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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Appellant,

v.

ALEXIS ALEJANDRO FUENTES,

Respondent.

No. S219109

RESPONDENT'S ANSWER BRIEF ON THE MERITS

From the published opinion of the Court of Appeal
Fourth District, Division Three, Case No. G048563

Orange County Superior Court Case No. 13NF0928
Honorable Nicholas S. Thompson, Judge Presiding

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ISSUE PRESENTED

Does the trial court have the power under Penal Code section 1385 to dismiss a Penal Code section 186.22 enhancement for gang-related crimes, or is the court limited to striking the punishment for the enhancement in accordance with subdivision (g) of section 186.22?

INTRODUCTION

Mr. Fuentes was found sleeping in a stolen car and the People charged him with vehicle taking and receiving stolen property for the benefit of a gang. Upon defense suggestion that the court consider dismissal of the gang allegations, the trial court agreed to consider the issue. The trial court accepted the People's version of the facts and the People's asserted criminal history of Mr. Fuentes. The court weighed the equities including Mr. Fuentes' youth and minimal record, as well as his minimal behavior in the instant crimes, and the judge determined that the interests of justice did in fact support dismissal of the enhancements alleged per Penal Code section 186.22[1] subdivision (b) [criminal street gang crime]. The People objected to any section 1385 dismissal of the gang allegations as the People were not agreeing to any plea bargain. The court dismissed the gang enhancements over the People's objection. The court determined that Mr. Fuentes deserved a chance at probation, and indicated that if he pled guilty the court would suspend

[1] Further statutory section (§) references are to the Penal Code unless otherwise indicated.

imposition of sentence on various conditions, including service of 240 days in jail; it is noteworthy that if not dismissed, those enhancements would have more than doubled Mr. Fuentes potential prison sentence from 3 to 7 years, and would have long lasting impacts upon young Mr. Fuentes as serious felonies including potential for life sentences on future cases, and exclusion from various programs including potentially life-saving treatment opportunities for drug violations, all for sleeping in a gang-like manner in a stolen car. Mr. Fuentes then pled guilty and the court offered him probation consistent with its indication.

The plain language of section 186.22 subdivision (g) grants two powers to trial courts which did not exist in section 1385 at the time those powers were granted in the gang allegation context: (1) courts could refuse to dismiss an enhancement and yet refuse to add any punishment for enhancements under the gang law (this power then existed with respect to other specified enhancements in section 1170.1), and (2) courts could deviate downward from the minimum sentences mandated by the gang law under certain circumstances. (The power in (1) above was included in the original statute adopted in 1988, while the power in (2) was added in 1989.) But for the power like (1), a court must impose the punishment for every enhancement proven and not dismissed per section 1385 (or comparable provision) – this was a material added power. (*People v. Bradley* (1998) 64 Cal.App.4th 386, 390.) Similarly, there was no general provision comparable to (2) above to simply

deviate downward from mandated "minimum" sentences.

In 1989, the Legislature enacted sweeping firearm legislation which "deleted" one of the code sections from the list of enhancements with express court authority to strike punishment per section 1170.1, with the Legislature-stated (and court enforced) effect of prohibiting striking of that allegation.

By 1997, however, the Legislature repealed section 1170.1 subdivision (h) on the ground that it was then considered to be redundant of the dismissal power in section 1385 subdivision (a).

In 2000, the Legislature determined that the power to strike allegations might not clearly include the power to simply strike the related punishment and therefore added the power now in section 1385 subdivision (c).

In 2011, the Court of Appeal, Fourth District, Division One, issued their opinion in the *Campos* case causing much mischief. (*People v. Campos* (2011) 196 Cal.App.4th 438 (*Campos*).) The *Campos* court erroneously held that subdivision (g) of section 186.22 replaced and crowded out all power of the courts under section 1385 with respect to gang allegations. (*Campos*, *supra*, 196 Cal.App.4th at pp. 446-454.)

The People read this opinion as prohibiting courts from dismissing gang allegations over the objection of the People, but somehow permitting courts to honor plea agreements of the People when they called for dismissal of gang allegations as part of the agreement. However, only the opposite is true: the courts cannot be so limited under the separation of powers doctrine

while the People have been disempowered to discontinue or abandon prosecution other than in compliance with section 1385 since at least 1872. (Pen. Code § 1386 [abolition of the People's power to abandon]; Cal. Const., art. III, § 3 [separation of powers doctrine].) Obviously, in the event that the courts retain the power to dismiss such allegations at all, it cannot be conditioned upon the acquiescence of the People without running afoul of the separation of powers doctrine. (*People v. Clancey* (2013) 56 Cal.4th 562, 579-580; *People v. Tenorio* (1970) 3 Cal.3d 89, 94-95.)

Under a proper reading of the laws, *Campos* was wrongly decided, trial courts retain the power under Penal Code section 1385 to dismiss any allegation under section 186.22 (and in this regard the courts are not limited by subdivision (g) of section 186.22), and the court's ability to dismiss any allegation is not dependent on acquiescence of the People.

STATEMENT OF THE CASE

The People's statement of the case is largely accurate with the following corrections, additions and clarifications.

Prior to the plea, the parties discussed the facts of the case and the criminal and juvenile delinquency history of Mr. Fuentes in chambers in the context of a defense request[2] that the court exercise its discretion pursuant to

[2] While there is some confusion if the defendant's role was an invitation or request that the court exercise its discretion, or a motion that it do so, this is not a material issue. (*People v. Dorsey* (1972) 28 Cal.App.3d 15, 19.)

section 1385 for dismissal; the parties had previously (April 18, 2013) discussed these same factual and background matters seeking an indication of what the court would plan to sentence Fuentes were he to plead guilty. (Reporter's Transcript [hereafter "RT"]: 1-3, 13.) The court conducted the hearing with respect to whether the court should exercise section 1385 power, and after accepting all potentially disputed factual positions of the People as true, the court dismissed the gang allegation in the interests of justice independent of and prior to any plea. (RT: 2-3.)[3] It is apparent that the court had announced its likelihood to exercise its discretion though further argument on the record was invited and occurred. (RT: 1-3.) After the court had completed dismissal of the gang allegations, the court initiated questioning of Fuentes as to his plea and Fuentes did plead guilty to the remaining base charges (never admitting the gang allegations). (RT: 4-12.) The court provided terms and conditions of probation as had been indicated; Fuentes accepted those terms and conditions of probation. (RT: 4-12, Court Transcript [hereafter, "CT"]: 5-14.) The People clarified that in the previous settlement discussions in chambers they had made an offer to settle the case with nine months custody and gang terms (not specified on the record what charges to be included), *contrasting* where the court's previous indicated sentence was

[3] The People did object to the court's indicated sentence and *claimed* that the indicated sentence included an offer that if Mr. Fuentes pled guilty the court would dismiss the gang allegations pursuant to section 1385 in exchange for that plea. (RT: 1-2.) However, the court dismissed the gang allegations before any plea commenced. (RT: 2-3.)

less time (termed "C.T.S.") but with Fuentes admitting all charges and allegations (termed "pleading to the sheet"). (RT: 12-13.) The People essentially complained that the court dismissed charges without their approval.

The remainder of the People's statement of the case is substantially accurate.

ARGUMENT

Trial courts have the power under Penal Code section 1385 to dismiss a Penal Code section 186.22 enhancement for gang-related crimes, as section 186.22 subdivision (g) expanded equitable powers of the courts with respect to gang allegations under section 186.22.

The section 1385 power of the courts to dismiss allegations in criminal cases is broad and generally reaches all variety of allegations from entire cases, to individual charges, enhancements, or prior convictions and even allegations invoking alternate sentencing schemes. (E.g., *People v. Burke* (1956) 47 Cal.App.2d 45, 50-51 [defining "striking" as "setting aside or dismissing", the court approved the power to dismiss even an admitted prior conviction for purposes of the current case only, stating that section 1385's "authority to dismiss the whole includes, of course, the power to dismiss or 'strike out' a part"]; *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 [alternate sentencing scheme allegations].) However, this power is statutory in nature and it can be withheld by the Legislature in such circumstances as the Legislature mandates by clear statement to that effect. In evaluating whether

judicial dismissal power remains or has been withdrawn by the Legislature, one must confront the separation of powers issue from California Constitution Article III, section 3: if the courts do not retain the power to dismiss allegations independent of the People's request or approval, the courts do not retain that power upon the People's motion either. The People should not lightly urge withdrawal, as the People no less than the defense rely upon the court's exercise of that power to efficiently resolve cases since the 1872 abolition of *nolo prosequi*.

A. Penal Code section 1385 grants trial courts broad equitable powers to dismiss in the interests of justice entire cases, as well as individual charges, enhancements, alternate sentencing scheme allegations and prior conviction allegations, in each case unless that power has been clearly withdrawn by the Legislature in a particular circumstance.

The power of the courts to dismiss any charge or other allegation abides unless clearly eliminated by *clear* mandate of the Legislature or the electorate. The Legislature has repeatedly demonstrated the ability to clearly exclude exercise of section 1385 powers in certain circumstances, but chose not to do so here. When the Legislature adopted section 186.22 in 1988, including the language relied upon by the Attorney General here, it did so shortly after a string of cases telling the Legislature it must be clear about withdrawing 1385 powers if that is the intention. In fact the Supreme Court told the Legislature that in *People v. Williams* (1981) 30 Cal.3d 470, 489 [superseded by initiative on other ground], before reminding the Legislature

that was what they had done in *Williams*, and again using that rule to find no abrogation of section 1385 powers in *People v. Fritz* (1985) 40 Cal.3d 227, 230 [abrogated on other ground, see below]. In fact, the Legislature demonstrated the ability to follow the Court's instruction to clearly eliminate the power described in *Fritz* by adoption of Penal Code section 1385, subdivision (b) in 1986. The Legislature lacked any similar direct statement or other clarity in 1988 when it adopted the language in question as subdivision (b)(4) of the original section 186.22. While the Legislature took no action on the *Williams* decision, the 1990 electorate did in adoption of Penal Code section 1385.1 ["a judge shall not strike or dismiss any special circumstance which is admitted by a plea of guilty or nolo contendere or is found by a jury or court..."] again following the Court's direction to eliminate that application of section 1385.

The court's power to "order an action to be dismissed" under section 1385 subdivision (a) includes the power to dismiss a part of that action, such as a criminal charge, a conduct enhancement, a prior conviction enhancement, or an allegation implicating an alternative sentencing scheme. However, "[b]ecause the power is statutory, the Legislature may eliminate it." (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 518.)

On the other hand, it has long been the openly expressed policy of the courts that "we will not interpret a statute as eliminating courts' power under section 1385 'absent a clear legislative direction to the contrary.'" (*Romero*,

supra, 13 Cal.4th at p. 518.) The Supreme Court told the Legislature this in 1981, then in 1985 reminded the Legislature that it:

> "sent an unmistakable signal to drafters of sentencing provisions of the need to include clear language eliminating a trial court's *section 1385* authority whenever such elimination is intended. *Williams* explains that absent a clear expression of legislative intent in this regard, a sentencing statute will not be construed to abrogate a trial court's general *section 1385* power to strike."

(*People v. Fritz*, *supra*, 40 Cal.3d at p. 230, citing *People v. Williams*, *supra*, 30 Cal.3d at p. 489.) The Legislature adopted (clearly written) section 1385, subdivision (b) in 1986 in response to *Fritz*, and Proposition 115's Penal Code section 1385.1 in 1990 to supersede *Williams*. Surely the 1988 Legislature was well aware of the need to give clear guidance to the courts if it wanted (then-) section 186.22, subdivision (b)(4) to eliminate the courts' section 1385 powers. It chose to leave out any restrictive language.

This was the setting for the dawn of the era of the gang law.

The Legislature has repeatedly demonstrated its ability to clearly restrict the courts' section 1385 discretion by plainly saying so (including laws both immediately before and shortly after adoption of the gang statute) in section 1385 itself[4] and elsewhere.[5]

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[4] E.g., in subdivisions (a) ["No dismissal shall be made for any cause which would be ground of demurrer to the accusatory pleading."], (b) ["This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667."] and (c)(2) ["This subdivision does not authorize the court to strike the additional punishment for any enhancement that cannot be stricken or dismissed pursuant to subdivision (a)."].

The courts should be careful to not read a facial *grant* of court power too loosely to imply a *restriction* of the court's section 1385 power. For example, in *Romero*, *supra*, 13 Cal.4th 497, 522-523, the Supreme Court examined then-in-effect section 667, subdivision (f).[6] In that case, the People argued two more-means-less ("*expressio unius est exclusio alterius*", literally inclusion of one is exclusion of others) arguments. First the People argued that the expression of a power to the People to move to dismiss or strike an allegation under section 1385 *or* if there was insufficient evidence to prove it,

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[5] E.g., Penal Code §§ 667.61 [subd. (g) "Notwithstanding Section 1385 or any other provision of law, the court shall not strike any allegation, admission, or finding of any of the circumstances specified in subdivision (d) or (e) for any person who is subject to punishment under this section"], 667.71 [subd. (d) "Notwithstanding Section 1385 or any other provision of law, the court shall not strike any allegation, admission, or finding of any prior conviction specified in subdivision (c) for any person who is subject to punishment under this section"]; 12022.5 [subd. (c) "Notwithstanding Section 1385 or any other provisions of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section"], 12022.53 [subd. (h), same]. Similarly, the voters know how to clearly withhold 1385 powers as they did in 1990's Proposition 115, codified in part at Penal Code section 1385.1 ["Notwithstanding Section 1385 or any other provision of law, a judge shall not strike or dismiss any special circumstance which is admitted by a plea of guilty or nolo contendere or is found by a jury or court as provided in Sections 190.1 to 190.5, inclusive."].

[6] As of 1996, Penal Code §667, subd. (f), read in its entirety:

"(1) Notwithstanding any other law, subdivisions (b) to (i), inclusive, shall be applied in every case in which a defendant has a prior felony conviction as defined in subdivision (d). The prosecuting attorney shall plead and prove each prior felony conviction except as provided in paragraph (2).

(2) The prosecuting attorney may move to dismiss or strike a prior felony conviction allegation in the furtherance of justice pursuant to Section 1385, or if there is insufficient evidence to prove the prior conviction. If upon the satisfaction of the court that there is insufficient evidence to prove the prior felony conviction, the court may dismiss or strike the allegation." [*Ibid.*]

and allowing the court to dismiss upon finding insufficient evidence (with no mention of section 1385), the Legislature was stripping the court of section 1385 power and restricting the court's dismissals to situations of insufficient evidence. Secondly, the People argued that by so stating the rights, the court was stripped of its *sua sponte* authority to dismiss and was dependent upon the People's motion under section 1385.

The *Romero* court rejected each of these arguments. As the statute did not "impose[] a command that is necessarily inconsistent with the court's power to strike under section 1385" it was read to *not* restrict the courts' use of section 1385. (*Romero*, *supra*, 13 Cal.4th at pp. 523-524.)

The Opinion of the Court of Appeal below does an excellent job of discussing the term "notwithstanding" and why its use in section 186.22 subdivision (g) is *not* inconsistent with the courts retaining section 1385 powers with respect to section 186.22 allegations. (Slip Opinion, attached to Appellant's Opening Brief on the Merits at pp. 5-9.) Supplemental to this position, it seems that no authority as of 1988 appears to have then found a section 1385 power to strike punishment[7] without dismissing an allegation.

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[7] Indeed, the courts had specified that 1385 powers were *dismissal* powers not mentioning waivers of sentence alone. (*People v. Burke*, *supra*, 47 Cal.2d at pp. 50-51 [defining "striking" as "setting aside or dismissing" an allegation].) The *Burke* court contrasted its situation with that in *People v. Superior Court* (1927) 202 Cal. 165, 173, where the court improperly refused to sentence death on first degree murder, instead pronounced judgment of second degree murder and sentenced thereon. See further discussion of this

While the courts may find clear indication of the Legislature's intent to withdraw section 1385 power where another provision is clearly inconsistent with the exercise of that power, such is not the case here. There is nothing inconsistent with the dual exercise of powers under section 1385 subdivision (a) and under section 186.22 subdivision (g). Indeed these statutes had no redundancy supported by published authority at the time of adoption of the gang statute, as section 1385 had no provision to withhold sentence without dismissal of an allegation and there was no language purporting to tie the courts' hands anywhere in section 186.22[8]. The addition of the court's power to deviate downward from certain otherwise "minimum" section 186.22 sentences further differentiated, and in no way conflicted with, section 1385.

Lacking any express refutation of section 1385 power, and lacking any clear limitation on the court's discretion which would be compromised by use of the section 1385 power, there is no conflict with section 186.22. This conclusion is only enhanced by the novelty of the powers granted in section

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topic, including concurrent and expressed parallel authorization to strike punishment in section 1170.1, in legislative history section below.

[8] Examples of provisions clearly inconsistent with the power to strike under section 1385 include the language in section 1203.06 prohibiting probation for those convicted of certain crimes with personal use of a firearm. (*People v. Tanner* (1979) 24 Cal.3d 514 [inconsistent where court dismissed gun enhancement per 1385 to defeat prohibition and make defendant eligible for probation].) Similarly, where the legislature deleted section 12022.5 [firearm use] from a list of allegations that the courts were authorized to dismiss per section 1170.1 – and the Legislative counsel's digest stated "This bill would delete that authorization" – that sufficed to implicitly but clearly withdraw 1385 powers. (*People v. Thomas* (1992) 4 Cal.4th 206, 209, 211.)

186.22 (as read in light of the 1988 state of jurisprudence), and the later legislative declaration that very similar provisions in section 1170.1 left section 1385 power intact.

B. The statutory history of Penal Code sections 1385, 186.22 and 1170.1 demonstrates that the Legislature included what is now subdivision (g) of section 186.22 in the original 1988 statute to add judicial discretion in this area, that the 1989 Legislature again expanded such judicial discretion in section 186.22, and later the 2000 Legislature amended section 1385 to include the power to strike punishment (as contrasted with the entire allegation) for any criminal enhancement.

As referenced in the Attorney General's brief, the legislative history of section 1385, especially when evaluated to include the history of purported exceptions to that power,[9] may be viewed as an epic journey, best read chronologically along with the related statutes. In the end, neither the actual words of the statutes at issue, nor anything in the legislative histories, satisfies this burden of *clear* withdrawal of judicial power under section 1385. One point to keep in mind, is that the "fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law." (*People v. Thomas* (1992) 4 Cal.4th 206, 210.) The 1988 Legislature should not be presumed to have acted in accordance with legal

[9] The section 1385 power in its original form (as clarified over time) is a power to dismiss reaching any allegation – any case or its component charges, prior conviction allegations, or other allegations impacting the sentence may be dismissed by the court acting independently of the People in the interests of justice... unless that power is rescinded or held back in some context described by the legislature.

principals first announced years later in 1997, principals they needed to codify for judicial clarity in 2000. The 1988 Legislature was not acting to pick out a power implicit but never uttered in statute or case up to that time. Section 186.22 was never intended to impact section 1385 powers and the latter are fully intact as against section 186.22 allegations.

1. Status of section 1385 law developments from 1981-1988.

As noted above, the Supreme Court provided drafting guidance to the Legislature for circumstances when a law was intended to withdraw courts' section 1385 powers to strike charges or other allegations: say it clearly. This was the message in 1981 with respect to what the People then asserted was a restriction of the courts power to dismiss special circumstance allegations (*People v. Williams*, *supra*, 30 Cal.3d 470), and in 1985 where the People alleged the courts lacked power to dismiss section 667 enhancements (*People v. Fritz*, *supra*, 40 Cal.3d 227). The *Fritz* Court even made special note of the fact that:

> "the provisions on which the People rely as having eliminated the trial court's *section 1385* power ... were drafted shortly after the *Williams* decision and were enacted by the voters [in] June 1982... . Neither [of those provisions], however, contains any express language indicating that it was intended to eliminate a trial court's *section 1385* power ..., and nothing in the ballot analysis or arguments which were before the voters suggests such a purpose."

(*Fritz*, *supra*, 40 Cal.3d at pp. 230-231 [italics in original].) In other words, where we just told you the rules of statutory interpretation on this issue, and

you didn't include a flag against the announced presumption in a law drafted shortly thereafter, you must have intended to go with the presumption.

In 1981, this Supreme Court had put the Legislature on strong notice that a law would not be read as rescinding the courts' 1385 power unless that law clearly said so. (*People v. Williams*, *supra*, 30 Cal.3d at p. 482.) In 1985, this Honorable Court again reminded the Legislature of that continuing policy. (*People v. Fritz*, *supra*, 40 Cal.3d at p. 230.) By 1986, the Legislature demonstrated they had got the message and surely knew how to clearly eliminate the courts' 1385 powers: it adopted subdivision (b) of section 1385 to supersede *Fritz*.

As of 1987, section 1170.1 subdivision (h) provided that the courts could (pursuant to that section) strike the punishment for any of the various statutes listed in that subdivision. Specifically:

> "Notwithstanding any other provision of law, the court may strike the additional punishment for the enhancements provided in Sections 667.5, 12022, 12022.4, 12022.5, 12022.6, 12022.7, and 12022.9 if it determines that there are circumstances in mitigation of the additional punishment and states on the record its reasons for striking the additional punishment."

(Pen. Code § 1170.1, subd. (h) [1987]; Stats 1986, ch. 1429, § 1.) As of January 1, 1988, section 1170.1 subdivision (h) provided that the courts could (pursuant to that section) strike the punishment for any of the expanded list of statutes listed in that subdivision. Specifically:

> "(h) Notwithstanding any other provision of law, the court may strike the additional punishment for the enhancements provided

> in Sections 667.5, 667.8, 667.85, 12022, 12022.2, 12022.4, 12022.5, 12022.6, 12022.7, 12022.75, and 12022.9, or the enhancements provided in Section 11370.2, 11370.4, or 11379.8 of the Health and Safety Code, if it determines that there are circumstances in mitigation of the additional punishment and states on the record its reasons for striking the additional punishment."

(Pen. Code § 1170.1, subd. (h) [1988]; Stats. 1987, ch. 1423, §3.7.) This clearly implied that the Legislature believed it was adding additional powers to the courts by doing so: the courts could strike *punishments* even without dismissing the allegations[10] for the listed code sections.

In this context, the Legislature passed section 186.22. [11]

2. Status of sections 1385 and 1170.1 at adoption of section 186.22.

As of 1988, section 1385 had been long established as a strong judicial power to dismiss any allegation impacting sentencing, though no authority appears to have found a section 1385 power to strike punishment alone without dismissing an allegation.

In 1988, the Legislature adopted the initial version of section 186.22, including its subdivision (b)(4) which read:

"(4) Notwithstanding any other provision of law, the court may

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[10] Courts had earlier defined 1385 powers to "strike" as authorization to set aside or dismiss the allegations, without suggestion that mere punishment could be withheld. (*People v. Burke*, *supra*, 47 Cal.2d at pp. 50-51.)

[11] In interpreting the legislative history of section 1385 – in particular for any action after 1981 (the *Williams* decision, described above) – the courts should see the language of the statutes and of any proffered legislative history, through the lens of this Supreme Court's prior instructions: *clearly tell the courts they do not have section 1385 power, if indeed that is the intent.*

> strike the additional punishment for the enhancements provided in this section in an unusual case where the interests of justice would best be served, if the specifies on the record and enters into the minutes the circumstances indicating that the interests of justice would best be served by that disposition."

(Pen. Code § 186.22, subd. (b)(4) [1988]; Stats. 1988, ch. 1242, §1.) In 1989, this subdivision was indeed amended to expand court power, adding the power "to refuse to impose the minimum jail sentence for misdemeanors". (Stats. 1989, ch. 144, §1.) By doing so the Legislature supplemented the courts broad equitable powers (such as those in section 1385). This clearly implied that the Legislature believed it was adding additional powers to the courts by doing so: the courts could strike punishments for additional allegations and could deviate downward from certain "minimum" sentences.

3. Status of sections 1385 and 1170.1 following 1988.

As noted above, in 1989, the Legislature implicitly reaffirmed the relevance of section 1170.1 subdivision (h) by deleting an allegation from the list of allegations whose punishment could be stricken, thereby intending to "delete" such authority (as clearly expressed in the Legislative Counsel's Digest of the bill). (For discussion, see *People v. Thomas*, *supra*, Cal.App.4th at pp. 212-213.)

As noted above, in 1990, the voters adopted section 1385.1 directly and clearly abolishing section 1385 power as applied to a specific situation (and the language of the statute specifically said so).

In 1997, sensitive to the *Thomas* decision above, the *then*-lawmakers

expressed and included in the law itself their belief that section 1385 powers under subdivision (a) incorporated the authority and discretion to strike punishment, and that the courts' section 1385 powers *remained* intact (including for allegations previously listed in section 1170.1 subdivision (h)), and those powers would not be impacted by repeal of section 1170.1 subdivision (h). (*People v. Bradley*, *supra*, 64 Cal.App.4th at p. 391, fn. 2; Stats. 1997, ch. 750, §3 [amendment to §1170.1] and §9 [explanation].) That is, the lawmakers believed that specific authorization to strike punishment for an allegation had not impacted the still intact "existing" full range of section 1385 powers with respect to that allegation. (Stats. 1997, ch. 750, §9.)

In 2000, the Legislature first adopted a generally applicable statute expressly providing that trial courts have the ability – in any circumstance where the section 1385 subdivision (a) power to dismiss is intact, to instead strike only the punishment for that enhancement. (Pen. Code §1385, subd. (c); Stats. 2000, ch. 689, §3.) Even per the Attorney General's cited legislative committee reports and advocacy materials, the granting of a power to strike punishment without dismissal may reach a middle ground preferable (i.e., seen as more just) to some judges in some circumstances.

As it must be assumed that the Legislature does not perform idle acts (on purpose), the 1977 Legislature must have intended to be granting some power when it adopted the original statutory power to strike *punishment* for certain allegations per section 1170.1 (then-) subdivision (g). (Stats. 1977, ch.

165, §17.) Similarly, the Legislature presumptively believed it was having some effect in each of the serial amendments to that subdivision (later renumbered subdivision (h)) until its repeal in 1997, when the Legislature indicated it appeared redundant. (Stats. 1997, ch. 750, §3 [amendment to §1170.1] and §9 [explanation]; see also, Appellant's Brief at p. 16 [partially acknowledging this].) *Note that the Legislature did not indicate at any time that it believed that the section 1170.1 grant of power to strike punishment for specified allegations in any way interfered with the court's power to dismiss under section 1385.* Rather, the 1997 Legislature indicated the opposite when it stated in the statute itself that: "it is not the intent of the Legislature to alter the *existing authority and discretion* of the court to strike those enhancements or to strike the additional punishment for those enhancements pursuant to Section 1385 ...". (Stats. 1997, ch. 750, §9.)

Original section 186.22, subdivision (b)(4) (later moved to subdivision (d), and currently subdivision (g)), had the same effect when adopted as very similar provisions of section 1170.1 in effect at the time of its adoption: it added powers to the court no authority had thence recognized. In the case of section 1170.1 that power to strike punishment, when later-announced-redundant was at that time also recognized to have left section 1385 powers in place, such that the repeal of the (redundant) power to strike punishment had no effect upon the still fully intact section 1385 powers to dismiss allegations *or* strike their punishment. Even so, the idea of an included power to strike

punishment was sufficiently unclear three years later that the Legislature found it necessary to specifically announce the power and to codify it as subdivision (c) of section 1385.

C. The People's typical understanding of Court powers to dismiss section 186.22 allegations (only to facilitate the People's approved settlements) would violate separation of powers doctrine.

While not directly addressed by the Attorney General in its briefing, the People's objection was not simply that the gang charges were dismissed, but that they were dismissed over the People's objection and without being part of the plea agreement offered by the People.[12] The People's view is that the courts cannot dismiss a gang allegation in a charging document unless that comes on request or approval of the People, and this view cannot stand. To put it another way:

> "The judicial power is compromised when a judge, who believes that a charge should be dismissed in the interests of justice, wishes to exercise the power to dismiss but finds that before he may do so he must bargain with the prosecutor. The judicial power must be independent, and a judge should never be required to pay for its exercise."

(*People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at p. 512, quoting

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[12] The People allude to this when they stated "Just so the record is clear, we did chamber this case on April 18th. I had offered nine months in custody with gang terms and probation. The court had previously offered C.T.S. pleading to the sheet." (RT: 12-13.) "C.T.S." refers to credit time served, i.e., no additional custody time, and "pleading to the sheet" refers pleading guilty and admitting all other allegations on the charging document. The People contrasted the court's previously indicated sentence of less time but admitting all allegations, verses the People's offer which had more time but apparently something other than all allegations. This is a very common People's strategy.

People v. Tenorio, *supra*, 3 Cal.3d at p. 94.) This Court previously gave detailed consideration of exactly this issue in the "Three Strikes" context, and made clear that if a law intended to give the People such a veto power over judicial power to dismiss an allegation, that veto power would run afoul of the separation of powers doctrine in the California Constitution, Article III, section 3.[13] (*Romero*, *supra*, 13 Cal.4th at pp. 508-522.) The Attorney General acknowledges that the courts' power under section 186.22 allegations must be independently exercisable by the courts if at all. (Appellant's Brief at p. 12.)

Where the courts' section 1385 powers are intact, no separation of powers problem arises because courts retain independent discretion to weigh the equities to dismiss allegations in the interests of justice without fear of executive veto.

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[13] "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." (Cal. Const., art. III, § 3.)

CONCLUSION

Respondent Fuentes requests that this Honorable Court affirm the opinion of the Fourth Appellate District, Division 3 below, in its entirety.

Dated: February 18, 2015

Respectfully Submitted,
FRANK OSPINO
Public Defender
MARK BROWN
Assistant Public Defender

MILES DAVID JESSUP
Senior Deputy Public Defender

CERTIFICATE OF COMPLIANCE Rule 8.504(d)(1)

The undersigned hereby certifies that this brief has been prepared using 13 point Times New Roman typeface. In its entirety, Respondent's Brief consists of 5,702 words as counted by Microsoft Word version 2003 word processing program, up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on February 18, 2015.

MILES DAVID JESSUP
Senior Deputy Public Defender

DECLARATION OF SERVICE

PEOPLE v. Alexis Alejandro FUENTES (Case no. S219109)

STATE OF CALIFORNIA)
) ss
COUNTY OF ORANGE)

I, Miles Jessup, declare that I am a citizen of the United States, over the age of 18 years, not a party to the above-entitled action, and have a business address at 14 Civic Center Plaza, Santa Ana, California 92701. That on February 18, 2015, I personally served copies of Respondent's Answer Brief on the Merits in the above-entitled action by depositing a copy thereof in a sealed envelope, postage thereon fully prepaid, in the United States Mail at Santa Ana, California. Said envelopes were addressed as follows:

Court of Appeal, 4th Appellate District, Division 3, Attn: Hon. Richard D. Fybel, Hon. William F. Rylaarsdam, and Hon. Raymond J. Ikola, 601 W. Santa Ana Blvd., Santa Ana, California 92701 [714-571-2600]

Orange County Superior Court, Attn: Hon. Nicholas S. Thompson (Dept: N-17), c/o Court Clerk, 700 Civic Center Drive W., Santa Ana, CA 92701 [657-622–5617]

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[619-645-2001]

I declare under penalty of perjury that the foregoing is true and correct.
Executed on February 18, 2015, at Santa Ana, California.

Name: Miles Jessup
Title: Senior Deputy Public Defender