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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Appellant,** **v.** **WESLEY CIAN CLANCEY,** **Defendant and Respondent.**	Case No. S200158

SUPREME COURT
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The Honorable Rene Navarro, Judge

APPELLANT'S ANSWER BRIEF ON THE MERITS

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
ERIC D. SHARE
Supervising Deputy Attorney General
LAURENCE K. SULLIVAN
Supervising Deputy Attorney General
State Bar No. 72857
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5849
Fax: (415) 703-1234
Email: Larry.Sullivan@doj.ca.gov
Attorneys for Plaintiff and Appellant

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ISSUE

Whether the trial court's offer to dismiss a prior strike and give a sentence for a package disposition below the statutory minimum punishment and the prosecutor's offer, or else to allow the withdrawal of the pleas, was judicial plea bargaining or indicated sentencing.

INTRODUCTION

"[P]lea bargaining is an integral component of the criminal justice system and essential to the expeditious and fair administration of our courts." (*In re Alvernaz* (1992) 2 Cal.4th 924, 933.) "'To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system.'" (*Missouri v. Frye* (2012) 566 U. S. __ ,__ [132 S.Ct. 1399, 1407, 182 L.Ed.2d 379], quoting Scott & Stuntz, *Plea Bargaining as Contract* (1992) 101 Yale L.J. 1909, 1912, ellipsis and bracketed phrase in *Frye*.)

Defendant prefers the system of the Santa Clara County Superior Court's aptly named "Early Resolution Calendar" (ERC). It makes plea agreements at "somewhat less than the going disposition at a trial department." (1 RT 7.) Informed in chambers by the court of its offer to defense counsel to dismiss a prior strike and to impose a below-minimum five-year term in exchange for a package disposition, a prosecutor, who tendered an eight- or nine-year sentence to resolve 11 felony and 3 misdemeanor charges, asked that defendant's two-strike cases be sent to the trial department where a preliminary hearing was set the following week. (1 RT 4; see 2 RT 56.) The court instead consummated its plea agreement over the prosecutor's objection at a hearing the next day. (1 RT 4-5.) Directing defendant's attention to "your disposition" (1 RT 3) and to "objections to the disposition" (1 RT 8), the court characterized the offer as

its "plea agreement" (1 RT 9), and its "promises given here" (1 RT 16). Defendant acknowledged the promises as the inducement for his pleas (1 RT 16, 17), then pleaded no contest to all charges and admitted the allegations in both cases (1 RT 18-23).

At sentencing, the prosecutor objected again and moved for reconsideration of the plea agreement as unlawful. (2 RT 30, 32; see CT 42-45.) The court responded that the prosecutor's comments reflected a judicial plea bargain and an abuse of discretion only when "viewed in a vacuum." (2 RT 54-55.) It ruled that ERC "settlement discussions with all parties" (2 RT 55), historically conducted with the district attorney's consent (1 RT 58, 60), result in an "indicated sentence" (2 RT 58), representing its "informed" and "fair offer" under the circumstances (2 RT 58-59). The court dismissed the strike and imposed the five-year sentence "in keeping with the agreed upon disposition." (2 RT 62.)

A divided panel of the Court of Appeal found an unlawful judicial plea bargain and vacated the pleas. (Ct.App. Maj. Opn. (MO) 1, 13; Ct.App. Dis. Opn. (DO 1, 37.)

Its judgment is correct, and the trial court erred in finding an indicated sentence. In its accepted form—not challenged here—indicated sentencing means pleading "to the sheet" without conditional promises when the trial court predicts (indicates) the sentence or sentence range its ordinary discretion yields uninfluenced by promises or concessions of leniency whether conviction is by trial or by plea. That is decidedly not this case.

STATEMENT OF THE CASE

A. Charges

A complaint charged defendant with two counts of forgery (Pen. Code, § 470, subd. (d)),[1] two counts of grand theft (§§ 484, 487, subd. (a)), and false personation (§ 529). The complaint alleged one prior strike conviction (§§ 667, subds. (b)-(i), 1170.12).[2] (CT 18-19.)

In a separate case, the complaint charged defendant with second degree burglary (§§ 459, 460, subd. (b)), concealing stolen property (§ 496, subd. (a)), three counts of attempted grand theft (§§ 484, 487, subd. (a), 664), misdemeanor access card fraud (§§ 484g, subd. (a), 488), felony access card fraud (§§ 484g, subd. (a), 487), and two misdemeanors of resisting an officer (§ 148, subd. (a)(1)), and giving false identification to an officer (§ 148.9). The complaint also alleged an on-bail enhancement (§ 12022.1) and the prior strike conviction (§§ 667, subds. (b)-(i), 1170.12). (CT 22-25.)

B. Trial Court Proceedings[3]

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[1] Further undesignated statutory references are to this code.

[2] Under so-called "two-strike" punishment statutes, if the current offense is a felony, and the defendant has one qualifying prior "strike" conviction, the term for the crime is doubled; probation denial with a prison sentence is mandatory; consecutive sentencing for crimes on separate occasions is mandatory; there is no aggregate term limitation on consecutive sentences; and prison conduct credit reduction is limited to one-fifth of the total term. (See §§ 667, subd. (c), 1170.12, subd. (a)).

[3] Defendant's petition for rehearing asserted no misstatement or omission of fact by the Court of Appeal. (Ct.App. Pet. for Rehg. 1-6.) Accordingly, this court is entitled to rely on the statement of facts in the opinion. (Cal. Rules of Court, rule 8.500(c)(2); see *People v. Correa* (2012) 54 Cal.4th 331, 334, fn. 3.) Additional facts appear in footnotes 5 through 7, *post*.

"At a change-of-plea hearing, defendant's trial counsel announced that defendant would be 'pleading as charged' and admitting the 'strike prior allegation,' and '[i]t's anticipated at the time of sentencing the Court will grant an oral Romero motion, [and] thereafter sentence Mr. Clanc[e]y to five years in state prison.' [1 RT 4.[4]] The prosecution objected to 'the Court offer' because the court had 'promised five years' and '[t]he only way to get to that term would be for the Court to strike his prior serious felony conviction.' [1 RT 4-5.[5]] The court responded that this matter was on the 'Early Resolution Calendar' and that 'matters that are placed in ERC calendar [*sic*] are usually with the understanding of both sides settled for somewhat less than the going disposition at a trial department.' [1 RT 6-7.] The court thereafter asked defendant: 'Mr. Clanc[e]y, did you hear your

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[4] *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 529-530 (*Romero*), held that section 1385(a) permits a court on its own motion to strike prior felony conviction allegations in cases brought under the Three Strikes law.

[5] The prosecutor additionally objected "to the taking of the plea" because "of the Court's promising the defendant the Court would strike his prior serious felony conviction if he changes his plea in these cases." (1 RT 4-5.) The People's position, the prosecutor said, was that an eight- or nine-year term under the Three Strikes law was reasonable if defendant pleaded before the preliminary examination, "which we could get to by dismissing one or two counts." (1 RT 5; see also 2 RT 56.) The prosecutor noted a "substantial difference" between the prosecutor's tendered resolution and the court's offer, given the understanding of the court and the parties that the prior strike's dismissal would increase defendant's presentence conduct credits and significantly shorten his time in prison. (1 RT 5.) The prosecutor noted a victim also had objected to the court's offer. (1 RT 6.)

Addressing "the comments yesterday in chambers," the prosecutor said that he was unaware until then of "some kind of practice or agreement . . . my office has with the Court on these types of cases," which was not the prosecutor's "personal practice," and that he would not have agreed to discussions in the ERC had he been aware "this was going to happen." (1 RT 6.)

plea agreement?' Defendant acknowledged that he had, and the court asked: 'You agree with it?' Defendant said 'Yes, sir.' [1 RT 9.] The court proceeded to advise defendant of his rights and obtain his waivers of them. [1 RT 13-16.] It then asked the prosecutor if he wished to engage in further examination of defendant. The prosecutor obtained defendant's acknowledgement that he was aware his maximum term was 16 years and eight months in prison and his minimum term was 11 years and four months, but he was 'being promised no more than or less than five years in state prison.' [1 RT 17.] Defendant then pleaded no contest to all of the charges in both cases and admitted the on-bail and strike allegations. [1 RT 18-23.]

"The probation report stated that the 'CONDITIONS' of defendant's pleas and admissions were 'Prison term of five years top/bottom. . . .' [CT 129.] Although the probation officer ultimately concluded that he 'concurs with the Court's indication of a State Prison commitment of five years,' he also stated that this was 'in accordance with the negotiated plea.' [CT 132.] The probation report also noted that, '[t]o stay within the parameters of the negotiated plea,' the court would need to strike the punishment for the on-bail enhancement. [CT 144.]

"The trial court conceded at the sentencing hearing that the prosecutor's objections, 'if they were viewed in a vacuum,' made it appear that 'the court engaged in plea bargaining.' [2 RT 54-55.] However, the court insisted that 'if you step away from that vacuum and you view this matter in the totality of the circumstances as how the court operates and has been operating for the past three years that I've been doing this assignment, I think that for purposes of any reviewing court, I need to outline for the reviewing court how the conferences are structured and how they're held.' [2 RT 54-55.] The trial court went on to describe how the 'Early Resolution Department' functioned. '[I]t's [*sic*] function and it's [*sic*]

assignment [is] to settle cases.' [2 RT 55.] It recounted how it had had before it a great deal of information about defendant before it made a decision about its 'offer.' [2 RT 55-58.[6]] 'So it isn't as though the court made an offer in a vacuum, but rather it was an informed offer that the court had, given the nature of the circumstances.' [2 RT 58.] The court 'felt that the offer was a fair offer given the circumstances and what I knew of the case.' [2 RT 59.[7]] The court highlighted that it was 'understood' among all of the parties 'that if there's anything new that comes up, that the court has the ability to set it aside and to put the parties back in their original positions and not to make it a condition of the plea.' [2 RT 58-59.] The court noted that, on past occasions, it 'has set aside pleas where I had indicated a sentence' and then learned additional circumstances that 'allowed the court to set aside the plea.' [2 RT 59-60.[8]] 'And it isn't as

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[6] The court referred to the unreported chambers conference the day before the plea hearing, "a date that we normally would meet for discussions." (2 RT 55-56.)

[7] The court recalled when "I made this offer," it told the prosecutor that "you want eight or nine and I'm giving him five." (2 RT 59.) The court acknowledged that it made the offer understanding that its striking defendant's prior strike would increase defendant's presentence conduct credits, and that "[i]t makes a big difference," but "notwithstanding that I still felt the offer was a fair offer given the circumstances and what [the court] knew about the case." (*Ibid.*) It awarded defendant enhanced presentence conduct credits pursuant to section 1385 and then extant case authority. (2 RT 64; see Argument V, *post.*)

[8] Compare section 1192.5, which governs conditional pleas involving sentencing leniency negotiated by the parties. It reads:

"Upon a plea of guilty or nolo contendere to an accusatory pleading charging a felony . . . the plea may specify the punishment to the same extent as it may be specified by the jury on a plea of not guilty or fixed by the court on a plea of guilty, nolo contendere, or not guilty, and may specify the exercise by the court thereafter of other powers legally available to it. [¶] Where the plea is accepted by the prosecuting attorney in open court and is approved by the court, the defendant, except as otherwise

(continued...)

though the court is engaging in plea bargaining because of the history that I've indicated for the record, that the district attorney, through their representatives have consented to.' [2 RT 60.]

"Defendant's trial counsel noted, and the trial court agreed, that defendant would be entitled to withdraw his pleas and admissions if the court did not 'honor [its] agreement' to strike the strike and impose a five-year prison term. [2 RT 45, 60-61.] Over the prosecutor's objections, the trial court then struck the strike finding and imposed the five-year prison term, which the court referred to as 'the agreed upon disposition.' [2 RT 61-62.]" (MO 1-4, bracketed record citations and footnotes added.)

C. Court of Appeal Decision

The People appealed. The Court of Appeal held the trial court "engaged in unlawful judicial plea bargaining," reversed the judgment, and directed that the pleas and admissions be vacated. (MO 1, 13.) The court found "all of the parameters of the court's offer to defendant" needed to review for abuse of discretion, and saw "no basis for deferring to the trial court's assertion that its actions did not amount to prohibited plea

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(...continued)
provided in this section, cannot be sentenced on the plea to a punishment more severe than that specified in the plea and the court may not proceed as to the plea other than as specified in the plea. [¶] If the court approves of the plea, it shall inform the defendant prior to the making of the plea that (1) its approval is not binding, (2) it may, at the time set for the hearing on the application for probation or pronouncement of judgment, withdraw its approval in the light of further consideration of the matter, and (3) in that case, the defendant shall be permitted to withdraw his or her plea if he or she desires to do so. The court shall also cause an inquiry to be made of the defendant to satisfy itself that the plea is freely and voluntarily made, and that there is a factual basis for the plea. [¶] If the plea is not accepted by the prosecuting attorney and approved by the court, the plea shall be deemed withdrawn and the defendant may then enter the plea or pleas as would otherwise have been available."

bargaining." (MO 9-10, & fn. 2.) It noted section 1192.7, subdivision (b)[9] includes in its definition of a plea bargain a "discussion" between a judge and a defendant that produces the defendant's agreement to plead guilty or no contest in exchange for a sentencing commitment by the judge. (MO 4.) The court quoted *People v. Orin* (1975) 13 Cal.3d 937 (*Orin*), the "seminal case" condemning judicial plea bargaining. (MO 4.) It noted *In re Lewallen* (1979) 23 Cal.3d 274 (*Lewallen*) later cited the disapproval of judicial plea bargaining in *People v. Superior Court* (*Felmann*) (1976) 59 Cal.App.3d 270 (*Felmann*), without addressing *Felmann*'s concept of indicated sentencing (MO 5-6). The court found six subsequent Court of Appeal decisions had failed to apply a "clear and coherent test" distinguishing an unlawful judicial plea bargain from a permissible indicated sentence. (MO 6-10.)[10]

The Court of Appeal held the trial court violated two principles that govern the distinction. (MO 10.) First, "[a] trial court '"may not offer any inducement in return for a plea of guilty or nolo contendere."'" (*Id.* at pp. 10-11, quoting *Lewallen*, *supra*, 23 Cal.3d at pp. 278-279.) It explained that a "proper indicated sentence is not premised on guilty or no contest pleas, but applies whether or not the defendant chooses to proceed to trial,"

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[9] The statute, designated hereafter section 1192.7(b), defines "plea bargaining" to mean "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, concessions, assurances, or consideration by the prosecuting attorney or judge relating to any charge against the defendant or to the sentencing of the defendant."

[10] See *People v. Superior Court* (*Smith*) (1978) 82 Cal.App.3d 909 (*Smith*); *People v. Superior Court* (*Ludwig*) (1985) 174 Cal.App.3d 473 (*Ludwig*); *People v. Superior Court* (*Ramos*) (1991) 235 Cal.App.3d 1261 (*Ramos*); *People v. Allan* (1996) 49 Cal.App.4th 1507 (*Allan*); *People v. Woolsey* (2010) 184 Cal.App.4th 1136 (*Woolsey*); *People v. Labora* (2010) 190 Cal.App.4th 907 (*Labora*).

disagreeing with *Ramos*, *supra*, 235 Cal.App.3d 1261, to that extent. (MO 10, fn. omitted.) The trial court's plea colloquy impermissibly informed defendant "that it would impose a five-year term and strike the strike *if he admitted all of the charges and allegations*." (*Id.* at p. 11.) "[T]he court's goal was 'to settle cases,'" and "its offer was contingent on the defendant pleading and would not have been valid if he chose to exercise his right to trial." (*Ibid.*) A true indicated sentence, the court said, is "nothing more than a prediction" and "is valid whether the defendant pleads or goes to trial." (*Id.* at p. 12.)

Second, "an 'offer' by the court that provides the defendant with the option to withdraw the . . . pleas and any admissions if the court decides to impose a sentence other than the one offered is not a proper indicated sentence," rejecting contrary dicta in *Felmann*, *supra*, 59 Cal.App.3d 270. (MO 11.) The trial court's "commitment that defendant could withdraw his pleas and admissions if the court did not follow through on it offer . . . confirmed the existence of a bargain." (*Ibid.*) Its offer amounted to a "risk-free proposition for defendant" as he was promised the five-year term or a return to his original position, which "makes the court's purported 'indicated sentence' identical, from the defendant's standpoint, to a true plea bargain . . . ." (*Id.* at p. 12 & fn. 4.) The trial court's action lacked the characteristics of an indicated sentence, in which "if the court learns something new that makes its prediction inaccurate, the defendant is vulnerable to a sentence other than the indicated one and has no right to withdraw the plea." (*Id.* at p. 12.)

The dissent by a Santa Clara County Superior Court judge sitting by assignment accepted that an indicated sentence is neither "a binding promise or guarantee" (DO 12), nor "conditioned on a . . . defendant's pleading guilty or no contest" (*id.* at p. 14, fn. 12 and p. 16); instead, it should be a reliable prediction "conditioned on the facts remaining

essentially the same at sentencing" (*id.* at pp. 13-14 & fn 12; see also *id.* at pp. 19, 21). Though acknowledging "the line between indicated sentences and plea bargains may not be bright and may allow diverse interpretations" (*id.* at p. 14), the dissent said a defendant can withdraw a plea if the trial court does not impose the indicated sentence (*id.* at p. 13), rather than the indication being "unconditionally binding on the defendant, though not on the court" (*id.* at p. 17). Few defendants, the dissent believed, would risk pleading guilty otherwise and sentence indications "will lose meaning." (*Id.* at pp. 20-21.)

An unauthorized judicial plea bargain, the dissent said, requires showing the trial court "modifie[d] a sentence indication in response to the defendant's reaction to the court's initial indication" (DO 12, fn. 11); or promised a plea and waiver of trial would guarantee "a specified sentence, regardless of what facts may be shown at sentencing" (*id.* at p. 21); or "suggest[ed] that a post-trial sentence would be more harsh" (*id.* at p. 34, fn. 24). The trial court's assurances to defendant were benign given the "true nature" of the trial court's use of the word "promise." (*Id.* at pp. 22-25, & fn. 22.) Reasoning the trial judge is "particularly well situated to determine if he or she engaged in any negotiating or bargaining, particularly if the claim is that the activity occurred off the record" (*id.* at p. 26), the dissent "accept[ed] the implicit factual findings supporting the trial court's conclusion that it did not engage in plea bargaining, but merely indicated a sentence as authorized by precedent" (*id.* at pp. 22-27).

Rejecting an argument by the People not addressed by the majority, and contrary to *Woolsey, supra*, 184 Cal.App.4th 1136, the dissent endorsed judicial promises to dismiss strikes (DO 29) as appropriate exercises of discretionary sentencing authority, "to be accomplished within the limits set by the Legislature" (*id.* at p. 31), "so long as the indication otherwise conforms to the formula for an indicated sentence" (*id.* at p. 33).

The dissent found "no record that the defense attorney talked the trial judge into changing his indicated sentence or that the judge was otherwise involved in negotiating with defense counsel regarding the sentence." (*Id.* at p. 34.) It was irrelevant that the trial court never "issued a sentence indication conforming precisely to the [dissent's] model," and that it sought to justify its actions by "historical practices." (*Id.* at p. 35, fn. 25.) And while not persuaded by defendant that the Three Strikes law exempts judges from its plea-bargaining prohibitions (*id.* at p. 36),[11] the dissent considered the separation of powers to be violated if that law precludes sentence indications involving the dismissal of a strike. (*Id.* at p. 37.) The dissent concluded that the prosecutor made "no showing that the court's off-the-record sentence indication resulted from judicial bargaining or negotiating and it was nothing more than a conditional offer . . . outside the prohibitions of the Three Strikes statutes and within judicial sentencing authority." (*Ibid.*)

SUMMARY OF ARGUMENT

The record reflects an unlawful judicial plea bargain. The trial court exchanged increased sentencing leniency in a package disposition for defendant's waivers by promising to dismiss a strike finding to allow a below-minimum punishment in a plea agreement. (1 RT 3-4, 7, 9, 16; 2 RT 58.) *Orin*, *supra*, 13 Cal.3d 937 held impermissible a functionally identical judicial plea bargain. *Lewallen*, *supra*, 23 Cal.3d 274 and *People v. Collins*

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[11] Section 667, subdivision (g) (section 667(g)), states: "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)." Section 1170.12, subdivision (e) (section 1170.12(e)) is virtually identical to section 667(g). We collectively refer to the statutes as the Three Strikes law.

(2001) 26 Cal.4th 297 (*Collins*) condemn judicial inducement of waivers of fundamental constitutional rights by promised leniency and judicial addition of punishment for refusing to waive those rights. *Romero, supra*, 13 Cal.4th 497 held a court abuses its discretion under *Orin* by dismissing a sentencing allegation or finding simply because a defendant pleads guilty or no contest.

The dangers of such bargains were described in *Orin* and manifested themselves here. The trial court's agreement distorted its duty to impartially consider the pleas. Its agreement preempted the prosecutor's tender of a higher sentence to resolve the cases by the court's offer of a significantly lower sentence. With respect to its inducement of increased presentence conduct credits, the agreement exposed defendant's waivers and pleas as products, in substantial part, of an illusory sentencing benefit. And the agreement opened the waivers to challenge on a claim they were coerced—a claim defendant remains free to assert if and when it proves advantageous.

The trial court did not give an indicated sentence. It did not state "what sentence it will impose if a given set of facts is confirmed, irrespective of whether guilt is adjudicated at trial or admitted by plea." (*People v. Turner* (2004) 34 Cal.4th 406, 419 (*Turner*).) An indicated sentence is a predicted sentence, not a promised dismissal or a conditional plea agreement that restricts ordinary sentencing powers. A trial court may not, in derogation of section 1192.5, under the guise of indicated sentencing, substitute itself for the prosecution by making a conditional plea agreement to induce the defendant's waivers of fundamental constitutional rights through unilateral or negotiated promises to strike or dismiss findings or charges, or to sentence below the statutorily-authorized minimum for all the charges and allegations. The absence of express "bargaining" or "threats" does not convert into an indicated sentence a plea agreement in violation of

statute and *Orin*. Defendant's argument that *Woosley*, *supra*, 184 Cal.App.4th 1136 should be "overruled" lacks merit.

The trial court's promise to strike the prior strike conviction as consideration for the plea agreement was also prohibited by the Three Strikes law (§§ 667(g), 1170.12(e).) A unilateral judicial promise to dismiss a strike as inducement for an admission of a properly charged allegation and consideration for an agreement to plead to other proper charges impermissibly invades the prosecutor's powers to negotiate conditional plea agreements and comes within section 1192.7(b). The Three Strikes plea bargaining restriction impinges no legitimate sentencing authority under *Orin*.

On closer consideration, we withdraw the argument made in the Court of Appeal that an indicated sentence is per se inconsistent with a trial court's statement that a defendant may withdraw a plea of guilty or no contest if it decides not to impose a sentence. The matter is fact dependent and ordinarily rests in the trial court's purview to determine the interests of justice. (See *People v. Williams* (1998) 17 Cal.4th 148, 164, fn. 7 (*Williams*).) This court need not decide the remedy if a trial court disapproves a proper indicated sentence. Defendant was given no indicated sentence, did not confront a trial court's disapproval of one, was not rebuffed trying to withdraw pleas, and will not need permission to withdraw pleas on remand as they must be vacated.

The substantial increase in presentence conduct credits was beyond the trial court's power. (*People v. Lara* (2012) 54 Cal.4th 896 (*Lara*.) The inducement was improper even as an indicated sentence. The unauthorized sentence can be raised as an independent claim on this appeal and requires correction because it improperly reduces the total time defendant serves in prison.

ARGUMENT

I. A TRIAL COURT'S OFFER OF A DISMISSAL OF FINDINGS AND A SPECIFIED SENTENCE ON CONDITION OF AND IN EXCHANGE FOR A PLEA OF GUILTY OR NO CONTEST IS A JUDICIAL PLEA BARGAIN, NOT AN INDICATED SENTENCE

Judicial plea bargaining without the consent of the prosecution contravenes statute and is an act in excess of the trial court's jurisdiction. (*Turner*, *supra*, 34 Cal.4th at p. 418; *Labora*, *supra*, 190 Cal.App.4th at pp. 913, 914; see §§ 1192.5 & 1192.7(b).) The court cannot violate the statute and exceed its jurisdiction, whether it does so under the guise of "agreeing" to a plea bargain or of giving an "indicated sentence."[12]

A. The Trial Court's Exchange of Promised Sentencing Leniency for Defendant's Waivers Violates Section 1192.5 and Constitutes an Improper Inducement of the Defendant's Pleas

1. The trial court substituted itself for the prosecutor by making a conditional plea agreement in violation of section 1192.5 and *Orin*

California's legislative scheme (§§ 1192.1-1192.5) "contemplates a district attorney negotiating with the accused and the trial judge approving or disapproving the ultimate agreement." (*In re Lewallen*, *supra*, 23 Cal.3d at pp. 280-281.) By statute, "a trial judge is precluded from offering an accused in return for a guilty plea a more lenient sentence than he would impose after trial." (*Id.* at p. 281, citing § 1192.5; *Felmann*, *supra*, 59 Cal.App.3d at p. 276.)

"[T]he process of plea negotiation 'contemplates an agreement negotiated by the People and the defendant and approved by the court. (§§

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[12] Nothing in this brief should be taken as implied approval of rules in other jurisdictions that forbid the involvement of judges in plea negotiations. (See *People v. Jensen* (1992) 4 Cal.App.4th 978, 984.)

1192.1, 1192.2, 1192.4, 1192.5; *People v. West* (1970) 3 Cal.3d 595, 604–608.) Pursuant to this procedure the defendant agrees to plead guilty [or no contest] in order to obtain a reciprocal benefit, generally consisting of a less severe punishment than that which could result if he were convicted of all offenses charged. (*People v. West*, *supra*, 3 Cal.3d at p. 604.) This more lenient disposition of the charges is secured in part by prosecutorial consent to the imposition of such clement punishment (§ 1192.5), by the People's acceptance of a plea to a lesser offense than that charged, either in degree (§§ 1192.1, 1192.2) or kind (*People v. West*, *supra*, 3 Cal.3d at p. 608), or by the prosecutor's dismissal of one or more counts of a multi-count indictment or information. Judicial approval is an essential condition precedent to the effectiveness of the "bargain" worked out by the defense and prosecution. (§§ 1192.1, 1192.2, 1192.4, 1192.5; *People v. West*, *supra*, 3 Cal.3d at pp. 607–608.) But implicit in all of this is a process of "bargaining" between the adverse parties to the case—the People represented by the prosecutor on one side, the defendant represented by his counsel on the other—which bargaining results in an agreement between them. (See *People v. West*, *supra*, 3 Cal.3d at pp. 604–605.)'" (*People v. Segura* (2008) 44 Cal.4th 921, 929-930 (*Segura*), quoting *Orin*, *supra*, 13 Cal.3d at pp 942–943, first brackets added.)

Section 1192.5 does not distinguish clement punishment exchanged for pleas "to the sheet" from pleas to fewer charges. Nor does statute authorize judicial promises of lenient dispositions, over the prosecution's objection, where the court's consideration for the pleas is "secured in part . . . by the . . . dismissal of one or more" prior strike convictions, or current offenses. (*Segura*, *supra*, 44 Cal.4th at p. 930.)

Pretrial dismissal of charges under section 1385 has been used to effectuate plea bargains between the People and the defense when approved by the court. (*Orin*, *supra*, 13 Cal.3d at p. 946.) The People's statutory

authority is to negotiate sentencing leniency. Their "legitimate interest in the fair prosecution of crimes properly alleged" undergirded *Orin*'s holding that the trial court cannot arrange a "package disposition" of the charges against a defendant, over the People's objection, by invoking section 1385 to dismiss charges in order to induce a defendant's plea of guilty to another charge. (*Id.* at pp. 947-948; see *id.* at p. 949 ["[T]he net effect of the dismissal was to preclude the prosecution and possible conviction of defendant for two offenses simply because he was willing to plead guilty to a third, all three offenses having been properly charged"].)

The court "clarified in *Orin* that only the prosecutor is authorized to negotiate a plea agreement on behalf of the state. '[T]he court has no authority to substitute itself as the representative of the People in the negotiation process and under the guise of "plea bargaining" to "agree" to a disposition of the case over prosecutorial objection. Such judicial activity would contravene express statutory provisions requiring the prosecutor's consent to the proposed disposition, would detract from the judge's ability to remain detached and neutral in evaluating the voluntariness of the plea and the fairness of the bargain to society as well as to the defendant, and would present a substantial danger of unintentional coercion of defendants who may be intimidated by the judge's participation in the matter.' [Citation.]" (*Segura*, *supra*, 44 Cal.4th at p. 930, quoting *Orin*, *supra*, 13 Cal.3d at p. 943.)

That the trial court in *Orin* did not accept pleas to "the sheet" before dismissing counts was not the basis for this court's overturning the plea agreement there. Nor was the basis for that decision a "negotiation" by the trial court with the defense. No decision by this court holds that a trial court may make an agreement with the defendant, over the prosecution's objection, for the purpose of inducing pleas "to the sheet," by promising to dismiss properly charged parts of an accusatory pleading and to sentence

below the statutory-minimum for all charged offenses and allegations. Nor does any statute sanction that procedure.

Assuming inherent power exists to give indicated sentences, "inherent powers should never be exercised in such a manner as to nullify existing legislation or frustrate legitimate legislative policy." (*People v. Municipal Court* (*Runyan*) (1978) 20 Cal.3d 523, 528.)

2. Judicial plea bargains undermine the plea bargaining system

Orin condemns the trial court's substituting itself as the representative of the People in the negotiation process, particularly through unilateral offers of section 1385 dismissals merely for the purpose of inducing pleas.

Prosecutorial control over the proffer of conditional plea agreements ensures an efficient and equitable system of plea bargaining. (See *In re Alvernaz*, *supra*, 2 Cal.4th at p. 933.) "[A] prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct [because] the initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution." (*People v. Michaels* (2002) 28 Cal.4th 486, 514-515, quoting *People v. Edwards* (1991) 54 Cal.3d 787, 828, internal quotation marks omitted and brackets in *Michaels*; see also *People v. Jurado* (2006) 38 Cal.4th 72, 98 [holding no presumption of vindictiveness applies to plea bargaining by prosecutor]; *United States v. Goodwin* (1982) 457 U.S. 368, 378, fn. 10 [explaining plea bargaining's legitimacy in terms of the necessity for inducing guilty pleas through the prosecutor's exclusive power to bring and increase charges]; *People v. Rivera* (1981) 127 Cal.App.3d 136, 146-148 [recognizing prosecutorial leverage in plea bargaining avoids systematic overcharging].)

By its conditional plea agreement, the trial court preempted the prosecutor's "broad discretion . . . to determine the extent of the societal interest in prosecution." (*Michaels*, *supra*, 28 Cal.4th at p. 515, internal quotation marks omitted.) That societal interest is legislatively "heightened . . . in the prosecution of more serious crimes." (*Burris v. Superior Court* (2005) 34 Cal.4th 1012, 1019.) Conversely, "no weight whatsoever may be given to factors extrinsic to the [legislative] scheme, such as the mere desire to ease court congestion . . . ." (*Williams, supra,* 17 Cal.4th at p. 161, citing *Romero, supra,* at p. 531.)

3. Judicial promises of leniency given to induce a defendant's waiver or forfeiture of fundamental constitutional rights imperil the conviction

Defendant is sanguine regarding judicial inducements for guilty pleas. (RBOM 16.) This court's plea bargain jurisprudence is not. (*Orin*, *supra*, 13 Cal.3d at p. 943.)

"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." (*In re Lewallen*, *supra*, 23 Cal.3d at pp. 278-279, quoting *Felmann*, *supra*, 59 Cal.App.3d at p. 276.) The court has explained that promising leniency to a defendant for refraining from the exercise of fundamental constitutional rights "has been rejected, whether its source is executive, legislative, or judicial in nature." (See *People v. Collins* (2001) 26 Cal.4th 297, 309, 306 (*Collins*).) "The impropriety of a trial court's explicit promise of more lenient treatment in sentencing if the defendant waives [such rights] is comparable to the impropriety of harsher treatment imposed because of the defendant's having invoked his or her right to trial by jury." (*Id.* at p. 307 [analogizing inducement of jury-trial waiver by indicating unspecified "benefits" of waiver to *Lewallen*, where defendant punished for

refusing a plea negotiation].) A trial court that formally fulfills procedural requirements for assuring a knowing and voluntary waiver of a right, as did the trial court below, "while announcing its intention to bestow some form of benefit in exchange for defendant's waiver of that fundamental constitutional right, act[s] in a manner that [is] at odds with its judicial obligation to remain neutral and detached in evaluating the voluntariness of the waiver." (*Id.* at p. 309.) "The *form of the trial court's negotiation with defendant* present[s] a 'substantial danger of unintentional coercion.'" (*Ibid.*, quoting *Orin*, *supra*, 13 Cal.3d at p. 943, italics added.)[13]

4. The trial court's role in approving a conditional plea agreement is compromised by judicial plea bargaining

"If the court does not believe the agreed-upon disposition is fair, the court 'need not approve a bargain reached between the prosecution and the defendant, [but] it cannot change that bargain or agreement without the consent of both parties.'" (*Segura*, 44 Cal.4th at p. 931 quoting *People v. Godfrey* (1978) 81 Cal.App.3d 896, 903.) Thus, a trial court's "'approval is an essential condition precedent to any plea bargain' negotiated by the

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[13] Where the court's promises induce the waiver of a right that, by itself, is not subject to its negotiation, the waiver is involuntary and due process violated. (*Collins*, *supra*, 26 Cal.4th at pp. 309, 311-312 [holding improper inducement of a jury-trial waiver a structural defect]; cf. *People v. Dixon* (2007) 153 Cal.App.4th 985, 993-994 [improper promise found not to have induced jury-trial waiver].) That is true even though, as this court said in *Collins*, the state through a plea bargain negotiated by the *prosecutor*, "'may encourage a guilty plea, and thereby obtain a waiver of those same rights, by offering substantial benefits in return for the plea,' which may obtain for the defendant 'the possibility or certainty . . . [not only of] a lesser penalty than the sentence that *could* be imposed after a trial and a verdict of guilty . . .' [citation], but also of a lesser penalty than that *required* to be imposed after a guilty verdict by a jury." (*Collins*, *supra*, at p. 309, fn. 4, quoting *Corbitt v. New Jersey* (1978) 439 U.S. 212, 218-220, internal quotation marks omitted, brackets and ellipses in *Collins*.)

prosecution and the defense, and a plea bargain is ineffective unless and until it is approved by the court." (*Alvernaz*, *supra*, 2 Cal.4th at p. 941.) "In exercising their discretion to approve or reject proposed plea bargains, trial courts are charged with the protection and promotion of the public's interest in vigorous prosecution of the accused, imposition of appropriate punishment, and protection of victims of crimes." (*Ibid.*) Hence, a plea agreement between the parties does not "bind a trial court which is required to weigh the presentence report and exercise its customary sentencing discretion." (*People v. Kaanehe* (1977) 19 Cal.3d 1, 14.)

A trial court making its own conditional plea agreement for sentencing leniency does not weigh a probation officer's report or exercise "customary sentencing discretion" as it does when deciding to approve or reject a bargain negotiated by the parties. The court alters its customary sentencing discretion by limiting its available powers through the inducement offered for the waivers of constitutional rights and the pleas, which "detract[s] from the judge's ability to remain detached and neutral in evaluating the . . . fairness of the bargain to society as well as to the defendant." (*Orin*, *supra*, 13 Cal.3d at p. 943.) As shown *post*, the evils described in *Orin* manifest themselves in this case.

B. The Record Establishes a Judicial Plea Bargain

The trial court induced defendant's pleas and admissions with its promise of the dismissal of a strike and a sentence below the minimum two-strike sentence for conviction on all charges. Defendant accepted the court's offer to exchange his pleas and admissions in a package disposition to obtain the reciprocal benefit of a less severe punishment than would result were he convicted after trial.

The trial court offered a plea agreement at a sentence discount "somewhat less than the going disposition at a trial department." (1 RT 7.) The court's consideration was its promise to dismiss a prior strike and to

impose a five-year prison sentence. (1 RT 4, 9; 2 RT 59.) The promised sentence was represented to defendant as one below the legislative minimum applicable to findings on all charges and allegations. (1 RT 16, 17.) The court conditioned its leniency on the "plea agreement" offered in the defendant's cases sent to the ERC. (1 RT 3-4, 7, 9.) Those promises were made pursuant to the court's assignment to settle as many cases as it can through its discussions with counsel and to sentence in accord with its plea agreements. Its offer, as the majority and dissent below tacitly agreed, was unavailable after a trial or even before trial outside the ERC. (1 RT 4-5; 2 RT 55, 62.)

The trial court's package disposition was a sentence offer below the statutory minimum. (1 RT 17; 2 RT 56.) It mooted bargaining over the longer sentence tendered by the prosecutor. (2 RT 59.) Its promises directly induced defendant's early pleas. (1 RT 7, 16, 17.) This conditional plea agreement rested on the court's promised leniency exchanged for the defendant's constitutional waivers and pleas. That the trial court took pleas to all charges before dismissing the prior strike fails to distinguish the plead-to-one-dismiss-another package disposition overturned in *Orin*. *Orin*'s rule is against dismissing properly charged parts of an accusatory pleading as a reciprocal benefit merely to induce a guilty plea to another proper charge. It is functionally identical to this case, where the plea agreement promised sentencing leniency on findings left after a promised dismissal of another finding. If there is a difference from *Orin*, it is that the trial court here specified a sentence that it informed the defendant was lower than the "going disposition" (1 RT 6-7)—the sentence available to the defendant if he were not to waive his rights and was sent to the trial department as a consequence of that decision.

Orin accurately predicted that "it would frustrate the orderly and effective operation of our criminal procedure as envisioned by the

Legislature if without proper and adequate reason section 1385 were used to terminate the prosecution of defendants for crimes properly charged in accordance with legal procedure." (*Orin*, *supra*, 13 Cal.3d at p. 947.) Today, as then, a trial court may not "frustrate the legitimate prosecution of a defendant by arranging a 'package disposition' of the charges against him over the People's objection." (*Ibid.*)

C. The Trial Court's Ruling and the Dissent's View of an Indicated Sentence Are Meritless

1. Trial court's ruling

The trial court justified its plea agreement with its historical practices. The dissent incorrectly found its reasoning irrelevant. In stating that prosecutors attend ERC discussions and had consented to earlier plea agreements there (2 RT 58, 60), the trial court was confused as to the law. Prosecutorial participation in settlement discussions is obligatory in this state. (*Bryce v. Superior Court* (1988) 205 Cal.App.3d 671, 672.) And an indicated sentence requires no prosecutorial consent. (*People v. Turner*, *supra*, 34 Cal.4th at pp. 418-419.) Consent by the prosecutor to a plea agreement is characteristic of a conditional plea bargain negotiated by the parties (§ 1192.5), not an indicated sentence. There was no consent to the court's offer or its plea agreement here. (1 RT 4-5.)

The trial court signaled a judicial plea bargain in its ruling. It said it did not impose a sentence under its plea agreements when an "additional factor" appeared "weighty enough" that "it allowed the court to set aside the plea," a situation that "would require this court to set aside the plea because of new information . . . ." (2 RT 59-60.) That is, the trial court views new facts of sufficient weight a condition to reassertion of its ordinary sentencing powers after a defendant accepts its plea agreements. Yet, new facts are not needed to reject an indicated sentence any more than they are to disapprove a plea bargain. (See *Segura*, *supra*, 44 Cal.4th at p.

930 [trial court may reject a plea bargain when it believes it is not "fair"]; cf. §§ 1018 [defendant must show good cause for court to grant permission to withdraw a plea of guilty or no contest]; 1192.5 [a conditional plea agreed to by the parties is ineffectual unless approved by the court; statute contains no requirement of good cause or new facts needed for trial court's disapproval].) The trial court's practice is explicable only if approval of its offered inducement is implicit when the defendant pleads in reliance thereon, rendering the plea agreement nonrescindable absent good cause, which the defendant has no incentive to show.

The trial court also found an indicated sentence because it considered the five-year sentence informed and fair. (2 RT 58-59.) Nothing in the record reflects the prosecutor's tendered offer of an eight- or nine-year sentence was not also informed and fair. A trial court no less abuses discretion by offering a plea bargain that preempts a range of presumptively fair sentencing outcomes as by offering one that does not.

The dangers of judicial plea bargains appear in the trial court's actions and in its ruling. Improper judicial inducements inject extraneous considerations into the duty of a trial court to consider impartially whether to approve or disapprove sentencing commitments and leave the court open to charges of coercion. Once agreed to by defendant, the court's offer effectively moots plea bargaining between a prosecutor and defense counsel. Here, the court offered a term less than half the minimum authorized by conviction on all charges in the complaints, and at least three years less than the eight- or nine-year sentence tendered by the prosecutor. It is impossible, on this record, to know if the defense was prepared to negotiate with the prosecutor to try to better the offer of eight or nine years. The court's plea agreement removed the incentive of defense counsel to try. Defendant's real incentive, if one existed, was to horse trade with the court to try to sweeten the deal.

2. The dissent below

The latter point undermines the argument, made by the dissent below and largely embraced by defendant here, that a court's promissory offer sufficient to induce pleas to all charges is an indicated sentence, so long as the record does not show the trial court was talked into changing its initial sentence offer by defense counsel, or actively negotiated the sentence with defense counsel, or threatened the defendant with a longer sentence after trial. (Since the threat of a longer sentence is implicit in ERC plea offers, the dissent obviously meant oral threats.) But the sheer fact plea negotiations between the trial court and defense counsel can, and usually are, cabined off the record is hardly the totem of an indicated sentence the dissent makes of it. Considering the battles that were required to bring plea bargaining into the open, it would be ironic, to confer blessings on "negotiations" squirreled behind curtains and to denounce what seeps onto the record. The dissent's preference is for a rule that keeps "bargaining" off the record. That rule might lurch along if all parties were estopped from attacking guilty pleas that rest, in any degree, on unreported discussions. But there is no prospect of that.

As *Orin* reflects, judicial plea bargains are condemned on the offered consideration of sentencing leniency exchanged for waivers of fundamental constitutional rights. *Orin* overturned a judicial plea bargain on a record with no references to dickering or negotiation. The offered agreement and the prosecutor's objection were made off the record at a settlement discussion and were then repeated at the plea hearing, as here. (See 13 Cal.3d at pp. 940-941, 948.) That is how an ERC operates, not as a trial or sentencing or dismissal calendar, but as a change-of-plea calendar to induce pleas. No points are awarded under *Orin* for proffered leniency by the trial court so enticing it immediately induces a defendant's pleas and makes superfluous barter or threats by *anyone*, this defendant included.

D. The Court's Plea Agreement Rests, in Significant Part, on Illusory Consideration

Defendant entered pleas under a representation the striking of the strike would substantially increase his presentence conduct credits. (See fns. 5 & 7, *ante*.) That was incorrect, a matter addressed in argument V, *post*. More problematic is that "[t]he [trial] court awards such credits at the time of sentencing (§ 2900.5), not as an exercise of discretion, but based on the sheriff's report of" the number of days the defendant was in presentence custody. (*Lara*, *supra*, 54 Cal.4th at p. 903.) Because the trial court had no discretion over the award of presentence conduct credits, defendant's pleas rest on offered consideration beyond the court's power to negotiate. (See *ibid.*)

II. The Trial Court's Plea Agreement With Defendant Was Not a Permissible Indicated Sentence

Defendant mixes various themes into his apparent definition of indicating sentencing as a trial court's offer of a conditional plea agreement, including dismissals and specified sentences, to induce a package disposition of all charges. Generally, defendant asserts the People simply are not aggrieved by such plea agreements. We confront the more prominent of these themes before addressing the central issue.

A. Defendant's Polemic on Standing, Gaming, Consent, and Best Possible Results Is Unsupported by Authority

1. Standing

Defendant asserts the Court of Appeal misconstrued the *Felmann*'s dicta about indicated sentencing and *Lewallen*. He claims those decisions only proscribe coercing a defendant's waiver of a jury trial *because* of that waiver, i.e., offering more lenient treatment than the defendant would have received, in defendant's words, "but for his waiver of his right to a jury trial." (RBOM 16.) But that eccentric reading of the cases might assist him

only if "indicated sentencing" actually is, in law, a synonym for judicial plea bargaining. Defendant entered his pleas to all charges after the trial court declared its offer was given on the "understanding" of the parties that cases settled in the ERC are for somewhat less than the going disposition in the trial department. (1 RT 6-7.) Defendant necessarily entered his waivers and pleas on the trial court's expressed understanding of its package disposition—an offer that but for defendant's waivers and pleas in the ERC, he would not get "more lenient treatment than he otherwise would have received." (*Felmann*, *supra*, 59 Cal.App.3d at p. 277.) Even the dissent below acknowledged: "[A] true indicated sentence is not conditioned on a defendant's change of plea (in substance, 'if you plead guilty to all charges, I will impose a' specified sentence) . . . ." (DO 16, fn. 16.) Yet, defendant and the dissent agree what the trial court said, all things considered, is *not* the same as telling defendant "in substance, 'if you plead guilty to all charges, I will impose a' specified sentence." (*Ibid.*) What to make of such malleable substance is a mystery.

More clear is defendant's misreading of *Lewallen* and *Felmann*. Far from holding coercion of a jury-trial waiver the only improper inducement of a guilty plea, *Lewallen* cited section 1192.5 and *Felmann* for the principle that "a trial judge is precluded from offering an accused in return for a guilty plea a more lenient sentence than he would impose after trial." (*Lewallen*, *supra*, 23 Cal.3d at p. 281, citing *Falmann*, *supra*, 59 Cal.App. 31 at p. 276.) That is this case.

Defendant also cites *Collins*, *supra*, 26 Cal.4th at page 307, for his idea that a "guilty plea is improperly 'induced' only when the court has coerced a waiver of a right to a jury trial," from which he infers a prosecutor lacks "standing" to oppose an indicated sentence on the ground the court coerced the defendant. He then declares a discussion of "inducement" "academic" because any error only "affects the interests of

another party." (RBOM 16-17.) *Collins* did not involve a guilty plea and did not hint at the permissibility of judicial offers condemned in *Lewallen*. Neither *Collins*, nor defendant's curious notion of jury-trial-waiver coercion as the singular improper inducement of guilty pleas, bears conceivable relation to "standing" by the People. Defendant also asserts a prosecutor can only complain if "the record shows that the court has clearly engaged in negotiating the length of the sentence," as in *Labora*, *supra*, 190 Cal.App.4th at pages 915-916 that defendant cites by example. (RBOM 17.) Argument I, *ante*, addresses the fallacy of the dissent that presumably inspires this argument. Judicial promises inducing a guilty plea that rest on impermissible or illusory promises of leniency violate statute and detract from the plea bargaining system aside from the risk of coerced pleas.

The People have standing to challenge indicated sentences. Argument III, *post*, details *Williams*, *supra*, 17 Cal.4th 148, a People's appeal under *Romero*. There, this court accepted the People's argument that the trial court's illusory inducement by an improper indication of the appropriateness of striking strikes allowed withdrawal of a guilty plea. (*Id.* at pp. 164-165 & fn. 7.) *Romero*, like *Orin*, holds judicial plea agreements reviewable on timely objection by the prosecutor, because "society, represented by the People, has a legitimate interest in the fair prosecution of crimes properly alleged." (*Romero*, *supra*, 13 Cal.4th at p. 531, internal quotation marks omitted.) Defendant has never claimed the charges were improperly alleged or that the objections by the prosecutor were untimely.

2. Gaming the system

Seeking to legitimize, or at least mitigate, the trial court's actions (RBOM 9-10), defendant quotes *Orin*'s discussion (13 Cal.3d at p. 949) of what he calls the trial judge's power "to deal with the prosecutor's obdurate refusal to settle a case" (RBOM 9-10). Defendant says *Orin* "foretold" the indicated sentencing concept as "invaluable in clearing the court's calendar

when the prosecutor refuses to be reasonable." (RBOM 14.) Presumably to suggest an "obdurate refusal to settle" or at least a refusal to be "reasonable," defendant claims the prosecutor below tried to "game the system" by seeking "to veto the court's informed sentencing judgment in order to seek a more favorable result from a different judge," and asserts "[t]his type of forum shopping" is "inconsistent with California law," citing *People v. Traylor* (2009) 46 Cal.4th 1205, 1213. (RBOM 20.)

Defendant does not cite the record, nor notes *Traylor* discussed section 1387's protection against "forum shopping" by repeated dismissal and refiling of identical charges. We do not assume his untethered argument implies facts outside the record or section 1387's relevance. Presumably, he alludes to the prosecutor's requests to the trial court to send the cases to the department in which the preliminary hearing was set (1 RT 4) and to reconsider its plea agreement (2 RT 31). Neither was an "obdurate refusal to settle" or attempted "veto" of anything. They were part and parcel of the prosecutor's objection to the plea agreement. Defendant's amuse bouche is the more the prosecution objects to a judicial plea bargain, the more it proves an indicated sentence. The record shows a prosecutor's bargaining offer of a sentence undercut by the court's plea offer of a lower sentence, not forum shopping.[14] (2 RT 55-56.)

Nor did *Orin* ordain or foretell judicial plea agreements as a solution when prosecutors refuse consent to those agreements. This court said "rigid prosecutorial policies manifesting an obstructionist position toward all plea bargaining irrespective of the circumstances of the individual case,"

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[14] That is not to say forum shopping is unassociated with indicated sentencing. There is no rule against defense counsel discussing the "worth" of a client's case with more than one judge. Reduced forum shopping is a beneficial result of precluding promises or offers like that given by the trial court below.

that is, an "automatic refusal of prosecutors to consider plea bargaining as a viable alternative to a lengthy trial," may be alleviated "if this can be accomplished by means of a permissible exercise of judicial sentencing discretion in an appropriate case." (13 Cal.3d at p. 949.)

Pursuing his gaming theme, defendant says it is telling the prosecutor did not appeal the dismissal of the strike as sentencing error and used "the backdoor method of claiming that the trial court somehow engaged in plea bargaining." (RBOM 21.) Defendant does not explain how the People's choice of appellate claims "games the system" of indicated sentencing, how backdoor claims announce to him on appeal differently from frontdoor claims, or how the tells he gathers from the People's briefs are assessed in determining if a trial court offers an indicated sentence or an illegal plea bargain. Instead, he gives assurances the trial court "acted in good faith and with the goal of efficiently administering justice." (*Ibid.*) Were this a game, and it is not, the only tell would be defendant's juxtaposing the trial court's sincerity (which we do not doubt, but which is no test of its actions) against his demonstrable preference for arguments the People do not make.

3. No prosecutorial consent is needed for indicated sentences when defendant pleads "to the sheet"

Defendant cites footnote 6 of *People v. Freyrer* (2010) 48 Cal.4th 426, 434. There, the court quoted *Turner*: "A trial court may provide the defendant an 'indicated sentence' if he or she pleads guilty or no contest to all charges and admits all allegations. (*People v. Turner*[, *supra*,] 34 Cal.4th [at p.] 419.) When 'the defendant pleads "guilty to all charges . . . so all that remains is the pronouncement of judgment and sentencing" [citation], "there is no requirement that the People consent to a guilty plea. [Citation.]"' (*Id.* at pp. 418–419.)" (See RBOM 5, 11, 13.) *Freyrer* distinguished the plea to all charges in that case from an indicated sentence, finding an actual plea bargain "in which the trial court gave its approval to

the parties' agreement rather than unilaterally negotiating a permissible agreement with defendant." (48 Cal.4th at p. 434, fn. 6.) That a court can give an indicated sentence without a prosecutor's consent if a defendant "pleads to the sheet" begs the question of distinguishing a permissible indicated sentence from unlawful judicial plea bargaining.

4. The fallacy that this is the best result possible for the prosecution

Defendant asserts an indicated sentence means the prosecutor "has achieved the best result possible." (RBOM 6.) "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." (RBOM 11.) "The prosecutor suffered no harm in this case since [defendant] admitted each and every allegation against him." (RBOM 13.)

First, judicial promises to dismiss findings and to grant leniency below the statutory minimum term invade the People's interest in securing higher authorized punishment through plea bargaining. The prosecutor is prevented from adding to or subtracting from the initial charges, or from offering less lenient sentencing concessions, once the trial court, in the vernacular, "takes the case away." The difference between a preempted party-bargained sentence and the judicially-promised sentence usually is widest for early pleas to "the sheet," when the defendant can "charge" the trial court premiums for package dispositions.

Second, defendant's no-harm no-foul argument is old wine in a new bottle. In *Orin*, defendant argued the trial court deferred making a final disposition until it read the probation report and was entitled to take into account its sentencing practices and determine the dismissed charges would not significantly affect his sentence. (13 Cal.3d at p. 950.) This court answered that defendant failed to distinguish case law removing the case from proper sentencing discretion, namely, making a package disposition

for more lenient treatment, over the prosecutor's objection, as exchange for a plea, rather than on a showing it was in the interests of justice. Additionally, defendant did not grapple with "the unavoidable fact" that he had avoided the higher term he would receive if convicted on all charges under existing punishment statutes, ignoring his speculation about the trial court's sentencing practices. (*Id.* at pp. 947, 950.) Similarly, this record shows "the unavoidable fact" that the court induced defendant's pleas in a package disposition by a promised dismissal. Defendant received more lenient treatment than a two-strike conviction allowed, ignoring speculation about the trial court's sentencing practices.

B. A Conditional Plea Agreement for Sentencing Leniency by the Trial Court Cannot Be Sustained as an Indicated Sentence Based on Expedient Inducement of Pleas "to the Sheet"

The defendant in *Turner*, a capital case, accepted a plea agreement in which the trial court "offered to sentence defendant to life without the possibility of parole in exchange for defendant's admission of his intent to kill the" victims. (*Turner*, *supra*, 34 Cal.4th at p. 416.) The prosecutor objected, but the trial court found "that the prosecutor abused its discretion in objecting to the court's offer and concluded that it could proceed with the offer pursuant to section 1385." (*Ibid.*) This court upheld mandamus to vacate what it declared was "an illegal plea bargain." (*Id.* at p. 418.) "[T]he trial court negotiated an agreement with defendant whereby defendant agreed to admit that he intended to kill the victims and, in exchange, the court agreed to sentence defendant to LWOP—rather than death. In doing so, the court entered into a plea bargain, which required the consent of the prosecutor." (*Ibid*, citing *Orin*, *supra*, 13 Cal.3d at p. 943.)

This court also rejected Turner's argument that an indicated sentence was established by a plea to all charges. (A capital penalty trial cannot be waived over objection of the prosecution.) In the course of that discussion,

the court explained, with conciseness, that an indicated sentence of a trial court is "'what sentence [it] will impose if a given set of facts is confirmed, irrespective of whether guilt is adjudicated at trial or admitted by plea.'" (*Turner*, *supra*, 34 Cal.4th at p. 419, quoting *People v. Superior Court* (*Smith*) (1978) 82 Cal.App.3d 909, 915–916.)

The sentence that is indicated applies irrespective of any pleas. It is not to save court time, but represents the trial court's application of the law (its ordinary sentencing discretion) to assumed facts (as explained in the indication by the trial judge in *Felmann* itself, see 59 Cal.App.3d at page 274). That element is what prevents an indicated sentence from invading the prosecutor's negotiating authority, and the trial court from becoming *the bargainer*.

A sentence dependent upon a trial court's promise to dismiss findings, when exchanged as consideration for the defendant's guilty pleas to the charges in the form of a conditional plea agreement, excludes that element. Recall that the trial court cannot proceed, without the consent of both parties, by inducing a plea through a promise or commitment to restrict its sentencing powers, as in a conditional plea agreement of the parties, without running afoul of section 1192.5 and *Orin*.

For that reason, a true sentence indication *cannot* require the consent of *either* the defendant *or* the prosecution: it is not a conditional plea. It cannot take the form of an offer of promissory consideration for pleas, otherwise, a court could restrict its sentencing powers without the parties' consent simply to induce waivers of the defendant's constitutional rights, including a partial or complete "indicated dismissal," as it were. The plea bargaining system, by default, would be a unilateral judicial function. The prosecutor's incentive would be to charge from the outset all possible crimes carrying the highest sentences, and detriment to defendants and the judicial system alike would follow, as discussed in *Orin*.

The trial court below never stated the sentence it "will impose irrespective of whether guilt is adjudicated at trial or admitted by plea." (*Turner*, *supra*, 34 Cal.4th at p. 419, internal quotation marks omitted.) It promised the sentence it would *not* impose if guilt was adjudicated at trial. It gave defendant express assurances of promissory leniency, including a reduced sentence and a dismissal of a finding, in exchange for his pleas (1 RT 4-5, 16, 17.)

The trial court, therefore, acted inconsistent with *Orin* and section 1192.5. Its plea agreement cannot be sustained as an indicated sentence.

C. Defendant's View of Indicated Sentencing as Unreported Judicial Bargaining for Pleas "to the Sheet" Is Unpersuasive

Defendant says challenges to indicated sentencing by prosecutors must be rejected "unless it clearly appears that the court has engaged in negotiations with the defendant." (RBOM 18.) He claims an indicated sentence is established here. Why? Because, putting all else aside, the trial court said, retrospectively at sentencing, that it "intended to give an 'indicated sentence' (2 RT 58)" and that its offer at the time was "premised on a full understanding of the relevant facts." (RBOM 19.)[15] Defendant represents this as applying the principle that "[t]he choice of words is not determinative." (RBOM 18, citing *Ramos*, *supra*, 235 Cal.App.3d at p. 1266, fn. 2.) In reality, for defendant and the dissent below, the trial court's choice of words is very determinative. (But see *Orin*, *supra*, 13 Cal.3d at p.

[15] Actually, the trial court admitted it did not think "we discussed the losses that were involved . . . . I don't have any notes on that. And I don't have a clear recollection, but I sort of have gotten off track here." (2 RT 58.) Shortly afterward, it said, "[T]here is nothing new that the court did not know back in August 18th when I made the offer, *that would require this court to set aside the plea because of new information that I didn't know at the time*." (2 RT 60-61, italics added.) We refer the court to Argument I.C.1., *ante*.

942 ["[N]otwithstanding the court's characterization of the disposition of the cause below as being 'in the nature of a plea bargain,' there was in fact no plea bargain and we are not here presented with any issue of the existence, validity or effect of any plea bargain"].)

Defendant seeks for the trial court the prosecutor's power to negotiate (off the record) conditional plea agreements to dismiss charges under section 1385 and to impose a specified sentence on less than all findings—so long as the court offered sufficient leniency to induce a defendant to plead "to the sheet," or, as in defendant's case, to all sheets. That makes *Orin* a dead letter, even though defendant says, substance controls over form. (RBOM 5, 33.) Section 1192.5 itself, and conceivably sections 1191.1 and 1191.2 on charge bargains, would be dead letters too, suitable only for the odd occasion where a trial court, for whatever reason, wears only robes and not also the prosecutor's hat.

Defendant insists that as a "simple matter of reality, there will be no plea absent the proffered sentence" (RBOM 13) by the court, as the indication procedure is "invaluable in clearing the court's calendar" (RBOM 14). He means it is invaluable to defense attorneys in off-the-record discussions to relay the court's offer and what it will take for the defendant to change his plea to guilty, knowing the trial court can utter the words "indicated sentencing" if a prosecutor, a crime victim, or a reviewing court questions the plea agreement. His in terrorem seemingly inspiring his expurgated hypothetical (RBOM 14)[16]—that prosecutors are wont to refuse

[16] He leaves out from his hypothetical the promise required by the trial court to strike the strikes to be able to offer probation to this three-strike-charged ailing bandit. Defendant also seems to assume there is no basis for a plea bargain with the prosecutor, though it is not clear why that would be so, since defendant's description of the case seems to imply a successful *Romero* motion is a certainty. Yet, if probation is certain, the (continued...)

bargains to the hopelessly incriminated, who then meaninglessly insist on meaningless trials, which causes indicated sentencing to fall into desuetude—is outlandish. Before and after *Felmann*, countless legal practitioners have bargained cases weak or strong with each other, not with a judge. Defendant may see indicated sentencing as *Romero* relief without burdensome litigation. But there was, in addition to the plea litigation, substantial *Romero* litigation in his case too. The prosecutor submitted numerous additional facts (CT 45-51.) Predictably, the bargain was not rescinded. Defendant does not establish the operative necessity for his exigency exception to rules against judicial plea bargaining, and certainly not its efficiency.

D. *Woolsey* Is a Correct Statement of Law

Defendant argues that the court should "overrule" *Woolsey*, *supra*, 184 Cal.App.4th 1136. (RBOM 25.) He acknowledges that the Court of Appeal did not rest its judgment on that decision, but nonetheless asserts that the case was wrongly decided as stated by the dissent. (RBOM 26.)

Woolsey held that inducing the defendant to plead guilty to all counts and admit the charged enhancement, by promising, over the prosecutor's objection, to dismiss an enhancement and impose an agreed-upon sentence is an unlawful judicial plea bargain. (*Woolsey*, *supra*, 184 Cal.App.4th at p. 1140.) Impliedly criticizing *People v. Vessell* (1995) 36 Cal.App.4th 285, 296, a case following *Ramos* cited by defendant (RBOM 28), the court in *Woolsey* reasoned that pleading guilty to all charges does not expose the defendant to a sentence and judgment on charges the trial court has to

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(...continued)
bandit has no reason to annoy the trial judge with a pointless demand for trial. There is no need for any plea agreement—the bandit can just plead. The whole point of the scenario is obscure. Plea bargaining is insurance against the uncertain, not the certain.

dismiss in order to impose its promised sentence. (184 Cal.App.4th at pp. 1146-1147.) "Even though section 1385 gives the trial court discretion to dismiss 'an action' in the interests of justice, the anticipatory commitment by the court to exercise that discretion to dismiss the enhancement cannot be used to negate the role of the prosecutor. . . . [¶] By defendant's reasoning, the trial court could agree to dismiss any or all of charges or enhancements, pursuant to section 1385, in exchange for a defendant's guilty plea on all the charges and enhancements. Such a practice is within neither the spirit nor the letter of state law as summarized in *Orin.*" (*Id.* at p. 1147.)

Woolsey is consistent with *Turner*'s definition of an indicated sentence.

III. IT IS UNNECESSARY TO DECIDE IF A DEFENDANT MAY WITHDRAW PLEAS IF THE TRIAL COURT REJECTS AN INDICATED SENTENCE

Defendant argues "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." (RBOM 21, style altered.) The trial court gave no such admonition, but it did accept a stipulation to a factual basis for the pleas. (1 RT 18.) The admonition and factual basis requirements come from the third paragraph of section 1192.5. That paragraph is "only for negotiated pleas specifying the punishment to be imposed." (§ 1192.5; *People v. Hoffard* (1995) 10 Cal.4th 1170, 1174.) It applies to "the conditional plea made pursuant to the first paragraph and accepted and approved pursuant to the second paragraph," where "the prosecution offers substantially reduced punishment in exchange for a plea of guilty or no contest." (*Id.* at pp. 1181-1182.) No admonition was required since no conditional plea under section 1192.5 was submitted to or approved by the trial court.

Defendant seeks endorsement of dicta at page 276 of *Felmann*, that the defendant has "the option of going to trial" if an indicated sentence is not imposed, and he observes subsequent Court of Appeal decisions recognize such a practice in trial courts. (RBOM 22, 25.) He also asserts due process demands the opportunity to withdraw a guilty plea. (RBOM 23.) Echoing the dissent below, he predicts "very few defendants will plead guilty without some assurance that their interests will be protected if the indicated sentence is not imposed." (RBOM 23-24.) He asserts the People should "bear a heavy burden to establish why *Felmann* should be overruled at this late date." (RBOM 22, italics added.)

On further consideration, we withdraw our argument in the Court of Appeal (Ct.App. AOB 11) that a trial court's statement that the defendant will be allowed to withdraw a plea if a sentence is not imposed is characteristic of judicial plea bargaining and removes the possibility that a plea resulted from an indicated sentence. Instead, the issue concerns the withdrawal of pleas under section 1018, and the answer will vary with the circumstances of the case.

In *Williams*, *supra*, 17 Cal.4th 148, the court found a limit to the usual rule that anticipated leniency is unenforceable by the defendant through the withdrawal of a guilty plea, not as a constitutional right, but in the interests of justice. There, the defendant admitted strike priors with no promises in an open plea after the trial court indicated the case would be appropriate for a two-strike sentence. (*Id.* at p. 156.) On the Attorney General's suggestion, this court found remedially inadequate the Court of Appeal's reversal of the trial court's sua sponte order vacating its finding of a prior serious felony conviction on the People's meritorious appeal under *Romero*, and that Williams should be allowed to withdraw his guilty plea. (*Id.* at pp. 164-165.) This court said "[w]hether to grant or deny a defendant permission to withdraw a plea of guilty must be decided in the interest of

promoting justice" under *People v. Superior Court* (*Giron*) (1974) 11 Cal.3d 793, 796-797; the People conceded the trial court's inappropriate sentence indication of its willingness to strike the prior conviction allegation was a "'powerful inducement'" for the guilty plea with admissions; "this was in fact *not* an 'appropriate case to strike a prior'" as the trial court had said, and Williams "should not have been subjected to its influence"; and, accordingly, "'in the interest of promoting justice (*ibid.*) he should be allowed to return to the status quo ante by withdrawing his plea of guilty with admissions, should he so choose" (*id.* at pp. 164-165, & fn. 7).

The dissent for three justices recognized "in light of the comments made by the judge before defendant entered his plea, that this may be a case in which the usual rule disfavoring withdrawal of a plea solely because anticipated leniency was not forthcoming should not be applied." (*Williams*, *supra*, 17 Cal.4th at p. 168 (conc. & dis. opn. of Baxter, J).) The court debated no constitutional principle, but the way to identify cases as exceptions to the usual rule against plea withdrawal for frustrated hopes of leniency in the context of an unlawful sentence indication. The dissent suggested a defendant bears the burden of establishing to the trial court's satisfaction that an improper indication is the factual inducement for the plea and good cause for plea withdrawal (§ 1018). The dissent suggested the majority, in essence, had held that, as a matter of law, comments about a court's inclinations regarding sentence induce the plea, which a defendant may withdraw if the anticipated sentence is not imposed, usurping the trial court's role in exercising discretion in the interests of justice in the first instance. (See *id.* at pp. 166-169 (conc. & dis. opn. of Baxter, J).)

This case requires no decision on whether, or how, *Williams*'s interests-of-justice exception to the rule disfavoring withdrawal of a plea for misplaced hopes of leniency applies if a trial court *properly* rejects an

indicated sentence on fuller consideration at sentencing. Defendant's problem is keeping his pleas, not deciding whether to withdraw them. The trial court's illusory consideration increasing defendant's presentence conduct credits was itself a powerful inducement for the pleas and was not within the court's discretionary sentencing power. Even were the trial court's offered plea agreement an indicated sentence, that inducement was one that it should not have given. Because that inducement resulted in clear prejudice to the People by reducing defendant's time in prison, the judgment of the Court of Appeal vacating the pleas must be affirmed. (See *Williams*, *supra*, 17 Cal.4th at pp. 164-165, fn. 7.)

IV. THE THREE STRIKES LAW PROHIBITED THE TRIAL COURT FROM OFFERING TO STRIKE THE PRIOR SERIOUS FELONY CONVICTION AS INDUCEMENT FOR THE PLEAS

Addressing an issue discussed only by the dissent, defendant claims the Three Strikes law (§§ 667(g) and 1170.12(e)) does not prohibit a trial court from offering dismissal of a prior strike as the inducement for pleas and admissions to the charges. (RBOM 30.) We disagree.

Under *Romero* and section 1385, "the sentence that is actually imposed under the Three Strikes law is frequently dependent upon the trial court's exercise of discretion in determining whether, in furtherance of justice, to strike any of the serious or violent prior convictions that have been charged by the prosecutor and, if so, how many prior convictions to strike." (*In re Coley* (2012) __ Cal.4th __, __ [2012 WL 3764526 *23].) However, judicial discretion to dismiss a charge or allegation may be eliminated by the Legislature even without an express reference to section 1385. (*Romero*, *supra*, 13 Cal.4th at pp. 518-519; *People v. Thomas* (1992) 4 Cal.4th 206, 211; see also *In re Greg F.* (2012) __ Cal.4th __, __ [2012 WL 3641512 *20, fn. 3] (dis. opn. of Cantil-Sakauye, C.J.).)

The Three Strikes prohibition at issue is more limited. It precludes using a prior strike in "plea bargaining." Defendant argues it is "doubtful" the law applies to judges as the law mentions only the prosecution. (RBOM 30-31.) He ignores the first sentence of the law, which expressly incorporates the definition of "plea bargaining" in section 1192.7(b). It plainly includes judicial plea bargaining. (*Ludwig*, *supra*, 174 Cal.App.3d at pp. 475-476.) When the language of a statute is plain and unambiguous, there is no need for a court to construe the statute or to determine the intent of the Legislature. (*People v. Zambia* (2011) 51 Cal.4th 965, 972.) In arguing the law was probably not intended to refer to an indicated sentence (RBOM 31-33), defendant repeats his claim that an indication was involved in this case. His argument the trial court did not "use" the strike, just took his "admission that the prior was true" (RBOM 32), does not affect the statute's plain meaning in the slightest.

Defendant also argues there is a separation of powers issue because the Three Strikes law eliminates indicated sentences. (RBOM 34-35.) But the law does not do that. "Judges must be as vigilant to preserve from judicial encroachment those powers constitutionally committed to the executive as they are to preserve their own constitutional powers from infringement by the coordinate branches of government." (*People v. Superior Court* (*Greer*) (1977) 19 Cal.3d 255, 262.) Noting *People v. Smith* (1975) 53 Cal.App.3d 655, *Greer* recognized a trial court's unlawful plea bargain over the prosecution's objection is a separation of powers issue a court meets by judicial "enforce[ment of] the allocation to the executive of the function of determining which persons are to be charged with what criminal offenses." (*Id.* at pp. 262-263 and see *id.* at p. 267 ["[T]he prosecutor's discretionary functions are not confined to the period before the filing of charges," but extend to the power to negotiate plea bargains].) When the court errs by entering into an unlawful plea bargain

over the prosecutor's objection, rather than giving an indicated sentence, "the prosecution [does] not violate any separation of power principles or improperly interfere with the court's power to impose a lawful sentence." (*People v. Turner*, supra, 34 Cal.4th at p. 419.) Defendant argues the Legislature (and the People by initiative) are compelling a trial court to undertake "a useless jury trial." (RBOM 36.) To the contrary, they are compelling plea bargaining without strikes as chips. That is wholly consistent with *Orin*. Defendant makes no showing the legislation defeats or materially impairs constitutional functions of trial courts. (See *People v. Bunn* (2002) 27 Cal.4th 1, 16.)

A "defendant has no right to be offered a plea [bargain]," nor "a federal right that the judge accept it." (*Frye, supra*, 566 U.S. at p. __ [132 S.Ct. at p. 1410]; see also *Weatherford v. Bursey* (1977) 429 U.S. 545, 561.) Judicial plea bargains are "'very different from the give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power.'" (*Bordenkircher v. Hayes* (1978) 434 U.S. 357, 362, quoting *Parker v. North Carolina* (1970) 397 U.S. 790, 809 (dis. opn. of Brennan, J.).) The trial court has exclusive sentencing authority. If a given negotiated outcome is inappropriate, the trial court can reject the bargain and exercise ordinary sentencing discretion when and if convictions ensue. It has no need to make its own bargain. That is what the trial court did, and the pleas cannot stand.

V. ALTERNATIVELY, IF DEFENDANT'S PLEAS STAND, THE TRIAL COURT SHOULD BE DIRECTED TO VACATE ITS AWARD OF ADDITIONAL PRESENTENCE CREDITS UNDER SECTION 4019

The trial court awarded day-for-day presentence conduct credit of 236 days for time spent on offenses committed in March 2010. It based the award on its dismissal of the prior strike and on the subsequently vacated

decision in *People v. Jones*, review granted Dec. 15, 2010, S187135. (1 RT 18-19, 2 RT 63-64; see CT 18-19, 128, 180.)

Trial courts lack discretion to dismiss or strike prior serious felony convictions under section 1385 in order to award additional presentence conduct credits under the former version of section 4019 to any prisoner who was required to register as a sex offender (see § 290 et seq.), was committed for a serious felony (see § 1192.7), or, like defendant, had a prior conviction for a serious or violent felony (see §§ 667.5, 1192.7). (*Lara*, *supra*, 54 Cal.4th at p. 899, see former § 4019, subds. (b)(2), (c)(2) & (f), as amended by Stats. 2009, 3d Ex. Sess., ch. 28, § 50.) *Lara* held that striking a prior conviction allegation does not authorize "award[ing] credits at the increased rate to a categorically disqualified prisoner by ignoring the disqualifying facts" (*Lara*, *supra*, 54 Cal.4th at p. 899); rather, the conviction remains a part of the defendant's prior criminal history and is "available for other sentencing purposes" (*id.* at p. 906). *Lara* upheld the trial court's denial of one-for-one conduct credits, notwithstanding a negotiated disposition in which the court struck the allegation of a prior strike, because the credit-limiting facts did not have to be formally pled and proved. (*Id.* at pp. 900, 907.)

The striking of the allegation in *Lara* is indistinguishable from the striking of the finding here. (*Lara*, *supra*, 54 Cal.4th at p. 907 & fn. 10 [credit limitations in former section 4109 operate "without reference to whether any enhancement has been found true"].) As in *Lara*, defendant committed his crimes after the January 25, 2010, legislative increase of the rate at which prisoners in local custody could earn conduct credits. (See *Lara*, *supra*, 54 Cal.4th at p. 899, citing former § 4019, subds. (b)(1), (c)(1) & (f).) The later amendment to section 4019 under the 2011 Realignment Legislation that now authorizes day-for-day credits for local prisoners without regard to a prisoner's prior convictions does not apply to those like

defendant in local custody for crimes committed before October 1, 2011. (§ 4019, subd. (h); *Lara*, *supra*, at p. 906, fn. 9; see *People v. Brown* (2012) 54 Cal.4th 314, 322, fn. 11, & 328-329.)

Either party may raise an erroneous calculation of presentence conduct credits as an unauthorized sentence on an appeal of other issues. (*People v. Duran* (1998) 67 Cal.App.4th 267, 270 [issue properly raised by the People on defendant's appeal from the judgment].) "'[L]egal error resulting in an unauthorized sentence commonly occurs where the court violates mandatory provisions governing the length of confinement.'" (*People v. Nasalga* (1996) 12 Cal.4th 784, 789, fn. 4, quoting *People v. Scott* (1994) 9 Cal.4th 331, 354, brackets original.) Accordingly, if defendant's no contest pleas are reinstated, the trial court must vacate its order granting presentence conduct credits and recalculate credits consistent with *Lara*.

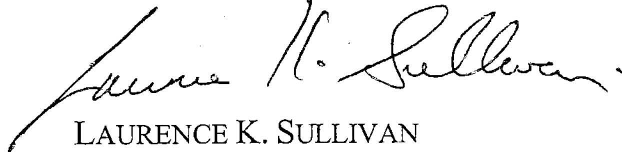
CONCLUSION

Accordingly, appellant respectfully requests that the judgment of the Court of Appeal be affirmed.

Dated: September 10, 2012

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
ERIC D. SHARE
Supervising Deputy Attorney General



LAURENCE K. SULLIVAN
Supervising Deputy Attorney General
Attorneys for Plaintiff and Appellant

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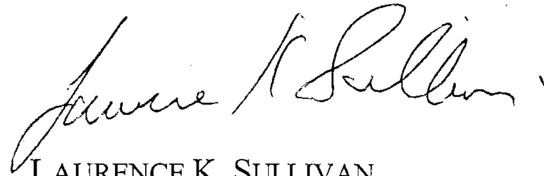
CERTIFICATE OF COMPLIANCE

I certify that the attached APPELLANT'S ANSWER BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 13,904 words.

Dated: September 10, 2012

KAMALA D. HARRIS
Attorney General of California



LAURENCE K. SULLIVAN
Supervising Deputy Attorney General
Attorneys for Plaintiff and Appellant

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Wesley Cian Clancey***
No.: **S200158**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On September 10, 2012, I served the attached **APPELLANT'S ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Dallas Sacher
Assistant Director
Sixth District Appellate Program
100 North Winchester Blvd., Suite 310
Santa Clara, CA 95050
(2 copies)

Sixth Appellate District
Court of Appeal of the State of California
333 West Santa Clara Street, Suite 1060
San Jose, CA 95113

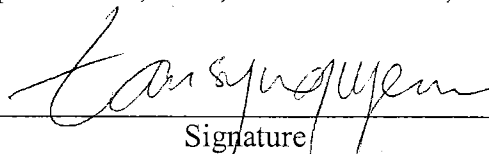
The Honorable Jeffrey F. Rosen
District Attorney
Santa Clara County District Attorney's Office
70 W. Hedding Street
San Jose, CA 95110

Attn: Executive Director
Sixth District Appellate Program
100 North Winchester Blvd., Suite 310
Santa Clara, CA 95050

County of Santa Clara
Criminal Division - Hall of Justice
Superior Court of California
Attention: Criminal Clerk's Office
191 North First Street
San Jose, CA 95113-1090

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 10, 2012, at San Francisco, California.

Tan Nguyen
Declarant


Signature

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