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LIU, J.

SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Appellant, v. **WESLEY CIAN CLANCEY,** Defendant and Respondent.	No. _____ (Court of Appeal No. H036501) (Santa Clara County Superior Court Nos. C1072166 and C1073855)

RESPONDENT'S PETITION FOR REVIEW

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SANTA CLARA HONORABLE RENE NAVARRO, JUDGE PRESIDING

SIXTH DISTRICT APPELLATE PROGRAM

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SUPREME COURT
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ISSUES PRESENTED FOR REVIEW

I. Should this court grant review in order to consider the Court of Appeal's majority opinion which has brought the "indicated sentence" procedure into question?

II. Should this court grant review in order to resolve the conflict in the case law as to whether a defendant is allowed to withdraw his guilty plea if the trial court decides that it cannot comply with the terms of its "indicated sentence?"

III. Should this court grant review in order to assess the merit of the holding in *People v. Woosley* (2010) 184 Cal.App.4th 1136 that a trial court may not offer an "indicated sentence" if the promised term cannot be achieved absent the dismissal of the punishment for an enhancement pursuant to Penal Code section 1385?

IV. If a defendant is charged with a strike prior pursuant to Penal Code section 1170.12, does a trial court engage in proscribed "plea bargaining" under section 1170.12 when it offers an "indicated sentence" that requires the exercise of Penal Code section 1385 discretion to dismiss the punishment for a strike prior?

REASONS FOR GRANTING REVIEW

The published decision in this case was decided by a vote of 2-1. Although the majority opinion did not expressly call for this court's intervention, the dissenting justice was of the view that the majority had gone seriously astray and was seeking a dramatic change in the law: "The majority, by disavowing 35 years of precedent, is implicitly inviting the California Supreme Court to determine the continued vitality of resolving criminal charges short of trial by the trial court's indication of a sentence." (Exhibit A, dis. opn. of Lucero, J., p. 1.)

Respondent believes that Judge Lucero got it right. The majority opinion essentially destroys the well settled "indicated sentence" procedure that has been used in California since the 1976 decision in *People v. Superior Court (Felmann)*(1976) 59 Cal.App.3d 270. Insofar as this court has recently stated the proper parameters of an "indicated sentence" in a manner that is entirely inconsistent with the majority opinion (*People v. Feyrer* (2010) 48 Cal.4th 426, 434-435, fn. 6), there can be little doubt that this case is worthy of this court's attention. Four significant questions are presented.

First, the practical question is whether the "indicated sentence" procedure can be effectively used under the terms suggested by the Court of Appeal majority. Since the majority opinion is out of step with existing precedent, it should not be allowed to stand.

This court has said that a trial court acts properly when it offers an "indicated sentence" in exchange for the defendant's guilty plea or plea of no contest to all charges and an admission of all enhancing allegations. (*People v. Feyrer,* supra, 48 Cal.4th 426, 434, fn. 6.) This procedure does not violate the separation of powers by intruding into the prosecutor's domain since the prosecutor has thereby achieved the best result possible (i.e. success on all charges and allegations). To allow the prosecutor to veto an "indicated sentence" violates separation of powers since it allows the prosecutor to control the court's exclusive power to sentence. (*People v. Superior Court (Felmann)*, supra, 59 Cal.App.3d 270, 275.)

Notwithstanding these settled principles, the majority in the Court of Appeal has announced the new rule that an "indicated sentence" is improper when it is "contingent on a defendant pleading guilty or no contest . . . ." (Exhibit A, majority opn., p. 10.) This test is unmoored from existing precedent. This court has expressly acknowledged that a proper indicated sentence allows the court to "unilaterally negotiat[e] a permissible agreement with defendant." (*Feyrer,* supra, 48 Cal.4th at p. 435, fn. 6; *People v. Hoffard* (1995) 10 Cal.4th 1170, 1184, fn. 12 [an "indicated sentence" has "been at least implicitly negotiated . . . ."].)

In the Court of Appeal, respondent cited both *Feyrer* and *Hoffard.* (RB 5, 8, 17.) The Court of Appeal majority made no mention of the cases.

Respondent pointed out this omission in his petition for rehearing. (Petition for Rehearing, pp. 1-5.) The majority denied rehearing without modifying its opinion. Plainly, the majority opinion is less than authoritative.

The approach taken by the majority is also unworkable. As a matter of reality, a defendant's guilty plea is necessarily "contingent" on the nature of the court's proffered "indicated sentence." If that was not true, a defendant would never plead in response to the court's indication. Insofar as the majority opinion leaves the reader to guess at the line between a "contingent" and noncontingent plea, this court's guidance is required.

Second, ever since 1976, the "indicated sentence" procedure has allowed a defendant to withdraw his guilty plea if the court was unwilling to honor its promised sentence. (*People v. Superior Court (Felmann)*, supra, 59 Cal.App.3d 270, 276.) The majority in the Court of Appeal expressed its disagreement with *Felmann*. (Exhibit A, majority opinion, p. 11.) As the dissenting justice indicated, this was "a dramatic departure from existing precedent without a good reason to disagree." (Exhibit A, dis. opn. of Lucero, J., p. 17.) Plainly, this court's intervention is required in order to resolve this controversy.

Third, in this case, the trial court could only achieve its promised sentence by exercising its Penal Code section 1385 power to dismiss the punishment for a strike prior. A Court of Appeal opinion holds that the use of

section 1385 power in this manner constitutes judicial plea bargaining. (*People v. Woosley*, supra, 184 Cal.App.4th 1136, 1147.) This is a highly dubious proposition since the trial court is merely exercising the same sentencing authority that it has whether there has been a trial or a plea to all charges and allegations. Although the majority did not place express reliance on *Woosley*, the dissenting justice agreed with respondent that the case was wrongly decided. (Exhibit A, dis. opn. of Lucero, J., p. 29.) This court should grant review in order to determine whether *Woosley* should be overruled.

Fourth, the People have argued that the trial court was precluded from giving an "indicated sentence" since Penal Code sections 667, subdivision (g) and 1170.12, subdivision (e) preclude "plea bargaining" when a strike prior has been alleged. There is no extant authority on this point. Although the majority did not address the issue, the dissenting justice agreed with respondent's position that section 1170.12, subdivision (e) precludes only prosecutorial plea bargaining and does not prevent the court from giving an "indicated sentence." (Exhibit A, dis. opn. of Lucero, J., pp. 35-37.) Given the paucity of authority on point, a grant of review is appropriate.

This case is rife with substantial and important issues. This court should grant review.

STATEMENT OF THE CASE

On April 30, 2010, respondent was charged in a first amended complaint filed in the Santa Clara County Superior Court in case number C1072166. (CT 18-20.) Respondent was charged with two counts of forgery (Penal Code section 470, subdivision (d)), two counts of grand theft (Penal Code sections 484 and 487) and one count of false personation (Penal Code section 529). (CT 18-19.) Respondent was also charged with a strike prior pursuant to Penal Code section 1170.12. (CT 19.)

On April 30, 2010, respondent was charged in a first amended complaint filed in the Santa Clara County Superior Court in case number C1073855. (CT 22-25.) Respondent was charged with three counts of attempted grant theft (Penal Code sections 487 and 664), two counts of using a stolen access card (Penal Code sections 484g and 488) and one count each of second degree burglary (Penal Code section 459), receiving stolen property (Penal Code section 496), delaying an officer (Penal Code section 148, subdivision (a)(1)) and giving a false name to an officer (Penal Code section 148.9). (CT 22-24.) Respondent was also charged with an on-bail enhancement pursuant to Penal Code section 12022.1 and a strike prior pursuant to Penal Code section 1170.12. (CT 24-25.)

On August 19, 2010, both of respondent's cases were heard on the early resolution calendar. (CT 36.) Based on the court's offer of an indicated

sentence of five years, respondent pled nolo contendere to all counts and admitted the enhancements. (CT 36.) The People objected to the court's action. (CT 36.)

On October 5, 2010, the People filed a motion for reconsideration of the indicated sentence. (CT 42-120.) The People also objected to the court's intention to dismiss respondent's strike prior pursuant to Penal Code section 1385. (CT 42-120.)

On November 16, 2010, the court sentenced respondent to five years in prison. (CT 178.) In case number C1072166, the court imposed the midterm of two years for one of the forgery convictions and a consecutive eight month term for the second forgery conviction. (CT 178.) The remaining sentences were run concurrent. (CT 178.) In case number C1073855, the court imposed eight month consecutive sentences for second degree burglary and using a stolen access card and consecutive four month sentences for the three counts of attempted grand theft. (CT 178-179.) The court struck the punishment for the Penal Code section 12022.1 enhancement and the Penal Code section 1170.12 enhancement pursuant to Penal Code section 1385. (CT 176-177.)

On January 13, 2011, the People filed notices of appeal in both of respondent's cases. (CT 181, 186.) On January 10, 2012, the Court of Appeal reversed the judgment by a vote of 2-1. (Exhibit A.) On January 23, 2012, respondent filed a petition for rehearing. On January 30, 2012, the court

denied rehearing. (Exhibit B.) Justice Lucero voted to grant rehearing. (Exhibit B.)

STATEMENT OF FACTS

The facts underlying the offenses are not material to the issues on appeal. Therefore, only a brief recitation of the facts is provided.

Case Number C1072166

On March 13, 2010, respondent used a fraudulent check to buy 20 gift cards at the Westfield Mall. (CT 130.) The gift cards were valued at $5060.

On March 16, 2010, respondent went to the Great Mall and represented himself to be Curtis Poseyesva. (CT 130.) Respondent submitted a fraudulent check in an attempt to buy $7540 worth of gift cards. (CT 130.) Respondent was arrested at the scene. (CT 131.)

Case Number C1073855

Between April 9, 2010 and April 13, 2010, respondent fraudulently used a credit card on several occasions and accrued charges to Y.A. Tittle and Associates. (CT 133.) On April 12, 2010, an employee at the Capitola Mall declined to sell gift cards to respondent based on his attempt to use the Y.A. Tittle account. (CT 133.)

On April 13, 2010, respondent used a stolen credit card belonging to Margaret Froehlich to rent a limousine. (CT 131.) Respondent rode in the limousine to Santana Row. (CT 131.) While at Santana Row, respondent

attempted to use a stolen credit card and was arrested. (CT 132.)

I.

THE MAJORITY OPINION PROVIDES AN UNWORKABLE TEST THAT IS INCONSISTENT WITH SETTLED PRECEDENT AND ITS ANALYSIS IS DEVOID OF ANY NEXUS TO THE CONSTITUTIONAL PRINCIPLE ON WHICH IT SUPPOSEDLY RESTS.

On August 19, 2010, respondent appeared on the trial court's early resolution calendar. The trial court gave an "indicated sentence" of five years. (1 RT 4.) Since imposition of the five year term would require the court to strike the punishment for respondent's serious felony prior pursuant to Penal Code section 1385, the prosecutor objected that the court was engaging in "plea bargaining" that is prohibited by Penal Code section 667, subdivision (g). (1 RT 5.) Over the prosecutor's objection, the court proceeded to take respondent's no contest pleas to all charges and admissions to all of the alleged enhancements. (1 RT 18-23.)

Subsequently, the People filed a motion for reconsideration and renewed the claim that the court had engaged in "plea bargaining" that was prohibited by Penal Code section 667, subdivision (g). (CT 43-45.) The People also argued that it would be an abuse of discretion for the court to strike the punishment for respondent's serious felony prior. (CT 46-55.)

At the sentencing hearing, the trial court rejected the contention that it

had engaged in "plea bargaining." (2 RT 60.) The court exercised its section 1385 power and struck the punishment for respondent's serious felony prior. (2 RT 61.) The court specified six separate reasons in support of its decision. (1 RT 61, 2 CT 175.)[1]/ Consistent with the "indicated sentence," the court imposed a five year sentence. (2 RT 62.)

The Court of Appeal majority found fault with the trial court's conduct since it had made its promised sentence "contingent" on respondent's no contest pleas. (Exhibit A, majority opinion, p. 10.) In the majority's view, the trial court had given respondent "an improper inducement" since its goal was to "'settle'" the case. (Exhibit A, majority opinion, p. 11.) This holding flies in the face of precedent and the separation of powers doctrine on which it purportedly rests.

At the outset, it must be emphasized that the trial court carefully complied with the requirements for a proper "indicated sentence." The court specified a sentence of five years and caused respondent to admit all of the charges and allegations in the two complaints. (*People v. Feyrer*, supra, 48 Cal.4th 426, 434, fn. 6.) Thus, the court made sure that it honored the prosecutor's constitutional discretion to decide what charges should be adjudicated. Insofar as respondent was found liable for *everything* alleged by

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[1]The People have made no claim on appeal that the trial court abused its discretion in striking the prior.

the prosecutor, the People have no grievance that the court intruded into their prosecutorial domain. (*People v. Superior Court (Ramos)* (1991) 235 Cal.App.3d 1261, 1270 ["[t]he prosecution 'has no right to interfere in the process of extending an indicated sentence to a defendant willing to plead guilty to all . . . of an information or indictment.' [Citations.]"].)

Notwithstanding the trial court's careful compliance with the settled "indicated sentence" procedure, the majority claimed that its rebuke of the trial court was "mandated" by this court's precedent. (Exhibit A, majority opinion, p. 12.) This is simply untrue.

In *People v. Orin* (1975) 13 Cal.3d 937, the defendant was charged with three counts. The prosecutor was unwilling to plea bargain. Acting on its own motion, the trial court offered the defendant a "'plea bargain'" by which it accepted a guilty plea to one count in exchange for the dismissal of the other two counts. (*Id.* at pp. 940-941.) This court found that the court had improperly intruded into the prosecutor's domain by substituting "itself as the representative of the People in the negotiation process . . . ." (*Id.* at p. 943.)

Significantly, this court drew a careful distinction between proscribed judicial plea bargaining and the proper exercise of the judicial sentencing function. In particular, the court observed that the court is not powerless to deal with the prosecutor's obdurate refusal to settle a case.

> "On the other hand, sentencing discretion wisely and properly exercised should not capitulate to rigid prosecutorial policies manifesting an obstructionist position toward all plea bargaining irrespective of the circumstances of the individual case. As the calendars of trial courts become increasingly congested, the automatic refusal of prosecutors to consider plea bargaining as a viable alternative to a lengthy trial may militate against the efficient administration of justice, impose unnecessary costs upon taxpayers, and subject defendants to the harassment and trauma of avoidable trials. [Citation.] A court may alleviate this burden placed upon our criminal justice system if this can be accomplished by means of a permissible exercise of judicial sentencing discretion in an appropriate case." (*Orin*, supra, 13 Cal.3d at p. 949.)

Soon after *Orin* was decided, the practice of offering an "indicated sentence" was approved in *People v. Superior Court (Felmann)*, supra, 59 Cal.App.2d 270. The *Felmann* court reasoned that the proffer of an "indicated sentence" does not invade the constitutional province of the District Attorney if the defendant is made to plead guilty to all of the charges. This is so since "the exercise of sentencing power cannot be made subject to the consent of the district attorney because the requirement of that consent is an injection of the executive into the province of the judicial branch of government. [Citation.]" (*Id.* at p. 275.)

The *Felmann* court made clear that form was not to be "exalted over substance" in the context of the "indicated sentence" procedure. (*Felmann,* supra, 59 Cal.App.3d 270, 276.) The court acknowledged that the offer of an "indicated sentence" is a form of a "conditional plea" which allows the

defendant to withdraw his plea if the promised sentence is not imposed. (*Ibid.*)

Although this court has not expressly approved *Felmann*, it has twice acknowledged that a lawful "indicated sentence" involves a negotiation between the court and the defendant. (*People v. Feyrer,* supra, 48 Cal.4th 426, 435, fn. 6; *People v. Hoffard*, supra, 10 Cal.4th 1170, 1184, fn. 12.) Of course, there is no constitutional vice in this practice so long as the defendant has pled guilty to all of the charges. This is so because the prosecutor could not have done any better by going to trial.

The majority opinion took absolutely no account of this reality. Instead, the majority narrowly focused on the notion that it is impermissible for the court to "induce" a plea. (Exhibit A, majority opinion, p. 10.) Two responses are in order.

First, "the presumption is that the judge acted as required by law." (*Felmann*, supra, 59 Cal.App.3d at p. 277, fn. 4.) Under existing precedent, there is nothing improper about a court advising the defendant of its view of the proper sentence should: (1) the defendant admit all charges; and (2) the probation report confirm that the court's understanding of the facts is correct. (*People v. Superior Court (Ramos)*, supra, 235 Cal.App.3d 1261, 1271.) While the court has certainly "induced" a plea by this mechanism, there is no harm to the People.

Stated otherwise, assuming the good faith of the court, it defies the

nature of human motivation to say that an offered "indicated sentence" cannot "induce" a plea. Of course, there is an inducement. However, as has been shown, there is no reasonable objection to the inducement since the court is merely proceeding directly to sentencing without wasting scarce resources on a needless trial. (*Orin*, supra, 13 Cal.3d at p. 949.)

Second, the majority's holding was premised on this court's opinion in *In re Lewallen* (1979) 23 Cal.3d 274. This reliance was entirely improper since the issue in *Lewallen* had nothing to do with an "indicated sentence." Rather, the issue was whether the trial court had erred by punishing the defendant for exercising his right to a jury trial. Moreover, the majority took the following quotation from *Lewallen* out of its proper context.

> "'A court may not offer any inducement in return for a plea of guilty or nolo contendere. It may not treat a defendant more leniently *because* he foregoes his right to trial or more harshly because he exercises that right.' (*People v. Superior Court (Felmann)* (1976) 59 Cal.App.3d 270, 276 [130 Cal.Rptr. 548].)" (*Lewallen*, supra, 23 Cal.3d at pp. 278-279, emphasis added.)

Lewallen does not say that an indicated sentence is improper when a specific disposition is promised. Rather, *Lewallen* stands only for the rather unremarkable proposition that the court may not impose a lenient sentence "because" the defendant pled guilty. In other words, the court may not condition a benefit based on a coerced loss of the right to a jury trial.

There can be no doubt that this understanding of *Lewallen* is correct

since the court was favorably quoting *Felmann.* (*Lewallen*, supra, 23 Cal.3d at p. 279.) Insofar as the *Felmann* court expressly approved of the practice of offering a "conditional plea" based on the admission of all charges, it is impossible to conclude that *Lewallen* provides any support for the majority's novel conclusion that an indicated sentence may not be contingent on guilty pleas to all charges. (*Felmann,* supra, 59 Cal.App.3d at p. 276.)

Finally, the test employed by the majority is unworkable. The majority held that an "indicated sentence" has been improperly arranged if it was "*conditioned* on the defendant *pleading* to all counts and *admitting* all allegations. . . ." (Exhibit A, majority opinion, p. 12, emphasis in original.) Simply stated, it is essentially impossible for a reviewing court to determine whether a guilty plea has or has not been "conditioned" on the promised sentence. Indeed, the majority offers absolutely no guidance as to how an appellate court might determine whether the plea is conditional. Given this lack of guidance, it is likely that trial courts will give up on the practice of "indicated sentences."

Turning to the bottom line, it is unquestionable that the majority's opinion will cause havoc if it is left in place. To date, the rules regarding "indicated sentences" have been settled and are easy to follow. The majority opinion has disrupted this certainty. Review should be granted.

II.

THIS COURT SHOULD GRANT REVIEW IN ORDER TO RESOLVE THE CONFLICT BETWEEN THE MAJORITY OPINION AND *PEOPLE v. SUPERIOR COURT (FELMANN)*, supra, 59 Cal.App.3d 270.

In *People v. Superior Court (Felmann)*, supra, 59 Cal.App.3d 270, the court took the defendant's no contest pleas to all counts and offered an indicated disposition of a grant of probation. The defendant was advised that he would be entitled to withdraw his pleas if a grant of probation was not forthcoming. (*Id.* at p. 273.) The Court of Appeal found no error in this procedure and specifically observed that the defendant would have "the option of going to trial" if the trial court ultimately determined that it could not impose the indicated sentence. (*Id.* at p. 276.)

In this case, the Court of Appeal majority disagreed with *Felmann*. (Exhibit A, majority opinion, p. 11.) The majority reasoned that a proper "indicated sentence" cannot be found when the defendant is offered the opportunity to withdraw his plea since an "indicated sentence" cannot be a "risk-free proposition for a defendant." (Exhibit A, majority opinion, p. 12, fn. omitted.) This conclusion flies in the face of both the Constitution and reality.

From the defendant's standpoint, an "indicated sentence" constitutes a promise from the court that a particular sentence will be imposed if he admits all of the charges. Obviously, no sane defendant would enter the arrangement

if there was no certainty that a remedy would be forthcoming if the promise were not honored. Moreover, the Constitution demands that there be a remedy.

A trial court judge is a governmental officer. If the court has induced a guilty plea by virtue of a promise to provide a specified sentence, the defendant must necessarily be allowed to withdraw his plea if the specified sentence is not imposed. (*People v. Mancheno* (1982) 32 Cal.3d 855, 860 [a violation of a promise made "by an officer of the state raises a constitutional right to some remedy. [Citations.]"].)

In response to this proposition, the Court of Appeal majority would argue that an "indicated sentence" cannot involve "a promise by the trial court." (Exhibit A, majority opinion, p. 12.) Therefore, in the majority's view, the defendant can have no right to withdraw his plea since nothing has been promised.

Felmann answers this argument: "Substance and not form must control." (*Felmann*, supra, 59 Cal.App.3d at p. 276.) In an "indicated sentence" procedure, the People's position is absolutely protected since they have obtained the best possible result (i.e. conviction on all charges). Similarly, if the court later learns of facts that change its view about the proper sentence, the defendant is protected since the right to withdraw the plea exists. In this way, the interests of all parties are protected.

In any event, there is unquestionably a conflict between *Felmann* and the majority opinion in this case. A grant of review is appropriate to resolve the conflict.

III.

REVIEW SHOULD BE GRANTED IN ORDER TO OVERRULE *PEOPLE v. WOOSLEY,* supra, 184 Cal.App.4th 1136.

In order to achieve the promised five year sentence in this case, the trial court was required to exercise its Penal Code section 1385 power to dismiss a strike prior. This ruling is in conflict with *People v. Woosley*, supra, 184 Cal.App.4th 1136.

In *Woosley*, the defendant was charged with two burglaries, petty theft and an on-bail enhancement. The defendant pled to the three counts and admitted the enhancement in response to the court's "indicated sentence" of two years, eight months. At the sentencing hearing, the court exercised its section 1385 power to dismiss the enhancement and imposed the "indicated sentence" of two years, eight months. On the People's appeal, the Court of Appeal held that the trial court had impermissibly encroached on the "prosecutor's charging authority" since "the substance of the bargain was no different from the trial court dismissing the on-bail enhancement before taking the plea." (*Woosley*, supra, 184 Cal.App.4th at p. 1147.) The judgment was

reversed.

The majority opinion in the Court of Appeal did not expressly rely on *Woosley*. However, the dissenting justice concluded that *Woosley* was wrongly decided. (Exhibit A, dis. opn. of Lucero, J., pp. 27-32.) The position of the dissenting justice is correct.

As an initial matter, there was absolutely no encroachment on the charging power of the prosecutor in *Woosley*. The prosecutor charged three counts and an on-bail enhancement. The defendant admitted all of the charges and the enhancement. The prosecutor could not have obtained any better result by going to trial. Thus, as a matter of fact, the court did not interfere with the prosecutor's charging decision since the prosecutor secured convictions and a true finding as to everything alleged in the charging document.

Given this reality, the flaw in the *Woosley* reasoning is easily exposed. Although the court perceived an intrusion on the prosecutor's charging authority, this is quite simply untrue. Once the defendant admitted all of the charges and the on-bail enhancement, the People achieved the full result to which they were constitutionally entitled. At that point, the authority shifted to the court so that it might lawfully exercise its power under section 1385.

Section 1385, subdivision (c)(1) provides the court with the sentencing authority to either dismiss an enhancement outright or to "strike the additional

punishment" for the enhancement.[2]/ The exercise of such authority is necessarily a function of the court's sentencing power. As such, the exercise of section 1385 discretion is not an intrusion on the prosecutor's domain as was claimed by the *Woosley* court. To the contrary, the holding in *Woosley* allowed the prosecutor to unconstitutionally control the court's independent sentencing discretion. (*People v. Superior Court (Felmann)*, supra, 59 Cal.App.3d 270, 275 ["the exercise of sentencing power cannot be made subject to the consent of the district attorney because the requirement of that consent is an injection of the executive into the province of the judicial branch of government. [Citation]."].)

Should there be any doubt regarding the soundness of respondent's position, a slight change in the *Woosley* facts reveals the error in its analysis. Assume that Mr. Woosley stood trial and the on-bail enhancement was found true. At sentencing, the prosecutor protested that the court had no section 1385 authority to strike the punishment for the enhancement. Presumably, the People would concede that such an argument would be utterly frivolous.

In the final analysis, the actual procedural posture of *Woosley* was

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[2]Penal Code section 1385, subdivision (c)(1) provides:

"If the court has the authority pursuant to subdivision (a) to strike or dismiss an enhancement, the court may instead strike the additional punishment for that enhancement in the furtherance of justice in compliance with subdivision (a)."

functionally no different from the hypothetical. Regardless of whether a jury returned a true finding concerning the enhancement or Mr. Woosley admitted it, the trial court retained the identical sentencing discretion. The holding in *Woosley* should be rejected.

It is worth noting that the true finding or admission of an enhancement remains a matter of record even if the court dismisses the enhancement outright rather than striking the punishment for the enhancement. (*People v. Shirley* (1993) 18 Cal.App.4th 40, 47.) Given this rule, the People can scarcely claim that the court has intruded on prosecutorial authority. Rather, the prosecutor will enjoy the prospective benefits of its charging decision regardless of the sentencing choice made by the court. (*Ibid.* [even though great bodily injury enhancement was dismissed at sentencing in prior case, the enhancement remained usable to establish that the underlying conviction qualified as a five year prior under Penal Code section 667].)

The analysis in *Woosley* cannot withstand scrutiny. Review should be granted so that *Woosley* may be overruled.

IV.

REVIEW SHOULD BE GRANTED IN ORDER TO RESOLVE THE ISSUE OF WHETHER AN "INDICATED SENTENCE" FALLS WITHIN THE TERMS OF PENAL CODE SECTIONS 667, SUBDIVISION (g) AND 1170.12, SUBDIVISION (e).

In the trial court, the People protested that the five year "indicated sentence" was unlawful since it contemplated the dismissal of respondent's strike prior. In the People's view, the promised sentence constituted "plea bargaining" that is proscribed by Penal Code section 667, subdivision (g). (1 RT 5, CT 43-45.)

On appeal, the People renewed their contention. (AOB 13-14.) Respondent argued to the contrary. (RB 13-17.) The majority of the Court of Appeal did not discuss the issue. However, the dissenting justice agreed with respondent that the Three Strikes law does not preclude a court from offering an "indicated sentence." (Exhibit A, dis. opn. of Lucero, J., pp. 35-37.) Since this issue is likely to arise again, it should be presently resolved. This is especially true since respondent's position is meritorious.

Initially, it is doubtful that section 667, subdivision (g) and section 1170.12, subdivision (e) were intended to apply to a judge.[3]/ The provisions

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[3]Penal Code section 667, subdivision (g) provides:

"Prior felony convictions shall not be used in plea bargaining as defined in subdivision (b) of Section 1192.7. The prosecution shall plead and prove all known prior felony convictions and shall not enter into any agreement to

preclude the "use" of strike priors in "plea bargaining" and direct the prosecution to plead and prove all strike priors and desist from seeking dismissal of the priors except in specified circumstances. Since the provisions mention only the "prosecution," it would appear that no limitation is placed on the court's authority to offer an "indicated sentence." (See *In re Marriage of Paillier* (2006) 144 Cal.App.4th 461, 471-472 [when a statute specifies certain enforcement methods but not others, the doctrine of *expressio unius est exclusio alterius* precludes the implication of methods not expressly mentioned].)

Another indication that the statutes do not apply to the court's conduct resides in the use of the term "plea bargaining." When the Three Strikes law was enacted in 1994, it was a settled principle that the court may not *ever* engage in plea bargaining. (*People v. Orin*, supra, 13 Cal.3d 937, 942-943.) Given this rule which was undoubtedly well known to the drafters of the law, there is no reason to believe that the phrase "plea bargaining" was intended to

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strike or seek the dismissal of any prior felony conviction allegation except as provided in paragraph (2) of subdivision (f)."

Penal Code section 1170.12, subdivision (e) provides:

"Prior felony convictions shall not be used in plea bargaining, as defined in subdivision (b) of Section 1192.7. The prosecution shall plead and prove all known prior felony convictions and shall not enter into any agreement to strike or seek the dismissal of any prior felony conviction allegation except as provided in paragraph (2) of subdivision (d)."

include the proffer of an "indicated sentence." (*City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 606 [Legislature is presumed to be aware of judicial decisions when it enacts laws].)

Even if it is assumed that the statutes apply to action taken by the court, the instant trial judge did not make any "use" of the strike prior within the meaning of the statutes. Instead, the court took appellant's admission that the prior was true. This conduct does not constitute a "use" of the prior. The full context of sections 667 and 1170.12 shows this to be the case.

Under the Three Strikes law, it is the duty of the prosecutor to plead and prove strike priors and to refrain from entering a plea bargain concerning the priors. However, once a strike prior is proven, the court retains section 1385 power to dismiss the prior at the time of sentencing. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 504.)

Properly understood, sections 667, subdivision (g) and 1170.12, subdivision (e) bar only a pretrial dismissal of a strike prior which is attendant to a plea bargain. Such a pretrial dismissal is a "use" of the prior. However, where, as here, the court requires an admission of the prior, the statutes are not violated.

Moreover, the court's dismissal of a strike prior at the time of sentencing does not fall within the meaning of "plea bargaining" as that term

is defined in section 1192.7, subdivision (b).[4]/ This is so since an "indicated sentence" is, by definition, not "plea bargaining."

In *People v. Allan* (1996) 49 Cal.App.4th 1507, the court cited section 1192.7, subdivision (b) as providing the controlling definition of "plea bargaining." (*Id.* at p. 1516.) The court then indicated that the proffer of an "indicated sentence" does not constitute "plea bargaining."

> "In an indicated sentence, a defendant admits all charges, including any special allegations and the trial court informs the defendant what sentence will be imposed. No 'bargaining' is involved because no charges are reduced. [Citations.]" (*Id.* at p. 1516.)

Aside from *Allan*, it bears emphasis that the People's position is entirely inconsistent with this court's approval of the "indicated sentence" procedure. (*People v. Feyrer,* supra, 48 Cal.4th 426, 434, fn. 6.) Obviously, an "indicated sentence" contains a promise regarding a specified sentence. While such a promise might be literally read as falling within section 1192.7, subdivision (b), it does not as a matter of law since the "indicated sentence" procedure has

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[4]Penal Code section 1192.7, subdivision (b) provides:

"As used in this section 'plea bargaining' means any bargaining, negotiation, or discussion between a criminal defendant, or his or her counsel, and a prosecuting attorney or judge, whereby the defendant agrees to plead guilty or nolo contendere, in exchange for any promises, commitments, concessions, assurances, or consideration by the prosecuting attorney or judge relating to any charge against the defendant or to the sentencing of the defendant."

been judicially approved for at least 35 years. (See *People v. Hoffard,* supra, 10 Cal.4th 1170, 1184, fn. 12 [an "indicated sentence" has "been at least implicitly negotiated . . . ."]; see also *People v. Superior Court (Ramos)*, supra, 235 Cal.App.3d 1261, 1266 and fn. 2; [although the trial court made an express "promise" regarding the sentence to be imposed, there was no error since the court properly offered an "indicated sentence" without using those words.].)

The Three Strikes law did not preclude the action taken by the trial court in this case. This court should grant review and so hold.

CONCLUSION

For the reasons expressed above, review should be granted.

Dated: February 10, 2012

Respectfully submitted,

DALLAS SACHER
Attorney for Respondent,
Wesley Cian Clancey

CERTIFICATE OF COUNSEL

I certify that this brief contains 5813 words.

Dated: February 10, 2012

DALLAS SACHER
Attorney for Respondent
Wesley Cian Clancey

EXHIBIT A

SEE DISSENTING OPINION

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Appellant,

v.

WESLEY CIAN CLANCEY,

Defendant and Respondent.

H036501
(Santa Clara County
Super. Ct. Nos. C1072166, C1073855)

Court of Appeal - Sixth App. Dist.
FILED
JAN 10 2012
MICHAEL J. YERLY, Clerk
By DEPUTY

The trial court made an offer to defendant Wesley Cian Clancey, over the prosecutor's objection, that, if defendant admitted all of the charges and allegations, the trial court would grant his motion to strike a strike and would impose a five-year state prison term or allow defendant to withdraw his pleas and admissions. The issue before us in this case is whether this was an unlawful judicial plea bargain or a lawful "indicated sentence." We conclude that the trial court engaged in unlawful judicial plea bargaining. Consequently, we reverse the judgment and vacate defendant's pleas and admissions.

I. Background

Defendant was charged by complaint in one case with two counts of forgery (Pen. Code, § 470, subd. (d)), two counts of grand theft (Pen. Code, §§ 484, 487, subd. (a)), and false personation (Pen. Code, § 529). He was charged in a separate case by an amended complaint with second degree burglary (Pen. Code, §§ 459, 460, subd. (b)), concealing stolen property (Pen. Code, § 496, subd. (a)), three counts of attempted grand theft (Pen.

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Code, §§ 484, 487, subd. (a), 664), misdemeanor access card fraud (Pen. Code, §§ 484g, subd. (a), 488), felony access card fraud (Pen. Code, §§ 484g, subd. (a), 487), misdemeanor resisting an officer (Pen. Code, § 148, subd. (a)(1)), and misdemeanor providing a false name to an officer (Pen. Code, § 148.9). The amended complaint also alleged an on-bail enhancement (Pen. Code, § 12022.1) and a prior strike (Pen. Code, §§ 667, subds. (b)-(i), 1170.12).

At a change-of-plea hearing, defendant's trial counsel announced that defendant would be "pleading as charged" and admitting the "strike prior allegation," and "[i]t's anticipated at the time of sentencing the Court will grant an oral Romero motion, [and] thereafter sentence Mr. Clanc[e]y to five years in state prison." The prosecution objected to "the Court offer" because the court had "promised five years" and "[t]he only way to get to that term would be for the Court to strike his prior serious felony conviction." The court responded that this matter was on the "Early Resolution Calendar" and that "matters that are placed in ERC calendar [*sic*] are usually with the understanding of both sides settled for somewhat less than the going disposition at a trial department." The court thereafter asked defendant: "Mr. Clanc[e]y, did you hear your plea agreement?" Defendant acknowledged that he had, and the court asked: "You agree with it?" Defendant said "Yes, sir." The court proceeded to advise defendant of his rights and obtain his waivers of them. It then asked the prosecutor if he wished to engage in further examination of defendant. The prosecutor obtained defendant's acknowledgement that he was aware his maximum term was 16 years and eight months in prison and his minimum term was 11 years and four months, but he was "being promised no more than or less than five years in state prison." Defendant then pleaded no contest to all of the charges in both cases and admitted the on-bail and strike allegations.

The probation report stated that the "CONDITIONS" of defendant's pleas and admissions were "Prison term of five years top/bottom . . . ." Although the probation officer ultimately concluded that he "concurs with the Court's indication of a State Prison

commitment of five years," he also stated that this was "in accordance with the negotiated plea." The probation report also noted that, "[t]o stay within the parameters of the negotiated plea," the court would need to strike the punishment for the on-bail enhancement.

The trial court conceded at the sentencing hearing that the prosecutor's objections, "if they were viewed in a vacuum," made it appear that "the court engaged in plea bargaining." However, the court insisted that "if you step away from that vacuum and you view this matter in the totality of the circumstances as how the court operates and has been operating for the past three years that I've been doing this assignment, I think that for purposes of any reviewing court, I need to outline for the reviewing court how the conferences are structured and how they're held." The trial court went on to describe how the "Early Resolution Department" functioned. "[I]t's [*sic*] function and it's [*sic*] assignment [is] to settle cases." It recounted how it had had before it a great deal of information about defendant before it made a decision about its "offer." "So it isn't as though the court made an offer in a vacuum, but rather it was an informed offer that the court had, given the nature of the circumstances." The court "felt that the offer was a fair offer given the circumstances and what I knew of the case." The court highlighted that it was "understood" among all of the parties "that if there's anything new that comes up, that the court has the ability to set it aside and to put the parties back in their original positions and not to make it a condition of the plea." The court noted that, on past occasions, it "has set aside pleas where I had indicated a sentence" and then learned additional circumstances that "allowed the court to set aside the plea." "And it isn't as though the court is engaging in plea bargaining because of the history that I've indicated for the record, that the district attorney, through their representatives have consented to."

Defendant's trial counsel noted, and the trial court agreed, that defendant would be entitled to withdraw his pleas and admissions if the court did not "honor [its] agreement" to strike the strike and impose a five-year prison term. Over the prosecutor's objections, the trial court then struck the strike finding and imposed the five-year prison term, which the

court referred to as "the agreed upon disposition." The prosecutor timely filed a notice of appeal.

II. Discussion

A. Statutory and Case Authority

"'[P]lea bargaining'" is statutorily defined as "any bargaining, negotiation, *or discussion* between a criminal defendant, or his or her counsel, and a prosecuting attorney or judge, whereby the defendant agrees to plead guilty or nolo contendere, in exchange for any promises, commitments, concessions, assurances, or consideration by the prosecuting attorney or judge relating to any charge against the defendant or to the sentencing of the defendant." (Pen. Code, § 1192.7, subd. (b), italics added.) Hence, a "discussion" between a judge and a criminal defendant that produces the defendant's agreement to plead guilty or no contest in exchange for a sentencing commitment by the judge is a judicial plea bargain.

Judicial plea bargaining has long been proscribed. The seminal case on the prohibition against judicial plea bargaining is *People v. Orin* (1975) 13 Cal.3d 937 (*Orin*). In *Orin*, the trial court had plainly entered into a plea bargain with the defendant, under which it agreed to dismiss some of the charges, over the prosecutor's objections. (*Orin*, at pp. 940-941.) The trial court explicitly told the defendant that it would allow him to withdraw his plea if it decided not to proceed with the bargain. (*Orin*, at p. 948.) The California Supreme Court strongly disapproved of the trial court's actions.[1] "[T]he court has

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[1] The dissent characterizes the California Supreme Court's analysis in *Orin* as "elaborate dicta" on the ground that the court stated that the case "did 'not involve a plea bargain.'" (Dissent, at p. 10.) Some of the analysis in *Orin* may technically be dicta because the court reversed the matter due to the trial court's abuse of its discretion under Penal Code section 1385, rather than specifically for prohibited judicial plea bargaining. However, the dissent takes out of context the *Orin* court's statement that the case before it "does not involve a plea bargain." The *Orin* court's statement meant only that the case did not involve a plea bargain *between the prosecutor and the defendant*, that is, a lawful plea bargain. (*Orin*, *supra*, 13 Cal.3d at p. 943.)

no authority to substitute itself as the representative of the People in the negotiation process and under the guise of 'plea bargaining' to 'agree' to a disposition of the case over prosecutorial objection. Such judicial activity would contravene express statutory provisions requiring the prosecutor's consent to the proposed disposition, [fn. omitted] would detract from the judge's ability to remain detached and neutral in evaluating the voluntariness of the plea and the fairness of the bargain to society as well as to the defendant, and would present a substantial danger of unintentional coercion of defendants who may be intimidated by the judge's participation in the matter." (*Orin*, at p. 943.) The California Supreme Court noted that "[i]t is for these reasons that many authorities considering the question have condemned the concept of 'judicial plea bargaining.'" (*Orin*, at p. 943, fn. 9.)

After *Orin* came *People v. Superior Court (Felmann)* (1976) 59 Cal.App.3d 270 (*Felmann*), in which the Court of Appeal recognized a distinction between prohibited judicial plea bargaining and what it viewed as a permissible "indicated sentence." In *Felmann*, the trial court, over the prosecutor's objection, accepted the defendant's conditional offer to plead no contest in exchange for a grant of probation with the proviso that the defendant could withdraw the plea if the court decided, after reviewing the probation report, to not grant probation. (*Felmann*, at pp. 273-274.) The prosecutor sought writ relief. (*Felmann*, at p. 274.) The Court of Appeal first pointed out that "[t]he 'plea bargaining' process foreclosed to the judicial branch of government includes the acceptance of a plea of guilty in return for 'clement punishment.'" (*Felmann*, at p. 276.) "A court may not offer any inducement in return for a plea of guilty or nolo contendere. It may not treat a defendant more leniently because he foregoes his right to trial or more harshly because he exercises that right. Leniency in return for a plea of guilty or no contest must be negotiated by the defendant with the prosecutor." (*Ibid.*) "But a court may indicate to a defendant what its sentence will be on a given set of facts . . . . [I]f the facts as developed are as assumed for the purpose of indicating the sentence, that sentence may then be imposed. If not, then defendant has the option of going to trial or accepting harsher treatment on a guilty or nolo

contendere plea. Unless form is exalted over substance, the facts which are the assumed basis of sentence may be expressed in the form of the basis of a conditional plea reserving the defendant's right to withdraw the plea and go to trial in the event the court determines that the facts recited are not confirmed in a fashion which enables it to sentence the defendant in accord with the condition. Substance and not form must control." (*Ibid.*) The Court of Appeal then concluded that the record was unclear as to whether the trial court had provided an indicated sentence or entered into an unlawful plea bargain. (*Felmann*, at p. 277.) It issued a writ requiring the trial court to reconsider the conditional plea and accept it only if lenient treatment was not being provided "solely because of the plea." (*Felmann*, at pp. 277-278.)

In *In re Lewallen* (1979) 23 Cal.3d 274 (*Lewallen*), the California Supreme Court approved of the portions of *Felmann* prohibiting judicial plea bargaining. "'A court may not offer any inducement in return for a plea of guilty or nolo contendere. It may not treat a defendant more leniently because he foregoes his right to trial or more harshly because he exercises that right.'" (*Lewallen*, at pp. 278-279.) A trial court acts improperly if its sentence is premised on the defendant agreeing to plead guilty. (*Lewallen*, at p. 279.) "[A] trial judge is precluded from offering an accused in return for a guilty plea a more lenient sentence than he would impose after trial." (*Lewallen*, at p. 281.) The California Supreme Court did not address *Felmann*'s endorsement of the practice of providing an indicated sentence or its assertion that an indicated sentence could properly provide a defendant with the right to withdraw the pleas if the court decided not to impose the indicated term.

In *People v. Superior Court (Smith)* (1978) 82 Cal.App.3d 909 (*Smith*), the trial court "advised the defendant of what sentence would be imposed if defendant pleaded guilty, with the sole caveat that if the probation investigation disclosed significant, theretofore unknown, facts which would alter the judge's assessment of the case the defendant would be permitted to withdraw his plea." (*Smith*, at p. 912.) The trial court made clear that the indicated sentences would be available only if the defendants pleaded. (*Smith*, at pp. 913-914.) The

defendants then entered pleas, and the prosecutor sought writ relief, claiming that the court had entered into illegal plea bargains. (*Smith*, at p. 912.) The Court of Appeal disapproved of the trial court's actions as prohibited judicial plea bargaining, but it concluded that writ relief was unavailable. (*Smith*, at pp. 915-916.)

People v. Superior Court (Ludwig) (1985) 174 Cal.App.3d 473 (*Ludwig*) was also a petition for writ relief by a prosecutor challenging the trial court's acceptance of a plea as an illegal plea bargain. (*Ludwig*, at p. 474.) The trial court had entered into a "'plea bargain over the District Attorney's objection'" under which the court offered the defendant a maximum term of eight years in state prison to "'induce'" his guilty plea. (*Ludwig*, at p. 475.) The Court of Appeal concluded that this was an improper judicial plea bargain and granted writ relief requiring the court to vacate its acceptance of the plea. (*Ludwig*, at p. 476.)

In *People v. Superior Court (Ramos)* (1991) 235 Cal.App.3d 1261 (*Ramos*), the trial court informed Ramos that, if he pleaded guilty, the court would impose a two-year prison term. (*Ramos*, at p. 1265.) The "court indicated that, if Ramos were to plead guilty, the court would commit to 'two years in prison.'" (*Ibid.*) The prosecutor objected that this was prohibited plea bargaining. (*Ibid.*) The trial court rejected his objection. Ramos pleaded guilty and was sentenced to two years in prison. Although the Second District Court of Appeal noted that the trial court had "used the words 'promise' and 'commitment,'" the Second District nevertheless concluded that this was an "'indicated sentence'" because the trial court's "choice of words is not determinative." (*Ramos*, at p. 1266 & fn. 2.) In a separate case also decided in the *Ramos* opinion, the trial court told Larsen, who was facing a burglary count and three prison prior allegations, that, if he pleaded, it would commit to impose the two-year middle term for the burglary count and two years for the two most recent prison priors, and that it would consider striking the remaining prison prior. The trial court stated that its "'commitment'" was in "'consideration for a plea today.'" (*Ramos*, at p. 1267, fn. 3.) Larsen pleaded guilty and admitted the prison priors. The court decided not

to strike the third prison prior, and it imposed a five-year prison term. (*Ramos*, at pp. 1266-1267 & fn. 3.) The Court of Appeal found that this too was a proper indicated sentence, and it denied the prosecutor's writ petitions in both cases. (*Ramos*, at p. 1267.)

In *People v. Allan* (1996) 49 Cal.App.4th 1507 (*Allan*), the defendant was charged with two narcotics counts and was alleged to have suffered a prior strike and five prison priors. (*Allan*, at p. 1510.) When the case was called for trial, the trial court struck the strike allegation and informed the defendant that she would receive a three-year prison term if she pleaded guilty to one of the two counts. (*Allan*, at pp. 1510-1511.) She did so, and the court then imposed the three-year prison term, "[p]ursuant to the *agreed disposition offered by the court*," and dismissed the remaining count and allegations. (*Allan*, at p. 1512.) The prosecution appealed, and the Court of Appeal, finding the trial court's actions to be "strikingly similar" to those of the trial court in *Orin*, concluded that this was an illicit judicial plea bargain and reversed the judgment. (*Allan*, at p. 1515.) It contrasted the trial court's actions with an indicated sentence. "In an indicated sentence, a defendant admits all charges, including any special allegations and the trial court informs the defendant what sentence will be imposed." (*Allan*, at p. 1516.)

Two recent cases have also found that trial courts engaged in proscribed judicial plea bargaining. The first of the two was *People v. Woosley* (2010) 184 Cal.App.4th 1136 (*Woosley*). In *Woosley*, the defendant was charged with two counts of burglary and one count of petty theft, and an on-bail enhancement was alleged. (*Woosley*, at p. 1140.) The court offered, over the prosecutor's objection, to grant the defendant probation with a suspended prison term if he pleaded, with the proviso that the defendant could withdraw his pleas and admission if the court, after reviewing the probation report, decided not to proceed as offered. (*Woosley*, at pp. 1140-1141.) After receiving the probation report, the court was not willing to proceed. The defendant then made another "'conditional plea'" premised on the court agreeing to a state prison term of two years and eight months. The court accepted this conditional plea with the same proviso. (*Woosley*, at pp. 1142-1143.) The court

thereafter imposed the agreed prison term, which necessitated dismissing the on-bail enhancement, and the prosecution appealed. (*Woosley*, at p. 1144.) The Court of Appeal held that the trial court had engaged in "unlawful judicial plea bargaining" when it "induced defendant to plead guilty in exchange for a commitment to dismiss the on-bail enhancement to reach the agreed-upon sentence." (*Woosley*, at pp. 1144-1145.) The key factor for the court in distinguishing the trial court's actions from an indicated sentence was that the sentence offered by the court required it to dismiss the on-bail enhancement. (*Woosley*, at p. 1147.)

The second recent case was *People v. Labora* (2010) 190 Cal.App.4th 907 (*Labora*). In *Labora*, the defendant pleaded guilty to all four counts and admitted a special allegation after the court promised that it would impose the six-year middle term for one count and run the sentences for the other counts concurrent. (*Labora*, at p. 910.) The court's promise occurred after it had initially told the defendant he would receive a sentence of six years and eight months, but the defendant had persuaded the court to reduce that to six years. (*Labora*, at p. 911.) Over the prosecutor's objections, the court imposed the promised six-year term, and the prosecution appealed. (*Labora*, at p. 912.) The *Labora* court, relying heavily on *Woosley*, concluded that the trial court had engaged in unlawful judicial plea bargaining. (*Labora*, at pp. 914-916.) The key factor for the *Labora* court was that the court initially offered a higher "indicated sentence" and then reduced it, which was indicative of bargaining. (*Labora*, at p. 916.)

B. Standard of Review

"We review allegations of judicial plea bargaining for abuse of discretion. This is because we may void the act of a trial court that is 'in excess of the trial court's jurisdiction'

[citation], and ' "judicial plea bargaining in contravention of existing law are acts in excess of a court's 'jurisdiction' " . . .' [citation]."[2] (*Labora, supra*, 190 Cal.App.4th at p. 914.)

C. Analysis

The prior cases that have considered this issue have failed to devise a clear and coherent test for determining whether a trial court's actions amounted to an improper judicial plea bargain or were instead a permissible indicated sentence. In our view, two principles govern the distinction between a judicial plea bargain and an indicated sentence.

First, an "offer" by the court that is contingent on a defendant pleading guilty or no contest cannot be a proper indicated sentence because it induces a defendant to plead guilty or no contest. A trial court " 'may not offer any inducement in return for a plea of guilty or nolo contendere.' " (*Lewallen, supra*, 23 Cal.3d at pp. 278-279.) A proper indicated sentence is not premised on guilty or no contest pleas, but applies whether or not the defendant chooses to proceed to trial.[3] To the extent that the Second District's decision in *Ramos* may be read to approve of pleas that were the product of "indicated sentences" that were *contingent* on the defendants admitting all of the charges and allegations, we must disagree with it on this point.

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[2] The dissent suggests that we must defer to the trial court's assertion that it was not engaging in plea bargaining. (Dissent, at p. 26.) We disagree. Since all of the parameters of the court's offer to defendant were placed on the record by the court and the parties below, we see no basis for deferring to the trial court's assertion that its actions did not amount to prohibited judicial plea bargaining.

[3] The dissent seems to imply that our principles might unintentionally "prohibit a defendant from changing his or her plea in response to a court's sentence indication if the indication is not conditioned on such a plea change." (Dissent, at p. 16, fn. 16.) Our principles could have no such impact. It is the trial court that is prohibited from offering an inducement that is contingent on the defendant entering guilty or no contest pleas. The prohibition on judicial plea bargaining binds trial courts, not defendants.

Second, an "offer" by the court that provides the defendant with the option to withdraw the guilty or no contest pleas and any admissions if the court decides to impose a sentence other than the one offered is not a proper indicated sentence. Since a true indicated sentence may not be premised on the defendant entering guilty or no contest pleas, and may not be part of a "bargain" between the court and the defendant, the court's decision to impose something other than the originally indicated sentence affords a defendant no basis for withdrawal of the pleas. The *Felmann* court suggested in dicta that the trial court's failure to impose the indicated sentence would provide a defendant with the right to withdraw the pleas. We disagree with that portion of *Felmann.*

The trial court's actions in this case violated the first principle by inducing defendant's pleas and admissions. The court informed defendant through the plea colloquy that it would impose a five-year term and strike the strike *if he admitted all of the charges and allegations*. This was an improper inducement for defendant to enter pleas and admissions. The trial court saw its role as "to settle cases" and believed that its offer was an "informed" one, but this does not establish, as the trial court suggested, that the court was not engaging in plea bargaining. The *settlement* of a case necessarily involves an exchange of promises. It is not necessary that there be negotiation. Here, the trial court agreed to impose a five-year prison sentence and strike the strike in exchange for defendant's pleas and admissions. Because the court's goal was "to settle cases," its offer was contingent on defendant pleading and would not have been valid if he chose to exercise his right to trial. Thus, the court's offer improperly induced the pleas and admissions in violation of the first principle.

The trial court also violated the second principle. In making a commitment that defendant could withdraw his pleas and admissions if the court did not follow through on its offer, the court confirmed the existence of a bargain. The court thereby guaranteed

defendant that he would either receive the offered five-year term or be returned to his original position, a risk-free position for defendant.[4]

It follows that the trial court's "offer" was not a proper indicated sentence because it was (1) *conditioned* on the defendant *pleading* to all counts and *admitting* all allegations, and (2) operated as a *commitment* by the judge to *impose* the offered sentence or to allow the defendant to *withdraw* the pleas and admissions. The court's "offer" violated both of the principles that distinguish a proper indicated sentence from an improper judicial plea bargain.

A true indicated sentence is not a promise by the trial court. It is nothing more than a prediction. A true indicated sentence does not induce a plea because it is not contingent on settlement of the case: the court's prediction is valid whether the defendant pleads or goes to trial. A true indicated sentence is not a risk-free proposition for a defendant: if the court learns something new that makes its prediction inaccurate, the defendant is vulnerable to a sentence other than the indicated one and has no right to withdraw the plea. Here, the court's "offer" was not a true indicated sentence because it lacked these characteristics. Hence, the court engaged in prohibited plea bargaining, and the judgment must be reversed.

We recognize the necessity and importance of resolving cases expeditiously. However, a trial court's attempt to promote the early resolution of a case by means of an indicated sentence must comport with the principles we have set forth above, which are mandated by California Supreme Court precedent. (*Orin*, *supra*, 13 Cal.3d 937, 943;

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[4] The fact that, notwithstanding the prosecutor's explicit opposition, a defendant may rely on a court's "indication" or be returned to his original position makes the court's purported "indicated sentence" identical, from the defendant's standpoint, to a true plea bargain where the prosecutor agrees to the bargain with the defendant and any significant deviation by the court will result in the defendant being returned to his original position. Thus, permitting such a purported "indicated sentence" would allow the defendant to achieve the same level of certainty that a plea bargain offers despite the prosecution's opposition.

Lewallen, supra, 23 Cal.3d at pp. 278-279; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

III. Disposition

The trial court's judgment is reversed, and it is directed to vacate defendant's pleas and admissions.

Mihara, J.

I CONCUR:

Bamattre-Manoukian, Acting P. J.

People v. Clancey
H036501

LUCERO, J., Dissenting

I respectfully dissent. The majority, by disavowing 35 years of precedent, is implicitly inviting the California Supreme Court to determine the continued vitality of resolving criminal charges short of trial by the trial court's indication of a sentence. I will explain why I believe that this indicated sentence practice remains vital and that there is no reason to change the law and impose further restrictions on the role of trial courts.

The central questions in this appeal are how far can the trial court go in attempting to resolve criminal charges short of trial and did the court in this case cross the line? That line is the same constitutional line that separates the powers of California's government (Cal. Const., art. 3, § 3), assigning to prosecutors the sole discretion to determine in the exercise of their executive powers whom to charge with public offenses and what charges to bring (*People v. Birks* (1998) 19 Cal.4th 108, 134) and to judges the sole discretion in the exercise of their judicial powers to dispose of those charges and impose sentences within limits set by the Legislature. (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 511-512 (*Romero*); cf. *People v. Superior Court* (*Smith*) (1978) 82 Cal.App.3d 909, 916 (*Smith*) ["The matter of ultimate sentencing is a matter of judicial discretion to be exercised within limits prescribed by the Legislature."].)

To clarify where I respectfully disagree with the majority, I will first identify what I believe is the common ground on which we stand. Then I will highlight where we disagree on the law and the facts of this case and finally explain why I believe that the People have failed to establish that the trial court in this case engaged in illegal plea bargaining.

1. Criminal Sentencing is an Inherently Judicial Function.

The People and the majority do not dispute that the trial court will have to make numerous discretionary decisions in imposing sentence if defendant goes to trial and is convicted as charged of all eleven felonies and three misdemeanors, with true findings of a

prior strike and the commission of many charged crimes while released on bail.[1] I will elaborate on these decisions to establish that sentencing and the dismissal of charges at sentencing are inherently and fundamentally judicial functions.

First, the trial court will need to determine which, if any, of defendant's crimes are felonies. When a crime is alternatively punishable by imprisonment in the county jail or state prison, it is a "wobbler." Except for the crimes that were strictly misdemeanors, all of defendant's other crimes—second-degree burglary (§ 461, subd. (b)), forgery (§ 473), grand theft (§ 489, subd. (b)), concealing stolen property (§ 496), misuse of an access card (§ 484g), and false personation (§ 529)—were wobblers. Even though defendant has a prior strike, the "Three Strikes" law does not preclude the sentencing court from exercising its discretion under section 17 to treat as a misdemeanor a crime that can be punished

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[1] Unspecified section references are to the Penal Code.

In Santa Clara County case No. 1072166 (the first case), defendant was charged with five crimes occurring on two days at two locations, on March 13, 2010 at Oakridge Mall forging a check (§ 470, subd. (d); count 1) and grand theft of gift cards worth over $400 (§§ 484-487; count 2), and, on March 16, 2010 at the Great Mall committing forgery and theft (counts 3 and 4, respectively) plus impersonating another person (§ 529; count 5).

In Santa Clara County case No. 1073855 (the second case), defendant was charged with eight crimes occurring on three specific days, namely attempted grand theft of merchandise from Fry's on April 11, 2010 (§ 664; count 9), attempted grand theft of currency from Y. A. Tittle and Associates on April 12, 2010 (count 4), and other crimes occurring on April 13, 2010, including grand theft from Y. A. Tittle and Associates (count 3), second degree burglary of a clothing store (§§ 459-460; count 1), and concealing and withholding a driver's license and credit cards (§ 496, subd. (a); count 3), and the three misdemeanors of using an altered access card to obtain goods and services with an aggregate value less than $950 (§§ 484g-488; count 5), resisting and obstructing a peace officer's performance (§ 148, subd. (a); count 6), and falsely identifying himself to a peace officer (§148.9; count 7). A ninth charge alleged the felony of using an altered access card sometime between April 9 and 13, 2010 to obtain goods and services with an aggregate value of $950 (count 8).

The second case included allegations that he committed all nine crimes while he was out on bail on the first case (§ 12022.1) and that he has a 2001 conviction in Arizona for the serious felony of robbery. (§§ 667, subds. (b)-(i), 1170.12.)

alternatively as a felony. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 974-975.)

Second, assuming the trial court were to find that at least one of these crimes requires a prison sentence, the court would need to consider whether to strike defendant's prior strike as to any or all felony counts. The finding of a single prior strike has a number of consequences under the Three Strikes statutes for current felony convictions. The statutes require the trial court to double the determinate term imposed. (§§ 667, subd. (e)(1), 1170.12, subd. (c)(1).) The defendant is limited to earning one-fifth of available sentence credits in prison. (§§ 667. subd. (c)(5), 1170.12, subd. (a)(5).) The statutes also mandate consecutive sentencing for each felony count that is "not committed on the same occasion, and not arising from the same set of operative facts." (§§ 667, subd. (c)(6), 1170.12, subd. (a)(6); cf. *People v. Casper* (2004) 33 Cal.4th 38, 43.) As to crimes committed on the same occasion, the sentencing court retains discretion to impose either consecutive or concurrent sentences. (*People v. Hendrix* (1997) 16 Cal.4th 508, 514; *People v. Deloza* (1998) 18 Cal.4th 585, 596.)

The Three Strikes statutes enacted by the Legislature and the voters in 1994 require prosecutors to plead and prove all known prior felony convictions, but they also allow prosecutors to seek dismissal under section 1385. (§§ 667, subds. (f), (g), 1170.12, subds. (d), (e).)[2] In order to avoid violating the constitutional separation of powers, *Romero, supra,*

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[2] Section 667 states in pertinent part: "(f)(1) Notwithstanding any other law, subdivisions (b) to (i), inclusive, shall be applied in every case in which a defendant has a prior felony conviction as defined in subdivision (d). The prosecuting attorney shall plead and prove each prior felony conviction except as provided in paragraph (2).

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

13 Cal.4th 497 construed the Three Strikes statutes as not precluding trial courts from dismissing strikes on their own motions within the restrictions of section 1385.[3] (*Id.* at p. 505.) Later cases have elaborated on the confines of the trial court's discretion to strike strikes. (E.g., *People v. Williams* (1998) 17 Cal.4th 148, 160-161.) The court also has discretion to strike a strike as to some counts and not others. (*People v. Garcia* (1999) 20 Cal.4th 490, 499.)

Third, the court will need to consider whether to impose or strike the on-bail enhancement. That enhancement seemingly requires imposing a two-year penalty

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"(g) Prior felony convictions shall not be used in plea bargaining as defined in subdivision (b) of Section 1192.7. The prosecution shall plead and prove all known prior felony convictions and shall not enter into any agreement to strike or seek the dismissal of any prior felony conviction allegation except as provided in paragraph (2) of subdivision (f)."

In virtually identical language, section 1170.12 states: "(d)(1) Notwithstanding any other provision of law, this section shall be applied in every case in which a defendant has a prior felony conviction as defined in this section. The prosecuting attorney shall plead and prove each prior felony conviction except as provided in paragraph (2).

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

"(e) Prior felony convictions shall not be used in plea bargaining, as defined in subdivision (b) of Section 1192.7. The prosecution shall plead and prove all known prior felony convictions and shall not enter into any agreement to strike or seek the dismissal of any prior felony conviction allegation except as provided in paragraph (2) of subdivision (d)."

[3] Section 1385, subdivision (a) states in part: "The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal must be set forth in an order entered upon the minutes."

enhancement consecutive to any other term imposed (§ 12022.1, subd. (b)),[4] but the trial court retains discretion to strike this enhancement under section 1385. (*People v. Meloney* (2003) 30 Cal.4th 1145, 1149.) That statute also requires imposition of a prison sentence for a secondary crime committed while released on bail consecutive to the sentence for the primary count. (§ 12022.1, subd. (e).)[5] However, when there is more than one secondary crime, the trial court retains discretion to determine whether to impose consecutive or concurrent sentences as to the other secondary crimes. (*People v. Tillotson* (2007) 157 Cal.App.4th 517, 544-545.)

Fourth, if the trial court avoids the mandatory consecutive sentencing provided for in the Three Strikes statutes and section 12022.1 by striking the strike as to all counts and the on-bail enhancement, it will need to decide whether to impose a consecutive or concurrent sentence as to each of the counts. (§ 669; Cal. Rules of Court, rule 4.425.)

Fifth, the court will need to determine whether any punishment should be stayed under section 654 for multiple crimes committed in a single course of conduct with a single objective. Section 654, subdivision (a) was amended in 1997 to require the trial court to impose "the longest potential term of imprisonment" for "[a]n act or omission that is punishable in different ways by different provisions of laws." (*People v. Kramer* (2002) 29 Cal.4th 720, 722.) Nevertheless, trial courts retain some discretion to identify the defendant's primary objective. (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 268.)

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[4] Section 12022.1, subdivision (b) states: "(b) Any person arrested for a secondary offense which was alleged to have been committed while that person was released from custody on a primary offense shall be subject to a penalty enhancement of an additional two years in state prison which shall be served consecutive to any other term imposed by the court."

[5] Section 12022.1, subdivision (e) states: "(e) If the person is convicted of a felony for the primary offense, is sentenced to state prison for the primary offense, and is convicted of a felony for the secondary offense, any state prison sentence for the secondary offense shall be consecutive to the primary sentence."

Sixth, when a sentencing court decides to impose a consecutive term of imprisonment, the Determinate Sentencing Law requires the court to determine an aggregate term of imprisonment including both the principal and all subordinate terms. (§ 1170.1, subd. (a).)[6] As this court concluded in *People v. Miller* (2006) 145 Cal.App.4th 206, the dictates of section 1170.1 do not require the trial court to select any particular count as the principal term. The court has discretion to structure the sentence in different ways. (*Id.* at p. 218.)

Seventh, in determining the principal term, the court must consider whether to impose the upper, middle, or lower term for the offense. When the punishment for a felony is not otherwise specified, as it is not for any of defendant's crimes, the range of punishment is from a lower term of 16 months to a middle term of two years to an upper term of three years. (§ 18.) "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court." (§ 1170, subd. (b).) "In exercising his or her discretion in selecting one of the three authorized prison terms referred to in section 1170(b), the sentencing judge *may* consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision." (Cal. Rules of Court, rule 4.420(b); emphasis added.)

In short, if defendant is convicted as charged after trial, the trial court will face a multitude of discretionary sentencing decisions. I have no reason to question that

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[6] Section 1170.1, subdivision (a) provides that "the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, the subordinate term, and any additional term imposed for applicable enhancements for prior convictions, prior prison terms, and Section 12022.1. The principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes, including any term imposed for applicable specific enhancements. The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, and shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses."

defendant's maximum sentence for being convicted as charged would be 16 years 8 months, as the prosecutor advised defendant at his change of plea hearing.

Though the Determinate Sentencing Law was expressly intended to promote uniformity in punishment (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 456-457), sentencing courts exercise "broad discretion to tailor the sentence to the particular case." (*People v. Scott* (1994) 9 Cal.4th 331, 349.) Judicial tailoring of the sentence to fit the crime and the criminal has also been identified as the objective of the court's discretion under section 1385 (*People v. Williams* (1981) 30 Cal.3d 470, 489)[7] and under section 654 (*People v. Latimer* (1993) 5 Cal.4th 1203, 1211). This principle also underlies the constitutional prohibition of cruel and unusual punishment. (*People v. Dillon* (1983) 34 Cal.3d 441, 479.)

Reviewing all the sentencing options provided by the criminal statutes applicable to this case emphasizes that "[t]he imposition of sentence and the exercise of sentencing discretion are fundamentally and inherently judicial functions." (*People v. Navarro* (1972) 7 Cal.3d 248, 258; *People v. Superior Court* (*Felmann*) (1976) 59 Cal.App.3d 270, 275 (*Felmann*).)

2. Trial Courts Have a Role in Plea Bargaining

Cases and statutes have recognized that trial judges and prosecutors have different roles to play in resolving criminal cases short of trial. *People v. Orin* (1975) 13 Cal.3d 937, 942-943 (*Orin*) described some of the statutes authorizing plea bargaining as follows. "The process of plea bargaining which has received statutory and judicial authorization as an appropriate method of disposing of criminal prosecutions contemplates an agreement negotiated by the People and the defendant and approved by the court. (§§ 1192.1, 1192.2, 1192.4, 1192.5; *People v. West* (1970) 3 Cal.3d 595, 604-608.) Pursuant to this procedure

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[7] *People v. Williams*, *supra*, 30 Cal.3d 470 authorized trial courts to strike special circumstances in death penalty cases. This was invalidated by the 1990 initiative enactment of section 1385.1.

the defendant agrees to plead guilty in order to obtain a reciprocal benefit, generally consisting of a less severe punishment than that which could result if he were convicted of all offenses charged. (*People v. West*, *supra*, 3 Cal.3d at p. 604.) This more lenient disposition of the charges is secured in part by prosecutorial consent to the imposition of such clement punishment (§ 1192.5), by the People's acceptance of a plea to a lesser offense than that charged, either in degree (§§ 1192.1, 1192.2) or kind (*People v. West*, *supra*, 3 Cal.3d at p. 608), or by the prosecutor's dismissal of one or more counts of a multi-count indictment or information. Judicial approval is an essential condition precedent to the effectiveness of the 'bargain' worked out by the defense and prosecution. (§§ 1192.1, 1192.2, 1192.4, 1192.5; *People v. West*, *supra*, 3 Cal.3d at pp. 607-608.)"

As indicated in *Orin*, a defendant who is willing to waive the constitutional rights involved in a trial may engage the prosecutor in "charge" bargaining to obtain a reduction in charges and "sentence" bargaining for either a specified sentence or a sentence within a range up to a specified maximum. (*People v. Labora* (2010) 190 Cal.App.4th 907, 914 (*Labora*).) The result of plea bargaining between the defendant and the prosecutor is a plea bargain or negotiated plea agreement.[8] A negotiated plea agreement is a form of contract

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[8] Section 999f, subdivision (c) defines a "plea agreement" as "an agreement by the defendant to plead guilty or nolo contendere in exchange for any or all of the following: a dismissal of charges, a reduction in the degree of a charge, a change of a charge to a lesser or different crime, a specific manner or extent of punishment."

This statute is part of sections 999b through 999h, not otherwise applicable here, which govern the prosecution of certain career criminals. Section 999f, subdivision (b) provides: "The prosecution shall not negotiate a plea agreement with a defendant in a career criminal prosecution; and Sections 1192.1 to 1192.5, inclusive, shall not apply, nor shall any plea of guilty or nolo contendere authorized by any such section, or any plea of guilty or nolo contendere as a result of any plea agreement be approved by the court in a career criminal prosecution." This statute has not been construed as restricting judicial authority. (*People v. Superior Court* (*Ramos*) (1991) 235 Cal.App.3d 1261, 1271 (*Ramos*).) Sections 999e, subdivision (b) and 999g expressly confer discretion on the prosecutor to not prosecute everyone as a career criminal who literally qualifies under the statute.

and is interpreted according to general contract principles. (*People v. Shelton* (2006) 37 Cal.4th 759, 767; *People v. Segura* (2008) 44 Cal.4th 921, 930.)

I do not understand the People or the majority to question that the trial court has a role in approving of plea bargains that have been negotiated between the prosecution and the defendant.

By statute the court's approval is not binding, but conditional. Section 1192.5 provides in part: "If the court approves of the plea, it shall inform the defendant prior to the making of the plea that (1) its approval is not binding, (2) it may, at the time set for the hearing on the application for probation or pronouncement of judgment, withdraw its approval in the light of further consideration of the matter, and (3) in that case, the defendant shall be permitted to withdraw his or her plea if he or she desires to do so." On the other hand, approval of a plea bargain does restrict the court, depending on the terms of the bargain, to imposing the exact sentence specified or a sentence within the range specified by the bargain. The court cannot impose a punishment more severe than that specified in the plea. (*Ibid.*) "However, by negotiating only a *maximum* term, the parties leave to judicial discretion the proper sentencing choice within the agreed limit." (*People v. Buttram* (2003) 30 Cal.4th 773, 789.)

Orin identified some restrictions on the judicial role under this paradigm of negotiation between the prosecutor and the defendant. "[T]he court has no authority to substitute itself as the representative of the People in the negotiation process and under the guise of 'plea bargaining' to 'agree' to a disposition of the case over prosecutorial objection. Such judicial activity would contravene express statutory provisions requiring the prosecutor's consent to the proposed disposition, [fn. omitted] would detract from the judge's ability to remain detached and neutral in evaluating the voluntariness of the plea and the fairness of the bargain to society as well as to the defendant, and would present a substantial danger of unintentional coercion of defendants who may be intimidated by the

judge's participation in the matter." (*Orin, supra*, 13 Cal.3d 937, 942-943.) This discussion in *Orin* was elaborate dicta, as that case did "not involve a plea bargain." (*Id.* at p. 943.)[9]

3. The Nature of an Indicated Sentence under Established Precedent

While a number of statutes require prosecutorial consent to certain forms of plea bargains, the prosecutor's consent is not required for a defendant to plead "to the sheet", guilty or no contest as charged, admitting all enhancements. (*Smith, supra*, 82 Cal.App.3d 909, 915; *People v. Vergara* (1991) 230 Cal.App.3d 1564, 1567 (*Vergara*); *Ramos, supra*, 235 Cal.App.3d 1261, 1271; see *People v. Allan* (1996) 49 Cal.App.4th 1507, 1516 (*Allan*).) This exception has provided the basis for development of a different paradigm for disposing of criminal cases short of trial, the indicated sentence. This section will review established precedent. The next section will point out where the majority departs from it.

Felmann, supra, 59 Cal.App.3d 270 is the earliest California appellate case I have found to discuss the practice of indicating a sentence. In that 1976 case, a majority of the Second District Court of Appeal (Div. 1) concluded "a court may indicate to a defendant

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[9] *Orin, supra*, 13 Cal.3d 937 involved an appeal by the People from the trial court's dismissal of two charges. In that case, over the People's objection, the trial court agreed to accept the defendant's guilty plea to a charge of assault with a deadly weapon and to dismiss charges of attempted robbery and burglary arising out of the same incident. The court indicated that it was likely the defendant would be sentenced to prison for the term prescribed by law for assault. (*Id.* at pp. 940-941.) The trial court in *Orin* characterized the situation as " 'in the nature of a plea bargain in which the People do not wish to enter, as stated by [the prosecutor] and with the further understanding that if the Court feels that it cannot at that time accept it, that the Court would allow you to set the plea aside and go to trial.' " (*Id.* at pp. 940-941.)

The Supreme Court rejected characterizing the transaction as a plea bargain (*Orin, supra*, 13 Cal.3d at p. 943), determined that the dismissal of two counts without a statement of reasons was procedurally defective under section 1385 (*id.* at pp. 943-945), and concluded that the trial court abused its sentencing discretion by giving no apparent thought to whether the dismissal was in the interests of justice. (*Id.* at pp. 949-951.) I do not understand *Orin* to have concluded that the trial court exceeded its authority by entering a plea bargain with the defendant.

what its sentence will be on a given set of facts without interference from the prosecutor except for the prosecutor's inherent right to challenge the factual predicate and to argue that the court's intended sentence is wrong." (*Id.* at p. 276.) "[S]ection 1192.5 cannot constitutionally be construed to prevent a trial judge from indicating what sentence he will impose if a given set of facts is confirmed, irrespective of whether guilt is adjudicated at trial or admitted by a plea." (*Id.* at p. 273; cf. *Smith*, *supra*, 82 Cal.App.3d 909, 915-916; *Ramos*, *supra*, 235 Cal.App.3d 1261, 1271.) "In an indicated sentence, a defendant admits all charges, including any special allegations and the trial court informs the defendant what sentence will be imposed." (*Allan*, *supra*, 49 Cal.App.4th 1507, 1516.)[10]

The California Supreme Court has recognized this practice in dictum. "Where the defendant pleads 'guilty to all charges . . . so all that remains is the pronouncement of judgment and sentencing' (*Smith*, *supra*, 82 Cal.App.3d at p. 915), 'there is no requirement that the People consent to a guilty plea' (*People v. Vessell* (1995) 36 Cal.App.4th 285, 296). In that circumstance, the court may indicate 'what sentence [it] will impose if a given set of

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[10] This quotation from *Allan* correctly states two components of an indicated sentence, but it mistakenly implies that the sentence indication must occur after the defendant admits all charges. However, the timing of these two events was not the basis for *Allan*'s finding "that the 'agreed disposition,' the three years offered by the court, was an illegal plea bargain." (*Allan*, *supra*, 49 Cal.App.4th 1507, 1517.) Instead, the appellate court relied on the absence of a plea to all charges. (*Ibid.*) What the trial court called an "agreed disposition offered by the court" (*id.* at p. 1512) was for a three-year high term on one count after the defendant pleaded guilty to one of two counts, entered no plea on the other count, and made no admission as to any of five alleged prior prison term enhancements. (*Id.* at pp. 1516-1517.) Although the opinion did not so characterize it, the trial court had entered a charge bargain involving "the dismissal of the section 667.5(b) priors and the misdemeanor charged in count 2." (*Id.* at p. 1517; fn. omitted.)

Since there was "nothing in the record to reflect any offer by the court," the appellate court felt compelled to "infer that there were discussions off the record which resulted in the 'agreed disposition.'" (*Allan*, *supra*, 49 Cal.App.4th at p. 1516.) In *Allan* a prior strike had also been alleged, but because it was dismissed shortly before the agreed disposition was announced, the appellate court did not consider it to be a condition of the plea. (*Id.* at p. 1517, fn. 5.)

facts is confirmed, irrespective of whether guilt is adjudicated at trial or admitted by plea' (*Smith*, at pp. 915–916.)" (*People v. Turner* (2004) 34 Cal.4th 406, 418-419; see *People v. Feyrer* (2010) 48 Cal.4th 426, 434, fn. 6.)

Case law has identified differences between indicated sentences and plea bargains. Most important, of course, an indicated sentence does not result from bargaining by the court. (Cf. *Allan*, *supra*, 49 Cal.App.4th 1507, 1516 ["No 'bargaining' is involved because no charges are reduced."]; *Felmann*, *supra*, 59 Cal.App.3d 270, 276; *Ramos*, *supra*, 235 Cal.App.3d 1261, 1271.)[11] As the prosecutor's consent is not required for a defendant to plead guilty to all charges, a court may offer and impose an indicated sentence over the prosecutor's objection. (Cf. *Ramos*, *supra*, 235 Cal.App.3d at p. 1271; see *Felmann*, *supra*, 59 Cal.App.3d 270, 276-277.)

Case law has also identified some similarities between a plea bargain and an indicated sentence. Like a plea bargain, an indicated sentence is not a binding promise or guarantee by the trial court. "An indicated sentence is just that: an indication." (*People v. Delgado* (1993) 16 Cal.App.4th 551, 555 (*Delgado*).) "The sentencing court may withdraw from the 'indicated sentence' if the factual predicate thereof is disproved." (*Ramos*, *supra*, 235 Cal.App.3d at p. 1271; see *People v. Woosley* (2010) 184 Cal.App.4th 1136, 1146 (*Woosley*).) The court's indication does not foreclose the prosecutor from presenting all available evidence and argument at sentencing, the same as after trial, in an attempt to demonstrate that imposing the indicated sentence would be an abuse of the court's

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[11] A trial court has clearly engaged in unauthorized judicial plea bargaining if the court modifies a sentence indication in response to the defendant's reaction to the court's initial indication. (*Labora*, *supra*, 190 Cal.App.4th 907, 916.) In *Labora*, as in many cases, the trial court's discussions with the prosecutor and defense counsel were in chambers and off the record. However, at the change of plea hearing and at sentencing, when the prosecutor objected to the judge's actions, the prosecutor stated for the record that the judge had reduced his original indicated sentence, and the judge essentially accepted the prosecutor's recitation without correction. (*Id.* at pp. 911-912.)

sentencing discretion. (*Felmann*, *supra*, 59 Cal.App.3d 270, 276; *Ramos*, *supra*, 235 Cal.App.3d at p. 1271.)

Also like a plea bargain, the defendant may be allowed the option of withdrawing his or her plea if the trial court does not impose the indicated sentence. (*Felmann*, *supra*, 59 Cal.App.3d 270, 276 ["the facts which are the assumed basis of sentence may be expressed in the form of the basis of a conditional plea reserving the defendant's right to withdraw the plea and go to trial in the event the court determines that the facts recited are not confirmed in a fashion which enables it to sentence the defendant in accord with the condition]; see *Smith*, *supra*, 82 Cal.App.3d 909, 915-916.) Indeed, the appellate remedy when an appellate court finds illegal plea bargaining by the trial court is to allow the defendant's plea to be withdrawn. (*Labora*, *supra*, 190 Cal.App.4th 907, 916; cf. *People v. Lopez* (1993) 21 Cal.App.4th 225, 231 [indicated sentence involved unauthorized striking of sentence].) That is the remedy requested by the People in this case.

In summary, the form of an indicated sentence as proposed by *Felmann* and echoed in later decisions is that a judge should say to a criminal defendant directly or through counsel, in essence, "If you are convicted of all charges by trial or plea and if the facts at sentencing are not materially different than they now appear, then I am likely to impose" a specified sentence. "If I do not impose that sentence, then you may have the options of accepting a greater sentence or withdrawing your plea." An indicated sentence should be a reliable prediction, not a guarantee, of what sentence the trial judge is likely to impose if the facts do not change significantly between the time of the indication and sentencing.[12]

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[12] As noted above, plea bargains are regarded as a form of contract. In terms of contract law, I believe that the closest analog to an indicated sentence is a unilateral contract. In civil law, an offer can "form the basis of a unilateral contract, if it calls for performance of a specific act without further communication and leaves nothing for further negotiation." (*Harris v. Time, Inc.* (1987) 191 Cal.App.3d 449, 455; Civ. Code, § 1584.)

Insofar as an indicated sentence leaves nothing for negotiation, this comparison is apt. But this analogy breaks down on closer analysis. "Further negotiation" presupposes that

4. The Majority's Concept of an Indicated Sentence

In this section I point out where I disagree with the majority's departure from precedent. The majority generally criticizes most of the precedent discussed above for failing "to devise a clear and coherent test for determining whether a trial court's actions amounted to an improper judicial plea bargain or were instead a permissible indicated sentence." (Maj. opn. *ante*, at p. 8.) I do not share this view. I have quoted above what I consider to be clear enough descriptions of an indicated sentence, particularly in *Smith*, *supra*, 82 Cal.App.3d 909[13] as quoted in *People v. Turner*, *supra*, 34 Cal.4th 406, 418-419. Until now, appellate courts have expressed no difficulty in distinguishing an indicated sentence from an illegal judicial plea bargain on an adequate record.

I acknowledge that the line between indicated sentences and plea bargains may not be bright and may allow diverse interpretations. In trying to sketch that line, *Felmann*, *supra*, 59 Cal.App.3d 270 stated: "A court may not offer any inducement in return for a plea of guilty or nolo contendere. It may not treat a defendant more leniently because he foregoes

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there has been some negotiation, which is not characteristic of an indicated sentence. Also, a true indicated sentence is not conditioned on a criminal defendant's performance of a specific act such as pleading guilty or no contest. Instead, it reflects the judge's educated assessment of the likely sentence based on the known facts, whether the defendant is convicted by plea or trial. Finally, the court is not bound by its indication even if the defendant attempts to accept it by pleading guilty. The court's offer is thus qualified and conditioned on the facts remaining essentially the same at sentencing.

[13] The majority reads *Smith*, *supra*, 82 Cal.App.3d 909 as disapproving "of the trial court's actions as prohibited judicial bargaining." (Maj. opn. *ante*, at p. 5.) My reading is different. On the one hand, the appellate court agreed "with the district attorney that in each case [of two] the trial judge 'bargained' with the defendant to obtain a plea of guilty." (*Smith*, *supra*, 82 Cal.App.3d at p. 914.) On the other hand, the appellate court refused to issue a writ of mandate commanding the trial court to vacate orders accepting pleas, citing *Felmann* (*id.* at p. 916) and noting "[t]he bargains which were struck are ones which do not require the concurrence of the district attorney." (*Id.* at p. 915.) The court also cited a procedural basis for denying the writ (*id.* at p. 916), so the opinion's actual holding is somewhat obscure.

his right to trial or more harshly because he exercises that right.[14] Leniency in return for a plea of guilty or no contest must be negotiated by the defendant with the prosecutor. If then a bargain is struck, the court has the power to approve or disapprove it.

"But a court may indicate to a defendant what its sentence will be on a given set of facts without interference from the prosecutor except for the prosecutor's inherent right to challenge the factual predicate and to argue that the court's intended sentence is wrong. If the prosecutor's argument does not persuade and if the facts as developed are as assumed for the purpose of indicating the sentence, that sentence may then be imposed. If not, then defendant has the option of going to trial or accepting harsher treatment on a guilty or nolo contendere plea. . . . [T]he facts which are the assumed basis of sentence may be expressed in the form of the basis of a conditional plea reserving the defendant's right to withdraw the plea and go to trial in the event the court determines that the facts recited are not confirmed in a fashion which enables it to sentence the defendant in accord with the condition." (*Felmann*, *supra*, 59 Cal.App.3d at p. 276.)

Felmann thus seems to contemplate that a true indicated sentence does not include any inducement to a criminal defendant to plead to the sheet *apart from the indicated sentence*. As an example of a prohibited inducement, *Felmann* cited an offer of more lenient treatment if the defendant waives trial.[15] In *Vergara*, *supra*, 230 Cal.App.3d 1564, the

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[14] As the majority notes (Maj. opn. *ante*, at pp. 4-5), *In re Lewallen* (1979) 23 Cal.3d 274 (*Lewallen*) quoted these two sentences from *Felmann* with approval (*id.* at pp. 278-279) without commenting on the subsequent analysis. That *Lewallen* said nothing more about *Felmann* is quite understandable, considering that the issue presented in that habeas petition was whether the trial court had punished the defendant for rejecting the prosecutor's plea offer and going to trial. (*Id.* at p. 277.) *Lewallen* involved neither an indicated sentence nor a plea bargain. I do not regard it as implicit disapproval of the undiscussed parts of *Felmann*.

[15] In *Felmann*, *supra*, 59 Cal.App.3d 270, the record was ambiguous on a key point, so the appellate court was unable to determine whether the trial court had crossed the line between indicating a sentence and plea bargaining. (*Id.* at p. 277.)

Second District (Div. 2) upheld indicated sentences to four defendants, noting that "the trial court is allowed to give advance indication of a sentence based upon a set of facts." (*Id.* at p. 1568, citing that court's earlier opinion in *Smith*, *supra*, 82 Cal.App.3d 909, 916.)

To solve the problem with precedent that the majority perceives, the majority identifies two principles to distinguish indicated sentences from plea bargains. I understand the first principle to be that a "proper" indicated sentence is one that applies whether the defendant goes to trial or pleads guilty or no contest. (Maj. opn. *ante*, at p. 11.) Phrased negatively, it is not premised or contingent on a defendant pleading guilty or no contest.

With due respect, there is nothing new or different in this principle. Twenty years ago, *Ramos* stated: "When giving an 'indicated sentence,' the trial court simply informs a defendant 'what sentence he will impose if a given set of facts is confirmed, irrespective of whether guilt is adjudicated at trial or admitted by plea.' (*People v. Superior Court* (*Smith*), *supra*, 82 Cal.App.3d 909, 915-916; *People v. Vergara*, *supra*, 230 Cal.App.3d at pp. 1567-1568.)" (*Ramos*, *supra*, 235 Cal.App.3d 1261, 1271.) As the first principle is consistent with established precedent, I agree with it.[16]

The majority disagrees with *Ramos* for violating this principle (p. 11), presumably because the appellate court's application of the principle did not coincide with its articulation. In one of two cases under review, the trial "court indicated that, if Ramos were

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[16] I am concerned that there may be something more to the majority's first principle. They later state, "A true indicated sentence does not induce a plea because it is not contingent on settlement of the case." (Maj. opn. *ante*, at p. 12.) Insofar as this is another way of saying that a true indicated sentence is not conditioned on a defendant's change of plea (in substance, "if you plead guilty to all charges, I will impose a" specified sentence), I agree. However, to the extent it suggests that any indicated sentence that induces or causes a defendant to change his or her plea is an illegal plea bargain, I disagree. It takes the statement from *Felmann*, as quoted by *In re Lewallen*, *supra*, 23 Cal.3d 274, 278—"A court may not offer *any* inducement in return for a plea of guilty or nolo contendere"—out of its context in the *Felmann* opinion as I just explained it. (Emphasis added.) I do not believe that the majority intends to prohibit a defendant from changing his or her plea in response to a court's sentence indication if the indication is not conditioned on such a plea change.

to plead guilty, the court would commit to 'two years in prison.'" (*Ramos*, *supra*, 235 Cal.App.3d 1261, 1265.) The appellate court also noted that the trial court "used the words 'promise' and 'commitment.'" (*Id.* at p. 1266, fn. 2.) Finding this choice of words "not determinative" (*ibid.*), the appellate court concluded that "[t]he instant 'indicated sentences' fall within the boundaries of the court's inherent sentencing powers." (*Id.* at p. 1271.)

I see no need to discuss or decide whether *Ramos* correctly applied the principles that it correctly stated. I find no fault with *Ramos*'s summary of precedent and its statement of the general parameters of an indicated sentence. *Ramos* provided a thoughtful review of five competing policy considerations for allowing indicated sentences while prohibiting judicial plea bargaining. (*Ramos*, *supra*, 235 Cal.App.3d 1261, 1268-1269.) I especially agree with the following point. "[A]t a time when both fiscal and judicial resources are in short supply, needless time-consuming trials are to be discouraged. 'A trial is a search for the truth. [Citations.]' [Citation.] This goal is achieved when a defendant is willing to plead guilty as charged and admit each and every special allegation. Wasteful expenditures of time, money and personnel detract from the cases which truly require trial. 'Indicated sentences' result in sure convictions for the People precluding the possibility of whole or partial acquittals, foreclose or at least substantially curtail appeals and the delays associated therewith, and allow the trial court to impose swift and fair punishment." (*Id.* at p. 1269.)

The second principle identified by the majority appears to be that a defendant's acceptance of a "proper" indicated sentence must be unconditionally binding on the defendant, though not the court. The majority phrases this differently, stating "an 'offer' by the court that provides the defendant with the option to withdraw the guilty or no contest pleas and any admissions if the court decides to impose a sentence other than the one offered is not a proper indicated sentence." (Maj. opn. *ante*, at p. 11.) The majority disagrees with the dicta in *Felmann* stating otherwise.

In contrast to the majority's first principle, I consider this second principle to be a dramatic departure from existing precedent without a good reason to disagree.

It is "'a fundamental jurisprudential policy that prior applicable precedent usually must be followed even though the case, if considered anew, might be decided differently by the current justices. This policy, known as the doctrine of stare decisis, "is based on the assumption that certainty, predictability and stability in the law are the major objectives of the legal system; i.e., that parties should be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law."'" (*People v. Garcia* (2006) 39 Cal.4th 1070, 1080.) As this court has previously acknowledged, while one appellate district is not bound to follow the decisions of another district, in respect of stare decisis, we ordinarily do so without having a good reason to disagree. (*People v. Landry* (1989) 212 Cal.App.3d 1428, 1436.)

The majority fails to cite any case authority for this ipse dixit. Even among the cases that have found a purported indicated sentence to be an illegal judicial plea bargain, none cited the defendant's ability to withdraw as a hallmark of a plea bargain.

In *Woosley*, *supra*, 184 Cal.App.4th 1136, the court accepted a conditional plea by the defendant by which he would admit all charges (burglary and petty theft while released on bail and another burglary) conditioned on the court imposing a sentence of two years, eight months, and further conditioned on the defendant being allowed to withdraw his admissions if the court did not accept this agreement. (*Id.* at pp. 1142-1143.) The appellate court concluded that there was an illegal judicial plea bargain in that "[t]he trial court stepped into the role of the prosecutor when it induced defendant to plead guilty in exchange for a commitment to dismiss the on-bail enhancement to reach the agreed-upon sentence." (*Id.* at pp. 1144-1145.) *Woosley* did not cite the withdrawal condition as additional support for its conclusion. In part 7A(1), *post*, I will explain that I disagree with *Woosley* for other reasons.

In *Orin*, *supra*, 13 Cal.3d 937, the trial court itself characterized its action as a plea bargain in which the People did not want to enter and it allowed the defendant to set aside the plea if the trial court did not accept it. (*Id.* at pp. 940-941.) However, the Supreme Court

rejected the trial court's characterization, stating that the case "did not involve a plea bargain." (*Id.* at p. 943.)[17]

In *Smith*, *supra*, 82 Cal.App.3d 909, the appellate court noted that the defendants in the two cases under review were "assured that if the sentence was not as promised, the plea could be withdrawn." (*Id.* at p. 915.) As noted above (*ante*, in fn. 13), the *Smith* opinion simultaneously characterized the trial court as having "bargained" with the defendants (*id.* at p. 914) and refused to issue a writ of mandate, stating, "The bargains which were struck are ones which do not require the concurrence of the district attorney." (*Id.* at p. 915.)

The People cite *Labora*, *supra*, 190 Cal.App.4th 907 as apparent support for the proposition that to allow a defendant to withdraw a plea is illegal judicial plea bargaining. In fact, that opinion said no such thing. It found illegal plea bargaining because the trial judge reduced an indicated sentence in response to the defendant's objection. (*Id.* at p. 916.)

The majority purports to derive this second principle in part from the first principle that "a true indicated sentence may not be premised on the defendant entering guilty or no contest pleas." (Maj. opn. *ante*, at p. 11.) However, it is one thing to say that an indicated sentence cannot be conditioned on a defendant's change of plea. It is quite another to say that the defendant's acceptance of an indicated sentence by pleading to the sheet must be completely unconditional. The majority acknowledges that a sentence indication is conditioned on the facts remaining the same, leaving the trial court free to rescind the indication upon a material change in facts.

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[17] In contrast, in *People v. Superior Court (Ludwig)* (1985) 174 Cal.App.3d 473, in finding that the trial court engaged in prohibited plea bargaining, the appellate court accepted the trial court's characterization of its actions as "'entering a plea bargain over the District Attorney's objection.'" (*Id.* at p. 475.) The court proclaimed that "[t]he court's action here was clearly a plea bargain, not an indicated sentence, as the latter is described by *Felmann*." (*Id.* at p. 476, fn. 1.)

As noted above, among the statutory conditions of a plea bargain are that "(1) [the court's] approval is not binding, (2) it may, at the time set for the hearing on the application for probation or pronouncement of judgment, withdraw its approval in the light of further consideration of the matter, and (3) in that case, the defendant shall be permitted to withdraw his or her plea if he or she desires to do so." (§ 1192.5.) In the context of plea bargaining, the California Supreme Court has recognized "that the requirements of due process attach . . . to implementation of the bargain itself. It necessarily follows that violation of the bargain by an officer of the state raises a constitutional right to some remedy." (*People v. Mancheno* (1982) 32 Cal.3d 855, 860.)

While section 1192.5 does not literally apply to an indicated sentence, the majority does not explain why the conditions of an indicated sentence must be more onerous for a criminal defendant than the conditions of a plea bargain. *Delgado*, *supra*, 16 Cal.App.4th 551 has indicated that these principles of section 1192.5 do apply to an indicated sentence, and that a defendant's remedy when the trial court refuses to honor its indication is not specific performance of the indication, but "the opportunity to withdraw his plea." (*Id.* at p. 555.)

I respectfully part company with the majority's announcement of its second principle in part because it contradicts precedent and in part because I foresee negative practical consequences. If a criminal defendant cannot reserve the right to withdraw his or her admissions to all charges if the judge's sentence indication is rescinded, pleading to the sheet in response to an indicated sentence creates a much greater risk that the defendant may receive the maximum possible sentence.[18] I foresee that very few defendants will be willing

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[18] The majority acknowledges its intention to raise the stakes for criminal defendants interested in acting on judicial sentence indications. It characterizes allowing a defendant the opportunity to withdraw his pleas and admissions as creating "a risk-free position for defendant." (Maj. opn. *ante*, at p. 12.) Presumably the majority finds the same fault in section 1192.5. I disagree that a defendant who pleads guilty in response to a sentence

to take this risk, and accordingly the trial courts' sentence indications will lose meaning. The only judicial indication that a defendant could really rely on is that the court will impose a sentence within a range up to the maximum possible. This new restriction on judicial sentence indications will compel defendants either to try their luck at trial or to accept the offers of sometimes zealous prosecutors. If the defendant's guilty plea in response to a judicial sentence indication must be irrevocable, while the defendant's guilty plea in response to a prosecutor's plea bargain is revocable, it is predictable that prosecutors will gain more control over the resolution of criminal cases without trial. The majority identifies no policy reason for this paradigm shift, which reduces the role of the judiciary in the pretrial resolution of cases. As I see it, to so circumscribe the role of the trial judges is to devalue their core competence, experience, and expertise in tailoring sentences to fit the crimes and the criminals.

As I understand it, the majority and I agree that one component of a true indicated sentence is a trial judge's statement to a defendant, in essence, "If you are convicted of all charges by trial or plea and if the facts at sentencing are not materially different than they now appear, then I am likely to impose" a specified sentence. I believe that the majority and I agree that the indication is conditioned on the facts remaining the same at sentencing and is not binding on the trial court if the facts at sentencing are materially different. The majority and I also agree that a trial judge crosses the line into unauthorized judicial bargaining by making a different statement such as "if and only if you admit all charges and waive trial, then I will promise or guarantee" a specified sentence, regardless of what facts may be shown at sentencing. I believe that my legal disagreement with the majority is limited to whether the trial court's sentence indication can include a condition allowing the defendant

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indication has nothing to lose. If the court imposes the indicated sentence, the defendant stands to suffer a significant deprivation of liberty without exercising the constitutional rights involved in a criminal trial.

alternatively to accept a sentence greater than the indication or to withdraw the defendant's admissions if the court declines to impose the indicated sentence.

5. The Trial Judge Has Been Unfairly Portrayed.

The majority faults the trial court for violating both of its principles. My disagreement with the majority is as much about what the facts in this case are as about what the law should be.

Piecing together what actually occurred in this case requires some interpolation from the record. The judge's actual mention of a sentence apparently occurred during an unrecorded conference in the chambers of Santa Clara County Superior Court's Early Resolution Calendar (ERC) court on August 18, 2010. The proposed resolution was put on the record at a change of plea hearing the next day, along with the prosecutor's objections "to the Court offer in this case." The court made a few remarks on the record on August 19, 2010 at the change of plea hearing in response to the prosecutor's objections. At sentencing on November 16, 2010, the prosecutor renewed his objections to the court's plea bargaining as well as arguing that the indicated sentence of five years was unwarranted in light of new information. At that hearing, the judge's somewhat discursive response to both parts of the prosecution's motion covers seven pages of the reporter's transcript. The majority has quoted parts of these hearings, as will I. At those subsequent hearings, the trial judge, the prosecutor, defense counsel, and even the probation officer offered a variety of characterizations of what the trial judge said to defendant through defense counsel, but no one purported to quote exactly the words used by the trial judge.

I agree with the majority that the record establishes that, as part of the unrecorded sentence indication, there was at least an implicit understanding, if not an expressly stated condition, that defendant would be allowed to withdraw his pleas if the court elected not to

impose the indicated sentence and the defendant was unwilling to accept a greater sentence.[19] For the reasons stated above (in pts. 3 and 4), I do not agree with the majority that this condition establishes that the court engaged in illegal plea bargaining.

I also disagree with the following italicized factual findings by the majority. "The trial court made an offer to defendant . . . that, if defendant admitted all of the charges and allegations, the trial court *would* grant his motion to strike a strike and *would* impose a five-year state prison term or allow defendant to withdraw his pleas and admissions." (Maj. opn. *ante*, at p. 1.) "Here, the trial court *agreed* to impose a five-year prison sentence and strike the strike *in exchange for* defendant's pleas and admissions." (Maj. opn. *ante*, at p. 12.) The trial court made "*a commitment* that defendant could withdraw his pleas and admissions if the court did not follow through on its offer." (Maj. opn. *ante*, at p. 12.) "[T]he court *guaranteed* defendant that he would either receive the offered five-year term or be returned to his original position." (Maj. opn. *ante*, at p. 12.)

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[19] In explaining at sentencing the general practices of the ERC court "for purposes of any reviewing court," the trial court stated, "even though the court was making an offer or suggesting an offer of–with respect to an oral *Romero* and indicated sentence, it was understood and it's still understood . . . , that all of these offers on the oral *Romeros* and indicated sentences are–what's the word I want to use[?]–it's understood that if there's anything new that comes up, that the court has the ability to set it aside and to put the parties back in their original positions and not to make it a condition of the plea. [¶] And so that's the understanding that we have and that we operate with and we've been operating with that understanding for at least two years."

This confirmed the assertion by defense counsel earlier at the hearing that in his experience, "the outcome is not always a foregone conclusion. [¶] So to say that there might be some reliance on the granting of a *Romero* motion in terms of an early resolution in this case, the fact that it will be granted is not a certainty. [¶] And information can be presented to the court, either through the lips of my client, as they have in the past, or by other witnesses that would cause the court to not honor that agreement, and to either allow the defendant to withdraw a plea and begin all over again or accept the sentence in accordance–as if the strike had not been stricken."

The majority has selected wording such as "commitment" and "guarantee" to connote a binding promise by the trial judge. While the trial judge went on for pages describing the practices of the ERC court at the sentencing hearing, I do not find these particular words used by the judge or any party to the unrecorded conference.[20] Instead the judge called his statements both "indicated sentences" and "offers." "Offer" was the most common characterization.

At the change of plea hearing, the trial court asked defense counsel to recite his understanding of the disposition of defendant's case. A deputy public defender stated, "he will be pleading as charged, and in each matter will be admitting a serious strike prior allegation. It's anticipated at the time of sentencing the Court will grant an oral *Romero* motion, thereafter sentence Mr. Clanc[e]y to five years in state prison." This anticipation was qualified by the implicit understanding just discussed that the court could change its mind in view of significant new facts.

In objecting to the court's actions as illegal plea bargaining, the *prosecutor* repeatedly characterized them as a "promise."[21] Unlike the particular circumstances in *Labora,, supra*, 190 Cal.App.4th 907, 911-912, I do not regard the court's response to the prosecutor's assertions as any kind of adoptive admission that the court made the defendant a binding, irrevocable, or enforceable promise, commitment, or guarantee. The court took

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[20] Claiming that "all of the parameters of the court's offer to defendant were placed on the record by the court and the parties below," the majority is unable to cite any mention of a "commitment" or a "guarantee." (Maj. opn. *ante*, at p. 10, fn. 2.)

[21] The prosecutor argued at the change of plea hearing, "In other words, the Court's promising the defendant the Court would strike his prior serious felony conviction if he changes his plea in these cases." When the prosecutor was called on at the same hearing to advise defendant of the maximum sentence, the prosecutor stated, "You're being promised no more than or less than five years in state prison." At sentencing, the prosecutor again asserted, "So what's happening today with the oral *Romero* and the recommended sentence by the probation department, if the court goes forward with this, is a foregone conclusion, because it's something that was promised to the defendant prior to him changing his plea."

pains to describe its general and specific practices in this case, and it did not use any of these terms.[22] Ultimately, the court rejected the prosecutor's claim of illegal plea bargaining. After first acknowledging at sentencing that, if its actions "were viewed in a vacuum, I think you would be correct in your assessment that the court engaged in plea bargaining," after explaining the background of its operating procedures and understandings with the District Attorney's office, the court concluded, "it isn't as though the court is engaging in plea bargaining."[23]

Finally, I disagree with the majority's factual inference that "[b]ecause the court's goal was to 'settle cases,' its offer was contingent on defendant's pleading and would not have been valid if he chose to exercise his right to trial." (Maj. opn. *ante*, at p. 12.) This might be a permissible factual inference from the record if we were reviewing a finding that the trial court had engaged in illegal plea bargaining, but that is not the posture of this appeal.

6. The Standard of Review

These implicit factual findings by the majority raise the question of the applicable standard of review. The majority quotes *Labora, supra*, 190 Cal.App.4th 907, but *Labora* does not address how an appellate court should determine the facts when the claim is that a trial court engaged in illegal judicial plea bargaining. (Maj. opn. *ante*, at p. 8.)

The standard for appellate review of such a claim is not well defined. It has been said that "[w]e review allegations of judicial plea bargaining for abuse of discretion" (*Labora, supra*, 190 Cal.App.4th 907, 914), but a trial "court has *no authority* to substitute itself as the

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[22] Even if the court said "promise," the choice of words is not as important as the true nature of the court's statement. (*Ramos, supra*, 235 Cal.App.3d 1261, 1266, fn. 2.)

[23] For the same reason, I attach no special significance to the probation's reports characterizations of the situation either as a "negotiated plea" or "the Court's indication" of a sentence. The judge did not write the probation report.

representative of the People in the negotiation process." (*Orin, supra*, 13 Cal.3d 937, 943; my emphasis.) "'[J]udicial plea bargaining in contravention of existing law'" is an act "'in excess of a trial court's "jurisdiction."'" (*Turner, supra*, 34 Cal.4th 406, 418, quoting *People v. Superior Court* (*Himmelsbach*) (1986) 186 Cal.App.3d 524, 532, disapproved on another ground by *People v. Norrell* (1996) 13 Cal.4th 1, 7, fn. 3; *Labora, supra*, 190 Cal.App.4th at p. 914.) Trial courts have no discretion to engage in plea bargaining.

What an appellate court must do when evaluating such a contention is to ascertain whether the trial judge engaged in plea bargaining or entered a plea bargain. Since a negotiated plea agreement is a form of contract, the standard of review for contracts appears applicable. As this court has stated, "[w]here the existence of a contract is at issue and the evidence is conflicting or admits of more than one inference, it is for the trier of fact to determine whether the contract actually existed. But if the material facts are certain or undisputed, the existence of a contract is a question for the court to decide." (*Bustamante v. Intuit, Inc.* (2006) 141 Cal.App.4th 199, 208.) Similarly, "[w]here the evidence on the negotiations forming the basis of the alleged oral contract is in conflict, the question is one of fact, and it is for the trial court to determine from the evidence whether a contract is proven." (*Townsend v. Flotill Products* (1947) 82 Cal.App.2d 863, 866.)

The trial judge, being an alleged party to the bargain, is particularly well situated to determine if he or she engaged in any negotiating or bargaining, particularly if the claim is that the activity occurred off the record. As usual, on appeal we will defer to any express or implicit factual findings to the extent they are supported by substantial evidence (compare *Liang v. Superior Court* (2002) 100 Cal.App.4th 1047, 1055 with *In re Honesto* (2005) 130 Cal.App.4th 81, 92), but we will independently review the legal significance of those facts. Of course, it will facilitate appellate review if a party or the court puts on the record whatever occurred off the record.

Unlike the majority, I believe that on appeal we must accept the implicit factual findings supporting the trial court's conclusion that it did not engage in plea bargaining, but merely indicated a sentence as authorized by precedent.

7. The Trial Court Did Not Engage in Illegal Plea Bargaining.

As the majority has accepted the People's first argument, it does not reach the People's next two arguments. As I am not persuaded by the first argument, I will review the others in order to determine whether the trial court in this case crossed the line and engaged in illegal plea bargaining.

A. The Conditional Offer to Dismiss the Strike Did Not Create a Plea Bargain.

The People assert that the second hallmark of plea bargaining is that "the trial court's inducement of the defendant's plea in this case hinged on its dismissal of defendant's prior serious felony conviction allegations in order to reach the agreed-upon prison term. That arrangement is materially indistinguishable from a promise to dismiss the enhancements at the time of the plea, and offends the rule set forth in *Orin* that only the prosecutor, not the court, can engage in charge bargaining."

(1). The *Woosley* Decision Is Unconvincing.

The People find support in *Woosley*, *supra*, 184 Cal.App.4th 1136, discussed above, which I will now examine more closely. In that case, the People asserted that the trial court had made an unlawful judicial plea bargain. The defendant was charged with two burglaries and petty theft, the latter two crimes occurring while he was released on bail. (*Id.* at p. 1140.) Over the prosecutor's objection, the defendant entered into what he characterized as a "'conditional plea' 'conditioned upon the defendant receiving 2 years 8 months state prison.'" (*Id.* at p. 1142.) At sentencing, defense counsel explained that the only way to arrive at this sentence was for the court to dismiss the on-bail enhancement under section

1385. (*Id.* at p. 1143.) The court imposed a sentence of two years eight months by dismissing the enhancement. (*Id.* at p. 1144.)

The Third District Court of Appeal agreed with the People that "the trial court engaged in unlawful judicial plea bargaining." (*Woosley*, *supra*, 184 Cal.App.4th at p. 1144.) After reviewing the authorities summarized above (*id.* at pp. 1145-1146), the court reasoned as follows. "Here, the trial court gave what appeared to be an indicated sentence. But that sentence could be imposed only if the trial court dismissed the on-bail enhancement. Therefore, it was more than just an indicated sentence; it included, anticipatorily, the dismissal of the on-bail enhancement.

"Even though section 1385 gives the trial court discretion to dismiss 'an action' in the interests of justice, the anticipatory commitment by the court to exercise that discretion to dismiss the enhancement cannot be used to negate the role of the prosecutor.[Fn. omitted] Such use encroaches on the prosecutor's charging authority and exposes the process to the evils discussed by the California Supreme Court in *Orin*, *supra*, 13 Cal.3d at p. 943. It 'would contravene express statutory provisions requiring the prosecutor's consent to the proposed disposition, would detract from the judge's ability to remain detached and neutral in evaluating the voluntariness of the plea and the fairness of the bargain to society as well as to the defendant, and would present a substantial danger of unintentional coercion of defendants who may be intimidated by the judge's participation in the matter. [Citation.]' (*Ibid.*, fns. omitted.)

"Defendant asserts, however, that this was nothing more than a plea of guilty to all charges and admission of the enhancement with an indicated sentence. To the contrary, defendant's characterization ignores the reality that the plea did not expose him to punishment for the on-bail enhancement because the trial court had promised to dismiss it. The form of the bargain was to have defendant admit the on-bail enhancement in anticipation of the trial court 'exercising' its discretion to dismiss the enhancement, but the substance of the bargain was no different from the trial court dismissing the on-bail enhancement before

taking the plea. Therefore, the bargain could be made only with the prosecutor's consent. [¶] By defendant's reasoning, the trial court could agree to dismiss any or all of charges or enhancements, pursuant to section 1385, in exchange for a defendant's guilty plea on all the charges and enhancements. Such a practice is within neither the spirit nor the letter of state law as summarized in *Orin*." (*Woosley*, *supra*, 184 Cal.App.4th at p. 1147.)

Defendant asserts that *Woosley* "was wrongly decided." I agree. *Woosley* seems to regard a trial court's exercise of section 1385 discretion as infringing on the prosecution's charging authority. As I will show, this is the very proposition that was rejected in a different context in *Romero*, *supra*, 13 Cal.4th 497.

I have already mentioned (*ante,* pt. 1) that *Romero* construed the Three Strikes statutes as allowing trial courts on their own motions to dismiss strikes under section 1385. In reaching this conclusion, the court began its analysis by reviewing "the impact of the separation of powers doctrine." (*Romero*, *supra*, 13 Cal.4th at p. 509.) The leading case of *People v. Tenorio* (1970) 3 Cal.3d 89 had examined a similar statute purporting to bar courts from striking prior convictions in certain drug cases without the prosecutor's consent. *Romero* summarized the reasoning of *Tenorio* "in this way: . . . conceding the Legislature's power to bar a court from dismissing certain charges altogether, when the Legislature does permit a charge to be dismissed the ultimate decision whether to dismiss is a judicial, rather than a prosecutorial or executive, function; to require the prosecutor's consent to the disposition of a criminal charge pending before the court unacceptably compromises judicial independence." (*Romero*, *supra*, 13 Cal.4th at p. 512.)

Romero stated, "[t]he applicable provision of the Three Strikes law (§ 667(f)(2); § 1170.12, subd. (d)(2)), if construed as the district attorney would have us construe it, would have precisely the same effect: A court that was convinced, in the proper exercise of its discretion, that justice demanded the dismissal of a prior felony conviction allegation pursuant to section 1385, would have no power to dismiss unless the prosecutor consented.

So interpreted, the statute would appear to violate the doctrine of separation of powers." (*Romero*, *supra*, 13 Cal.4th at p. 513, fn. omitted.)

Romero rejected the contention that the Three Strikes statutes were intended to afford "judicial oversight of the prosecutor's charging discretion." (*Romero*, *supra*, at p. 514.) "This view of the statute is impossible to accept. To describe the statute as subjecting the prosecutor's charging discretion to judicial oversight is sophistic. The statute does not purport to require the court to oversee the prosecutor's charging decisions. Nor does the court, in reality, exercise any power over the prosecutor's charging decisions. Any decision to dismiss is necessarily made *after* the prosecutor has invoked the court's jurisdiction by filing criminal charges. '[O]nce the state is ready to present its case in a judicial setting, "the prosecutorial die has long since been cast."' [Citations.] . . .

"The notion that a statute with the effect described may be construed and justified as dealing with charging discretion, rather than with the court's disposition of pending charges, was expressly and flatly rejected in *People v. Tenorio*, *supra*, 3 Cal.3d at page 94 [citation]: 'When the decision to prosecute has been made, the process which leads to acquittal or to sentencing is fundamentally judicial in nature.' (See also *People v. Superior Court* (*On Tai Ho*) [(1974)] 11 Cal.3d [59] at p. 66 ['[W]hen the jurisdiction of a court has been properly invoked by the filing of a criminal charge, the *disposition* of that charge becomes a judicial responsibility.']; [citation.]" (*Romero*, *supra*, at p. 514.) *Romero* concluded that any "[i]nterference with the traditional prerogatives of the executive cannot justify interference with the independence of the judiciary." (*Id.* at p. 515.)

It seems to me that *Woosley* accepted the same argument that *Romero* previously rejected, namely, that for a court to dismiss an enhancement under section 1385 somehow interferes with the prosecutor's ability to charge the enhancement. I consider *Romero* to be more persuasive, if not controlling, on this point. In terms of the prosecutor's charging authority, it is exhausted once charges are filed invoking the court's jurisdiction. The court's subsequent dismissal of a strike does not have the effect of wiping out the conviction or the

prosecutor's allegation. It is simply a determination that the sentencing consequences of that conviction should not be applied to the defendant in a particular case. (*Romero*, *supra*, 13 Cal.4th 497, 508.)

In the earlier decision in *Vergara*, *supra*, 230 Cal.App.3d 1564, a decision not discussed in *Woosley*, the Second District Court of Appeal was not troubled by an indicated sentence that was contingent on dismissing an enhancement. In that case, each of four codefendants faced eight possession charges, two involving drugs and six involving weapons, and a charge of selling cocaine. Attached to the drug charges was a quantity enhancement that "would have added 15 years to each defendant's sentence under counts 1 and 2, and an additional 3 years as to count 3." (*Id.* at pp. 1566-1567.) After negotiations between the prosecution and the defendants broke down, the court gave an indicated sentence to each defendant of nine years eight months, after which each defendant pleaded guilty to all charges and enhancements, and the trial court imposed the indicated sentences, which involved staying the enhancements. (*Id.* at p. 1567.)

The appellate court quickly rejected the claim that the trial court had engaged in illegal plea bargaining. "It is clear that there is no requirement that the People need to consent when a defendant pleads guilty to all charges of the information. . . . Further, the trial court is allowed to give advance indication of a sentence based upon a set of facts. (*People v. Superior Court* (*Smith*), *supra*, at p. 916.) Sentencing is the exclusive province of the judiciary, to be accomplished within the limits set by the Legislature. (*Ibid.*) Accordingly, the trial court acted within its power in accepting the pleas and imposing the base sentences." (*Vergara*, *supra*, 230 Cal.App.4th at pp. 1567-1568.)

As a separate issue, *Vergara* concluded that the trial court had erred by failing to state reasons for permanently staying or striking the enhancements and it reversed that aspect of the judgment so that the trial court could either state reasons or impose the enhancements. (*Id.* at p. 1569.) Unlike *Vergara*, the People here do not assert that the trial court abused its discretion under section 1385.

While the result of *Vergara* was to uphold an indicated sentence that required dismissal of an enhancement, unlike *Woosley*, the opinion did not discuss whether the dismissal infringed on the prosecutor's authority. I now turn to this point.

(2) The Indicated Sentence in this Case Did Not Exceed the Trial Judge's Authority.

In part 1, ante, I explained that if defendant had opted for jury trial and he was convicted of all charges, with true findings on the on-bail enhancement and prior strike, the court at sentencing would be required to engage in a complex series of discretionary decisions to arrive at the ultimate sentence. At the sentencing hearing, the prosecution would be free to argue for any term it saw fit up to the maximum of 16 years 8 months. If the court at sentencing determined to impose a term of five years (calculated exactly as the sentence in this case was) after striking the strike and the on-bail enhancement, no persuasive argument could be made that the sentencing after trial somehow negated the prosecutor's role, encroached on the prosecutor's charging authority, or required the prosecutor's consent. Instead, the sentencing court would be recognized to be performing a fundamentally judicial function.

I do not understand *Woosley* to have suggested that the trial court at sentencing after conviction at trial would have exceeded its authority if it had imposed a same sentence of two years and eight months, even though this sentence involved striking the on-bail enhancement. But *Woosley* prohibited the trial judge from announcing and later acting on the same preliminary assessment of the defendant's likely sentence if convicted of all charges without conducting a trial. *Woosley* characterized such an indication as not only an "anticipatory commitment," but as tantamount to "dismissing the on-bail enhancement before taking the plea." (*Woosley*, *supra*, 184 Cal.App.4th 1136, 1147.) As I explained above, an indication of a sentence is an indication, an informed prediction of how the judge is likely to view the same facts at sentencing. It is not a binding commitment. It is certainly not a pre-plea imposition of the sentence or a dismissal of an enhancement. It is no less

within judicial authority to indicate a sentence before trial than to impose a sentence after trial, even if the indication contemplates dismissal of an enhancement, so long as the indication otherwise conforms to the formula for an indicated sentence.

As noted above, at sentencing after an indicated sentence the prosecution is in the same position as if it had obtained defendant's conviction on all charges after trial. The prosecutor has an opportunity to marshal evidence, including what has been properly excluded from the jury's purview, in an attempt to convince the court of what sentence to impose in its considerable discretion. The prosecutor in this case took advantage of this opportunity, presenting a 12-page motion with several attachments showing defendant's criminal history and the nature of his current crimes. Having exercised their executive function in determining what charges to bring, the People's remaining responsibilities are to prove their charges and to argue for an appropriate sentence. The People are not required to consent to a plea of guilty as charged. After such a plea, when the People have the opportunity to present evidence and argument about the proper sentence, I see no infringement of the prosecutor's constitutional role. Rather, by preventing a trial court from providing a preliminary assessment of a defendant's likely sentence, the result in *Woosley* amounts to an infringement on the court's authority to exercise judicial sentencing discretion.

There is legitimate concern that a trial judge not figuratively step down from the bench and become entangled in a process of negotiation and partisan give-and-take with the criminal defendant. (*Orin*, *supra*, 13 Cal.3d 937, 942-943; *People v. Weaver* (2004) 118 Cal.App.4th 131, 148-149.) Impartiality and due process must be respected for all parties. However, for a court to simply announce an indicated sentence within the parameters described above, not conditioned on the defendant's change of plea, does not involve the court in negotiating or bargaining. If arriving at that indicated sentence requires the court to select a certain midterm as a principal term, to run several other terms concurrent, to strike a

strike, and to strike an enhancement, the court has done nothing outside of performing core judicial functions and has not invaded the province of the executive branch.

In this case, as the critical statements by the judge during an early resolution conference were not recorded or later quoted, conflicting inferences may arise from the existing record of after-the-fact characterizations and paraphrases. It is the appellant's burden to demonstrate judicial error. In their appeal the People have cited no evidence establishing that the trial judge engaged in any bargaining with defendant. They emphasize that the judge repeatedly described the indicated sentence as an "offer." I do not believe that the judge was attempting to use the word as a term of art, but as another way of describing the indicated sentence. Unlike *Labora*, *supra*, 190 Cal.App.4th 907, in objecting to the court's action, the prosecutor here made no record that the defense attorney talked the trial judge into changing his indicated sentence or that the judge was otherwise involved in negotiating with defense counsel regarding the sentence. While the prosecutor characterized the court's action as making a promise in exchange for a guilty plea, the trial court implicitly rejected that characterization. For all that appears in the record, both sides presented their positions about an appropriate resolution at this meeting and the judge then indicated a sentence.[24]

Applying a deferential review to the implied findings of the trial court, all that appears in this record is that the trial judge determined and announced that, based on the facts before him at the time of the early resolution conference, he would sentence defendant to five years

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[24] The extent to which the court becomes involved in discussions or bargaining between the prosecutor and defense counsel is critical to whether the court has stepped outside its judicial role and substituted itself as a representative of the People. The court can surely listen to the positions of the parties and ask for responses from each side. (Cf. *People v. Weaver*, *supra*, 118 Cal.App.4th 131, 148.) It can announce an indicated sentence based on all the information presented that would apply equally to conviction by plea or trial. However, it cannot modify its indication based on the defense attorney's reaction or suggest that a post-trial sentence would be more harsh.

in prison if all charges were proved at trial. It is true that this sentence could only be imposed by striking defendant's prior strike, and it was anticipated, not promised, that the court would grant an oral *Romero* motion at sentencing if no important new facts were presented. For the reasons stated above, I conclude that for the trial court to give this indication before trial did not exceed the court's sentencing authority or infringe on the prosecutor's charging authority. It was a proper indicated sentence.[25]

B. The Statutory Prohibitions on Plea Bargaining Involving Strikes are Inapplicable.

In view of my conclusion that it is generally acceptable to predicate an indicated sentence on dismissal of an admitted enhancement, contrary to *Woosley*, the remaining question is whether the Three Strikes statutes affect that conclusion.

The People's final point is that the Three Strikes statutes, sections 667, subdivision (g) and 1170.12, subdivision (e), prohibit plea bargaining, as defined in section 1192.7, subdivision (b), involving prior felony convictions. This statute states: "As used in this section 'plea bargaining' means any bargaining, negotiation, or discussion between a criminal defendant, or his or her counsel, and a prosecuting attorney or judge, whereby the defendant agrees to plead guilty or nolo contendere, in exchange for any promises, commitments, concessions, assurances, or consideration by the prosecuting attorney or judge relating to any charge against the defendant or to the sentencing of the defendant." (§ 1192.7, subd. (b).)

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[25] I reach this conclusion because the record, reviewed with respect to the trial court's implicit factual findings, does not support the People's claims that the trial court misunderstood or exceeded its authority to indicate a sentence. I am not persuaded, nor need I be, that the trial court issued a sentence indication conforming precisely to the model I have identified. The trial court sought to justify its actions based on its historical practices. It is precedent and the record before me and not this trial court's practices that dictate my conclusion.

Defendant responds that the plea bargaining restrictions in the Three Strikes statues were aimed only at prosecutors, not judges. The subdivisions expressly require prosecutors to plead and prove "all known prior felony convictions" and prohibit prosecutors from entering "into any agreement to strike or seek the dismissal of any prior felony conviction allegation" except pursuant to section 1385. (§§ 667, subd. (g), 1170.12, subd. (e).)

Since these subdivisions refer to plea bargaining as defined in section 1192.7, subdivision (b), and that subdivision mentions "any promises, commitments, concessions, assurances, or consideration by the prosecuting attorney or judge," I am not persuaded that the plea bargaining prohibition in the Three Strikes statutes was intended to exempt judges. (Cf. *Allan*, *supra*, 49 Cal.App.4th 1507, 1516.) This statutory definition was enacted in 1982 as part of Proposition 8. While Proposition 8 seemingly recognized a judicial role in the bargaining process, it did so only in the context of prohibiting plea bargaining by prosecutors and judges in a wide range of felony cases not including the felonies charged in this case.[26] It is applicable here only by virtue of defendant having a prior strike that is subject to the Three Strikes statutes.

I recognize that section 1192.7, subdivision (b) is broadly phrased. The majority emphasizes its prohibition of any discussion between a judge and a criminal defendant, asserting that "a 'discussion' between a judge and a criminal defendant that produces the defendant's agreement to plead guilty or no context in exchange for a sentencing commitment by the judge is a judicial plea bargain." (Maj. opn. *ante*, at p. 3.)

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[26] Section 1192.7, subdivision (a)(2) prohibits plea bargaining "in any case in which the indictment or information charges any serious felony, any felony in which it is alleged that a firearm was personally used by the defendant, or any offense of driving while under the influence of alcohol, drugs, narcotics, or any other intoxicating substance, or any combination thereof . . . , unless there is insufficient evidence to prove the people's [*sic*] case, or testimony of a material witness cannot be obtained, or a reduction or dismissal would not result in a substantial change in sentence." Section 1192.7, subdivision (c) defines "serious felony" by providing a list of 42 kinds of offenses.

This broad interpretation does not apply to a true indicated sentence. As described above, an indicated sentence is not conditioned on the defendant's change of plea. It is equally applicable whether the defendant is convicted by plea or at trial. An indicated sentence therefore is not offered "in exchange for" a defendant's agreement to plead guilty or no contest. The fact that a sentence indication results in a guilty plea does not establish that it was indicated with the prohibited intent.

Moreover, as stated above, an indication is simply that, an indication. It is not a binding promise, nor is it a commitment, concession, assurance, or consideration. A true sentence indication necessarily involves "discussion," since it must be articulated somehow, but it does not involve "any bargaining" or "negotiation" between a defendant or defense counsel and the judge. (§ 1192.7, subd. (b).) It is a conditional offer by the court leaving nothing for negotiation. To the extent that the broad language of this subdivision suggests a more expansive interpretation that would prohibit a court from indicating a sentence that involves the dismissal of a strike or enhancement pursuant to section 1385, I would conclude that "[s]o interpreted, the statute would appear to violate the doctrine of separation of powers." (*Romero*, *supra*, 13 Cal.4th 497, 513.)

I therefore conclude that the Three Strikes statutes, in restricting plea bargaining, do not prohibit the established practice of trial courts indicating sentences. As the prosecutor in this case made no showing that the court's off-the-record sentence indication resulted from judicial bargaining or negotiating and it was nothing more than a conditional offer, it falls outside the prohibitions of the Three Strikes statutes and within judicial sentencing authority.

For the reasons stated above, I would affirm the judgment.

LUCERO, J.*

* Judge of the Santa Clara County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution

Trial Court:	Santa Clara County Superior Court
Trial Judge:	Honorable Rene Navarro
Attorneys for Plaintiff and Appellant:	Kamala D. Harris Attorney General of the State of California Dane R. Gillette Chief Assistant Attorney General Gerald A. Engler Senior Assistant Attorney General Laurence K. Sullivan Supervising Deputy Attorney General Amy Haddix Deputy Attorney General Jeffrey Francis Rosen Santa Clara County District Attorney
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EXHIBIT B

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

Court of Appeal - Sixth App. Dist.
FILED
JAN 30 2012
MICHAEL J. YERLY, Clerk
By _____ DEPUTY

THE PEOPLE,
Plaintiff and Appellant,
v.
WESLEY CIAN CLANCEY,
Defendant and Respondent.

H036501
Santa Clara County No. C1072166, Santa Clara County No. C1073855

BY THE COURT*:

Respondent's petition for rehearing is denied.

(Lucero, J.** would grant the petition.)

Date: JAN 30 2012

BAMATTRE-MANOUKIAN, J.
_____ Acting P.J.

*Before Bamattre-Manoukian, Acting P.J., Mihara, J., and Lucero, J.**

**Judge of the Santa Clara County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

RECEIVED
JAN 31 2012
S.D.C.A.P.

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 ***RESPONDENT'S PETITION FOR REVIEW*** 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:

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I declare under penalty of perjury the foregoing is true and correct. Executed this 14th day of February, 2012, at Santa Clara, California.

Priscilla A. O'Harra