IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

RICARDO LARA ,

Defendant and Appellant.

Case No. S192784

APPELLANT'S BRIEF ON THE MERITS

Review of Opinion Reversing Judgment and Remanding for Resentencing,
Court of Appeal, Sixth Appellate District, No. H012195

Appeal from Judgment of Conviction After No Contest Plea
in the Superior Court of the State of California,
in and for the County of Santa Clara, No. E1007527

Honorable Kenneth Barnum, Judge

Sixth District Appellate Program
William M. Robinson, Staff Attorney
State Bar No. 95951
100 N. Winchester Blvd., Suite 310
Santa Clara, CA 95050
Telephone: (408) 241-6171

Attorneys for Appellant Ricardo Lara

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MISCELLANEOUS

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. RICARDO LARA , Defendant and Appellant.	No. S192784 (6th Dist. Appeal No. H036143) (Santa Clara County No. E1007527)

APPELLANT'S BRIEF ON THE MERITS

Issue Presented for Review

This Court granted the Government's petition for review, which raised the following question:

> 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 credits?

The "Statement of Issue" on this Court's website puts the question with a bit more equanimity:

> Does a trial court have discretion to dismiss or strike a prior serious felony conviction under Penal Code section 1385 in order to award the defendant additional presentence credits under Penal Code section 4019?[1]

SUMMARY OF ARGUMENT

By an amendment effective on January 25, 2010, the Legislature, as part of emergency fiscal legislation designed to reduce prison population and government expenditures, amended Penal Code section 4019 in such manner

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1. http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=1978304&doc_no=S192784

as to alter the scheme for earning presentence conduct credits.[2] Prior to this amendment, with exceptions not applicable here, all prisoners earned "one-for-two" presentence conduct credits for all time served in local custody prior to sentencing.[3] The January 2010 amendment altered this landscape by creating two classes of offenders, one of which possesses specifically designated negative characteristics – a current or prior conviction for a serious or violent felony, or an obligation to register as a sex offender pursuant to section 290, et. seq. – who can only earn one-for-two conduct credits; and a second class, who lack these factors, who are eligible to earn one-for-one credits.

The question presented here is a narrow one. Does the broad discretion afforded trial judges pursuant to section 1385 include the authority to dismiss the fact of a prior serious felony conviction which gives rise to the one-for-two credit restriction created by the new two-tiered conduct credit scheme? This Court's determination of this issue will necessarily turn on its resolution of two descendingly narrower sub-issues. First, this Court must decide whether there is an implied requirement that the fact of a prior serious felony conviction, which, in pertinent part, disentitles a defendant to one-for-one conduct credits under the new credit scheme, must be *pled and proven*. Resolution of this issue depends on the determinative question in the present case, i.e., whether the existence of the fact of a prior serious felony conviction, which results in a fifty percent reduction in presentence conduct credits, effects an *increase in punishment*. The preceding question is determinative

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2. Statutory references are to the Penal Code unless indicated.

3. The terms "one-for-two" and "one-for-one" are employed herein because the other mode used to describe such credits, "half-time" and "one-third time" credits, refers to the custody period, not the credit award, and are somewhat confusing, even to practiced criminal advocates.

because, under this Court's holdings in *People v. Lo Cicero* (1969) 71 Cal.2d 1186 (*Lo Cicero*) and *In re Varnell* (2003) 30 Cal.4th 1132 (*Varnell*), it is only where the facts at issue result in a meaningful increase in punishment that there arises an implied pleading requirement, and only where facts are required – expressly or implicitly – to be pled and proven, that they are an "action" subject to dismissal under section 1385.

The key question, then, is whether the existence of the facts giving rise to the credit restrictions under January 2010 amendment to section 4019 have the result of increasing a defendant's punishment. The answer to this question must be an unqualified "Yes." As plainly put in Presiding Justice Rushing's opinion in the present case, the existence of a prior conviction in this situation invariably results in a limitation of credits, which manifestly increases the amount of time a defendant will serve in custody, and "[i]f that is not additional punishment, we don't know what is." (Slip opin., p. 5.)

Respondent raises two contrary arguments in an attempt to refute this rather straightforward analysis. The first argument, in Part B-1, contends that the implied pleading requirement of cases like *Lo Cicero* and *People v. Ford* (1964) 60 Cal.2d 772 are not triggered by an increase in *punishment* from the existence of certain facts, but in an increase in *penalty* which flows from such facts. Implicitly conceding – at least in this part of its argument – that the credit restriction here increases punishment by requiring the subject defendant to serve a longer period of incarceration, the government suggests that this is of no moment because the *penalty* for his or her crime is not increased. As explained below, there are several problems with this novel interpretation: it has no support in the case law; does not make sense because the terms "penalty" and "punishment" are used interchangeably in common parlance, legal dictionaries, and case law discussion; and because it completely fails to explain the holding in the key case, *Lo Cicero*, where there was no increase

in "penalty," as respondent describes it, just a per se ineligibility for the potential benefit of probation. Notably, the distinction drawn by this Court in *Varnell*, between the flat probation ineligibility requirement at issue in *Lo Cicero*, on the one hand, and the Proposition 36 ineligibility for a certain *type* of drug-treatment probation, was the basis for the "no implied pleading requirement" holding of this Court in *Varnell*, not any imagined distinction between an increase in "penalty" versus an increase in "punishment."

Respondent's secondary position, advanced in Parts B-2 and B-4 of its brief, contradicts its prior concession by asserting that entitlement to greater or lesser conduct credits does not affect "punishment", because the changes in the law are designed to affect only the conduct of a defendant while incarcerated. This vessel fails to hold water for several reasons. First, the premise is faulty. The change of law affected by the January 2010 amendment to section 4019 was not enacted to improve inmate behavior by dangling a bigger carrot, as respondent's argument suggests. Rather, it was expressly enacted for the purpose of reducing jail and prison population and, accordingly, cut government costs by shortening the time prisoners spend incarcerated. In other words, its express mechanism, if not its express purpose, was a reduction in the length of punishments. Second, from the point of view of the sentencing judge, the government's premise makes no sense. By the time of sentencing, when, under defendant's construction of the law, the court can exercise discretion whether to dismiss admitted or alleged facts giving rise to the credit restriction, the defendant has already earned (or failed to earn) his conduct credits through good (or not-good) behavior and participation. And third, and most significantly, the government's position is made without regard to the jurisprudence of our nation's highest court, which, in the closely analogous situation involving laws which unfavorably alter a prisoner's ability to earn behavior credits, holds that such laws effect an

increase in punishment, such that retroactive application of these changes to persons whose crimes were committed before the effective date of the new law run afoul of the Ex Post Facto Clause. (See *Weaver v. Graham* (1981) 450 U.S. 24; *Lynce v. Mathis* (1997) 519 U.S. 433.)

In Part B-3, respondent makes the peculiar argument that appellant's punishment was not increased by virtue of the existence of the fact of his prior conviction because he received the same credits which he would have received prior to the January 2010 amendment to section 4019. But the argument here has nothing at all to do with retroactivity. Appellant's crimes were committed *after* the effective date of the January 2010 amendment, and the issue in the present case focuses on the distinction in conduct credit entitlement between persons with prior serious felony convictions and persons who lack them. It is that distinction which effects an increase in punishment, and the fact that under the prior, no longer applicable legislative scheme, nobody got one-for-one presentence credits is of no moment.

In Part C, respondent contends that the existence of the prior conviction in the present case is on the same footing as the prior convictions in *Varnell*, which made a defendant ineligible for probation and treatment under Proposition 36, which this Court concluded were mere sentencing facts that did not trigger an implied pleading requirement. Respondent is wrong because its discussion of *Varnell* ignores the critical distinction this Court drew in *Varnell* between complete ineligibility for probation, as in *Lo Cicero* – which, it concluded, increased punishment and gave rise to an implied pleading and proof requirement – and ineligibility for a certain type of drug-treatment probation which, in and of itself, did not increase punishment, since the defendant in *Varnell* was still probation eligible by virtue of the trial court's grant of *Romero* relief. (*Varnell, supra*, 30 Cal.4th at pp. 1140-1141.) The present case is akin to *Lo Cicero*, not *Varnell*, since the existence of the

prior conviction *invariably* results in a longer period of imprisonment, and thus an increase in punishment, such that its existence must be pled and proven.

In Part D herein, appellant addresses the remedy ordered by the Court of Appeal, arguing that because the prior serious felony conviction allegation in the present case was dismissed, and never admitted nor proven, the proper remedy is a modification of credits to award one-for-one presentence conduct credits. Alternatively, the case should be remanded for the trial court to exercise its section 1385 authority with respect to the prior conviction and one-for-one credit eligibility.

STATEMENT OF THE CASE AND FACTS

On February 11, 2010, appellant Ricardo Lara and Angel Estrada were involved in a fight with other men at the Brass Rail in Sunnyvale.[4] It appears that a beating of the victim, Tony Trevino, by appellant and Estrada took place following a previous altercation, broken up by security guards, in which appellant himself was attacked by Trevino and another person and beaten while on the ground. (CT 24-25)

Appellant was charged with one count of assault by force likely to inflict great bodily injury (§ 245, subd. (a)(1)), with an allegation of personal infliction of great bodily injury (§ 12022.7, subd. (a)). It was further alleged, based on a prior residential burglary conviction, that appellant had a "strike" prior (§ 1170.12) and a serious felony prior (§ 667, subd. (a)). (CT 2-4)

Pursuant to a bargained-for agreement, on August 3, 2010 appellant pled no contest to the aggravated assault charge, with an understanding that the prosecution would move for dismissal of the great bodily injury, strike,

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4. The facts are cursorily summarized from the probation report, as they are not pertinent to the single issue raised on appeal.

and serious felony allegations, and with a promised "top-bottom" sentence of two years in state prison. (CT 12-18 [plea form], 19 [minutes]; 1RT 3-6.)

On September 30, 2010, appellant was sentenced to state prison for two years pursuant to the plea bargain agreement, with the court dismissing the great bodily injury, strike, and serious felony allegations on motion of the prosecutor. In connection with this sentence, the court awarded a total of 348 days of presentence credits, based on 232 actual days of confinement and 116 days of section 4019 conduct credits. (CT 43-44) The credit allocation was made over argument and objection by defense counsel, who contended that in light of the fact that the prior serious felony allegation was never proven, appellant was entitled to one-for-one credits based on the 2010 amendment to section 4019 and under the reasoning of the then-new appellate decision in *People v. Jones* (2010) 188 Cal.App.4th 165 (rev. gtd. 12/15/2010). (See 2RT 10-13)

In his direct appeal before the Sixth Appellate District, appellant, following the then-extant holding in *Jones*, contended that there was an implicit pleading and proof requirement as to prior serious felony conviction which made a defendant ineligible for one-for-one credits under the January amendment to section 4019. Presiding Justice Rushing, writing for a unanimous Court of Appeal, agreed with appellant's contention that facts giving rise to ineligibility for enhanced presentence conduct credits resulted in an increase in punishment, and thus had to be pled and proven. (Slip opin., pp. 7-11.) The appellate court further concluded that since the plea bargain agreement was silent on the question whether the dismissed prior serious felony conviction could be utilized to reduce appellant's conduct credit entitlement under the January 2010 amendment to section 4019, remand was required to permit the trial court to exercise its discretion under section 1385 to disregard the prior conviction for purposes of maximizing appellant's

presentence conduct credits. (Slip opin., pp. 11-13.)

ARGUMENT

INELIGIBILITY FOR ONE-FOR-ONE PRESENTENCE CONDUCT CREDITS UNDER THE JANUARY 2010 AMENDMENT TO SECTION 4019 CONSTITUTES AN INCREASE IN PUNISHMENT SUCH THAT THERE IS AN IMPLIED PLEADING REQUIREMENT AS TO FACTS GIVING RISE TO INELIGIBILITY. IT THUS FOLLOWS THAT A TRIAL COURT'S SECTION 1385 DISMISSAL AUTHORITY INCLUDES PRIOR SERIOUS FELONY CONVICTIONS WHICH GIVE RISE TO INELIGIBILITY, AND THE COURT OF APPEAL'S HOLDING TO THIS AFFECT SHOULD BE MODIFIED, AS ARGUED IN PART D BELOW, OR AFFIRMED.

A. Section 4019, Past and Present.

A defendant sentenced to state prison is entitled to credit against his sentence for all actual days spent in custody before sentencing, and for conduct credits pursuant to section 4019. (§ 2900.5, subd. (a).) Before January 25, 2010, section 4019 provided that for each six-day period of custody, one day was deducted for performing assigned labor and one day was deducted for satisfactorily complying with the rules and regulations. (Former § 4019, subds. (b) and (c).) Thus "if all days are earned under this section, a term of six days will be deemed to have been served for every four days spent in actual custody." (Former § 4019, subd. (f).)[5]

In October of 2009, the Legislature amended section 4019 to increase pre-sentence credits for defendants who, like appellant, have no current or prior convictions for serious or violent felonies and who are not required to

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5. There are three versions of section 4019 involved, in some fashion, in the present case. For the sake of simplicity, appellant will refer in his briefing to the original, pre-January 2010 version as "former section 4019," the version based on the amendment effective January 25, 2010 as the "January 2010 amendment to section 4019" and the current version as "section 4019."

register as sex offenders. (Stats. 2009-2010, 3rd Ex.Sess., c. 28 (S.B.18), § 50.) The amended statute provided that presentence credits accrue at twice the previous rate for all defendants except those required to register as a sex offender, committed for a serious felony, or with a prior conviction for a serious or violent felony. (Jan. 2010 amend. § 4019, subd. (b)(2) and (c)(2).) Thus under the January 2010 amendment, one day of work credit and one day of conduct credit is to be deducted for each four-day period of confinement or commitment, so "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. . . ." (Jan. 2010 amend. § 4019, subd. (f).)

Senate Bill 18 went into effect on January 25, 2010. (Cal. Const. Art. 4, § 8(c)(1) ["a statute enacted at a special session shall go into effect on the 91st day after adjournment of the special session at which the bill was passed"]; Cal. Senate Journal, 2009-10 Third Extraordinary Session, Nov. 30, 2009, at p. 273 [Third Extraordinary Session adjourned Oct. 26, 2009].) Appellant's crimes were committed on February 11, 2010 (CT 24-25), and thus the January 2010 amendment to section 4019 applies prospectively to his case.[6]

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6. In the Fall of 2010, the Legislature enacted emergency legislation again amending section 4019, and including many of the former amendments to that section in an amended subdivision (e) of section 2933. However, these amendments have no effect on the present case since, by express provision, they only apply to persons whose crimes were committed after the effective date of the amendments. (Stats. 2010 ch 426 § 2 (SB 76), effective September 28, 2010.)

B. **Denial of Increased Presentence Custody Credits Under the January 2010 Amendment Results in an Increase in Punishment, Triggering an Implied Pleading and Proof Requirement.**

Presiding Justice Rushing's opinion in the present case held that denial of increased presentence custody credits under the January 2010 amendment to section 4019 results in an increase in punishment. Relying on *Lo Cicero*, *supra*, 71 Cal.2d 1186, and the way it was interpreted by this Court in *Varnell, supra*, 30 Cal.4th 1132, the opinion below held that the January 2010 amendment to section 4019 reduces the overall period of confinement for eligible persons, such that having a serious felony conviction is a condition which increases a defendant's punishment.

> [W]hen the state relies on a prior conviction to allow a defendant fewer credits than he would otherwise 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 do not know what is.

(Slip opin., p. 5.)

A review of all the salient case law and circumstances demonstrates the correctness of this conclusion. And a careful review of the contrary arguments of respondent put forward in its opening brief on the merits shows that they are misplaced or unpersuasive.

1. **The Parallel Authority of *Weaver* and *Lynce*.**

The conclusion by the court below that ineligibility for one-for-one presentence conduct credits amounts to an increase in punishment is consistent with a line of authority from the United States Supreme Court on the related subject of retroactive *reductions* in entitlements to prison credits

as violative of the constitutional protections against ex post facto laws. The High Court has made it clear that such a change amounts to an *increase* in punishment which, if applied retroactively, violates the Ex Post Facto Clause of the federal constitution. (*Weaver v. Graham*, *supra*, 450 U.S. 24 ("*Weaver*"); *Lynce v. Mathis*, *supra*, 519 U.S. 433 ("*Lynce*"). A law reducing such credit entitlements "implicates the *Ex Post Facto* Clause because such credits are one determinant of petitioner's prison term . . . and [the prisoner's] effective sentence is altered once this determinant is changed." (*Lynce*, *supra*, at p. 445; see *In re Lomax* (1998) 66 Cal.App.4th 639, 647.) Similarly, the change of law here means that the existence of a prior serious felony conviction effectively results in an increase of the "effective sentence" of a criminal defendant to his detriment, and thus effects an increase in punishment in this fundamental constitutional sense.

A review of the facts and circumstances of *Weaver* and *Lynce* demonstrates that the punishment increases at issue in those cases are virtually indistinguishable from the situation presented here. *Weaver* involved a statute which reduced the amount of good conduct credits that could be accumulated and deducted from a prisoner's sentence. In holding that a reduction in the availability of such credits violated the Ex Post Facto Clause when applied to prisoners whose crimes were committed before the change in the law, the High Court held that "decreasing the amount of good time credits that can be earned substantially alters the consequences of a completed crime and changes the quantum of punishment." (*Lomax*, *supra*, 66 Cal.App.4th at p. 644, citing *Weaver*, *supra*, 450 U.S. at p. 33.) "Thus, the new provision constricts the inmate's opportunity to earn early release, and thereby makes more onerous the punishment for crimes committed before its enactment." (*Weaver*, *supra*, at pp. 35-36.)

In *Lynce*, the Florida Legislature enacted legislation cancelling

previously enacted early release credits that had been granted to reduce prison overcrowding, which led to the petitioner in *Lynce* being reimprisoned. The Supreme Court held that the 1992 law which cancelled the early release credits violated the Ex Post Facto Clause as to the petitioner, whose crime was committed prior to its enactment. (*Lynce*, *supra*, 519 U.S. at pp. 435-436, 440-449.) In pertinent part, the Supreme Court in *Lynce* held that it was of no moment that the purpose of the underlying legislation was to relieve overcrowding, and not to reduce punishments.

> "To the extent that respondents' argument rests on the notion that overcrowding gain-time is not 'in some technical sense part of the sentence' [citation], this argument is foreclosed by our precedents. As we recognized in *Weaver*, retroactive alteration of parole or early release provisions, like the retroactive application of provisions that govern initial sentencing, implicates the Ex Post Facto Clause because such credits are 'one determinant of petitioner's prison term . . . and . . . [the petitioner's] effective sentence is altered once this determinant is changed.'"

(*Lomax*, *supra*, 66 Cal.App.4th at pp. 646-647, quoting *Lynce*, *supra*, 519 U.S. at p. 445, ellipses and omission of citations by court in *Lomax*.)

In Part B-2 of its brief, the government makes an argument akin to the one raised by the respondent in *Lynce*. According to respondent, there is no reduction in punishment at issue here because the legislation which enacted the January, 2010 amendment to section 4019 "was a response to the state's fiscal emergency and not a reduction of penalty for crimes . . .", and in no way reflected a belief by the Legislature that criminal sentences were too long or too harsh." (Respondent's Opening Brief on the Merits ("ROBM"), pp. 14-15.) As the Court of Appeal in *Lomax* explained, *Weaver* "directs us to look at the objective effect of the law . . .", not its form, to determine whether it affects an increase in punishment. (*Lomax*, *supra*, 66 Cal.App.4th at p. 646,

quoting *Weaver*, *supra*, 450 U.S. at p. 31.)

> It cannot seriously be disputed that the objective effect of the amendment is to lengthen respondents' terms of imprisonment by barring them from earning credit restoration through good behavior. This constitutes punishment. It is objectively no different from the statute in *Weaver* that was found violative of the ex post facto clause by retroactively reducing the amount of good time credits that prisoners could earn, thereby effectively postponing their release dates. The statute at issue in *Weaver* did not withdraw any credits that had already been awarded. By curtailing the availability of future credits, however, it effectively postponed the date Weaver could become eligible for early release. The court observed that the opportunity to earn credits is one determinant of a prison term and that a sentence effectively is altered once this determinant is changed.

(*Lomax*, *supra*, at p. 646, citing *Weaver*, *supra*, 450 U.S. at p. 32.)

The bedrock principle that animates the ex post facto jurisprudence of the Supreme Court in *Weaver* and *Lynce* is that a reduction in prison credits amounts to an increase in the "quantum of punishment" which detrimentally alters a prisoner's "effective sentence." (*Lomax*, *supra*, 66 Cal.App.4th at p. 644; *Lynce*, *supra*, at p. 445.) Although the present case does not concern retroactivity or the application of the Ex Post Facto Clause, there is no conceivable reason to treat the concept of "punishment" any differently for present purposes than in the context of cases such as *Weaver* and *Lynce*. Here, as in those cases, a reduction in entitlement to conduct credits increases the period of imprisonment and thus lengthens the punishment imposed. As such, as explained below, it is subject to the implied pleading requirement as described by this Court's holdings in *Lo Cicero* and *Varnell*.

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2. Under *Lo Cicero* and *Varnell*, the Punishment Increase From the Existence of a Prior Serious Felony Conviction Triggers an Implied Pleading Requirement.

It is settled that where the existence of a fact, such as a prior conviction, results in an increase in punishment, there is an implied requirement that such fact be pled and proven as a precondition to imposition of the enhanced punishment. This principle, first explained by this Court in *People v. Ford*, *supra*, 60 Cal.2d at p. 784, was given express articulation by this Court more than 40 years ago in *Lo Cicero*, *supra*, 71 Cal.2d 1186. At issue in that case was a statutory provision making a defendant convicted of a drug offense entirely ineligible for probation if he had previously incurred a drug conviction. Reversing a trial court's order precluding probation on this ground, this Court held that before a defendant can be made to suffer an increase in penalty from a prior conviction, "the fact of the prior conviction . . . must be charged in the accusatory pleading, and if the defendant pleads not guilty . . . the charge must be proved. . . ." (*Id.*, at p. 1192-1193.) *Lo Cicero* expressly held that "[t]he denial of opportunity for probation involved here is equivalent to an increase in penalty, and the [pleading and proof] principle declared in *Ford* should apply." (*Ibid.*)

Subsequent authority limited the holding in *Lo Cicero* to categorical disqualification for probation. Thus in *People v. Dorsch* (1992) 3 Cal.App. 4th 1346, 1350, the Court of Appeal held that a law which makes a defendant *presumptively*, but not entirely, ineligible for probation does not include an implicit pleading and proof requirement.

It was upon this distinction which this Court based its holding in the next key case, *In re Varnell*, *supra*, 30 Cal.4th 1132. The defendant in that case was charged with a current drug possession offense, with allegation of a prior strike conviction which rendered him ineligible for probation under the

Three Strikes law, and, based on the same serious felony prior, ineligible for the mandatory probation and drug treatment provisions of the Substance Abuse and Crime Prevention Act of 2000 (hereinafter "Proposition 36"). The defendant sought an order from the trial court, under section 1385, dismissing the "strike" prior under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 to make him probation eligible, and asked the court to "disregard the prior . . . being used to disqualify [him] from Proposition 36." (*Id.*, at p. 1135.) The trial court granted the *Romero* request, but found defendant ineligible for Proposition 36 because of the same prior conviction. The Court of Appeal reversed, finding that section 1385 gave the trial court authority to disregard the prior conviction in order to make the defendant Proposition 36 eligible. This Court granted review and reversed this ruling by the intermediate appellate court. (*Id.*, at pp. 1135-1136.) Holding that section 1385 authority applied only to dismissal of "criminal actions or a part thereof . . .", which referred to "individual charges and allegations in a criminal action . . .", this Court held that such authority did not extend to "mere sentencing factors." (*Id.*, at p. 1137, quoting *People v. Hernandez* (2000) 22 Cal.4th 512, 521-524, internal quotations omitted.)

The holding in *Varnell* pertinent to the present case concerns the bases for this Court's characterization of the prior serious felony conviction which made a defendant ineligible for Proposition 36 probation as a "sentencing fact" not subject to the pleading requirement of *Lo Cicero* and the section 1385 authority of the trial court. *Varnell*'s discussion of *Lo Cicero* begins with the recognition that the earlier case constitutes "authority for finding an implied pleading and proof requirement in criminal statutes." (*Varnell, supra*, at p. 1140.) Reciting the holding of *Lo Cicero* that "denial of opportunity for probation . . . is equivalent to an increase in penalty . . .", which triggers an implied pleading requirement, this Court found *Lo Cicero* distinguishable

because the facts giving rise to ineligibility for Proposition 36 probation did not make the defendant in *Varnell* subject to the type of *blanket* ineligibility at issue in *Lo Cicero*, since he could still receive a grant of probation under section 1203, subdivision (e), and even drug treatment as a condition of probation. (*Id.*, at p. 1140 & fn. 5.) Analogizing the case to the earlier holding of *People v. Dorsch*, *supra*, 3 Cal.App.4th 1346, which it cited with approval, this Court held that where a statutory provision does not "absolutely preclude the opportunity for probation . . .", but rather "rendered [a defendant] unfit for probation under a particular provision . . .", the effect is "not the equivalent of an increase in penalty . . .", and there is no implied pleading requirement under *Lo Cicero*. (*Varnell*, *supra*, at pp. 1140-1141.)

As Justice Rushing's opinion below explains, the holdings in *Varnell* and *Dorsch* which find the implied pleading requirement to be inapplicable "rest on the premise that the measures under scrutiny there did not increase the 'penalty,' i.e., punishment imposed on the defendant . . .", but only "increased the *likelihood* . . ." of imprisonment instead of probation. (Slip opin. at p. 10.) Thus, the reasoning of these cases does not apply to the case at bar because "the direct consequence of the court taking notice of defendant's strike prior was to increase the length of time he would in fact spend in prison." (*Ibid.*) That such a change is a categorical increase in punishment, as the Court of Appeal concluded here, is established by the ex post facto cases discussed above in Part B-1. It thus follows that the present case is subject to the implied pleading requirement of *Lo Cicero*, which this Court in *Varnell* cited with approval, even while distinguishing its applicability.

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3. Respondent's "Penalty-Punishment" Distinction Is Unsupported, Contrary to the Legal and Plain Meanings of These Terms, and Contrary to the Holding in *Varnell.*

The government, seizing on the fact that the word "penalty," not "punishment," is used in the opinions of this Court in *Ford*, *Lo Cicero*, and *Varnell*, makes a novel contention for the first time in its brief on the merits in this court, contending that the implied pleading requirement of *Lo Cicero* does not apply here because there is only an increase in *punishment*, and not of the "penalty," which, respondent contends, is a term which "refers to a defendant's *sentence*, not to the ultimate duration of his incarceration." (ROBM, p. 12.)[7] Although it is indubitable, as respondent suggests, that "the sentence [imposed] and the length of incarceration are different and distinct matters . . ." (ROBM, p. 13), this does not give rise to any meaningful distinction in terms of the issue now before this court. This is so for several reasons.

First, the terms "penalty" and "punishment" are virtually interchangeable in their common meanings and use in legal parlance. Black's Law Dictionary defines "punishment" as "[a]ny fine, *penalty*, or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court for some crime or offense committed by him. . . ." (*Black's Law Dictionary* (5th ed. West 1979), p. 1110, emphasis added.) Likewise, "penalty" is defined as "[a]n elastic term with many different shades of meaning [which] involves idea of *punishment*, corporeal or pecuniary, or civil or criminal. . . ." (*Id.*, at p. 1020.) In common parlance, "punishment" is

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7. Respondent appears to be conceding, at least in this part of its argument, that the conduct credit restrictions at issue here do result in an increase in "punishment" insofar as they unquestionably lead to a greater length of incarceration.

defined as "a penalty inflicted for an offense, fault, etc. . . .", and "penalty" as "a punishment imposed or incurred for a violation of law or rule."[8] It is thus more than fair to assume, as does Presiding Justice Rushing's opinion below in the present case, that the term "penalty" as used by this Court in *Varnell* and *Lo Cicero*, means "punishment." (Slip opin. at p. 10.)

Second, respondent advances no authority for its claim that the implied pleading rule applies only to the term of imprisonment. If this were so, then the holding in *Lo Cicero*, as interpreted recently by this Court in *Varnell*, would make no sense. At issue in *Lo Cicero* was not the specific term of years to be imposed, or any provisions, such as Proposition 36, which required a grant of probation, but a blanket probation provision affecting the *opportunity* for a grant of probation.[9] This did not affect the actual penalty imposed by the trial court, but only the availability of an exercise of discretion to impose a less onerous sentence by lowering the *floor* of punishment, allowing the court, in its discretion, to grant probation rather than impose a prison term.

In practical terms, this amounts to a difference in degree, but not in kind, from a trial court's exercise of discretion, under section 1385, to reduce a sentence based on striking a prior conviction, as in the *Romero* context. At issue here, as the opinion below makes clear, is a comparable exercise of discretion by a trial court to strike a prior conviction in order to reduce punishment by eliminating a bar to the enhanced one-for-one presentence conduct entitlement under the January 2010 amendment to section 4019. Thus in *Lo Cicero*, the *Romero* situation, and the present situation, a court's

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8. See http://dictionary.reference.com/browse/punishment, and http://dictionary.reference.com/browse/penalty, last checked 9-8-11.

9. See discussion in Part B-2 above.

exercise of discretion, to grant probation, in *Lo Cicero*, or dismiss a serious felony allegation in the *Romero* context of the present case, is a sentencing decision which affects the actual punishment to be suffered by the defendant. Respondent's attempt to carve out a distinction between "punishment" and "penalty" that makes no difference is contrary to *Lo Cicero*, and to the plain and legal meanings of these words, and should be disregarded by this Court.

4. Respondent's Various "No Increase in Punishment" Arguments in Parts B-2 Through B-4 Are Illogical and Unavailing.

In Parts B-2 and B-3 of its brief, respondent makes two rather puzzling arguments, contending that there is no "increase" in punishment which affects appellant, first because the January 2010 amendments were not intended to effect a reduction in punishment (ROBM at pp. 14-15) and second because he was eligible for the same credits before and after the January 2010 amendments. (ROBM at p. 15-16.) Then, in Part B-4, respondent advances the argument, familiar from the briefing of the retroactivity issue before this court in *People v. Brown*, S181963, that because the amendments at issue concern behavior credits, they are directed at influencing conduct, not reducing or increasing punishment. A review of these points makes it clear that they are unavailing in advancing respondent's position.

Respondent's first point, that the Legislature did not intend, when it enacted the January 2010 amendment to section 4019, to effect a decrease in punishment (Part B-2, ROBM pp 14-15), is both besides the point and questionable in its reasoning. It is of no moment for the reasons explained in Part B-1 of this brief in connection with the discussion of the parallel authority of the Supreme Court's ex post facto jurisprudence concerning credit reducing statutes. The fact that the Legislature intended to reduce prison crowding and cut costs does not matter because the *effect* of the amendment

was, in the ex post facto cases, to retroactively increase the "effective punishment" of offenders and, in the present circumstances, to decrease the effective punishment of persons not subject to the exceptions. (See *In re Lomax*, *supra*, 66 Cal.App.4th at p. 646, *Weaver*, *supra*, 450 U.S. at p. 32, and discussion in Part B-1, *post*.)

In any event, the reasoning of respondent's premise is questionable. If the legislative purpose of the amendments at issue was to address the fiscal emergency, what matters in determining whether the effect of the law is to reduce punishment is not the purpose, but the *mechanism* for cutting government expenditures. For example, the Legislature could have addressed the fiscal emergency occasioned by prison overcrowding in a number of ways without reducing punishments, e.g., by reducing the salaries of correctional officers, eliminating prison vocational programs, or making prisoners pay for the costs of their meals and clothes. Instead, the Legislature chose to address both costs *and* overcrowding by providing for enhanced presentence credits, and thereby shortening the incarceration period of eligible prisoners. This chosen mechanism is no different – aside from being less arbitrary, and fairer – than a legislative enactment which would have reduced prison terms by six months for all qualifying inmates. In the latter hypothetical situation, respondent would have to agree that there was a reduction in both "penalty and punishment," even if the motivation for it was cost-cutting, not beneficence towards convicted criminals. Thus, in any meaningful sense, use of the *mechanism* of reducing punishments is enough to make a legislative enactment.

It is true, as respondent contends in Part B-3, that appellant, with his presentence conduct credits restricted under the January 2010 amendment to section 4019 because of his serious felony prior, received the same credits as he would have received under the pre-amendment, former version of section

4019. However, the arguments advanced by appellant are not premised on any question of a retroactive decrease in punishment. Appellant's crime occurred after the January 2010 amendment went into effect, and thus the former version of the law has no effect on him. There is no argument in the present case which depends on any imagined contention that appellant's credits went down because of his prior serious felony conviction when compared to what he would have gotten without such a prior conviction prior to the January 2010 amendments. The increase in punishment at issue here solely concerns the provisions of the January 2010 amendment, and respondent's attempt to suggest otherwise in Part B-3 is supported by "no reason in law or logic." (*People v. Brock* (2006) 143 Cal.App.4th 1266, 1279.)

Lastly, in Part B-4, respondent advances the argument, familiar from the government's briefing in *Brown* and in the scores of section 4019 retroactivity cases which preceded *Brown* in the lower courts, that the January 2010 amendment to section 4019 is not an "amendatory statute lessening punishment," by which respondent means that because it involves conduct credits, it is designed to influence conduct, not reduce punishments. (ROBM, pp. 16-19.) Again, the retroactivity issue in *Brown* has no application here, and thus the discussion of prospective versus retroactive effect (ROBM, p. 16) is utterly irrelevant to the present case. As explained above, the underlying, and determinative issue in the present case is whether the existence of a serious felony prior conviction, which triggers the more restrictive one-for-two presentence conduct credit provision under the January 2010 amendments to section 4019, effects an increase in punishment in terms of the otherwise available one-for-one credit scheme, such that, under *Lo Cicero*, there is an implied pleading requirement. In that context, respondent's arguments from the retroactivity cases, that conduct credit statutes are focused on "provid[ing]

incentive for prisoners to work towards rehabilitation," and thus do not involve "punishment," make no sense.

As respondent recognizes, a similar argument was made and rejected by the court in *People v. Doganiere* (1978) 86 Cal.App.3d 237, where the Court of Appeal applied *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*) to an amendment which, as in the current situation, increased conduct credits. The court in *Doganiere* rejected the same argument advanced by the government here, that *Estrada* does not apply with respect to an amendment extending the opportunity to earn conduct credits because it is designed to control future behavior. (*Ibid.*) As *Doganiere* explained: "Under *Estrada*, it must be presumed that the Legislature thought the prior system of not allowing credit for good behavior was too severe." (*People v. Doganiere*, *supra*, at p. 240.)

In *Estrada*, the amendment at issue lessened the punishment for a group of offenders. In the present situation, the amendment to section 4019 reduces the punishment for a subset of prisoners who have good conduct in jail while awaiting trial, while not making the same reduction for other prisoners who, like appellant, allegedly have a prior serious felony conviction. The fact that the reduction in time is tied to conduct rather than to a specific offense is a "distinction . . . without legal significance." (*People v. Hunter* (1977) 68 Cal.App.3d 389, 392.)

Estrada stands for the principle that a statute that lightens punishment must be applied to all cases that are not yet final on appeal. As this Court concluded in *In re Kapperman* (1974) 11 Cal.3d 542 and *People v. Sage* (1980) 26 Cal.3d 498, and as the Court of Appeal concluded in *Hunter*, that principle applies when the Legislature increases credits as well as when it reduces the sentence for a particular crime. The fact that the presentence credits at stake here relate to time awarded for good conduct, as opposed to time served, is a distinction without a difference for two related reasons. First,

as explained above, it is the effect, not the purpose of the law, which matters in terms of determining whether it increases or decreases punishment. Second, it is simply not true that the purpose of the January 2010 amendment to section 4019 was "to reward good behavior." Former section 4019 already rewarded good behavior by providing for one-for-two credits for such behavior. When a sentencing judge awards credit to persons, like appellant, who served time in jail prior to the sentencing, the decision whether to impose one-for-one credits or one-for-two credits cannot possibly influence behavior. Mr. Lara, and other similarly situated defendants, already had incentive for good behavior and, more importantly, have already earned full credits for their jail time.

It is far more accurate to say the January 2010 amendment to section 4019, in addition to carrying out the overall intent of Senate Bill 18, to reduce prison overcrowding and the costs which this causes to the state, necessarily reflects a legislative determination that the reward previously given to the specified category of jail inmates for good conduct was too small. Such a determination is logically indistinguishable from a legislative conclusion that the punishment given to defendants who commit a certain type of crime was previously too large. It thus follows that the existence of a prior conviction which disqualifies a defendant from one-for-one conduct credits increases his punishment, and triggers the implied pleading requirement.

5. *Pacheco* Did Not Address the Issue Before the Court and is Distinguishable.

In Part C of its brief, respondent contends that the pleading and proof argument advanced by appellant, and found to be required by the Court of Appeal, is "inappropriate" under *Varnell*. As appellant has already addressed the holding in *Varnell*, in the context of *Lo Cicero*, little more need be said now. It suffices to note here that respondent appears to assume the conclusion

that "appellant's recidivist status" within the meaning of the January 2010 amendment to section 4019 "was a sentencing factor" akin to the prior conviction in *Varnell*, and not an "action" subject to dismissal under section 1385, a conclusion which, for all the reasons discussed above, is erroneous.

In support of this assertion, respondent cites *In re Pacheco* (2007) 155 Cal.App.4th 1439. It is evident that respondent has misread the holding in *Pacheco*. In that case, the defendant pled guilty to a charge of inflicting corporal injury on a cohabitant, and admitted a great bodily injury ("GBI") enhancement under section 12022.7. When it sentenced the defendant, the court struck the punishment for the great bodily injury enhancement, and imposed a three year sentence pursuant to the plea agreement. Thereafter, the Department of Corrections and Rehabilitation ordered Pacheco's prison credits restricted under section 2933.1 because, by virtue of the great bodily injury enhancement which he had admitted, his current crime was a "violent felony" subject to the fifteen percent credit limits of section 2933.1. Pacheco challenged this determination on habeas, claiming that his crime was not a violent felony because the trial court had struck the GBI enhancement. (*Id.*, at p. 1442.) The Court of Appeal denied habeas relief, concluding that when the court struck the GBI enhancement, it struck only the punishment, and not the enhancement itself. (*Id.*, at p. 1444.) Thus, the court in *Pacheco* concluded, the defendant remained a "person convicted of . . ." a violent felony by virtue of his admission of the truth of the GBI allegation. (*Ibid.*) In other words, the trial court's actions in that case had the limited effect of eliminating the three year prison term for the GBI enhancement which would otherwise be mandatory, but did not alter the fact, established by defendant's plea and admission, that the defendant's current crime was the violent felony of infliction of corporal injury with a GBI enhancement.

The opinion *Pacheco* makes it clear that the result would have been

different if the court had stricken "the enhancement allegation in its entirety, not just the punishment. . . ." (*Id.*, at p. 1445.) Thus, *Pacheco* is distinguishable from the present case because here, unlike *Pacheco*, appellant never admitted the truth of the allegation that he had previously suffered a serious felony conviction, which allegation was dismissed by the court on motion of the prosecutor. (See CT 19, 43-44)

In dicta, the court in *Pacheco* opined that the restriction of worktime credits under section 2933.1 "is not considered punishment . . .", but is rather "benefits a prisoner earns based on good conduct and participation in qualifying programs." (*Id.*, at p. 1445.) As explained above, in some detail, this summary conclusion, for which no authority is cited, is incorrect. In any case, the question whether there is an implied pleading requirement with respect to facts which make a crime a violent felony, for purposes of section 2933.1, is nowhere addressed in *Pacheco*. As this Court has frequently stated, "it is axiomatic that cases are not authority for propositions not considered." (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176; accord, *Sonic-Calabasas A, Inc. v. Moreno* (2011) 51 Cal.4th 659, 694.)

C. There Are No Significant or Unmanageable "Collateral Consequences" From a Ruling Favorable to Appellant.

In Part E of its brief respondent suggests that this Court should consider, in its resolution of this issue, whether a result favorable to appellant will place onerous pleading requirements on prosecutors. (ROBM at p. 28.) The only issue before the court concerns whether there is an implied pleading requirement as to prior conviction allegations which make a defendant ineligible for one-for-one credits under the amendment to section 4019. There is nothing onerous about requiring prosecutors to plead the existence of prior convictions, a practice which is diligently followed as to a host of sentence enhancements and alternative schemes too numerous to reference here. As

this Court explained more than 40 years ago in *Lo Cicero*, "[t]he statutory procedure for charging and proving prior convictions is specific and comprehensive; it is in common use and familiar to courts and attorneys." (*Lo Cicero*, *supra*, 71 Cal.2d at p. 1194.)

The suggestion that a favorable ruling will also require the prosecution to plead that a current crime is a serious felony ignores the fact that such a pleading is already commonplace under section 669f, or is unnecessary where, as in most situations, the crime itself is defined as a serious felony. Even assuming, without conceding, that the third trigger for restriction of conduct credits, sex offender registration, would have to be pled and proven, this would hardly be an onerous burden, since the status in question almost always involves a lifetime obligation, the existence of which is readily available to prosecutors and easy to prove as a matter of record.

The phantom menace of other "unpredictable consequences" which would attach in the event of a favorable ruling (ROBM, p. 28-29) should cause this Court no concern. As discussed herein, the distinction between facts that invariably increase punishment, which contain an implied pleading requirement, and those which do not increase punishment, and do not include such a requirement, was well explained by this Court in *Varnell* and can be further clarified herein. It is a sound rule, based on settled principles of notice and due process in connection with imposition of greater punishment, and should not be short-circuited because it may, in some unexpected way, impact other punishment laws enacted by the Legislature.

D. **The Plea Bargain and the Remedy.**

In briefing the present claim in the Court of Appeal, appellant sought modification of the sentence to include one-for-one credits, on the grounds that the prosecution had failed to comply with the implicit pleading and proof

requirement as to the prior conviction.

> In the present case, an allegation of a serious felony prior was pleaded, but was then dismissed on the prosecution's motion without being proven or admitted. Thus, the prosecution failed to "plead and prove" the allegation giving rise to credit restriction, and he is entitled to full, one-for-one credits under the January, 2010 amendments to section 4019.

(AOB in No. H036143, p. 5.)

In its opinion, the Court of Appeal evaluated the question of remedy as involving an interpretation of the plea bargain agreement in the present case, ultimately concluding that the bargain, while contemplating dismissal of the serious felony allegations for purposes of the Three Strikes law,"manifestly failed to reach any agreement on whether the stricken prior would affect defendant's presentence confinement credits." (Slip opin., p. 12.) From this, the court concluded "that the plea agreement vested the trial court with discretion to determine whether the priors should be taken into account, or instead disregarded, in the determination of presentence [conduct] credits . . .", and remanded the case to permit the trial court to "exercise that discretion" pursuant to section 1385. (Slip opin., pp. 12-13.)

Before addressing the merits of this aspect of the Court of Appeal ruling in the present case, appellant notes that respondent's discussion of this portion of the opinion below is essentially a rehash of the arguments it had raised in the prior portions of its brief, to the effect that trial courts lack discretion to dismiss prior convictions for purposes of awarding credits, and a contention that custody credits are an automatic consequence of conviction which do not involve discretion. (ROBM at pp. 25-26.) Both points beg the questions addressed in the brief, i.e., whether the existence of a prior conviction increases punishment in such manner as to give rise to the implied pleading requirement discussed in *Lo Cicero* and *Varnell*, and the section

1385 discretion that comes with such a pleading requirement. Again, this discussion does not need repetition here.

With respect to the remedy fashioned by the Court of Appeal, appellant respectfully submits that the lower court's conclusion on this point is contrary to *Lo Cicero*, and should be reconsidered by this Court in the event that it agrees with appellant, and with the Court of Appeal, as to the existence of the implied pleading requirement.[10] The implied pleading rule of *Lo Cicero* manifestly requires that prior be conviction be not only pled but also proven to the finder of fact or admitted by the defendant. (*Lo Cicero*, *supra*, 71 Cal.2d at pp. 1192-1193, quoting *Ford*, *supra*, 60 Cal.2d at p. 794.) Here, though the prior was pled, it was never proven nor admitted. Thus, there was noncompliance with the implied pleading and proof requirement, and appellant cannot suffer the consequences of the prior conviction.

In *Lo Cicero*, this Court ordered a remand based on its determination that the trial judge probably denied probation based on the unpled, unproven prior conviction. (*Lo Cicero*, *supra*, at pp. 1194-1195.) In the present case, the proper remedy, in light of the failure of either proof or admission of the prior conviction, is to order a modification of the judgment to reflect an award of one-for-one presentence conduct credits under the January 2010 amendment to section 4019.

Alternatively, for the reasons expressed in the Court of Appeal opinion with respect to the remedy fashioned in said opinion, this Court should hold that by virtue of the implied pleading and proof requirement at issue here, the trial court has discretion, under section 1385, to dismiss the prior serious

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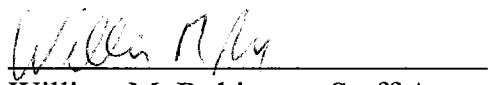
10. Although this Court's order granting review was not specifically addressed to the remedy afforded by the Court of Appeal, appellant submits that this sub-issue is one which is "fairly included" in the issue on which review was granted. (See Rule 8.516.)

felony allegation in the present case in order to make appellant eligible for one-for-one credits.

CONCLUSION

For the reasons explained below, appellant respectfully submits that the judgement of the Court of Appeal be affirmed with respect to its conclusion regarding the implied pleading requirement, and modified with respect to remedy, with the trial court directed to award one-for-one credits. Alternatively, as argued above, the judgment imposed in that court should be affirmed.

Dated: September 12, 2011 Respectfully submitted,

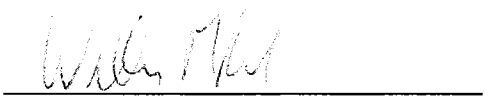


William M. Robinson, Staff Attorney
Sixth District Appellate Program
Attorney for Appellant Ricardo Lara

CERTIFICATE OF WORD COUNT

Appellant, by and through his appointed counsel on appeal, hereby certifies that the software used in preparing this brief is Corel Word Perfect 8 and that according to the software report for this document the brief contains 8852 words.

I declare under penalty of perjury under the laws of the state of California that this declaration is true and correct. Executed at Santa Clara, California, on September 12, 2011.



William M. Robinson, Staff Attorney
Sixth District Appellate Program
Attorney for Appellant Ricardo Lara

PROOF OF SERVICE

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

X Placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Clara, California, addressed as follows:

Eric D. Share, Esq.
Attorney General's Office
455 Golden Gate Avenue
Suite 11,000
San Francisco, CA 94102-7004
[Attorney for Respondent]

District Attorney's Office
70 W. Hedding Street
San Jose, CA 95110

Clerk of the Superior Court
191 N First Street
San Jose, CA 95113

Sixth District Court of Appeal
333 W. Santa Clara Street
Suite 1060, 10th Floor
San Jose, CA 95113

Ricardo Lara
2929 Sherbrooke Way
San Jose, CA 95127

I declare under penalty of perjury the foregoing is true and correct. Executed this 12th day of September, 2011, at Santa Clara, California.

Priscilla A. O'Harra