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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. BRIAN K. VORAVONGSA, Defendant and Appellant.	A130098 (Sonoma County Super. Ct. No. SCR585540)

I. INTRODUCTION

Defendant Brian Voravongsa appeals from a judgment of conviction following a no contest plea to possessing a shank while in custody in violation of Penal Code section 4502, subdivision (a),[1] and the admission of one prior "strike" conviction. The sole issue he raises on appeal is whether he is entitled to additional conduct credits under the amendments to section 4019 that became effective January 25, 2010. These amendments increased conduct credits for some defendants, but not for offenders who were required to register as a sex offender or had suffered a prior serious felony conviction. Defendant does not make a retroactivity claim, since he was sentenced after the amendments became effective. Rather, he contends the trial court should have considered his *Romero* motion,[2] which the court denied, not only for the purpose of his eligibility for probation, but also his eligibility for additional conduct credits. He asks for a limited remand so the court can consider his motion for the latter purpose.

[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 [53 Cal.Rptr.2d 789, 917 P.2d 628].

The issue defendant raises on appeal then, is whether a trial court can exercise its discretion under section 1385 to dismiss a prior conviction in order to award additional conduct credits otherwise unavailable under the January 25, 2010, amendments to section 4019. In *In re Varnell* (2003) 30 Cal.4th 1132 [135 Cal.Rptr.2d 619, 70 P.3d 1037] (*Varnell*), the Supreme Court held a trial court's power to dismiss under section 1385 extends only to matters that must be pled and proven, and not to "sentencing factors" that need not be pled and, even if they are, survive a dismissal under section 1385. We must therefore decide whether sex offender registration or a prior serious felony conviction are matters that must be pled and proven under the January 25, 2010, amendments to section 4019 and are subject to a motion to dismiss under section 1385, or whether they are sentencing factors beyond the purview of such a motion.

We are not the first court to consider these questions. In fact, this case concerning the reach of section 1385, deals with the third of the trilogy of issues concerning the January 25, 2010, amendments to section 4019 the courts of appeal have addressed over the past year—the first being retroactivity and the second, whether sex offender registration or a prior serious felony conviction must be pled and proven but not considering the reach of section 1385. The courts of appeal have reached differing results, and the Supreme Court has granted review, on all three issues.[3]

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[3] E.g., *People v. Brown* (2010) 107 Cal.Rptr.3d 286, review granted June 9, 2010 (retroactivity); *People v. Rodriguez* (2010) 107 Cal.Rptr.3d 460, review granted June 9, 2010 (retroactivity); *People v. Landon* (2010) 107 Cal.Rptr.3d 847, review granted June 23, 2010 (retroactivity); *People v. Pelayo* (2010) 108 Cal.Rptr.3d 825, review granted July 21, 2010 (retroactivity); *People v. Norton* (2010) 109 Cal.Rptr.3d 197, review granted August 11, 2010 (retroactivity); *People v. Otubuah* (2010) 110 Cal.Rptr.3d 14, review granted July 21, 2010 (retroactivity); *People v. Jones* (2010) 115 Cal.Rptr.3d 258, review granted December 15, 2010 (plead and prove, and § 1385); *People v. Koontz* (2011) 122 Cal.Rptr.3d 705, review granted May 18, 2011 (§ 1385); *People v. Lara* (2011) 124 Cal.Rptr.3d 50, review granted May 18, 2011 (plead and prove, and § 1385); see also *People v. Williams* (May 3, 2011, No. D056611) 2011 WL 1901989 [nonpub. opn.], petition for review filed June 21, 2011 (§ 1385).

The courts are nearly evenly split on whether sex offender registration and a prior serious felony conviction are matters that must be pled and proven under the January 25, 2010, amendments to section 4019 and are subject to a motion to dismiss under section 1385.[4] Several of the courts that have answered these questions in the affirmative have done so as though the answers inevitably follow from a conclusion the amendments are retroactive. (E.g., *People v. Koontz, supra,* 122 Cal.Rptr.3d at p. 706 [commencing section 1385 analysis with citations to *In re Estrada* (1965) 63 Cal.2d 740 [48 Cal.Rptr. 172, 408 P.2d 948] (*Estrada*), and other retroactivity cases]; *People v. Jones, supra,* 115 Cal.Rptr.3d at pp. 270-272 ["[b]ecause Senate Bill No. 18 reduces punishment for those who are eligible [thus making it retroactive under *Estrada*], having a prior serious conviction is a condition that increases punishment," requiring that it be pled and proven under *People v. Lo Cicero* (1969) 71 Cal.2d 1186 [80 Cal.Rptr. 913, 459 P.2d 241] (*Lo Cicero*), and thus allowing for a motion to dismiss under section 1385], disapproved on another point in *Curl v. Superior Court* (1990) 51 Cal.3d 1292, 1301-1302, fn. 6 [276 Cal.Rptr. 49, 801 P.2d 292].)

While this court has agreed in other cases that the January 25, 2010, amendments to section 4019 are retroactive, we agree with *James, supra*, 2011 WL 2505557, that retroactivity is an entirely different issue, subject to a different analysis. We also agree with *James* that there is no pleading and proof requirement under the amendments to

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[4] Pleading and proof required and section 1385 motion to dismiss available: *People v. Jones* (2010) 115 Cal.Rptr.3d 258, review granted December 15, 2010 (plead and prove, and § 1385); *People v. Tolbert* (Nov. 22, 2010, No. B221747) 2010 WL 4721320 (plead and prove, and § 1385); *People v. Koontz, supra,* 122 Cal.Rptr.3d 705, review granted May 18, 2011 (§ 1385); *People v. Lara, supra*, 124 Cal.Rptr.3d 50, review granted May 18, 2011 (plead and prove, and § 1385).

No pleading and proof requirement: *People v. Fuentes* (2010) 2010 WL 4621842 (plead and prove, and § 1385); *People v. Smith* (Jan. 14, 2011, No. E050923) 2011 WL 148923 (plead and prove, and § 1385); see also *People v. Williams, supra*, 2011 WL 1901989, petition for review filed June 21, 2011 (§ 1385); *People v. Ortiz* (June, 10, 2011, No. A129049) 2011 WL 2295507 (plead and prove); *People v. James* (June 24, 2011, No. D057527) 2011 WL 2505557 (*James*) (plead and prove).

section 4019 and that section 1385 does not reach the credit dictates of those provisions. We therefore affirm the judgment.

II. BACKGROUND

During the afternoon of July 7, 2010, defendant was transported from one unit to another at the Sonoma County Main Adult Detention Facility. During a search of his personal property, jail personnel discovered a jail issued toothbrush with a forged and sharpened end. That evening, a deputy with the Sonoma County Sheriff's Office was dispatched to the facility to investigate. The toothbrush was classified as a shank that could injure inmates or staff. On July 9, 2010, the Sonoma County District Attorney filed a complaint charging defendant with one count of possessing a shank while in a penal institution in violation of section 4502, subdivision (a), and also alleging he had suffered a prior strike conviction and prior prison conviction.

On August 25, 2010, pursuant to a negotiated disposition, defendant pled no contest to possessing a shank while in custody and admitted the prior strike conviction. The parties also agreed if the trial court granted defendant's *Romero* motion, struck the prior and placed him on probation, any subsequent prison term would not exceed eight years. If the trial court denied his motion, he would be immediately committed to prison for a term not exceeding six years. No agreement was made as to, nor did defendant request, additional conduct credits under the January 25, 2010, amendments to section 4019. On September 17, 2010, the trial court denied defendant's *Romero* motion, sentenced him to prison and gave him 109 days of custody credit. He filed a timely notice of appeal on October 19, 2010.[5]

[5] Defendant did not waive the issue he raises on appeal since at the time he entered into a plea agreement (August 25, 2010), no case had even suggested, much less held, there was a pleading and proof requirement under the January 25, 2010, amendments to section 4019 and a *Romero* motion could be made in connection therewith. (See *People v. Cardenas* (2007) 155 Cal.App.4th 1468, 1479 [66 Cal.Rptr.3d 821].)

III. DISCUSSION

Statutory Framework

Section 4019 permits a defendant to earn additional custody credits prior to being sentenced by performing assigned labor (§ 4019, subd. (b)) or by good behavior during confinement. (§ 4019, subd. (c).) Such credits are collectively referred to as "conduct credits." (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3 [95 Cal.Rptr.3d 408, 209 P.3d 623].) Section 4019's scheme for presentencing credits " ' "focuses primarily on encouraging minimal cooperation and good behavior by persons temporarily detained in local custody before they are convicted, sentenced, and committed. . . ." ' [Citations.]" (*Dieck*, at p. 939.)

Senate Bill No. 18, enacted in October 2009, amended section 4019 (eff. Jan. 25, 2010) to enhance the rate at which certain offenders could accrue conduct credits. (Stats. 2009-2010, 3d Ex.Sess., ch. 28, § 50, p. 4427.) The amendments allowed defendants to earn conduct credits at an accelerated rate of four days' credit for every two days actually served. (Former § 4019, subd. (f).) However, the amendments specified sex offender registrants and defendants with a prior, serious felony conviction were ineligible to earn credits at the accelerated rate. (Former § 4019, subds. (b)(2), (c)(2).) Such defendants continued to earn credits at the pre-January 25, 2010, rate of "six days . . . for every four days spent in actual custody." (Compare, former § 4019, subd. (f) [Stats.1982, ch. 1234, § 7]; former § 4019, subd. (f) [Stats. 2009-2010, 3rd Ex.Sess., ch. 28 (S.B. 18), § 50, eff. Jan. 25, 2010].)[6]

Pleading and Proof Requirement

As we stated at the outset, the issue in this appeal is whether a trial court has discretion under section 1385 to dismiss a prior, serious felony conviction in order to

[6] Effective September 28, 2010, the Legislature again amended section 4019, returning to the earning rate in effect prior to January 25, 2010, and deleting the sections excluding sex registrants and defendants with a prior, serious felony from enhanced credit-earning eligibility. The September 28, 2010, amendments apply only "to prisoners who are confined to a county jail . . . for a crime committed on or after the effective date of that act." (§ 4019, subd. (g).)

award additional conduct credits otherwise unavailable under the January 25, 2010, amendments to section 4019. As we also observed, this issue turns on whether the facts that render a defendant ineligible for additional credits—sex offender registration or a prior, serious felony conviction—must be pled and proven, or whether they are "sentencing facts" beyond the reach of a section 1385 motion to dismiss. We therefore begin with a review of the relevant Supreme Court cases on what has come to be called the pleading and proof requirement.

In *People v. Ibarra* (1963) 60 Cal.2d 460 [34 Cal.Rptr. 863, 386 P.2d 487] (*Ibarra*),[7] the defendant was determined to be ineligible for deferred entry of judgment/suspension of imposition of sentence in connection with a drug rehabilitation program because, according to his arrest record and a probation report, he had twice been convicted of narcotics felonies and sentenced to prison. (*Id.* at pp. 466-467.) Only one of the convictions had been charged in the information, but the Attorney General asserted the trial court could properly take judicial notice of the other. (*Id.* at p. 467.) The Supreme Court disagreed, stating "[i]f an allegation of a prior conviction will bar a defendant from the program, although the trial judge considers him a fit subject for rehabilitative treatment, that allegation should come before the court in a manner affording the defendant adequate opportunity to rebut the allegation. Charging the prior conviction in the information fulfills this requirement, but merely presenting the conviction in a probation report does not." (*Id.* at pp. 467-468.) In deciding whether a defendant was otherwise "a fit subject for the rehabilitation program," however, the trial court could "properly consider the defendant's probation report, including facts therein relating to prior [uncharged] convictions." (*Id.* at p. 468, fn. 2.)

In *People v. Ford* (1964) 60 Cal.2d 772 [36 Cal.Rptr. 620, 388 P.2d 892] (*Ford*),[8] the information, as to certain counts, failed to include enhancement allegations that the

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[7] Disapproved on another ground as stated in *People v. Weaver* (2001) 26 Cal.4th 876, 928, footnote 9 [111 Cal.Rptr.2d 2, 29 P.3d 103].

[8] Disapproved on another ground in *People v. Satchel* (1971) 6 Cal.3d 28, 35-40 [98 Cal.Rptr.33, 489 P.2d 1361].

defendant had suffered prior convictions and was armed while committing the charged offenses. (*Id.* at p. 794.) The judgment, however, recited that the prior convictions and being armed had been both "charged" and proved or admitted. (*Ibid.*) The Supreme Court struck the enhancement findings. Citing to a number of statutes, including then section 3024, subdivision (e), which expressly required that a prior conviction or use of a deadly weapon be charged and found or admitted (former § 3024, subd. (e), repealed by Stats. 1976, ch. 1139, § 279, p. 5151, operative July 1, 1977), the court stated "[b]efore a defendant can properly be sentenced to suffer the increased penalties flowing from such finding [citations] the fact of the prior conviction or that the defendant was thus armed must be charged in the accusatory pleading, and if the defendant pleads not guilty thereto the charge must be proved and the truth of the allegation determined by the jury, or by the court if a jury is waived." (*Ford*, at p. 794.) Accordingly, "the statutorily increased penalties" could not be applied to the counts in question. (*Ibid.*)

In *Lo Cicero, supra*, 71 Cal.2d 1186, the defendant was determined to be ineligible for probation because he had suffered a prior conviction for possession of marijuana. At the time, section 1203 provided that in all felony cases the defendant was entitled to apply for probation, except in certain substance abuse cases if he or she had suffered a prior felony conviction. (*Lo Cicero*, at pp. 1191-1192.) The defendant admitted the prior, but it had not been charged in the pleadings. (*Id.* at p. 1192.) The Attorney General maintained a prior conviction was a "bar to probation no matter by what means it comes to the attention of the court." (*Ibid.*) The Supreme Court disagreed.

Citing to section 969 et seq., the court pointed out the Penal Code "establishes a detailed procedure for the charging, trying and finding of previous felony convictions" and characterized these statutes as providing "a safeguard of value." (*Lo Cicero, supra*, 71 Cal.2d at p. 1192.) Citing *Ford* for the proposition that before a defendant "can properly be sentenced to suffer the increased penalties flowing from" a prior conviction the conviction must be pled and proven, the court stated "[t]he denial of opportunity for probation involved here is equivalent to an increase in penalty." (*Lo Cicero*, at p. 1193.) The instant case, said the court, also "resembled" *Ibarra*, in which it had held if a prior

conviction would " 'bar a defendant from the [narcotics rehabilitation] program,' " it had to be charged to afford him adequate opportunity to "rebut the allegation." (*Lo Cicero,* at p. 1193.) The court declined to speculate whether *Ibarra* left open the possibility a prior might be proven by some different procedure affording adequate opportunity to rebut the charge. Instead, the court held "whenever under Health and Safety Code section 11715.6 the fact of a prior conviction affects a defendant's eligibility for probation, the prior conviction should be charged and proved according to the relevant provisions of the Penal Code." (*Lo Cicero*, at p. 1194.) The court also distinguished "ineligibility" for probation from the denial of probation "on the merits," stating "[i]n deciding whether [a] defendant should receive probation the trial judge may properly consider the probation report, including prior convictions appearing in that report but not charged in the pleadings." (*Id.* at p. 1195.)

In *People v. Hernandez* (1988) 46 Cal.3d 194 [249 Cal.Rptr. 850, 757 P.2d 1013] (*Hernandez*),[9] the defendant was convicted of rape, assault, and kidnapping. (*Id.* at p. 199.) Not until the probation report was any mention made of section 667.8, which provided for a three-year additional term for kidnapping for purposes of rape. (*Hernandez,* at p. 199.) The trial court imposed the additional term. (*Ibid.*) The Supreme Court reversed, holding the section must be pled and the predicate facts for the enhancement proven. (*Id.* at pp. 200-207.)

Notably, the court's analysis was *not* that section 667.8 lengthened the period of incarceration and thus ipso facto triggered a pleading and proof requirement. Rather, the court engaged in a legislative intent analysis. The court first observed the language of the section "did not of itself require that violation of the section be pled and proven before its additional term could be imposed." (*Hernandez, supra,* 46 Cal.3d at p. 200.) This was "in contrast to the numerous other sentence enhancements specifically required to be pled and proven." (*Ibid.*) Accordingly, the absence of "a pleading-and-proof requirement" in

[9] Abrogated on other grounds in *People v. King* (1993) 5 Cal.4th 59, 78, footnote 5 [19 Cal.Rptr.2d 233, 851 P.2d 27] and on other grounds as stated in *People v. Rayford* (1994) 9 Cal.4th 1, 9 [36 Cal.Rptr.2d 317, 884 P.2d 1369].

section 667.8 created "an ambiguity inviting inquiry into the Legislature's intent in enacting this statute." (*Hernandez*, at p. 201.)

The court next examined the nature of the enhancement and concluded it required a mens rea not otherwise required for the underlying offense. (*Hernandez, supra*, 46 Cal.3d at p. 204.) It then considered whether this "new fact" required for imposition of the enhancement (i.e., the requisite mental state) was a "sentencing fact" that did not need to be pled and proven and could be found by the trial court, rather than the jury. (*Id.* at pp. 204-207.) There is a distinction, the court explained, between "a trial court's decision in fashioning appropriate punishment from the need to establish before the trier of fact the wrongful criminal conduct for which punishment is being imposed. 'Sentencing facts' such as aggravating and mitigating circumstances assist a judge in selecting from among the options of punishment the trier of fact's verdict has made available." (*Id.* at p. 205.)

The court also distinguished *McMillan v. Pennsylvania* (1986) 477 U.S. 79 [90 L.Ed.2d 67, 106 S.Ct. 2411] (*McMillan*), in which the United States Supreme Court upheld a state statute that expressly provided notice of a mandatory minimum penalty, determined in part by whether a firearm was used, need *not* be given. That statute " 'neither alter[ed] the maximum penalty for the crime committed nor create[d] a separate offense calling for a separate penalty; it operate[d] solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm.' " (*Hernandez, supra*, 46 Cal.3d at pp. 205-206, italics omitted, quoting *McMillan, supra*, 477 U.S. at pp. 87-88.) The three-year enhancement provided by section 667.8, in contrast, both "was silent on the pleading and proof problem" and "increase[ed] the range available to the court." (*Hernandez*, at p. 206, italics omitted.) Accordingly, the court could not "say that the fact that a kidnapping was for the purpose of rape is one of the traditional facts of a crime or of a defendant's criminal history usually taken into account by sentencing judges." (*Ibid.*)

Given all of the "foregoing considerations," the court concluded the "failure to include section 667.8 among those enhancements listed in section 1170.1, subdivision (f)

as requiring pleading and proof was an oversight"—and one the Legislature had "already acted to correct." (*Hernandez, supra*, 46 Cal.3d at p. 207.)

The court also rejected a harmless error argument. "[N]o notice whatsoever, not just of the code section but of the mens rea required by section 667.8, was given either in the information, arguments of counsel, or evidence produced at trial. Mention that a three-year additional term would be added for kidnapping for the purpose of rape was first made in the probation report filed ten days before sentencing. As a matter of due process, the enhancement under section 667.8 could not be imposed under these circumstances." (*Hernandez, supra*, 46 Cal.3d at p. 208.) It was therefore "unnecessary to articulate a particular standard of review and engage in a harmless-error analysis when defendant's due process right to notice ha[d] been so completely violated." (*Id.* at pp. 208-209.)

In *People v. Wiley* (1995) 9 Cal.4th 580 [38 Cal.Rptr.2d 347, 889 P.2d 541] (*Wiley*), the defendant was convicted of a number of crimes, including attempted murder. A five-year sentence enhancement was imposed on the basis of two prior serious felony convictions, which were pled and found to be true by the jury. (*Id.* at p. 584.) The defendant contended the jury was also required to find the convictions arose from charges "brought and tried separately." (*Id.* at p. 585.) The Supreme Court disagreed, holding that finding is one properly made by the sentencing judge. The court first observed it "was well settled . . . that a trial court, in deciding whether a defendant was eligible for probation under section 1203, could determine whether the defendant had suffered a previous felony conviction, even though the prior offense had not been pleaded or proven before the jury." (*Id.* at p. 586.) In the instant case, there was a statutory requirement the five-year enhancement, as well as other enhancements, had to be pled and proven. (*Id.* at p. 589.)

There was "no constitutional right," however, "to have a jury determine factual issues relating to prior convictions alleged for purposes of sentence enhancement"—a proposition confirmed by the Legislature's enactment of numerous statutes expressly providing that when a defendant pleads guilty to the underlying offense, the truth of

alleged sentence enhancements is to be determined by the court, not a jury. (*Wiley*, *supra*, 9 Cal.4th at p. 589.) Nevertheless, when a defendant pleads not guilty, California is "one of a minority of states that, by statute, has granted defendants the right to have a jury determine the truth of such prior conviction allegations." (*Ibid*.) Even so, the enhancement statutes "are limited in nature" and do not confer any right to have a jury determine whether prior convictions arose from separate charges. (*Ibid.*, citing § 667.) Furthermore, this is the type of "inquiry traditionally performed by judges as part of the sentencing function." (*Wiley*, at p. 590.)

In *People v. Mancebo* (2002) 27 Cal.4th 735 [117 Cal.Rptr.2d 550, 41 P.3d 556] (*Mancebo*), the defendant was convicted of various violent sex offenses. Several sentence enhancements were imposed, including an unpled multiple victim circumstance imposed as a purported substitute for a properly pled gun-use enhancement. (*Id.* at pp. 740, 744.) The Supreme Court reversed on the ground the plain language of the applicable statutory pleading and proof requirements had been violated. (*Id.* at pp. 743-744 ["[t]he plain wording of [the statute] . . . controls here"].) "[I]n addition . . . a defendant has a cognizable due process right to fair notice of the specific sentence enhancement allegations that will be invoked to increase punishment for his crimes." (*Id.* at p. 747.) "[N]o factual allegation in the information or pleading in the statutory language," however, "informed defendant that if he was convicted of the underlying offenses, the court would consider his multiple convictions as a basis for One Strike sentencing under section 667.61, subdivision (a)." (*Id.* at p. 745.)

The court again rejected a harmless error argument, emphasizing the mandatory nature of the statutory pleading and proof requirements and the "fair notice" thereby accorded to a defendant may be critical to his or her ability to contest strike sentencing. The court also observed a decision to go to trial or to plea bargain may well "turn on the extent of his exposure to a lengthy prison term." (*Mancebo*, *supra*, 27 Cal.4th at p. 752.) The court additionally distinguished *People v. Karaman* (1992) 4 Cal.4th 335 [14 Cal.Rptr.2d 801, 842 P.2d 100], in which it had held that a trial court retained jurisdiction to impose a new sentence urged in a probation report that was not greater

than the original sentence. "Section 1203.6 prescribes grounds for probation ineligibility. As such, it is inapposite here [to One Strike sentencing enhancements] because probation is not punishment [citation], and is further a matter of privilege, not right. The due process fair notice concerns in this case [involving One Strike sentencing enhancements] are simply not implicated in the same way when a trial court exercises its broad discretion to declare a defendant probation-ineligible at sentencing without prior notice." (*Mancebo*, at p. 754.)

In *Varnell, supra,* 30 Cal.4th 1132, the defendant pled no contest to a felony drug possession charge after the trial court, pursuant to section 1385, dismissed an alleged prior serious felony conviction in order to place him outside the purview of the three strikes law for sentencing. (*Varnell*, at p. 1135.) The defendant also urged the court to dismiss the prior to render him eligible for probation under the Substance Abuse and Crime Prevention Act of 2000 (Proposition 36). (*Varnell*, at p. 1135.) The trial court concluded dismissing the prior had not eliminated the "fact of the prior conviction" and that fact rendered him ineligible for Proposition 36. (*Varnell*, at p. 1135, italics omitted.) The Supreme Court agreed and reversed the Court of Appeal's grant of habeas relief. (*Id.* at pp. 1136, 1144.)

The court first explained " '[t]he *only* action that can be dismissed under . . . section 1385, subdivision (a), is a criminal action or a part thereof.' " (*Varnell, supra,* 30 Cal.4th at p. 1137, quoting *People v. Hernandez* (2000) 22 Cal.4th 512, 524 [93 Cal.Rptr.2d 509, 994 P.2d 354].) An "action" means "the 'individual charges and allegations in a criminal action.' " (*Varnell*, at p. 1137, quoting *People v. Hernandez, supra,* at pp. 521-523.) The dismissal of a charged prior conviction, moreover, is not a "determination that defendant did not in fact suffer the conviction." (*Varnell*, at p. 1138.) "[W]hile a dismissal . . . ameliorates the effect of the dismissed charge or allegation, the underlying facts remain available for the court to use." (*Ibid.*) Accordingly, "the trial court's dismissal of the 'strike' allegation . . . did not wipe out the fact of the prior conviction and the resulting prison term that made petitioner ineligible" for Proposition 36 probation. (*Varnell*, at p. 1138.)

The court pointed out nothing in the statutory language requires a defendant's ineligibility for Proposition 36 probation to be alleged in the information or complaint. (*Varnell, supra*, 30 Cal.4th at p. 1139.) Nor, said the court, do sections 969 et seq. impose such a requirement. "Section 969 does not itself articulate a duty to charge prior convictions but simply specifies, once a duty to charge a prior conviction is imposed by some other law, that *all* such priors be charged." (*Varnell*, at p. 1141, fn. 6.)

The court declined to find a statutorily "implied pleading and proof requirement," as it had in *Lo Cicero*. (*Varnell, supra*, 30 Cal.4th at p. 1140.) Unlike in *Lo Cicero*, the defendant's prior conviction "did not eliminate his opportunity to be granted probation." (*Varnell*, at p. 1140.) Although he was ineligible for probation under section 1210.1 (Proposition 36), he was eligible under section 1203, subdivision (e). Accordingly, the case was similar, said the court, to *People v. Dorsch* (1992) 3 Cal.App.4th 1346 [5 Cal.Rptr.2d 327] (*Dorsch*), in which the defendant's prior felony convictions made him presumptively ineligible for probation under section 1203, subdivision (e)(4), unless the trial court determined probation was warranted in the interests of justice. In *Dorsch*, the Court of Appeal rejected the defendant's assertion his prior convictions had to be pled and proven, and distinguished *Lo Cicero* on the ground the prior conviction there was an absolute bar to probation. (*Dorsch*, at pp. 1349-1350; *Varnell*, at p. 1140.) The Court of Appeal also observed that " 'when a pleading and proof requirement is intended, the Legislature knows how to specify the requirement.' " (*Varnell*, at p. 1141, quoting *Dorsch, supra*, 3 Cal.App.4th at p. 1350.) The Supreme Court "agree[d] with *Dorsch.*" (*Varnell*, at p. 1141.) The defendant's prior conviction did not "absolutely preclude the opportunity for probation," it "simply rendered him unfit for probation under a particular provision." This was "not the equivalent of an increase in penalty." (*Ibid.*)

The court also declined to find a pleading and proof requirement as a matter of due process. (*Varnell, supra*, 30 Cal.4th at pp. 1141-1142.) It noted the defendant had not identified any case "holding that a defendant is entitled as a matter of due process to notice in the accusatory pleading of his ineligibility for less restrictive alternative punishments." (*Id.* at p. 1141.) On the contrary, the *Apprendi* line of cases hold that

"any fact that increases the penalty for a crime beyond the statutory maximum prescribed for that crime" must be proven. (*Varnell*, at pp. 1141-1142, citing *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435, 120 S.Ct. 2348] (*Apprendi*).) Defendant's ineligibility for Proposition 36 probation did not increase the statutory maximum penalty for the possession offense to which he had pled. (*Varnell*, at p. 1142.) But even if his ineligibility was deemed "an enhancement," *Apprendi* "does not apply to 'sentence enhancement provisions that are based on a defendant's prior convictions.' " (*Varnell*, at p. 1142, quoting *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326 [109 Cal.Rptr.2d 851, 27 P.3d 739].) The *McMillan* line of cases, in turn, involve mandatory minimum sentencing laws. (*Varnell*, at p. 1142, citing *McMillan*, *supra*, 477 U.S. 79.) Since the defendant remained eligible for probation under other provisions, his ineligibility under Proposition 36 did not create a minimum sentence. But, again, "even if [his] criminal history *were* to bar him automatically from probation, due process would not require that the facts supporting imposition of a mandatory prison term be pleaded and proved." (*Varnell*, at p. 1142, citing *McMillan*, at pp. 87-88.)

The court also distinguished *Mancebo, supra,* 27 Cal.4th 735, and *Hernandez, supra,* 46 Cal.3d 194, in which it had held the failure to plead statutory sentencing enhancements violated not only statutory pleading requirements (either expressly set forth or implied), but also the defendant's due process rights. (*Varnell, supra*, 30 Cal.4th at p.1143.) Those cases dealt with enhancements that increased the specified punishment for the charged crimes. In contrast, in *Varnell*, the defendant's "criminal history did not increase his punishment above the statutory maximum." (*Ibid.*) "Moreover, *Mancebo* explicitly distinguished the grant or denial of probation from the sentence enhancement at issue and warned that '[t]he due process fair notice concerns in [that] case are simply not implicated in the same way when a trial court exercises its broad discretion to declare a defendant probation-ineligible at sentencing without prior notice.' " (*Ibid.*)

Notably none of these cases cites, let alone relies on, *Estrada, supra*, and its progeny addressing the issue of retroactivity. As the Court of Appeal observed in *James,* pleading and proof requirements are based on "considerations of fairness and due

process." (*James, supra,* 2011 WL 2505557 at p. *4.) Retroactivity, in contrast, is "based on the practical notion that when the Legislature reduces the sentence for a particular offense . . . and does not specify that the reduction is to have prospective application only, the Legislature must have concluded that the previous penalty was too severe," and thus, intended the reduced penalty to apply to as many offenders as constitutionally possible. (*Ibid.*)

Sections 4019 and 1385

The Supreme Court's pleading and proof cases, and particularly *Varnell* and *Hernandez*, indicate we should consider two questions in regards to the January 25, 2010, amendments to section 4019. First, is there any indication the legislature intended that a pleading and proof requirement apply to these provisions? Second, if no such intent is apparent, must such a requirement be implied as a matter of constitutional due process?

We do not discern any intent on the part of the Legislature that the January 25, 2010, amendments to section 4019 embrace a pleading and proof requirement. The statutory language sets forth no such requirement. (See *Varnell*, *supra*, 30 Cal.4th at pp. 1139, 1141 [" 'when a pleading and proof requirement is intended, the Legislature knows how to specify the requirement' "], quoting *Dorsch, supra,* 3 Cal.App.4th at p. 1350]). Nor is section 4019 a constituent part of a statutory scheme that otherwise includes such a requirement. For example, section 4019 is not like former section 667.8, which the Supreme Court considered in *Hernandez* and which was one of a number of enhancement statutes under the three strikes law, most of which expressly required that the enhancements be pled and proven. (See *Hernandez, supra,* 46 Cal.3d at pp. 200-201 [lack of requirement in section 667.8, "in contrast to the numerous other sentence enhancements specifically required to be pled and proven," created "an ambiguity inviting inquiry into the Legislature's intent in enacting the statute"].)

Further, we do not discern any significant distinction between the character of the facts that foreclose additional conduct credits under the January 25, 2010, amendments—sex offender registration and prior serious felony conviction—and other facts sentencing courts could then find, and can still find, that wholly foreclose conduct credits—i.e., the

defendant refused to satisfactorily perform assigned labor (§ 4019, subd. (b)) or failed to comply with reasonable rules and regulations (§ 4019, subd. (c)). The latter facts cannot even plausibly be pled at the outset of a criminal prosecution since they only exist, if at all, after detention and, indeed, may not exist until long after the pleadings are settled. Yet, the finding of such facts by a sentencing judge has even greater consequence than sex offender registration or a prior serious felony conviction, since they render a defendant wholly ineligible for conduct credits. (§ 4019, subds. (b), (c); see *People v. Buckhalter* (2001) 26 Cal.4th 20, 30 [108 Cal.Rptr.2d 625, 25 P.3d 1103].) Sex offender registration or a prior serious felony merely preclude a defendant from receiving the additional conduct credits available to other sentenced offenders. It makes no sense to us that a sentencing judge can find a defendant ineligible for any conduct credits because he refused to perform assigned labor or failed to comply with applicable rules and regulations, but be unable to find him ineligible for additional conduct credits because he is a registered sex offender or has suffered a prior serious felony conviction, unless the registration or prior conviction was pled and proven.

Similarly, it has long been recognized that a sentencing judge can deny probation on the basis of an uncharged, prior serious felony conviction. (See *Wiley*, *supra*, 9 Cal.4th at p. 586.) Again, it seems wholly incongruous that having permissibly sentenced a defendant to prison on the basis of an uncharged prior serious felony conviction, the sentencing judge would then be unable to calculate custody credits as directed by January 25, 2010, amendments to section 4019, unless that prior conviction had, in fact, been pled and proven.

Thus, in the context of section 4019, we conclude the Legislature envisioned sex offender registration and prior serious felony convictions as among the "traditional facts of a crime or of a defendant's criminal history usually taken into account by sentencing judges." (*Hernandez*, *supra*, 46 Cal.3d at p. 206.)

We therefore turn to the question of whether a pleading and proof requirement must be implied in connection with section 4019 as a matter of constitutional due process. In our view, *Varnell* speaks directly to this issue.

As the Supreme Court explained in *Varnell*, the *Apprendi* line of cases holds that "any fact that increases the penalty for a crime beyond the statutory maximum prescribed for that crime" must proven. (*Varnell, supra,* 30 Cal.4th at pp. 1141-1142.) Conduct credits accorded by section 4019 do not increase the statutory maximum penalty for any offense. Indeed, we do not agree with defendant's assertion that his punishment was "increased" in any respect due to his ineligibility for additional conduct credits. Even without the additional credits, section 4019 effected a *decrease* in the period of his incarceration, not an increase. In order to characterize his ineligibility for additional conduct credits as an "increase" in his punishment, it would be necessary to view those additional credits as having been granted to him. Only then could his ineligibility be regarded as "increasing" his punishment by taking away the additional credits. However, neither amended section 4019, nor its predecessor version, ever granted the additional conduct credits to ineligible defendants. As a result, such ineligibility did not "increase" any defendant's punishment; it simply did not decrease it. That other eligible defendants may receive additional conduct credits, reducing the duration of their incarceration, similarly fails to prove "increased" punishment for ineligible defendants. It merely means an ineligible defendant's reduction under section 4019 is less than the reduction received by other offenders. A change in the statutory scheme for earning credits that further reduces punishment for some, does not create an "increase" in the punishment of others. (See *James, supra,* 2011 WL 2505557 at p. *4 ["while the enhanced custody credits reduce the *amount of time* that a qualified defendant will spend in prison, their application does not reduce *the defendant's punishment* for due process purposes"].)

The *McMillan* line of cases, as the Supreme Court further explained, involve mandatory minimum sentencing laws. (*Varnell, supra,* 30 Cal.4th at p. 1142.) Conduct credits accorded by the January 25, 2010, amendments to section 4019 do not fix a minimum sentence. Rather, *before* a sentencing judge ever reaches the final act of calculating credits, he or she will have first considered probation and then, if necessary, mitigating and aggravating factors in setting a prison term. Thus, section 4019 does not affect a defendant's eligibility for probation, or even a mitigated prison term. (See

Varnell, at p. 1142.) Further, "due process would not require," in any case, "that the facts supporting imposition of a mandatory prison term be pleaded and proved." (*Ibid.*)

Varnell also made clear there is a range in the due process concerns associated with pleading and proof issues. They are very significant in the context of sentence enhancements, which lengthen the otherwise prescribed maximum prison term for an offense. (*Varnell, supra*, 30 4th at p. 1143, citing *Mancebo, supra*, 27 Cal.4th at p. 754, & *Hernandez, supra*, 46 Cal.3d at p. 194.) They are significantly less pronounced in the context of a sentencing judge's decision whether to grant probation. (*Ibid.*) And in our opinion, they are similarly of less concern in the context of determining conduct credits as directed by section 4019.

We therefore conclude there is no pleading and proof requirement in connection with conduct credits under the January 25, 2010, amendments to section 4019. Rather, sex offender registration and prior serious felony convictions are "sentencing facts" in the context of section 4019 that need not be pled or proven. (See *James, supra*, 2011 WL 2505557.)

These facts are, accordingly, not subject to a motion to dismiss under section 1385. As *Varnell* explains, even if such facts are alleged, and even if they are dismissed under section 1385 for other purposes, they are not "wipe[d] out" by such a motion, but "remain available for the court to use." (*Varnell, supra*, 30 Cal.4th at p. 1138.) In *Varnell*, for example, although the defendant's prior conviction was dismissed for purposes of removing him from the three strikes law, the conviction remained an extant fact disqualifying him from probation under Proposition 36. So, too, with sex registration and prior convictions for purposes of additional conduct credits under the January 25, 2010, amendments to section 4019. Even if these facts are alleged and dismissed under section 1385 for other purposes, they remain extant facts precluding additional conduct credits under the amended provisions. The trial court therefore did not error in failing to consider defendant's *Romero* motion for the purpose of awarding additional conduct credits under the January 25, 2010, amendments to section 4019.

IV. DISPOSITION

The judgment of conviction is affirmed.

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Banke, J.

We concur:

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Margulies, Acting P. J.

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Dondero, J.

Trial Court:	Sonoma County Superior Court
Trial Judge:	Honorable Arthur A. Wick

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gerald A. Engler, Senior Assistant Attorney General, Stan Helfman, Supervising Deputy Attorney General and Luke Fadem, Deputy Attorney General, for Plaintiff and Respondent.

Robert L.S. Angres, under appointment by the Court of Appeal, First District Appellate Project, for Defendant and Appellant.