In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

RICARDO ANTONIO LARA,

Defendant and Appellant.

Case No. S192784

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

RESPONDENT'S OPENING BRIEF ON THE MERITS

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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?

INTRODUCTION

In 2009, the Legislature increased the presentence conduct credits available to most convicted offenders, but denied the increase to certain others, including those with a prior serious or violent felony conviction. (Pen. Code, § 4019.)[1] The increase became effective on January 25, 2010. Among other things, that meant some prisoners could earn presentence conduct credits at a faster rate, while those like appellant with a prior serious felony conviction continued to earn presentence conduct credits at the old rate before the amendment.

In this case, the Court of Appeal decided that a prior serious felony conviction making presentence conduct credits available at the old rate is additional punishment that must be pleaded and proved.

Extending its holding, the court further decided when a prior serious felony conviction is pleaded but struck pursuant to a plea bargain that is silent as to its effect on conduct credits under former section 4019, the trial

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[1] Further undesignated statutory references are to the Penal Code. Effective September 28, 2010, the Legislature again amended section 4019 to restore the conduct credit accrual rate as it existed before January 25, 2010. (See Senate Bill 76, Stats. 2010, ch. 426, § 2 ("S.B. 76").) This latest amended version of the statute applies to prisoners who committed crimes *after* September 28, 2010, and is not applicable to this case. (§ 4019, subd. (g).) Since this case involves the prior amended version of section 4019 that became effective January 25, 2010, that is no longer in effect, we refer to it henceforth as "former section 4019."

court can exercise discretion to grant the maximum possible presentence custody credits as though the prior never existed, if the court concludes that it is in the interests of justice under section 1385.[2] On that basis, the appellate court remanded so that the trial court could consider whether its order striking the prior conviction should be applied to award appellant the maximum allowable conduct credits.

Neither of those constituent holdings by the appellate court withstands analysis. Former section 4019 contained no pleading and proof requirement. Nor does case authority support a conclusion that the Legislature's decision to retain the availability of conduct credit at the same rate as before for persons with prior serious felony convictions constituted an increase in punishment that must have been pleaded and proved.

This court's precedent also compels the conclusion that section 1385's dismissal authority is inapplicable in the present case. Former section 4019 expressed the Legislature's specific intent that recidivists of the designated classes were not entitled to presentence conduct credits at the higher rate made available to nonrecidivist prisoners. Nothing in the statute authorized trial courts to disregard a defendant's status in order to defeat this clearly stated intent. An expansion of section 1385 dismissal authority to facts that constitute sentencing factors effecting the duration of imprisonment would threaten unacceptable disparity of terms and lead to anomalous results.

Because trial courts are not vested with discretion to ignore a defendant's recidivist status in awarding presentence conduct credits, the Court of Appeal's recognition of such discretion should be reversed and the judgment of the trial court affirmed.

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[2] Section 1385 provides in relevant part: "(a) The judge . . . may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed."

STATEMENT OF THE CASE

According to the probation report, on February 11, 2010, appellant and a companion were involved in an altercation outside a bar that resulted in serious injuries to a third person. Appellant and his companion fled the scene, but the police apprehended them shortly thereafter. (CT 24-25.)

On February 18, 2010, the Santa Clara County District Attorney filed a complaint charging appellant and his companion with assault by means of force likely to produce great bodily injury. (§ 245, subd. (a)(1).) As enhancements, the complaint alleged that appellant personally inflicted great bodily injury (§§ 12022.7, subd. (a), 1203, subd. (e)(3)) and previously had been convicted of first degree burglary, a strike (§§ 667, subds. (b)-(i), 1170.12, 667, subd. (a)). (CT 2-4; see also CT 28 [description of appellant's criminal history].)

On August 3, 2010, appellant pleaded no contest to the assault charge and admitted probation violations in a plea bargain. (CT 12-18 [plea form], CT 19 [minute orders]; 1 RT 3-6.) The plea agreement was reflected in a "Plea Form, With Explanations and Waiver of Rights," which recited, as pertinent here, that appellant would receive a sentence of two years in prison and that the "GBI enhancement & Strike allegation will be struck." (CT 13.) At the change of plea hearing, the prosecutor described the plea to the court: "Mr. Lara will be pleading guilty to the 245(a)(1) . . .; the 12022.7 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 alluded to an unreported "discussion about the credits," and asked defense counsel if she wished to "put something on the record." (2 RT 10.) Counsel 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 that 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.)[3]

The court and counsel then discussed *People v. Jones*, formerly reported at (2010) 188 Cal.App.4th 165, and review granted December 15, 2010, S187135, which had been decided shortly before the sentencing hearing. *Jones* had held that when the trial court granted a motion to dismiss a strike 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 discretion to determine whether also to disregard the strike for purposes of determining the defendant's entitlement to presentence conduct credits under former section 4019. In light of *Jones*, defense counsel urged the trial court to disregard appellant's prior serious felony in determining presentence custody credits. (2 RT 10-11, 12-13.) The prosecutor argued that *Jones* was incorrect and should not be followed pending possible further review by this court. (2 RT 11-12.) Rejecting appellant's claim that former section 4019 "punished" him by not increasing the rate at which he could have earned presentence conduct

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[3] The Court of Appeal observed: "In fact no formal motion to dismiss was ever made; nor did the trial court ever make an oral order of dismissal." (Typed opn., p. 3, fn. 1.) It further stated that an order was "implicit . . . in the [trial] 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, PC 667(b)-(i)/1170.12.'" (*Ibid.*; see also CT 43 [minute orders] and CT 44 [abstract of judgment].)

credits, the trial court awarded conduct credits at the preexisting rate in view of appellant's prior serious felony conviction. (2 RT 13-14.) Thus, the trial court sentenced appellant to two years in prison and allowed 348 days of credit consisting of "232 actual days, plus 116 under [former section] 4019(b)(2) of the Penal Code." (2 RT 14.)[4]

Appealing to the Court of Appeal for the Sixth District, appellant argued that the dismissal of the prior conviction allegation as part of the plea bargain entitled him to the accelerated presentence conduct accrual rate in former section 4019. In an opinion for the court, Presiding Justice Rushing reasoned that "when the state relies on a prior conviction to allow a defendant fewer credits than he would other[wise] receive toward the completion of his sentence, it is necessarily increasing his punishment by virtue of that conviction." (Typed opn., p. 5) On that premise, the court held first that pleading and proof of the fact causing the increased punishment is necessitated because "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." (*Id.* at p. 10.) It held second that under section 1385 the court is entitled to strike the "additional punishment," reasoning that when a "plea bargain is silent concerning the extent to which [prior conviction] 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." (*Id.* at p. 1; see also *id.* at pp. 11-13.) Since appellant had not advanced an argument that the plea bargain should be

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[4] According to a May 31, 2011, letter from appellant's counsel to this court, appellant has been paroled.

construed as dismissing the prior for purposes of calculating conduct credits, the Sixth District remanded the matter with directions to the trial court to consider whether, in its discretion, appellant should be allowed credits calculated "without regard to the prior conviction." (Typed opn., p. 1; see also *id.* at p. 13.)

SUMMARY OF ARGUMENT

Former section 4019 denied to serious and violent offenders an opportunity to earn presentence conduct credits at the increased rate allowed to other prisoners during part of 2010. The lack of an opportunity to earn conduct credit at the higher rate did not increase the punishment of recidivist prisoners. The contrary view rests upon a false equation of the offender's "punishment," i.e., the duration of incarceration, with that of "penalty," i.e., the sentence. Nothing in former section 4019 increased appellant's penalty. Since appellant was entitled to earn exactly the same amount of presentence conduct credits before the enactment of former section 4019 as he was while the statute was in force, his punishment did not increase either.

It is undisputed that former section 4019 contained no provision that required appellant's recidivist status to be pleaded and proved in the complaint. Because the statute did not increase appellant's punishment in that his opportunity to earn conduct credits at the same rate was not reduced, neither was there an *implicit* pleading and proof requirement respecting the trial court's determination of the appropriate conduct credits rate in this case.

The appellate decision below expanding trial courts' section 1385 dismissal authority is contrary to *In re Varnell* (2003) 30 Cal.4th 1132 (*Varnell*). *Varnell* makes clear that the limited circumstances in which this court has found an implied pleading and proof requirement and related section 1385 dismissal authority are not present in former section 4019.

Nor did the award of presentence conduct credits under former section 4019 involve section 1385 discretion to strike a defendant's prior conviction. Indeed, such discretion expressly contravenes the Legislature's intention to exclude recidivists from the higher conduct credits rate. It follows that appellant could not have bargained the effect that striking his prior conviction had on the presentence custody credits to which he was otherwise entitled. Under former section 4019, appellant could not bargain for his recidivist status to be ignored because the trial court had no such discretion. Any contrary conclusion would unacceptably lead to disparities in terms and the unprecedented "striking" of sentencing factors. Since no discretion exists to be exercised, the trial court's judgment should be affirmed.

ARGUMENT

TRIAL COURTS ARE NOT VESTED WITH DISCRETION TO IGNORE A DEFENDANT'S RECIDIVIST STATUS IN AWARDING PRESENTENCE CONDUCT CREDITS

No statutory or case authority vests trial courts with discretion to ignore a defendant's recidivist status in order to award the maximum allowable presentence conduct credits. The conclusion below that trial courts implicitly possess such discretion is unsupported by logic. Moreover, it is inconsistent with statutory language and this court's precedent.

A. Statutory Background—Section 4019 and Recent Amendments Thereto

Prior to 2010, section 4019 authorized prisoners to earn presentence worktime and good-behavior credits (collectively, "conduct credits")[5] at a

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[5] "'Conduct credit' collectively refers to worktime credit pursuant to section 4019, subdivision (b), and to good behavior credit pursuant to (continued...)

maximum rate of two additional days for every four days served in local custody. It then provided: "a term of six days will be deemed to have been served for every four days spent in actual custody." (§ 4019, subd. (f); Stats. 1982, ch. 1234, § 7.) That credit rate applied to any prisoner who had not refused to perform assigned labor or to comply with reasonable rules and regulations while in local custody. (§ 4019, subd. (d), Stats. 1982, ch. 1234, § 7.)

In October 2009, the Legislature passed Senate Bill 18 ("S.B. 18"). S.B. 18 was effective January 25, 2010. Among other things, it amended section 4019 to increase the rate at which certain prisoners could earn conduct credits. Instead of accruing six days for every four actually served, it permitted qualifying defendants to earn credit at a rate of four days for every two actually served. (Former § 4019, subds. (b)(1), (c)(1), (f), as amend. by Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28, § 50.)

S.B. 18 excluded certain defendants from earning conduct credits at the accelerated rate. The Legislature determined that a defendant required to register as a sex offender, who had committed a serious felony, or who had a prior conviction for a serious or violent felony could only earn conduct credits at the prior rate of six days for every four days actually served. (Former § 4019, subds. (b)(2) and (c)(2).) Specifically, former section 4019, subdivisions (b)(2), provided:

> If the prisoner is required to register as a sex offender pursuant to Chapter 5.5 (commencing with section 290), was committed for a serious felony, as defined in Section 1192.7, or has a prior conviction for a serious felony, as defined in Section 1192.7, or a violent felony, as defined in Section 667.5, for each six day period in which the prisoner is confined in or committed to a

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(...continued)
section 4019, subdivision (c). [Citation.]" (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3.)

> facility as specified in this section, one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has refused to satisfactorily perform labor as assigned by the sheriff, chief of police, or superintendent of an industrial farm or road camp.

Subdivision (c)(2) retained the requirement that the prisoner comply with the reasonable rules and regulations of local custody. Subdivision (f) stated: "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 actual custody for persons described in paragraph (2) of subdivision (b) or (c).*" (Italics added.)

B. Because Former Section 4019 Did Not Increase Punishment, Pleading and Proof of a Prior Violent or Serious Felony Was Not Required

In finding section 1385 discretion to disregard appellant's serious felony—despite subdivisions (b)(2) and (c)(2) of former section 4019—the Court of Appeal found the legislative denial of the higher presentence conduct credit rate granted to nonrecidivist defendants increased his "punishment." The court asserted that "when the state relies on a prior conviction to allow a defendant fewer credits than he would other[wise] receive toward the completion of his sentence, it is necessarily increasing his punishment by virtue of that conviction." (Typed opn., p. 5.)[6] That increase in punishment, the appellate court declared, required a qualifying

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[6] See also *id.* at p. 5 ["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"].

prior conviction to be pleaded and proved. That confuses the distinct concepts of "punishment" and "penalty."

1. *Lo Cicero* Does Not Stand for the Proposition that a Factor That Increases a Defendant's "Punishment" Must Be Pleaded and Proved

Former section 4019 contains no pleading on proof requirement for the factors that made certain defendants ineligible for its accelerated accrual rate of conduct credits. The appellate court cited *People v. Lo Cicero* (1969) 71 Cal.2d 1186 (*Lo Cicero*)[7] for the proposition that a pleading and proof requirement was implicit in the "additional punishment" in the statute. (Typed opn., pp. 7-8, 10-11.) In that analysis, any prior conviction that increases a defendant's punishment, defined as the actual duration of his incarceration, must be pleaded and proved.

The Court of Appeal's interpretation of *Lo Cicero* is erroneous. Neither *Lo Cicero*'s holding, nor the reasoning in that decision, suggests that any fact that leads to an increased period of imprisonment must be pleaded and proved. In *Lo Cicero*, the defendant was charged with the furnishing and sale of marijuana. (71 Cal.2d at pp. 1187-1188.) Although the defendant had a prior conviction for drug possession—which he admitted at trial—the prosecutor had not alleged the prior in the indictment. (*Id.* at p. 1192.) The trial court found the defendant ineligible for probation under Health and Safety Code former section 1171.6, which precluded a grant of probation to offenders with such a prior conviction. (*Id.* at pp. 1191-1192.) On appeal, the defendant contended that the trial court's

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[7] Disapproved on another ground in *Curl v. Superior Court* (1990) 51 Cal.3d 1292, 1301-1302, fn. 6.

finding was erroneous because section 969 required his prior conviction to be pleaded and proved. (*Id.* at p. 1192.)[8]

Lo Cicero relied on this court's decision in *People v. Ford* (1964) 60 Cal.2d 772 (*Ford*)[9] in concluding that pleading and proof was required under section 969 and related statutes. In *Ford*, the defendant had been convicted of murder and other crimes during a burglary. (*Id.* at pp. 775-776.) The judgment stated that a prior conviction and arming during the murder had been "'*charged* and proved or admitted,'" but neither fact had was alleged in the information or submitted to the jury. (*Id.* at p. 794.) This court agreed with the defendant that "the increased penalties flowing from either such finding [citations] the fact of the prior conviction or that the defendant was thus armed 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 allegations determined by the jury, or by the court if a jury is waived." (*Ibid.*)

Lo Cicero applied *Ford* to the statute that denied probation due to a prior conviction and held that "'before 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

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[8] Section 969 provided, as it still does: "In charging the fact of a previous conviction of felony, or of an attempt to commit an offense which, if perpetrated, would have been a felony, or of theft, it is sufficient to state, 'That the defendant, before the commission of the offense charged herein, was in (giving the title of the court in which the conviction was had) convicted of a felony (or attempt, etc. or of theft).' If more than one previous conviction is charged, the date of the judgment upon each conviction may be stated, and all known previous convictions, whether in this State or elsewhere, must be charged."

[9] Overruled on another ground in *People v. Satchell* (1971) 6 Cal.3d 28, 40-41.

charge must be proved and the truth of the allegation determined by the jury, or by the court if a jury is waived.' ([*Ford, supra,*] 60 Cal.2d at p. 794.) *The denial of opportunity for probation involved here is equivalent to an increase in penalty*, and the principle declared in *Ford* should apply." (*Lo Cicero, supra*, 71 Cal.2d at pp. 1192-1193, italics added.)

Ford thus recognized that as a matter of statute, a prior conviction or other fact used as the basis for a sentence enhancement must be pleaded in the charging document and admitted or proved to increase the sentence. (See also *People v. Hernandez* (1988) 46 Cal.3d 194, 208 ["due process requires that an accused be advised of the specific charges against him so that he may adequately prepare his defense. [Citation.] An enhanced term cannot be imposed without proof of each fact it requires. [Citations]"].)[10] *Lo Cicero* applied that principle to hold a fact used to *deny* a defendant probation as a matter of law must be pleaded and proved.

Neither *Ford* nor *Lo Cicero* require a fact that increases the duration of a defendant's *punishment* to be pleaded and proved. Those opinions concern a fact that *increases penalty*. (*Ford, supra*, 60 Cal.2d at p. 794; *Lo Cicero, supra*, 71 Cal.2d at p. 1193.) The word *punishment* was not used in either decision.[11] Nor does penalty, the term used in *Lo Cicero* and *Ford*, equate to punishment. The facts in both *Lo Cicero* and *Ford* establish that penalty refers to a defendant's *sentence*, not to the ultimate duration of his incarceration. In *Ford*, the "increased penalties" referred to statutory sentencing enhancements. (*Ford, supra*, 60 Cal.2d at p. 794.) The phrase

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[10] As a matter of federal constitutional law, recidivism, including prior convictions, used to increase a sentence is not treated as an element of a crime that must be pleaded and proved or tried to a jury. (*Almendarez-Torres v. United States* (1998) 523 U.S. 224, 243-247.)

[11] As discussed *infra*, *Lo Cicero* later was limited to its facts by this court in *Varnell, supra*, 30 Cal.4th at pp. 1140-1141. *Varnell* establishes that the principles of *Ford* and *Lo Cicero* are not to be extended broadly.

in *Lo Cicero* referred to the elimination of a disposition in lieu of the prescribed sentence. (*Lo Cicero*, *supra*, 71 Cal.2d at p. 1193.)

Both legally and practically the sentence and the length of incarceration are different and distinct matters. The sentence determines whether a defendant will be incarcerated or granted probation. If the court chooses incarceration, it sets the limit of the term. Although that sentence is one factor in the actual duration of incarceration, other factors affect the actual duration of the term as well.

Former section 4019 was not a penalty provision that increased the sentence. It affected the duration of incarceration in prison by providing for presentence custody credits. Similarly, credits earned under section 2933, subdivision (b), reduce the period of incarceration based on the prisoner's period of confinement and conduct in prison, but the credits do not affect the actual sentence. (See, e.g., *In re Pacheco* (2007) 155 Cal.App.4th 1439, 1443 (*Pacheco*).) In addition, statutes governing parole (see § 3040 et seq.) permit the prisoner to be released from a period of incarceration without directly affecting the sentence. Any or all of these statutes involve facts that can have a considerable effect on punishment, as the Court of Appeal defined the term, but none of those facts alter the authorized sentence as in *Ford* and *Lo Cicero*. Indeed, the operation of any or all of these statutes in a particular case will result in different periods of incarceration for defendants who originally received the exact same sentence.

The pleading and proof requirements for sentencing established in *Ford* and *Lo Cicero* do not translate to statutory provisions that may or may not affect the actual period of incarceration. Those decisions concerned section 969 and related statutes that prescribe the way a prior conviction must be pleaded and proved for an increase in sentence. None of the statutes concern pleading and proof of facts that affect the duration of imprisonment.

To speak in terms of a pleading and proof requirement in this context is exceedingly curious. The degree to which "punishment"—the duration of incarceration—may be reduced under former section 4019 depends ultimately on the length of presentence custody and conduct while in that custody. Similarly, reduction of a period of incarceration under section 2933 depends on conduct in prison. Of course, no authority suggests those ultimate facts are to be proved to a jury. Yet, the fact of a prior conviction under former section 4019 amounts to only one other circumstance that may or may not affect the actual period of incarceration. Hence, a prior conviction calls for no different procedural requirements than those other facts.

2. Even Were a Fact Increasing "Punishment" to Require Pleading and Proof, Former Section 4019's Limit on Conduct Credits Does Not Constitute Increased Punishment

Assuming that any prior conviction increasing "punishment" must be pleaded and proved, it would not follow that the denial of the additional conduct credits under former section 4019 increased appellant's punishment. The Court of Appeal posited that appellant's punishment increased because a reduction in the duration of incarceration he otherwise would have received from custody credits did not accrue. That conclusion is flawed. A *lesser reduction* in custody credits than nonrecidivist defendants received is not an *increase* in appellant's punishment.

S.B. 18 was a response to the state's fiscal emergency and not a reduction of penalty for crimes. It was enacted pursuant to the fiscal emergency declared by the former governor on December 19, 2008. (See S.B. 18 at § 62.) S.B. 18 began as a "budget" bill, and became a "corrections" bill affecting numerous criminal statutes. The Legislature's intent in amending former section 4019, necessarily implied from the action it took and the manner in which it was done, was two-fold. First, it

intended to create additional incentive for good behavior by some inmates in local custody facilities (with the necessary result of maintaining discipline and minimizing threats to institutional security). Second, it intended to address the state's fiscal emergency by reducing prison populations.

Nothing in former section 4019 implied that the Legislature thought criminal sentences too long or harsh. Notably, the Legislature did not take any direct approach to shorten sentences or authorize early release. Instead, its indirect approach provided some jail inmates the opportunity to earn a reduction in the length of their incarceration by increasing the accrual rate of conduct credits based on their behavior in custody. The Legislature's judgment was that the protection of the public justified excluding serious offenders and sex offenders from the accelerated conduct credits accrual rate. Had it wanted to reduce prison sentences to compel earlier release of all prisoners, it could have done so by granting additional credits without regard to status or behavior. The provision for the opportunity to earn additional credits did not inevitably result in a reduction of incarceration time for any particular inmate. Consequently, former section 4019 affected incentive credits, not punishment or penalties.

3. Appellant's Punishment Was Not Increased; He Was Eligible for the Same Amount of Credits Before and After Former Section 4019

The effect of former section 4019 on the period of appellant's period of incarceration was to *decrease* it. A change in the statutory scheme for earning presentence credits that reduces punishment for *nonrecidivists*—a class of felons to which appellant does not belong—does not increase appellant's punishment. Appellant suffered no reduction in the amount of conduct credits he could receive when former section 4019 became effective. Before the effective date of the statute as after, a prisoner like

appellant was entitled to earn two days of conduct credit for every four days actually served. For this reason as well, a conclusion that appellant's punishment was increased by the former statute is illogical.

4. Former Section 4019 Was Not an Amendatory Statute Lessening Punishment

In *People v. Brown*, review granted June 9, 2010, S181963, this court is considering whether former section 4019 applied retroactively to all judgments that were not final as of the effective date of the amendments. Central to the retroactivity determination is whether former section 4019 was an amendatory statute lessening punishment. In *Brown*, the People have argued that it was not. That former section 4019 was not an amendatory statute lessening punishment provides further support for the conclusion that appellant's punishment was not increased by the statute. Because the issue of whether former section 4019 was an amendatory statute lessening punishment is fully briefed in *Brown*, we only summarize the People's argument.

Section 3 states that no part of the Penal Code is "retroactive, unless expressly so declared." (See also *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1208.) There is an exception to the general rule of prospective application for amendatory statutes that lessen punishment. *In re Estrada* (1965) 63 Cal.2d 740 held that "[a] legislative mitigation of penalty for a particular crime represents a legislative judgment that the lesser penalty of the different treatment is sufficient to meet the legitimate ends of the criminal law." (*Id.* at pp. 744-745.)

Prior to S.B. 18, lower courts considered whether a change in the rate of accrual of credits is a "statute lessening punishment." In *People v. Hunter* (1977) 68 Cal.App.3d 389 (*Hunter*), the court applied *Estrada* and held that an amendment to section 2900.5 should apply retroactively. (*Id.* at p. 393.) Section 2900.5, subdivision (a), allows for "back time" credit

against a sentence resulting from a misdemeanor or felony conviction, or what is known as "actual" credit. (*Hunter*, *supra*, 68 Cal.App.3d at p. 393.) In *Hunter*, the statute was amended to include "back time" for periods of imprisonment imposed as a condition of a grant of probation. *Hunter* is distinguishable from former section 4019 because it dealt with actual credits, not conduct credits. The distinction is significant because the legislative intent behind awarding actual credits and conduct credits is entirely different.

Hunter found that increasing credits for *actual* days served in custody is in effect a reduction in punishment. (*Hunter*, *supra*, 68 Cal.App.3d at p. 393.) In contrast, the legislative intent in awarding (or increasing) credit for conduct is to encourage good behavior. Unlike credits for actual days served, a defendant has no entitlement to conduct credits. Conduct credits are awarded based on a defendant's satisfactory performance of labor and compliance with rules and regulations. (See § 4019, subds. (b) & (c).)

Courts, including this one, have recognized the legislative intent in awarding conduct credits: "The[] provisions of section 4019 make clear that conduct credits are designed to ensure the smooth running of a custodial facility by encouraging prisoners to do required work and to obey the rules and regulations of the facility." (*People v. Silva* (2003) 114 Cal.App.4th 122, 128; see also *People v. Brown* (2004) 33 Cal.4th 382, 405 ["section 4019, focuses primarily on encouraging minimal cooperation and good behavior by persons temporarily detained in local custody"]; *People v. Saffell* (1979) 25 Cal.3d 223, 233 ["The purposes of the provision for 'good time' credits seem self-evident. First, and primarily, prisoners are encouraged to conform to prison regulations and to refrain from engaging in criminal, particularly assaultive, acts while in custody. Second, [prisoners are induced] to make an effort to participate in what may be termed 'rehabilitative' activities"]; *Pacheco*, *supra*, 155 Cal.App.4th at p.

1445 ["a reduction in credits is not considered 'punishment' under the law. Rather, such credits are benefits a prisoner earns based on good conduct and participation in qualifying programs"]; *People v. Guzman* (1995) 40 Cal.App.4th 691, 695 [section 4019 encourages good behavior prior to sentencing]; *People v. Moore* (1991) 226 Cal.App.3d 783, 787 [same]; *In re Stinnette* (1979) 94 Cal.App.3d 800, 804-805 [the public purpose behind statutes awarding conduct credits "is the desirable and legitimate purpose of motivating good conduct among prisoners so as to maintain discipline and minimize threats to prison security. Reason dictates that it is impossible to influence behavior after it has occurred"].)

In *People v. Doganiere* (1978) 86 Cal.App.3d 237, the Court of Appeal reasoned that the *Estrada* exception also applied to conduct credits because, "it must be presumed that the Legislature thought the prior system of not allowing credit for good behavior was too severe." (*Id.* at p. 240.) This reasoning ignores the legislative intent behind conduct credits, as opposed to actual credits: i.e., encouraging good behavior. The awarding of conduct credits is not a legislative determination that sentences are too severe; rather, it is a determination that motivating and encouraging good behavior helps maintain discipline and minimizes threats to prison and jail security.

Section 4019 like other credit statutes is a means to provide incentive for prisoners to work towards rehabilitation. (See *People v. Van Buren* (2001) 93 Cal.App.4th 875, 800[12] [section 2933.1 which governs post-sentence conduct credits "is not a sentencing statute" even though it can lead to increased punishment for some prisoners]; *Pacheco*, *supra*, 155 Cal.App.4th at p. 1445 ["a reduction in credits is not considered

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[12] Overruled on another ground in *People v. Mosby* (2004) 33 Cal.4th 353.

'punishment' under the law"].) In former section 4019, the increased conduct credits for some prisoners did not necessarily reduce their punishment; the credits still had to be earned. That is, a prisoner had to perform the good acts that ultimately shortened his sentence. The increase in a reward for certain behavior is not the equivalent of a reduction in punishment. (See, e.g., *People v. Brunner* (1983) 145 Cal.App.3d 761, 764 [amendment that expressly afforded credits to mentally disordered offenders for time spent in mental hospitals and repealing a statute precluding such credits (sections 1364 and 1365) was not a "statute lessening punishment"].) In sum, former section 4019 was not an amendatory statute lessening punishment.

C. Pleading and Proof Requirements Are Inappropriate Under *Varnell*

In *Varnell*, the defendant pleaded no contest to a charge of simple drug possession and admitted the truth of a prior serious felony conviction allegation. (*Varnell, supra*, 30 Cal.4th at p. 1135.) The prior serious felony conviction made him statutorily ineligible for the alternative probation scheme of the Substance Abuse and Crime Prevention Act of 2000 ("Proposition 36"). The trial court exercised discretion under section 1385 to strike defendant's prior conviction to remove him from the Three Strikes law's alternative sentencing scheme. Despite that action, the trial court found the prior made him ineligible for Proposition 36 probation. The Court of Appeal disagreed, holding that the trial court had the power under section 1385 to disregard Varnell's criminal history in determining his eligibility for Proposition 36 probation. (*Id.* at pp. 1135-1136)

This court reversed. (*Varnell, supra*, 30 Cal.4th at pp. 1135, 1137-1144.) It held that eligibility or ineligibility for drug treatment probation under Proposition 36 was not itself a charge or allegation in the information that could be dismissed by the trial court. Section 1385 permits only

dismissal of a "criminal action or a part thereof." This court has "consistently interpreted 'action' to mean the 'individual charges and allegations in a criminal action' [citations] and [has] never extended it to include mere sentencing factors." (*Id.* at p. 1137, quoting *People v. Hernandez* (2000) 22 Cal.4th 512, 524.) In contrast, a "'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.) "[T]rial courts may not use section 1385 to disregard 'sentencing factors' that are not themselves required to be a charge or allegation in an indictment or information." (*Id.* at p. 1135.) The dismissal of a prior conviction allegation under the Three Strikes law does not mean that the defendant did not in fact suffer the conviction. It remains a historical fact for purposes of sentencing factors, such as eligibility for Proposition 36 probation. (*Id.* at p. 1138.)

Varnell limited *Lo Cicero*, finding the legislative action *completely removing* probation eligibility for those with a prior felony conviction, in effect, had increased the penalty for Lo Cicero's crime. (*Varnell, supra*, 30 Cal.4th at p. 1140.) In *Varnell*, in contrast to *Lo Cicero,* the Legislature did not increase penalties. Rather, it only removed one option for obtaining probation. *Varnell* further explained that "dismissal of a prior conviction allegation under section 1385 'is not the equivalent of a determination that defendant did not in fact suffer the conviction.'" (*Id.* at p. 1138, quoting *People v. Burke* (1956) 47 Cal.2d 45, 51, and *People v. Garcia* (1999) 20 Cal.4th 490, 496.) "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" for Proposition 36 probation. (*Id.* at p. 1138, fn. omitted.) This court held:

> We therefore hold that a 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)) or to select among the aggravated, middle, or mitigated terms (e.g., *id.*, rule 4.421(b)(1)). Section 1210.1 . . . does not require that 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. The Court of Appeal thus erred in finding uncharged historical facts could be disregarded under section 1385.

(*Id.* at p. 1139; contrast *People v. Orabuena* (2004) 116 Cal.App.4th 84, 94-95 [misdemeanor conviction based on charges and accusations in accusatory pleading in same proceeding is an "action" within the meaning of section 1385 and can be stricken by the trial court to avail defendant of Proposition 36's benefits].) Rendering Varnell ineligible for one type of probation was "not the equivalent of an increase in penalty. Accordingly, nothing in *Lo Cicero* required the prosecution to plead petitioner's ineligibility under Proposition 36." (*Varnell*, *supra*, 30 Cal.4th at p. 1141.)

Here, appellant's recidivist status within the meaning of former section 4019, subdivisions (b)(2) and (c)(2), was a sentencing factor used to determine the accrual rate of his conduct credits within the range prescribed by the statute. For purposes of former section 4019, the historical fact of appellant's prior conviction was simply a sentencing factor, as opposed to an "action" for purposes of section 1385.[13]

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[13] In some cases, a defendant's prior conviction(s) might be alleged in the complaint or information because it is a "strike" under the Three Strikes law. Such was the case here. Unlike former section 4019, however, (continued...)

Discounting *Varnell*, the Court of Appeal below promoted *Lo Cicero* to a foundational principle, asserting that "[i]f 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." (Typed opn., p. 8.) In *Varnell*, this court, did not *assume* a pleading and proof requirement from a statute's failure to explicitly include such a requirement. In so holding, it examined *People v. Dorsch* (1992) 3 Cal.App.4th 1346, which interpreted section 1203, subdivision (e)(4), a presumptive probation ineligibility statute for any person who has been convicted twice of a felony. *Dorsch* rejected a claim that section 1203, subdivision (e)(4), contained an implicit pleading and proof requirement. It found that "neither due process nor statutory construction requires an implied pleading and proof requirement for application" of the statute. (*Id.* at p. 1350.) Significantly, *Dorsch* explained that "[t]he Legislature has demonstrated in numerous penal statutes that *when a pleading and proof requirement is intended, the Legislature knows how to specify the requirement.*" (*Id.* at p. 1350, italics added.)[14]

(...continued)
the Three Strikes law explicitly requires a qualifying prior be pleaded and proved. (§§ 667, subd. (f), 1170.1, subd. (e).)

[14] The Court of Appeal asserted that *Dorsch*'s observation regarding the power of the Legislature to explicitly specify a pleading and proof requirement "would wholly abrogate *Lo Cicero*, which the Supreme Court exhibited no willingness to do." (Typed opn., p. 10, fn. 4.) However, this court in *Varnell* cited *Dorsch* with *approval*. (*Varnell*, *supra*, 30 Cal.4th at p. 1141; see also typed opn., p. 10, fn. 4 [citing *Varnell*'s quotation of *Dorsch*].) The logic stands that if the Legislature had intended there to be a pleading and proof requirement in former section 4019—or in the statutes addressed in *Varnell* or *Dorsch*—it knew how to specify that requirement.

Contrary to the Court of Appeal's assumption here, statutory silence should not be presumed to necessitate pleading and proof. Former section 4019 included nothing that explicitly stated—or even suggested—a pleading and proof requirement before a recidivist could be denied an accelerated conduct accrual rate. No persuasive authority supports the Court of Appeal's finding that those requirements are implied from silence.

A comparable situation was addressed in *Pacheco*, *supra*, 155 Cal.App.4th 1439. There, the defendant pleaded guilty to inflicting corporal injury on a cohabitant (§ 273.5) and admitted a great bodily injury enhancement ("GBI") (§§ 273.5, 12022.7, subd. (a)). (*Id.* at pp. 1441-1442.) The trial court struck the GBI enhancement for purposes of sentencing. Thereafter, the California Department of Corrections limited defendant's post-sentence custody credits pursuant to section 2933.1, which provides in relevant part: "any person who is convicted of a felony offense listed in subdivision (c) of Section 667.5 shall accrue no more than 15 percent of worktime credit, as defined in Section 2933." (*Id.* at p. 1442, fn. 4.) Defendant sought habeas relief arguing he was not serving time for a violent felony offense under section 2933.1 because the trial court struck the punishment for the GBI enhancement. (*Id.* at pp. 1442-1444; see also § 667.5, subd. (c)(8) [defining violent felony as one in which the defendant inflicts GBI].)

The Court of Appeal disagreed. (*Pacheco*, *supra*, 155 Cal.App.4th at pp. 1442, 1446.) It noted that section 1385, subdivision (c)(1), provides that whenever a trial court has power "'to strike or dismiss an enhancement, the court may instead strike the additional punishment for that enhancement.'" (*Id.* at p. 1442, fn. 2.) In *Pacheco*, the trial court struck only the punishment for the GBI enhancement, not the enhancement itself. (*Id.* at pp. 1442, 1444-1445.) Thus, *Pacheco* concluded, the limit on defendant's credits was correct.

> The Legislature enacted section 2933.1 to protect the public from the early release from prison of prisoners convicted of violent offenses (§ 667.5, subd. (c)). Although the sentencing court in this case approved a plea agreement which gave leniency to petitioner by striking additional three-year term for the GBI enhancement, the purpose underlying section 2933.1 was unaffected.

(*Id.* at p. 1445.) Accordingly, defendant was not entitled to additional custody credits in addition to the reduction in sentence he had already received as part of his plea bargain. If the trial court had chosen to strike the GBI enhancement entirely, instead of just the punishment, the result would have been different: Pacheco would not have been serving time for a violent felony offense for purpose of section 2933.1's restriction on worktime credits. However, that would have been a distinct factual finding, akin to the granting of a motion under section 1181.1 or a new trial motion based on insufficient evidence. In the present case, such options are not available to attack the legitimacy of a prior conviction in a *separate and later* proceeding.[15]

Just as the trial court's dismissal of the defendant's prior serious felony conviction did not eliminate the fact of the conviction in *Varnell*, the dismissal of the allegation pursuant to a plea bargain did not eliminate the historical fact of the prior serious felony conviction here. Just as defendant Varnell remained eligible for probation, just not Proposition 36 probation, so here, under former section 4019, appellant remained eligible for presentence credits, just not the credits available to those without a serious or violent prior. Like section 1210.1, the pertinent provisions of former

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[15] The Court of Appeal here dismissed *Pacheco* stating it did not "squarely address the question of how this distinction should be applied when more than one 'additional punishment' flows from an enhancement." (Typed opn., p. 7.) This cursory dismissal does not undermine *Pacheco*'s persuasive authority in the analogous situation presented here.

section 4019 did not require that the basis for appellant's ineligibility be alleged in the accusatory pleading. Had the Legislature intended to include a pleading and proof requirement, it could have easily and explicitly done so. (See, e.g., §§ 667, subd. (f), 1170, subd. (3).) Appellant's prior conviction placed him squarely within the provisions of former section 4019, subdivisions (b)(2) and (c)(2). The trial court did not have discretion to disregard that fact: "In the absence of a charge or allegation, there [was] nothing to order dismissed under section 1385." (*Id.* at p. 1139.)

D. Appellant's Plea Bargain Did Not Vest the Trial Court with Discretion to Dismiss His Prior Conviction for Purposes of Awarding Him Additional Presentence Conduct Credits

Appellant was not required to admit the truth of the prior conviction allegation. The plea bargain contemplated his prior conviction would be "dismissed or 'struck.'" (Typed opn., p. 11.) The Court of Appeal observed that under section 1385, if the court has the discretion to dismiss an enhancement, it "may instead strike the additional punishment for that enhancement." (§ 1385, subd. (c)(1), cited at typed opn., p. 11.) It further stated that "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." (*Id.* at p. 11.) Ultimately, it decided that the "parties manifestly failed to reach any agreement on whether the stricken prior would affect defendant's presentence confinement credits." (*Id.* at p. 12.) On the other hand, 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 p. 13.) It remanded for the trial to exercise "discretion." (*Ibid.*)

Statutory and case authority establishes that custody credits are an automatic consequence of conviction. (§ 2900.4; *People v. Sage* (1980) 26 Cal.3d 498, 508-509 [section 2900.5 imposes on the sentencing court the obligation to determine the number of days of custody and, in those cases to which it applies, conduct credits to which the defendant is entitled; the computation of credits should be a routine ministerial function]; *People v. Aguirre* (1997) 56 Cal.App.4th 1135, 1139 ["the calculation of credits is purely mathematical . . . . The calculation of credits is not discretionary and there are no 'choices'"]; *People v. Jack* (1989) 213 Cal.App.3d 913, 917 [trial courts exercise no discretion when determining the days of presentence custody; the calculation of credits pursuant to statutory formula "has been characterized as a ministerial duty"]; *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 had no sentencing discretion"].)

As argued, *ante*, section 1385 does not vest trial courts with discretion to dismiss prior convictions for purposes of former section 4019. It follows that the trial court had no discretion to award presentence conduct credits based on a plea bargain that manifestly contained no agreement on the affect of the prior on that very issue. Parties cannot bargain for a result that is not permitted by law, i.e., ignoring the defendant's recidivist status in calculating credits. Had appellant instead admitted the prior conviction allegation, that also would not create section 1385 discretion to dismiss the prior for purposes of awarding maximum credits pursuant to former section 4019. In *Varnell*, the defendant's prior conviction was pleaded and

admitted, and the trial court struck it for purposes of the Three Strikes law. Nonetheless, the fact of the conviction rendered the defendant ineligible for Proposition 36 probation. (*Varnell*, *supra*, 30 Cal.4th at pp. 1135-1136.)

People v. Superior Court (*Romero*) (1996) 13 Cal.4th 497 dictates no different result. There, the relevant statute—the Three Strikes law—*expressly* referred to section 1385 and required a prior conviction to be pleaded and proved. (*Id.* at pp. 520-521 [discussing section 667, subdivision (f)(2)'s express reference to section 1385].) Former section 4019 does not—expressly or implicitly—incorporate section 1385 or require the ineligibility factor of a prior conviction to be pleaded and proved. Moreover, subdivisions (b)(2), (c)(2), and (f) of section 4019 clearly reflect the intent that recidivists *not* benefit from the more favorable conduct credit accrual rate.

Nor can the circumstances here be analogized to the permissible choice of a defendant to *waive* his or her *statutory right* to custody credits to achieve a plea bargain. Such a procedure was sanctioned in *People v. Johnson* (1978) 82 Cal.App.3d 183. A "*Johnson* waiver" is a waiver of a statutory right to credits for time served against a subsequent county jail or state prison sentence pursuant to section 2900.5. Its basis is the authority that the most basic rights of criminal defendants are subject to waiver. (See *United States v. Mezzanatto* (1995) 513 U.S. 196, 201; see also *People v. Johnson* (2002) 28 Cal.4th 1050, 1055.) This is consistent with the established rule allowing a "'party [to] waive any provision . . . intended for his benefit.'" (*Mezzanatto*, *supra*, 513 U.S. at p. 201; accord, Civ. Code, § 3513; *Cowen v. Superior Court* (1996) 14 Cal.4th 367, 371.) A defendant can waive benefits to which he or she is statutorily *entitled*. A defendant with a prior serious felony conviction is not statutorily entitled to the accrual rate for conduct credits of one without such a conviction under

former section 4019. Therefore, appellant can neither bargain for nor obtain those credits.

E. Undesirable Collateral Consequences Follow the Court of Appeal's Analysis

The Court of Appeal's broad analysis can be read to require prosecutors to plead and prove all exempting factors provided by former section 4019—or provided in a future version of that statute—not just prior serious felony convictions. Because the effect of each eligibility factor is the same, the judgment below lends itself to the argument of pleading and proof of a defendant's sex offender registration status or of a present commitment for a serious felony. (See former § 4019, subds. (b)(2) & (c)(2) [sex offender registration and present commitment for a serious felony are exempting factors].) Additionally, the retroactive application of the January 25, 2010, amendments to section 4019 has not yet been determined. Depending on this court's disposition of that issue, a far greater number of cases is potentially affected than is immediately obvious from the four corners of the opinion below.

Another unpredictable consequence of the judgment below is its potential for disparity of terms if applied to other statutes. For example, amendments to section 2933 contain eligibility factors similar to former section 4019 for prison worktime credits. (See § 2933, subd. (e)(3) ["Section 4019, and not this subdivision shall apply if the prisoner is required to register as a sex offender . . . , was committed for a serious felony . . . , or has a prior conviction for a serious felony . . . or a violent felony . . ."]; see also S.B. 76, § 1.) Still other sentencing statutes provide eligibility factors based on a defendant's recidivist status or some other historical fact. (See, e.g., §§ 1203, subd. (k), 1203.07, 2933.1.) "A ruling that section 1385 could be used to disregard sentencing factors . . . would be unprecedented." (*Varnell, supra*, 30 Cal.4th at p. 1137.)

Finally, the court below has sent an unsettling message to the Legislature. Its logic suggests that the Legislature must *explicitly* remove section 1385 discretion from any statute that may affect a defendant's term of incarceration to which section 1385 is not intended to apply. (See typed opn., p. 8 ["That rule of that case [the Court of Appeal's interpretation of *Lo Cicero*] has now been in effect for over 40 years. If the Legislature wanted to *excuse* the prosecution from the burdens of that rule [i.e., pleading and proving a factor that increases a defendant's "punishment"] it was perfectly free to do so"].) Yet, many sentencing statutes that take into account recidivist status or other aspects of a defendant's history manifestly are not statutes defining an "action" within the meaning of section 1385. Accordingly, the judgment is not only in conflict with this court's section 1385 jurisprudence (*Varnell*, *supra*, 30 Cal.4th at p. 1138), it is inconsistent with settled law concerning other sentencing laws (see, e.g., *People v. Neild* (2002) 99 Cal.App.4th 1223, 1227 [section 1203, subd. (k)'s exemption of probation for recidivists may not be stricken pursuant to section 1385]; *People v. McGuire* (1993) 14 Cal.App.4th 687, 693 [trial courts may not disregard prior convictions for purpose of section 1203.07]).

CONCLUSION

Accordingly, respondent respectfully requests that the judgment of the Court of Appeal be reversed.

Dated: July 1, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S OPENING BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 8,232 words.

Dated: July 1, 2011

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Ricardo Lara**
No.: **S192784**

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 July 1, 2011, I served the attached **RESPONDENT'S OPENING BRIEF ON THE MERITS** 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 July 1, 2011, at San Francisco, California.

Pearl Lim
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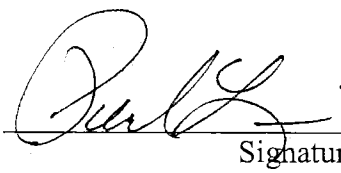

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