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In the Supreme Court of the State of California

K.R.,
Petitioner,

v.

THE SUPERIOR COURT OF SACRAMENTO COUNTY,
Respondent,

PEOPLE OF THE STATE OF CALIFORNIA,
Real Party in Interest.

Case No. S231709

SUPREME COURT
FILED

MAY 11 2016

Frank A. McGuire Clerk

Deputy

Appellate District Third, Case No. C079548
Sacramento County Superior Court, Case No. JV134953
The Honorable James Arguelles, Judge

PEOPLE'S ANSWERING BRIEF ON THE MERITS

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QUESTION PRESENTED

Was petitioner entitled to a disposition hearing before the same judge who accepted his admissions to a criminal offense and probation violations even though he did not make an affirmative showing of individualized facts in the record establishing that this was an implied term of the plea agreement? (See *People v. Arbuckle* (1978) 22 Cal.3d 749.)

INTRODUCTION

This case presents an example of the mischief that can arise when a simple application of law to fact is misinterpreted as creating an affirmative right. In *People v. Arbuckle* (1978) 22 Cal.3d 749, 756-757 (*Arbuckle*), this Court applied established contract principles to conclude that an implied term of the defendant's plea agreement was that the judge who accepted the plea would also preside at sentencing. Though it was based on contract principles, the *Arbuckle* decision gave rise to the misguided notion of an affirmative "*Arbuckle* right" and the necessity for an "*Arbuckle* waiver" whenever a judge other than the plea judge presides at sentencing.[1]

This notion of an affirmative "*Arbuckle* right" likely led petitioner in this case to mistakenly believe he had a right where none existed. Consequently, petitioner's insistence on the existence of a phantom "*Arbuckle* right" has caused substantial and unnecessary litigation. Both courts below have had to carefully review the record to determine whether

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[1] Because the term "*Arbuckle* right" is inaccurate and misleading, the People will instead use the phrase "implied *Arbuckle* term" when referring to a term of a plea agreement that requires sentencing by the same judge who took the plea. This phrase more accurately describes what this Court found to implicitly exist in *Arbuckle*—an enforceable term of the plea agreement mandating sentencing by the plea judge.

an implied *Arbuckle* term was actually part of petitioner's plea[2] agreement. Unfortunately for petitioner, the record does not support his claim that he entered the agreement with the expectation of and reliance on sentencing by the juvenile judge who was going to accept his plea. The Court of Appeal correctly rejected this claim.

Moreover, this case highlights the persistent misinterpretation of *Arbuckle* made by many litigants and presents an excellent vehicle for this Court to clarify *Arbuckle* and to ensure greater accuracy and consistency in the enforcement of plea agreements.

STATEMENT OF THE CASE

Because the numerous juvenile court proceedings leading to petitioner's admission of two probation violations and the subsequent disposition hearing are not relevant to the issues before this Court, they are omitted here. A recitation of those preliminary proceedings may be found in the opinion of the court below. (Slip. Opn. at pp. 5-6.)[3]

In its decision below, the Court of Appeal fully detailed the proceedings in the juvenile court that are directly relevant to the issue here:

> On May 28, the parties appeared before Judge Sapunor in Department 97 for the settlement conference hearing. The

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[2] The People recognize that, as a juvenile, petitioner made admissions rather than entered a plea. Furthermore, rather than being sentenced, petitioner will be given a disposition. However *Arbuckle* originated in the context of a plea agreement and applies equally to adult and juvenile criminal proceedings. Therefore, to avoid unnecessarily complicating matters, and to highlight the general application of these principles, the People will use the applicable adult terms (plea and sentencing) when referring to the proceedings here and in criminal cases in general.

[3] The decision of the court below was originally published at 243 Cal.App.4th 495. Because that decision was depublished upon the grant of review, the People will cite to the original slip opinion of the court.

minor's attorney told the court the minor was prepared to admit the allegation in the first petition that he remained away from his home overnight without parental permission and the allegation in the second petition that he brandished a replica firearm "with an understanding that the disposition would be 54 days in custody in juvenile hall. He has 47 days as of today. [¶] The intention is in one week from today to recalendar this for proof that [the minor's grandmother] has purchased the plane ticket to Nevada as the minor's mother is currently a resident of the state of Nevada, and this case would be transferred out for [supervision] to Nevada." The following colloquy then occurred:

"THE COURT: We're going to order the transfer today and then calendar it for a week to make sure that's been accomplished?

"[THE MINOR'S ATTORNEY]: Yes.

"THE COURT: That would be the Petitioner's recommended disposition?

"[THE PROSECUTOR]: Yes, your Honor."

At that point, the court solicited the minor's waiver of his right to a hearing on the alleged violations, his rights to remain silent and against self-incrimination, his right to confront and cross-examine the witnesses against him, and his right to testify. The minor then admitted the two violations of probation, the court granted the prosecutor's motion to dismiss the remaining allegations, and the court revoked and reinstated all previous orders. Before the court could finish the disposition, however, the probation officer serving as the presenter to the court interrupted: "Your Honor, just a thought real quick, I know we just took the admission. My only concern is if we come back a week from now and there's not a ticket bought and if we do the dispo today, we may have to unravel all that we're doing right now -- not the admission necessarily, just the disposition." The following colloquy then took place:

"THE COURT: Maybe we ought to put this out for a week to make sure that the disposition goes as planned.

"THE PRESENTER: That was just my thought that it all worked cleanly together. If for some reason it fell apart, we'll have to undo everything we're doing.

"[THE MINOR'S ATTORNEY]: I am fine with putting whatever we need necessary. My only request is that if we put the case over for one week, the time slots have to coordinate with the flight information. What is the quickest that he will be able to be processed to be released to get out to get on the plane?"

"THE PRESENTER: If we come in first thing in the morning, 8:30, 9:00, 9:30, let's say the flight's purchased for 1:30, 2:00 in the afternoon, the later the better, we would be good to go.

"[THE MINOR'S ATTORNEY]: That's agreeable. We can continue putting dispo over for the final terms to one week from today in the morning.

"THE PRESENTER: We can sign all the interstate on that date also.

"THE COURT: You want to have disposition one week from today which is going to be the 4th of June?

"[THE MINOR'S ATTORNEY]: Yes. The intention is for him to be deemed time served at that time.

"THE COURT: Yes. He's to be deemed time served on June 4th at 8:30. All the other conditions, this case would be transferred to Clark County, Nevada, for final disposition, and then he will be released to go to Las Vegas.

"Okay. So come back, then, on the 4th at 8:30."

The minute order for the May 28 hearing showed that the minor had admitted two violations and the remaining allegations had been dismissed, although the parties agreed they could be considered at the time of disposition. The minute order further showed that the disposition hearing was set for June 4.

On June 4, the parties appeared again in Department 97; this time, Judge Arguelles was presiding. Judge Arguelles noted that there was "a minute order saying that May 28th the minor

admitted a violation of probation" and "[a]pparently, probation is recommending that [the minor] just be shipped off to Vegas to live with his mother." Judge Arguelles disagreed with that proposal and stated that his intention was "probably to send him to DJJ [Department of Juvenile Justice] but I'd be willing to hear argument for Level B." Because the minor's regular attorney was not present, however, Judge Arguelles agreed to continue the disposition hearing to June 8, when she would be back.

At the hearing on June 8, the minor's attorney objected to Judge Arguelles presiding over the disposition because "we have not affirmatively asserted an *Arbuckle* waiver in this case." She requested that the matter be set for hearing in front of Judge Sapunor, who she believed was sitting in Sacramento for the next two weeks. Judge Arguelles reiterated his disagreement with the proposed disposition of sending the minor to live with his mother in Las Vegas, set a schedule for the parties to brief the application of *Arbuckle*, and continued the matter to July 2.

On June 25, the minor commenced the present proceeding in this court by filing a petition for a writ of mandate, essentially requesting that we order Judge Arguelles to either: (1) impose the disposition the parties had agreed upon in front of Judge Sapunor or (2) set the case for a disposition hearing in front of Judge Sapunor. The minor also requested a stay on further proceedings in the juvenile court pending our resolution of the matter. We issued the requested stay that same day, excepting from the stay "the superior court's determination on the *Arbuckle* waiver."

On July 6, Judge Arguelles issued a written ruling in which he denied the minor's objection to him conducting the disposition hearing "because the minor did not have a reasonable expectation that the same judge who took his admission/plea would be the same judge who imposed the disposition."[FN] Judge Arguelles also acknowledged that his rejection of the proposed disposition that was part of the plea agreement would entitle the minor to withdraw his plea but noted that the stay ordered by this court precluded him from either offering the minor the right to do so or proceeding with disposition if the minor elected not to do so.

[FOOTNOTE] While the superior court's order of July 6, 2015, was not part of the record produced by the minor in

> support of his petition (because the order did not yet exist when the minor filed his petition), we take judicial notice of it on our own motion. (Evid. Code, §§ 452, subd. (d), 459, subd. (a).)

(Slip Opn. at pp. 6-9.)

After issuing an order to show cause, the Court of Appeal, Third Appellate District, denied the petition for writ of mandate in a published opinion. (Slip opn. at p. 23.)

SUMMARY OF ARGUMENT

The Court of Appeal properly applied *Arbuckle* in rejecting petitioner's claim that sentencing by Judge Sapunor was an implied term of petitioner's plea agreement. The court initially concluded that *Arbuckle* does not require that an implied term be found in every plea bargaining case but requires an individualized, case-by-case determination of the term's existence. The court then determined, based on a thorough evaluation of the record in juvenile court, that an *Arbuckle* term was not part of petitioner's plea agreement, either implied or express. The Court of Appeal did not err.

Arbuckle was grounded in contract principles inherent in plea bargaining and was not based on statutory or constitutional rights. (*People v. McIntosh* (2009) 177 Cal.App.4th 534, 541.) Accordingly, *Arbuckle* and its progeny require an individualized determination of an implied *Arbuckle* term based on the record of the plea in individual cases. (*People v. Horn* (1989) 213 Cal.App.3d 701, 707-708.) The Court of Appeal below therefore properly concluded that the existence of an implied *Arbuckle* term in petitioner's case had to be determined from the record of petitioner's plea, rather than simply implied categorically in his case. (Slip opn. at p. 17.)

In deciding whether an implied *Arbuckle* term existed here, the court below correctly determined that the record did not support petitioner's claim. Nothing in the record supported a conclusion that sentencing by Judge Sapunor was a term of the agreement between the People and petitioner. To the contrary, Judge Sapunor's status as a visiting judge contradicted petitioner's claim that sentencing by Judge Sapunor was a material term of the agreement. This is further confirmed because sentencing was scheduled for a specific day and time to accommodate petitioner's travel plans, and Judge Arguelles, the regularly assigned juvenile judge, was scheduled to preside on that day. Furthermore, Judge Sapunor made no indication that he was going to be available or assigned to Sacramento County Juvenile Court on the specific day set for sentencing. On this record, petitioner cannot establish that an implied *Arbuckle* term existed.

In addition, the circumstances of this case highlight the need for further clarification and development of *Arbuckle*, which can only be made by this Court. This Court should first expressly disapprove dicta from *Arbuckle* announcing a "general principle" that suggests *Arbuckle* terms must be implied in all plea bargains. In addition, this Court should establish a presumption that an *Arbuckle* term is not part of a plea agreement when such a term is not expressly incorporated in the agreement. These clarifications to the *Arbuckle* jurisprudence will encourage parties to expressly include *Arbuckle* terms in plea agreements, which in turn will lead to greater accuracy and consistency in the enforcement of those agreements.

ARGUMENT

I. THE COURT OF APPEAL CORRECTLY DETERMINED THAT SENTENCING BY THE PLEA JUDGE WAS NOT AN IMPLIED TERM OF PETITIONER'S PLEA AGREEMENT

In rejecting petitioner's *Arbuckle* claim, the Court of Appeal below evaluated the specific record of this case to determine if an *Arbuckle* term was part of the plea agreement. After reviewing the record, the court held that petitioner "has failed to persuade us that he entered into the plea agreement here in expectation of and reliance upon Judge Sapunor presiding over the disposition hearing." (Slip opn. at p. 23.) The Court of Appeal properly applied *Arbuckle*.

A. *Arbuckle* Requires an Individualized Determination of Whether the Plea was Given in Expectation of and in Reliance Upon Sentence Being Imposed by the Same Judge

Relying on broad language from *Arbuckle*, petitioner first suggests that the Court of Appeal erred by using an individualized approach in his case. (Petitioner's Opening Brief on the Merits (OB) at p. 17 [asserting that *Arbuckle*'s "general proposition that an implied condition of a plea bargain is that the judge that took the plea would be the sentencing judge" is still valid].) Petitioner overstates the reach of *Arbuckle* and ignores almost 40 years of jurisprudence interpreting that decision. As the court below correctly found, "[I]it appears to us to have been settled law for more than 25 years that an *Arbuckle* right to be sentenced by the judge who accepted a negotiated plea arises not as a matter of general principle, but only when the specific facts of a given case show that the plea was given 'in expectation of and in reliance upon sentence being imposed by the same judge.'" (Slip opn. at p. 16.)

1. Contract principles in plea bargaining

It is settled that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." (*Santobello v. New York* (1971) 404 U.S. 257, 262.) "When a guilty plea is entered in exchange for specified benefits such as the dismissal of other counts or an agreed maximum punishment, both parties, including the state, must abide by the terms of the agreement." (*People v. Walker* (1991) 54 Cal.3d 1013, 1024.)

Furthermore, a plea agreement is interpreted according to contract principles. (*People v. Shelton* (2006) 37 Cal.4th 759, 767.)

> "The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. (Civ. Code, § 1636.) If contractual language is clear and explicit, it governs. (Civ. Code, § 1638.) On the other hand, '[i]f the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it.' [Citations.]"

(*Ibid.*) To resolve ambiguity in the terms of a plea agreement, a court should "consider the circumstances under which this term of the plea agreement was made, and the matter to which it relates (Civ. Code, § 1647) to determine the sense in which the prosecutor and the trial court (the promisors) believed, at the time of making it, that defendant (the promisee) understood it (*id.*, § 1649)." (*Id.* at pp. 767-768.)

2. *People v. Arbuckle*

In *Arbuckle*, this Court applied contract principles to hold that an implied term of the defendant's plea agreement was that his sentence would be imposed by the same judge who accepted his plea. (*Arbuckle, supra*, 22 Cal.3d at p. 756.) In that case, the defendant entered a guilty plea to one

count of assault with a deadly weapon in exchange for dismissal of two other counts and a promise "that defendant would be referred to the Department of Corrections for preparation of a report under the provisions of section 1203.03 of the Penal Code, and that the judge would 'follow the recommendation' made in such report in sentencing defendant." (*Id.* at p. 752.) After the report from the Department of Correction was received, the judge who originally took the plea was transferred, and the defendant was brought before another judge for sentencing. (*Id.* at p. 753.) He objected to sentencing by the new judge and insisted he was entitled to sentencing by the original judge. (*Ibid.*) Over the defendant's objections, but consistent with the Department of Corrections' report, the new judge sentenced defendant to state prison. (*Ibid.*)

On appeal, this Court held "that the plea bargain herein was entered in expectation of and in reliance upon sentence being imposed by the same judge." (*Arbuckle*, *supra*, 22 Cal.3d at p. 756.) That finding was supported by the trial court's repeated use of the pronoun "I" when accepting the plea. (*Id.* at p. 756 & fn. 4 ["I have agreed, as has your attorney, Mr. Kenner, that before I could send you to the State Prison, I would have to get that 90-day diagnostic study and I would follow the recommendation."].)

In addition to finding that the record supported the existence of an implied term, this Court also indicated, "As a general principle, moreover, whenever a judge accepts a plea bargain and retains sentencing discretion under the agreement, an implied term of the bargain is that sentence will be imposed by that judge." (*Arbuckle*, *supra*, 22 Cal.3d at pp. 756-757.) Finally, this Court concluded that the defendant was entitled to specific performance of the implied term (sentencing by the judge who took plea), and, if not possible, the defendant was permitted to withdraw his plea. (*Id.* at p. 757.)

3. Post-*Arbuckle* legal developments

Following *Arbuckle,* California courts initially adopted the "general principle" language from the decision and categorically implied *Arbuckle* terms in all plea bargain cases. (See, e.g., *In re Ray O.* (1979) 97 Cal.App.3d 136, 139-140 ["In the absence of clear waiver, whenever a juvenile enters a plea bargain before a judge he has the right to be sentenced by that same judge"]; *People v. DeJesus* (1980) 110 Cal.App.3d 413, 418 ["The court in *Arbuckle* held that the defendant is entitled to be sentenced by the judge who accepts the guilty plea pursuant to plea bargain"]; *People v. Pedregon* (1981) 115 Cal.App.3d 723, 725 ["we have noted the *Arbuckle* court's finding of an implicit term in every plea bargain that the sentence will be imposed by the judge who accepts the plea"].) Those courts also rejected an individualized, record-based approach, especially involving an analysis of the trial court's use of personal pronouns. (See, e.g., *In re Thomas S.* (1981) 124 Cal.App.3d 934, 939 ["The court's phraseology, specifically its failure to use the personal pronoun in accepting a plea, is immaterial"].)

In 1983, however, this Court confirmed the importance of an individualized determination of an implied *Arbuckle* term. (*In re Mark L.* (1983) 34 Cal.3d 171, 177.) "We emphasize that here, as in *Arbuckle*, the record indicates an *actual assumption* by the court and parties that the officer taking the plea would have final and exclusive dispositional authority." (*Ibid.*, italics added.) "There seems ample basis to conclude 'that the plea bargain herein was entered in expectation of and reliance upon [disposition] being imposed by the same [judicial officer].'" (*Ibid.*, quoting *Arbuckle*, *supra*, 22 Cal.3d at p. 756.) Thus, in *Mark L.*, this Court did not rely on a categorical "general principle" to find an implied *Arbuckle*

term in the juvenile's plea agreement but instead focused on the specific record of the plea to imply the existence of such a term.

Following this Court's decision in *Mark L.,* California courts began focusing on the specific record of the plea to determine the existence of an implied *Arbuckle* term. (See, e.g., *In re James H.* (1985) 165 Cal.App.3d 911, 919; *People v. Ruhl* (1985) 168 Cal.App.3d 311, 315; *People v. Serrato* (1988) 201 Cal.App.3d 761, 764.) These courts turned away from a categorical presumption that sentencing by the plea judge was always an implied term of a plea agreement.

> It is not always an implied term of a plea bargain that the judge who accepts the plea will impose the sentence, rather, the record must affirmatively demonstrate some basis upon which a defendant may reasonably expect that the judge who accepts the plea will retain sentencing discretion. [Citation.]

(*People v. Ruhl, supra,* 168 Cal.App.3d at p. 315.)

Following this shift, appellate courts that had initially adopted a categorical approach embraced the individualized determination of implied *Arbuckle* terms. (See *People v. Horn, supra,* 213 Cal.App.3d at p. 708 ["Accordingly, this court disapproves its previous opinions in *Davis* [(1988)] 205 Cal.App.3d 1305, *Rosaia* [(1984)] 157 Cal.App.3d 832, and *In re Ray O., supra,* 97 Cal.App.3d 136, to the extent they either hold or suggest the *Arbuckle* term is implied in all plea bargains even in the absence of an affirmative showing on the record supporting a reasonable expectation that the judge who accepted the plea will also impose sentence."].) As the court below noted, the 1989 decision in *People v. Horn* was

> the final nail in the coffin for . . . the idea that every defendant who enters a negotiated plea has an *Arbuckle* right to be sentenced by the same judge who accepted the plea, as no published case since *Horn* has deviated from the individualized approach under which the court examines the record to

determine what the defendant reasonably could have expected at the time the plea was entered

(Slip opn. at p 15.)

Accordingly, petitioner's suggestion that the "general principle" mentioned in *Arbuckle* still survives today has no basis in the case law. To the contrary, decisions by this Court and numerous Courts of Appeal have emphasized the importance of an individualized approach when applying *Arbuckle*. Since *Arbuckle* was founded on contract principles, the actual intentions and expectations of the parties to the agreement should govern, rather than a categorical imposition of a term that may not have been contemplated by the parties. (See *People v. Shelton*, *supra*, 37 Cal.4th at p. 767 ["The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties . . ."].)

4. Even assuming courts may categorically imply an *Arbuckle* term when sentencing discretion is retained, petitioner's plea falls outside of that "general principle"

As discussed above, the language in *Arbuckle* purporting to establish a categorical "general principle" has been abandoned by California courts in favor of an individualized approach. However, even assuming that principle retains some merit, petitioner's case falls outside of its reach.

"As a general principle[ ], whenever a judge accepts a plea bargain *and retains sentencing discretion under the agreement*, an implied term of the bargain is that sentence will be imposed by that judge." (*Arbuckle*, *supra*, 22 Cal.3d at pp. 756-757, italics added.) Here, under the terms of petitioner's plea agreement, the juvenile court retained no meaningful discretion at sentencing. Specifically, the parties agreed that, in exchange for his plea, petitioner would be sentenced to 54 days in custody and his case would be transferred to Nevada. (Petition for Writ of Mandate (PWM), Exh. 11 at p. 2.) Thus, the court did not retain "discretion under

the agreement" to impose a sentence other than exactly what the parties had explicitly agreed.[4] Under the plea agreement entered into by petitioner, Judge Sapunor (or any other judge) had no choice but to follow the proposed sentence or reject it entirely. Because the plea agreement provided no discretion at sentencing, petitioner had no reason to insist upon Judge Sapunor's presence at sentencing. (See *People v. McIntosh*, *supra*, 177 Cal.App.4th at p. 545 [*Arbuckle* right not implied when judge was left with "very limited discretion" at sentencing].)

Since the terms of petitioner's plea agreement left the juvenile court no discretion at sentencing, there is no basis to imply that sentencing by Judge Sapunor was automatically a term of the agreement. Thus, the "general principle" discussed in *Arbuckle* did not apply here, and the Court of Appeal below properly undertook an individualized analysis of petitioner's *Arbuckle* claim.

B. The Record of Petitioner's Plea Does Not Support a Finding That Sentencing by Judge Sapunor Was an Implied Term of Petitioner's Plea Agreement

Petitioner also asserts that the court below erred because "in petitioner's case, the record affirmatively demonstrate[d] a basis on which petitioner reasonably could expect the judge who accepted his admission would also be the dispositional judge." (OB at p. 18.) Petitioner's argument displays a fundamental misunderstanding of *Arbuckle*. The key

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[4] The People disagree with the court below that the general principle could apply here because the court retained the discretion to reject the proposed disposition altogether. (Slip opn. at pp. 17-18.) In *Arbuckle*, this Court, after noting that an implied term may exist when a judge retains sentencing discretion specifically noted that the sentencing judge may have a "range of dispositions available." (22 Cal.3d at p. 757.) Thus, the "sentencing discretion" reference by this Court is best understood as discretion to impose a range of sentences rather than to reject a stipulated term. (See *People v. McIntosh, supra,* 177 Cal.App.4th at p. 545.)

issue is not whether petitioner may have expected Judge Sapunor to be the sentencing judge but whether he made his plea in reliance on that expectation. Here, the Court of Appeal carefully evaluated the record below and concluded that it did not support a finding that petitioner's plea was given in expectation of and reliance on sentencing by the judge who accepted his plea. (Slip opn. at pp. 18-21.) The court's conclusion is well supported by the record below.

The recitation of the plea agreement by petitioner's counsel contains no mention or even suggestion that sentencing by Judge Sapunor was a material, motivating term of the agreement. Instead, petitioner's counsel focused on the agreed-upon sentence that would permit petitioner to complete his custody in a week and have his case transferred to Nevada to live with his mother. (PWM, Exh. 11 at pp. 1-2.) It appears that Judge Sapunor had very little, if anything, to do with the plea agreement. When petitioner's case was called, his counsel immediately indicated that the parties had reached an agreement. (PWM, Exh. 11 at p. 1.) There is no indication in the record that, when the parties reached this agreement, they were even aware that Judge Sapunor, a visiting judge, was going to be taking the plea. The complete lack of involvement by Judge Sapunor in the plea negotiations suggests that his availability for sentencing was not a term of the agreement.

Furthermore, Judge Sapunor was a visiting judge with no set schedule. Therefore, there was no guarantee that he was going to be available on the specific date scheduled for sentencing—June 4, 2015. That specific date was critical because the parties agreed that would be the day petitioner would be released to the custody of his grandmother for transportation to Nevada. (PWM, Exh. 11 at p. 2.) Judge Sapunor did not suggest that he would be personally present for the scheduled sentencing. Indeed, Judge Sapunor specifically asked the parties what they wanted with

no indication as to his schedule. (PWM, Exh. 11 at p. 5 ["You want to have disposition one week from today . . . ?"].) Moreover, as of the date of the plea, Judge Sapunor already knew he had been assigned to a different county on June 4. (Arguelles Order at p. 7.)[5]

Significantly, disposition was scheduled for June 4, 2015 in Department 97, a date when Judge Arguelles, the regularly assigned judge in that department, was scheduled to be presiding. (Arguelles Order at p. 7.) Had the plea agreement been contingent upon sentencing by Judge Sapunor, it is unlikely the parties would have scheduled the sentencing in a department presided over by a different judge.

Also, nothing that Judge Sapunor said in the plea hearing suggested that he would be the judge at sentencing. The only personal pronoun used by Judge Sapunor was "we." (PWM, Exh. 11 at pp. 2&4.) However, Judge Sapunor's use of that term involved discussing actions that the parties and the court should do on the day of the plea hearing, May 28, 2015. (PWM, Exh. 11 at p. 2. ["We're going to order the transfer today and then calendar it for a week to make sure that's been accomplished?"]; and at p. 4 ["Maybe we ought to put this out for a week to make sure that the disposition goes as planned."].) Judge Sapunor's use of the term "we" when referring to actions on the date of the plea hearing in no way suggested that that judge was going to be present for sentencing.

In addition, Judge Sapunor never used the personal pronoun "I" when discussing the anticipated sentence. (Cf. *People v. Adams* (1990) 224 Cal.App.3d 1540, 1543 [plea judge's use of "I" when discussing sentencing supported finding of implied *Arbuckle* term]; *People v. Serrato, supra,* 201

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[5] The July 6, 2015 order by Judge Arguelles was not part of the record presented by petitioner. However, the Court of Appeal took judicial notice of the order and made it part of the record in this case. (Slip opn. at p. 9, fn. 3.)

Cal.App.3d 761, 764 [same].) Petitioner argues that Judge Sapunor's lack of the use of the personal pronoun "I" is not significant. (OB at p. 17, citing *In re Ray O., supra*, 97 Cal.App.3d at p. 139.) Petitioner's reliance on *Ray O.*, in support of his argument, however, is misplaced as that decision was expressly disapproved in *People v. Horn, supra*, 213 Cal.App.3d at page 708.

Finally, when petitioner first appeared before Judge Arguelles on June 4, 2015 for disposition, he did not immediately object to sentencing by that judge.[6] (PWM, Exh. 12 at pp. 1-2.) Rather, petitioner did not raise an *Arbuckle* claim nor request Judge Sapunor until June 8, 2015, after Judge Arguelles had indicated that he was going to reject the agreed-upon sentence. (PWM, Exh. 1 at p. 5.) Petitioner's failure to immediately object to Judge Arguelles demonstrates that sentencing by Judge Sapunor was not a material term of the plea agreement. (*People v. Horn, supra,* 213 Cal.App.3d at p. 709 ["A defendant's failure to object when faced with a different sentencing judge suggests he did not enter his plea in reliance on or with the understanding that the judge accepting his plea would also impose sentence"].) Indeed, petitioner's objection only after Judge Arguelles rejected the plea agreement demonstrated that what petitioner was really concerned about was the specific sentence that had been negotiated and not a specific judge to impose that sentence. (See *People v. West* (1980) 107 Cal.App.3d 987, 992 [Defendant "does not have the option of taking his chances before the different judge and, if the result is unfavorable, then demand the original judge"].)

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[6] The People recognize that petitioner's regular attorney was not present on June 4, 2015, which may explain the lack of an immediate objection. However, petitioner himself was present and could have informed substitute counsel that sentencing by Judge Sapunor was a material term of the plea agreement.

Here, petitioner has improperly conflated his reasonable expectation of receiving the agreed-upon sentence with an expectation to have that sentence imposed by Judge Sapunor. For example, petitioner argues, "It is clear in this case that the parties assumed that disposition would be carried out as anticipated by Judge Sapunor in that it was the only possible disposition contemplated by the court." (OB at p. 18). Petitioner further argues that "Judge Sapunor certainly anticipated the plea/admission agreement and disposition would be carried out as agreed." (OB at p. 19.) What petitioner, the People, or even Judge Sapunor reasonably expected to be the ultimate sentence in this case is not relevant to the *Arbuckle* issue here. As the court below succinctly observed, "A defendant's expectation that he will receive an agreed-upon sentence is not the same expectation with which *Arbuckle* is concerned: the expectation of being sentenced by the same judge who accepted the negotiated plea." (Slip opn. at p. 18.) The record here simply does not support the conclusion that petitioner entered his plea in reliance on sentencing by Judge Sapunor.

In short, the Court of Appeal correctly concluded that the record below does not support petitioner's assertion that an implied term of the plea agreement was that Judge Sapunor would preside at sentencing. There is no evidence that petitioner entered his plea with the "expectation of and reliance on" sentencing by Judge Sapunor. (*Arbuckle, supra*, 22 Cal.3d at p. 756.) Rather, petitioner entered his plea to obtain the specific sentence to which he and the People had agreed.

II. AN EXPRESS *ARBUCKLE* TERM SHOULD BE INCLUDED IN THE RECORD OF A PLEA TO ENSURE ITS ENFORCEABILITY AND AVOID A PRESUMPTION THAT SUCH A TERM IS NOT PART OF THE PLEA AGREEMENT

This case highlights the uncertainty that occurs when courts are forced to try to determine when implied terms to a plea agreement exist. Recognizing the continued confusion regarding the scope of the *Arbuckle*

"right," the court below suggested that "the best way of fostering certainty and settled expectations in light of these concerns would be to encourage the use of an *Arbuckle* request." (Slip opn. at p. 22.) The People agree with the court below and request this Court to: (1) expressly disapprove the "general principle" language in *Arbuckle*; and (2) establish a presumption that an *Arbuckle* term is not part of the plea agreement when such a term is not expressly included. These changes will "foster certainty and settled expectations" in the plea bargaining context and will prevent unnecessary appellate litigation. (Slip opn. at p. 22.)

A. Language in *Arbuckle* Suggesting That an *Arbuckle* Term May Be Categorically Implied in All Plea Agreements Should Be Disapproved

To alleviate continued confusion regarding implied *Arbuckle* terms, this Court should disavow the dicta in *Arbuckle* purporting to create an implied term in virtually all plea bargains. This Court should finally put to rest the notion that, as a general principle, *Arbuckle* terms should be implied in every case when a judge retains sentencing discretion following a plea.

As discussed above, California courts have generally rejected such a categorical approach in favor of an individualized determination of an implied *Arbuckle* term. As the court below noted, however, the expansive interpretation of the "general principle" language stubbornly persists in many legal treatises, "which often leave the distinct impression that the general rule from *Arbuckle* is still very much alive." (Slip opn. at p. 15, citing 2 Erwin et al., *Cal. Criminal Defense Practice (2015) Arraignment & Pleas*, § 42.44[1], pp. 42-154.8(5) to 42-154.9; *Cal. Criminal Law: Procedure and Practice* (Cont.Ed.Bar 2015) *Pronouncing Judgment*, § 35.11, p. 1028; Levenson, *Cal. Criminal Procedure* (The Rutter Group 2015) *Plea Bargaining*, § 14:18, p. 14-20 (rel. 12/2015).

The persistence of this broad interpretation of the "general principle" language from *Arbuckle* undermines certainty in plea bargaining and fosters the continued misperception that *Arbuckle* established an inherent "right" for defendants. This misperception does not benefit defendants, the People, or the courts.

For example, relying on the "general principle" language from *Arbuckle*, a defendant may mistakenly assume that he or she automatically has an implied *Arbuckle* term when entering a guilty or no contest plea.[7] Because of this mistaken assumption, a defendant may not seek to include an express *Arbuckle* term in the plea agreement, even if sentencing by the plea judge is a material motivating factor of the defendant's plea. Accordingly, the defendant's ability to enforce that term may depend on the extent that the record of the plea supports the existence of the implied term. If the record is insufficient to show an implied term, the defendant will not be able to enforce that term.

Not only will defendants benefit from this change, but the People and the courts will as well. The People will have greater certainty that a negotiated plea agreement will remain if the judge who took the plea is not available. In addition, courts will avoid the unnecessary litigation that will continue to arise over defendants' mistaken reliance on the continued viability of *Arbuckle*'s "general principle" language.

Accordingly, repudiation of the "general principle" language from *Arbuckle* will provide greater certainty to all parties involved in plea bargaining. No longer will defendants mistakenly believe that *Arbuckle*

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[7] That assumption seems to have occurred here. When arguing this matter before Judge Arguelles, petitioner's counsel asserted that, under *Arbuckle*, petitioner had "a right to be in disposition in front of the trial court that took the admission" and that petitioner did not "enter an expressed *Arbuckle* waiver . . . ." (PWM, Exh. 1 at pp. 5, 7.)

announced an inherent right to a specific judge at sentencing in all plea bargains.

B. Absent an Express *Arbuckle* Term in the Plea Agreement, Courts Should Presume That Sentencing by the Same Judge Who Took the Plea Was Not a Material Term of The Plea

This Court should establish a presumption that an *Arbuckle* term is not part of a plea agreement when such a term is not expressed in the agreement. Such a presumption would encourage the inclusion of express *Arbuckle* terms, foster accuracy in the enforcement of plea agreements, avoid unnecessary litigation, discourage judge-shopping, and be consistent with long-established contract principles.

First, such a presumption would encourage defendants to specifically negotiate an *Arbuckle* term and ensure it is placed on the record, if such a term is truly a motivating factor in the plea. (See *People v. McIntosh, supra,* 177 Cal.App.4th at p. 545, fn. 8 ["If the identity of the sentencing judge is truly a material element in a defendant's decision to enter a plea, it would be reasonable to expressly articulate this fact on the record at the time the plea is entered."].) A defendant who knows that an *Arbuckle* term must be expressly included in a plea agreement to ensure its enforceability will have a strong incentive to ensure that term is included.

Second, establishing this presumption will also foster greater accuracy in the enforcement of plea agreements. "The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties." (*People v. Shelton, supra*, 37 Cal.4th at p. 767.) By encouraging parties to include an *Arbuckle* term in the expressed terms of a plea agreement, the presumption would ensure that an *Arbuckle* term is enforced only when it was an actual term of the agreement. The current practice of generally permitting courts to imply the existence of an *Arbuckle* term creates the potential that *Arbuckle* terms will be inaccurately enforced.

Third, the presumption would also limit the need for courts to undertake post-hoc evaluation of the record of a plea to determine if an implied *Arbuckle* term exists. As this case demonstrates, determining whether an implied *Arbuckle* term exists requires courts to analyze sometimes ambiguous records to try to infer the intent of the parties to the agreement. Courts would not be forced to divine the parties' intentions based on how many times a judge used the pronoun "I" when taking a plea. A presumption would reduce the need for such difficult and speculative fact finding by the courts.

Fourth, the presumption would reinforce the principle that "multi-judge superior courts act as one superior court" and "the departments ordinarily operate under the presumption that they are jurisdictionally equivalent and fungible." (*People v. Martinez* (2005) 127 Cal.App.4th 1156, 1159.) This would emphasize that all judges in a given superior court are equally qualified and acceptable to preside at sentencing. Courts should not simply assume that a particular judge is more acceptable to the parties at sentencing, absent an expressed indication of such a preference in the plea agreement. (See *People v. Preciado* (1978) 78 Cal.App.3d 144, 149 ["'judge-shopping[]' [is] an evil that should be prevented."].)

Fifth, adoption of the presumption would be consistent with the general contract principles upon which *Arbuckle* was based. Courts may not "create for the parties a contract which they did not make, and . . . cannot insert in the contract language which one of the parties now wishes were there." (*Levi Strauss & Co. v. Aetna Casualty & Surety Co.* (1986) 184 Cal.App.3d 1479, 1486.) Accordingly, "[a] contract term will be implied only where the term is 'indispensable to effectuate the expressed intention of the parties.'" (*Ben-Zvi v. Edmar Co.* (1995) 40 Cal.App.4th 468, 473 quoting *Lippman v. Sears, Roebuck & Co.* (1955) 44 Cal.2d 136,

145.) The suggested presumption would therefore be consistent with the general restriction in contract law against implying terms to an agreement.

In sum, adopting a presumption against an implied *Arbuckle* term will provide many benefits to the parties and to the courts going forward. Greater accuracy in enforcement of plea agreements and ease of litigation will result if *Arbuckle* terms are made explicitly in the record rather than implied from ambiguous plea transcripts.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the decision of the court below be affirmed. In addition, respondent requests that this Court modify the *Arbuckle* rule to encourage the use of express plea terms rather than implied terms.

Dated: May 10, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached PEOPLE'S ANSWERING BRIEF ON THE MERITS uses a 13-point Times New Roman font and contains 6,575 words.

Dated: May 10, 2016

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **K.R. v. Superior Court (Sacramento County)**
No.: **C079548 / S231709**

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 May 10, 2016, I served the attached **PEOPLE'S ANSWERING 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 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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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 May 10, 2016, at Sacramento, California.

_____
Signature

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