that the single act would not have altered the outcome, and that this was merely a factor for the trial court to consider. (*In re Vargas*, Informal Response, pp. 10-11, Return, pp. 14-15.)

The Court of Appeal agreed that, although based on the record that had been available to the trial court, respondent's proffered conclusion was

not unreasonable, the preliminary hearing transcript rather established a single criminal act. (*Vargas I*, Slip. Opn, pp. 14, 16-17.) Respondent did not file a petition for rehearing, and in the subsequent appeal, it similarly failed to reassert its position regarding the separate acts. (*Vargas II*, RB.) Instead, it focused on why the trial court was not mandated to dismiss one of the prior strikes and that the single act was merely a factor courts could consider in their discretion. (*Vargas II*, RB, pp. 16-17.)

Although respondent claims, in a footnote, that it never conceded the single act factor (RBM, p. 9, fn. 6), even if such concession was not express, the record leaves no doubt that respondent failed to raise the claim it is now presenting to this Court, in either the original or the second appeal. Even at resentencing, the People argued that the single act was "merely a factor for the Court to consider in making its decision whether or not Ms. Vargas [was] within the spirit of the 3 strikes law." (1 R.T. p. 3.)

By failing to counter appellant's argument that the two convictions arose from the single act of taking the victim's car, respondent is precluded from now contending otherwise. (See *California Ins. Guar. Ass'n v. Workers' Comp. App. Bd.* (2005) 128 Cal.App.4th 307, 316, fn. 2 [issue to which respondent's brief contains no reply "will be deemed submitted on appellant's brief"]; see also *People v Duvall* (1995) 9 Cal.4th 464, 481 [respondent is deemed to have admitted the material factual allegations in a

petition which it fails to dispute in the return]; see also *Pratt v. Union Pacific Railroad Co.* (2008) 168 Cal.App.4th 165, 174 ["[g]enerally, a reviewing court will not consider claims raised for the first time on appeal that could have been but were not presented to the trial court... [f]ailure to raise a claim may be forfeited or waived."].)

Respondent has filed a request for judicial notice to submit "additional evidence" for this Court's consideration and has even *reframed* the issues to incorporate this new argument. (RJN, Argument B, ¶ 1; RBM, p. 1, ¶ 1.) Respondent has done so without first seeking to correct or modify the Court of Appeal's decision that the two prior convictions did, in fact, arise from a single act.[2] For instance, respondent claims that the Court of Appeal did not consider appellant's concurrent sentences in the prior case. (RBM, pp. 5-6.) However, respondent did not file a petition for rehearing or an answer to appellant's petition for review, to point out what it now claims to be an incorrect ruling or omission by the Court of Appeal.

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[2] See *Vargas I*, Slip. Opn, p. 17 ["Although we affirmed the judgment on appeal because the evidence before the trial court justified its ruling, we concluded a different outcome was reasonably probable had the trial court known that a single act was involved []."]; *Vargas II*, Slip. Opn. p. 7 ["Respondent does not dispute that these convictions arose from the same act. []."]; *Vargas II*, Slip. Opn. pp. 15-16 ["...the circumstances of multiple convictions arising from the same act or course of conduct is a factor to consider when determining, and not dispositive of, motions to dismiss a strike allegation. (footnote omitted)."]

Review is limited to issues raised in the Court of Appeal. (Cal. Rules of Court, rule 8.500(c)(1).) Briefs on the merits are also generally limited to the issues specified by this Court's order. (Cal. Rules of Court, rule 8.520(b)(3).) Respondent never sought rehearing in the Court of Appeal, nor did it file an answer to appellant's petition for review, in order to address this additional issue it wishes to now present. (Cal. Rules of Court, rule 8.500(c)(2).) Respondent's first argument should, therefore, be disregarded altogether, as neither petitioner nor respondent is before this Court in an original proceeding, but on review from issues previously litigated in the Court of Appeal.

Regardless, even if this Court is inclined to consider respondent's newly-raised claim, along with its accompanying request for judicial notice, the contention that appellant committed two separate criminal acts fails on merit. The record in the prior case, including the preliminary hearing transcript and the guilty plea form, proves that the contrary is true—the second degree robbery and carjacking convictions were for the single act of taking the victim's car.

B. Appellant's Guilty Plea to the Robbery and Carjacking and the Resulting Concurrent Sentences in the Prior Case Were Not an Admission that She Committed Two Separate Criminal Acts.

Respondent urges this Court to ignore the evidence presented at the preliminary hearing in the prior case, and instead, consider the transcript of

the plea hearing. (RJN, Ex. A.) It reasons that by pleading to both the robbery and carjacking charges and accepting the concurrent; thus, separate sentences, appellant essentially acknowledged that she committed two separate criminal acts. Respondent claims it is not necessary to "look beyond" this purported admission. (RBM, p. 9.) First, the cases respondent has relied on are inapposite. (*Id.* at pp. 9-12.)

In *People v. Wallace* (2004) 33 Cal.4th 738 ("*Wallace*"), this Court considered whether the defendant's guilty plea to a prior conviction adequately proved that the conviction qualified as a strike, since, prior to the plea, the magistrate had dismissed the charge at the preliminary hearing for insufficiency of the evidence. This Court found that the guilty plea was an admission that the defendant had committed every element of the crime, and it created the presumption that a factual basis for the plea existed. (*Id.* at pp. 749-750.)

In *People v. Ellis* (1987) 195 Cal.App.3d 334, 345-347 ("*Ellis*"), at the time of the plea hearing, the defendant admitted she was pleading to a serious felony, but later claimed she had done so in error, and that the prior conviction did not qualify as a serious felony under the Three Strikes law. The court rejected the defendant's claim in light of the plea bargain and her admission. (*Id.* at pp. 345-347.)

The foregoing cases have no relevance to the issue at hand. Appellant is not asking that one of her prior strikes be dismissed, because the prosecution *failed to prove* the truth of one or both of the prior strike convictions, or that one or two of these convictions were not serious or violent felonies. Both offenses clearly qualified as prior strikes under the Three Strikes law. (Pen. Code,[3] §§ 667.5, subd. (c)(9), (17), 1192.7, subd. (c)(19), (27).) The question, rather, is whether one of the two qualifying convictions arising from a single act must or may be dismissed.

One criminal act can give rise to two separate offenses and result in violations of multiple statutes; hence, multiple convictions. (§ 954; *People v. Ortega* (1998) 19 Cal.4th 686, 692.) In fact, section 215, subdivision (c), specifically notes that "[a] person may be charged with a violation of [section 215] and Section 211" for taking a car by means of force or fear. By pleading guilty, appellant admitted that she violated both sections 211 (robbery) and 215 (carjacking). Her guilty plea, however, was, in no way, an admission that she committed two distinct acts, and neither *Wallace* nor *Ellis* is dispositive of this issue.

Respondent also contends that since appellant received concurrent sentences in the prior case, then, this Court should presume that appellant had multiple intents or objectives under section 654 and that she accepted

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[3] Unless otherwise indicated, all statutory references are to the Penal Code.

responsibility for two separate acts. (RBM, p. 12.) Notwithstanding the forfeiture of the claim, as discussed *ante*, at pages 3 through 7, this assertion also fails, because respondent relies on cases that are not applicable. (*Id.* at pp. 13-14.)

Respondent cites a slew of cases, all of which stand for the proposition that where a sentence is imposed pursuant to a plea bargain, the defendant forfeits a claim of a section 654 error on appeal, because he or she had received a benefit in exchange for the waiver of the requirement that his or her sentence be stayed. (*People v. Hester* (2000) 22 Cal.4th 290, 295 ("*Hester*").) Any such challenge, therefore, may not be brought without first obtaining a certificate of probable cause. (*People v. Cuevas* (2008) 44 Cal.4th 374, 384.)

Respondent also cites *People v. Osband* (1996) 13 Cal.4th 622 ("*Osband*"). (RBM, p. 13.) There, following a jury trial, the court imposed consecutive sentences for the rape and robbery of the same victim. (*People v. Osband, supra*, 13 Cal.4th at p. 730.) This Court found no error in the court's failure to stay the sentences pursuant to section 654, because the evidence introduced at trial supported the court's implicit finding of separate objectives in the commission of each offense. (*Id.* at pp. 730-731.)

Neither *Hester* nor *Osband* addresses the issue that is before this Court in the instant case. Unlike in *Hester*, appellant is not challenging the

concurrent sentences in her prior case or attempting to withdraw her guilty plea based on a section 654 error. Moreover, unlike in *Osband*, here, there was no jury trial or any evidence from which one could reasonably deduce that appellant harbored multiple objectives or committed separate acts, thereby justifying or explaining the concurrent sentences. The fact that appellant received concurrent sentences as a result of a plea agreement does not answer the question of whether she committed separate criminal acts, for purposes of sentencing under the Three Strikes law.

As respondent acknowledges in a footnote (RBM, pp. 12-13, fn. 7), section 215, subdivision (c) makes clear that, while a person may be charged with both robbery and carjacking, he or she may not be punished under sections 215 and 211 "for the same act which constitutes a violation of both [Section 215] and Section 211." Here, appellant was punished separately for violating both sections 211 and 215. (*People v. Deloza* (1998) 18 Cal.4th 585, 594, citing *In re Wright* (1967) 65 Cal.2d 650, 654 [multiple sentencing is prohibited by section 654, whether consecutive or concurrent].) Does this, alone, mean that she committed separate criminal acts? The answer is no.

The plea hearing was held before Judge David S. Milton. (RJN, Ex. A, p. 1.) Judge Milton opined that the maximum term appellant could receive for the robbery and carjacking was 10 years, and that trial counsel

had "[done] a fantastic job getting [the] case down from ten years to three years []." (*Id.* at p. 6.) The court clearly calculated the maximum exposure based on the upper term of 9 years for the carjacking and consecutive sentencing for the robbery. (§§ 213, subd. (a)(2), 215, subd. (b).) However, Judge Milton was not the magistrate before whom the preliminary hearing had been held. (*In re Vargas*, Ex. C.) Therefore, it is not clear whether Judge Milton was aware that the robbery and carjacking stemmed from the single act of taking the victim's car, which would have required that the sentence in the robbery count be stayed under section 654 and would have limited the maximum exposure to 9 years. (§ 215, subd. (c).)

Stated otherwise, the fact that the sentence for the robbery was not stayed could have very well been an error on the part of the court in the prior case and all counsel present. To illustrate further, this case is the perfect example of where a section 654 error was committed, and no objection was lodged in the trial court. In fact, appellant highlighted this very same point in her traverse when challenging her sentence in the first appeal. (*In re Vargas*, Traverse, pp. 12-13.)

In her first appeal, appellant pointed out that her sentence for grand theft should be stayed, because she harbored the same intent and objective when entering the residence and committing the burglary, as shown by the evidence. (*Vargas I*, AOB, pp. 27-30.) Respondent conceded the issue, and

the Court of Appeal ordered that appellant's concurrent sentence for grand theft be stayed. (*Vargas I*, RB, pp. 16-17, Slip. Opn., p. 15.) In other words, section 654 errors are not uncommon, and Judge Milton's failure to consider the application of section 654 did not provide proof of separate criminal acts or intents, as respondent proffers.

Regardless, as respondent points out, even where section 654 applies to stay punishment in one or more counts, in the context of plea bargaining, parties can reach an agreement for the court to do otherwise and to impose what would otherwise constitute an unauthorized sentence. (*People v. Cuevas*, *supra*, 44 Cal.4th at p. 384; *People v. Hester*, *supra*, 22 Cal.4th at p. 295.) Here, as the sentencing court in the prior case indicated, appellant agreed to 3-year concurrent sentences to avoid a maximum of what the court believed to be 10 years. (RJN, Ex. A, pp. 1-2, 10.)

Appellant's waiver of the section 654 application in the prior case, did not establish that she committed separate criminal acts giving rise to the two separate convictions. Respondent's contention—that appellant agreed to the concurrent sentence; thus, she may not now ask for leniency—would have merit if appellant had filed an appeal in 1999 and asked the Court of Appeal to order her concurrent sentence for robbery stayed. (RBM, p. 15.) Respondent's contention might also have merit if appellant's sentence for the robbery had been stayed, as was the case in *People v. Benson* (1998) 18

Cal.4th 24, 27 34-35 ("*Benson*"), and where this Court opined that the defendant had previously "received the benefit of section 654" in the prior case.

Respondent is conflating several issues and attempting to draw a conclusion regarding the facts of the prior offenses, based on inapplicable legal principles. The answer, however, lies elsewhere, as the determination of whether appellant committed separate criminal acts can only be made by examining the circumstances of the prior case.

C. In Determining Whether the Robbery and Carjacking Involved a Single Criminal Act and Objective and to Ascertain the Nature of Appellant's Stipulation to a Factual Basis When Admitting Guilt, this Court Must Look at the Entire Record of the Prior Case, Including the Preliminary Hearing Transcript and the Guilty Plea Form.

Respondent insists that this Court disregard the preliminary hearing transcript in deciding what the Court of Appeal has previously determined, even though respondent raised no objection, whatsoever, to the introduction of the document at any point in time. To resolve the issue, appellant proposes that this Court not only review the preliminary hearing transcript, but also the written guilty plea form.

In deciding whether a prior conviction qualifies as a strike under the Three Strikes law, courts have consistently required examining the entire record of the prior criminal proceeding, "to determine the nature or basis of the crime of which the defendant was convicted." (*People v. McGee* (2006)

38 Cal.4th 682, 691; *People v. Castellanos* (1990) 219 Cal.App.3d 1163, 1171.) In doing so, courts have held that "the trier of fact may 'look beyond the judgment to the entire record of the conviction,'... '*but no further*'." (*People v. Trujillo* (2006) 40 Cal.4th 165, 177, quoting *People v. Guerrero* (1988) 44 Cal.3d 343, 355-356, emphasis in original.) This is fair, because "it effectively bars the prosecution from relitigating the circumstances of a crime committed years ago and thereby threatening the defendant with harm akin to double jeopardy and denial of speedy trial." (*Id.* at p. 355.)

The term "record of conviction" has been interpreted as broadly as the record on appeal, or as narrow as "those record documents reliably reflecting the facts of the offense for which the defendant was convicted." (*People v. Reed* (1996) 13 Cal.4th 217, 223.) These include the transcripts of the preliminary hearing, the defendant's guilty plea, and the sentencing hearing. (*Id.* at p. 223; *People v. Abarca* (1991) 233 Cal.App.3d 1347, 1350; *People v. Smith* (1988) 206 Cal.App.3d 340, 345.)

The preliminary hearing transcript "contains evidence that was admitted against the defendant and was available to the prosecution prior to the conviction," and may therefore clarify the basis for the conviction. (*People v. Trujillo*, *supra*, 40 Cal.4th at p. 180.) It is also admissible due to the procedural safeguards afforded to the defendant at such hearing, such as the right to confront and cross-examine witnesses under oath, which "tend

to ensure the reliability of such evidence." (*People v. Reed, supra*, 13 Cal.4th at pp. 223, 230.) In contrast, statements made by a defendant following a guilty plea have been deemed not part of the record of conviction, because they were not and could not have been used to obtain the conviction. (*People v. Trujillo, supra*, 40 Cal.4th at p. 179.)

Much like the determination of a prior conviction as a strike, the question of whether appellant committed a single criminal act cannot be definitively and properly answered unless one examines the entire record of judgment, which, here, includes the preliminary hearing transcript and the guilty plea form. (*In re Vargas*, Ex. C; JN, Exs. A, B.)[4] Respondent refers to the "factual basis" that appellant stipulated to. (RBM, pp. 4, 14, 15.) According to the written guilty plea form, the factual basis included the preliminary hearing transcript. (JN, Ex. B, p. 2, § 18.) By respondent's own admission, the preliminary hearing is, therefore, highly relevant, since it shows and as the Court of Appeal twice found, the robbery and carjacking were for the single act of taking the victim's car. (*Vargas I*, Slip. Opn., p. 16; *Vargas II*, Slip. Opn., pp. 12-16.)

To that end, respondent claims that even if the preliminary hearing transcript could be considered, it does not provide "dispositive evidence" that a single criminal act was committed. (RBM, p. 14, p. 14.) Respondent

[4] JN refers to appellant's request for judicial notice, filed concurrently with this reply brief on the merits.

elaborates: "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. [Citation omitted.] 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." (*Ibid.*)

At the outset, it is worth repeating what the victim actually testified: "Then she came up. She was still at the driver's window, right where I was sitting, and she said she had a gun too. And she took the keys out of my car. And *he* -- *they* checked to see if I had any money. They opened the door and pulled me out." (*In re Vargas*, Ex. C, p. 4; JN, Ex. A, p. 4, emphasis added.) Trial counsel then objected to the use of the word 'they,' and asked for clarification as to who committed what specific acts. (*Ibid.*)

First, there was insufficient evidence that appellant was intending to steal cash. The testimony was ambiguous as to whether it was appellant or her male companion who "checked to see" if the victim had any money. (*Ibid.*) More importantly, it was unclear what the victim meant by this statement, i.e., did appellant or her male companion search through his pockets? There was certainly no testimony that appellant specifically requested that the victim hand over his wallet or money. If one or both in

fact searched through the victim's pockets, it is also entirely possible that they were looking for any weapons the victim might have on his person, rather than money.

Moreover, while respondent interprets this testimony as appellant's intent to sell drugs to the victim, and, in turn, steal his money, the victim himself later clarified that the reason appellant was yelling to the victim and insisting that he buy methamphetamine was to "signal[] the male into [his car]." (*In re Vargas*, Ex. C, p. 11; JN, Ex. A, p. 11.) In other words, appellant was attempting to distract the victim, not steal his money. Even more important is the fact that even if the evidence established an intent to steal cash, as respondent surmises, appellant was never charged with, nor did she plead or stipulate to an attempted robbery based on such intent. *People v. Thoma* (2007) 150 Cal.App.4th 1096, in instructive.

There, the prosecution contended that by stipulating to the preliminary hearing transcript as the factual basis of the plea, the defendant had admitted the truth of the victim's injuries. (*Id.* at p. 1104.)

The court disagreed and held as follows:

> "No evidence suggests that in his plea [appellant] was asked to, or did, admit any particular facts stated in the preliminary hearing [transcript] ..., other than those facts necessary to the ... charge itself.... '[Appellant] pled guilty to an information, not to a preliminary hearing transcript.' The present case, therefore, is not comparable to one in which a *charging instrument* is introduced to show the allegations that the defendant, by plea, subsequently admitted. [Citations.]"

(*Id.* at p. 1104, quoting *People v. Reed, supra,* 13 Cal.4th at p. 224, fn. omitted, emphasis in original.)

The court also distinguished *People v. Sohal* (1997) 53 Cal.App.4th 911, as follows:

> In *Sohal* the prosecutor specified particular facts that he "could produce ... at trial" as the factual basis for the defendant's plea. (*Id.*, at p. 914, [].) The defendant's counsel agreed that the prosecutor could produce evidence establishing these facts. The appellate court held that, when defendant pleaded guilty, he "made an adoptive admission of the truth of the facts" specified by the prosecutor. (*Id.*, at p. 916, [].) Unlike *Sohal*, here neither the prosecutor nor defense counsel specified particular facts as the factual basis of appellant's plea. Instead, there was a general stipulation "to a factual basis based upon the police reports and preliminary hearing transcript."

(*People v. Thoma, supra,* 150 Cal.App.4th at p. 1104.) As such, the court reversed the finding of the prior strike and remanded for resentencing and retrial of the strike allegation. (*Id.* at pp. 1104-1105, citing generally *People v. Barragan* (2004) 32 Cal.4th 236.)

Likewise, here, the only statement concerning the factual basis was the court's inquiry as to whether trial counsel joined in the plea and waivers and stipulated to a factual basis, to which counsel responded, "I do." (RJN, Ex. A, p. 7.) The court found a factual basis for the plea "by stipulation," which, again, included the preliminary hearing transcript. (JN, Ex. B, p. 2, § 18.) Given the absence of any discussion concerning the factual basis, appellant's stipulation to the preliminary hearing transcript was limited to

those facts that supported the robbery and carjacking based on the taking of the victim's car. (*People v. Thoma, supra*, 150 Cal.App.4th at p. 1104; see also *People v. Bueno* (2006) 143 Cal.App.4th 1503, 1505, 1509-1510 [the court dismissed the prior strike allegation for insufficiency of the evidence, because, while the defendant pleaded to the violation of section 243, subdivision (d) in the prior case, he never admitted that this was a serious felony, as alleged in the charging document]; see also *People v. Gold* (2008) 163 Cal.App.4th 101, 110-113 [same].)

Respondent correctly notes that there was no evidence in the record that appellant or her companion took any property other than the car. (RBM, p. 14, fn. 9.) Therefore, appellant's stipulation to the factual basis, including the preliminary hearing transcript, pertained to the taking of the car, not the ambiguous statement that either her companion or both "checked to see if [the victim] had any money," which, without more, did not and could not support a robbery conviction.

Curiously, respondent claims that there is no indication in the record that the prosecution "would have been unable to prove its case." (RBM, p. p. 14, fn. 7.) Assuming that respondent is referring to the People's ability to prove, beyond a reasonable doubt, an alleged robbery of Brandon Brian's personal property, other than his car, the record belies this statement, as the it is devoid of any proof of such alleged robbery. Of course, appellant may

not be subjected to an indeterminate sentence based on a robbery conviction that was never pleaded or proven, as demonstrated by the entire record. (*People v. Griffis* (2013) 212 Ca.App.4th 956, 965.)

Furthermore, when the magistrate held appellant to answer to the charges of robbery and carjacking, there was no indication that the robbery was for taking any personal property other than the victim's car. (JN, Ex. A, pp. 15-16.) Applying respondent's logic, if the prosecution felt that the evidence was, in fact, capable of proving beyond a reasonable doubt an additional robbery charge for stealing cash, more likely than not the prosecution would have added a fourth count for such criminal act in the information, but it did not. (*Vargas I*, 1 C.T. pp. 172-174.)

Finally, during the plea colloquy, the court asked, "You also understand you are pleading guilty to two strikes, these are two serious felonies, which means that if in the future you are convicted of any other felony offense, your conviction will result in a sentence of 25 years to life in prison. [P] You understand that? " (RJN, Ex. A, pp. 5-6.) Appellant replied: "Yes, sir." (*Id.* at p. 6.)

Respondent does not appear to argue that appellant was precluded from bringing a *Romero*[5] motion in light of this admonishment, as it makes a mere fleeting reference to this. For reasons stated *ante*, at pages 3 through

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[5] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 ("*Romero*").

7, respondent has forfeited any such argument, because it failed to raise it at the original sentencing or during any subsequent proceedings in the trial or appellate court, where appellant would have had the opportunity to respond.

Regardless, the written plea form did not include an agreement concerning appellant's future waiver of the right to seek dismissal of one or both of her convictions for robbery and carjacking. (JN, Ex. B.) Therefore, it appears that the court was merely advising appellant of the possibility that the two convictions would be used as qualifying prior strikes under the Three Strike law, and nothing more. Respondent has not cited any authority for the proposition that a sentencing court has the power to override the discretion of a subsequent court in sentencing matters. As such, the trial court in the present case retained the discretion to grant the *Romero* motion.

More importantly, to the extent that respondent relies on this admonition to suggest that appellant received the benefit of the bargain in the prior case; thus, she may not complain of any "fundamental unfairness" in light of her third strike sentence, respondent ignores an important point. (RBM, p. 15.) Respondent is seemingly proposing a public policy approach, as it is attempting to analogize the instant situation to those circumstances where a defendant enters a guilty plea, then, later complains of a lengthy or unlawful sentence.

Had appellant elected to proceed to trial and been convicted and

sentenced in the prior case, she would have received a maximum of 9 years for carjacking and the sentences in the remaining two counts would have been stayed. The difference between 9 years and the agreed-upon concurrent 3 years was a mere 6 years, whereas she is currently serving 30 years to life for her new offenses. Applying respondent's logic and only in response to its contention, it does not appear that public policy or "fundamental []fairness" would endorse an agreement to a possible future life sentence, in order to avoid an additional 6 year sentence.

II.

DISMISSING ONE OF APPELLANT'S PRIOR STRIKES, GIVEN THAT HER TWO PRIOR CONVICTIONS AROSE FORM THE SAME CRIMINAL ACT, WOULD NOT VIOLATE THE LEGISLATIVE HISTORY OR PURPOSE OF THE THREE STRIKES LAW

Respondent has misunderstood and/or misconstrued appellant's arguments regarding the single act factor. Respondent additionally offers a lengthy discussion regarding the legislative history and purpose of the Three Strikes law, in support of its contention that appellant's prior convictions may not be dismissed under any circumstance. For the following reasons, these assertions lack merit.

A. Dismissal of One of Multiple Prior Convictions Arising from the Same Act Is Not Mandatory in Every Case, and Appellant Does Not Rely on a Section 654 Analysis to Reach Any Such Conclusion.

At the outset, as appellant highlighted in her opening brief, she does

not interpret *Benson*, as requiring trial courts to *automatically* dismiss one of multiple prior convictions arising from the same act in every case. (AOBM, p. 27.) Therefore, respondent's contention that appellant cites *Benson* "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," and that such mandatory dismissal would contradict the legislative intent behind the Three Strikes law is *not* in response to any such claim made by appellant. (RBM, pp. 15-16.)

Next, in a footnote, respondent expresses its lack of understanding as to the nature of appellant's contentions. (RBM, p. 15, fn. 10.) It adds, "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 stayed pursuant to 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." (RBM, pp. 15-16, fn. 10.)

Appellant is compelled to reiterate her points for purposes of clarification. First, in *Benson*, the majority in this Court reasoned, in part, that the defendant had previously received the benefit of a stayed sentence

in the prior case and was now precluded from complaining of the unfairness of his indeterminate life sentence. (*People v. Benson*, *supra*, 18 Cal.4th at pp. 34-35.) In her opening brief, appellant pointed out that, unlike the defendant in *Benson*, her sentence for robbery in the prior case was not stayed, and that appellant was, therefore, deserving of leniency, at least according to the reasoning offered by this Court in *Benson*. (AOBM, pp. 3, 28-29.)

With respect to respondent's next assertion, that had appellant's prior convictions arisen from the same act, one of her sentences would have been stayed, appellant has previously addressed the flaw in this, *ante*, in Argument I. Moreover, respondent is mistaken that appellant has relied heavily on case law dealing with a section 654 analysis. (RBM, p. 15 ["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."]

In support, respondent cites pages 22 through 25 of the opening brief, where appellant discussed relevant case law, namely *Benson*, including the dissenting opinion, as well as *People v. Burgos* (2004) 117 Cal.App.4th 1209 ("*Burgos*"), rather than cases dealing exclusively with section 654, as respondent claims. (RBM, p. 16, fn. 10.) Respondent omits the fact that appellant also addressed the decision in *People v. Scott* (2009)

179 Cal.App.4th 920 ("*Scott*"). (AOBM, pp, 26-27.) Again, in her analysis, appellant made clear that she was not urging the courts to dismiss one of her two prior convictions based on a section 654 analysis. (AOBM, p. 28.)

As discussed *ante*, at page 25, appellant limited her section 654 discussion to the fact that, unlike the defendant in *Benson*, her sentence in the prior case was not stayed. (*Id.* at pp 28-29.) The majority of appellant's arguments were clearly focused on the circumstances of the prior case. (*Id.* at pp. 27-33.) Moreover, in highlighting the fact that appellant's offenses arose from the same act of taking the victim's car, as compared to the gratuitous violence observed in *Benson*, appellant also harmonized the majority and dissenting opinion there. (*Id.* at p. 28.) In sum, appellant believes her arguments do not suffer from any ambiguity.

B. Dismissal of One of Two Prior Convictions that Arose from the Same Act, Under Section 1385, Would Not Be Inconsistent with the Legislative History or Purpose of the Three Strikes Law.

Respondent claims that the language of section 1170.12, in particular, the portion of the statute that provides, "[n]otwithstanding any other provision of law," makes clear that; (1) each prior conviction for a serious or violent felony necessarily qualifies as a strike; (2) the prohibition against double punishment under section 654 does not override this requirement; and (3) dismissal of a prior strike would automatically violate the legislative intent to qualify each prior conviction as a strike. (RBM, pp.

16-30, citing *People v. Benson*, *supra*, 18 Cal.4th at pp. 31-32, and *People v. Palacios* (2007) 41 Cal.4th 720, 727-728.)

Once again, respondent's assertions do not counter appellant's arguments. As discussed *ante*, at pages 24 through 26, appellant does not rely on a section 654 analysis. Nor does she claim that dismissal of a prior strike conviction is mandatory under *Benson*. In fact, in her opening brief, appellant expressly acknowledged that, as this Court observed in *Benson*, "the Legislature need not expressly reference section 654, in order to override its application." (AOBM, p. 28, citing e.g., *People v. Palacios*, *supra*, 41 Cal.4th at p. 730.)

Turning to the substantive arguments, respondent claims that if the legislative intended to create an exception based on the single act factor, it would have done so. (RBM, pp. 25-26.) In support, it cites section 1170.12, subdivision (a)(6), which requires consecutive sentencing where the felony convictions did not occur on the same occasion. Respondent also references the voters' version of the Three Strikes law, which stated: "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 a serious and/or violent felony offenses." (Ballot Pamp. Gen. Elec. (Nov. 8, 1994) text of Prop. 184, p. 64 et seq, emphasis added; RJN, Ex. B.) Based on this language,

respondent argues: "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." (RBM, pp. 16, 28.)

Appellant submits that the contrary is true. As the initiative was explained to the voters, the law meant, "3 Strikes and You're Out," and that it was intended to punish "career criminals, who rape women, molest innocent children and commit murder []." (Ballot Pamp. Gen. Elec. (Nov. 8, 1994) Argument in Favor of Prop. 184, p. 36.) The Rebuttal to the Argument Against Proposition 184, read: "We did it because soft-on-crime judges, politicians, defense lawyers and probation officers care more about violent felons than they do victims. They spend all of their time looking for loopholes to get rapists, child molesters and murderers out on probation, early parole, or off the hook altogether," and further reassured the voters that the law only targeted "career criminals—those with a history of committing SERIOUS/VIOLENT crimes." (Ballot Pamp. Gen. Elec. (Nov. 8, 1994) Rebuttal to the Argument Against Prop. 184, p. 37, emphasis in original.)

A reasonable voter would most likely understand this to mean that a person would be subject to an indeterminate life sentence, *only* after he or she committed two separate qualifying felonies on two separate occasions

and failed to reform for a third time. Moreover, the reasonable voter with no legal training could not be expected to understand that a single act could give rise to two separate convictions at the same time, and most certainly, no reasonable voter would elect to punish a person so harshly for a single criminal act committed on the same occasion.

The fact that the voters were recently afforded the opportunity and did elect to reaffirm their original intent to punish repeat offenders *only* where the current offenses were for violent and/or serious felonies, strongly suggests that, while concerned with public safety, the voters did not intend for such life sentences to be imposed, where such harsh penalty would be unfair and unjust. (Ballot Pamp., Gen. Elec. (Nov. 6, 2012) text of Prop. 36, § 1, p. 105.) The bottom line is that the Three Strikes law was intended to punish "repeat offenders." (*People v. Anderson* (1995) 35 Cal.App.4th 587, 592-593, 595.) One need not resort to a dictionary to conclude that the word "repeat" implies committing an act on more than one occasion, i.e., to do it again.

Regardless, respondent seemingly suggests that in light of the language of the Three Strikes law, no exceptions or circumstances would warrant dismissal of a prior strike conviction, and that each prior conviction must be treated as a separate strike in every case. (RBM, p. 25.) Much like an automatic dismissal rule wherever the prior convictions arose from the

same act, this interpretation of the law would equally eliminate a trial court's discretion to dismiss one such prior conviction in the interests of justice under section 1385.

Essentially, respondent is asking this Court to overrule *Romero* and its progeny, and any other case that has approved of a court's discretionary power to dismiss one or two prior convictions when sentencing a defendant pursuant to the Three Strikes law, including *Benson*. (*People v. Benson, supra*, 18 Cal.4th at p. 26, fn. 8 [contemplating a trial court's abuse of discretion in failing to dismissing one of the two prior convictions arising from the same conduct]; *People v. Romero*, *supra*, 13 Cal.4th at p. 504 ["Although the Legislature may withdraw the statutory power to dismiss in furtherance of justice, we conclude it has not done so in the Three Strikes law. Accordingly, in cases charged under that law, a court may exercise the power to dismiss granted in section 1385, either on the court's own motion or on that of the prosecuting attorney, subject, however, to strict compliance with the provisions of section 1385 and to review for abuse of discretion.".]

Respondent is conflating the plain statutory requirement that each prior serious or violent felony conviction qualify as a prior strike, with a trial court's powers to dismiss one such qualifying strike under section 1385. In *Romero*, this Court did not "insert" any language in section

1170.12, when it found that the Legislature had not overridden the powers of a court to dismiss a prior felony conviction under section 1385. (*People v. Romero*, *supra*, 13 Cal.4th at p. 504.) It simply read the Three Strikes law, in conjunction with section 1385. (*Id.* at p. 518 ["... the statutory power to dismiss in furtherance of justice has always coexisted with statutes defining punishment and must be reconciled with the latter.".]

In fact, this Court explained, at length, why the discretion to dismiss one such prior would not interfere with the prosecution's powers to allege any qualifying prior convictions they elected to do, as it made clear that the process of fact-finding and sentencing were 'fundamentally judicial in nature.' (*Id.* at p. 514, quoting *People v. Tenorio* (1970) 3Cal.3d 89, 94.) The court further reasoned that since the Legislature had not, for instance, repealed section 1385 and eliminated the discretionary powers of a trial court to dismiss a prior felony conviction under that statute, then, nothing in the language of the Three Strikes law prevented a trial court from doing so in the interests of justice. (*People v. Romero*, *supra*, 13 Cal.4th at pp. 518-521.) In support, it further pointed out that section 667, subdivision (f)(2), referenced a prosecutor's decision to move to dismiss a prior conviction under section 1385. (*Id.* at p. 519.)

In sum, nothing in the legislative language prohibits a trial court from dismissing a prior conviction where the two prior strikes arose from

the same act. More importantly, contrary to respondent's assertions, the statutory language of the Three Strikes law does not mandate that each and every alleged qualifying prior felony conviction be treated as such at sentencing, as trial courts enjoy the power to dismiss one such prior in the interests of justice. Finally, nothing precludes a reviewing court from finding an abuse of discretion, when the circumstances of the prior offenses make clear that the two convictions were the product of a single criminal act. (*People v. Benson, supra*, 44 Cal.4th at p. 36 fn. 8.)

C. *Burgos* Was Not Wrongly Decided, and Its Reasoning Was Not Inconsistent with the Holding in *Benson* or the Legislative Intent of the Three Strikes Law.

Respondent misinterprets the court's reasoning in *Burgos* and its reliance on section 215, subdivision (c), which prohibits punishment for both robbery and carjacking. In reaching the conclusion that the robbery and carjacking stemming from the same act of taking the victim's car warranted dismissal of one of the prior strikes, the court expressly acknowledged that section 215, subdivision (c) "[did] not refer to the use of the convictions as priors in a later prosecution." (*People v. Burgos, supra*, 117 Cal.App.4th at p. 1216.) The court merely considered this as a factor in finding the type of abuse of discretion this Court in *Benson* had contemplated in footnote 8. (*Id.* at p. 1216, citing *People v. Benson, supra*, 18 Cal.4th at p. 26, fn. 8.)

Respondent also contends that *Benson* "undermined" the decision of the court in *Burgos* to rely on the prohibition against multiple punishments for both robbery and carjacking under section 215, subdivision (c). (RBM, p. 27.) Respondent claims, as *Benson* held, the defendant in *Burgos* was on notice that his prior felony convictions would be treated as two separate strikes. (RBM, p. 27.)

As explained *ante*, at pages 25 and 26, however, this discussion in *Benson* pertained to the defendant's claim that one of his prior convictions should be dismissed in light of his stayed sentence in his prior case. This Court rejected that argument, as it distinguished a section 654 analysis from one that pertained to the interests of justice and the leniency the defendant had previously received. (*People v. Benson*, *supra*, 18 Cal.4th at pp. 34-35.) Again, these discussions are not relevant here, since appellant's sentences in the prior case were not stayed, and that is simply not what appellant has been arguing.

In addition, *Burgos* did not carve out a per se and/or mandatory dismissal rule in *every case* and *each time* that two prior strikes arose from the same act, as respondent claims. (RBM, pp. 22-24.) Nor did the court in *Burgos* consider the single act as a mere factor. Rather, it first held that the failure to dismiss one of the two prior strikes was an abuse of discretion under *Benson*, and it then additionally justified its holding by examining the

individual considerations under *Romero*. (*People v. Burgos*, *supra*, 117 Cal.App.4th at pp. 1216-1217.)

Stated otherwise, *Burgos* did not violate the legislative purpose of the Three Strikes law. Nor was its holding inconsistent with the statutory intent that a trial court consider each qualifying prior strike when sentencing a defendant pursuant to the Three Strikes law (§ 1170.12), while retaining its powers to dismiss one in the interests of justice (§ 1385).

D. The Trial Court Abused Its Discretion in Failing to Dismiss One of Appellant's Prior Convictions for Robbery and Carjacking Based on the Single Act of Taking the Victim's Car, and this Conclusion Neither Violates the Legislative Intent of the Three Strikes Law, Nor Is It Inconsistent with the Holding in *Benson*.

Respondent reads footnote 8 of *Benson*, to mean that the single criminal act is merely a factor a trial court may consider. (RBM, pp. 27-28.) Appellant does not presume to know for certain what this Court intended, although this Court did reiterate and somewhat expand on footnote 8 in *People v. Sanchez* (2001) 24 Cal.4th 983, 993, as it observed: "...[W]e believe it is appropriate and prudent to note that in this court's decision in *Benson*, we observed that a trial court may strike a prior felony conviction under section 1385, and that we left open the possibility that 'there are some circumstances in which two prior felony convictions are so closely connected . . . that a trial court would abuse its discretion under section

1385 if it failed to strike one of the priors.'" (Quoting *People v. Benson*, *supra*, 18 Cal.4th at p. 36, fn. 8.)

Based on the foregoing, appellant's understanding is the following: Under *Romero*, a trial court may dismiss a prior strike conviction in the interest of justice, based on "individualized considerations," including the circumstances of the current and prior offenses, and appellant's background and his or her criminal history. (*People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at p. 531.) In footnote 8 of *Benson*, as well as the reference made in *Sanchez*, this Court seemingly suggested that a court may also dismiss a prior strike conviction based on the *circumstances of the prior strike case alone*, where the multiple convictions arose from the same criminal act. (*People v. Benson*, *supra*, 18 Cal.4th at p. 36, fn. 8; see also *People v. Sanchez*, *supra*, 24 Cal.4th at p. 993.) Under the latter, it is not necessary to additionally examine any other facts or information as a trial court would typically do under *Romero*, and the single act factor alone would suffice, under certain circumstances, to warrant dismissal of one of the prior strike convictions.

What *Benson* proposed does not, in any way, violate the legislative intent and would not strip trial courts of their discretionary powers, as respondent contends. (RBM, p. 28.) Again, as discussed *ante*, at pages 28 and 29, it is highly questionable that the voters intended to punish a

defendant for "3 Strikes," where the prior convictions were simultaneous and arose from the same criminal act and occurred on the same occasion.

In addition, a reviewing court may properly declare a trial court's failure to dismiss one of two prior strikes arising from the same conduct as an abuse of discretion, without infringing on the sentencing court's discretionary powers under section 1385. First, neither *Benson* nor *Sanchez* created a per se rule that such dismissal should be required of every trial court whenever there was a single act involved. Second, a trial court may decide what is in the best interest of justice under section 1385, and a reviewing court may properly disagree with the trial court's decision and find that it abused its discretion. (See e.g., *People v. Carmony* (2004) 33 Cal.4th 367, 374.)

More importantly, judicially-created principles that deal with fundamental fairness in punishment are not a novel idea. For instance, in the context of cruel and unusual punishment, courts have applied a categorical bar on mandatory life sentences for juveniles. (See generally *Miller v. Alabama* (2012) 567 U.S. __ [132 S.Ct. 2455, 183 L.Ed.2d 407]; *Graham v. Florida* (2010) 560 U.S. __ [130 S.Ct. 2011, 176 L.Ed.2d 825]; *People v. Caballero* (2012) 55 Cal.4th 262; *People v. Mendez* (2010) 188 Cal.App.4th 47, 50-51.) Another example would be the multiple victim exception to the application of section 654, which does not appear in the

language of section 654, but remains intact, even following this Court's recent interpretation of the statute in focusing primarily on "a single physical act," rather than the defendant's intent or objectives. (*People v. Jones* (2012) 54 Cal.4th 350, 358; *People v. Mesa* (2012) 54 Cal.4th 191, 199-200; *People v. Oates* (2004) 32 Cal.4th 1048, 1063.)

Finally, respondent also misconstrues appellant's reliance on Justice Chin's dissenting opinion in *Benson.* (RBM, pp. 28-29.) What is crucial about Justice Chin's discussion, as relevant here, is his analysis that similar to the multiple victim or objective exception under section 654, courts have the power to impose a 25-year-to-life sentence for two prior convictions arising from the same occasion, where the circumstances demonstrated multiple objectives or gratuitous acts of violence. (*People v. Benson, supra,* 18 Cal.4th at pp. 45-46 (dis. opn. of Chin, J.).) In other words, where the majority and Justice Chin parted ways in terms of a section 654 analysis, they were consistent in their conclusions regarding fairness in sentencing. Accordingly, where "multiple convictions arise out of a single act," (*People v. Benson, supra,* 18 Cal.4th at p. 36, fn. 8) or were "closely connected" (*People v. Sanchez, supra,* 24 Cal.4th at p. 993), the interests of justice require that they be treated as one strike.

Applying the foregoing principles to the instant case, appellant's robbery and carjacking convictions arose from the same criminal act; thus,

the failure to dismiss one of the prior strikes was an abuse of discretion. Of course, respondent does not dispute the fact of the single act; it merely claims two separate acts were involved *as a matter of law*. As discussed *ante*, in Argument I, this contention should be disregarded. Appellant stipulated to the facts presented at the preliminary hearing, which supported the taking of the victim's car by force and fear; hence, the robbery *and* the carjacking convictions, and nothing more.

Respondent's discussion regarding the distinction between the offenses of carjacking and robbery are also not particularly helpful. (RBM, pp. 17-19.) Respondent points out that the prosecution may charge a defendant with both offenses. (*Id.* at pp. 18-19.) It also argues that carjacking may occur even if the defendant intended to temporarily deprive the owner of the possession of his car, whereas robbery requires an intent to do so permanently. (*Id.* pp. 17-18.)

These distinctions have no effect on the issue at hand. The preliminary hearing transcript includes testimony by a Rochelle Moreno, who testified that, the day following the incident, appellant picked her up in the stolen Honda. (RN, Ex. A, pp. 12-15.) Evidently, appellant drove about five blocks before she was stopped by the police and "rammed" the car into a chain link fence. (*Id.* at pp. 6, 14.) Nothing in the record shows that appellant intended to deprive the victim of the car only "temporarily,"

which, respondent seemingly suggests would indicate a different intent when taking the car within the meaning of section 211. (RBM, pp. 17-18.) Appellant was still driving the car the following day. There was no evidence she intended to abandon the car at some point, where it could be found by the police or the owner.

In addition to the mention of a "single act" (*People v. Benson, supra*, 18 Cal.4th at p. 36, fn. 8), this Court in *Sanchez*, also referred to "circumstances in which two prior felony convictions [were] so closely connected," that the failure to dismiss one such prior would be deemed an abuse of discretion under section 1385 (*People v. Sanchez, supra*, 24 Cal.4th at p. 993). Here, as the victim testified, the entire incident took no more than 45 seconds. (*In re Vargas*, Ex. C, p. 10; JN, Ex. A, p. 10.) Thus, not only were the two prior convictions for the forcible taking of the victim's car, but the 45-second encounter made the offenses so closely connected that to treat them as separate strikes would be fundamentally unfair.

At resentencing, the trial court adopted the prosecution's view that appellant had had a "very active" role during the incident. (1 R.T. pp. 3, 7-8.) However, as Justice Chin in *Benson* notably asked: "As an example, suppose a person stops a pedestrian at knifepoint and demands a watch. Based solely on that act, the person could conceivably be convicted of felony false imprisonment, assault with a deadly weapon, and attempted

robbery. Because each conviction would involve personal use of a deadly weapon, each could, individually, qualify as a strike. (See § 1192.7, subd. (c)(23).) Would that mean three strikes occur at once?" (*People v. Benson, supra*, 18 Cal.4th at pp. 43-44 (dis. opn. of Chin, J.).)

Here, appellant may have had an "active role" by attempting to distract the victim at first, then, threatening him with a gun and taking away the car keys and pushing him out of the car. However, these actions were all part of what led to the forcible taking of the car within 45 seconds. More importantly, her active role did not result in the type of gratuitous violence that this Court in *Benson* believed to have justified the 25-year-to-life sentence for a defendant who, in addition to committing a residential burglary, had stabbed the victim 20 times. (*People v. Benson, supra*, 18 Cal.4th at p. 35.) In other words, in deciding whether a person poses a great danger to society or whether the interests of justice require that he or she receive a life sentence, it is not the active participation of a defendant that is dispositive, but whether the two convictions involved multiple acts of great violence, and suggested multiple objectives. These circumstances were not present here.

Appellant's objective was to take the victim's car as quickly as possible. No other property was taken from the victim. Nor did she or her male companion physically harm the victim, and although they did take the

car at knifepoint, that act was an element of the forcible taking (§ 215, subd. (a)), and the violence did not extend further than what was necessary to accomplish this goal. To the extent that respondent argues that appellant also harbored an intent to steal cash, as explained *ante*, in Argument I, at pages 17 through 21, not only was the testimony vague as to who checked for what, but there were also no charges or convictions for an attempted robbery or a stipulation to any facts that would support such inference.

III.

THE TRIAL COURT ABUSED ITS DISCRETION IN DECLINING TO DISMISS ONE OF APPELLANT'S PRIOR STRIKE CONVICTIONS, BECAUSE NOT ONLY DID THE COURT FAIL TO CONSIDER THE SINGLE ACT FACTOR, BUT THE INDIVIDUALIZED CONSIDERATIONS WARRANTED A DIFFERENT RESULT

At the outset, contrary to respondent's claim, the trial court did not even consider the single act as a factor, as appellant pointed out in her opening brief. (AOBM, pp. 32-33; RBM, p. 35.) Respondent is correct that the court discussed the circumstances of the prior offense. (RBM, p. 35.) However, the trial court expressly commented that "the central focus [was] not on the single act single victim, same time same intent," but "the defendant's status as a repeat felon." (1 R.T. p. 6.) Clearly, the court did not believe the single act factor was worth consideration. For this reason alone, the court's decision was an abuse of discretion, because a failure to exercise discretion itself has been deemed "an abuse of discretion," warranting

reversal. (See e.g., *People v. Crandell* (1988) 46 Cal.3d 833, 861; see also *People v. Benson, supra,* 18 Cal.4th at pp. 28, 36-37.)

Moreover, although this is not an issue before this Court, appellant objects to respondent's contention that "appellant and her co-defendant were *positively* identified by a neighbor who had *witnessed* the burglary of the first house." (RBM, p. 34, emphasis added.) First, the neighbor *did not* witness the burglary. What she saw was a man and a woman carrying numerous items in a suitcase and a recycling bin across the street. (*Vargas I,* 2 R.T. pp. 735-745, 756, 760-765, 769, 776-777, 779-781.)

Nor did the neighbor "positively" identify these two individuals. Her identification was highly questionable, in light of her description of the man and the woman and her brief observations from a distance. (*Vargas I*, 2 R.T. pp. 738, 744, 757-760, 760-763, 767, 773-774, 777-785, 790, 3 R.T. pp. 1038-1039, 1045-1048, 1052.) In fact, she admitted she selected appellant's photograph in the six-pack, simply because the police were showing it to her. (*Vargas I*, 2 R.T. pp. 786-787.)

The Court of Appeal rejected appellant's argument regarding the mistaken identification and the suggestive photographic line-up. (*Vargas I*, Slip Opn., pp. 5-9, 15.) Still, appellant wishes to point out that respondent's characterization of the evidence introduced at trial is incorrect. For similar reasons, it is unclear why appellant giving a false name to the police

following her arrest, as testified by the arresting officer, has any bearing on the trial court's decision to not dismiss a prior strike. (RBM, p. 34.) The trial court did not make any mention of what transpired after appellant's arrest, but, instead, relied heavily on the circumstances of the prior case. (1 R.T. pp. 6-7.)

With respect to appellant's criminal history, respondent claims that the reference to appellant's section 496 "conviction" in her juvenile record was not inaccurate, because the same reference appears in the transcript of the plea hearing in the prior case. (RBM, p. 36, citing RJN, Ex. A, p. 6.) However, the transcript of the plea hearing is not *proof* of any such adjudication. Certainly, the probation officer's report did not list any juvenile record. (*Vargas I*, 1 C.T. p. 205.) As appellant stated in her opening brief, to the extent that the trial court did consider this juvenile robbery or section 496 violation, the decision was arbitrary and violated appellant's federal due process rights. (AOBM, p. 34.)

Respondent also contends that any error in this regard was harmless, because there is no indication that the trial court would have dismissed one of the prior convictions in the absence of such prior record. (RBM, p. 36.) However, given the court's emphasis of appellant's criminal past, including the express mention of the section 496 adjudication in its final ruling, and the fact that a decision on a *Romero* motion necessarily rests on a

defendant's criminal history, appellant does not share respondent's confidence that the trial court's decision would have been the same absent the unproven juvenile history. (1 R.T. p. 8.)

Respondent also characterizes appellant's criminal record as including a "*substantial number of convictions over a relatively long period of time*." (RBM, p. 35, emphasis added.) Appellant's two parole violations and the single misdemeanor trespass conviction since her 1999 convictions over a ten-year period, however, hardly qualify as such. (*Vargas I*, 1 C.T. pp. 183-205.) Respondent insists *People v. Scott, supra*, 174 Cal.App.4th 920, was correctly decided. (RBM, p. 24.) What respondent does not mention is that the defendant there had a "violent" criminal past, which included numerous convictions for assault, robbery, stabbing and disciplinary actions (*People v. Scott, supra*, 174 Cal.App.4th at pp. 923-924), whereas appellant's criminal record does not (*Vargas I*, 1 C.T. p. 205). Similarly, the current offenses did not involve any acts of violence.

Lastly, as appellant emphasized in the final portion of her arguments, appellant's status as a repeat offender, which she acknowledges, still did not justify the imposition of the indeterminate life sentence pursuant to three strikes. (AOBM, pp. 34-37.) The question is not whether appellant is a recidivist, but whether, under both *Romero* and *Benson*, and in light of the circumstances of both the prior and current offenses, as well

as her subsequent criminal history which did not involve any acts of violence, her punishment was appropriate in the interests of justice. Respondent is curiously silent on this point.

As discussed *ante*, in Argument II, at pages 27 through 29, in 1994, the voters intended to impose the harshest penalty on those who committed the most serious acts of violence. The voters recently reaffirmed their original intent by clarifying that the current offenses should be for serious or violent felonies only. (Ballot Pamp., Gen. Elec. (Nov. 6, 2012) text of Prop. 36.) As the United States Supreme Court has observed, the purpose of the Three Strikes law is to "… to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time." (*Rummel v. Estelle* (1980) 445 U.S. 263, 284-285 [100 S.Ct. 1133, 63 L.Ed.2d 382].)

Appellant is not requesting that both of her prior convictions be dismissed. She is also not claiming that she is not a repeat offender. As Justice Chin observed in *Benson*, in light of the prior strike convictions, appellant may be "punished today as a recidivist." (*People v. Benson*, *supra*, 18 Cal.4th at pp. 45-46 (dis. opn. of Chin, J.).) However, the single act factor tips the scale heavily in favor of punishing appellant pursuant to two strikes, not three.

Respondent relies on the probation officer's listed aggravating circumstances. (RBM, pp. 34-35.) What the probation officer also noted that appellant might be stealing to support a drug addiction. (*Vargas I*, 1 C.T. p. 210.) Coincidentally, when appellant and her co-defendant were arrested for the current offenses, her co-defendant was in possession of methamphetamine. (*Vargas I*, 3 R.T. pp. 969-972, 1008, 1027-1028.) Regardless, whether her motives were "greed" or one that was drug-related, appellant's maximum exposure of 17 years pursuant to two strikes would still ensure that she was isolated from society for a lengthy period of time, and, at the same time, afford her the opportunity to rehabilitate and reform. (§§ 667, subd. (a)(1), (e)(1), 1170.12 , subd (c)(1); *Rummel v. Estelle*, *supra*, 445 U.S. at pp. 284-285.)

To that end, it should be noted that while the trial court dismissed the prior strike convictions with respect to the remaining counts, this act of leniency has less significance today than it did at the time of the sentencing and resentencing. This is because under the new version of the Three Strikes law, which requires that the current offenses be serious or violent felonies (§§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C)), under section 1170.126, appellant would be eligible for dismissal of one of her prior strikes for the non-serious and non-violent offenses of receiving stolen

property (§ 496, subd. (a)) and conspiracy to commit theft (§ 182, subd. (a)(1)).

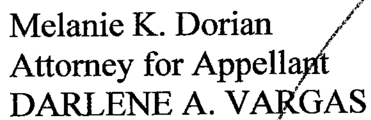
Arguably, this is one more factor to consider in asking whether a single incident and criminal conduct that lasted less than a minute 10 years prior to the current offenses, only one of which current offenses is now subject to punishment as a third strike, justifies a 25-year-to-life sentence? Appellant respectfully submits the answer is no.

CONCLUSION

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

Dated: March 26, 2013

Respectfully submitted,



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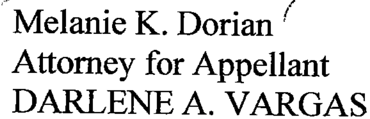
CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.520(c)(1) of the California Rules of Court, I, Melanie K. Dorian, appointed counsel for Darlene A. Vargas, hereby certify that I prepared the foregoing Reply Brief on the Merits on behalf of my client, and that the word count for this brief is 11,029, excluding the tables and cover.

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



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DARLENE A. VARGAS

PROOF OF SERVICE

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

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

On March 27, 2013, I served a true copy of APPELLANT'S REPLY BRIEF ON THE MERITS, by first class mail, on the following parties:

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

Executed on March 27, 2013, at Glendale, California.

MELANIE K. DORIAN