SUPREME COURT OF THE STATE OF CALIFORNIA

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

RESPONDENT'S REPLY BRIEF ON THE MERITS

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

SIXTH DISTRICT APPELLATE PROGRAM

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES (CONTINUED)

STATUTES

SUPREME COURT OF THE STATE OF CALIFORNIA

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

INTRODUCTION

In his opening brief, respondent demonstrated that the application of separation of powers principles yields several simple and clear rules that should be adopted by this court: (1) a proper indicated sentence should be found when the trial court specifies the sentence to be imposed if the defendant "pleads guilty or no contest to all charges and admits all allegations. [Citation.]" (*People v. Feyrer* (2010) 48 Cal.4th 426, 434, fn. 6); (2) it must be presumed on appeal that the trial court acted properly (*People v. Superior Court (Felmann)* (1976) 59 Cal.App.3d 270, 277, fn. 4); (3) unlawful judicial plea bargaining may be found only if the record reflects that the trial court dismissed charges or negotiated the length of the sentence with the defendant (*People v. Labora* (2010) 190 Cal.App.4th 907, 915-916); (4) an appellate

claim that the trial court engaged in illegal plea bargaining must be assessed under the abuse of discretion standard (*Labora*, supra, 190 Cal.App.4th 907, 914); and (5) in the context of an indicated sentence, it is entirely proper for the court to exercise Penal Code section 1385 authority to strike the punishment for an enhancement at the time of sentencing since a contrary rule would unconstitutionally permit the prosecutor to control the court's sentencing power (*Felmann*, supra, 59 Cal.App.3d at p. 275).

In response, the People offer little guidance as to how an appellate court might go about distinguishing between proper indicated sentences and unlawful judicial plea bargaining. On the one hand, the People offer no challenge to the legality of indicated sentences in their "accepted form." (ABOM 2.) The People also accept this court's existing precedent that a proper indicated sentence must be found when the defendant admits all charges and the court states the sentence that it intends to impose. (*People v. Turner* (2004) 34 Cal.4th 406, 418-419.) Nonetheless, the People engage in a lengthy discussion which evolves into the entirely amorphous notion that a proper indicated sentence occurs only when the defendant admits all charges "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 plea."

(ABOM 2.) This suggested test is without content and is impossible to meaningfully apply.

As respondent has already demonstrated in his opening brief, it is senseless to say that an indicated sentence cannot "induce" the defendant's plea or that an indicated sentence cannot be "conditional." (RBOM 12-16.) In the real world, a defendant will *only* plead guilty in response to an indicated sentence if conditions are stated (i.e. the length of the sentence). So long as the court is acting with the proper motive of exercising its sentencing discretion, there is no constitutional restriction on resolving the case in this manner. (*People v. Superior Court* (*Felmann*), supra, 59 Cal.App.3d 270, 276 [an indicated sentence is a form of a "conditional plea."].)

The People have offered only brief argument regarding whether Penal Code sections 667, subdivision (g) and 1170.12, subdivision (e) preclude a court from offering an indicated sentence. Respondent will again demonstrate that the statutes apply only to prosecutors and do not prohibit a court from invoking the indicated sentence procedure. Even if the statutes were intended to prohibit indicated sentences, the statutes are violative of separation of powers insofar as they impermissibly restrain the court's authority to regulate its docket and expeditiously resolve cases.

The People have correctly argued that the trial court erred by awarding

118 days of presentence credit to which respondent was not entitled. Insofar as respondent has already completed his prison sentence, the case should be remanded to the trial court with directions that it may exercise its discretion to relieve respondent of the obligation to serve the additional 118 days if the circumstances demonstrate that it would be unfair to return him to custody. (*People v. Statum* (2002) 28 Cal.4th 682, 696-697, fn. 5.)

I.

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

The Court of Appeal majority held that an indicated sentence is improper when "it induces a defendant to plead guilty or no contest." (Majority Opinion, p. 10.) Respondent has demonstrated that this test is unworkable, unprincipled and contrary to existing law. (RBOM 12-17.) The People spend very little space defending the majority's test. (ABOM 25-27.) Instead, the People offer a series of points which appear to coalesce around the broad theme that the instant trial court somehow engaged in judicial plea bargaining even though its conduct was entirely within the parameters of existing case law other than *People v. Woosley* (2010) 184 Cal.App.4th 1136. (ABOM 14-25, 27-35.) Respondent will do his best to reply to the various

discrete points advanced by the People.

At the outset, it is important to note that the People do not quarrel with this court's stated position that a trial court may lawfully indicate a specified sentence if the defendant "pleads guilty or no contest to all charges and admits all allegations. [Citation.]" (*People v. Feyrer*, supra, 48 Cal.4th 426, 434, fn. 6.) (ABOM 29-32.) Since this is exactly what occurred here (i.e. respondent admitted all charges and the court specified a sentence of five years), the burden is necessarily on the People to demonstrate that the trial court somehow infringed on the rights of the prosecution. The People do not even come close to shouldering their burden.

In conformance with *Feyrer* and preceding cases, respondent has argued that a proper indicated sentence must be found when: (1) the defendant admits all charges; and (2) the court specifies the sentence to be imposed without expressly negotiating the length of the sentence or coercing the defendant's plea by stating that the sentence would be harsher after a trial. (RBOM 5.) The People do not directly challenge this test. Instead, the People propound the vague rule that a proper indicated sentence "is a predicted sentence, not a promised dismissal or a conditional plea agreement that restricts ordinary sentencing powers." (ABOM 12.) The proposed formulation fails on multiple levels.

First, the People fail to define "predicted." Thus, it is unclear whether the People would find that a specified sentence of 5 years (as here) is "predicted" or not.

Second, the term "promised dismissal" is an inaccurate description of what occurred in this case. Respondent admitted the strike prior alleged by the People. In an exercise of its sentencing discretion, the court declined to impose punishment for the prior. This conduct does not constitute judicial plea bargaining since the court was merely exercising its routine sentencing power. (*People v. Vessell* (1995) 36 Cal.App.4th 285, 296 [where the defendant was charged with a felony and a strike prior, the court properly offered an indicated sentence when it promised to reduce the felony to a misdemeanor pursuant to Penal Code section 17].)

Third, the term "conditional plea agreement" cannot serve to distinguish plea bargains from indicated sentences. As respondent has already demonstrated, an indicated sentence is necessarily "conditional" since a defendant will not enter a guilty plea absent the condition stated by the court (i.e. the length of the sentence). (RBOM 12-16.) The existence of the "condition" is therefore necessary for the implementation of the indicated sentence. (*People v. Superior Court* (*Felmann*), supra, 59 Cal.App.3d 270, 276 [an indicated sentence is a form of a "conditional plea."].)

Fourth, it is simply untrue that the proffer of an indicated sentence serves to restrict "ordinary sentencing powers." (ABOM 12.) To the contrary, an indicated sentence *is* the exercise of normal sentencing authority. So long as the court is well informed about the relevant facts, an indicated sentence is no different from a sentence imposed after a trial or a plea bargain between the parties. (*People v. Superior Court* (*Felmann*), supra, 59 Cal.App.3d at pp. 276-277 [indicated sentence is proper where the court promises to impose a specified sentence if the "facts which are the assumed basis" of the offered sentence are confirmed as true at the sentencing hearing].)

In the final analysis, the People's proposed test is entirely unworkable. The People suggest that an indicated sentence "cannot take the form of an offer of promissory consideration for pleas. . . ." (ABOM 32.) However, the logical conclusion of this claim is that a court may never offer an indicated sentence. After all, how can a defendant knowingly accept an indicated sentence if the court is prohibited from specifying the term to be imposed? Since the People otherwise concede that indicated sentences are permissible in their "accepted form" (ABOM 2), we are simply left to guess as to how a proper indicated sentence might be executed under the People's view.

As their primary thesis, the People repeatedly cite *People v. Orin* (1975) 13 Cal.3d 937 for the principle that judicial plea bargaining is

impermissible. The People posit that *Orin* "is functionally identical to this case" and therefore provides authority for condemning the trial court's conduct. (ABOM 21.) This analysis is off the mark.

To start, *Orin* was decided before the indicated sentence procedure was first approved in *People v. Superior Court (Felmann)*, supra, 59 Cal.App.3d 270. Thus, *Orin* is scarcely authority for assessing the indicated sentence offered in this case.

The facts of *Orin* are also entirely different from those presented here. In *Orin*, the trial court expressly offered the defendant a "'plea bargain'" by which it accepted a guilty plea to one count in exchange for the dismissal of two other counts. (*Orin*, supra, 13 Cal.3d at pp. 940-941.) This court found impermissible judicial plea bargaining since the court had substituted "itself as the representative of the People in the negotiation process . . ." (*Id.* at p. 943.) Nothing of the sort occurred in this case. Respondent admitted all of the charges and there was no negotiation. The court merely indicated the five year sentence that it intended to impose. Obviously, this procedure bears no resemblance to what occurred in *Orin.*

Moreover, as the People fail to acknowledge, *Orin* drew a very careful distinction between pretrial dismissal of counts under Penal Code section 1385 and the court's exercise of section 1385 discretion at the time of

sentencing. (*Orin*, supra, 13 Cal.3d at p. 946.) On this point, the court specifically observed that the "power to dismiss priors has been deemed to be an integral part of the trial court's sentencing discretion, and hence cannot be limited by a requirement of prosectorial consent. [Citation]." (*Id.* at p. 946, fn. 11.)

In the case at bar, the trial court caused respondent to admit all of the counts and enhancements. Then, at the time of sentencing, the court exercised its section 1385 power to dismiss enhancements including a strike prior. Nothing in *Orin* precludes this action.

The People also fail to appreciate the significance of a portion of *Orin* that is contrary to their position. As respondent demonstrated in his opening brief, *Orin* foretold the indicated sentence procedure and carefully explained why the court's exercise of sentencing discretion does not constitute plea bargaining. (RBOM 9-10.

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

> exercise of judicial sentencing discretion in an appropriate case." (*Orin*, supra, 13 Cal.3d at p. 949.)

The import of the quoted paragraph is unmistakable. The principled distinction between improper judicial plea bargaining and a lawful indicated sentence is whether the defendant has been made to admit all of the charges advanced by the prosecutor. (*People v. Feyrer,* supra, 48 Cal.4th 426, 434, fn. 6.) If the defendant has admitted all of the charges, there has been no intrusion into the prosecutorial domain. (*Orin*, supra, 13 Cal.3d at p. 949.)

The People also suggest that the indicated sentence offered in this case was barred by the legislative scheme found in Penal Code sections 1192.1-1192.5 which allows only the prosecutor to bargain with the defendant. (ABOM 14-15.) This argument gets the People nowhere. By definition, the court did not "bargain" with respondent. Thus, the statutes in question have no bearing on the case.

As another primary theme, the People advance a number of loaded terms as a form of indictment against the indicated sentence procedure. For example, the People assert that the "trial court exchanged increased sentencing leniency in a package disposition for defendant's waiver by promising to dismiss a strike finding to allow a below-minimum punishment in a plea agreement." (ABOM 11.) The problem with this assertion (and others to be discussed below) is that it has no nexus to the constitutional principles at issue.

As the People entirely ignore throughout their brief, there are two parts to the separation of powers question in this case. A trial court offends the prerogatives of the prosecutor when it intrudes on the prosecutor's charging function by dismissing charges or negotiating a plea bargain with the defendant. However, the prosecutor equally intrudes on the authority of the court when it seeks to control the court's sentencing power. (*People v. Superior Court* (*On Tai Ho*)(1974) 11 Cal.3d 59, 66-68.) The proper balance between these competing constitutional restrictions lies in the indicated sentence procedure. If, as here, the court requires the defendant to admit all of the charges, there is quite simply no infringement on the prosecutor's domain. Rather, the People's objection to the "below-minimum punishment" is nothing more than an impermissible attempt to control the court's sentencing power. (*People v. Superior Court* (*Felmann*), supra, 59 Cal.App.3d 270, 275 ["the exercise of sentencing power cannot be made subject to the consent of the district attorney because the requirement of that consent is an injection of the executive into the province of the judicial branch of government. [Citation.]."].)

The People next assert that the "trial court's agreement distorted its duty to impartially consider the pleas." (ABOM 12.) This is supposedly so since a court offering an indicated sentence "does not weigh a probation officer's

report or exercise 'customary sentencing discretion' . . . ." (ABOM 20.) This claim fails as both a matter of logic and as a matter of fact on the instant record.

The logical problem with the argument is that it proves too much. By definition, every indicated sentence is the product of the court's individual determination regarding the proper sentence. If this process is deemed to be an exercise of partiality, the criticism leveled by the People would apply to all indicated sentences. Since the People otherwise concede that indicated sentence are permissible (ABOM 2), they have failed to provide any guidance as to how one might distinguish between proper and illegal indicated sentences.

With regard to the record in this case, it is patently untrue that the court ignored the probation report or failed to follow customary sentencing procedures. The prosecutor was afforded the opportunity to vehemently oppose the court's exercise of section 1385 power. The People filed a brief and orally argued the matter at length. (CT 46-55, 2 RT 31-45.) The court indicated that it had "read and considered" the probation report in reaching its decision. (2 RT 29.) Any fair reading of the record demonstrates that the court made a sentencing decision that was unrelated to an improper motive to invade the prosecutor's charging province.

As their next point, the People proclaim in an argument heading that the "record establishes a judicial plea bargain." (ABOM 20.) In support of this claim, the People cite bits and pieces of the record which supposedly show that the court "promised leniency" in exchange for "defendant's constitutional waivers and pleas." (ABOM 21.) The record is to the contrary.

Preliminarily, it is important to note that the People do not offer any comment regarding the proper standard of review. Respondent has submitted that the proper standard is abuse of discretion as held in *People v. Labora,* supra, 190 Cal.App.4th 907, 914. (RBOM 17-19.) Under this test, the People's claim of judicial plea bargaining is plainly meritless.

Under the abuse of discretion standard, the appellate court is required to review the entirety of the record and not a few stray words spoken by the trial court. (*People v. Superior Court* (*Ramos*) (1991) 235 Cal.App.3d 1261, 1266, fn. 2 [the "choice of words is not determinative."].) Affirmance is required even if the trial court used words like "promise" and "commitment" rather than "indicated sentence." (*Ibid.*)

Fairly read, the record reveals that the court carefully followed the proper protocol for offering an indicated sentence. At the sentencing hearing, the court provided a lengthy description for the "reviewing court" of the methodology employed at the early resolution calendar (ERC). (2 RT 54-61.)

The court noted that it was fully advised about respondent's criminal record and the facts of the present offenses. (2 RT 57-58.) In so doing, the court acknowledged that it could properly withdraw its offer if "anything new" came up at the sentencing hearing. (2 RT 58.) The court imposed its indicated sentence since neither the prosecutor nor the probation officer provided "new information" which was unknown to the court at the change of plea hearing. (2 RT 60-61.)

Notwithstanding this record, the People seize on a comment made by the court at the change of plea hearing. According to the People, the court evinced its intent to plea bargain by stating that it was offering a plea agreement of "somewhat less than the going disposition at a trial department. (1 RT 7.)" (ABOM 20, 26.) However, the full context of the court's comment does not support the People's claim.

Prior to the court's comment, the prosecutor raised his objection to the court's indicated sentence. (1 RT 4-6.) The prosecutor noted that he would not "have agreed to come to ERC" if he knew that an indicated sentence might be offered. (1 RT 6.) In response, the court stated:

> "The Court: The only thing I would add to the record, and that is that your last comment with respect to the manner in which the case arrived to ERC, which is the Early Resolution Calendar, the matter - - ERC was set in Department 23 which is the practice out of 23 to set matters in my department for early resolution with the understanding that matters that are placed in

> ERC calendar *are usually with the understanding of both sides settled for somewhat less than the going disposition at a trial department.*
>
> "I understand that you objected to it being sent to ERC, but nevertheless, Department 23 did send it to me. But I understand this case also originates from your office from the standpoint of it being a career criminal case, and I was not aware of any prohibition of career criminal cases being sent to my department for ERC for early resolution." (1 RT 6-7, emphasis added.)

As is readily apparent, the court's comment concerning the "disposition" of cases was a reference to the "understanding of both sides" as to what might happen at the ERC calendar. (1 RT 7.) Thus, the court was not discussing *its* practice of plea bargaining. Rather, the court was simply noting the *parties'* knowledge that cases frequently settled during the ERC process.

The People next draw a nefarious inference from the court's comment that the function of the ERC court is "to settle cases, as many as it can, by way of settlement discussions with all parties, taking place." (2 RT 55.) In the People's view, this comment somehow compels the conclusion that the court was bent on engaging in improper judicial plea bargaining. (ABOM 21.) No such conclusion can be drawn.

The comment made by the court was a simple statement of fact: the purpose of the ERC court is to settle cases. This fact has no tendency in reason to show that the court was participating in plea bargaining rather than

complying with the indicated sentence procedure specified in existing law.

Without quoting anything said by the court, the People baldly assert that the record shows that the court's indicated sentence "was unavailable after a trial or even before trial outside the ERC." (ABOM 21.) Suffice to say that the court made no such comment.

The People next reference the court's comment at the sentencing hearing that it would reconsider an indicated sentence if "new information" came to its attention. (2 RT 60.) The People say that the court thereby "signaled a judicial plea bargain in its ruling." (ABOM 22.) Actually, the contrary is true.

A hallmark of the indicated sentence procedure is that the court should withdraw its approval if new facts are brought to its attention at the sentencing hearing. (*People v. Superior Court (Ramos)*, supra, 235 Cal.App.3d 1261, 1269.) Thus, the court's comment manifests an intent to properly follow the indicated sentence procedure.

As a final point about the record, the People acknowledge that it does not reflect any negotiation between the court and defense counsel nor is there any evidence that the court threatened respondent with a longer term if he failed to accept the indicated sentence. (ABOM 24.) Nonetheless, the People posit that judicial plea bargaining must be found since the negotiations were

"cabined off the record." (ABOM 24.) Little need be said regarding this claim.

There is absolutely nothing in the record that reflects off-the-record negotiations by the court. The prosecutor was present for the off-the-record discussions and made no claim along the lines suggested by the People. Instead, the prosecutor's sole objection was that the indicated sentence was prohibited by Penal Code section 667, subdivision (g). (1 RT 5.) The People's belated claim of off-the-record negotiations is baseless.

Shifting gears, the People make a brief and indirect attempt to defend the analysis of the Court of Appeal majority. (ABOM 18-19, 25-27.) As will be recalled, the majority's holding was that an indicated sentence is illegal when "it induces a defendant to plead guilty or no contest." (Majority Opinion, p. 10.) In the People's view, this is correct since a judicial promise of leniency serves to illegally coerce the defendant's plea. (ABOM 18-19.) As respondent has already shown, this analysis is mistaken. (RBOM 12-17.)

The proffer of an indicated sentence is neither a promise of leniency nor does it constitute coercion. Rather, the offered indicated sentence constitutes the *identical* sentence that the court would impose regardless of whether there is a guilty plea or a trial. (*People v. Superior Court (Ramos)*, supra, 235 Cal.App.3d 1261, 1271.) Since the sentence will be the same whether there

is a plea or not, the court is not offering leniency or coercing the defendant. The court is merely imposing "swift and fair" punishment. (*Id.* at p. 1269.)

At the risk of redundancy, it must be emphasized that the acceptance of the semantics employed by the Court of Appeal majority and the People would render it impossible to ever uphold an indicated sentence. In order to communicate its indicated sentence, the court must necessarily specify the term that it intends to impose. If this is a promise of leniency or an act of coercion, the indicated sentence procedure will be a dead letter.

Of course, there is a clear line that the court may not cross. A defendant's plea is coerced if the court makes known that a greater sentence will be imposed after trial if the defendant does not accept the proffered indicated sentence. (*In re Lewallen* (1979) 23 Cal.3d 274, 278-279.) This conduct constitutes coercion since the court is offering a benefit in exchange for a guilty plea. In contrast, an indicated sentence offers no benefit since the court intends to impose the same sentence regardless of whether a trial is held.

In a strange passage, the People criticize respondent's position as involving the "curious notion of jury-trial-waiver coercion as the singular improper inducement of guilty pleas . . . ." (RBOM 27.) Implicit in this assertion is the claim that there must be some other type of inducement that is proscribed. However, we are left to guess as to what that inducement might

be since the People never specify the nature of the inducement other than the references to the unworkable theses regarding "leniency" and "conditional" pleas that have already been addressed above.

Regardless of the exact definition of "coercion," respondent has previously shown that the People lack standing to raise the issue. (RBOM 16-17.) This is so since the defendant's constitutional rights are personal to him and the prosecution has no authority to assert those rights and suffers no harm when those rights are waived. (RBOM 16-17.) In response, the People say that they have standing under *People v. Williams* (1998) 17 Cal.4th 148. (ABOM 27.) Not so.

In *Williams*, the defendant was facing a life sentence under the Three Strikes law for a felony charge of driving under the influence. The defense made a pretrial motion to reduce the charge to a misdemeanor. The court stated that it was disinclined to grant the motion but that it might be amenable to striking a prior under Penal Code section 1385. The defendant entered a guilty plea and admitted his strike priors. The court exercised its section 1385 power to dismiss a strike prior and imposed a determinate term. The People appealed and argued that the court had abused its discretion in dismissing the strike prior. This court agreed with the People. In its disposition, the court held that the defendant should be afforded the opportunity to withdraw his

guilty plea since the plea had been influenced by the trial court's suggestion that it might dismiss a strike prior. (*Id.* at p. 164.) In so holding, this court noted that the People had acknowledged at oral argument that it was only fair to allow the defendant to withdraw his plea. (*Id.* at p. 164, fn. 7.)

According to the People, *Williams* stands for the proposition that they have standing to challenge an "illusory inducement" offered to a defendant. (ABOM 27.) Nothing in *Williams* supports this claim.

The People's appeal in *Williams* did not involve a challenge to defendant's guilty plea. The issue on appeal was whether the trial court had committed sentencing error. *Williams* scarcely provides authority for the People's claim that they have standing to argue that a defendant's plea has been coerced.

It is true that the People's position in *Williams* was that it would be fair to allow the defendant to withdraw his plea. (*Williams*, supra, 17 Cal.4th 148, 164, fn. 7.) However, a party's suggestion concerning the proper disposition of an appeal does not mean that the party has standing to raise a legal claim on behalf of the other party.

As a virtual throwaway argument, the People claim that respondent's plea was induced by the "illusory consideration" that he would receive additional "presentence conduct credits" as a result of the indicated sentence.

(ABOM 25.) Aside from the fact that the People have no standing to raise this claim for the reasons just stated, the truth is that respondent was not misled regarding the consequences of his plea.

Respondent was charged with a single strike prior. If the prior had been imposed, respondent would have been limited to 20 percent conduct credit during the service of his prison term. (Penal Code section 1170.12, subd. (a)(5).) However, as a result of the court's decision to strike the prior, respondent became eligible to earn 1 for 1 conduct credit in prison. (Penal Code section 2933, subd. (b).)

Before respondent entered his pleas, the prosecutor stated on the record that the terms of the indicated sentence called for the dismissal of the strike prior with the attendant consequence that respondent would only have to serve "fifty percent" of his sentence rather than "eighty percent." (1 RT 5.) This information was correct. In fact, respondent received 1 for 1 conduct credit in prison when he later served his sentence.

Nonetheless, the People claim that respondent was somehow misled about the conduct credit which he was going to earn for time spent in the county jail. (ABOM 25.) This is untrue. Nothing was said on this topic.

Respondent has previously demonstrated that the constitutional prerogatives of the prosecutor are maintained under the indicated sentence

procedure since the defendant is required to plead to all charges. (RBOM 11.) Thus, there can be no harm to the People since they have obtained conviction on *everything* alleged. (RBOM 11.) The People declare that this construct is a "fallacy." (ABOM 30.) This is supposedly so since the prosecutor is precluded from: (1) "adding" to the charges; and (2) obtaining greater punishment. (ABOM 30-31.) These claims are meritless.

Presumably, the prosecutor has fully investigated the case before filing a complaint. Thus, the prosecutor can have no grievance if the defendant elects to plead guilty at the earliest opportunity. If anyone is to blame for the prosecutor's inability to "add" charges, it is the prosecutor.

The People also decry their inability to secure "higher authorized punishment through plea bargaining." (ABOM 30.) The simple answer to this claim is that the court, not the prosecutor, is the ultimate arbiter of the punishment to be imposed. By constitutional design, the prosecutor's thirst for punishment must be slaked by conviction on all charges.

The People next deny that the prosecutor's conduct involved forum shopping. (ABOM 27-29.) The denial is not credible.

Initially, the People seem to imply that the prohibition against prosecutorial forum shopping is limited to the dismissal and refiling of identical charges under Penal Code section 1387. (ABOM 28.) This is

incorrect. Prosecutorial forum shopping has been expressly prohibited in other contexts. (*People v. Superior Court (Jimenez)* (2002) 28 Cal.4th 798, 805-809 [prosecutor may not forum shop to obtain different result on a Penal Code section 1538.5 motion]; *Johnson v. Superior Court* (1975) 15 Cal.3d 248, 266, fn. 12 (conc. opn. of Mosk, J.) [prosecutor engaged in forum shopping by seeking a grand jury indictment after dismissal of the case by a magistrate].)

In this case, the prosecutor made no attempt to conceal his desire to forum shop. Although California law requires a prosecutor to appear on a settlement calendar set by the court (*Bryce v. Superior Court* (1988) 205 Cal.App.3d 671, 676, fn. 2), the instant prosecutor candidly acknowledged that he would have disregarded his obligation had he known that an indicated sentence was going to be offered.

> "Regarding the comments yesterday in chambers this is some kind of practice or agreement, the office my office has with the Court on these types of cases, I explained yesterday this is not my personal practice. I wasn't aware of it. *I would not have agreed to come to ERC to discuss the case if I thought this was going to happen.* I think that reflects everything I have to say." (1 RT 6, emphasis added.)

Significantly, the People ignore the quoted comments in their discussion of forum shopping. (ABOM 27-29.) This silence speaks volumes.

The prosecutor strongly and repeatedly expressed his outrage at the 5 year sentence specified by the court. (1 RT 4-6, 2 RT 31-45, 51-52, CT 42-

55.) Notwithstanding their clear entitlement to raise an appellate challenge to the trial court's exercise of section 1385 discretion, the People have elected to raise only the limited procedural claim that respondent's plea was erroneously obtained. Only one conclusion is possible. The People recognize that the 5 year sentence is lawful and reasonable. Given this recognition, the People chose to pursue an avenue of relief that would result in the reassignment of the case to a different judge. This tactic should not be rewarded.

Finally, there is little question that the People have displayed an antipathy for the indicated sentence procedure and wish that it simply did not exist. The antipathy is best shown by the People's discussion of the hypothetical posited in respondent's opening brief. (RBOM 14.)

In the hypothetical, the prosecutor has chosen to seek a sentence of 25 years to life under the Three Strikes law against an 85 year old man who is undoubtedly guilty of stealing a razor. Given the defendant's lack of any criminal history in the prior 60 years, the court offers an indicated sentence of probation if the defendant will plead to the charge and admit his strike priors. In creating the hypothetical, respondent sought to demonstrate the vital role played by the indicated sentence procedure when the prosecutor refuses to be reasonable. (*People v Superior Court (Ramos)*, supra, 235 Cal.App.3d 1261, 1269 [indicated sentence procedure conserves "fiscal and judicial resources"

and avoids "needless time-consuming trials."].)

In discussing the hypothetical, the People ignore the salutary goal of saving scarce judicial resources in an era of tight budgets. Instead, the People mock the hypothetical as "outlandish" and claim that prosecutors are always willing to plea bargain. (RBOM 34-35.) In the alternative, the People suggest that the defendant in the hypothetical should simply plead guilty since there is no need "to annoy the trial judge with a pointless demand for trial." (ABOM 35, fn. 16.) These comments quite simply ignore the realities of our judicial system.

Prosecutors are sometimes unreasonable. While some prosecutors believe that they are entitled to full control over the criminal courts, this is simply not our constitutional structure. The court has plenary authority to decide on the proper sentence within the guidelines set by the Legislature. When the prosecutor unreasonably declines to plea bargain, the court may employ the indicated sentence procedure to efficiently and fairly resolve the case. This court should so hold. (*People v. Orin*, supra, 13 Cal.3d 937, 949 [the trial court may circumvent the "automatic refusal of prosecutors to consider plea bargaining . . . by means of a permissible exercise of judicial sentencing discretion in an appropriate case."].)

II.

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

Consistent with a long line of cases, respondent has argued that a defendant must be allowed to withdraw his plea if the court determines that it cannot impose a promised indicated sentence. (ABOM 21-22 and cases cited therein.) This rule is compelled by the federal due process clause which requires a remedy when a governmental official fails to comply with a promise that induced a guilty plea. (*Santobello v. New York* (1971) 404 U.S. 257, 262; *People v. Mancheno* (1982) 32 Cal.3d 855, 860.)

In the Court of Appeal, the People initially ignored the case law on point and claimed that "the right to withdraw the plea if the sentence is not imposed" constitutes "a classic form of plea bargaining." (AOB 11.) The People presently withdraw this argument and suggest that the court should have discretion on a case by case basis to determine whether to allow the withdrawal of a plea. (ABOM 37.) This suggestion fails for at least four reasons.

First, as the People fail to discuss, the federal Constitution requires that the remedy be certain, not discretionary. If the governmental official does not

comply with the promise made, the defendant must be restored to the status quo ante (i.e. his plea must be withdrawn). (*Santobello*, supra, 404 U.S. 257, 262; *Mancheno*, supra, 32 Cal.3d 855, 860.)

Second, the rule requiring withdrawal of the plea has been in place without controversy since 1976. (*People v. Superior Court (Felmann)*, supra, 59 Cal.App.3d 270, 276.) The People offer absolutely no justification for the abrogation of this well settled rule. (*Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 297 [stare decisis should prevail absent subsequent developments that reveal that a precedent is unsound].)

Third, the authority cited by the People does not support their proposed test. As was discussed above, *People v. Williams*, supra, 17 Cal.4th 148 was a case where the defendant elected to plead guilty when the court suggested that it might be appropriate to dismiss a strike pursuant to Penal Code section 1385. This court held that the proper disposition was to allow defendant to withdraw his plea since he was "'manifestly influenced'" by the court's comment. (*Id.* at p. 164.)

Ignoring the holding, the People claim that their rule of trial court discretion should prevail since a footnote in *Williams* states that the trial court generally decides whether the interests of justice allow for the withdrawal of a plea. (*Williams*, supra, 17 Cal.4th at p. 164, fn. 7.) Obviously, the general

principle stated in the footnote cannot trump this court's actual holding that withdrawal of the plea is required when the defendant is improperly influenced by the court's comment.

In addition, there is a fundamental difference between the situation presented in *Williams* and an indicated sentence case. In *Williams*, the court made no promise. In an indicated sentence case, a formal promise is made. As Justice Baxter recognized in *Williams*, federal due process requires that the plea be withdrawn when a formal promise is made. (*Williams*, supra, 17 Cal.4th 148, 166 (conc. and dis. opn. of Baxter, J.) ["Had the prosecutor or the court given defendant any assurance that the prior conviction would be stricken or had any other promises of leniency been made which are not to be honored, the promise would have to be kept or the defendant be permitted to withdraw the plea of guilty. [Citation.] Due process requires no less. [Citation.]."].)

Fourth, certainty is favored in the law. Under the existing 36 year old rule, a trial court knows exactly what it must do when it fails to enforce an indicated sentence. Under the People's approach, uncertainty would prevail as the appellate courts would have to review case by case instances of discretionary decisions made by trial courts. There is no reason to invite this disarray.

III.

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

In his opening brief, respondent provided a detailed critique of *Woosley*. (ROBM 25-29.) In reply, the People offer only a single argument: *Woosley* was correctly decided since it is consistent with the holding in *People v. Orin*, supra, 13 Cal.3d 937 which condemned judicial plea bargaining. (ABOM 35-36.) Although this point has already been substantially discussed above, respondent will briefly repeat his analysis.

There is a vital distinction between the situation described in *Orin* and the indicated sentence procedure. In *Orin*, the court unconstitutionally invaded the province of the prosecutor by requiring a guilty plea to only one of the three counts alleged in the charging document. (*Orin*, supra, 13 Cal.3d at pp. 940-941.) The failure to require a plea to all counts was an act of judicial plea bargaining.

In contrast, an indicated sentence is constitutionally permissible since the defendant is required to admit all allegations. (*People v. Feyrer*, supra, 48 Cal.4th 426, 434, fn. 6.) In *Woosley*, as here, the court was careful to require the defendant to admit all counts and enhancements.

In light of the distinction between the *Orin* and *Woosley* situations, the People essentially contend that the two situations are functionally identical

since "findings" are dismissed in both instances. (ABOM 30.) This is a legal mischaracterization.

Under our constitutional scheme, the prosecutor has unfettered discretion to charge those counts and enhancements that are supported by evidence. The prosecutor is also entitled to require an admission of all allegations if the defendant elects to waive his right to a trial. However, once all of the allegations *are* admitted, the prosecutor no longer has any power to control the court's exercise of its sentencing authority. This is particularly true when the court elects to exercise its Penal Code section 1385 discretion to dismiss a prior at the sentencing hearing. (*Orin*, supra, 13 Cal.3d at p. 946, fn. 11 [the "power to dismiss priors has been deemed to be an integral part of the trial judge's sentencing discretion, and hence cannot be limited by a requirement of prosecutorial consent. [Citation.]."].)

Should there be any doubt that *Orin* and *Woosley* present entirely different procedural postures, one need only compare the sentencing hearing that was held in *Orin* and the hearing that was held in this case. In *Orin*, the court was disabled from considering a sentence on all charges since the defendant had pled guilty to only one of three counts. In our case, respondent pled guilty to all counts and admitted all enhancements. Thus, the court was in a position to entertain the People's highly detailed argument as to why it

would be error to exercise section 1385 discretion with regard to the strike prior.

By any rational measurement, the People were not deprived of due process in this case. They were allowed to exhaustively oppose the court's indicated sentence. As a result, this court should reject *Woosley's* holding that a court violates separation of powers when it offers an indicated sentence that contemplates an exercise of section 1385 power that is entirely within the court's sentencing discretion.

Finally, the People acknowledge that *People v. Vessell*, supra, 36 Cal.App.4th 285 supports respondent's position insofar as the *Vessell* court found a lawful indicated sentence where the defendant admitted a felony and a strike prior based on the court's representation that it intended to reduce the felony to a misdemeanor pursuant to Penal Code section 17. (*Id.* at p. 296.) (ABOM 35.) The People offer no comment on *Vessell*. Since *Vessell* is analytically indistinguishable from the case at bar, it provides further support for the demise of *Woosley*.

Woosley was wrongly decided. It should be overruled.

IV.

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

In his opening brief, respondent offered four separate points regarding Penal Code section 667, subdivision (g) and section 1170.12, subdivision (e): (1) the statutes do not apply to the court since only the "prosecution" is mentioned; (2) the statutes do not govern indicated sentences since only "plea bargaining" is mentioned; (3) the statutes do not govern indicated sentences since a court offering an indicated sentence makes no "use" of a prior conviction within the meaning of the statutes; and (4) if the Legislature intended to prohibit indicated sentences, the statutes fall afoul of the constitutional principle of separation of powers. (RBOM 30-37.) The People provide only a brief omnibus argument as to points 1-3 and answer the separation of powers argument by offering the *ipse dixit* that the instant trial court engaged in plea bargaining. (ABOM 39-41.) Respondent will separately address the limited arguments advanced by the People.

With regard to the proper interpretation of the statutes, the People make only a single argument. The People note that the first sentence of the statutes precludes the use of prior convictions "in plea bargaining, as defined in subdivision (b) of Section 1192.7." (Sections 667, subd. (g) and 1170.12,

subd. (e).) Since the section 1192.7 definition of "plea bargaining" refers to the "judge," the People conclude that the judge must also be included within the ambit of sections 667 and 1170.12. (ABOM 40.) This argument fails.

Language in a statute is not to be read in isolation. (*People v. Carter* (1996) 48 Cal.App.4th 1536, 1540.) Rather, the court is required to read the statute "as a whole, harmonizing the various elements by considering each clause and section in the context of the overall statutory framework. [Citations.]" (*People v. Jenkins* (1995) 10 Cal.4th 234, 246.) Under these principles, the People's simplistic interpretation of the statutes is unpersuasive.

As the People ignore, the statutes make no reference to the court nor does the statutory bar on the "use" of prior convictions have any obvious connection to the usual duties of the court. As a result, the most plausible interpretation of the statutes is that the bar on "plea bargaining" applies only to the conduct of the prosecutor. This interpretation is compelled since the Legislature knew at the time of enactment in 1994 that only the prosecutor is permitted to participate in plea bargaining.

As is noted above, respondent has argued that the statutory term "use" cannot be reasonably construed as applying to the offer of an indicated sentence since the court is in no sense "using" a prior when it requires the defendant to admit it. (RBOM 31-32.) On this point, the People offer the

unexplained assertion that the "plain meaning" of the statutes is to the contrary. (ABOM 40.) Given the lack of a supporting explanation, respondent is at a loss to reply to the People's claim.

On the separation of powers point, the People fail to join the issue. The predicate for respondent's position is that the instant trial court offered a proper indicated sentence within the parameters of existing law. Respondent has always understood the People's position to be that sections 667, subdivision (g) and 1170.12, subdivision (e) preclude the offer of an indicated sentence. Based on this assumption, respondent has argued that the Legislature would violate the separation of powers if it sought to prohibit a court from offering an indicated sentence. (RBOM 34-37.)

Instead of addressing respondent's argument, the People merely repeat their mantra that there was a plea bargain and not an indicated sentence in this case. (ABOM 40-41.) Since this claim is unresponsive to the separation of powers argument, respondent rests on the analysis set forth in his opening brief.

V.

THE CASE SHOULD BE REMANDED FOR A DETERMINATION AS TO WHETHER RESPONDENT SHOULD SERVE AN ADDITIONAL 118 DAYS IN CUSTODY.

The People contend that the trial court erred by awarding day for day presentence conduct credit pursuant to Penal Code section 4019. (ABOM 41-43.) This claim is well taken. Insofar as respondent admitted that he had a strike prior, the trial court had no discretion to award day for day credit. (*People v. Lara* (2012) 54 Cal.4th 896, 900.) Rather, the court should have awarded 1 for 2 credit. Insofar as respondent earned 237 days of actual credit, the proper award of conduct credit should be 118 days.

The question remains as to the proper disposition of the case. As is reflected in this court's electronic docket, respondent was discharged from CDCR custody on April 8, 2012. (See docket entry for April 26, 2012.) Thus, the trial court would ordinarily be required to recommit respondent into custody to serve an additional 118 days. However, respondent suggests that the trial court should be granted the discretion to avoid this result.

Under California law, a released defendant need not be recommitted to custody to complete a lawful sentence when there are equitable factors which demonstrate that such a result is unnecessary for the defendant's rehabilitation. (*People v. Statum*, supra, 28 Cal.4th 682, 696-697, fn. 5.) These factors

include: (1) the defendant's successful completion of the previously imposed sentence; (2) the defendant's return to a law abiding lifestyle; and (3) circumstances that show that it would be unfair to reincarcerate the defendant. (*Ibid.*)

In this case, respondent will have been out of custody for a substantial period of time before the appeal is resolved. Assuming that this court reverses the Court of Appeal and reinstates respondent's five year sentence, the trial court should be granted the discretion to relieve respondent of the obligation to serve the 118 additional days of custody. (*Statum*, supra, 28 Cal.4th 682, 696-697, fn. 5.)

CONCLUSION

For the reasons expressed in respondent's briefs, this court should reverse the judgment of the Court of Appeal and reinstate the judgment of the Superior Court. The case should be remanded to the Superior Court with directions to exercise its discretion as to whether respondent should be required to serve an additional 118 days in custody.

Dated: October 15, 2012 Respectfully submitted,

DALLAS SACHER
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CERTIFICATE OF COUNSEL

I certify that this brief contains 7959 words.

Dated: October 15, 2012

DALLAS SACHER
Attorney for Respondent,
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PROOF OF SERVICE

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

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

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I declare under penalty of perjury the foregoing is true and correct. Executed this 19th day of October, 2012, at Santa Clara, California.

Priscilla A. O'Harra