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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

RICHARD TIMOTHY FISCHER,
Defendant and Appellant.

San Diego County Superior Court, Case No. SCN383174
The Honorable Daniel B. Goldstein, Judge

RESPONDENT'S BRIEF

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INTRODUCTION

After being charged with sexual battery, 16 counts of assault and battery by a public officer involving several victims, and false imprisonment, the court granted appellant bail release. As a condition of his bail release, appellant had to stay away from his victims and wear an electronic GPS monitoring device at all times. Otherwise, appellant was permitted to leave his home at any time for any reason, and was free to travel anywhere within San Diego County. Although initially not awarded custody credits for this time period on bail release, the trial court awarded credit upon a stipulation by the parties. However, upon discovery that the stipulation was based on a misunderstanding about the nature of appellant's bail release, that it constituted home detention when it did not, the court granted the prosecution's motion to withdraw from the stipulation and revoked the additional credits as unlawful. As found by the trial court, there was no bad faith on the part of either counsel but a combination of events due to the pandemic and availability of the original judge at the time of the stipulation.

Appellant challenges the revocation of credits on appeal, claiming that he was entitled to presentence credits pursuant to Penal Code sections 1203.018 and 2900.5, which authorize custody credits for time spent in a home detention program, and the trial court lacked jurisdiction to vacate the order.

The trial court did not err. Despite being electronically monitored by the sheriff's department, appellant was never placed in a home detention program. Appellant could freely leave

his home and travel anywhere in the county with only some minor restrictions (i.e., stay-away orders). Accordingly, because appellant was not entitled, under sections 1203.018 and 2900.5, to receive any presentence credits for that period of time, his sentence was unauthorized and the trial court had the jurisdiction to correct it at the request of the People.

Lastly, contrary to appellant's contention, requiring appellant to return to jail after he was erroneously awarded unauthorized custody credits was not unjust.

STATEMENT OF THE CASE

On February 22, 2018, the San Diego District Attorney's office filed a complaint charging appellant with sexual battery (count 1; Pen. Code, § 243.4, subd. (d)); 13 counts of assault and battery by an officer (counts 2-12, 14, 15; Pen. Code, § 149); and false imprisonment (count 13; Pen. Code, § 236). (1 CT 13-18.) Appellant was arraigned that same date and was remanded to custody with bail set at $100,000, which he subsequently posted. (5 CT 1239-1241.)

On December 7, 2018, a consolidated information[1] was filed charging appellant with forcible oral copulation (count 1; Pen. Code, § 288a, subd. (c)(2)(A)); first degree burglary (count 2; Pen.

[1] On August 9, 2018, the prosecution filed a second complaint charging appellant with felony forcible oral copulation (count 1; Pen. Code, § 288a, subd. (c)(2)(A)); first degree burglary (count 2; Pen. Code, § 459); and three counts of assault and battery by an officer (counts 3-5; Pen. Code, § 149). The trial court subsequently consolidated the two cases.

Code, § 459); 16 counts of assault and battery by an officer (counts 3-4, 6-16, 18-20); Pen. Code, § 149); sexual battery – masturbation (count 5; Pen. Code, § 243.4, subd. (d)); and false imprisonment (count 17; Pen. Code, § 236) (1 CT 25-30.)

On September 5, 2019, appellant pled guilty to four felony counts of assault by a public officer (Pen. Code, § 149), two misdemeanor counts of assault by a public officer (Pen. Code, §§ 149, 17, subd. (b)(4)), and one count of false imprisonment (Pen. Code, § 236).[2] As part of the plea, the prosecution and defense agreed to a sentencing range up to a maximum local prison sentence of five years, with any misdemeanors to run concurrently to the sentence on the felony counts. (2 CT 327-331; 5 CT 1276-1277.)

On December 10, 2019, the trial court sentenced appellant to five years in local custody, ordering that 16 months of his sentence be suspended and deemed a period of mandatory supervision. The trial court awarded appellant three days of presentence custody credits. (4 CT 1014-1015; 5 CT 1281-1282.)

On May 15, 2020, the San Diego County District Attorney's Office and appellant's counsel stipulated to amend appellant's custody credits to include the days he had spent being monitored electronically by the sheriff's department prior to his sentencing. The parties stipulated that appellant would receive 478 days of custody credit and 478 days of conduct credit for this period. (4

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[2] All further statutory references are to the Penal Code unless otherwise specified.

CT 1016-1017; 5 CT 1285.) On June 18, 2020, the trial court amended the presentence custody credits that were previously imposed to include 602 actual days and 602 Penal Code section 4019 conduct credit days for a total of 1,204 days. (5 CT 1224, 1285.)

On July 22, 2020, the district attorney's office moved to withdraw the stipulation and vacate the order granting the additional presentence custody credits, contending that the award of the additional 956 days of custody credits was improper because appellant was not subject to home detention and therefore not "in custody" during the time he was being electronically monitored prior to his sentencing. (4 CT 1018-1168.)

On September 24, 2021, the trial court granted the motion, finding the additional presentence custody credits had been illegally granted. The trial court ordered appellant to surrender to authorities on November 21, 2021, and serve the remainder of his sentence in county jail. (5 CT 1294.)

Appellant filed a timely notice of appeal. (5 CT 1237.)

STATEMENT OF FACTS[3]

Thirteen victims reported that between July 2015 and October 2017, appellant inappropriately touched them while on duty as a Deputy Sheriff. Throughout the course of the

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[3] The statement of facts is based on the probation report because appellant pleaded guilty. (3 CT 697-709.)

investigation, six additional victims came forward with the same claims, stating that appellant inappropriately touched them.

In July 2015, appellant stopped M.Y. and after conducting a probation search, found a prescription bottle with two different pills inside. M.Y. said she had a prescription for the pills that was in her nearby storage unit, so appellant offered to follow her there. After she showed appellant her prescription, he asked for a hug. M.Y. did not want to hug appellant, but she did so because she was afraid of getting into trouble. Appellant squeezed M.Y.'s body tightly, forcefully grabbed her buttocks and pulled her towards him. Appellant released her and then asked for another hug.

About two months later, appellant approached M.Y. outside of a convenience store. He searched her and found drug paraphernalia, for which he cited her. Appellant said he would give her a ride home, and after she got into the back of his patrol car, appellant leaned over her to fasten her seatbelt. In doing so, appellant brushed his hand over her thighs, vagina and groin area. When they arrived at M.Y.'s residence, while unfastening the seatbelt, appellant rubbed his forearm over M.Y.'s breasts and said, "I hope your boyfriend doesn't mind."

In November 2015, appellant pulled over a vehicle driven by K.P. and subsequently arrested her for drug possession. When they arrived at the sheriff's substation, appellant searched K.P., moving his hands up her legs to her crotch area on each leg. He searched her cell phone and asked if she had any nude pictures on her phone. Before transporting her to jail, appellant again

searched her and rubbed his hand across her breasts. When appellant unbuckled her seatbelt, he again intentionally touched her breasts.

In January 2016, appellant pulled over a vehicle that L.R. was in with her husband. After finding two Vicodin pills during a consensual search of the vehicle, appellant took L.R. into custody. While transporting her, each time appellant would buckle or unbuckle her seatbelt, he would rub against her breasts. Appellant ended up returning her to the place of arrest, and before releasing her, asked her for a hug. She obeyed his commands, and appellant rubbed her back and moved his hands up and down her buttocks.

In February 29, 2016, appellant approached W.F. who was having car trouble. Appellant blocked in W.F.'s car with his patrol car, and informed W.F. he was going to conduct a pat down search. Appellant directed W.F. to turn away from him as he fondled her body by running his hands all over her body and touching the sides of her breasts. After searching her car and finding lingerie, appellant again said he was going to pat down W.F. Appellant directed her to turn away from him, put her arms in the air and spread her legs. He then pressed his palms against her breasts and moved his hands down, grabbing her buttocks and the inside of her thighs. Appellant slid his hand under her skirt, touching her bare leg and asked W.F. where they could go later to meet. W.F. was afraid of retaliation so she gave him her phone number.

In August 2016, appellant responded to a burglary call at T.S.'s house. After the house was cleared, appellant returned to the house, asked T.S. how she was doing, and said it looked like she could use a hug. Before she responded, appellant hugged her. He then asked to use her restroom, and when he was leaving, he hugged her again.

In September 2016, appellant and other deputies responded to a call a C.M.'s house. After the other deputies left, appellant asked to use her restroom. He then asked C.M. if she needed a hug, and because she was intimated by appellant's size and the fact he was wearing a uniform, she agreed. Appellant wrapped his arms around her shoulders and touched her back, pushing his chest against hers.

In October 2016, D.N. called the sheriff's department regarding a suspicious man at her apartment complex's pool. D.N. ended up speaking with appellant a few times about the man. About a week after the initial call, appellant showed up at D.N.'s apartment and asked if he could give her a hug. Appellant went inside D.N.'s apartment, and while hugging her, rubbed her back and touched her buttocks. Appellant groped D.N.'s buttocks and then kissed her on the mouth while trying to grind his crotch towards her crotch area.

In November 2016, appellant was one of the deputies who responded to a domestic violence call at M.P.'s house. After deputies arrested M.P.'s husband and left, appellant returned and she let him inside her house. Appellant hugged M.P., moving his hands up and down her back and touching her buttocks. M.P.

pulled away and appellant said he was not done hugging her, and he pulled her close to him. M.P.'s phone rang and she walked appellant to the door.

Also in November 2016, appellant responded to P.G.'s house for a welfare check after she accidentally dialed 9-1-1. P.G. explained the situation to appellant, and said her father had died two days ago and her mother just had a stroke. After inquiring about P.G.'s age, appellant said to her that he thought she was "hot" and that she needed a hug. Appellant pulled P.G. towards him, firmly embracing her upper body and squeezing her breasts against his chest. When P.G. pulled back and tried to show appellant to the door, he wrapped his arms around her waist and pulled her towards him for another hug. Appellant moved his hands to touch her buttocks and before he left, he asked P.G. for a kiss. P.G. reached for the door and appellant tried to kiss her but P.G. was able to open the door between them.

In December 2016, appellant was one of two deputies who responded to a residential living facility where T.D. worked. While at the call, appellant asked T.D. for a hug and she said "okay." He later returned to the facility and hugged her two more times without permission. Appellant subsequently returned to T.D.'s place of work several times with another incident resulting in an uninvited hug. One time, appellant entered T.D.'s office and began hugging and kissing her. She felt scared and confused, and told appellant to leave, which he did after hugging and kissing her a few more times.

At the end of March or beginning of April 2017, at around 9:00 p.m., appellant went to T.D's apartment and said he had to talk to her about something important. She felt she had no choice but to let appellant in, where he began kissing her and forcefully grabbing her breasts and buttocks, T.D. told appellant to leave, but he made her sit on the bed while he unzipped his pants, grabbed the back of her head, forced his erect penis in her mouth and thrust his hips back and forth while his penis was inside her mouth. She tried to pull away but could not and was in fear of the gun on appellant's duty belt. After appellant left her apartment, T.D. never saw him again.

In May 2017, after completing a traffic stop of T.M., appellant followed her home and snuck up behind her as she was unloading her car. Appellant asked for a hug, so she tried to give him a quick hug, and as she felt him move his hands towards her buttocks, she pulled away. Appellant followed T.M. to the back house that she rented, but left when her landlord came out.

In June 2017, appellant initiated a traffic stop of S.H.'s vehicle and after she said she had a suspended driver's license, he asked if he could search her vehicle. She agreed and got out of her vehicle. Instead of searching the vehicle, appellant began searching S.H. by holding her hands behind her back with one of his hands and searching her with the other. Appellant told S.H. she was "hot," and he put his hand into S.H.'s front pants pocket and moved his hand across her vagina. He put his hand completely in her back pocket and squeezed her buttocks. Appellant found a meth pipe in S.H.'s back pocket and told her to

get rid of it, which she did. Appellant told S.H. to park her car up the street and after she did, he approached her window and said there was a dark corner nearby where they could make out. S.H. then heard sirens and appellant left.

In August 2017, appellant was one of the responding deputies to a welfare check at K.H.'s house. The deputies confirmed she was okay and left, but then appellant returned and knocked on her door. Appellant asked if he could use her restroom, and when he exited the restroom, told K.H. she was "hot" and asked for a hug. Appellant pulled K.H. into him, pressed his body against hers, and started moving his hands up and down her back. Appellant released K.H., began complementing her appearance and asked to hug her again. She felt she had no choice but to hug him. Appellant put his arms around K.H. and pulled her towards him as she tried to push him off of her. Appellant asked for a third hug, and K.H. told him he had to leave and he did.

In September 2017, S.G. was involved in a hit-and-run accident after she had been drinking. After being arrested and taken into custody, appellant was assigned to take her to the scene of the accident. When appellant put her in the backseat of his patrol car, he got too close to her while putting on her seatbelt, and then made a derogatory comment about her boyfriend. Appellant then drove S.G. to her home, and after learning she had just turned 24, appellant asked if she wanted a birthday kiss. Upon arriving at S.G.'s home, appellant said, "Here comes your favorite part." He then leaned in the back seat

and rubbed his palms against S.G.'s bare legs, commenting how soft her thighs were. Appellant also grabbed her buttocks and rubbed his hand against her vagina as she tried to get away.

In October 2017, appellant responded to a domestic dispute call at D.A.'s residence. D.A. told appellant she was scared of her boyfriend, and appellant hugged her and then began asking about her home—if anyone could see inside and if anyone else was home. While at her home, appellant hugged D.A. two more times, grabbing her buttocks with both hands during the third hug. Appellant then grabbed D.A.'s hand and put it on top his pants over his erect penis, and forced her to move her hand up and down. Before leaving, appellant told D.A. not to tell anyone, and that he would be keeping an eye out for her.

In October 2017, appellant pulled over a vehicle driven by N.G. on suspicion of driving under the influence. During the stop, N.G. told appellant that she and her daughter were staying at a hotel. Appellant determined she was not under the influence and let her leave, but he later called her several times and then showed up at her hotel room. Appellant asked N.G. to speak with her alone, and because she felt like she had no choice, she followed him into the bathroom. Appellant proceeded to hug her, tell her how attractive she was and how good her body felt.

Appellant eventually released her and left, but an hour later started calling her again and then returned to the hotel room. Appellant again led her to the bathroom where he began hugging her and then pushed her against a wall. From behind, appellant started grinding his hips into N.G. while holding the back of her

neck with one hand. N.G. was afraid appellant could snap her neck at any moment so she complied with what he was doing. Appellant then turned N.G. around, lifted her onto the counter, spread her legs apart and groped her body. Appellant put his hands down the back of N.G.'s pants, grabbed her buttocks and put his hands over her genital region. Throughout the encounter appellant was telling N.G. how beautiful she was. Appellant told N.G. he should not be doing this because he could get into trouble, asked her to not tell her friends, and then left.

ARGUMENT

I. THE TRIAL COURT PROPERLY CORRECTED ITS AWARD OF CREDITS BECAUSE THE UNEARNED CREDITS CONSTITUTED AN UNAUTHORIZED SENTENCE

Appellant claims that the trial court did not have jurisdiction to overturn its order awarding appellant custody credits for time spent on GPS monitoring. (AOB 15-32.) However, because the sentence was unauthorized, the trial court had jurisdiction to correct its own errors.

A. Relevant procedural background

At his initial sentencing hearing on December 10, 2019, the trial court sentenced him to five years in local jail which included 16 months of mandatory supervision. He was remanded to local custody that day. (4 CT 1014-1015; 3 RT 286-287.) Although the court did not orally pronounce an award of credits, the minute order and abstract of judgment stated that appellant was

awarded three days of local credit against his sentence.[4] (4 CT 1014-1015; 5 CT 1281.)

At the end of February 2020, defense counsel submitted a custody credits packet to the trial court with a cover letter stating that the trial court had not awarded appellant custody credits for the time spent in the electronic monitoring program on home detention. (4 CT 1050-1052.) On April 3, 2020, defense counsel sent Deputy District Attorney Fox an email with the custody credits packet and a proposed order regarding the credits that the defense believed were due to appellant.[5] (4 CT 1062.) After this email, both counsel agreed to submit the matter to the probation department to accurately calculate appellant's credit for the time he was on CPAC electronic monitoring. (See 4 CT 1067-1070.)

Based on the calculation from the probation department, defense counsel drafted a Stipulation and Order to Amend Custody Credits stating that appellant was due 478 days of custody time for the time appellant as on "Sheriff's CPAC electronic monitoring," plus 478 days of section 4019 good-behavior credits for a total of 956 days of credit. (4 CT 1016-1017.) The trial court filed the stipulation on May 15, 2020, and

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[4] The day before sentencing, appellant had filed a response to the probation report, which noted that when calculating appellant's credits, the probation report did "not take into account the time that he has been subject to GPS monitoring prior to his sentencing." (4 CT 1006-1009.)

[5] Because of the pandemic, the courts closed on March 17, 2020 and remained closed for most matters until the end of April, 2020.

appellant was released that day from county jail and began serving the supervised release portion of his sentence. (4 CT 1016-1017, 1028; 4 RT 437.)

On July 22, 2020, the prosecution filed a motion to vacate the order granting credits, withdraw stipulation, and remand defendant. (4 CT 1018-1168.) The prosecution asserted it had entered into the stipulation based on the belief that appellant was on presentencing home detention while he was subject to GPS monitoring. However, after the stipulation was filed, the prosecution obtained the records from the County Parole and Alternative Custody Unit (CPAC) that showed appellant was not confined on home detention but was only GPS-monitored. (4 CT 1019-1023.) The motion further stated that because custody credits for straight GPS-monitoring were not authorized by law, the stipulation was invalid because it stipulated to an incorrect application of the law. (4 CT 1023-1024.)

Defense counsel subsequently filed a response and supplemental brief, and the prosecution filed a rebuttal brief. Throughout this time appellant remained on supervised release. (4 CT 1171-1197; 5 CT 1200-1228.)

On September 24, 2021, the trial court heard the prosecution's motion. At the outset, the trial court noted it had received an email on June 4, 2020, from then Chief Deputy District Attorney Hendren regarding withdrawing the stipulation, and for various reasons including the pandemic and the judge's unavailability, the motion was finally before the court, approximately 15 months later. (4 RT 403-405.)

The prosecutor reiterated that the motion to withdraw the stipulation was filed because the credits were not authorized and therefore, the stipulation resulted in an unlawful sentence. (4 RT 405-406.) The trial court expressed concern with the fact that the People had agreed to the sentence, even if the credits were unearned. (4 RT 406-407.) The prosecutor explained that at the time the stipulation was entered, it appeared that neither party understood that appellant was not entitled to credits because he was not on home detention. (4 RT 407.) She explained that after the stipulation was filed, the former Chief Deputy asked her to review the records and research whether the custody credits were authorized by law. (4 RT 408.) It was after she reached the conclusion that the credits were not authorized that the People filed the motion to withdraw the stipulation. (4 RT 409.) The prosecutor added that the deputy district attorney who signed the stipulation was not present at the arraignment and did not have the transcripts from that hearing, so she did not realize that appellant was not on home detention as represented by defense counsel. (4 RT 409-410.) After receiving and reviewing the transcripts from the arraignment it became clear that appellant was ordered on GPS monitoring but not home detention. (4 RT 410-411.)

The trial court then asked Deputy District Attorney Fox, who signed the stipulation and was present at the motion hearing, if she looked at the court file before signing the stipulation. (4 RT 412.) She said she did not have access to the court file at that time, and that when defense counsel sent her

the email with the documents requesting the custody credits, it was presented as if appellant was on home detention. (4 RT 412-414.) Thus, based on the information before her, Deputy District Attorney Fox believed that appellant was entitled to credits, and because they were in the middle of a pandemic, she did not want appellant to be kept in custody if he had enough credits to be released. (4 RT 414-415.) Further, because the judge, who had presided over the arraignment, plea, and sentencing was not available at that time, the stipulation was sent to the presiding judge who signed it and wrote "Approved by Judge Goldstein." (4 RT 416.)

Rather than arguing that appellant was on home detention, defense counsel asserted that the prosecution was seeking to recall the stipulation after receiving bad press regarding appellant's release. (4 RT 418-419.) The prosecutor countered that she was asked to look at this case anew as an independent reviewer with all of the facts, and she reached her conclusion based on the law applied to these facts. (4 RT 419.) The trial court noted it did not think the prosecution's motion was based on politics but it did believe that the office was "taking heat" for the overall sentence. (4 RT 419-420.) The prosecutor explained that her office's decision to file this motion was made in an objective and fair manner, and based on her independent legal conclusion that appellant was not legally entitled to the credits. (4 RT 421.) She added that the motion was based purely on the legal question of whether or not appellant was entitled to the credits. (4 RT 421.)

The prosecutor also explained that because the stipulation occurred shortly after the pandemic hit, the records were not available to the parties. (4 RT 422.) The deputy district attorney who entered into the stipulation did so based on the information provided by the defense that was later discovered to be incomplete. (4 RT 422-423.) It was not until August 2020 that the prosecutor obtained the transcript from the second arraignment, when the GPS monitoring condition was imposed. (4 RT 423.)

Defense counsel asserted that because the probation department was involved in calculating the credits for the time appellant was on electronic monitoring and home detention, the prosecution did have all the facts that were needed to enter into the stipulation. (4 RT 423-424.)

The trial court observed that when appellant's two cases were consolidated, the docket showed that appellant was to remain on bond for $100,000 with GPS monitoring. (4 RT 426.) It also said that appellant was permitted to travel to Michigan on certain dates, and that his passport was surrendered to the court. (4 RT 426.) The trial court pointed out that at that time, it said that CPAC was appropriate, but CPAC was never set up for appellant, and although there was GPS monitoring and a stay-away order, which is common in sex crimes, there was no home detention order. (4 RT 426.)

Defense counsel did not agree that appellant was not on home detention because there was a signed home detention order and appellant thought he was on home detention. (4 RT 426.)

Thus, defense counsel stated that appellant believed he was on both electronic monitoring and home detention because he signed the sheriff's department form. (4 RT 427.) Defense counsel acknowledged that some things were crossed out on the form, and said that the sheriff's department crossed them out. (4 RT 427.)

The trial court said it was looking at the transcript from the second arraignment and it never ordered appellant on house arrest. (4 RT 428.) Defense counsel responded that there was a subjective belief by appellant that he was in custody, and that he acted as though he was in custody. (4 RT 428.) Counsel argued that the agreement appellant signed was very restrictive, and claimed he did not know why the first two lines, which were the ones that would have placed appellant on home detention, were crossed out. (4 RT 428.) Counsel further asserted that based on everything else on the CPAC form, it showed appellant was subject to GPS monitoring and home confinement by the sheriff's department. (4 RT 428-429.) However, defense counsel acknowledged that the trial court did not order home confinement—"Yes. Absolutely." (4 RT 429.)

The trial court read and noted, as argued by the prosecutor, that the first paragraph of the CPAC form that said, "I shall remain within the interior premises of my residence during the hours designated by the sheriff's county parole and CPAC unit" had been stricken as well as the part prohibiting alcoholic

beverages and the Fourth waiver.[6] (4 RT 429-430.) The trial court concluded that based on the CPAC form, appellant was not in custody because he did not have to remain in his home. (4 RT 430.)

Defense counsel agreed that the stay-at-home condition was stricken, but again asserted that appellant did stay in his home and that was the reason appellant had to sign that form. (4 RT 430-431.) The trial court stated it had ordered appellant to stay away from certain locations, and was required to have GPS monitoring, but that was ordered so the court or law enforcement would know where appellant was while his case was pending. (4 RT 431.) The court said if you looked at the transcript and the docket in combination with the CPAC order it was consistent with what the court ordered because the home detention part was crossed out. (4 RT 431.)

Defense counsel asked why appellant had to sign the CPAC form, and the trial court replied it was because of the other conditions like the GPS monitoring. (4 RT 431.) Defense counsel agreed that the GPS monitoring was to ensure appellant stayed away from the victims, but argued that could have been done without the form. (4 RT 431-432.) The trial court said that with GPS monitoring, either CPAC or the sheriff's department was in charge of the monitoring, and the CPAC form, with the home

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[6] At the hearing, the trial court indicated a belief that despite the Fourth Waiver provision being stricken, it had imposed the condition but there is nothing in the record to indicate that it imposed a Fourth Waiver. (See 4 CT 1141-1148.)

detention requirement crossed out, was consistent with its order. (4 RT 432.) The trial court added that if home detention was part of its order, it would have clarified the restriction, such as allowing appellant to work but ordering a curfew from 10:00 p.m. to 7:00 a.m. in which he was to remain in his residence, but it did not do that. (4 RT 434-435.)

The trial court found that appellant was not in custody for the purpose of calculating credits, and therefore the custody credits were calculated wrong. (4 RT 435.) The probation officer who was present at the motion hearing noted that although appellant's GPS monitoring was supervised by CPAC, all that CPAC did was monitor appellant based on his movements, so appellant should not get credit for that time. (4 RT 439.)

The trial court found that the custody credits were awarded illegally to appellant and therefore, the stipulation was illegal. (4 RT 446.) The trial court said it did not find bad faith on the part of either the People or the defense when entering into the stipulation, and that several factors contributed to the illegal stipulation such as the pandemic and the judge being unavailable at that time to clarify his order regarding CPAC and the GPS monitoring. (4 RT 446.) The trial court ordered appellant to report to the county jail on November 21, 2021, which was when his mandatory supervision ended, to finish out the remainder of his sentence. (4 RT 445-447.)

B. The trial court had jurisdiction to correct the unlawful sentence

Appellant was not entitled to presentence custody credits for the time he was released on bail and subject to GPS monitoring

but not home detention. Accordingly, the order resulted in an unlawful sentence and the trial court retained jurisdiction to correct it.

An error in calculating presentence credits results in an unauthorized sentence that cannot be forfeited and can be corrected any time. (*People v. Duran* (1998) 67 Cal.App.4th 267; *People v. Zito* (1992) 8 Cal.App.4th 736, 741-742; see also *People v. Gisbert* (2012) 205 Cal.App.4th 277, 282.)

Division Three of this Court's opinion in *People v. Gisbert, supra,* 205 Cal.App.4th 277 is on point. While imprisoned, Gisbert was charged with a new felony and he served a Penal Code section 1381[7] demand. (*Gisbert, supra*, at p. 280.) On the day he appeared for arraignment on the new charges, he pleaded guilty and was given a sentence to be served concurrently with his existing sentence. (*Ibid.*) With respect to the new sentence, he was initially granted custody credits for the period between the service of his section 1381 demand and his sentencing, but the trial court later vacated the credits upon motion of the prosecution. (*Gisbert, supra*, at p. 280.)

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[7] Section 1381 provides: "If a charge is filed against a person during the time the person is serving a sentence in any state prison or county jail of this state . . . it is hereby made mandatory upon the district attorney of the county in which the charge is filed to bring it to trial within 90 days after the person shall have delivered to said district attorney written notice of the place of his or her imprisonment or commitment and his or her desire to be brought to trial upon the charge . . ." (Pen. Code, § 1381.)

On appeal, Gisbert claimed that the trial court had discretion to award the presentence custody credits, so the sentence was not unauthorized and subject to correction at any time. (*Gisbert, supra*, 205 Cal.App.4th at p. 281.) In affirming the trial court's decision to vacate the credits, the Court of Appeal held that the trial court did not have discretion to award the custody credits, and therefore, the incorrect award of presentence custody credits was an unauthorized sentence that may be corrected at any time. (*Id.* at p. 282.)

People v. Fares (1993) 16 Cal.App.4th 954 is also instructive, because it reinforces the propriety of the trial court to correct unauthorized credits or award them. In that case, this Court expressed consternation upon being asked to utilize its resources to decide an issue of credits when it could have just as easily been addressed in the trial court. This Court stated, "We are disturbed that this attempt at a minor correction of a sentence error has required the formal appellate process. The error in question in any view of the matter that we can conceive must be deemed clerical, inadvertent, or at most negligent." (*Fares, supra*, at p. 957.)

This Court went on to suggest that such errors must be addressed in the trial court first.

> The most expeditious and, we contend, the appropriate method of correction of errors of this kind is to move for correction in the trial court. It is the obligation of the superior court, under section 2900.5, to calculate the number of credit days and include same in the abstract of judgment (§ 2900.5, subd. (d)). If a dispute arises as to the correct calculation of credit days, such should be presented on noticed motion "for

> resolution to the court which imposed the sentence and which has ready access to the information necessary to resolve the dispute." [Citation]
>
> There is no time limitation upon the right to make the motion to correct the sentence. "The ... effect of the court's failure to comply with [section 2900.5, subdivision (d)] [is] to render its initial finding and resulting sentence a nullity. It follows that once appropriately apprised of its inadvertence, the court therein [becomes] licensed to impose a proper finding and sentence. [Citations.]" [Citation] The court's power to correct its judgment includes corrections required not only by errors of fact (as in the mathematical calculation) but also by errors of law. [Citation.]

(*People v. Faris, supra*, 16 Cal.App.4th at p. 958.)

Appellant contends that although the trial court had jurisdiction to "correct its earlier miscalculation of appellant's presentence credits even though his conviction had long been final," it no longer had jurisdiction to correct the award of credits. He also argues that section 1237 only applies to a defendant's request for correction. (AOB 16-20.)

Penal Code section 1237.1 states, "No appeal shall be taken by the defendant from a judgment of conviction on the ground of an error in the calculation of presentence custody credits, unless the defendant first presents the claim in the trial court at the time of sentencing, or if the error is not discovered until after sentencing, the defendant first makes a motion for correction of the record in the trial court." It would certainly stand to reason that if the defendant has an obligation to seek a modification of

credits in the trial court then the trial court is not divested of jurisdiction should the prosecution raise an identical claim.

Furthermore, appellant fails to acknowledge the role the defense played in initiating and causing the unlawful sentence in the first place. The misunderstanding as to whether appellant was on home detention seemed to occur after the defense filed a letter on February 20, 2020, with the trial court asserting that "the court awarded no credits for the time [appellant] spent in the electronic monitoring program on home detention." (See 4 CT 1050-1052.) Defense counsel attached a blank CPAC Electronic Monitoring Application to the letter, so it did not show that the home detention requirement was crossed out on the form signed by appellant. (4 CT 1054-1060.) As Deputy District Attorney Fox explained in her declaration, neither current defense counsel nor herself were present at the hearing where the trial court imposed the GPS monitoring condition but not home detention, and the transcript from the hearing was not available until after the parties stipulated to the conduct credits. (4 CT 1046-1048.)

Appellant acknowledges that a trial court retains jurisdiction to correct an order that has become unauthorized by law, yet he claims the trial court's unlawful award of the custody credits does not fall under this narrow exception. (AOB 20-27.) However, as discussed more thoroughly below, because appellant was not on home detention, he was not entitled to custody credits based on home detention as a matter of law so the award of credit was unauthorized

Accordingly, because appellant was not entitled to any presentence credits for the time he was subject to GPS monitoring without home detention, the trial court had jurisdiction to modify its order granting the unauthorized credits.

C. Appellant was not entitled to custody credits under Penal Code section 2900.5 for the days he was released on bail and subject to GPS monitoring because these conditions were not imposed pursuant to Penal Code section 1203.018

Contrary to appellant's claim, he was never placed on "home detention" within the meaning of section 1203.018. Because appellant was not subject to home detention in addition to the GPS monitoring, he was not entitled to receive any presentence credits under section 1203.018, in which home detention is a requisite condition.

The award of presentence custody credits is governed by section 2900.5, subdivision (a), which provides in relevant part: "In all felony . . . convictions, either by plea or by verdict, when the defendant has been in custody, including, but not limited to . . . days served in home detention pursuant to Section 1203.018, shall be credited upon his or her term of imprisonment[.]"

Section 1203.018 authorizes counties to "offer a program under which inmates being held in lieu of bail in a county jail or other county correctional facility may participate in an electronic monitoring program." The statute leaves the exact terms of the electronic monitoring program to the discretion of county authorities, but the program must require the inmate to "remain within the interior premises of his or her residence during the hours designated by the correctional administrator." (§ 2900.5,

subds. (b), (d)(1).) "Section 1203.018 authorizes 'the board of supervisors of any county' to 'offer a program under which inmates being held in lieu of bail in a county jail or other county correctional facility may participate in an electronic monitoring program' under specified conditions. (§ 1203.018, subd. (b).)" (*People v. Raygoza* (2016) 2 Cal.App.5th 593, 599.) An "'[e]lectronic monitoring program'" is defined as "includ[ing], but is not limited to, home detention programs, work furlough programs, and work release programs." (§ 1203.018, subd. (j)(2).)

The statute leaves the exact terms of the electronic monitoring program to the discretion of county authorities but requires the home detention programs created to obtain the participant's assent in writing to the following conditions:

> (1) The participant *shall remain within the interior premises of the participant's residence* during the hours designated by the correctional administrator. [¶] (2) The participant shall admit any person or agent designated by the correctional administrator into the participant's residence at any time for purposes of verifying the participant's compliance with the conditions of detention. [¶] (3) The electronic monitoring may include global positioning system devices or other supervising devices for the purpose of helping to verify the participant's compliance with the rules and regulations of the electronic monitoring program. [...] [¶] (4) The correctional administrator in charge of the county correctional facility from which the participant was released may, without further order of the court, immediately retake the person into custody if the electronic monitoring or supervising devices are unable for any reason to properly perform their function *at the designated place of home detention*, if the person *fails to remain within the place of home detention* as stipulated in the agreement, or if the person for any other reason

> no longer meets the established criteria under this section.

(§ 1203.018, subd. (d)(1)–(4), italics added; see also *Raygoza*, *supra*, 2 Cal.App.5th at p. 599.) Based on the plain language of section 1203.018, GPS monitoring alone, without home detention, does not constitute an "electronic monitoring program" as defined by the statute. (§ 1203.018, subd. (d); see *id.* at subd. (f) [referencing "the designated place of confinement"].)

Here, appellant is not entitled to custody credits under section 2900.5 because he was not on home detention. Section 1203.018 requires that home detention be performed "in lieu of bail and on no other basis." Appellant posted bail in the amount of $750,000 so he was not held in lieu of bail. (4 CT 1145.) In addition, appellant did not spend any time on home detention, and was not ever ordered to be on home detention or required to spend certain hours at his home.

The fact that appellant was required to wear a GPS monitor does not change this analysis. A defendant who participates in an electronic monitoring program that does not sufficiently restrict his movements and allows him to come and go as he pleases is not entitled to custody credits.[8] (*People v. Anaya* (2007)

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[8] The question whether confinement was sufficiently restrictive as to amount to custody constitutes a factual question. (*People v. Ambrose* (1992) 7 Cal.App.4th 1917, 1922.) The focus is generally on factors such as the extent of one's freedom of movement, visitation regulations, rules regarding personal appearance, and the rigidity of a program's daily schedule. (*People v. Reinertson* (1986) 178 Cal.App.3d 320, 326.) Although (continued…)

158 Cal.App.4th 608, 613.) Thus, appellant is not entitled to custody credits because he was not in custody.

This case is different from *People v. Raygoza*, *supra*, 2 Cal.App.5th 593, cited by appellant (AOB 15-16). In *People v. Raygoza*, the defendant initially posted bail in the amount of $455,000, but was subsequently brought back into custody due to an issue with the bond and a new bail hearing was set. (*Id.* at p. 597.) At the new bail hearing, a representative for the bonding company was present and stated that based on his finances, the defendant qualified for less bail than he was initially granted. (*Ibid.*) The defendant asked that bail be reduced to that amount. (*Ibid.*) "The court agreed to reduce bail, provided appellant agreed to electronically monitored home detention, '24–hour except for qualified medical and/or emergencies.'" (*Ibid.*)

Raygoza agreed and executed a participant contract for the Los Angeles County electronic monitoring program. (*Ibid.*) "Under the contract, [Raygoza] agreed 'to remain within the interior premises of [his] residence at all times, except for the days [he] work[ed], or to keep appointments for which [he had] received permission in advance." (*Ibid.*) The contract also said that if the defendant " 'willfully [left] [his] residence without authorization [or] fail[ed] to return to [his] residence at the

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(…continued)

the legislature declared that home detention pursuant to section 1203.018 is custody in its 2011 amendment to section 2900.5, appellant's supervised release while out on bail was not home detention.

prescribed time,' he could be 'prosecuted for escape'." (*Id.* at pp. 597-598.)

At sentencing, the trial court denied Raygoza's request for presentence custody credits because he had been "released on home detention with electronic monitoring as a condition of reduced bail and not 'in lieu of bail'." (*Raygoza, supra*, 2 Cal.App.5th at p. 598.) On appeal, the reviewing court found that the trial court erred by not awarding custody credits because Raygoza's home detention was "in lieu of" of bail in the amount of $455,000. (*Id.* at pp. 600-602.)

In *Raygoza*, the conditions of defendant bail were modified based on a change in circumstances—his inability to pay for a $455,000 bond. Here, there were no change in circumstances justifying modification of bail. At the second arraignment, the trial court was asked to reduce bail, which had been set at $2,000,000 when the prosecution obtained the arrest warrant after the second complaint was filed. This amount was considerably over the approximately $210,000 figure set by the bail schedule. (4 CT 1090-1091, 1093, 1123.) Defense counsel told the court that bail was originally set at $100,000 on the first complaint, but it increased to $2,000,000 when the second complaint was filed. (4 CT 1124.) Counsel requested that the trial court reduce the amount to $210,000, which was in line with the bail schedule. (4 CT 1128.)

After the trial court heard the prosecution's recitation of the facts underlying the charged crimes, it said it was going to lower the bail amount, but still set it over schedule. (4 CT 1138-1145.)

Thus, in order to decrease the likelihood of any danger to the public or the victims, the trial court set bail at $750,000, which was still higher than the bail schedule. (4 CT 1145.) The trial court further noted there were already no contact orders filed in both cases, so as a condition of bail, appellant was "to have no contact, direct or indirect, come within 100 yards of any listed victim in either case," and to also wear a GPS monitoring device. (4 CT 1145-1146.)

Thus, unlike the situation in *Raygoza* where the bail amount was reduced due to the defendant's inability to pay, here the amount of bail was reduced from $2,000,000 to $750,000 because the trial court found that the lower number was sufficient to ensure the safety of the public and the victims, and it was still over $210,000 set by the bail schedule. In addition, the GPS monitoring was not imposed in return for the reduction in bail, but to ensure appellant stayed away from the victims. Moreover, unlike Raygoza, appellant was never subject to a home detention order.

Furthermore, the recent case of *People v. Gerson* (2022) 74 Cal.App.5th 561 is distinguishable. In *Gerson*, after first being released to a locked hospital, and then to a less restrictive treatment center, Gerson was discharged to home detention. (*Id.* at p. 580.) Although he was released on bail, he was required to wear a GPS monitoring device and was subject to a Fourth Amendment waiver. (*Ibid.*) At sentencing, the trial court awarded him custody and conduct credits for the time spent at the two treatment centers but denied his request for credits for

his time on home detention, finding it was not a "custodial environment." (*Ibid.*)

On appeal, Gerson acknowledged that he was not on a home detention program within the meaning of Penal Code section 1203.18 because he was not released on the home detention with electronic monitoring in lieu of bail. (*Id.* at p. 581.) However, Gerson argued that denying him pre-conviction custody credits violated his right to equal protection because he was similarly situated to inmates released on home detention with GPS monitoring within the meaning of section 1203.018. (*Id.* at pp. 581-582.) This Court agreed. (*Ibid.*)

This Court noted that in order to demonstrate that individuals such as himself, who were out on bail and subject to electronic monitoring were similarly situated to those on an electronic monitoring program under section 1203.018, Gerson had to show that "the terms of his release were as 'custodial, or restraining' as a statutory home detention program pursuant to section 1203.018." (*Gerson, supra*, 74 Cal.App.5th at p. 582.)

The version of section 1203.018 in effect at the time required that participants in a home detention program comply with certain rules, including: "(1) remaining within the interior premises of his or her residence during the hours designated by the correctional administrator; (2) admitting persons into his or her residence at any time for purposes of verifying compliance with the conditions of his or her detention; and (3) a GPS device or other supervising device." (*Ibid.*) Because "the record shows that Gerson was required to remain in his home during the hours

designated by the court, wear a GPS device, and was subject to a Fourth Amendment waiver," this Court found that his "home detention satisfied the statutory requirements" of a home detention program under section 1203.018. (*Ibid.*) Accordingly, after finding there was no rational basis to treat individuals such as Gerson, who are released on bail and ordered to home detention with electronic monitoring, differently, he was entitled to pre-conviction custody credits. (*Id.* at pp. 583-584.) In addition, this Court found that because "Gerson has shown entitlement to custody credits under the equal protection clause," he was also entitled to section 4019 conduct credits for his time spent on home detention. (*Id.* at pp. 584-585.)

Here, however, appellant was never placed on a court ordered home detention program of any kind. None of the court orders nor the CPAC documents confined appellant to his home or restricted his movement with the exception of the order to stay away from his victims. (See 4 CT 1081-1082.) To be sure, the CPAC form expressly provided: "No restrictions to movement other than protected parties in CPOs. No programs. GPS monitor only." (4 CT 1074.) Thus, while released on bail, appellant was subject to GPS monitoring solely to ensure that he complied with the stay-away-orders. Further, unlike Gerson, appellant was not subject to a Fourth Amendment waiver as evidenced by this condition being crossed out on the CPAC form. (See 4 CT 1082.)

Furthermore, contrary to appellant's assertion, the trial court's correction of its unlawful award of credits was not based

on the court's improper weighing of the facts, which were set forth in the prosecution's motion to vacate the order. (AOB 29-32.) In order to make the legal determination that the sentence was unlawful, the trial court had to consider certain factual matters that were beyond dispute, such as whether appellant was ever ordered on to be home detention. Because defense counsel had attached a blank CPAC form to its request for the credits and referred to appellant as being on home detention, it was necessary for the trial court to look at the CPAC form executed by appellant and to the record of the hearing when GPS monitoring was imposed to determine if appellant was on home detention.

Appellant cites *People v. Fond* (1999) 71 Cal.App.4th 127, for the proposition that "a court may not overturn its earlier order as 'unauthorized' by law based on assessing (or reassessing) the facts." (AOB 32.) In *Fond*, the prosecution relied on the "unauthorized sentence" doctrine to argue, in responding to the defendant's appeal, that the trial court erred by failing to impose a 25-years-to-life sentence. (*Id*. at p. 133.) The reviewing court observed that the trial court had found that imposing such a sentence would be cruel and unusual punishment based on the facts of the case. (*Ibid*.) Thus, because the trial court had "relied on its view of the facts in determining that the mandated sentence to be cruel and unusual," the issue was not "clear and correctable independent of any factual issue," and the sentence was not "unauthorized." (*Ibid*.) Therefore, the *Fond* court found that the prosecution had waived their right to challenge the sentence. (*Id*. at pp. 133-134.)

In *Fond*, the prosecution also challenged, for the first time on appeal, the trial court's failure to impose a mandatory $200 parole restitution fine. (*Id*. at p. 134.) The *Fond* court agreed and noted it was "undisputed that Fond's sentence includes a period of parole." (*Ibid*.) Thus, the reviewing court found that the fine was correctable "because the imposition of such a fine is independent of any factual issues presented at sentencing." (*Ibid*.)

Here, the trial court had to consider what occurred leading up to appellant being released on bail in order to determine that appellant was not on home detention and therefore, not legally entitled to custody credits. There was no discretion on the part of the trial court involved. Thus, the situation was akin to the *Fond* court correcting the trial court's error regarding the mandatory parole restitution fine on appeal.

Furthermore, there was not "any factual issues presented by the record" that the trial court had to resolve because the defense did not dispute that any home detention requirement was crossed out on the CPAC form and the trial court never ordered that appellant be on home detention. (See 4 RT 429-430.) As the prosecutor stated at the beginning of the hearing, it was "purely a legal question as to whether or not the credits were authorized." (4 RT 405.)

In sum, because appellant was never on home detention, the law did not provide for custody credits for his time released on bail with GPS monitoring. Accordingly, the trial court properly

corrected the unauthorized sentence when the error was brought to its attention.

II. REQUIRING APPELLANT TO RETURN TO JAIL AFTER HE WAS ERRONEOUSLY AWARDED UNAUTHORIZED CREDITS WAS NOT UNJUST

Appellant contends the trial court's order returning him to county jail after he had been released for over a year was unjust. (AOB 32-35.) Appellant, while serving as a trusted police officer, committed numerous serious crimes, and agreed to a five year sentence pursuant to a plea. The fact that he was prematurely and improperly released from county jail and placed on supervised release by virtue of an unlawful grant of custody credits does not render his return to county jail unfair, particularly since the discovery of the error occurred within two months of it being made. Appellant simply received the benefit of the delay in the hearing to address the correction, which occurred because of the ongoing pandemic and the unavailability of the judge who was assigned the case.

Appellant reliance on *People v. Tanner* (1979) 24 Cal.3d 514 to support his contention is misplaced as the case has been discredited, is not well-reasoned, and has been limited by subsequent decisions. In *Tanner*, the defendant was granted probation and ordered to serve one year in county jail after the trial court struck a gun use finding. (*Id*. at p. 518, fn. 1.) On review, the Supreme Court concluded that "the trial court erred in striking the use finding and sending defendant to county jail rather than to prison." (*Id*. at p. 521.) It then considered whether it would be unfair to require the defendant to serve his

sentence in prison after he had complied with the conditions of his probation, including serving his county jail term. (*Id*. at pp. 521-522.) Relying on *United States v. Denson* (5th Cir. 1979) 588 F.2d 1112, the Court concluded a second incarceration would be "unfair" and "unjust" to require the defendant to serve a second term for his criminal act. (*Tanner*, at pp. 521-522.)

Subsequently, in *People v. Statum* (2002) 28 Cal.4th 682, our Supreme Court questioned the viability of *Tanner* because four months after it was decided, the Fifth Circuit Court of Appeals vacated the panel decision on which *Tanner* had relied. (*Id*. at pp. 695-696; see *United States v. Denson* (5th Cir. 1979) 603 F.3d 1143, 1145, 1148 (en banc).) Additionally, the *Statum* Court noted that "we have never relied on [*Tanner*] to pretermit the correction of a sentence that was illegally or improperly imposed." (*Id*. at p. 696.)

The *Statum* Court endorsed the reasoning of the en banc court decision in *Denson* in the following terms:

> "Like the Fifth Circuit, we cannot discern how the imposition of a harsher sentence on appeal, should that occur, would work a substantially greater hardship on defendant. The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner. [Citation.] We are unaware of any authority that provides 'the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be . . . His legitimate expectations are not defeated if his sentence is increased on appeal any more than are the expectations of the defendant who is placed on parole or probation that is later revoked.' [Citation.]"

(*Statum, supra*, 28 Cal.4th at p. 696.)

Moreover, *Statum* stated that even if *Tanner* remained good law, it had been limited. Specifically, *Statum* noted that "the Courts of Appeal have limited *Tanner* to circumstances in which (1) the defendant has successfully completed an unauthorized grant of probation; (2) the defendant has returned to a law-abiding and productive life; and (3) 'unusual circumstances' generate a 'unique element' of sympathy, such that returning the defendant to jail 'would be more than usually painful or "unfair."' [Citation.]" (*Id.* at pp. 696-697, fn. 5.) *Statum* did not reach the same result as that in *Tanner* stating: "[e]ven if *Tanner* remains good law, defendant cannot satisfy this test." (*Ibid.*)

Tanner was similarly not followed in *People v. Clancey* (2013) 56 Cal.4th 562. In *Clancey*, our Supreme Court refused to apply *Tanner* where the defendant was prematurely released from prison due to a miscalculation of custody credits. (*Id.* at pp. 585-587.) The *Clancey* Court pointed out that, "[t]he unfairness in *Tanner* arose from the prospect of the defendant serving a specific term in prison when he had already 'complied with his conditions of probation—including one year's stay in county jail.' Under those circumstances, . . . 'a second incarceration would be unjust.'" (*Clancey, supra*, at pp. 586-587.) "Here, by contrast, even if the trial court reinstates the judgment and recalculates defendant's credits, there is no prospect that Clancey would be asked 'to now serve a second term for his criminal act' [Citation.] or to 'suffer a punishment in excess of the legal maximum.' [Citation.]" (*Clancey, supra*, at p. 587.)

Similarly here, *Tanner* does not apply to invalidate the trial court's correction of appellant's unlawful credits. As in *Clancey*, the days of credit that were erroneously awarded to appellant were days that appellant should have, but did not, serve in custody. (See *Clancey, supra*, 56 Cal.4th at p. 587.) When appellant was released on May 15, 2020, he was released on mandatory supervision, which was part of his agreed upon five-year sentence. He was still serving his term on mandatory supervision when the trial court recalled the stipulation on September 24, 2021. (See 4 RT 441-445.) Thus, no issue of a "second incarceration" or "second term" arose by remanding him back to the county jail to finish his sentence.

Further, it would be illogical to conclude that reincarceration to serve the balance of an unlawfully short sentence, by itself, provokes a unique element of sympathy such that "returning [the defendant] to prison would be more than usually painful or unfair." (*In re Borlik* (2011) 194 Cal.App.4th 30, 43.) When the initial release from prison custody is contrary to law, as it is here, reimprisonment is not cruel or unusual punishment. (*In re Johnson* (1995) 35 Cal.App.4th 160, 172 [rejecting a claim that reimprisonment after 13 months of release violates the federal and state Constitutions].)

In sum, appellant has not established that he is entitled to extraordinary relief.

CONCLUSION

Accordingly, the trial court's order vacating the stipulation should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Respondent's Brief uses a 13 point Century Schoolbook font and contains 10,654 words.

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California Court of Appeal, Fourth Appellate District Division 1

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IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. RICHARD T. FISCHER, Defendant and Appellant.	Court of Appeal No. D079585 San Diego County Superior Court No. SCN383174

APPELLANT'S OPENING BRIEF

APPEAL FROM AN ORDER AFTER JUDGMENT OF THE
SUPERIOR COURT OF SAN DIEGO COUNTY
HONORABLE DANIEL GOLDSTEIN, JUDGE PRESIDING

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IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. RICHARD T. FISCHER, Defendant and Appellant.	Court of Appeal No. D079585 San Diego County Superior Court No. SCN383174

APPELLANT'S OPENING BRIEF

OVERVIEW

Following the court's pronouncement of judgment and sentence upon appellant's guilty plea, the People and appellant Fischer stipulated to correct and amend the court's award of credits. The court so ordered, and because of the additional credits, appellant was released from custody. Shortly afterwards, however, when (as described by the judge) "the D.A.'s office was taking heat," for appellant's sentence (see 4 RT 420:19-28), the People moved for an order withdrawing their stipulation, vacating that order, and remanding appellant into custody. The court's order granting the People's motion is the subject of this appeal – an "order made after judgment, affecting the substantial rights of the party." (Pen. Code §1237, subd. (b).) Analysis of the issues presented requires a detailed examination of the relevant trial court proceedings, but the facts of the offenses to which appellant pleaded guilty are not material. Consequently, the

following procedural history is extended, and the statement of facts abbreviated.

PROCEDURAL HISTORY

On September 9, 2019, the District Attorney of San Diego County filed an Amended Consolidated Information charging appellant Richard Timothy Fischer with four counts of felony assault and battery by an officer (Counts 1-4) in violation of section 149 of the Penal Code,[1] and two counts of that offense charged as misdemeanors (§§ 149, 17, subd. (b)(4); Counts 6-7); Count 5 charged appellant with misdemeanor false imprisonment (§ 236). (1 CT 31-33.)[2] That same day, appellant entered a negotiated guilty plea to each of these charges; it was specified that in consequence of his pleas he could receive a maximum punishment of five years imprisonment for the felony charges; for the misdemeanor convictions, appellant could receive a maximum of three years concurrent time, or imprisonment plus a term of mandatory supervision, a fine of $10,000, and four years on parole or post-release supervision. If not sentenced to prison, appellant could be granted probation for up to five years subject to conditions including up to a year in jail custody; appellant was also subject to a restitution fine, and possible registration as a sex offender (§ 290.0060). (2 CT 327-331.)

---

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

[2] Page citations to "CT" and "RT" preceded by the appropriate volume number, refer to the clerk's and reporter's transcripts, respectively.

Judgment was pronounced on December 10, 2019, in Department N-12 of the Superior Court for San Diego County, Honorable Daniel B. Goldstein, Judge presiding. (5 CT 1281-1282; 3 RT 204-290.) Appellant was sentenced to the upper term of three years for the felony assault and battery charged in Count 1. For the remaining felony convictions (Counts 2-4), appellant was sentenced to consecutive terms of 8 months each (1/3 the midterm), for a total term of five years, of which 16 months were suspended and deemed a period of mandatory supervision, pursuant to section 1170, subdivision (h)(5)(B). For the misdemeanor convictions (Counts 5, 6, 7), the court sentenced appellant to credit for time served and denied probation. (5 CT 1281-1282; 3 RT 287:16-18.) The court summarized: "So the total term is five years. You will do 25 months in custody. You'll be under mandatory supervision for 16 months." (3 RT 286:24-26.) The judge did not mention credits during his oral pronouncement of judgment. However, the court's minute order (5 CT 1281) and the abstract of judgment (4 CT 1014-1015) indicate appellant was awarded 3 days of local credits (§ 4019) against his sentence.[3]

---

[3] The probation report summarized the "Custody Data" which it calculated as three days of actual custody time in the San Diego County Jail on February 22, 2018 and on August 16 and 17, 1018, with no behavior credits. (3 CT 724.) Appellant's response challenged the probation report's credit calculation, noting: "it does not take into account the time that he has been subject to GPS monitoring prior to his sentencing in this case, and it also does not take into account PC 4019 credits." (4 CT 1009.) As noted, however, the court did not address the credits problem at sentencing, uncritically adopting the probation officer's calculation.

The court's order granting mandatory supervision (filed the same day, 12/10/2019) provided that the concluding 16 months of appellant's sentence would be suspended, and that during that time appellant was subject to the mandatory supervision of the Probation Department pursuant to section 1170, subdivision (h)(5)(B), subject to specified terms and conditions, which included that he "Follow such course of conduct that the Probation Officer ("P.O.") communicates to defendant"; "Comply with a curfew if so directed by the P.O."; "Have a photo ID card on his/her person at all times"; "Report any change of address or employment to the P.O. and Revenue & Recovery /Court Collections within 72 hours"; "Seek and maintain full-time employment, schooling, or a full-time combination thereof if directed by the P.O."; "Participate and comply with any assessment program if directed by the P.O."; and "Work furlough / Public Service Program / volunteer work as directed by the P.O."; "Participate in treatment, therapy, counseling, or other course of conduct as suggested by validated assessment tests"; "Submit to any chemical test of blood, breath, or urine to determine blood alcohol content . . ."; "Attend and successfully complete counseling program(s)" – specified as "Anger Mgmt." and "Sex Offender"; "Undergo periodic polygraph examinations at the direction of the P.O. . . ." Appellant was explicitly required to "Participate in Global Positioning System (GPS) monitoring . . . if directed by a P.O." (4 CT 1010-1012.)

A few months later, on April 9, 2020, the San Diego District Attorney and defense counsel executed a stipulation amending

and correcting appellant's custody credits. The stipulation noted that appellant had been sentenced under section 1170 to five years imprisonment, "with a split sentence of 44 months in custody of the Sheriff's Department and 16 months of mandatory supervision." The prosecution and defense counsel agreed that 478 days of custody time was to be added for time on "Sheriffs CPAC electronic monitoring," plus 478 days of section 4019 good-behavior credits totaling 956 days; that total was to be added to the 3 days credits awarded at the time appellant was sentenced. The stipulation recognized that appellant had served 121 days of custody to "today's date, April 7, 2020," from his sentencing on December 10, 2019, which totaled 124 days as of that date. It was further stipulated that appellant was entitled to "another 124 days of § 4019 good behavior credits for a total of 248 days." Under the stipulation, those 248 days were to be added to the 956 days, for "a total of 1,204 custody days ordered to be credited to Mr. Richard Fischer's sentence as of April 7, 2020." The stipulation was signed by Gretchen C. von Helms as attorney for appellant, and Lisa B. Fox Deputy District Attorney representing the People. It was so ordered by Presiding Judge Lorna A. Alksne, "with approval of Judge D. Goldstein." (4 CT 1016-1017.)

However, likely because of disruption caused by the COVID pandemic, the court's action was not reflected in its minute orders for nearly a month. The ex parte minute order for June 18, 2020 stated as follows:

> "The Court is in receipt of Stipulation and Order to Amend Custody Credits for Richard Fischer filed May 15, 2020.

> "The Court amends pre-sentence custody credits imposed as follows:
>
> 602 Actual days
> 602 PC4019 credits [2/2]
> 1,204 Total days custody credits
>
> "The Court finds that the defendant is entitled to receive the credits stated above and amends the sentence imposed on December 10, 2019, nunc pro tunc to that date. The Abstract of Judgment of that sentence, which was prepared on January 16, 2020, is also corrected by virtue of this minute order to reflect the above credits." (5 CT 1285.)

By then, appellant had already been released from County Jail – on the date the stipulated order was executed, May 15, 2020. (4 CT 1028; 4 RT 437.)

Nevertheless, a few weeks later, on July 22, 2020, the prosecution filed a motion seeking to withdraw their stipulation, vacate the court's May 15 order and have appellant remanded into custody. (4 CT 1018-1168.) The People argued they had made a mistake in entering into the stipulation – that appellant was not really entitled to the presentence custody credits to which they stipulated. The prosecution asserted it had entered into the stipulation in the mistaken belief that appellant had been "on presentencing home detention while supervised by the County Parole and Alternative Custody Unit (CPAC)." (4 CT 1019.) The People attributed their "mistake" to a "storm of events" which they blamed largely on the COVID-19 pandemic. (4 CT 1019.)

The prosecution maintained that due to the mistaken stipulation and the court's order, appellant had erroneously been released from county jail. The People calculated that absent the disputed credits, as of July 15, 2020 appellant owed 1019 days of custody (as opposed to mandatory supervision) which he should be returned to county jail to serve. (4 CT 1028-1029.)

Appellant filed a response to the People's motion on August 9, 2020 (4 CT 1171- 5 CT 1216), and a supplemental brief on September 15, 2020 (5 CT 1217-1224). The prosecution filed a rebuttal brief to the defense supplemental brief on September 18, 2020. (5 CT 1225-1228.) On September 24, 2021, the court ordered the stipulation set aside and appellant taken into custody: "The court hears arguments by all counsel. The court denies the GPS/CPAC credits. The defendant is ordered to report to central jail on 11/21/21 @ 8 – to serve 949 total days per 1170(h)(5)(a) to commence on 11/21/21/ as stated on the record." (5 CT 1294; see 4 RT 446-448.)

Appellant filed a timely notice of appeal from the "Order setting aside Stipulation for Custody Credits and Order to Surrender" on October 4, 2021. (5 CT 1237.)

STATEMENT OF FACTS

The facts of the offenses to which appellant pleaded guilty are not pertinent to whether the trial court had jurisdiction to issue its post-judgment order. Appellant notes that although it is common in such circumstances to rely on the facts set out in the probation report, here that is inappropriate. As observed in appellant's response to the report, the information relied on by the probation officer was taken solely from the District Attorney's file, and included instances of conduct to which appellant had *not* pleaded guilty and had not even been alleged in the amended complaint; in particular appellant had not been charged with any forcible sexual conduct or oral copulation. (4 CT 1006-1007.)

For purposes of this appeal, it is sufficient to state that the unlawful conduct that was the basis for appellant's convictions consisted of his inappropriately hugging or embracing women that he interacted with while on-duty as a San Diego Deputy Sheriff. (3 CT 631, 697.)

STATEMENT OF APPEALABILITY

The October 4, 2021 order is appealable as an "order made after judgment, affecting the substantial rights of the party." (§1237, subd. (b).)

ARGUMENT

I

THE COURT HAD NO JURISDICTION TO OVERTURN ITS ORDER CORRECTING APPELLANT'S CREDITS, WHICH HAD BECOME FINAL AND WAS NEITHER CLERICAL ERROR NOR UNAUTHORIZIED BY LAW

A. *California Credits for Pretrial Home Detention*

Subdivision (a) of section 2900.5 provides that for both felony and misdemeanor convictions, "all days of custody of the defendant, including ... days served in home detention pursuant to Section 1203.016 or Section 1203.018, shall be credited upon his or her term of imprisonment[.]" In appellant's case, the focus is on section 1203.018, which applies to pretrial detention; its relevant provisions were well summarized in *People v. Raygoza* (2016) 2 Cal.App.5th 593, as follows:

> "Section 1203.018 authorizes 'the board of supervisors of any county' to 'offer a program under which inmates being held in lieu of bail in a county jail or other county correctional facility may participate in an electronic monitoring program' under specified conditions. (§ 1203.018, subd. (b).) The statute leaves the exact terms of the electronic monitoring program to the discretion of county authorities, but requires the programs created to obtain the participant's assent in writing to the following conditions: (1) the participant 'shall remain within the interior premises of his or her residence during the hours designated by the correctional administrator'; (2) the participant 'shall admit any person or agent designated by the correctional administrator into his or her residence at any time for purposes of verifying the participant's compliance

> with the conditions of his or her detention'; (3) the electronic monitoring 'may include global positioning system devices or other supervising devices for the purpose of helping to verify the participant's compliance with the rules and regulations of the electronic monitoring program' which may be used to record 'conversation[s] between the participant and the person supervising the participant ... for the purposes of voice identification'; and (4) the administrator in charge of the facility from which the participant has been released may 'immediately retake the person into custody' if the electronic monitoring device malfunctions, the participant fails to remain at home, the participant fails to pay the fees associated with the program, or the participant 'for any other reason no longer meets the established criteria.' (*Id.*, subd. (d)(1)-(4).) The correctional administrator is empowered to 'permit electronic monitoring program participants to seek and retain employment in the community, attend psychological counseling sessions or educational or vocational training classes, or seek medical and dental assistance.' (*Id.* subd. (h).)" (2 Cal.App.5th at pp. 599.)

B. *The Court Lost Jurisdiction to Overturn its Post-Judgment Order When the Order Became Final and Res Judicata*

"Under the general common law rule, a trial court is deprived of jurisdiction to resentence a criminal defendant once execution of the sentence has commenced. [Citations.]" (*People v. Karaman* (1992) 4 Cal.4th 335, 344.) "This rule was established in order to provide litigants with some finality to legal proceedings." (*Id.* at p. 348; see *People v. Cortez* (2016) 3 Cal.App.5th 308, 313.) This "jurisdictional rule . . . pertains to the court's *fundamental* jurisdiction over the res of the action." "'A court lacks jurisdiction in a fundamental sense when it has no

authority at all over the subject matter or the parties, or when it lacks any power to hear or determine the case.'" (*Cortez*, *supra*, at p. 313, quoting *People v. Ford* (2015) 61 Cal.4th 282, 286.)

As to the court's June 18, 2020 order, the court retained the power to correct its earlier miscalculation of appellant's presentence credits even though his conviction had long been final. By virtue of section 1237.1, "the trial court retains jurisdiction after a notice of appeal has been filed to correct any error in the calculation of presentence custody credits upon the defendant's request for correction." (See *People v. Moore* (2003) 105 Cal.App.4th 94, 98.) The order was based on a stipulation signed off by both parties, but the People still could have appealed it as an order after judgment affecting their substantial rights. (§1238, subd. (a)(5)). They did not do so, and when the time to file a notice of appeal expired 30 days later on July 18 (see Cal. Rules of Ct, rule 8.853(a)), the order became final.[4] Undismayed, on July 22 the prosecution filed a motion repudiating their stipulation and seeking to vacate the now-final order. More than a year after that, on September 24, 2021, the court granted the prosecution's motion and ordered appellant returned to County Jail after a year of 18 months of freedom.

By that time, however, the court's jurisdiction over the matter had long since expired. "Generally a trial court lacks jurisdiction to resentence a criminal defendant after execution of

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[4] Section 1237 would not avail because it applies only "upon the *defendant's* request for correction." (Italics added.)

sentence has begun." (*People v. Turrin* (2009) 176 Cal.App.4th 1200, 1204, quoting *People v. Howard* (1997) 16 Cal4th 1081, 1089.) And once jurisdiction has expired, a court may not revise an earlier order, even to conform with the court's actual, original intention. (*In re Daoud* (1976) 16 Cal.3d 879, 882; *In re Candelario* (1970) 3 Cal.3d 702, 705.) And "a court cannot revive lapsed jurisdiction by the simple expedient of issuing an order nunc pro tunc." (*In re Daoud*, *supra*, at p. 882.)

Here, the People assented to the trial court's order, indeed, they solicited it through their joint stipulation with the defense. The prosecution allowed the order to become final by failing to file a notice of appeal within the prescribed period. It follows that their subsequent motion filed *after* the order had become final was too late because the court's jurisdiction had lapsed and should have been denied by the trial court on jurisdictional grounds. (*People v. Burke* (1956) 47 Cal.2d 45, 53-54, disapproved on another point in *People v. Sidener* (1962) 58 Cal.2d 645; accord *In re Rogers* (1980) 28 Cal.3d 429, 437 ["The state had an opportunity to appeal the determination of the trial court and failed to do so"]; see also *People v. Braeseke* (1979) 25 Cal.3d 691, 700; *People v. Price* (1986) 184 Cal.App.3d 1405, 1412, fn. 8.)

In *Burke*, the trial court convicted defendant of possession of marijuana; during sentencing, the court struck a prior prison term enhancement that would have doubled the length of defendant's sentence. (47 Cal.2d at pp. 50-51.) The People did not exercise their right to appeal that ruling; but on *defendant's* appeal they attempted to argue that the statute he violated

precluded the trial court from striking defendant's prior prison term enhancement. (*Id.* at p. 51.) The *Burke* court declined to reach the merits of the district attorney's argument, finding that "[t]he failure of the People to appeal ... indicate[d] acquiescence in the order and the sentence which followed." (*Id.* at p. 54; see (*Jackson v. Superior Court* (2010) 189 Cal.App.4th 1051, 1067 ["The loss of jurisdiction for purposes of reconsideration of the ruling would occur when the order became final and binding, or when the People filed a notice of appeal from the order"].)

Here, as noted, the People did not merely acquiesce in the court's order, they sought it through stipulation. Then, by failing to appeal within the prescribed time, it became final; "the superior court's ruling is therefore binding upon the People . . . ." (*In re Crow* (1971) 4 Cal.3d 613, 622-623; accord, *In re Russell* (1974) 12 Cal.3d 229, 234-235 & fn. 4.) Importantly, even an *erroneous* final judgment or order will be given res judicata effect. (*Id.* at p. 437, fn. 6.) "'An erroneous judgment is as conclusive as a correct one.'" (*Weil v. Barthel* (1955) 45 Cal.2d 835, 839; *City of Bell Gardens v. County of Los Angeles* (1991) 231 Cal.App.3d 1563, 1570; *Sabek, Inc. v. Engelhard Corp.* (1998) 65 Cal.App.4th 992, 999.)

These judicata principles have the beneficial purpose of precluding a party "from again drawing [the matter] into controversy and subjecting the other party to further expense in its reexamination." (*In re Crow*, *supra*, at p. 623.) That concern certainly applies in appellant's case. The only issue in this appeal – the *only* reason appellant's case is before this court – is that the

trial court exceeded its jurisdiction by overturning its own earlier final order to which the People had assented.

C. *A Court Retains Jurisdiction to Correct an Order that Has Become Final Only If It Is Clerical Order or Unauthorized by Law*

The foregoing does not mean that in *all* circumstances a court is powerless to correct what it comes to see as an erroneous order, but those circumstances as narrowly limited. "It is not open to question that a court has the inherent power to correct clerical errors in its records so as to make these records reflect the true facts. . . . The court may correct such errors on its own motion or upon the application of the parties." (*In re Candelario*, *supra*, 3 Cal.3d at p. 705, citations omitted.) But as Chief Justice Wright further explained in *Candelario*,

> "Clerical error, however, is to be distinguished from judicial error which cannot be corrected by amendment. The distinction between clerical error and judicial error is 'whether the error was made in rendering the judgment, or in recording the judgment rendered.' [Citation.] Any attempt by a court, under the guise of correcting clerical error, to 'revise its deliberately exercised judicial discretion' is not permitted. (*In re Wimbs* (1966) 65 Cal.2d 490, 498, 55 Cal.Rptr. 222, 228, 421 P.2d 70, 76.)" (*Candelario*, *supra*, at p. 705, parallel citations omitted; *People v. Amaya* (2015) 239 Cal.App.4th 379, 385.)

As other courts have explained the distinction: "'Generally, a clerical error is one inadvertently made, while a judicial error is one made advertently in the exercise of judgment or discretion. [Citations.]'" (*People v. McGee* (1991) 232 Cal.App.3d 620, 624,

quoting *People v. Jack* (1989) 213 Cal.App.3d 913, 915.)

The bottom line is "judicial error (as well as an exercise of judicial discretion) in rendering judgment cannot be corrected by the trial court once jurisdiction has expired, unless the judgment is *void* on the face of the record." (*People v. Karaman* (1992) 4 Cal.4th 335, 345, fn. 11, original italics. To state the rule more fully:

> "[J]udicial error in the pronouncement of judgment . . . can only be corrected in two circumstances: (1) where the judgment as pronounced is not merely erroneous but void for lack of jurisdiction; and (2) where the modification of the judgment as pronounced is made before the judgment is entered in the minutes and before the defendant is placed under the restraint of his sentence." (*People v. Hartsell* (1973) 34 Cal.App.3d 8, 13, citations omitted; accord *People v. Jack*, *supra*, 213 Cal.App.3d at p. 916.)

In appellant's case, the People relied on the first of these exceptions, arguing the court should vacate its June 18, 2020 order because it (and the People's stipulation) was unlawful and void. (See 4 CT 1041-1043.) But although the court was persuaded, the People's argument was at odds with long-established legal principles tightly limiting the concept of a void or "unauthorized" sentence.

D. *The Limited Exception for Unauthorized Sentences or Orders*

An unauthorized sentence can be corrected "at any time." (*People v. Scott* (1994) 9 Cal.4th 331, 354-355.) But "unauthorized sentence" is not a catch-all category. *Scott* explained that "the 'unauthorized sentence' concept constitutes a

narrow exception," as applicable to that case, "to the general requirement that only those claims properly raised and preserved by the parties are reviewable on appeal." (*Id.* at p. 354.)

Case law closely adheres to the principle a sentence or order is only "unauthorized" when manifested as a pure question of law; these are orders that literally violate the law, nearly always as clearly established by statute. The seminal case is *Neal v. State* (1960) 55 Cal.2d 11, 15, disapproved on another point by *People v. Correa* (2012) 54 Cal.4th 331. Neal was convicted for throwing gasoline into the victims' bedroom, severely burning the husband and wife inside. Defendant argued that his convictions of two counts of attempted murder and attempted arson were invalid under section 654 by punishing him three times for a single act. He sought writ relief from what he claimed was an invalid sentence. The *Neal* court premised its analysis by first finding the relevant facts were undisputed – namely that defendant had been convicted of the three offenses based on his single act of throwing the gasoline. Accordingly, our Supreme Court concluded only a question of law was at issue – "[t]he applicability of a statute *to conceded facts*" – so, appellant was entitled to consideration of his claim on the merits. (*Id.* at pp. 17-18, italics added.)

The two cases cited by the *Scott* decision – *In re Ricky H.* (1981) 30 Cal.3d 176, 190-191 and *People v. Davis* (1981) 29 Cal.3d 814, 827 & fn. 5 further illustrate that an "unauthorized" sentence is one that is invalid as a matter of law. The *Ricki H.* decision addressed a court's commitment order that had

erroneously imposed on the juvenile a three-year middle term instead of the four-year upper term that was "automatically" required by statute. (30 Cal.3d at pp. 190-191.) In *Davis*, the trial court imposed a sentence of life without possibility of parole on defendant which our Supreme Court found unauthorized as a matter of law because defendant was a minor (16-years old) at the time of his offenses, explaining that "imposition of a sentence for which there is no statutory authority is jurisdictional error . . . subject to correction." (*Id.* at p. 827 & fn. 5.)

Case law has consistently treated the "unauthorized" concept as narrowly limited to allowing correction of legally void orders. (See, e.g., *People v. Martinez* (1998) 65 Cal.App.4th 1511, 1519 [court ordered imposition of criminal laboratory analysis fee of $100; statute limited fine to $50]; *People v. Miles* (1996) 43 Cal.App.4th 364, 367 [sentence unlawful under Three Strikes law]; *People v. Irvin* (1991) 230 Cal.App.3d 180, 189-193 [court failed to either impose or strike prior-prison-term enhancement as required by statute]; *People v. Massengale* (1970) 10 Cal.App.3d 689, 693 [multiple sentencing errors]; *People v. Orrante* (1962) 201 Cal.App.2d 553, 561 [court granted probation although prohibited by "clear and certain" statutory language].)

An important defining rule is that a sentencing order may be deemed "unauthorized" only if the error "is 'clear and correctable' *independent of any factual issues* presented by the record at sentencing." (*Ibid.*, italics added, quoting *People v. Welch* (1993) 5 Cal.4th 228, 235.) Stated in different words, "a sentence is generally 'unauthorized 'where it could not lawfully

be imposed *under any circumstance* in the particular case." (*Ibid.*, italics added.) As Justice Baxter's opinion in *Welch* explained, cases finding a sentence unauthorized "generally involve pure questions of law that can be resolved *without reference to the particular sentencing record* developed in the trial court." (*Id.* at p. 235, italics added.)

Thus, when the perceived "'[e]rror . . . is not correctable without referring to factual findings in the record or remanding for further proceedings,'" it is not correctable as "unauthorized." (*People v. Amaya*, *supra*, 239 Cal.App.4th at p. 386, quoting *In re Alexander A.* (2011) 192 Cal.App.4th 847, 859.) "[A]t least where no actual fraud has been perpetrated upon the court, a criminal court has no authority to vacate [an order] entered deliberately but upon an erroneous factual basis." (*Smith v. Superior Court* (1981) 115 Cal.App.3d 285, 287.) When a purported correction of the error "concerned the trial court's reevaluation of the factual basis for its earlier ruling," it instead addressed judicial error and therefore, "the trial court was without jurisdiction to entertain the prosecutor's motion to reconsider its earlier ruling." (*People v. McGee*, *supra*, 232 Cal.App.3d at pp. 625-626.) More specifically, a court may not "correct" an earlier sentencing order simply because it later learns a component of its sentence was based on erroneous information. (*In re Wimbs* (1966) 65 Cal.2d 490, 498 & fn. 6 [court's initial order the sentences run consecutively was based misunderstanding of the facts].)

E. *The Error, if any, Was not Clear and Correctable*

After the Distict Attorney's office received "bad press" concerning appellant's sentence, a new prosecutor (Deputy District Attorney Linh Lam) was assigned to research the correctness of the People's initial position on the credits issue as reflected in their stipulation. At the September 24, 2021 hearing on the People's motion to withdraw their stipulation and vacate the court's order, DDA Lam told the court she had concluded from her research that the pretrial credits awarded appellant by the court's June 18, 2020 order were unearned. Lam explained that the opposite conclusion reached by earlier prosecutors, "was not based upon all the facts that were known to me at the time that I did my research." The DDA clarified that she had reached her different conclusion because she had "the benefit of more information." (4 RT 408-410.)

The impetus for the People's reconsideration of their position was media criticism of the San Diego District Attorney's Office's handling of appellant's case. That was so is undisputed. At the hearing, defense counsel observed that the People changed their view following "bad press" received by the District Attorney's office concerning appellant's sentence: "It was all over the paper." "That's what happened, and everybody is running for cover." (4 RT 418-419.)

The prosecutor replied that the People's change of heart "was not influenced by politics." (4 RT 419.) While the judge accepted the prosecutor's assurance, the court nonetheless recognized "that being in the paper," and "the D.A.'s office was

taking heat, not for the stipulation, but for the overall sentence . . . it just doesn't look good on the D.A.'s office." (4 RT 420:19-28.) The judge told Lam he knew, "the reason why you were asked to do something is because the 13th floor of the D.A.'s office felt political pressure, [but] you can still be objective. . . . So the office says, 'man, we're looking bad. Let's send the assistant chief of appellate on this one and do an objective finding,' right?" (4 RT 421:18-27.) DDA Lam did not dispute the accuracy of these statements by defense counsel and the judge; she acknowledged it was her assigned job "to redo the research." (4 RT 422: 4-5.)

Defense counsel (Jan Ronis) pointed to evidence indicating that appellant, in actuality was on home detention. Counsel pointed out that "there is a signed home detention order." The court agreed: "There is." (4 RT 426:23-26.) Counsel observed that appellant "thought he was on home detention . . . ." Again, the judge agreed: "He did." (4 RT 426:26-28.)

Mr. Ronis then pointed to these specific facts:

> "He stayed home. And, in fact, at one point, he had to seek permission because of some family emergency to travel to the state of Michigan, which was granted to him. And so he was on both electronic monitoring and home detention, at least in his own mind, and, certainly, the sheriff's department was put on notice that he was because they had him sign the form. Now, they may have crossed things out. We didn't cross them out; they crossed them out. And so he didn't – he had the – and he was monitored. And if they didn't monitor adequately, then it's on them, not on him, and that's the problem." (4 RT 427:1-12.)

Neither the prosecution nor the court disputed the accuracy of defense counsel's summary of those pertinent facts. As shown by their stipulation, the People believed appellant was on home detention – until they decided otherwise; appellant believed that the court had ordered him on home detention and that he was required to constrain his conduct accordingly. And he did so. But as it turned out there was (in the court's words), "a lot of sloppiness," in the court's specifying the exact terms of appellant's detention. (4 RT 428:17-21.)

Defense counsel explained (and the prosecutor did not dispute) that as a practical matter – that as actually administered – home detention varies greatly as to the extent a defendant is required to stay within their residence. Counsel explained:

> "[T]hey can visit their attorneys, things of that nature. Nobody is confined 24/7 to their home, and every case is different. When people don't work, they are confined to their home if that's one of the stipulations, but it's pretty loosely interpreted and pretty loosely monitored understandably because there's so many people on home detention, and deputies have other obligations . . . ." (4 RT 430:21-431:3.)

The judge did not question this was accurate. And he acknowledged it was "entirely possible" the court had made "an unclear order" (4 RT 431:7-16). The order might have been more clear as to its restrictions, the judge explained, "if I would have spent more time on the order . . . ." (4 RT 434:20-435:2.) Yet the court nonetheless concluded: "I don't believe the defendant was in

custody for the purpose of calculating credits. I just don't." (4 RT 435:14-16.)

Assuming – it is unnecessary here to decide – that the People's stipulation and the resulting court order were technically mistaken in describing appellant as having been on "home detention," this was not the species of sentencing error that was "clear and correctable" as required by *People v. Scott*, *supra*, 9 Ca1.4th at page 354. To drive home the observations just discussed, consider that the judge acknowledged the part of his order addressing appellant's home detention "was misinterpreted by everybody." (4 RT 445:26-28.) The judge further admitted: "it's my fault. I should have looked at the dockets." (4 RT 446:2-9.) That the judge did not "believe" appellant should be deemed to have been on home detention hard connotes "clear and correctable" error.[5]

[5] In their written motion, the People also argued that appellant did not meet the requirement the "in lieu of bail" requirement of section 1203.018, subdivisions (d) and (k) because he was not truly on "home detention." (4 CT 1036-1037.) Whether viewed as circular or redundant, the People did not reiterate that argument at the September 24, 2021 hearing and the court did not address it.

F. *The Court Did Not Over Turn Its Earlier Order on the Basis It Was Unauthorized "Independent of Any Factual Issues"; Instead, the Court Considered, Assessed and Weighed Facts, Exercising Its Discretion to Find that the Conditions of Appellant's Pretrial Custody Were Not Sufficiently Restrictive to Qualify as Home Detention*

The underlying claim asserted by the People was neatly summarized in the portion of their motion asserting (in its heading): "Electronic monitoring is *insufficiently restrictive* to qualify as 'custody' even with restrictions to stay away from multiple victims." (4 CT 1037, italics added, bold omitted.) This does not assert error as a matter of law. To begin with, sufficiency questions are generally addressed to the trial court's sound discretion. (See, e.g., *People v. Ramirez* (2021) 10 Cal.5th 983, 1032 [trial court exercises its discretion to determine sufficiency of foundational facts to support admissibility of evidence]; *People v. Flinner* (2020) 10 Cal.5th 686, 727 [same]; *People v. Powell* (2018) 6 Cal.5th 136, 145 [whether circumstances warranted severance of defendants reviewed for abuse of court's discretion]; *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903, 966 [whether commonality of interest is sufficient to support class certification reviewed for abuse of discretion].) And as more specifically applicable to the present case, home detention conditions appropriate to be imposed on a particular defendant are a matter for the court's exercise of discretion. (*People v. Reinertson* (1986) 178 Cal.App.3d 320, 325.)

Neither the People's argument nor the trial court's ruling

recognized the court could not overturn its order correcting appellant's credits unless it was an unauthorized sentence – defined as one whose invalidity presents a "pure question[] of law that can be resolved without reference to the particular sentencing record developed in the trial court." (*People v. Welch*, *supra*, 5 Cal.4th 228, 235; accord *Neal v. State*, *supra*, 55 Cal.2d 11, 17 [The applicability of a statute to conceded facts is a question of law"].)

Here, however, the prosecution, in its written motion unhesitatingly advanced in support of the order's invalidity matters that were purely factual, such as:

> "The probation officer noted two concerns related to the defendant's custody credits. First, it noted the Sheriff's Department incorrectly applied the custody credits including the GPS credits to the defendant and released him too early. Even applying the GPS credits, the probation officer determined that the defendant still owes 71 days (about 36 actual days and 35 PC4019 credits) on the custodial portion of his split sentence.
>
> "Second, the probation officer noted that she spoke with the CPAC office. CPAC reported that 'the offender being equipped with their GPS device was a condition of his release on bail not a result of house arrest in lieu of custodial detention/commitment.' The offender 'was not on house arrest as he had no restrictions imposed on him by CP AC. He was able to move about the community freely. The offender was equipped with their GPS device as only a means to monitor his movement in the community and for the protection of the victims.'" (4 CT 1028:22-1029:6.)

Similarly, at another point in their motion the prosecution advanced this evidence: "The CPAC records show the defendant was not confined to his home in any way." (4 CT 1039.)

Like the prosecutor, the trial court also failed to recognize it could only vacate its now final order if it presented a pure question law. Instead, the court too relied on what it viewed as decisive *facts*, which it weighed to conclude (in opposition to defense counsel's position) that the constraints its order had imposed on appellant were insufficient to qualify as "home detention." For example, the court reasoned:

> "I don't think I ordered your client to be in custody during those pretrial hearings. I gave him a lot of leeway, that he could move around. In fact, he was doing some investigative work for your firm, and that – that doesn't have the color of custody, right? It just doesn't, and I didn't order it." (4 RT 434:12-18.)

In so stating, of course, the court was considering, assessing and weighing facts.[6] And given the question before the court, that was unavoidable. In determining whether a defendant was "in custody" for "home detention" purposes, courts must consider the actual circumstances of the particular defendant. (See, e.g., *People v. Pottorff* (1996) 47 Cal.App.4th 1709, 1716-1717; *People v. Reinertson, supra*, 178 Cal.App.3d at p. 326.)

The court also recognized and considered, "the confusion that was involved with the sheriff's department and CPAC in the

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[6] Moreover, in doing so, the court may have proved too much. The judge's statement shows he was personally aware of appellant's absences from his home and inferentially must have okayed them.

order"; additionally, the judge acknowledged the part played in these events by "my medical situation," and assured counsel "I don't find any bad faith on behalf of the people or the defense." (4 RT 446:12-22.) But as previously set out, case law uniformly holds that a court may not overturn its earlier order as "unauthorized" by law based on assessing (or reassessing) the facts (See *People v. Fond* (1999) 71 C.A.4th 127, 133 [lesser sentence than that mandated by statute was not "unauthorized," where "the trial court relied on its view of the facts].)

II

THE TRIAL COURT'S ORDER RETURNING APPELLANT TO COUNTY JAIL AFTER HE HAD RELEASED MORE THAN A YEAR EARLIER AS HAVING SATISFIED HIS SENTENCE – CAUSED AS IT WAS BY ACKNOWLEDGED ERRORS BY THE PROSECUTION AND THE TRIAL COURT – WAS FUNDAMENTALLY UNJUST; THIS COURT SHOULD ORDER APPELLANT RELEASED FROM CUSTODY

In *People v. Tanner* (1979) 24 Cal.3d 514, the defendant was granted probation and ordered to serve one year in county jail after the trial court struck a gun use finding. (*Id.* at p. 518, fn. 1.) Our Supreme Court concluded the trial court had erred in striking the use finding and sending defendant to county jail rather than prison. However, the court determined it would be "unjust" to require the defendant to serve his sentence in prison

after he had complied with the conditions of his probation, including serving his county jail term. *Id.* at pp. 521-522.)

To be sure, subsequent decisions have read *Tanner* narrowly. In *People v. Statum* (2002) 28 Cal.4th 682, the Supreme Court observed that the Fifth Circuit Court of Appeals' decision cited by *Tanner* was later vacated. (*Id.* at p. 695.) *Statum* explained that subsequent California Court of Appeal decisions have "limited Tanner to circumstances in which (1) the defendant has successfully completed an unauthorized grant of probation; (2) the defendant has returned to a law-abiding and productive life; and (3) 'unusual circumstances' generate a 'unique element' of sympathy, such that returning the defendant to jail 'would be more than usually painful or "unfair."'" (*Statum*, *supra*, at pp. 696-697, fn. 5.) The court again questioned *Tanner* in *People v. Clancey* (2013) 56 Cal.4th 562. But in both *Clancey* and *Statum*, the Supreme Court found it unnecessary to determine "whether *Tanner* remains good law" (*Clancey*, at p. 586), because the defendant in each case could not satisfy the three-pronged *Tanner* test. (*Ibid.*; accord, *Statum*, at pp. 696-697 & fn. 5.)

The upshot is that in the 40 years since it decided *Tanner*, our Supreme Court has had clear opportunities to disavow that decision if it wanted to – most recently in *Clancy* and *Statum* – yet the court has refrained from doing so. Consequently, that decision remains binding on California courts. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) And unlike

many cases, appellant's circumstances readily satisfy *Tanner's* three-prong test.

As for the first criterion, it is undisputed that appellant successfully completed the county jail term to which he was sentenced; he was released based on the court's determination he had done just that. Appellant's situation also satisfies the second prong: there is no suggestion he had done other than "returned to a law-abiding and productive life." The third circumstance set out in *Statum*'s fifth footnote, that "unusual circumstances generate a unique element of sympathy, such that returning the defendant to jail would be more than usually painful or unfair" (internal quotation marks omitted) is somewhat amorphous, but appellant's situation satisfies it. As discussed earlier, appellant was released from the county jail in May of 2020. After a year-and-a-half of freedom, the court locked him up again. And this was not because of any fault on appellant's part. Instead, it occurred because the People made a stipulation they later came to regret after they got "bad press" – because, as the judge explained, "the 13th floor of the D.A.'s office felt political pressure . . . ." (4 RT 421.)

Additionally – and it must must be said this is much to his credit – Judge Goldstein took his share of responsibility. He acknowledged he should have "spent more time on the order" (4 RT 434) and that the result was "an unclear order" (4 RT 431), with "a lot of sloppiness" (4 RT 428), which then "was misinterpreted by everybody" (4 RT 445). To paraphrase from *People v. Lockridge* (1993) 12 Cal.App.4th 1752: "In other words,

[appellant] is peculiarly put upon by errors in the judicial system if we now send [him] back to prison." (*Id.* at p. 1760.) And as in *People v. Holt* (1985) 163 Cal.App.3d 727, "it would constitute cruel and unusual punishment to subject him to a second deprivation of liberty . . . ." (*Id.* at p. 734.)

Finally, although the situations are not identical, the court's reasoning in *People v. Holt* (1985) 163 Cal.App.3d 727 seems equally appt here:

> "It is one thing for the state to impose a mandatory prison term on a convict and require him or her to serve it. It is quite another thing to incarcerate a convict as a term of probation, allow the convict to successfully fulfill the condition of probation and return to the general population and then with no additional malfeasance on his or her part, remove him or her a second time from the general population to serve the relatively short balance of what should have been the proper sentence." (*Id.* at p. 734.)

Experience shows that the three requirements for relief under *Tanner*, as specified in *Statum* and reiterated in *Clancey* are, by design, difficult to meet. But appellant's is one the very rare cases that easily satisfies each. And it should not be forgotten that in consequence of mistakes by others, appellant has lost a year and a half of the custody time he would otherwise have served toward the date he can get to get out of jail for good and pick up the pieces of his life. Regardless of whether this court reverses the order that is the subject of this appeal, it should order appellant released forthwith.

CONCLUSION

The trial court's order of September 24, 2021 should be reversed. But any event the court should order appellant's immediate release from the San Diego County Jail.

Respectfully submitted,

By s/ Alan S. Yockelson

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Attorneys for Appellant Fischer

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.204(c), undersigned counsel certifies under penalty of perjury that the Appellant's Opening Brief, excluding indices and tables, consists of 7,776 words, as calculated by Microsoft Word.

Dated: February 17, 2022 *s/ Alan S. Yockelson*

Alan S. Yockelson, Esq.

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Case Name: *People v. Fischer*, Case No. D079585

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