COPY

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 REPLY BRIEF ON THE MERITS

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
LAURENCE K. SULLIVAN
Supervising Deputy Attorney General
ERIC D. SHARE
Supervising Deputy Attorney General
State Bar No. 151230
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-1375
Fax: (415) 703-1234
Email: Eric.Share@doj.ca.gov
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

ARGUMENT

TRIAL COURTS MAY NOT DISMISS OR IGNORE A DEFENDANT'S PRIOR SERIOUS OR VIOLENT FELONY CONVICTION IN AWARDING PRESENTENCE CREDIT UNDER FORMER SECTION 4019

Appellant maintains that because Penal Code section 4019[1] as amended January 25, 2010 (former section 4019) increased the rate at which other defendants could earn presentence custody credit—but left the rate unchanged for defendants like him who had suffered a prior serious or violent felony conviction—it increased his "punishment." That increased punishment, appellant argues, "trigger[ed] an implied pleading and proof requirement" as to his prior conviction. (Appellant's Opening Brief on the Merits (AOBM) 10.) Appellant's argument is without merit. The statute neither altered the sentence nor lengthened the duration of incarceration in cases like this one. Therefore, the statute did not include any implied pleading and proof requirement for the fact of a prior conviction. Because the prior conviction was not an "action or a part thereof" that needed to be pleaded and proved for the court to grant presentence conduct credit at the same rate as before January 25, 2010, the trial court had no discretion under section 1385 to dismiss or ignore the prior in appellant's case.[2]

---

[1] Further undesignated statutory references are to the Penal Code.

[2] As noted in our opening brief, the Legislature amended section 4019 effective September 28, 2010, to restore the conduct credit accrual rate as it existed before January 25, 2010. (SB 76, Stats. 2010, ch. 426, § 2.) At that time, the Legislature moved the restriction on the ability of certain prisoner's (e.g., those with a prior serious or violent felony conviction and those required to register as a sex offender) to earn accelerated conduct credit to section 2933. (See § 2933, subd. (e)(3) ["Section 4019, and not this subdivision, shall apply 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

(continued...)

A. Appellant's Opportunity to Earn Conduct Credit Was Not Affected by Former Section 4019 and He Was Not Denied Any Credits to Which He Was "Entitled"

Appellant's argument rests on faulty postulations about the operation of former section 4019. Contrary to that argument, his opportunity to earn conduct credit was not affected by former section 4019. As detailed in our opening brief (AOBM 7-9), section 4019 originally permitted prisoners to earn presentence credit at a maximum rate of two additional days for every four days served in local custody. The amendments to section 4019, as of January 25, 2010, afforded certain prisoners the opportunity to earn conduct credit at an increased rate—two days of conduct credit for every two days of actual custody. Former section 4019 excluded certain classes of defendants—including those who had suffered a prior serious or violent felony—from earning credits at the new accelerated rate. Those defendants, including appellant, continued to earn credit at the original rate of two days of conduct credit for every four days actually served.

As is thus evident, appellant suffered no *reduction* in the rate at which he was able to earn conduct credit when former section 4019 was in effect. He concedes this. (AOBM 20-21, italics added ["It is true, as respondent contends . . ., that appellant, with his presentence conduct credits restricted under the January 2010 amendment to section 4019 because of his serious

---

(...continued)
Section 1192.7, or a violent felony, as defined in Section 667.5"]; see also SB 76, Stats. 2010, ch. 426, § 2.)

More recently, two other bills concerning section 4019 have been enacted. (Assembly Bill 109, Stats. 2011, ch. 15, § 482, effective April 4, 2011, operative October 1, 2011; Assembly Bill 117, Stats. 2011, ch. 39, §§ 53 & 68, effective June 30, 2011, operative October 1, 2011.) The conduct accrual rate in the new laws will apply to confinement for a crime committed on or after October 1, 2011. Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law." (Stats. 2011, ch. 39, § 53.)

felony prior, *received the same credit as he would have received under the pre-amendment*, former version of section 4019"].)

Appellant's attempt to dismiss this fact as irrelevant—because he is not claiming "a retroactive decrease in punishment"—is unpersuasive. (See AOBM 21 ["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"].) Appellant maintains his punishment was increased prospectively because he was denied the opportunity to earn additional credit. This reflects a second faulty premise, i.e., former section 4019 *entitled* him to earn conduct credit at the same rate as nonrecidivists, and thus he was punished when this opportunity was foreclosed to him by virtue of his prior conviction. (See, e.g., AOBM 2, underlining added ["this Court must decide whether there is an implied requirement that the fact of a prior serious felony conviction, which, in part, disentitles a defendant to one-for-one conduct credits under the new credit scheme must be *pled and proven*"]; *ibid.* [the determinative question is "whether the existence of the fact of a prior serious felony conviction, which results in a fifty percent reduction in presentence credits, effects an *increase in punishment*"]; AOBM 13 ["Here, as in [cases interpreting the ex post facto clause of the United States Constitution] a reduction in entitlement to conduct credits increases the period of imprisonment and thus lengthens the punishment imposed"].)

Appellant was not *entitled* to any particular rate of conduct credit accrual or, for that matter, any conduct credit at all. There is no constitutional right to sentence reduction credits. (*Wolff v. McDonnell* (1973) 418 U.S. 539, 557.) They are a statutory creation that the Legislature declared to be a privilege, not a right. (See § 2933, subd. (c).)

Credits must be earned and are subject to forfeiture in certain circumstances. (See *ibid.*) Because credits are a privilege and not a right, the Legislature may determine that certain classes of prisoners are entitled to the opportunity to earn more credits than others when those distinctions are based on rational, equitable, and nonarbitrary considerations. Thus, in former section 4019, the Legislature reasonably determined that those without a prior conviction (and who were not required to register as a sex offender or committed for a serious felony) could be afforded added behavioral incentives to shorten their period of incarceration. Recidivists, like appellant, who had already demonstrated that a prior conviction had not served to reform and rehabilitate their behavior, reasonably were denied this added incentive. The distinction drawn by the Legislature in former section 4019 did not deny appellant credits to which he was prospectively "entitled," nor did it effect an increase in his punishment. Offering less opportunity for reward to recidivists for good conduct in presentence custody relative to nonrecidivists cannot be equated with increasing the punishment of the former.

B. Appellant's Analogy to Cases Interpreting the Ex Post Facto Clause Undermines His Contention that Former Section 4019 Increased His Punishment

Appellant concedes that he must prove that former section 4019 actually increased his punishment. As he frames the issue, a fact that results in a meaningful increase in a defendant's punishment necessitates pleading and proof of that fact, and only where a fact is required—expressly or implicitly—to be pleaded and proven, is it an "action" subject to dismissal under section 1385. (AOBM 3.) Thus, under appellant's formulation, "[t]he key question . . . is whether the existence of the facts giving rise to the credit restrictions under [the] January 2010 amendment to

section 4019 have the result of increasing a defendant's punishment." (AOBM 3.)

Disputing respondent's distinctions asserted in its opening brief between statutes that affect a defendant's sentence and those that affect his period of incarceration—appellant relies heavily on cases construing the ex post facto clause of the United States Constitution. According to appellant, these cases discuss a "closely analogous situation" (AOBM 4; see also AOBM 10 ["parallel authority"]), and stand for the proposition that laws which unfavorably alter a prisoner's ability to earn behavior credit effect an increase in punishment (AOBM 4-5). Appellant reads these cases far too broadly. Moreover, in severing these cases from the ex post facto context in which they were decided, he misapplies them.

"To fall within the ex post facto prohibition, a law must be retroactive—that is, 'it must apply to events occurring before its enactment'—and it 'must disadvantage the offender affected by it,' [citation], by altering the definition of criminal conduct or increasing the punishment for the crime, see *Collins v. Youngblood*, 497 U.S. 37, 50." (*Lynce v. Mathis* (1997) 519 U.S. 433, 441 (*Lynce*), quoting *Weaver v. Graham* (1981) 450 U.S. 24, 29 (*Weaver*); see also *In re Ramirez* (1985) 39 Cal.3d 931, 934.) "[I]t is the effect, not the form, of the law that determines whether it is ex post facto. The critical question is whether the law changes the legal consequences of acts completed before its effective date. (*Weaver, supra*, 450 U.S. at p. 31, fn. omitted.)

In *Weaver*, the Supreme Court considered whether retroactively decreasing the amount of "gain time" awarded for an inmate's good behavior violated the ex post facto clause. In 1976, Weaver pleaded guilty to murder and was sentenced to 15 years in prison. Florida law provided credits for good conduct that would have provided Weaver with the opportunity to be released after serving less than nine years of his sentence.

In 1978, Florida enacted a new formula for computing gain time. The new statute limited Weaver's ability to earn future credits and, thus, postponed the date when he would become eligible for early release. (*Weaver*, *supra*, 450 U.S. at pp. 25-27.) The Supreme Court held that a reduction in the availability of good conduct credits violated the ex post facto clause when applied to prisoners who had been sentenced *before* the change in the law. (*Id.* at pp. 35-36.) "For prisoners who committed crimes before its enactment, [the new statute] substantially alters the consequences attached to a crime already completed, and therefore changes 'the quantum of punishment.' [Citation.] Therefore, it is a retrospective law which can be constitutionally applied to petitioner only if it is not to his detriment. [Citation.]" (*Id.* at p. 33.) The statutory change, however, did alter the gain time to Weaver's detriment. "[T]he new provision constricts the inmate's opportunity to earn early release, and thereby makes more onerous the punishment for crimes committed before its enactment." (*Id.* at p. 36.)

Following *Weaver*, *California Dept. of Corrections v. Morales* (1995) 514 U.S. 499 addressed an amendment to California law that decreased the frequency of parole hearings if the parole board determined it was unreasonable to expect that parole would be granted to a prisoner at a hearing during the subsequent years. (*Id.* at p. 507.) The Court found no ex post facto violation because there "is no reason to conclude that the amendment will have any effect on any prisoner's actual term of confinement . . . ." (*Id.* at p. 512.)

The Supreme Court again construed the ex post facto clause in *Lynce*, which addressed Florida's *cancellation* of early release credits previously granted to prisoners. Florida statutes authorized the award of early release credits to prisoners when the state's prison population exceeded certain levels. In 1992, Lynce, who in 1986 had received a 22-year prison sentence, was *released* from prison due to his accumulation of various

types of early release credits, including provisional credits awarded due to prison overcrowding. Pursuant to a later statute that canceled the provisional credits, the state issued rearrest warrants for former prisoners like Lynce. (*Lynce*, *supra*, 519 U.S. at pp. 435-439.)

Relying on *Weaver*, *Lynce* held that "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.' [Citation.]" (*Lynce, supra*, 519 U.S. at p. 445, quoting *Weaver*, *supra*, 450 U.S. at p. 32.) The court explained that its reasoning in *Weaver* "relied not on the subjective motivation of the legislature in enacting the gain-time credits, but rather on whether objectively the new statute 'lengthen[ed] the period that someone in petitioner's position must spend in prison.' [Citation.]" (*Id.* at p. 442.) In *Lynce*, the "1992 statute has unquestionably disadvantaged petitioner because it resulted in his rearrest and prolonged his imprisonment. Unlike the California amendment at issue in *Morales*, the 1992 Florida statute did more than simply remove a mechanism that created an *opportunity* for early release for a class of prisoners whose release was unlikely; rather, it made ineligible for early release a class of prisoners who were previously eligible—including some, like petitioner, who had actually been released." (*Id.* at pp. 446-447.)[3]

From these cases, appellant draws the following conclusion:

---

[3] *Lynce* explained further that *Morales* "rested squarely on the conclusion that 'a prisoner's ultimate date of release would be entirely unaffected by the change in the timing of suitability hearings.' [Citation.] Although we held that 'speculative and attenuated possibilit[ies]' of increasing the measure of punishment do not implicate the Ex Post Facto Clause, [citation], the bulk of our analysis focused on the effect of the law on the inmate's sentence." (*Lynce*, *supra*, 519 U.S. at p. 444.)

> a reduction in prison credits amounts to an increase in the "quantum of punishment" which detrimentally alters a prisoner's "effective sentence." [Citations.] 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.

(AOBM 13; see also AOBM 11 ["the change in 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 affects an increase in punishment in this fundamental constitutional sense"].)

The Supreme Court's analysis in *Weaver* and *Lynce*, in context, provides no support for appellant's claim that the Legislature *punished* him by enacting former section 4019. Whatever term is used, e.g., punishment, penalty, disadvantage, neither appellant's sentence nor term of imprisonment changed upon former section 4019's enactment. The ex post facto cases pertain to situations in which some opportunity for a benefit to which the defendant was *entitled* was retroactively *denied* to that defendant. In *Weaver*, a law passed after the defendant's crime and sentencing reduced his opportunity to earn credits to which he previously was entitled and constricted his opportunity to earn early release. Unlike appellant, at the time of Weaver's crime and sentencing, Weaver was *entitled* to earn credit at the previously applicable rate. That opportunity was unconstitutionally rescinded by application of a retroactive law. The situation in *Lynce* was even more drastic. The statute that Florida attempted to enforce against Lynce not only would have retroactively cancelled credits he had already earned, it would have resulted in his rearrest and return to prison.

Defendants in both *Weaver* and *Lynce* were entitled to an application of law that the state tried to change retroactively to their detriment. Because the laws the state tried to enforce applied to events occurring before their enactment, and disadvantaged the defendants, they violated the ex post facto clause. Here, as appellant concedes, there is no issue regarding the retroactive application of a law. Former section 4019 undeniably applies to appellant's case. Moreover, even by way of analogy, the high court's ex post facto analysis cannot be stretched to apply to the situation here where appellant was not entitled to application of a more favorable rate of conduct credit, experienced no change in the rate at which he could earn conduct credit, and suffered no other detriment as a result of the enactment of former section 4019.[4]

C. Appellant Fails to Establish that Former Section 4019 Contained an Implied Pleading and Proof Requirement

Appellant acknowledges that former section 4019 contained no explicit pleading and proof requirement. Relying on his ex post facto cases, however, he argues 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." (AOBM 14.) He maintains this case is indistinguishable from *People v. Lo Cicero* (1969) 71 Cal.2d 1186 (*Lo Cicero*), which found an implied pleading and proof requirement for the fact of a prior conviction that rendered the defendant ineligible for probation. (*Id.* at pp. 1192-1193; see also *People v. Ford* (1964) 60 Cal.2d

---

[4] Cf. *In re Ramirez*, *supra*, 39 Cal.3d 931, 937 [new statutory scheme for awarding sentence reduction credits could be applied to prisoners who committed crimes before its effective date because all that changed was the sanction for misconduct occurring after the statute's effective date; the new statutes "neither increase petitioner's maximum sentence nor reduce the good behavior credit he can earn"].

772, 775-776, overruled on another ground in *People v. Satchell* (1971) 6 Cal.3d 28, 40-41 [pleading and proof required under section 969 for increased penalties flowing from prior conviction and arming allegations].) As shown in our opening brief (ROBM 10-14), *Lo Cicero* does not compel the holding appellant seeks.

As established, appellant suffered no penalty or punishment by the enactment of former section 4019.[5] Thus, rather than *Lo Cicero*, this case is governed by *In re Varnell* (2003) 30 Cal.4th 1132 (*Varnell*). In *Varnell*, the defendant's prior serious felony conviction made him statutorily ineligible for Proposition 36 probation. This court held that eligibility or ineligibility for drug treatment probation under Proposition 36 was not a charge or allegation in the information that could be dismissed by a trial court. Section 1385 permits only dismissal of a "criminal action or a part thereof." An "action" means the individual charges and allegations in a criminal action and has never extended to mere sentencing factors. (*Id.* at p. 1137.)

Varnell clarified that *Lo Cicero* addressed a law that limited a court's option of ordering an alternative to incarceration. (*Varnell, supra*, 30 Cal.4th at p. 1140; see also *People v. Ibarra* (1963) 60 Cal.2d 460, 467-468 [prior conviction barring a defendant from a narcotics rehabilitation

---

[5] Appellant repeatedly asserts that respondent, in noting differences between factors that can affect a defendant's sentence and those that can affect his period of incarceration, makes an implicit concession that former section 4019 increased appellant's "punishment" by "unquestionably" leading to longer incarceration. (See, e.g., AOBM 3, 4, & 17, fn. 7.) In finding such a concession in respondent's opening brief, appellant either misreads or misunderstands our argument. Respondent's position is consistent and clear—nothing in former section 4019 increased *either* appellant's sentence or period of incarceration, or decreased his opportunity to earn conduct credits—whatever words ultimately are used to describe those concepts. (See ROBM 6, 9, 14.)

program should be alleged in the information; the prior conviction eliminated a sentencing option for the trial judge, i.e., an alternative to imprisonment].) In *Varnell*, in contrast to *Lo Cicero*, the Legislature did not completely eliminate the sentencing option, but rather removed only one type of probation eligibility. (*Varnell*, *supra*, 30 Cal.4th at p. 1139.)[6] 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." (*Id.* at p. 1141; see also *People v. Dorsch* (1992) 3 Cal.App.4th 1346, 1350 [statute which made defendant presumptively ineligible for probation, but did not foreclose probation, did not include an implied pleading and proof requirement].)[7]

Appellant maintains that this 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." (AOBM 6; see also AOBM 16.) Appellant misapprehends the effect of his prior conviction under former section 4019. His prior conviction neither increased his sentence nor

---

[6] It is *Varnell*'s distinction between statutes that affect a defendant's sentence—by removing a sentencing option or an alternative to incarceration from a trial court—and those that only affect punishment—by rendering a defendant ineligible for one type of probation or by making him eligible for a certain rate of conduct credit accrual—that respondent's opening brief referenced by distinguishing "penalty" from "punishment." (See ROBM 10-14.) Thus, appellant's vociferous objection to this distinction (AOBM 17-19) is not well taken.

[7] This Court further explained that even were Varnell's criminal history to have barred him automatically from probation, "due process would not require that the facts supporting imposition of a mandatory prison term be pleaded and proved." (*Varnell*, *supra*, 30 Cal.4th at p. 1142, citing *McMillan v. Pennsylvania* (1986) 477 U.S. 79, 87-88, and *Harris v. United States* (2002) 536 U.S. 545, 568.)

foreclosed a sentencing option. In *Lo Cicero*, entirely barring probation removed a sentencing choice—an alternative to incarceration—from the trial court's discretion and required imposition of a prison sentence. Here, former section 4019 did not impinge on the trial court's sentencing choices. Rather, the existence of appellant's prior conviction only disqualified him from an accelerated conduct credit accrual rate the Legislature deemed appropriate for those without prior convictions (and who were not required to register as a sex offender or convicted of a serious felony).

Under former section 4019, appellant was still entitled to earn presentence conduct credit—and at the same rate as before the statute. The opportunity to earn any conduct credit can only serve, if a defendant avails himself of the opportunity, to decrease his time in custody. Former section 4019's accelerated conduct credit accrual rate available to defendants without disqualifying factors did not increase appellant's punishment. It simply did not afford him the opportunity to decrease his period of incarceration as much as others who had no disqualifying factor.

For purposes of former section 4019, the historical fact of appellant's prior conviction was a sentencing factor used to determine the applicable accrual rate of appellant's conduct credits within the range prescribed by the Legislature, not an "action or a part thereof" that could be dismissed under section 1385. "A ruling that section 1385 could be used to disregard sentencing factors, which . . . are not included as offenses or allegations in an accusatory pleading, would be unprecedented." (*Varnell*, *supra*, 30 Cal.4th at p. 1137; cf. *Oregon v. Ice* (2009) 555 U.S. 160, 170 ["It is . . . not the case that . . . the federal constitutional right [to jury trial] attaches to every contemporary state-law 'entitlement' to predicate findings"].)

Instructive here is *In re Pacheco* (2007) 155 Cal.App.4th 1439 (*Pacheco*) in which the defendant pleaded guilty to inflicting corporal injury on a cohabitant and admitted a great bodily injury enhancement

(GBI) (§§ 273.5, 12022.7, subd. (a)). Although the trial court struck the GBI enhancement for purposes of sentencing, the California Department of Corrections limited defendant's postsentence credits because of his conviction of a violent felony (§ 2933.1). Pacheco sought habeas relief claiming he was not serving time for a violent felony because the trial court struck the punishment for the GBI enhancement. *Pacheco* held that the trial court had struck only the punishment for the GBI enhancement, not the enhancement itself. Although the trial court approved a plea agreement that gave Pacheco leniency by striking the term for the GBI enhancement, the purpose underlying the limit on credits for those who had committed a violent felony was unaffected. (*Id.* at p. 1441-1445.)

Appellant contends "*Pacheco* is distinguishable because here, unlike in that case, appellant never admitted he had suffered a prior conviction." (AOBM 25.) Also, an allegation that he had suffered a prior strike was dismissed by the court on motion of the prosecutor for purposes of the Three Strikes law. (AOBM 25.) Appellant's proposed distinctions assume his argument. As established, for purposes of former section 4019, it was not necessary for him to have admitted that he had suffered a prior conviction. Thus, it is immaterial that he had not admitted the fact. Moreover, akin to *Pacheco*, the prior conviction's dismissal for sentencing under the Three Strikes law did not mean it ceased to exist as part of appellant's criminal history. It did exist as a sentencing factor that the trial court, at the direction of the Legislature, had to consider in calculating presentence conduct credits.

Significantly, *Pacheco* explained—contrary to the assumption underlying appellant's arguments—that just because a prisoner spends additional time in prison does not necessarily mean his "punishment" has been "increased." "A reduction in the worktime credits allowed by section 2933.1 *may feel like* '*additional punishment*' to a prisoner, a result

seemingly inconsistent with the sentencing court's order in this case under section 1385. *However, 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." (*Pacheco*, *supra*, 155 Cal.App.4th at p. 1445, italics added.) Appellant dismisses this language from *Pacheco* by asserting that for the reasons he has already given, *Pacheco*'s "summary conclusion, for which no authority is cited, is incorrect." (AOBM 25.) *Pacheco*'s conclusion cannot be so easily discharged. As *Pacheco* accurately observed, that something may *feel* like punishment to a prisoner does not make it so in a legal sense.

Finally, appellant claims *Pacheco* is inapposite because it did not specifically consider whether there is an implied pleading and proof requirement for facts that make a crime a violent felony for purposes of section 2933.1. (AOBM 25.) Again, *Pacheco* cannot so easily be disregarded. *Pacheco* presents an analysis of an *analogous* situation and demonstrates why a defendant's criminal history is not an "action" that can be dismissed under section 1385. That it does not present the *exact* situation now before this court does not diminish its persuasive authority.[8]

---

[8] Appellant compares the section 1385 dismissal authority he urges the court to adopt for former section 4019 to a trial court's authority to dismiss a strike under *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497. (See AOBM 18.) The comparison is not apt; indeed, it weakens appellant's argument. The Three Strikes law, unlike former section 4019, specifically requires strikes to be pleaded and proved and acknowledges authority to dismiss a prior conviction allegation under section 1385. (See §§ 667, subd. (f)(2), 1170.12, subd. (d)(2); *Romero*, *supra*, 13 Cal.4th at p. 514.) The Three Strikes law demonstrates that when the Legislature intends to include a pleading and proof requirement in a statute, it knows how to specify that requirement. (See also *Dorsch*, *supra*, 3 Cal.App.4th at p. 1350.) Indisputably, former section 4019 contained no such requirements.

D. Former Section 4019 Was Intended to Reduce Costs and Prison Overcrowding, and to Motivate Good Behavior

Again relying on his ex post facto cases, appellant asserts that the Legislature's intent in amending section 4019 is "of no moment" and that it is only the "effect" of the amendments that is relevant. (AOBM 19-20.) Nonetheless, he strives to convince this court that the Legislature's intent was to reduce punishment. He finds it immaterial that the mechanism the Legislature chose was to increase incentives for good behavior in local custody. (See AOBM 4 [former section 4019 "was not enacted to improve inmate behavior by dangling a bigger carrot"]; AOBM 23 ["it is simply not true that the purpose of the January 2010 amendment to section 4019 was 'to reward good behavior'"].) Thus, appellant posits:

> 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 punishment, 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. <u>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</u>.

(AOBM 20, underlining added; see also AOBM 23 [legislative determination that reward previously given for good conduct was too small "is logically indistinguishable from a legislative conclusion that the punishment given to defendants who commit a certain type of crime was

previously too large"].) Appellant's equation of adding incentives for good behavior in local custody to reducing sentences directly is erroneous. The Legislature did not enact a blanket reduction in prison sentences for qualifying inmates, but rather chose a mechanism to further motivate good behavior by those inmates.

Former section 4019 may have been intended in part to redress a fiscal emergency and to reduce prison overcrowding. But the mechanism the Legislature chose provided added motivation for most prisoners to behave in local custody, and thereby appears to have been aimed at better managing inmate populations. (See *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"]; see also cases cited at ROBM 17-18.) That the Legislature did not reduce prison terms directly cannot lightly be disregarded. Under former section 4019 (and all prior versions of section 4019), a prisoner had to perform the good acts that would entitle him to conduct credit and, consequently, shorten his period of incarceration. An increase in a reward for certain behavior is not the equivalent of a direct reduction to sentences or punishment. (See *People v. Brunner* (1983) 145 Cal.App.3d 761, 764.) Thus, appellant's attempt to reframe former section 4019 as an act aimed at reducing punishment or prison terms does not withstand scrutiny.[9]

---

[9] Appellant also asserts that former section 4019 was not aimed at rewarding good behavior because the previous version of the statute "already rewarded good behavior." (AOBM 23.) Logically, of course, offering a *greater* reward is likely to provide *additional* motivation for a prisoner's good conduct.

E. Appellant's Argument is Undercut By a Trial Court's Authority to Deny *All* Conduct Credits Without Pleading and Proof

There is no significant distinction between the character of facts that disqualify a defendant from former section 4019's accelerated rate of conduct credit accrual and other facts a sentencing court can find that reduce an award of conduct credits, e.g., a defendant's refusal to perform assigned labor or noncompliance with institutional regulations. These latter facts cannot be pleaded at the outset of a criminal prosecution since they will only exist, if at all, after detention has occurred. Yet, a sentencing court's finding of such facts has an even greater consequence than a prior conviction or sex offender registrant status since they can render a defendant *entirely* ineligible for conduct credit. An anomalous result of appellant's proposed rule is that a sentencing court could refuse altogether conduct credit based on uncharged conduct in local custody, yet be unable to refuse an accelerated conduct credit accrual rate because of a prior conviction (or sex offender registration status or current serious felony) that was not pleaded and proved. (Cf. *People v. Wiley* (1995) 9 Cal.4th 580, 586 ["From the earliest days of statehood, trial courts in California have made factual determinations relating to the nature of the crime and the defendant's background in arriving at discretionary decisions in the sentencing process, for example, with regard to the grant or denial of probation"].)

F. Appellant's Attempt to Discount the Consequences of the Rule He Urges Is Unsuccessful and His Proposed Remedy is Unjustified

Appellant dismisses respondent's suggestion that requiring pleading and proof of prior convictions under former section 4019 will have undesirable collateral consequences. (AOBM 25-26.) He suggests that although pleading and proof is required for a prior serious or violent felony

conviction, it is not necessarily required for sex offender registration status. (See AOBM 26, italics added ["assuming, *without conceding*" sex offender registration status would have to be pleaded and proved].) Yet, the logic of appellant's argument is that *all* disqualifying factors in former section 4019 increased punishment. He provides no basis for distinguishing among those factors. Thus, his rule raises the unprecedented possibility that a trial court could ignore or dismiss a defendant's status as a sex offender registrant. Appellant also derides the "phantom menace of other 'unpredictable consequences' . . . ." (AOBM 26.) Yet, he ignores the possible effect of the ruling he urges on other statutes. (See, e.g., §§ 1203, subd. (k), 1203.07, 2933, subd. (e)(3), 2933.1.)

As to remedy, appellant does not believe the Court of Appeal went far enough. Rather than remand the matter to the trial court for further proceedings, he urges this court to modify the judgment to reward him additional conduct credit because his prior conviction was not pleaded and proved. (AOBM 26-28.) As respondent argued in our opening brief, no remedy is justified since former section 4019 does not include an implied pleading and proof requirement. (ROBM 25-28.) Were this court to find such an implied requirement, however, appellant still would not be entitled automatically to additional credit. Appellant's prior conviction was pleaded in this case for purposes of the Three Strikes law. Because of a plea deal, no proceedings were necessary to prove the prior and it was dismissed. Had the prosecution, or the court, understood that the failure of proof might affect credits, considerations as to the plea deal might have been different. Therefore, it would be inequitable to the People to simply award petitioner additional credits without further proceedings in the trial court.

CONCLUSION

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

Dated: September 29, 2011

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
LAURENCE K. SULLIVAN
Supervising Deputy Attorney General

ERIC D. SHARE
Supervising Deputy Attorney General
Attorneys for Respondent

SF2011201338
20525814.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S REPLY BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 4,915 words.

Dated: September 29, 2011

KAMALA D. HARRIS
Attorney General of California

ERIC D. SHARE
Supervising Deputy Attorney General
Attorneys for Respondent

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 with postage thereon fully prepaid that same day in the ordinary course of business.

On September 29, 2011, I served the attached **RESPONDENT'S REPLY BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope 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:

William M. Robinson
Staff Attorney
Sixth District Appellate Program
100 N. Winchester Blvd., Suite 310
Santa Clara, CA 95050

Clerk
County of Santa Clara
Superior Court of California
191 North First Street
San Jose, CA 95113-1090

The Honorable Jeffrey F. Rosen
District Attorney
Santa Clara Co. District Attorney's Office
70 W. Hedding Street
San Jose, CA 95110

Sixth Appellate District
Court of Appeal of the State of California
333 West Santa Clara Street, Suite 1060
San Jose, CA 95113

Sixth District Appellate Program
100 N. Winchester Boulevard, Suite 310
Santa Clara, CA 95050-6520

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 September 29, 2011, at San Francisco, California.

Pearl Lim
Declarant

Signature

SF2011201338
20531450.doc