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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

TOMAS GRAJEDA, JR.,

Defendant and Appellant.

D060725

(Super. Ct. No. FVA025452)

APPEAL from a judgment of the Superior Court of San Bernardino County, Stephen G. Saleson, Judge. Reversed and remanded for resentencing.

Defendant Thomas Grajeda, Jr., was convicted of two counts, and the jury found true certain enhancing allegations. The court sentenced Grajeda to a total term of 70 years to life. However, on appeal from that judgment, this court in a prior unpublished opinion (*People v. Grajeda* (Mar. 22, 2011, D058090 [nonpub. opn.] (*Grajeda I*)) concluded the evidence was insufficient to support the jury's true finding on the gang enhancement appended to one of those counts, and we therefore reversed the true finding

on the gang enhancement and remanded the matter for resentencing. On remand, the court sentenced Grajeda to a total term of 50 years to life. In this appeal, Grajeda challenges the new sentence, asserting (1) he was denied due process because he was not present at the sentencing hearing, (2) the court abused its discretion when it refused to dismiss one of his prior strike conviction allegations, (3) it was error to consider his prior strike convictions in sentencing, and (4) the court erred in imposing the restitution fine and calculating custody credits.

## I

### BACKGROUND

#### A. The Convictions and Prior Sentence

In 2008, a jury convicted Grajeda of one count of attempted murder (Pen. Code, §§ 664/187, subd. (a),<sup>1</sup> count 1) and one count of carrying a loaded firearm (§ 12031, subd. (a)(1), count 2). The jury found true, in connection with count 1, that Grajeda (1) personally used a firearm within the meaning of section 12022.53, subdivision (b), (2) personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivision (c), and (3) personally discharged a firearm causing great bodily injury within the meaning of section 12022.53, subdivision (d). The jury also found true that he committed the offense alleged in count 1 for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1)(C), and that, at the time Grajeda

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified.

committed the offense alleged in count 2, he was an active participant in a criminal street gang. (§ 186.22, subd. (a); *Grajeda I, supra*, D058090, at p. 2.)

In a bifurcated proceeding, the court found true the allegations that Grajeda had suffered three prior convictions under the three strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). The court sentenced Grajeda to an indeterminate term of 45 years to life on count 1, a consecutive indeterminate term of 25 years to life for the firearm enhancement under section 12022.53, subdivision (d), and a concurrent indeterminate term of 25 years to life for the conviction on count 2. (*Ibid.*)

#### B. *Grajeda I*

In *Grajeda I*, this court held the evidence was insufficient to support the gang enhancement as to count 1, but rejected Grajeda's remaining claims of error as to the judgments of conviction. We declined to consider his claims of sentencing error because we recognized that some or all of his sentencing claims might be remedied and/or rendered moot on resentencing.<sup>2</sup>

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<sup>2</sup> In *Grajeda I*, Grajeda raised a series of sentencing claims: the court abused its discretion by not dismissing his prior strike conviction allegations; the court's use of his prior felony convictions from former cases to impose a three strikes sentence violated the terms of his plea bargains in the former cases; the court did not provide proper pre-sentence credits under section 4019; and the court erred by imposing a restitution fine without considering Grajeda's ability to pay that fine. Because it was necessary to remand the matter for resentencing, Grajeda might raise these claims at the new sentencing hearing, and that some or all of these sentencing claims might be remedied and/or rendered moot depending on the sentencing choices made by the court on remand, we declined to consider his challenges to the sentence in *Grajeda I*. (*Grajeda I, supra*, D058090, at p. 38.)

### C. The New Sentencing Hearing

After remand, the trial court conducted a new sentencing hearing on August 22, 2011. Grajeda, who was not present at the hearing, was represented by attorney Faulhaber, who stated Grajeda's presence was waived. The court imposed a total term of 50 years to life, composed of a 25-year-to-life term for the attempted murder conviction pursuant to the three strikes law, and a consecutive 25-year-to-life term for the firearm enhancement under section 12022.53, subdivision (d). The court stated it had "modified the sentence in the appropriate fashion, which was to reduce the indeterminate term from 70 to 50, which was the whole purpose of the opinion and its effect, as [I] understand it," and Faulhaber stated "I agree." Faulhaber appeared only to discuss whether the reversal of the section 186.22, subdivision (b)(1)(C), enhancement appended to count 1 had any potential impact on the "active participant" enhancement appended to count 2, and the appropriate fines to be imposed.

## I

### ANALYSIS

#### A. Grajeda Was Denied His Right to be Present at Sentencing

Grajeda contends, and the People concede, that a criminal defendant has a constitutional and statutory right to be present at all critical stages of the criminal proceeding, including sentencing hearings. (*People v. Arbee* (1983) 143 Cal.App.3d 351, 355-356; § 1193, subd. (a).) Because the record here establishes the resentencing took place in Grajeda's absence, and there is no claim by the People that Grajeda validly waived his presence at the resentencing hearing, the cause must be remanded for

resentencing to give him an opportunity to present evidence and legal arguments prior to the imposition of the new, modified sentence (*Arbee, supra*) unless we are convinced the denial of Grajeda's right to be present at the August 22, 2011, hearing can be deemed harmless.

B. Remand Is Necessary Under the Facts of This Case

The People assert the erroneous exclusion of Grajeda from the August 22, 2011, resentencing hearing was harmless, arguing his presence at that resentencing hearing was unnecessary "[b]ecause appellant had already had the opportunity to address the court's discretionary choices at the first sentencing" and "the trial court had already made the relevant discretionary decisions at the initial sentencing [and therefore] the outcome would have been identical."

"A criminal defendant's federal constitutional right to be present at trial, largely rooted in the confrontation clause of the Sixth Amendment, also enjoys protection through the due process clause of the Fifth and Fourteenth Amendments [citation] "whenever his presence has a relation, reasonably substantial, to the [fullness] of his opportunity to defend against the charge," "but not "when presence would be useless, or the benefit but a shadow." ( *Kentucky v. Stincer* (1987) 482 U.S. 730, 745 . . . , quoting *Snyder v. Commonwealth of Massachusetts* (1934) 291 U.S. 97, 105-107 . . . .) Article I, section 15 of the California Constitution applies the same standard." (*People v. Ochoa* (2001) 26 Cal.4th 398, 433, disapproved on other grounds by *People v. Prieto* (2003) 30 Cal.4th 226, 263, fn. 14.)

In *People v. Carmony* (2004) 33 Cal.4th 367, the court (examining the appropriate standard for reviewing a decision not to exercise the power to dismiss a prior strike conviction allegation under *Romero*<sup>3</sup>), concluded a trial court's refusal or failure to dismiss a prior conviction allegation under section 1385 is subject to review for abuse of discretion, explaining:

"We reach this holding not only because of the overwhelming case law, but also as a matter of logic. 'Discretion is the power to make the decision, one way or the other.' [Citation.] We have previously concluded that a court's decision to strike a qualifying prior conviction is discretionary. [Citation.] As such, a court's decision *not* to strike a prior necessarily requires some exercise of discretion. . . . [¶] We therefore reject [*People v. Benevides* (1998) 64 Cal.App.4th 728] to the extent it holds that appellate courts lack authority to review a trial 'court's informed decision' not to 'exercise its section 1385 power in the furtherance of justice.' [*Id.* at p. 735.] Indeed, we do not find persuasive the grounds proffered by *Benevides* in support of this holding. In refusing to review the court's decision not to strike a prior for abuse of discretion, *Benevides* noted that '[s]ection 1385 does not confer a motion or right to relief upon the defendant' [*id.* at p. 734], and that 'a trial court is under no obligation to rule on such a "motion" ' (*ibid.*). According to *Benevides*, it therefore 'follows that if the court does not exercise its power to dismiss or strike, there is no review available to defendant on appeal.' (*Ibid.*)"

"This reasoning, however, is faulty. A defendant has no right to make a motion, and the trial court has no obligation to make a ruling, under section 1385. *But he or she does have the right to 'invite the court to exercise its power by an application to strike a count or allegation of an accusatory pleading, and the court must consider evidence offered by the defendant in support of his assertion that the dismissal would be in furtherance of justice.'* [Citation.] And '[w]hen the balance falls clearly in favor of the defendant, a trial court not only may *but should* exercise the powers granted to [it] by the Legislature and grant a dismissal in the interests of justice.'

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<sup>3</sup> *People v. Superior Court (Romero)* 13 Cal.4th 497 (*Romero*).

[Citation, italics added by *Carmony*.] Nonetheless, any failure on the part of a defendant to invite the court to dismiss . . . waives or forfeits his or her right to raise the issue on appeal." (*Carmony*, *supra*, 33 Cal.4th at pp. 375-376, italics added.)

In *People v. Rodriguez* (1998) 17 Cal.4th 253, our Supreme Court explained that when a case is remanded because a trial court misunderstood the discretion afforded it by *Romero* and its progeny, "the superior court should conduct a hearing in the presence of defendant, his counsel, and the People to determine whether to dismiss one or more prior felony conviction findings pursuant to section 1385." (*Rodriguez*, at p. 260.) The court specifically rejected the argument that the defendant's original *Romero* motion was sufficient to place its position before the court (*Rodriguez*, at p. 258), explaining "[t]he evidence and arguments that might be presented on remand cannot justly be considered 'superfluous,' because defendant and his counsel have never enjoyed a full and fair opportunity to marshal and present the case supporting a favorable exercise of discretion." (*Ibid.*) Subsequently, in *People v. Buckhalter* (2001) 26 Cal.4th 20, the Supreme Court (explaining its decision in *Rodriguez*) stated, "Under *section 1260 itself*, we concluded [in *Rodriguez* that] it was 'just under the circumstances' to require the defendant's presence with counsel on remand, even if the trial court ultimately decided against alteration of its earlier [t]hree [s]trikes sentence, . . . to allow the defendant to advance any arguments for the favorable exercise of the court's discretion." (*Buckhalter*, at p. 35.)

Thus, *Carmony* teaches that a court's decision whether or not to dismiss a qualifying prior conviction allegation necessarily requires some exercise of discretion,

and a defendant has the right to " 'invite the court to exercise its power by an application to strike a count or allegation of an accusatory pleading' " (*Carmony, supra*, 33 Cal.4th at p. 375), and that when a defendant makes such an application the court is required to " 'consider evidence offered by the defendant in support of his assertion that the dismissal would be in furtherance of justice.' " (*Ibid.*) Moreover, *Rodriguez* teaches that, when a defendant has previously invited the trial court to exercise its discretion under *Romero* but the trial court denied the motion for reasons other than an informed " 'consider[ation of the] evidence offered by the defendant in support of his assertion that the dismissal would be in furtherance of justice' " (*Carmony*, at p. 375), the defendant is entitled to a *new* hearing "in the presence of defendant, his counsel, and the People to determine whether to dismiss one or more prior felony conviction findings pursuant to section 1385" (*Rodriguez, supra*, 17 Cal.4th at p. 260), and the defendant's original *Romero* application was not a sufficient substitute for a new hearing at which the defendant was entitled to be present because "[t]he evidence and arguments that might be presented on remand cannot justly be considered 'superfluous,' because defendant and his counsel have never enjoyed a full and fair opportunity to marshal and present the case supporting a favorable exercise of discretion." (*Id.* at p. 258.)

Applying the foregoing authorities, we cannot conclude, on the facts of this case, Grajeda's absence from the August 22, 2011, hearing was without " 'a relation, reasonably substantial, to the [fullness] of his opportunity to defend against the charge,' [or that his] presence would [have been] 'useless, or the benefit but a shadow.' " (*Kentucky v. Stincer, supra*, 482 U.S. at p. 745, quoting *Snyder v. Commonwealth of Massachusetts, supra*, 291

U.S. at pp. 105-107.) In the trial court proceedings that resulted in our opinion in *Grajeda I*,<sup>4</sup> Grajeda (representing himself in propria persona) tried to invoke the court's discretion under *Romero* by filing a pretrial motion to dismiss the prior strike conviction allegations, but that motion was never ruled on. After the jury returned a guilty verdict and the court found true the prior strike conviction allegations, new counsel was appointed to represent Grajeda in connection with a motion for a new trial and for sentencing. After the court denied the new trial motion, it moved directly to sentencing, and Grajeda's new counsel apparently did nothing to resurrect Grajeda's *Romero* application but instead submitted on the basis of the probation report and sentencing memorandum. Thus, the trial court in the original sentencing proceeding was never asked to consider the merits of Grajeda's *Romero* application.<sup>5</sup>

At the resentencing hearing, Grajeda's counsel again made no *Romero* application. Under these circumstances, Grajeda's absence from the resentencing hearing at a minimum deprived him of the opportunity to "invite the court to exercise its power by

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<sup>4</sup> We take judicial notice of pleadings and record in *Grajeda I*. (*Hammell v. Britton* (1941) 19 Cal.2d 72, 75 [court may take judicial notice of its own records of prior appeal].)

<sup>5</sup> Indeed, in his first appeal, Grajeda argued he was deprived of effective assistance of counsel for numerous reasons, including his new counsel's failure to seek dismissal of the prior strike conviction allegations. Although this court reached the claims of ineffective assistance of counsel relating to the validity of the convictions (*Grajeda I*, *supra*, D058090, at pp. 15-27), we expressly declined to reach any of his arguments (including his separate claim of ineffective assistance of counsel) that related to his sentence because, as we observed, he could "raise his claims at the new sentencing hearing, and some or all of these sentencing claims may be remedied and/or rendered moot depending on the sentencing choices made by the court on remand." (*Id.* at p. 38.)

an application to strike a count or allegation of an accusatory pleading' " (*Carmony, supra*, 33 Cal.4th at p. 375), which would have required the court to " 'consider evidence offered by the defendant in support of his assertion that the dismissal would be in furtherance of justice.' " (*Ibid.*) Because counsel in his first sentencing hearing never presented a *Romero* application, Grajeda's presence at the resentencing hearing to present evidence and marshal arguments "cannot justly be considered 'superfluous,' because defendant . . . never enjoyed a full and fair opportunity to marshal and present the case supporting a favorable exercise of discretion." (*Rodriguez, supra*, 17 Cal.4th at p. 258.)

The People appear to argue that Grajeda's inability (because of his absence from the hearing) to raise his *Romero* claim at the resentencing hearing, and his counsel's failure to raise a *Romero* claim at that hearing, should be deemed harmless because it was unlikely the court would have agreed that Grajeda fell outside the spirit of the three strikes law. However, we are cognizant that the test is not how we might have ruled on Grajeda's motion in the first instance; instead, a *Romero* motion is a matter vested in the sound discretion of the trial court to determine whether, considering all the circumstances before it, the interests of justice would be served by dismissing one or more of his prior strike conviction allegations. (See, e.g., *People v. Zichwic* (2001) 94 Cal.App.4th 944, 960-961.) Grajeda advanced a claim for the exercise of that discretion in his *propria persona* pretrial motion, and contends in the current appeal that his claim was at a

minimum an arguable one,<sup>6</sup> but that claim was not reinterposed by his counsel at the original sentencing hearing and Grajeda was not able (because of his absence) to "present the case supporting a favorable exercise of discretion" (*Rodriguez, supra*, 17 Cal.4th at p. 258) at his resentencing hearing. Because we are loathe to abrogate to ourselves (under the rubric of predicting the likely outcome of that motion) this quintessential discretionary determination that is vested in the trial court, we reject the People's argument that Grajeda's absence and his counsel's failure to raise the issue must be deemed harmless error.

We conclude, considering the unique circumstances presented here, that we must vacate the sentence imposed on Grajeda in his absence, and remand with directions that the trial court conduct a new sentencing hearing at which Grajeda is present unless waived as required by law.<sup>7</sup>

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<sup>6</sup> Grajeda points out the prior strikes were from a 1988 conviction, entered under a plea bargain agreement at a time when he could not have known of the collateral consequences of those convictions, for robberies committed when he was a juvenile during a three-day period. He also notes that he had been "violence free" in the 17 years between that conviction and the current offense because, although he has had convictions and parole violations during that period, none of his subsequent offenses involved violence but instead largely involved drug offenses.

<sup>7</sup> In a related claim, Grajeda argues the court erred when it changed its restitution order in Grajeda's absence and without considering his ability to pay. At the August 22, 2011, resentencing hearing, the court stated it would strike the imposition of any restitution fine, referring obliquely to Grajeda's ability to pay, and the abstract of judgment contained no restitution fine. However, one month later, the court apparently filed another abstract of judgment that *did* contain a restitution fine. Grajeda asserts imposition of this fine, imposed in his absence and without consideration of his ability to pay, was error. Because a new sentencing hearing must be held, at which Grajeda is

### C. The Remaining Claims

Grajeda's appeal raises two additional claims, which we briefly address for the guidance of the court on remand.

Grajeda first asserts that a court is barred from considering his 1988 convictions as strike convictions because those convictions resulted from a plea bargain, and any use of those strikes to impose a three strikes sentence would violate the plea agreement. We conclude this contention is without merit. An analytically identical claim was considered and rejected in *People v. Gipson* (2004) 117 Cal.App.4th 1065 (*Gipson*), in which the court pointed out that a plea bargain is contractual in nature and must be measured by contract law standards, and the government must fulfill any promise that it expressly or impliedly makes in exchange for a defendant's guilty plea. (*Id.* at p. 1069.) However, *Gipson* also noted that "contracts are 'deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy' (*id.* at p. 1070), and the defendant's plea bargain " 'vest[ed] no rights other than those which relate[d] to the immediate disposition of the case.' " (*Ibid.*) Rejecting the defendant's claim that his convictions under a plea agreement could not be used to enhance a sentence under subsequent amendments to the three strikes law, *Gipson* explained:

"[D]efendant's contract clause challenge fails. His plea bargain is 'deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy. . . .'

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entitled to be present, we are confident the court will reconsider de novo the appropriate restitution amount in the circumstances of this case.

[Citation.] The plea bargain 'vest[ed] no rights other than those which relate[d] to the immediate disposition of the case.' [Citation.] The 1994 amendment to section 667 did not affect the 1992 plea bargain; it did not create or destroy any substantive rights defendant had in the plea bargain. Subsequent to the plea bargain, the Legislature amended the law; defendant committed another crime; defendant became subject to the penalty described in the amended statute. The increased penalty in the current case had nothing to do with the previous case except that the existence of the previous case brought defendant within the description of persons eligible for a five-year enhancement for his prior conviction on charges brought and tried separately. There was no error." (*Ibid.*)

We agree with the analysis in *Gipson*. Accordingly, the subsequent enactment of the three strikes law by statute and initiative, and the use of defendant's 1988 convictions as qualifying priors under that new law, did not alter the agreed terms of, or the People's compliance with, Grajeda's 1988 plea bargain. Under the terms of that plea agreement, he bargained only for the consequences attendant on his plea to the offenses charged in that proceeding. Although "the requirements of due process attach . . . to implementation of the [plea] bargain itself" (*People v. Walker* (1991) 54 Cal.3d 1013, 1024, overruled on other grounds by *People v. Villalobos* (2012) 54 Cal.4th 177, 183), Grajeda does not claim the People did not abide by the terms of that agreement. We conclude that consideration of Grajeda's 1988 convictions in the sentencing decisions in this case was proper.

Grajeda also asserts the court erroneously denied him pre-sentence conduct credits of 194 days. The People concede that claim is correct. Accordingly, the trial court shall include the appropriate number of conduct credits in its new sentence.

DISPOSITION

The sentence is vacated and the cause is remanded to the trial court with directions to hold a new sentencing hearing.

McDONALD, J.

WE CONCUR:

HUFFMAN, Acting P. J.

AARON, J.