

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Appellant,

v.

KENNETH MARVIN SAMPLES,

Defendant and Respondent.

D039196

(Super. Ct. No. SCD156807)

ORDER MODIFYING OPINION
AND DENYING REHEARING

[NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on November 7, 2002, be modified as follows:

1. On page 3, the last sentence of the paragraph preceding the Factual and Procedural Background is deleted and replaced with the following two sentences:

The People were required to seek appellate review of the court's order finding not true the prior Texas conviction strike allegation by way of petition for writ of mandate or prohibition within 60 days of that order. Because they did not do so, we have no choice but to dismiss this appeal.

2. On page 19, two new paragraphs are added prior to the start of the first full paragraph as follows:

The People also assert that a recent opinion by the California Supreme Court, *People v. Statum* (2002) 28 Cal.4th 682 (*Statum*), casts doubt upon the continued viability of the *Douglas* decision's statement that it would be unfair to allow an appeal that effectively challenges a grant of probation because of the danger that a defendant would serve his or her probationary period, only to later be sentenced to prison if the challenged order is reversed. However, *Statum* did not disapprove this rule.

In *Statum*, the sentencing court, over the People's objection, reduced the defendant's conviction from a felony to a misdemeanor, and imposed county jail time. The People appealed, and the defendant, relying on *Douglas*, asserted that it would be unfair to allow an appeal because the defendant would receive a prison term if the court's order were reversed. However, in rejecting the defendant's argument, the court first noted that "[t]he absence of a grant of probation distinguishes this case from *Douglas*" (*Statum, supra*, 28 Cal.4th 682, 688.) This fact alone makes *Statum* inapplicable to our situation. Moreover, the court in *Statum* relied upon case law in deciding that it was not "unfair" to correct a sentence that was not properly imposed. (*Id.* at pp. 695-697.) In *Douglas* by contrast, the court looked to section 1238, subdivision (d) itself, and the legislative history of that statute, which indicated that the unfairness issue was precisely why subdivision (d) was enacted. (*Douglas, supra*, 20 Cal.4th at p. 93, fn. 8.) *Statum* did not reverse the *Douglas* court's holding that the People cannot appeal an order that directly or indirectly challenges a grant of probation.

There is no change in the judgment.

The petition for rehearing is denied.

KREMER, P. J.