

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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

**APPELLANT'S PARTIAL OPPOSITION TO RESPONDENT'S  
MOTION FOR JUDICIAL NOTICE**

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

Honorable Bruce F. Marrs, Judge

MELANIE K. DORIAN  
California State Bar No. 197955  
P.O. Box 5006  
Glendale, California 91221-5006  
Telephone: (818) 241-5837

Attorney for Appellant  
DARLENE A. VARGAS

SUPREME COURT  
**FILED**

APR - 3 2013

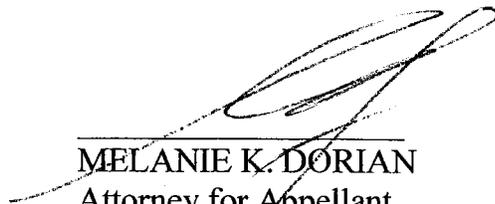
Frank A. McGuire Clerk  
\_\_\_\_\_  
Deputy

Appellant Darlene A. Vargas, through counsel, objects to respondent's request that this Court judicially notice the transcript of the plea hearing in case number KA043362, attached to its motion as Exhibit A.

This partial opposition to appellant's motion for judicial notice is based upon the attached supporting points and authorities, as well as the record in this matter, including that in the Court of Appeal. Respondent has requested judicial notice of said record in the Court of Appeal, as well as other documents, which request appellant does not oppose.

Dated: April 2, 2013

Respectfully submitted,



MELANIE K. DORIAN  
Attorney for Appellant  
DARLENE A. VARGAS

## INTRODUCTION

In 1999, appellant pleaded guilty to robbery and carjacking in case number KA043362. (Prior Case.) Some ten years later, she was convicted of residential burglary, among other offenses, and sentenced to 25 years to life, plus 5 years in the new case, for her two prior strike convictions. An appeal followed. (*Vargas I.*) Appellant also instituted a habeas corpus proceeding, wherein she introduced the transcript of the preliminary hearing testimony of the victim in the prior case. (*In re Vargas.*) The Court of Appeal found that, based on the preliminary hearing transcript, appellant's convictions arose from the same act and remanded for resentencing. (*Vargas I*, Slip. Opn.)

At resentencing, the trial court imposed the same sentence, and a second appeal followed. (*Vargas II.*) The Court of Appeal affirmed the judgment, and appellant sought review in this Court. When granting review, this Court ordered briefing on the following issues: "(1) Was the trial court required to dismiss one of defendant's two prior convictions under the three strikes law, when they arose from the same prior incident and were based on the same act? (2) If dismissal of one prior conviction was not mandatory, did the trial court abuse its discretion by failing to dismiss one?"

Respondent did not object to the introduction of the preliminary hearing transcript at any time. Nor did it attempt to introduce any other record from the prior case. It never countered appellant's argument that, based on the preliminary hearing transcript, the two convictions arose from the same act, and did not seek rehearing, correction and/or modification of the Court of Appeal's conclusions concerning the single act. Respondent also never filed an answer to appellant's petition for review to expand on the issues before this Court.

### **ARGUMENT**

Evidence Code section 459, subdivision (a) permits a reviewing court to take judicial notice of any matter specified in section 452. Under Evidence Code section 452, subdivision (d), such matters include the records of any court. In addition, California Rules of Court, rule 8.520(g) requires that a party comply with rule 8.252(a), in order to obtain judicial notice under Evidence Code section 459.

To do so, a party must file a motion which states as follows:

- (A) Why the matter to be noticed is relevant to the appeal;
- (B) Whether the matter to be noticed was presented to the trial court and, if so, whether judicial notice was taken by that court;
- (C) If judicial notice of the matter was not taken by the trial court, why the matter is subject to judicial notice under Evidence Code section 451, 452, or 453; and

(D) Whether the matter to be noticed relates to proceedings occurring after the order or judgment that is the subject of the appeal.

(Cal. Rules of Court, rule 8.252(a)(2).) If the matter to be noticed is not part of the record, the party must “explain why it is not practicable to do so.”

(Cal. Rules of Court, rule 8.252(a)(3).)

Here, respondent has filed a motion for judicial notice, requesting, in part, that this Court judicially notice the transcript of the plea hearing in the prior case. (RJN, Ex. A.) Respondent relies “extensively” on this transcript to argue that appellant’s prior strikes arose from separate criminal acts. (RJN, Argument B; RBM, pp. 9-15.) However, this transcript was never introduced in the trial court or the Court of Appeal, at either party’s request. More importantly, at no time, did respondent challenge the appellate court’s finding that appellant’s prior convictions arose from a single criminal act.

Having had several opportunities to raise this new issue and having failed to do so, respondent is precluded from now contending that appellant’s prior strike convictions arose from multiple acts. (See *California Ins. Guar. Ass’n v. Workers’ Comp. App. Bd.* (2005) 128 Cal.App.4<sup>th</sup> 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.4<sup>th</sup> 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.4<sup>th</sup>

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.”].)

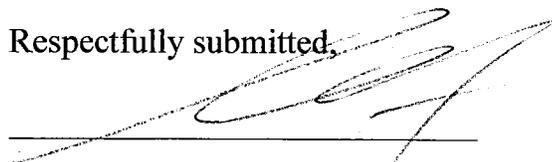
Review is limited to issues raised in the Court of Appeal. (Cal. Rules of Court, rule 8.500(c)(1).) Briefs on the merits are also generally limited to the issues specified by this Court’s order. (Cal. Rules of Court, rule 8.520(b)(3).) Respondent never sought rehearing in the Court of Appeal, nor did it file an answer to appellant’s petition for review, in order to address this additional issue it wishes to now litigate. (Cal. Rules of Court, rule 8.500(c)(2).) Therefore, the transcript of the plea hearing is not relevant to the issues before this Court, which necessarily presumes that appellant’s prior convictions stemmed from a single act.

### CONCLUSION

For the foregoing reasons, appellant respectfully requests that this Court deny respondent’s motion for judicial notice of the plea hearing in the prior case.

Dated: April 2, 2013

Respectfully submitted,



Melanie K. Dorian  
Attorney for Appellant  
DARLENE A. VARGAS

**DECLARATION 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 April 2, 2013, I served a true copy of APPELLANT'S PARTIAL OPPOSITION TO RESPONDENT'S MOTION FOR JUDICIAL NOTICE; by first class mail, on the following parties:

California Court of Appeal  
Second District, Division Eight  
300 S. Spring Street, Room 2217  
Los Angeles, California 90013

Darlene A. Vargas X37014  
CCWF  
P.O. Box 1508  
Chowchilla, California 93610

Kim Aarons  
Office of the Attorney General  
300 S. Spring Street, Room 1702  
Los Angeles, California 90013

Lisa Washington  
Office of the Public Defender  
100 W. Second Street, Suite 200  
Pomona, California 91766

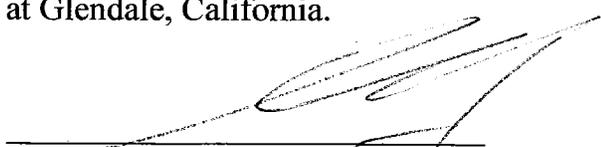
Gerald E. Ferris  
District Attorney's Office  
400 Civic Center Plaza, Room 201  
Pomona, California 91766

California Appellate Project  
520 South Grand Ave, 4<sup>th</sup> Floor  
Los Angeles, California 90071

Pomona Courthouse  
400 Civic Center Plaza, Dept L  
Pomona, California 91766  
FOR DELIVERY TO:  
Hon. Bruce F. Marrs, Judge

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

Executed on April 2, 2013, at Glendale, California.

  
\_\_\_\_\_  
MELANIE K. DORIAN