S192784

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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
v.
RICARDO LARA,
Defendant and Appellant.

Case No. S1

Sixth Appellate District, Case No. H036143
Santa Clara County Superior Court, Case No. E1007527
The Honorable Kenneth Paul Barnum, Judge

PETITION FOR REVIEW

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PETITION FOR REVIEW

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT

Respondent, the People of the State of California, respectfully petition this Court to grant review, pursuant to rule 8.500 of the California Rules of Court, of the above-entitled matter, following the issuance of a published opinion on March 30, 2011, by the Court of Appeal, Sixth Appellate District. The Court of Appeal's opinion holds that Penal Code section 1385[1] vests trial courts with discretion to strike a prior serious felony conviction in order to afford the maximum allowable section 4019 presentence conduct credits,[2] and orders the matter remanded for the trial court to exercise that discretion. A copy of the Court of Appeal's opinion is attached as Appendix A ("Typed Opn.").

ISSUE PRESENTED

Are trial courts vested with discretion by Penal Code section 1385 to strike an uncharged sentencing eligibility factor, such as the historical fact of a prior conviction, for the purpose of granting the maximum allowable presentence custody credits?[3]

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[1] All subsequent statutory references are to the Penal Code.

[2] "'Conduct credit' collectively refers to work time credit pursuant to section 4019, subdivision (b), and to good behavior credit pursuant to section 4019, subdivision (c). [Citation.]" (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3.)

[3] The issue presented for review in this case is identical to that presented in *People v. Koontz* (2011) 193 Cal.App.4th 151, Petition for Review filed April 11, 2001, S192116. Should this Court grant review in *Koontz*, respondent requests that this case be granted and held for that case. (See also *People v. Jones*, rev. granted Dec. 15, 2010, S187135 [appellate opinion discussed same issue, and case granted and held on issue of the retroactivity of the amendments to section 4019].)

STATEMENT OF THE CASE

According to the probation report, appellant and a companion injured the victim in an assault. (CT 24-25.) On February 18, 2010, the Santa Clara County District Attorney filed a complaint charging appellant with assault by means of force likely to inflict great bodily injury. (§ 245, subd. (a)(1).) The district attorney also alleged that appellant personally inflicted great bodily injury (§§ 12022.7, subd. (a), 1203, subd. (e)(3)) and had previously been convicted of first degree burglary (§§ 667, subds. (b)-(i), 1170.12, 667, subd. (a)). (CT 2-4.)

On August 3, 2010, appellant pleaded no contest to the assault charge and admitted probation violations. He was not asked to admit the allegations concerning his prior conviction. The "Plea Form, with Explanations and Waiver of Rights" (CT 12-18), recited that appellant would receive a sentence of two years in prison and the "GBI enhancement & Strike allegation will be struck." (CT 13; see also CT 19; 1 RT 3-6.) The prosecutor stated that under the plea agreement: "the 12022.7 [great bodily injury enhancement] will be dismissed and the 667(a), Prop A [*sic*; "8"] prior, will be dismissed and the strike prior." (1 RT 3.)

At sentencing on September 3, 2010, the court and parties discussed whether appellant could avail himself of the then existing version of section 4019—which has since been amended—because he had a prior strike conviction. The court referred to an unreported "discussion about credits" and asked defense counsel if she wished to "put something on the record." (2 RT 10.) She replied: "My understanding is that you would not be giving him 50 percent credits pursuant to [former section 4019], and we would object to that on the basis that my understanding is he would not be receiving 50 percent credits because of the strike prior, which was pled but never proven. It was dismissed and not pled and then struck." (2 RT 10.) The court asked, "How was it dismissed? Under what?" Defense counsel

replied, "Motion of the district attorney; the prosecutor added, "Plea bargain." (2 RT 10.)

The court and counsel discussed the then recent opinion of the Court of Appeal in *People v. Jones*, formerly reported at (2010) 188 Cal.App.4th 165, and review granted December 15, 2010, S187135. *Jones* held that when a trial court dismisses a strike prior under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, in order to effectuate a plea agreement, the court should exercise its discretion to determine whether to disregard the strike for purposes of determining the defendant's entitlement to presentence credits. (2 RT 12-13.) Concluding that appellant was not "really being punished" (2 RT 13) by a limitation on his ability to earn conduct credits, the trial court rejected appellant's request for additional conduct credit. It awarded him 348 days of credit, consisting of "232 actual days, plus 116 under 4019(b)(2) of the Penal Code." (2 RT 14.)

On appeal, appellant argued that because his serious felony allegation was not specifically admitted as part of his plea bargain, he was entitled to additional presentence credits under the version of section 4019 in effect at the time he was sentenced. In other words, he contended that since the allegation was neither pleaded nor proved for purposes of the Three Strikes law, he was eligible for a more favorable conduct credit accrual rate. On March 30, 2011, the Court of Appeal issued its published opinion finding that the trial court was vested with discretion under section 1385 to strike appellant's prior conviction for purposes of section 4019. It remanded the matter to the trial court for it to exercise that discretion. The appellate court stated its holding as follows:

> [W]here the plea bargain is silent concerning the extent to which such allegations [prior convictions] are to be given effect, and the defendant does not contend the plea bargain must be understood to categorically deny them any adverse effect, the question of their effect is vested in the discretion of the trial

court, which may disregard them for purposes of presentence credit if it concludes that it would be in the interest of justice to do so.

(Typed Opn. at 1.)

REASONS FOR GRANTING REVIEW

The Court of Appeal's decision to expand the scope of section 1385 to an uncharged sentencing factor will have significant adverse impacts on the criminal justice system. Many cases pending before this Court and decided by the Court of Appeal address the retroactive operation of January 25, 2010, amendments to section 4019.[4] Although the outcome of those cases will affect the volume of resentencing hearings necessitated by this decision, the Court of Appeal's opinion imposes an additional and significant burden on the judicial system. It appears that defendants who have prior serious felony convictions and who are either sentenced or in custody between January 25, 2010, and September 28, 2010,[5] now are entitled to a discretionary determination by a trial court as to what accrual rate applies to their conduct credit calculations.

The Court of Appeal's opinion is unsupported by this Court's well-established authority and abrogates the legislative intent clearly expressed in section 4019. This Court has never interpreted section 1385 to allow

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[4] See, e.g., *People v. Brown*, rev. granted June 5, 2010, S181963, and other cases held for this lead case.

[5] Effective September 28, 2010, the statute was again amended to restore the former three-for-two days conduct credit formula as to all prisoners. (Stats. 2010, ch. 426, § 2.) By its terms, the amendment applies only to offenses committed after its adoption. (*Id.* at subd. (g).) This creates a window of approximately eight months in which cases, such as this one, continue to be governed by the January 2010 version of the statute.

Further references to "section 4019" in this brief are to the January 25, 2010, version of the statute—the version in effect when appellant was sentenced.

trial courts to disregard uncharged factors which need not be pleaded and proven, nor has it described the award of custody credits as discretionary.

This Court should grant review to settle whether section 1385 vests trial courts with discretion to disregard an uncharged sentencing factor despite clear legislative intent to the contrary, and ensure uniformity of decisions across the state. Given the number of defendants affected by the Court of Appeal's published opinion, and the certainty that this issue will recur, this Court's review is important.[6]

I. THE COURT OF APPEAL'S OPINION IS INCONSISTENT WITH THE STATUTORY LANGUAGE AND THIS COURT'S PRECEDENT

Prior to January 25, 2010, section 4019 permitted a defendant to earn conduct credit at a maximum rate of two additional days for every four actually served. Thus, a prisoner would get six days of credit for every four actually served—a three-for-two ratio of credits for days served. (Former § 4019, subd. (f), Stats. 1982, ch. 1234, § 7.) The statute applied to all prisoners without restriction provided they complied with certain rules and regulations. (Former § 4019, subds. (b)-(d), Stats. 1982, ch. 1234.) Effective January 25, 2010, the statute was amended to grant some prisoners four days' credit for every two days served—a two-for-two ratio of credits for days served. (§ 4019, subds. (b)(1), (c)(1), (f); Stats. 2009, 3d ext. Sess., ch. 28, § 50.) Thus, section 4019, subdivision (f), provided:

> It is the intent of the Legislature that if all days are earned under this section, a term of four days will be deemed to have been served for every two days spent in actual custody, except that a term of six days will be deemed to have been served for every four days spent in custody for persons described in paragraph (2) of subdivision (b) or (c).

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[6] See, e.g., *People v. Koontz* (2011) 193 Cal.App.4th 151, 156, fn. 2 [suggesting there "is sure to be a flurry of defendants and petitioner's seeking" additional section 4019 credits should trial courts have discretion to disregard a prior conviction].

Subdivision (b)(2) and (c)(2) of section 4019 exempted from the more beneficial credit accrual rate prisoners who are required to register as sex offenders pursuant to section 290, et. seq., are committed for a serious felony, or have a prior conviction for a serious or violent felony. Section 4019 did not require a prisoner's status as a recidivist or sex offender registrant to be pleaded or proven, and the statute did not refer to section 1385.

The Court of Appeal held that to deny appellant the same presentence credits granted to prisoners who had not suffered a prior conviction constitutes an increase in punishment and requires that a qualifying prior conviction be pleaded and proved. (Typed Opn. at 4; 7, 10-11.) It further held that a trial court has discretion under section 1385 to dismiss a prior conviction for purposes of maximizing a defendant's presentence credits. (Typed Opn. at 13.) These conclusions are erroneous merit.

Only an "action" that must be pleaded and proven may be stricken by section 1385. (§ 1385; *In re Varnell* (2003) 30 Cal.4th 1132, 1137 ("*Varnell*").) In contrast, a "'sentencing factor' is 'a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence within the range authorized by the jury's finding that the defendant is guilty of a particular offense.' (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 494, fn. 19; accord *People v. Hernandez* (1988) 46 Cal.3d 194, 205 [defining 'sentencing facts'].)" (*Varnell, supra*, 30 Cal.4th at p. 1136, fn. 3.) Appellant's recidivist status within the meaning of section 4019, subdivisions (b)(2) and (c)(2), is a sentencing factor used to determine the rate of his accrual of conduct credits within the range prescribed by the statute. For purposes of section 4019, the prior conviction need not have been pleaded or proved. In other words, the historical fact of appellant's prior conviction was an uncharged sentencing factor, as opposed to an "action" for purposes of sections 4019 and 1385.

In *Varnell*, the defendant admitted a prior conviction that had been pleaded and proven for purposes of the Three Strikes law. (*Varnell*, *supra*, 30 Cal.4th at pp. 1135-1136.) The trial court struck the defendant's prior conviction for purposes of the Three Strikes law, but found that the prior conviction nevertheless exempted him from the benefits of Proposition 36 (§ 1210.1.) (*Id.* at p. 1136.) This Court agreed:

> The trial court's power to dismiss an "action" under section 1385 extends only to charges or allegations, and not to uncharged sentencing factors . . . such as those that are relevant to the decision to grant or deny probation (e.g., Cal. Rules of Court, rule 4.414(b)(1)) or to select among the aggravated, middle, or mitigated terms (e.g., *id.*, rule 4.421(b)(1)). Section 1202.1, like the deferred-entry-of judgment statutes, does not require the basis for a defendant's ineligibility be alleged in the accusatory pleading. In the absence of a charge or allegation, there is nothing to order dismissed under section 1385.

(*Id.* at p. 1138; cf. *People v. Orabuena* (2004) 116 Cal.App.4th 84, 94-95 [misdemeanor conviction based on charges and accusations in accusatory pleading in the same proceeding is an "action" within the meaning of section 1385 and can be stricken by trial court to avail defendant of Proposition 36's benefits].) "[D]ismissal of a prior conviction allegation under section 1385 'is not the equivalent of a determination that defendant did not in fact suffer the conviction.' [Citations.]" (*Varnell*, *supra*, 30 Cal.4th at p. 1138.)

"There is authority for finding an implied pleading and proof requirement in criminal statutes," but it does not apply here. (*Varnell*, *supra*, 30 Cal.4th at p. 1140, citing *People v. LoCicero* (1969) 71 Cal.2d 1186.) In *LoCicero*, the defendant's prior conviction resulted in complete ineligibility for probation, which constituted an increase in punishment. (*LoCicero*, *supra*, 71 Cal.2d at pp. 1192-1193.) In *Varnell*, this Court distinguished *LoCicero*, noting that the petitioner's prior conviction did not eliminate his opportunity for probation. (*Varnell*, *supra*, 30 Cal.4th at p.

1140; see also *People v. Dorsch* (1992) 3 Cal.App.4th 1346, 1350-1351 [court may consider unpleaded prior convictions for purposes of section 1203, subdivision (e)(4)].)

The Court of Appeal here relied on *LoCicero* (Typed Opn. at 10-11) and sought to distinguish *Varnell* and *Dorsch*. It stated that if the Legislature wanted to "*excuse* the prosecution from the [pleading and proof] burdens of [the *LoCicero*] rule it was perfectly free to say so." (AOB 8.) The Court of Appeal reasoned that *Varnell* and *Dorsch* "rest on the premise that the measures under scrutiny there did not increase the 'penalty,' i.e., punishment imposed on the defendant." (Typed Opn. at p. 10, fn. omitted.) The Court concluded that the same is not true here because limiting the rate at which a defendant with a prior conviction can earn custody credits increases punishment. (See Typed Opn. at 5-7.)

The Court of Appeal's erroneous interpretation of California Supreme Court authority undermines its conclusion that the Legislature had to state *explicitly* that section 4019 did not contain a pleading and proof requirement for prior convictions. Moreover, a favorable change in the accrual rate of conduct credit for some defendants does not constitute an amendatory statute lessening punishment. (See *In re Estrada* (1965) 63 Cal.2d 740, 744.) The change in accrual rate was adopted by the Legislature as part of measures aimed at addressing a fiscal emergency. Nothing about the change in the accrual rate suggests the Legislature believed punishments for criminal conduct were too harsh. Indeed, sentences for crimes were not altered. Also, conduct credits, unlike actual credits, are awarded to entice future good behavior and work performance. (*People v. Silva* (2003) 114 Cal.App.4th 122, 128.) Therefore, they are not part of a defendant's "punishment." It follows, then, that a limitation on the ability of some defendants to earn additional conduct credit does not increase their punishment.

Appellant, as a recidivist, earned conduct credit at the same rate *after* the January 25 amendments to section 4019 as he would have *before* the statute was amended. Prior to the amendments, he would have been entitled to six days of credit for every four days actually served. After the amendments, the same rate of accrual applied. Although he was awarded conduct credit at a less favorable accrual rate than defendants who did not have a prior conviction, that does not mean the amendments to section 4019 *increased his punishment*. Section 4019 is therefore more similar to section 1210.1 and, thus, this case is controlled by *Varnell*.

Because appellant was not required to admit the prior conviction as part of his plea agreement, the Court of Appeal concluded the plea agreement is ambiguous as to the parties' intentions regarding section 4019 credits. In its view, "the parties manifestly failed to reach any agreement on whether the stricken prior would affect defendant's presentence confinement credits. (Typed Opn. at 11-12.) On that premise, it concluded that "the plea agreement vested the trial court with discretion to determine whether the prior should be taken into account, or instead disregarded, in the determination of presentence confinement credits." (*Id.* at 13.) It remanded to the trial court to "permit [it] to exercise that discretion." (*Ibid.*)

The Court of Appeal mistakenly found trial court discretion to dismiss the prior conviction for purposes of calculating presentence conduct credit based on a silent plea bargain. Parties cannot bargain for a result that is not permitted by law, i.e, ignoring the strike in calculating credits. Thus, the plea is not "ambiguous," and there is no basis for remanding the matter to the trial court.

Even had appellant admitted the prior in his plea bargain, making it pleaded and proven for purposes of the Three Strikes law, that would be irrelevant with respect to the accrual rate of custody credits pursuant to

section 4019. In *Varnell*, defendant's prior conviction was pleaded and admitted, and the trial court struck it for purpose of the Three Strikes law. Nonetheless, this Court still held the fact of the prior conviction rendered the defendant ineligible for Proposition 36. (*Varnell, supra*, 30 Cal.4th at pp. 1135-1136.)

This case also is not similar to *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497. There, the statute—the Three Strikes law—*expressly* referred to section 1385 and required the prior conviction to be pleaded and proven. (*Id.* at pp. 520-521 [discussing section 667, subdivision (f)(2)'s express reference to section 1385].) Section 4019, however, does not—explicitly or implicitly—require the ineligibility factor of a prior conviction to be pleaded and proven. Nor does it refer to section 1385. Moreover, subdivisions (b)(2), (c)(2), and (f) of section 4019 clearly reflect a legislative intent that recidivists *not* benefit from the more favorable accrual rate. Accordingly, in reaching its conclusion that trial courts are vested with discretion to strike the fact of a prior conviction for purposes of awarding conduct credit, the Court of Appeal erred.

II. THE COURT OF APPEAL'S OPINION REPRESENTS AN UNPRECEDENTED EXPANSION OF THE SCOPE OF SECTION 1385, AND IMPOSES AN UNWARRANTED BURDEN ON THE JUDICIAL SYSTEM

The Court of Appeal's extension of section 1385 to an uncharged sentencing factor is without precedent and undermines authority determined by this Court. As this Court held stated in *Varnell*:

> [O]ur courts have refused to permit trial courts to invoke section 1385 to dismiss sanity proceedings or a plea of insanity [citation]; to reduce a verdict of first degree murder to second degree murder [citations]; to reduce the offense of conviction to an uncharged lesser related offense [citations]; or to enter a judgment of acquittal [citation]. A ruling that section 1385 could be used to disregard sentencing factors, which similarly are not included as offenses or allegations in an accusatory pleading, would be unprecedented.

(*Varnell, supra*, 30 Cal.4th at p. 1137.) For this reason as well, the Court of Appeal's opinion is erroneous and will lead to inequitable results.

The Court of Appeal's opinion renders the award of conduct credits a discretionary determination that can be a term of a negotiated plea or a decision left to the discretion of a trial judge. This result would alter the fundamental purpose and operation of conduct credits. The award of credits is not discretionary, but is an automatic consequence of a conviction. (See § 2900.5; *People v. Sage* (1980) 26 Cal.3d 498, 508-509 [the computation of the additional conduct credit based upon a judgment awarding custody credit should be a ministerial function]; *People v. Aguirre* (1997) 56 Cal.App.4th 1135, 1139 ["the calculation of credits is purely mathematical"]; *People v. Jack* (1989) 213 Cal.App.3d 913, 916-917 [trial courts exercise no discretion when determining the days of presentence custody]; *People v. Shabazz* (1985) 175 Cal.App.3d 468, 473 ["whether appellant was entitled to credit under the facts found was a question of law as to which the court has no sentencing discretion"].)

By placing an uncharged sentencing factor within the ambit of section 1385, the Court of Appeal has created uncertainty as to whether the other exempting factors in section 4019 need be pleaded and proven. Although prior serious or violent felony convictions are commonly pleaded and proven where the Three Strikes law is implicated, it is less likely that a defendant's status as a section 290 sex offender registrant would appear in an information, or be admitted by a defendant. The Court of Appeal's reasoning, if not its holding, seems to require prosecutors to allege and prove this fact in order to deny defendants the accelerated credit accrual rate under section 4019.

In sum, review of this case is necessary to cure the Court of Appeal's error, clarify the bounds of a trial court's discretion under section 1385 to strike or disregard uncharged sentencing factors, and prevent an unnecessary and unwarranted burden on our judicial system.

CONCLUSION

Accordingly, respondent respectfully requests that the petition for review be granted.

Dated: May 3, 2011

Respectfully submitted,

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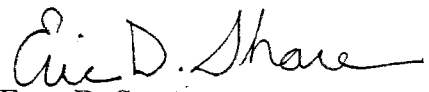

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CERTIFICATE OF COMPLIANCE

I certify that the attached PETITION FOR REVIEW uses a 13 point Times New Roman font and contains 3,306 words.

Dated: May 3, 2011

KAMALA D. HARRIS
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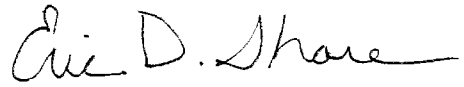

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EXHIBIT A

Filed 3/30/11

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RICARDO ANTONIO LARA, Defendant and Appellant.	H036143 (Santa Clara County Super. Ct. No. E1007527)

The question presented here is whether a defendant's credit for presentence confinement can be reduced by virtue of a prior conviction when the allegations concerning that conviction are "struck" and "dismissed" as part of a plea bargain. We hold that where the plea bargain is silent concerning the extent to which such allegations are to be given effect, and the defendant does not contend that the bargain must be understood to categorically deny them any adverse effect, the question of their effect is vested in the discretion of the trial court, which may disregard them for purposes of presentence credit if it concludes that it would be in the interests of justice to do so. Here the court appeared to conclude that it was obligated to impose a reduction in presentence credits on the ground that defendant was not "really being punished" by the credit reduction. We reject this premise. We will therefore remand with directions to consider whether, in the trial court's discretion, defendant should be allowed credits calculated without regard to the prior conviction.

BACKGROUND

According to the probation report, defendant and a companion were involved in an altercation outside a Sunnyvale bar resulting in injuries to a third person. A complaint was filed charging defendant and his companion with assault by means of force likely to produce great bodily injury. It was alleged that defendant personally inflicted great bodily injury (Pen. Code, §§ 12022.7, subd. (a), 1203, subd. (e)(3)) and had previously been convicted of first degree burglary (Pen. Code, §§ 667, subds. (b)- (i), 1170.12, 667, subd. (a)). The probation report stated that defendant had sustained these convictions, and recounted his description of the underlying conduct.

Almost six months after his arrest in this matter, defendant entered a plea of no contest to the charged offense and admitted certain probation violations as part of a plea bargain. He was not asked to, and did not, admit the allegations concerning a prior conviction. The agreement was reflected in a "Plea Form, With Explanations and Waiver of Rights," which recited, as pertinent here, that defendant would receive a sentence of two years in prison and that the "GBI enhancement & Strike allegation will be struck." The prosecutor stated the latter provision slightly more broadly at the change-of-plea hearing: "the 12022.7 [great bodily injury enhancement] will be dismissed and the 667(a), Prop A [*sic*; "8"] prior, will be dismissed and the strike prior."

At sentencing the court alluded to an unreported "discussion about the credits," and asked defense counsel if she wished to "put something on the record." She replied, "My understanding is that you would not be giving him 50 percent credits pursuant to [former Penal Code section] 4019 [(§ 4019)], and we would object to that on the basis that my understanding is he would not be receiving 50 percent credits because of the strike prior, which was pled but never proven. It was dismissed and not pled and then

struck." The court asked, "How was it dismissed? Under what?" Defense counsel replied, "Motion of the district attorney," and the prosecutor added, "Plea bargain."[1]

The court and counsel then discussed the soundness and applicability of *People v. Jones* (2010) 188 Cal. App. 4th 165, review granted December 15, 2010, S187135, which had been decided some three weeks earlier. The Court of Appeal there held that when the trial court granted a motion to dismiss a strike prior under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, in order to effectuate a plea agreement as to maximum punishment, the court should exercise its discretion to determine whether to also disregard the strike for purposes of determining the defendant's entitlement to pre-sentence credits. Relying primarily on this decision, defense counsel urged the court below to disregard defendant's strike for purposes of presentence credits. The prosecutor countered that the case was wrongly decided, was likely to be challenged in the Supreme Court, and should not be followed. Stating that defendant "isn't really being punished," the trial court ruled in favor of the prosecution, allowing 348 days of credit, consisting of "232 actual days, plus 116 under 4019(b)(2) of the Penal Code."

This timely appeal followed.

DISCUSSION

A. *Introduction*

Prior to January 25, 2010, a defendant held in county jail prior to sentencing would typically earn six days' credit (i.e., reduce his remaining time by six days) for each

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[1] In fact no formal motion to dismiss was ever made; nor did the court ever make an oral order of dismissal. Such an order is implicit, however, in the court's acceptance of the plea bargain. Moreover the minute order of the sentencing hearing appears to reflect an order striking the enhancement allegations, albeit under the heading "Plea Conditions." A checkbox entitled "Dismissal/Striking" is marked, with the word "Dismissal" lined out and this handwritten text inserted: "@ this time: Alleg: PC 667(a), PC 667 (b)-(i)/1170.12, PC 12022.8(A)." Similarly, the abstract of judgment recites, "Striking PC 12022.7(a), PC 667(b)-(i)/1170.12."

four days actually served—in effect, a three-to-two ratio of credits allowed for days served. (Former Pen. Code, § 4019, subds. (b), (c), (f); Stats. 1982, ch. 1234, § 7.) Effective January 25, 2010, the statute was amended to grant some prisoners four days' credit for every two days served—in effect, a two-to-one ratio. (Former Pen. Code, § 4019, subds. (b)(1), (c)(1), (f); Stats. 2009 3d Ext. Sess., ch. 28, § 50.) Some classes of prisoners, however, continued to accrue credits at the previous three-for-two rate. (*Id.*, subds. (b)(2), (c)(2), (f).) These included any prisoner who "ha[d] a prior conviction for a serious felony, as defined in section 1192.7." (*Id.*, subds. (b)(2), (c)(2).)[2]

Defendant contends that to deny him the presentence credits granted to other prisoners constitutes an increase in punishment which requires that the triggering cause—his having sustained a qualifying prior conviction—be pleaded and proved. This was the reasoning adopted in *Jones*, *supra*. However, between the filing of defendant's initial brief and the filing of the state's response, the Supreme Court granted review in that case, rendering the decision not citable as authority. (See Cal. Rules of Court, rule 8.1115(a).) Nonetheless, both parties continue to frame the issues before us in terms of the rationale on which that decision rested, which may be reduced to the following propositions: (1) to deny a defendant custody credits allowed to other prisoners, by virtue of a prior conviction, is to impose increased or additional punishment on account of that prior conviction; (2) when a statute imposes a additional punishment based upon a prior conviction, the prior conviction must be pleaded and proved before the increased punishment can be imposed; and (3) where the prior is pleaded and proved, the trial court

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[2] Effective September 28, 2010, the statute was amended to restore the former three-for-two formula as to all prisoners. (Stats. 2010, ch. 426, § 2.) By its terms, however, the amendment applies only to offenses committed after its adoption. (*Id.*, subd. (g).) This created a window of approximately eight months that would continue to be governed by the January 2010 version of the statute. This matter falls within that window.

has the discretionary power to strike it for purposes of calculating presentence confinement credits.

We now address these propositions without regard to the *Jones* decision.

B. *Increased Punishment*

The trial court refused to grant defendant the more favorable credit formula because it did not believe he was "really being punished" by the application of a less favorable one. But when the state relies on a prior conviction to allow a defendant fewer credits than he would other receive toward the completion of his sentence, it is necessarily increasing his punishment by virtue of that conviction. If two defendants spend the same amount of time in jail before sentencing, and one has no prior convictions while the other has a strike prior, then under the January 2010 version of section 4019 the second defendant will remain in prison after the first has been released. If that is not additional punishment, we don't know what is.

Respondent insists that defendant has suffered no increase in punishment by comparison to what would have happened *under the prior version* of section 4019.[3] But that is not a relevant comparison. The question is not the rate at which defendant might have earned credit under a prior state of the law, but the rate at which he would have earned credit, *without the prior conviction*, under the law in effect when he was sentenced. His objection is not that the amendment to the statute increased his punishment over that of past defendants in his position—that would not be true. His

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[3] Respondent writes, "*Jones* erroneously conflated 'increased' punishment with the lack of ability for prisoners with prior serious or violent felonies to earn additional credits at a faster rate than they could have prior to the amendment. Appellant, and others like him who suffered from prior felony convictions, is in the same position after the amendment to section 4019 as before . . . . That the Legislature has seen fit to increase the rate that some prisoners could earn credit, but not including those prisoners with serious or violent felonies, does not show any increase in punishment as to the latter."

objection is that the amendment attached a new punitive consequence to his prior conviction so that he suffered punishment not inflicted on prisoners without such a prior. That seems inescapably true. The additional punishment can be easily and precisely quantified. If not for the prior conviction, the trial court would have been compelled to allow defendant credits of 232 actual days plus 232 conduct and work-time. Instead the court allowed "232 actual days, plus 116 under 4019(b)(2) of the Penal Code." The direct and inexorable effect of this decision was to imprison defendant for 116 additional days beyond the time he would have served without the strike prior. This was unquestionably an additional "punishment."

Respondent attempts to draw support for a contrary conclusion from *People v. Van Buren* (2001) 93 Cal.App.4th 875, 880 (*Van Buren*) (disapproved on another point in *People v. Mosby* (2004) 33 Cal.4th 353, 365, fn. 3), which was concerned not with presentence credit under section 4019 but post-sentence credits earned in prison under Penal Code section 2933.1 (§ 2933.1). In the paragraph quoted by respondent, the court stated that section 2933.1 "is not a sentencing statute" but a legislative attempt to "provide an incentive for some prisoners to work towards rehabilitation, while recognizing the need to protect society by delaying parole for violent or serious felons—those that by their past histories have exhibited the greatest current danger to the citizenry." (*Van Buren, supra*, 93 Cal.App.4th at p. 880.) Thus taken out of context, this statement posits a false exclusivity as between a rehabilitative or protective measure, on the one hand, and the infliction of punishment, on the other. Incarceration in a state prison may serve a rehabilitative and protective function, but it is no less "punishment" for that. And the *Van Buren* court apparently did not mean to suggest otherwise. In a paragraph following the one respondent quotes, the court acknowledged the punitive character of reduced credits, observing that section 2933.1 "complements the purpose of the Three Strikes law to ensure longer prison sentences and *greater punishment* for those

who commit serious or violent felonies." (*Van Buren*, *supra*, 93 Cal.App.4th at p. 880, italics added.)

Respondent also cites *In re Pacheco* (2007) 155 Cal.App.4th 1439, which held that despite the trial court's granting of a *Romero* motion and striking a prior, prison authorities properly allowed the defendant a reduced rate of credit under section 2933.1 because, as the reviewing court found, "the sentencing court struck only the punishment for the GBI enhancement, and not the enhancement in its entirety." (*Id.* at p. 1442.) The court noted that Penal Code section 1385 (§ 1385), subdivision (c)(1), provides that whenever a trial court has the power to " 'to strike or dismiss an enhancement, the court may instead strike the additional punishment for that enhancement.' " (See *Pacheco, supra*, 155 Cal.App.4th at p. 1442, fn. 2.) The court did not squarely address the question of how this distinction should be applied when more than one "additional punishment" flows from an enhancement. Nor need we attempt to parse the decision in that light because the court that rendered that decision has recently expressed agreement with our view that the January 2010 amendment to section 4019 "mitigates punishment by reducing the period of imprisonment. [Citation.] A prisoner released from prison one day sooner has been punished one day less in prison. [Citations.]" (*People v. Koontz* (Mar. 2, 2011, B224697, B224701) ___ Cal.App.4th ___ [p. 2] (*Koontz*).) It follows that the denial of credits at issue here constitutes additional punishment occasioned by defendant's prior conviction.

C. ***Requirement of Pleading and Proof***

Defendant contends that if the trial court relied on the strike prior to impose additional punishment—as it obviously did—the prior had to be pleaded and proven, and that one or both of these requirements was not satisfied. The asserted requirement is drawn from *People v. Lo Cicero* (1969) 71 Cal.2d 1186, 1188 (*Lo Cicero*), which held that a trial court erred by finding a defendant categorically ineligible for probation based upon a prior conviction not charged in the accusatory pleading or formally found to have

been sustained. The court held that the "denial of opportunity for probation" was "equivalent to an increase in penalty," which triggered the following rule: " '[B]efore a defendant can properly be sentenced to suffer the increased penalties flowing from . . . [a] finding . . . [of a prior conviction] the fact of the prior conviction . . . must be charged in the accusatory pleading, and if the defendant pleads not guilty thereto the charge must be proved and the truth of the allegation determined by the jury, or by the court if a jury is waived.' " (*Id.* at pp. 1192-1193, quoting *People v. Ford* (1964) 60 Cal.2d 772, 794, overruled on another point in *People v. Satchell* (1971) 6 Cal.3d 28, 40-41.)

Respondent reads *Lo Cicero* as implying a pleading-and-proof requirement from the statute there at issue, which declared the defendant categorically ineligible for probation if he had sustained a qualifying prior. According to respondent, no similar construction can be placed upon the statute here. But none of respondent's arguments are peculiar to the present statute. They would apply equally to the statute at issue in *Lo Cicero*. Moreover the holding there was based less on the terms of the statute imposing the additional punishment than on the code's "detailed procedure for the charging, trying, and finding of previous felony convictions." (*Lo Cicero*, *supra*, 71 Cal.2d at p. 1192.) That rule of that case has now been in effect for over 40 years. If the Legislature wanted to *excuse* the prosecution from the burdens of that rule it was perfectly free to say so. In the meantime it is not for us to undermine a decision that seems entirely consistent not only with sound procedural principles but basic fairness.

Respondent contends that the more applicable authority is *In re Varnell* (2003) 30 Cal.4th 1132 (*Varnell*), which concerned the trial court's power, under section 1385, to disregard *sentencing factors* that would render a defendant ineligible for the mandatory probation and drug treatment prescribed by the Substance Abuse and Crime Prevention Act of 2000 (Proposition 36). The pleading there charged a drug offense and alleged two enhancements arising from a prior strike conviction. The defendant lodged a request to "dismiss the 'strike' allegation, so as to avoid the 'Three Strikes' law," and a separate

request to "disregard 'the prior or count being used to disqualify [him] from Proposition 36.' " (*Id.* at p. 1135.) The trial court granted the first request but "found that the *fact* of the prior conviction and resulting prison term rendered him 'ineligible in this court's opinion for Prop[osition] 36 treatment.' " (*Ibid.*; italics in original.) The Court of Appeal concluded that the trial court had the power under section 1385 "to disregard 'historical facts' in determining a defendant's eligibility under Proposition 36." (*Id.* at p. 1136.) On that basis, it issued a writ ordering the trial court to reconsider the sentence in light of the discretion thus afforded it. The Supreme Court reversed the judgment of the Court of Appeal. It reasoned that section 1385 empowers trial courts to dismiss only " 'a criminal action, or a part thereof.' " (*Id.* at p. 1137, quoting *People v. Hernandez* (1988) 46 Cal.3d 194, 524 (*Hernandez*).) "[A]ction" had been consistently interpreted to mean " 'individual charges and allegations in a criminal action.' " (*Ibid.*, quoting *Hernandez*, *supra*, 46 Cal.3d at pp. 521-522, 523.) It had never been "extended . . . to include mere sentencing factors." (*Ibid.*)

The court also discussed the limited effect of an order dismissing allegations of prior convictions: "[D]ismissal of a prior conviction allegation under section 1385 'is not the equivalent of a determination that defendant did not in fact suffer the conviction.' [Citations.] 'When a court strikes prior felony conviction allegations in this way, it " 'does not wipe out such prior convictions or prevent them from being considered in connection with later convictions.' " ' [Citations.] Thus, while a dismissal under section 1385 ameliorates the effect of the dismissed charge or allegation, the underlying facts remain available for the court to use. Hence, the trial court's dismissal of the 'strike' allegation in this case did not wipe out the fact of the prior conviction and the resulting prison term that made petitioner ineligible under subdivision (b)(1) of [Penal Code] section 1210.1." (*Varnell, supra*, 30 Cal.4th at p. 1138, fn. omitted.)

The *Varnell* court distinguished *Lo Cicero* on the ground that it involved a statute imposing a *categorical ineligibility*, whereas the statute in *Varnell* rendered the defendant

ineligible only for probation under Proposition 36, while leaving him eligible for probation under another statute. (*Varnell, supra*, 30 Cal.4th at p. 1138.) The court impliedly limited *Lo Cicero* to cases "where the prior conviction absolutely denied a defendant the opportunity for probation." (*Id.* at p. 1140.) It drew support for this approach from *People v. Dorsch* (1992) 3 Cal.App.4th 1346, 1350 (*Dorsch*), which held *Lo Cicero* inapplicable—and the pleading of a prior conviction unnecessary—when the effect of the prior was to make the defendant *presumptively*, but not utterly, ineligible. The apparent rationale of the case is that a categorical disqualification from probation "eliminate[s] the alternative to imprisonment" whereas a presumptive ineligibility "merely ma[kes] probation less likely" and is thus " 'not the equivalent of an increase in penalty.' " (*Varnell, supra*, 30 Cal.4th at p. 1141, quoting *Dorsch, supra*, 3 Cal.App.4th at p. 1350.) Similarly, Proposition 36 "simply rendered [the defendant] unfit for probation under a particular provision," and as such was "not the equivalent of an increase in penalty." (*Id.* at p. 1141.)

Both *Varnell* and *Dorsch* rest on the premise that the measures under scrutiny there did not increase the "penalty," i.e., punishment, imposed on the defendant.[4] They increased the *likelihood* that the defendant would suffer a more severe penalty (imprisonment instead of probation), but they did not increase the severity itself. The same cannot be said here. As we have already observed, the direct consequence of the trial court's taking notice of defendant's strike prior was to increase the length of time he would in fact spend in prison. We therefore conclude that the case is governed by *Lo Cicero* and not by *Varnell* and *Dorsch*. It follows that the prior convictions had to be

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[4] The *Dorsch* court also observed, in words the Supreme Court found "equally applicable here," that " 'when a pleading and proof requirement is intended, the Legislature knows how to specify the requirement.' " (*Varnell, supra*, 30 Cal.4th at p. 1141, quoting *Dorsch, supra*, 3 Cal.App.4th at p. 1350.) Of course, this reasoning would wholly abrogate *Lo Cicero*, which the Supreme Court exhibited no willingness to do.

pleaded and proved before they could operate to limit defendant's pre-sentence custody credits.

D. *Application*

This brings us to the question whether the strike prior was pleaded and proved for purposes of this requirement. In this respect the case differs from *Lo Cicero* in two crucial respects. The defendant there was convicted at a jury trial, and the prior conviction had never been mentioned in any accusatory pleading. (*Lo Cicero, supra*, 71 Cal.2d 1186, 1192.) Here the judgment was the product of a plea agreement specifying that the enhancement alleging the prior conviction would be dismissed or "struck." The question is what effect to give this provision of the plea bargain in determining credits under former section 4019. The code specifically contemplates that allegations making up an enhancement may be stricken *for some purposes and not others*. As the statute puts it, the court may strike or dismiss the enhancement, or it "may instead strike the additional punishment for that enhancement." (§ 1385, subd. (c)(1).) But, as illustrated by the cases discussed above, the allegations making up an enhancement may support various kinds of "additional punishment" beyond the additional term of imprisonment typically described in an enhancement. To strike the enhancement *in toto* would presumably eliminate *all* of these additional punishments, because it would require that the pleading be read as if the allegations supporting them were wholly absent. At the same time, the court's power to strike only the "additional punishment" presumably includes the power to strike some but not all of the punitive consequences flowing from those allegations.

In this context, the critical feature of this case is the ambiguity of the parties' plea agreement. Had they expressed an intent only to strike the additional prison term flowing from the strike prior, there would be no issue. Nor would there be much to debate if they had specified that they intended for defendant to receive presentence credit at the two-for-one rate rather than the three-for-two rate otherwise flowing from the prior, or that the

prior was stricken for all purposes. Alternatively, they could have agreed to reserve to the trial court the discretion it would have had, as to any or all of these effects, in the absence of any plea agreement. Instead they simply stated that the relevant allegations were "struck" or "dismissed."

In *Koontz*, *supra*, ___ Cal.App.4th at ___, the court dealt with this problem by invoking *People v. Harvey* (1979) 25 Cal.3d 754, 758 (*Harvey*), which held that where a plea bargain called for the dismissal of a prior conviction enhancement, it implicitly reflected an " 'understanding (in the absence of any contrary agreement) that defendant will suffer no adverse sentencing consequences by reason of the facts underlying, and solely pertaining to, the dismissed [prior conviction enhancement].' " However the court then held that the trial court retained "the discretion to strike a prior serious felony conviction to afford maximum presentence conduct credits." (*Koontz*, *supra*, ___ Cal.App.4th ___ [p.4].) This conclusion is understandable, despite the invocation of *Harvey*, *supra*, 25 Cal.3d 754, on the following rationale: If the parties had explicitly agreed to strike the prior for purposes of maximizing the defendant's presentence credits, the trial court would have had to choose between honoring that agreement and giving the defendant an opportunity to withdraw his plea. The defendant there, however, had apparently not objected to the trial court's action as a violation of the plea bargain, and had not sought relief on that ground. This was an implied concession that, *Harvey* notwithstanding, the plea agreement allowed the trial court discretion to maximize or not maximize the presentence credits. Since the court had not believed it had any discretion, a remand was warranted for the limited purpose of allowing the court an opportunity to do so.

Here too the parties manifestly failed to reach any agreement on whether the stricken prior would affect defendant's presentence confinement credits. Under *Harvey* the agreement might be deemed to include a provision disregarding the prior for these purposes, but that argument was not presented to the trial court and has not been urged

upon us. We therefore conclude that the plea agreement vested the trial court with discretion to determine whether the prior should be taken into account, or instead disregarded, in the determination of presentence confinement credits. The matter will be remanded to permit the court to exercise that discretion.

DISPOSITION

The judgment is reversed with respect to the calculation of credits. On remand the trial court will exercise its discretion to decide whether its order striking enhancements should be applied so as to maximize defendant's presentence credits under the version of section 4019 applicable to this case. If it so decides, it shall modify the judgment accordingly and transmit an amended abstract of judgment to correctional authorities. In all other respects the judgment is affirmed.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.

Trial Court:	Santa Clara County Superior Court No.: E1007527
Trial Judge:	The Honorable Kenneth P. Barnum
Attorney for Defendant and Appellant Ricardo Antonio Lara:	William M. Robinson under appointment by the Court of Appeal for Appellant
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Ricardo Lara**
No.: **S1**_____

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 that same day in the ordinary course of business.

On May 3, 2011, I served the attached **PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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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 3, 2011, at San Francisco, California.

Pearl Lim
Declarant


Signature

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