SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Appellant, v. **WESLEY CIAN CLANCEY,** Defendant and Respondent.	No. S200158 (Court of Appeal No. H036501) (Santa Clara County Superior Court Nos. C1072166 and C1073855)

RESPONDENT'S OPENING BRIEF ON THE MERITS

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SANTA CLARA HONORABLE RENE NAVARRO, JUDGE PRESIDING

SIXTH DISTRICT APPELLATE PROGRAM

DALLAS SACHER
Executive Director
State Bar #100175
100 N. Winchester Blvd., Suite 310
Santa Clara, CA 95050
(408) 241-6171

Attorneys for Respondent,
Wesley Cian Clancey

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES (CONTINUED)

TABLE OF AUTHORITIES (CONTINUED)

CONSTITUTIONS

STATUTES

SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Appellant, v. **WESLEY CIAN CLANCEY,** Defendant and Respondent.	No. S200158 (Court of Appeal No. H036501) (Santa Clara County Superior Court Nos. C1072166 and C1073855)

STATEMENT OF ISSUES PRESENTED

I. Should this court grant review in order to consider the Court of Appeal's majority opinion which has brought the "indicated sentence" procedure into question?

II. Should this court grant review in order to resolve the conflict in the case law as to whether a defendant is allowed to withdraw his guilty plea if the trial court decides that it cannot comply with the terms of its "indicated sentence?"

III. Should this court grant review in order to assess the merit of the holding in *People v. Woosley* (2010) 184 Cal.App.4th 1136 that a trial court may not offer an "indicated sentence" if the promised term cannot be achieved absent the dismissal of the punishment for an enhancement pursuant to Penal Code section 1385?

IV. If a defendant is charged with a strike prior pursuant to Penal Code section 1170.12, does a trial court engage in proscribed "plea bargaining" under section 1170.12 when it offers an "indicated sentence" that requires the exercise of Penal Code section 1385 discretion to dismiss the punishment for a strike prior?

STATEMENT OF THE CASE

On April 30, 2010, respondent was charged in a first amended complaint filed in the Santa Clara County Superior Court in case number C1072166. (CT 18-20.) Respondent was charged with two counts of forgery (Penal Code section 470, subdivision (d)), two counts of grand theft (Penal Code sections 484 and 487) and one count of false personation (Penal Code section 529). (CT 18-19.) Respondent was also charged with a strike prior pursuant to Penal Code section 1170.12. (CT 19.)

On April 30, 2010, respondent was charged in a first amended complaint filed in the Santa Clara County Superior Court in case number C1073855. (CT 22-25.) Respondent was charged with three counts of attempted grant theft (Penal Code sections 487 and 664), two counts of using a stolen access card (Penal Code sections 484g and 488) and one count each of second degree burglary (Penal Code section 459), receiving stolen property (Penal Code section 496), delaying an officer (Penal Code section 148, subdivision (a)(1)) and giving a false name to an officer (Penal Code section 148.9). (CT 22-24.) Respondent was also charged with an on-bail enhancement pursuant to Penal Code section 12022.1 and a strike prior pursuant to Penal Code section 1170.12. (CT 24-25.)

On August 19, 2010, both of respondent's cases were heard on the early resolution calendar. (CT 36.) Based on the court's offer of an indicated

sentence of five years, respondent pled nolo contendere to all counts and admitted the enhancements. (CT 36.) The People objected to the court's action. (CT 36.)

On October 5, 2010, the People filed a motion for reconsideration of the indicated sentence. (CT 42-120.) The People also objected to the court's intention to dismiss respondent's strike prior pursuant to Penal Code section 1385. (CT 42-120.)

On November 16, 2010, the court sentenced respondent to five years in prison. (CT 178.) In case number C1072166, the court imposed the midterm of two years for one of the forgery convictions and a consecutive eight month term for the second forgery conviction. (CT 178.) The remaining sentences were run concurrent. (CT 178.) In case number C1073855, the court imposed eight month consecutive sentences for second degree burglary and using a stolen access card and consecutive four month sentences for the three counts of attempted grand theft. (CT 178-179.) The court struck the punishment for the Penal Code section 12022.1 enhancement and the Penal Code section 1170.12 enhancement pursuant to Penal Code section 1385. (CT 176-177.)

On January 13, 2011, the People filed notices of appeal in both of respondent's cases. (CT 181, 186.)

On January 10, 2012, the Court of Appeal reversed the judgment by a vote of 2-1. (Court of Appeal opinion.) On January 23, 2012, respondent filed

a petition for rehearing. On January 30, 2012, the court denied rehearing. (Court of Appeal order of January 30, 2012.) Justice Lucero voted to grant rehearing. (Court of Appeal order of January 30, 2012.)

STATEMENT OF FACTS

The facts underlying the offenses are not material to the issues on appeal. Therefore, only a brief recitation of the facts is provided.

Case Number C1072166

On March 13, 2010, respondent used a fraudulent check to buy 20 gift cards at the Westfield Mall. (CT 130.) The gift cards were valued at $5060.

On March 16, 2010, respondent went to the Great Mall and represented himself to be Curtis Poseyesva. (CT 130.) Respondent submitted a fraudulent check in an attempt to buy $7540 worth of gift cards. (CT 130.) Respondent was arrested at the scene. (CT 131.)

Case Number C1073855

Between April 9, 2010 and April 13, 2010, respondent fraudulently used a credit card on several occasions and accrued charges to Y.A. Tittle and Associates. (CT 133.) On April 12, 2010, an employee at the Capitola Mall declined to sell gift cards to respondent based on his attempt to use the Y.A. Tittle account. (CT 133.)

On April 13, 2010, respondent used a stolen credit card belonging to Margaret Froehlich to rent a limousine. (CT 131.) Respondent rode in the

limousine to Santana Row. (CT 131.) While at Santana Row, respondent attempted to use a stolen credit card and was arrested. (CT 132.)

SUMMARY OF ARGUMENT

The majority in the Court of Appeal concluded that prior cases "have failed to devise a clear and coherent test for determining whether a trial court's actions amounted to an improper judicial plea bargain or were instead a permissible indicated sentence." (Majority Opinion, p. 10.) This assertion is incorrect. The parameters for a lawful indicated sentence are well settled.

The trial court properly provides an indicated sentence when it advises the defendant that a specified sentence will be imposed "if he or she pleads guilty or no contest to all charges and admits all allegations. [Citation.]" (*People v. Feyrer* (2010) 48 Cal.4th 426, 434, fn. 6.) The trial court acts properly so long as it does not expressly negotiate the length of the sentence or coerce the defendant's plea by stating that its sentence would be harsher after a trial. While the People may challenge the court's act of negotiating a sentence, they lack standing to argue that a plea has been coerced since the right to enter a plea is personal to the defendant.

A trial court enjoys broad discretion in controlling its calendar. If the People raise an appellate challenge to the trial court's decision to offer an indicated sentence, reversal is warranted only if the People can establish an abuse of discretion. In applying the abuse of discretion standard, the reviewing court should assess the totality of the trial court's conduct and may

not reverse based on a single stray comment made by the court.

If the trial court determines at the time of sentencing that it cannot impose a promised indicated sentence, the defendant must be offered the opportunity to withdraw his plea. (*People v. Superior Court (Felmann)*(1976) 59 Cal.App.3d 270, 276.) This principle is compelled by the Due Process Clause of the Fourteenth Amendment which requires that a defendant must be allowed a remedy when a governmental official declines to enforce a previously made promise. (*People v. Mancheno* (1982) 32 Cal.3d 855, 860.)

According to *People v. Woosley*, supra, 184 Cal.App.4th 1136, a proper indicated sentence may not be found when imposition of the sentence requires the court to dismiss the punishment for an enhancement pursuant to Penal Code section 1385. The rationale for this conclusion is that the trial court's application of section 1385 impermissibly encroaches on the "prosecutor's charging authority." (*Id.* at p. 1147.) This is simply untrue. If the defendant is required to admit all of the charges and allegations in the charging document, the prosecutor has achieved the best result possible. Indeed, a restriction on the court's exercise of its section 1385 would result in the prosecutor's improper intrusion on the court's power. (*People v. Superior Court (Felmann)*, supra, 59 Cal.App.3d 270, 275 ["the exercise of sentencing power cannot be made subject to the consent of the district attorney because the requirement of that consent is an injection of the executive into the

province of the judicial branch of government. [Citation].").] *Woosley* should be overruled.

In order to impose the promised indicated sentence in this case, the court exercised its Penal Code section 1385 power to dismiss the punishment for a strike prior. This conduct did not violate Penal Code sections 667, subdivision (g) and 1170.12 subdivision (e) since those statutes apply only to prosecutors and do not preclude a court from offering an indicated sentence in a case falling under the Three Strikes law. This conclusion is also compelled by the principle of separation of powers since a contrary result would impermissibly intrude on the court's power to regulate its docket and expeditiously resolve cases.

I.

THE MAJORITY OPINION OF THE COURT OF APPEAL PROVIDES AN UNWORKABLE TEST THAT IS INCONSISTENT WITH SETTLED PRECEDENT AND ITS ANALYSIS IS DEVOID OF ANY NEXUS TO THE CONSTITUTIONAL PRINCIPLE ON WHICH IT SUPPOSEDLY RESTS.

On August 19, 2010, respondent appeared on the trial court's early resolution calendar. The trial court gave an indicated sentence of five years. (1 RT 4.) Since imposition of the five year term would require the court to strike the punishment for respondent's serious felony prior pursuant to Penal Code section 1385, the prosecutor objected that the court was engaging in plea

bargaining that is prohibited by Penal Code section 667, subdivision (g). (1 RT 5.) Over the prosecutor's objection, the court proceeded to take respondent's no contest pleas to all charges and admissions to all of the alleged enhancements. (1 RT 18-23.)

Subsequently, the People filed a motion for reconsideration and renewed the claim that the court had engaged in plea bargaining that was prohibited by Penal Code section 667, subdivision (g). (CT 43-45.) The People also argued that it would be an abuse of discretion for the court to strike the punishment for respondent's serious felony prior. (CT 46-55.)

At the sentencing hearing, the trial court rejected the contention that it had engaged in plea bargaining. (2 RT 60.) The court exercised its section 1385 power and struck the punishment for respondent's serious felony prior. (2 RT 61.) The court specified six separate reasons in support of its decision. (1 RT 61, 2 CT 175.)[1]/ Consistent with the indicated sentence, the court imposed a five year sentence. (2 RT 62.)

The Court of Appeal majority found fault with the trial court's conduct since it had made its promised sentence "contingent" on respondent's no contest pleas. (Majority Opinion, p. 10.) In the majority's view, the trial court had given respondent "an improper inducement" since its goal was to "'settle'"

---

[1]The People have made no claim on appeal that the trial court abused its discretion in striking the prior.

the case. (Majority Opinion, p. 11.) This holding flies in the face of precedent and the constitutional doctrine on which it purportedly rests.

The issue before the court involves a question of separation of powers. The question is not a close one. The instant trial court acted well within its constitutional prerogatives. For the reasons that follow, the majority opinion must be reversed.

The genesis of the indicated sentence procedure lies in this court's decision in *People v. Orin* (1975) 13 Cal.3d 937. There, the defendant was charged with three counts. The prosecutor was unwilling to plea bargain. Acting on its own motion, the trial court offered the defendant a "'plea bargain'" by which it accepted a guilty plea to one count in exchange for the dismissal of the other two counts. (*Id.* at pp. 940-941.) This court found that the court had improperly intruded into the prosecutor's domain by substituting "itself as the representative of the People in the negotiation process . . . ." (*Id.* at p. 943.) The error made by the trial court lay in its improper conduct in dismissing charges over the prosecutor's objection.

Significantly, this court drew a careful distinction between proscribed judicial plea bargaining and the proper exercise of the judicial sentencing function. In particular, the court observed that the trial judge is not powerless to deal with the prosecutor's obdurate refusal to settle a case.

"On the other hand, sentencing discretion wisely and

> properly exercised should not capitulate to rigid prosecutorial policies manifesting an obstructionist position toward all plea bargaining irrespective of the circumstances of the individual case. As the calendars of trial courts become increasingly congested, the automatic refusal of prosecutors to consider plea bargaining as a viable alternative to a lengthy trial may militate against the efficient administration of justice, impose unnecessary costs upon taxpayers, and subject defendants to the harassment and trauma of avoidable trials. [Citation.] A court may alleviate this burden placed upon our criminal justice system if this can be accomplished by means of a permissible exercise of judicial sentencing discretion in an appropriate case." (*Orin*, supra, 13 Cal.3d at p. 949.)

Soon after *Orin* was decided, the practice of offering an indicated sentence was approved in *People v. Superior Court (Felmann)*, supra, 59 Cal.App.3d 270. The *Felmann* court reasoned that the proffer of an indicated sentence does not invade the constitutional province of the District Attorney if the defendant is made to plead guilty to all of the charges. This is so since "the exercise of sentencing power cannot be made subject to the consent of the district attorney because the requirement of that consent is an injection of the executive into the province of the judicial branch of government. [Citation.]" (*Id.* at p. 275.)

The *Felmann* court made clear that form was not to be "exalted over substance" in the context of the indicated sentence procedure. (*Felmann,* supra, 59 Cal.App.3d 270, 276.) The court acknowledged that the offer of an indicated sentence is a form of a "conditional plea" which allows the defendant to withdraw his plea if the promised sentence is not imposed. (*Ibid.*)

Over time, the indicated sentence procedure has been approved by the appellate courts and has become a regular feature of the efficient administration of trial court calendars. (See *People v. Allan* (1996) 49 Cal.App.4th 1507, 1516 and cases cited therein.) As this court has recently acknowledged, a trial court properly provides an indicated sentence when it advises the defendant that a specified sentence will be imposed "if he or she pleads guilty or no contest to all charges and admits all allegations. [Citation.]" (*People v. Feyrer*, supra, 48 Cal.4th 426, 434, fn. 6.)

Stripped to its essence, the indicated sentence procedure carefully balances the constitutional roles of the prosecutor and the court. By requiring a plea to all charges, the court honors the prosecutor's constitutional discretion to decide what charges should be adjudicated. Insofar as the defendant is found liable for *everything* alleged by the prosecutor, the People have no grievance that the court has intruded into the prosecutorial domain. On the other hand, the prosecutor can have no legitimate objection to the promised disposition since it is the court's constitutional function to determine the proper sentence. (*People v. Superior Court (Felmann)*, supra, 59 Cal.App.3d 270, 275.)

With regard to the last point, *People v. Superior Court (On Tai Ho)* (1974) 11 Cal.3d 59 is persuasive authority that the prosecutor is constitutionally prohibited from vetoing the court's decision to offer an

indicated sentence. There, this court considered a statute that required the prosecutor's consent before the court could grant diversion. After determining that the disposition of a case is solely within the power of the court, this court held that the statute was violative of separation of powers since the prosecution is prohibited from controlling the court's sentencing power. (*Id.* at pp. 66-68.)

A parallel situation is presented here. When a defendant accepts an indicated sentence, he is necessarily admitting all of the charges in the case. Once this occurs, the prosecutor is constitutionally powerless to veto the court's decision regarding the proper disposition of the case. (*On Tai Ho*, supra, 11 Cal.3d at pp. 66-68.)

Notwithstanding these rather straightforward and easy to follow principles, the majority in the Court of Appeal has sought to upset the apple cart by devising a vague test that is unworkable, unprincipled and inconsistent with existing law. In the majority's view, an indicated sentence is improper when "it induces a defendant to plead guilty or no contest." (Majority Opinion, p. 10.) Although the majority failed to provide any guidance as to the exact meaning of "inducement," it made clear that it saw improper inducement in this case.

> "The court informed defendant through the plea colloquy that it would impose a five-year term and strike the strike *if he admitted all of the charges and allegations.* This was an improper inducement for defendant to enter pleas and admissions." (Majority Opinion, p. 11, emphasis in original.)

There are multiple objections to the quoted conclusion. The objections are both legal and practical.

First, the majority opinion found that the court erred because it premised its offered indicated sentence on the requirement that respondent admit "*all of the charges and allegations.*" However, this is the essential hallmark of the indicated sentence procedure. (*People v. Feyrer*, supra, 48 Cal.4th 426, 434, fn. 6.) It would appear that the majority's reasoning would entirely do away with indicated sentences.

Second, the majority's focus on the term "induce" is simply unworkable. An offer of an indicated sentence will necessarily "induce" a plea in the sense that "induce" is a verb that means "[t]o bring about." (Webster's II New Riverside University Dictionary (1984) p. 624, col. 2.) As a simple matter of reality, there will be no plea absent the proffered indicated sentence. Thus, the offer of the indicated sentence has necessarily "induced" the plea. Once again, it is unclear as to how there can ever be a proper indicated sentence under the majority's test.

Third, the majority's conclusion is entirely unmoored from the applicable constitutional principle. As has been discussed above, the prosecutor suffered no harm in this case since respondent admitted each and every allegation made against him. The prosecutor was therefore barred from exercising a veto against the court's sentencing decision.

Fourth, there is no doubt that the indicated sentence procedure is a vital tool in the efficient administration of justice. As this court has so wisely foretold, the procedure is invaluable in clearing the court's calendar when the prosecutor refuses to be reasonable. (*People v. Orin*, supra, 13 Cal.3d 937, 949; accord, *People v. Superior Court (Ramos)* (1991) 235 Cal.App.3d 1261, 1269.) A simple hypothetical establishes the proper functioning of the indicated sentence procedure.

Assume that an 85 year old man is captured on videotape as he steals a razor from a drugstore. The man has two robbery prior convictions that are 60 years old. The prosecutor brings a felony charge of petty theft with a prior and seeks a sentence of 25 years to life under the Three Strikes law. At an early resolution calendar, the judge is told that the defendant has had an absolutely clean record for 60 years and is in ill health. The judge is also told that the videotape conclusively establishes the defendant's guilt. On this record, the judge is fully entitled to offer an indicated sentence of a grant of probation if the defendant is willing to plead guilty to the felony charge and admit his strike priors. Patently, this result efficiently serves the interests of justice insofar as a reasonable sentence is imposed without the need for an entirely useless trial. (*People v. Orin*, supra, 13 Cal.3d at p. 949 [the trial court may circumvent the "automatic refusal of prosecutors to consider plea bargaining . . .by means of a permissible exercise of judicial sentencing

discretion in an appropriate case."].)

In fairness to the Court of Appeal majority, it is true that the *Felmann* court and this court have used the word "inducement." However, the use in question provides a definition for improper judicial plea bargaining which is absent from the majority's proposed test.

The *Felmann* court drew a distinction between a proper indicated sentence and improper judicial plea bargaining. The court stated that a proper indicated sentence requires a "conditional plea" where the court promises to impose a specified sentence if the "facts which are the assumed basis" of the proposed sentence are confirmed as true at the sentencing hearing. (*Felmann*, supra, 59 Cal.App.3d at pp. 276-277.) Proscribed plea bargaining occurs when the court offers "more lenient treatment" in exchange for a guilty plea. (*Ibid.*) The court summed up its view of illegal plea bargaining as follows:

> "A court may not offer any inducement in return for a plea of guilty or nolo contendere. It may not treat a defendant more leniently because he foregoes his right to trial or more harshly because he exercises that right." (*Felmann*, supra, 59 Cal.App.3d at p. 276.)

Subsequently, this court held that a sentencing court may not impose a harsher sentence because the defendant has exercised his right to a jury trial. (*In re Lewallen* (1979) 23 Cal.3d 274, 281.) Although *Lewallen* did not address indicated sentences, the court quoted the portion of *Felmann* that is included above. (*Id.* at pp. 278-279.)

The Court of Appeal majority drew great significance from *Lewallen* and cited it as authority for its test. (Majority Opinion, p. 10.) The majority erred by failing to properly appreciate the principle stated in *Felmann* and quoted in *Lewallen*.

The principle is that the court may not *coerce* the defendant into waiving his right to a jury trial by providing a disposition *because* of the waiver. In the words of *Felmann*, it is improper for the court to offer "more lenient treatment [to the defendant] than he otherwise would have received" but for his waiver of his right to a jury trial. (*Felmann*, supra, 59 Cal.App.3d at p. 277.)

In short, the Court of Appeal majority entirely misconstrued the meaning of "inducement" as it was used in *Felmann* and *Lewallen*. A guilty plea is improperly "induced" only when the court has coerced a waiver of the right to a jury trial. (See *People v. Collins* (2001) 26 Cal.4th 297, 307 [waiver of jury trial was coerced by the promise of an "unspecified benefit" in exchange for the waiver].)

In any event, the discussion of "inducement" is academic since the prosecutor has no standing to oppose an indicated sentence on the grounds that the court coerced the defendant. The defendant's right to a jury trial is personal to him. If the defendant makes no claim of coercion, the prosecutor lacks a legal basis to complain about an error that only affects the interests of

another party. (*People v. Cortez* (1992) 6 Cal.App.4th 1202, 1212 [party must be actually aggrieved in order to advance a constitutional objection].)

Although the prosecutor has no standing to argue that the court has coerced the defendant, the prosecutor does have the right to object when the court intrudes into the prosecutorial domain. As this court has made clear, it is solely the prosecutor's prerogative to negotiate a resolution of the case. (*People v. Orin*, supra, 13 Cal.3d at p. 943.) Thus, if the record shows that the court has clearly engaged in negotiating the length of the sentence, the prosecutor has standing to challenge the sentence imposed by the court. (*People v. Labora* (2010) 190 Cal.App.4th 907, 915-916 [the trial court engaged in improper plea bargaining when it first offered an indicated sentence of six years, eight months but then reduced its offer to six years at the request of defense counsel].)

In this case, the record is devoid of any improper "negotiation" by the trial court. The court offered five years and respondent immediately accepted the offer. (1 RT 4-7, 2 RT 59.)

The remaining question is the nature and scope of appellate review when the People claim that the trial court has not imposed a proper indicated sentence. Respondent suggests the following clear-cut rules.

When, as here, the record shows that the trial court has specified an indicated sentence in exchange for admissions of all of the allegations in the

charging document, it should be presumed that the court has acted lawfully. (*People v. Superior Court (Felmann)*, supra, 59 Cal.App.3d 270, 277, fn. 4 ["the presumption is that the judge acted as required by law."].) Given the presumption of regularity, the People must demonstrate that the court abused its discretion. (*People v. Labora,* supra, 190 Cal.App.4th 907, 914 ["[w]e review allegations of judicial plea bargaining for abuse of discretion."].) Under the abuse of discretion standard, the People bear the heavy burden of showing that the court's conduct was patently outside the bounds of its authority. (*People v. Carmony* (2004) 33 Cal.4th 367, 376 [the complaining party must show that the trial court's decision was irrational or arbitrary].)

In applying the abuse of discretion standard, the appellate court should not parse the trial court's words in a game of "gotcha." In this context, form is not to be "exalted over substance . . . ." (*Felmann*, supra, 59 Cal.App.3d at p. 276.) The reviewing court should examine the overall conduct of the court and affirm an indicated sentence unless it clearly appears that the court has engaged in negotiations with the defendant. (*People v. Superior Court (Ramos)*, supra, 235 Cal.App.3d 1261, 1266, fn. 2 ["[t]he choice of words is not determinative."].) Even if the trial court has not used the magic words "indicated sentence," the judgment should be affirmed so long as the court did not intrude on the prosecutor's charging or negotiating discretion. (*Ibid.* [action of trial court was affirmed when the court used the words "promise"

and "commitment" rather than "indicated sentence."].)

When the instant record is examined under the foregoing principles, there can be no doubt that the trial court's judgment should be affirmed. At the early resolution calendar, respondent accepted the court's five year offer without debate and admitted all of the allegations in the charging document. (1 RT 4, 9, 18-23.) At the sentencing hearing, the court provided a resume of the in-chambers discussions prior to the plea. (2 RT 54-61.) The court categorized its own conduct as having been to make "an offer" of an "indicated sentence" to respondent. (2 RT 58.) The court also noted that the purpose of the early resolution calendar was "to settle cases . . . ." (1 RT 55.) The court made clear that it was well informed about respondent's present case and prior criminal conduct when it stated its indicated sentence. (2 RT 57-58.)

Under the abuse of discretion standard of review, the trial court's judgment must be affirmed. The court expressly stated that it intended to give an "indicated sentence." (2 RT 58.) The court also stated on the record that its proffered indicated sentence was premised on a full understanding of the relevant facts. On this record, the People are unable to demonstrate that the trial court stepped beyond its broad discretion to efficiently dispose of the case by offering an indicated sentence.

In holding to the contrary, the majority in the Court of Appeal seized on the trial court's statement that its role was "to settle cases." (Majority

Opinion, p. 11.) However, this focus on a single phrase is inappropriate. To the extent that the court's overall conduct was well within the protocol for offering an indicated sentence, the single phrase cannot be deemed controlling. (*People v. Superior Court (Ramos)*, supra, 235 Cal.App.3d 1261, 1266 and fn. 2 [proper indicated sentence found even though the trial court stated on the record that it was exercising its power "'to make a settlement of the case.'"].)

Finally, it should not go unmentioned that the prosecutor sought to game the system. This is so in two respects.

First, the prosecutor attempted to engage in forum shopping. The trial court accepted respondent's no contest pleas and admissions at an early resolution calendar. Since the prosecutor was displeased with the court's indicated sentence, he sought to veto the court's informed sentencing judgment in order to seek a more favorable result from a different judge. This type of forum shopping is inconsistent with California law. (*People v. Traylor* (2009) 46 Cal.4th 1205, 1213.)

Second, it is significant that the prosecutor did not appeal from the trial court's reasoned explanation for exercising its Penal Code section 1385 discretion to dismiss the strike prior. Although the prosecutor made an impassioned written and oral protest that the court would abuse its discretion by dismissing the prior, no such claim is advanced on appeal. This is a telling

point.

Lacking any viable claim that the five year sentence imposed by the trial court constituted sentencing error, the prosecutor close the backdoor method of claiming that the trial court somehow engaged in "plea bargaining." Of course, the court did nothing of the kind. The court merely exercised its constitutional authority to impose a just sentence.

The trial court acted in good faith and with the goal of fairly and efficiently administering justice. It should be held that the trial court imposed a lawful indicated sentence in this case.

II.

WHEN A TRIAL COURT OFFERS AN INDICATED SENTENCE, IT MUST ADVISE THE DEFENDANT THAT HE WILL HAVE THE OPPORTUNITY TO WITHDRAW HIS PLEA IF THE COURT LATER DETERMINES THAT IT IS UNABLE TO IMPOSE THE INDICATED SENTENCE.

In *People v. Superior Court (Felmann)*, supra, 59 Cal.App.3d 270, the court took the defendant's no contest pleas to all counts and offered an indicated disposition of a grant of probation. The defendant was advised that he would be entitled to withdraw his pleas if a grant of probation was not forthcoming. (*Id.* at p. 273.) The Court of Appeal found no error in this procedure and specifically observed that the defendant would have "the option of going to trial" if the trial court ultimately determined that it could not

impose the indicated sentence. (*Id.* at p. 276.)

The Court of Appeal majority disagreed with *Felmann*. (Majority Opinion, p. 11.) The majority reasoned that a proper indicated sentence cannot be found when the defendant is offered the opportunity to withdraw his plea since an indicated sentence cannot be a "risk-free proposition for a defendant." (Majority Opinion, p. 12.) This conclusion is contrary to both the Constitution and the practical administration of justice.

At the outset, it is critical to note that all of the decisions since *Felmann* have presumed that the defendant's right to withdraw the plea is a proper component of the indicated sentence procedure if the court determines that it cannot impose the indicated sentence. Several cases have either expressly confirmed the practice or recited the trial court proceedings where the practice was employed. (*People v. Woosley*, supra, 184 Cal.App.4th 1136, 1142; *People v. Allan,* supra, 49 Cal.App.4th 1507, 1514; *People v. Delgado* (1993) 16 Cal.App.4th 551, 555; *People v. Superior Court (Ramos)*, supra, 235 Cal.App.3d 1261, 1269; *Bryce v. Superior Court* (1988) 205 Cal.App.3d 671, 676, fn. 2; *People v. Superior Court (Smith)* (1978) 82 Cal.App.3d 909, 915.) Insofar as *Felmann* has not been challenged for 36 years and the trial courts have relied on its procedures, the People bear a heavy burden to establish why *Felmann* should be overruled at this late date.

The Court of Appeal majority ignored a fundamental constitutional

problem with its holding. A trial court judge is a governmental officer. If the court has induced a guilty plea by virtue of a promise to provide a specified sentence, the defendant has a due process right to withdraw his plea if the specified sentence is not imposed. (*Santobello v. New York* (1971) 404 U.S. 257, 262 [prosecutor must honor his promise to the defendant]; *People v. Mancheno*, supra, 32 Cal.3d 855, 860 [a violation of a promise made "by an officer of the state raises a constitutional right to some remedy. [Citations.]"].)

In response to this proposition, the Court of Appeal majority would argue that an indicated sentence cannot involve "a promise by the trial court." (Majority Opinion, p. 12.) Therefore, in the majority's view, the defendant can have no right to withdraw his plea since nothing has been promised. This argument founders for the same reasons that respondent has already advanced.

There is quite simply no constitutional restriction on the court's power to specify the sentence that it will impose based on a given set of facts. Whether the specified sentence is "promised" or "indicated," the constitutional bottom line remains that the court has not exceeded its authority by proceeding in this manner: "Substance and not form must control." (*Felmann*, supra, 59 Cal.App.3d at p. 276.) In an indicated sentence procedure, the People's position is absolutely protected since they have obtained the best possible result (i.e. conviction on all charges). If the court later learns of facts that change its view about the proper sentence, the defendant is protected since the

right to withdraw the plea exists. In this way, the constitutional interests of all parties are honored.

The holding of the Court of Appeal majority also fails for a purely practical reason. Unless the defendant has the right to withdraw his plea if the court is unable to impose the indicated sentence, no rational defendant will participate in the indicated sentence procedure. Simply stated, very few defendants will plead guilty without some assurance that their interests will be protected if the indicated sentence is not imposed. Since the indicated sentence procedure serves the salutary purpose of efficiently disposing of those cases where the prosecutor declines to make a reasonable settlement offer, there is every reason to keep the *Felmann* protocol in place.

It cannot escape notice that the Court of Appeal majority displayed an antipathy for the indicated sentence procedure. In a footnote, the majority argued that a defendant who pleads guilty in response to an indicated sentence should not have the same degree of protection as a defendant who enters a plea bargain with the prosecutor. (Majority Opinion, p. 12, fn. 4.) In all candor, this position is inexplicable.

In the case of both plea bargains and indicated sentences, defendants plead guilty based on representations made by governmental officers. In both instances, defendants are waiving valuable rights with an expectation that the government will be true to its word. There is quite simply no reason why a

defendant should have no protection if a judge, as distinguished from a prosecutor, fails to keep his word. In a democracy, a citizen expects no less.

The *Felmann* protocol has worked well for 36 years. This court should endorse *Felmann* and reject the contrary view of the Court of Appeal majority.

III.

THIS COURT SHOULD OVERRULE *PEOPLE v. WOOSLEY*, supra, 184 Cal.App.4th 1136.

In order to achieve the promised five year sentence in this case, the trial court was required to exercise its Penal Code section 1385 power to dismiss a strike prior. This ruling is in conflict with *People v. Woosley*, supra, 184 Cal.App.4th 1136.

In *Woosley*, the defendant was charged with two burglaries, petty theft and an on-bail enhancement. The defendant pled to the three counts and admitted the enhancement in response to the court's indicated sentence of two years, eight months. At the sentencing hearing, the court exercised its section 1385 power to dismiss the enhancement and imposed the indicated sentence of two years, eight months. On the People's appeal, the Court of Appeal held that the trial court had impermissibly encroached on the "prosecutor's charging authority" since "the substance of the bargain was no different from the trial court dismissing the on-bail enhancement before taking the plea." (*Woosley*, supra, 184 Cal.App.4th at p. 1147.) The judgment was reversed.

The majority opinion in the Court of Appeal did not expressly rely on *Woosley*. However, the dissenting justice concluded that *Woosley* was wrongly decided. (Dissenting Opinion, pp. 27-32.) The position of the dissenting justice is correct.

As an initial matter, there was absolutely no encroachment on the charging power of the prosecutor in *Woosley*. The prosecutor charged three counts and an on-bail enhancement. The defendant admitted all of the charges and the enhancement. The prosecutor could not have obtained any better result by going to trial. Thus, as a matter of fact, the court did not interfere with the prosecutor's charging decision since the prosecutor secured convictions and a true finding as to everything alleged in the charging document.

Given this reality, the flaw in the *Woosley* reasoning is easily exposed. Although the court perceived an intrusion on the prosecutor's charging authority, this is quite simply untrue. Once the defendant admitted all of the charges and the on-bail enhancement, the People achieved the full result to which they were constitutionally entitled. At that point, the authority shifted to the court so that it might lawfully exercise its power under section 1385.

Section 1385, subdivision (c)(1) provides the court with the sentencing authority to either dismiss an enhancement outright or to "strike the additional

punishment" for the enhancement.[2]/ The exercise of such authority is necessarily a function of the court's sentencing power. As such, the exercise of section 1385 discretion is not an intrusion on the prosecutor's domain as was claimed by the *Woosley* court. To the contrary, the holding in *Woosley* allowed the prosecutor to unconstitutionally control the court's independent sentencing discretion. (*People v. Superior Court (Felmann)*, supra, 59 Cal.App.3d 270, 275 ["the exercise of sentencing power cannot be made subject to the consent of the district attorney because the requirement of that consent is an injection of the executive into the province of the judicial branch of government. [Citation]."].)

Should there be any doubt regarding the soundness of respondent's position, a slight change in the *Woosley* facts reveals the error in its analysis. Returning to the hypothetical Three Strikes case described above (p. 14, supra), assume that the defendant was convicted at trial and the strike priors were found true. At sentencing, the prosecutor protested that the court had no section 1385 authority to strike the punishment for the enhancements. Presumably, the People would concede that such an argument would be utterly

---

[2]Penal Code section 1385, subdivision (c)(1) provides:

"If the court has the authority pursuant to subdivision (a) to strike or dismiss an enhancement, the court may instead strike the additional punishment for that enhancement in the furtherance of justice in compliance with subdivision (a)."

frivolous.

In the final analysis, the actual procedural posture of *Woosley* was functionally no different from the hypothetical. Regardless of whether a jury returned a true finding concerning the enhancement or Mr. Woosley admitted it, the trial court retained the identical sentencing discretion. The holding in *Woosley* should be rejected.

The People will likely defend *Woosley* on the grounds that the defendant did not truly "expose" himself to the additional punishment posed by the enhancement since the court had promised to dismiss it. (*Woosley*, supra, 184 Cal.App.4th at p. 1147.) This argument has been previously rejected.

In *People v. Vessell* (1995) 36 Cal.App.4th 285, the defendant was charged with a felony violation of Penal Code section 273.5 and a strike prior. The court offered an indicated sentence by which the felony conviction would be reduced to a misdemeanor pursuant to Penal Code section 17. Over the People's objection, the Court of Appeal concluded that no error occurred.

> "Here, the record shows that the court gave an indicated sentence and respondent entered into an open plea. We conclude that the trial court properly exercised its sentencing discretion and did not participate in an illegal plea bargain." (*Vessell*, supra, 36 Cal.App.4th at p. 296.)

Vessell presents the same circumstance as *Woosley*. In each case, the People would argue that there was no "true" exposure to the charges alleged

since the court had promised to eliminate felony punishment (*Vessell*) or enhanced punishment (*Woosley*). As *Vessell* shows, it would unduly restrict the court's sentencing discretion to preclude the use of the indicated sentence procedure in this circumstance.

It is worth noting that the admission of an enhancement remains a matter of record even if the court dismisses the enhancement outright rather than striking the punishment for the enhancement. (*People v. Shirley* (1993) 18 Cal.App.4th 40, 47.) Given this rule, the People can scarcely claim that the court has intruded on prosecutorial authority. Rather, the prosecutor will enjoy the prospective benefits of its charging decision regardless of the sentencing choice made by the court. (*Ibid.* [even though great bodily injury enhancement was dismissed at sentencing in prior case, the enhancement remained usable to establish that the underlying conviction qualified as a five year prior under Penal Code section 667].)

The analysis in *Woosley* cannot withstand scrutiny. *Woosley* should be overruled.

IV.

THE OFFER OF AN INDICATED SENTENCE IS NOT PRECLUDED BY PENAL CODE SECTIONS 667, SUBDIVISION (g) AND 1170.12, SUBDIVISION (e).

In the trial court, the People protested that the five year indicated sentence was unlawful since it contemplated the dismissal of respondent's strike prior. In the People's view, the promised sentence constituted "plea bargaining" that is proscribed by Penal Code section 667, subdivision (g). (1 RT 5, CT 43-45.)

The majority in the Court of Appeal did not discuss the issue. However, the dissenting justice agreed with respondent that the Three Strikes law does not preclude a court from offering an indicated sentence. (Dissenting Opinion, pp. 35-37.) This view should be affirmed by this court.

Initially, it is doubtful that section 667, subdivision (g) and section 1170.12, subdivision (e) were intended to apply to a judge.[3]/ The provisions

---

[3]Penal Code section 667, subdivision (g) provides:

"Prior felony convictions shall not be used in plea bargaining as defined in subdivision (b) of Section 1192.7. The prosecution shall plead and prove all known prior felony convictions and shall not enter into any agreement to strike or seek the dismissal of any prior felony conviction allegation except as provided in paragraph (2) of subdivision (f)."

Penal Code section 1170.12, subdivision (e) provides:

"Prior felony convictions shall not be used in plea bargaining, as defined in subdivision (b) of Section 1192.7. The prosecution shall plead and prove all known prior felony convictions and shall not enter into any agreement to strike or seek the dismissal of any prior felony conviction

preclude the "use" of strike priors in "plea bargaining" and direct the prosecution to plead and prove all strike priors and desist from seeking dismissal of the priors except in specified circumstances. Since the provisions mention only the "prosecution," it would appear that no limitation is placed on the court's authority to offer an indicated sentence. (See *In re Marriage of Paillier* (2006) 144 Cal.App.4th 461, 471-472 [when a statute specifies certain enforcement methods but not others, the doctrine of *expressio unius est exclusio alterius* precludes the implication of methods not expressly mentioned].)

Another indication that the statutes do not apply to the court's conduct resides in the use of the term "plea bargaining." When the Three Strikes law was enacted in 1994, it was a settled principle that the court may not *ever* engage in plea bargaining. (*People v. Orin*, supra, 13 Cal.3d 937, 942-943.) Given this rule which was undoubtedly well known to the drafters of the law, there is no reason to believe that the phrase "plea bargaining" was intended to include the proffer of an indicated sentence. (*City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 606 [Legislature is presumed to be aware of judicial decisions when it enacts laws].)

Even if it is assumed that the statutes apply to action taken by the court,

---

allegation except as provided in paragraph (2) of subdivision (d)."

the instant trial judge did not make any "use" of the strike prior within the meaning of the statutes. Instead, the court took respondent's admission that the prior was true. This conduct does not constitute a "use" of the prior. The full context of sections 667 and 1170.12 shows this to be the case.

Under the Three Strikes law, it is the duty of the prosecutor to plead and prove strike priors and to refrain from entering a plea bargain concerning the priors. However, once a strike prior is proven, the court retains section 1385 power to dismiss the prior at the time of sentencing. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 504.)

Properly understood, sections 667, subdivision (g) and 1170.12, subdivision (e) bar only a pretrial dismissal of a strike prior which is attendant to a plea bargain. Such a pretrial dismissal is a "use" of the prior. However, where, as here, the court requires an admission of the prior, the statutes are not violated.

Moreover, the court's dismissal of a strike prior at the time of sentencing does not fall within the meaning of "plea bargaining" as that term is defined in section 1192.7, subdivision (b).[4]/ This is so since an indicated

---

[4]Penal Code section 1192.7, subdivision (b) provides:

"As used in this section 'plea bargaining' means any bargaining, negotiation, or discussion between a criminal defendant, or his or her counsel, and a prosecuting attorney or judge, whereby the defendant agrees to plead guilty or nolo contendere, in exchange for any promises, commitments,

sentence is, by definition, not "plea bargaining."

In *People v. Allan*, supra, 49 Cal.App.4th 1507, the court cited section 1192.7, subdivision (b) as providing the controlling definition of "plea bargaining." (*Id.* at p. 1516.) The court indicated that the proffer of an indicated sentence does not constitute "plea bargaining."

> "In an indicated sentence, a defendant admits all charges, including any special allegations and the trial court informs the defendant what sentence will be imposed. No 'bargaining' is involved because no charges are reduced. [Citations.]" (*Id.* at p. 1516.)

Aside from *Allan*, it bears emphasis that the People's position is entirely inconsistent with this court's approval of the indicated sentence procedure. (*People v. Feyrer,* supra, 48 Cal.4th 426, 434, fn. 6.) Obviously, an indicated sentence contains a promise regarding a specified sentence. While such a promise might be literally read as falling within section 1192.7, subdivision (b), it does not as a matter of law since the indicated sentence procedure has been judicially approved for at least 36 years. (See *People v. Superior Court (Ramos)*, supra, 235 Cal.App.3d 1261, 1266 and fn. 2; [although the trial court made an express "promise" regarding the sentence to be imposed, there was no error since the court properly offered an indicated sentence without using

---

concessions, assurances, or consideration by the prosecuting attorney or judge relating to any charge against the defendant or to the sentencing of the defendant."

those words.].)

In the Court of Appeal, the People claimed that *People v. Superior Court (Ludwig)* (1985) 174 Cal.App.3d 473 is dispositive in their favor. The People are mistaken.

In *Ludwig*, the defendant was charged with robbery and kidnapping. By its own admission, the trial court arranged "'a plea bargain over the District Attorney's objection.'" (*Ludwig*, supra, 174 Cal.App.3d at p. 475.) On this record, the Court of Appeal held that the "plea bargain" was illegal under Penal Code section 1192.7, subdivision (b). In so holding, the court specifically noted that it was not passing on the interplay between the indicated sentence procedure and section 1192.7 since the "court's action here was clearly a plea bargain, not an indicated sentence . . . ." (*Id.* at p. 476, fn. 1.)

In short, *Ludwig* does not hold that a proper indicated sentence is foreclosed by section 1192.7, subdivision (b). Moreover, Ludwig had no occasion to construe sections 667, subdivision (g) and 1170.12, subdivision (e) since the provisions were not in existence at the time. *Ludwig* is of no utility in deciding this case.

Finally, respondent's interpretation of the Three Strikes law must necessarily prevail in order to avoid a profound constitutional issue. This is so since the People's construction of the statutes would cause a separation of powers problem.

The People's view is that sections 667, subdivision (g) and 1170.12, subdivision (e) constitute a legislative directive that a trial court may not dispose of a case involving a strike prior by way of an indicated sentence. Such a directive involves the constitutional prerogatives of the court.

As a general proposition, the Legislature does not violate the separation of powers when it enacts statutes that regulate court proceedings. (*People v. Engram* (2010) 50 Cal.4th 1131, 1147.) However, the Legislature improperly intrudes into the domain of the courts when it attempts to regulate either the court's docket or the manner in which the court resolves controversies. When there is a material impairment of these core functions, the Legislature has gone too far. (*Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1104.)

Lorraine v. McComb (1934) 220 Cal.753 illustrates the boundary that the Legislature may not transgress. There, this court considered a statute which required the trial court to grant a 30 day postponement of a trial upon the written agreement of the parties. This court recognized that the statute likely violated the principle of separation of powers if it was construed as mandatorily requiring the court to grant a postponement.

> "The orderly and effective dispatch of legal business is the controlling factor with the court. The rights and conveniences of the parties to each particular cause present the other side. It is regrettable that a clash may at times occur between these forces. But the exercise of controlling discretion in such a situation must be exerted by the trial court, subject to revision by the higher courts if such discretion is abused. Ordinarily it

> should be possible to accommodate the parties in cases where they mutually agree to a postponement of the trial date, but in case this becomes impracticable, the judicial control reposed in the court by the Constitution must prevail." (*Lorraine*, supra, 220 Cal. at p. 755.)

Similar results were subsequently reached in *Thurmond v. Superior Court* (1967) 66 Cal.2d 836 and *People v. Engram*, supra, 50 Cal.4th 1131. In both cases, calendaring statutes were deemed to be directory rather than mandatory in order to avoid the "constitutional-separation-of-powers" problem identified in *Lorraine.* (*Engram,* supra, 50 Cal.4th at p. 1152.)

Le Francois v. Goel, supra, 35 Cal.4th 1094 closely bears on the case at bar. There, the question was whether Code of Civil Procedure sections 437 and 1008 barred a trial court from giving *sua sponte* reconsideration to its ruling on a motion for summary judgment. While this court acknowledged that the Legislature may "regulate the courts' inherent power to resolve specific controversies between parties," it also indicated that the Legislature "may not defeat or materially impair the courts' exercise of that power." (*Id.* at p. 1103.) In order to avoid a constitutional problem, this court held that the statutory provisions allowed for reconsideration. (*Id.* at p. 1105.)

The separation of powers considerations addressed in the aforementioned cases are equally applicable here. Under the People's theory, the Legislature has enacted a prohibition that compels the trial court to undertake a useless jury trial even though the court is already fully informed

about the case and knows what sentence will be imposed. Unquestionably, the application of this legislative directive would serve to "'materially impair'" the core function of the trial court which is to efficiently and justly manage its calendar and resolve cases. (*Engram*, supra, 50 Cal.4th at p. 1147.) Since it cannot be presumed that the Legislature intended to create a constitutional problem, sections 667, subdivision (g) and 1170.12, subdivision (e) cannot be construed as precluding the court from expeditiously concluding a case by way of an indicated sentence.

The Three Strikes law did not preclude the action taken by the trial court in this case. This court should so hold.

CONCLUSION

For the reasons expressed above, this court should reverse the judgment of the Court of Appeal and reinstate the judgment of the Superior Court.

Dated: June 18, 2012

Respectfully submitted,

DALLAS SACHER
Attorney for Respondent,
Wesley Cian Clancey

CERTIFICATE OF COUNSEL

I certify that this brief contains 8623 words.

Dated: June 18, 2012

DALLAS SACHER
Attorney for Respondent
Wesley Cian Clancey

PROOF OF SERVICE

I declare that I am over the age of 18, not a party to this action and my business address is 100 N. Winchester Blvd., Suite 310, Santa Clara, California 95050. On the date shown below, I served the within ***RESPONDENT'S OPENING BRIEF ON THE MERITS*** to the following parties hereinafter named by:

X **BY ELECTRONIC TRANSMISSION** - I transmitted a PDF version of this document by electronic mail to the party(s) identified on the attached service list using the e-mail address(es) indicated.

Amy Haddix, Esq.
Attorney General's Office
455 Golden Gate Avenue
Suite 11,000
San Francisco, CA 94102-7004
[attorney for appellant]
DOCKETING6DCASFAWT@DOJ.CA.GOV

Court of Appeal, Sixth Appellate District
333 W. Santa Clara Street
Suite 1060, 10th Floor
San Jose, CA 95113

X **BY MAIL** - Placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Clara, California, addressed as follows:

District Attorney's Office
70 W. Hedding Street
San Jose, CA 95110

Clerk of the Superior Court
191 N First Street
San Jose, CA 95113

Wesley Clancey
322 Park Drive
Aptos, CA 95003

I declare under penalty of perjury the foregoing is true and correct. Executed this 14th day of June, 2012, at Santa Clara, California.

Priscilla A. O'Harra