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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ELIJAH DEMITRICE POUNCEY, Defendant and Appellant.	B230061 (Los Angeles County Super. Ct. No. BA369280)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gregory A. Dohi, Judge. Affirmed.

Alex Coolman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, and Shawn McGahey Webb, Deputy Attorney General, for Plaintiff and Respondent.

Elijah Demitrice Pouncey appeals from his conviction for possession of a firearm and possession of ammunition by a felon. (Pen. Code, §§ 12021, subd. (a)(1), 12316, subd. (b)(1).)[1] Pouncey contends the trial court abused its discretion when it declined to dismiss a prior conviction that qualifies as a strike. Pouncey also contends his trial counsel provided ineffective assistance by failing to advise him of a plea offer made by the prosecution. We affirm.

PROCEDURAL BACKGROUND

By information Pouncey was charged with shooting at an unoccupied vehicle (§ 247, subd. (b)(1); count 1), shooting at an uninhabited building or dwelling house (§ 247, subd. (b); count 2), possession of a firearm by a felon (§ 12021, subd. (a)(1); count 3), and possession of ammunition by a felon (§ 12316, subd. (b)(1); count 4). The information also alleged that Pouncey had suffered two prior strike convictions (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). Pouncey pleaded not guilty and denied the strike allegations.

The court granted Pouncey's motion for a bifurcated trial and denied his motion seeking acquittal. Pouncey waived his right to a jury trial on the priors.

A jury convicted Pouncey of possession of a firearm and possession of ammunition (counts 3 and 4), found him not guilty of shooting at an uninhabited building (count 2), and failed to reach a unanimous verdict on the charge of shooting at an unoccupied vehicle (count 1). The trial court found the strike allegations true. The court denied Pouncey's *Romero*[2] motion, ordered him to pay $510 in fines and fees, and sentenced him to state prison for a three-strike term of twenty-five years to life on count 3. The court imposed, and stayed, a twenty-five years to life term on count 4. Pouncey received 421 days of presentence custody credit, including 281 days of actual time and 140 days good time/work time.

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

[2] *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*).

FACTUAL BACKGROUND

Pouncey dated Cindy Palmer for about four years between 2004 and early 2009, and thereafter they remained friends. On March 18, 2010, Palmer and Pouncey spent most of the day together. Pouncey left Palmer's house on San Pedro Street by 5:00 p.m. He came back at about 8:00 p.m. Palmer was sitting on her porch with a neighbor when Pouncey returned. She went into her house as Pouncey walked up the driveway because she did not want "any problems." Pouncey spoke to Palmer through a locked safety/screen door, and asked her if she had seen his cell phone; she had not. Pouncey searched the ground around Palmer's car which was parked in the driveway, and opened the door to look inside. Palmer dialed the phone's number, but neither she nor Pouncey could hear his phone ring. Palmer asked Pouncey to leave.

Pouncey came towards the door and asked Palmer to come outside. She refused and asked him to leave again. Pouncey lit a cigarette, stepped off the porch and walked toward Palmer's car, reaching under his jacket with his right hand. He then extended his right arm at shoulder height, and his hand was clenched as though holding something pointed at Palmer's car. Palmer saw flashes and heard four shots. She ran to the back of the house to check on her daughter. As she returned to the front of the house she heard two more shots in the front yard. Palmer called 911, left the house and saw Pouncey walk south on San Pedro.

Los Angeles Police Department (LAPD) Officers Marin and Reyes were patrolling the area in an unmarked police vehicle when the shots were fired. Officer Marin drove south on San Pedro and saw Palmer waving from a porch. She directed the officers toward Pouncey, whom she said was "in the white car."[3] The officers drove south on San Pedro and, saw a man inside a white car parked at the curb. The man appeared "startled" when he saw the officers, and quickly drove west on 75th Street, then turned and headed north on San Pedro at a high rate of speed. The officers followed the man for several

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[3] Pouncey drove a white Oldsmobile Alero.

blocks while Officer Reyes broadcast information about the pursuit. Palmer was still on the phone with the 911 operator when Pouncey sped past her house followed by the unmarked police car. He turned east onto 74th Street and then south on Avalon. Officer Marin lost sight of Pouncey after he turned onto Avalon.

LAPD Officer Paz and his partner were in the area and heard the other officers' broadcast. Officer Paz saw the white Alero headed south on Avalon near Manchester at a high rate of speed, and turned to pursue the car. He followed the Alero south on Avalon and east on 87th Street. By the time Officer Paz caught up with the Alero, it had crashed into another vehicle on 87th Street and the driver was gone. Bystanders told the officers the driver had run south. A perimeter was set up and the driver was detained after a 20 minute search. In a field show-up, Palmer identified the driver as the man who had earlier fired a gun outside her house. Palmer also showed police bullet holes she had found in her car, and in a shed in front of her house. A .45 caliber shell casing and a spent bullet were recovered from Palmer's yard.

Police recovered a loaded .45 caliber semi-automatic handgun from the crashed white Alero. The gun was wedged between the floorboard and the frame rail of the driver's side door.

Firearms analysis established that the shell casing and spent bullet recovered from Palmer's yard were fired by the handgun recovered from the Alero. The parties stipulated that no latent fingerprints of value were found on the handgun, the spent casing, or the live rounds, and also stipulated that Pouncey was previously convicted of a felony.

Pouncey did not testify and presented no evidence in his defense.

DISCUSSION

1. Romero motion

Pouncey maintains the trial court abused its discretion when it denied his *Romero* motion because the court failed to accord "any significance at all to [Pouncey's] 'background, character, and prospects' aside from the record of his convictions." We conclude otherwise.

a. Legal standard

In *Romero*, the Supreme Court explained that, under section 1385, a trial court may strike or vacate an allegation or finding under the Three Strikes law that a defendant has previously suffered a serious and/or violent felony conviction. (*Romero*, *supra*, 13 Cal.4th at p. 504.) The court's exercise of its discretion to dismiss strikes in the furtherance of justice "'"requires consideration both of the constitutional rights of the defendant, and the interests of society represented by the People . . . ."'" (*Id*. at p. 530, italics omitted.)

In *People v. Williams* (1998) 17 Cal.4th 148 the Supreme Court articulated the standard for striking prior convictions: "[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, 'in furtherance of justice' pursuant to Penal Code section 1385(a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies. If it is striking or vacating an allegation or finding, it must set forth its reasons in an order entered on the minutes, and if it is reviewing the striking or vacating of such allegation or finding, it must pass on the reasons so set forth." (*Id*. at p. 161.)

"[T]he [T]hree [S]trikes law not only establishes a sentencing norm, it carefully circumscribes the trial court's power to depart from this norm and requires the court to explicitly justify its decision to do so. In doing so, the law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper. [¶] In light of this presumption, a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances." (*People v. Carmony* (2004) 33 Cal.4th 367, 378 (*Carmony*).) Therefore, "[b]ecause the circumstances must be 'extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of

the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack' [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the [T]hree [S]trikes scheme must be even more extraordinary." (*Ibid*.)

A trial court's decision to deny a *Romero* motion is reviewed for abuse of discretion. (*Carmony*, *supra*, 33 Cal.4th at pp. 374–376.) It is the defendant's burden as the party attacking the sentencing decision to show that it was arbitrary or irrational. Absent such a showing, we presume the trial court "'"acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside."'" (*Id*. at pp. 376–377.)

b. Pouncey's Romero motion

Pouncey challenges the trial court's exercise of discretion on two grounds. First, he argues that trial court failed to consider that his prior conviction for carjacking occurred 23 years before the crime at issue here and was committed when "he was scarcely an adult" and at a time when changes in his brain chemistry suggest he was "'susceptib[le] to negative influences and outside pressures, including peer pressure'" from his older accomplice. Second, he contends the court failed to consider the fact that he tried to accept a plea in this case but was forced to go to trial when the prosecution abruptly withdrew its offer. Neither aspect of Pouncey's argument has merit.

The record reflects that Pouncey has spent virtually his entire adult life incarcerated or on parole, probation or supervised release. In April 1987, about two weeks after his eighteenth birthday, Pouncey committed the crimes of kidnapping, assault with a deadly weapon, joy riding, and one of the robbery strikes at issue in this case. The victim in that case was sitting in his vehicle with the engine idling. Pouncey and an accomplice got into the backseat. Pouncey pointed a sawed-off shotgun at the victim, demanded the vehicle and he and his accomplice drove off after the victim got out. When Pouncey saw the victim watching them, he leaned out of the window, pointed the shotgun at the victim and fired. Pouncey pleaded guilty to robbery and admitted using a

firearm in the commission of that offense and to possession of a deadly weapon. He was sentenced to four years in state prison, but housed by the California Youth Authority.

In early May 1990, while on parole from the robbery conviction, Pouncey was convicted of obstruction/resisting arrest and fighting in a public place. He was sentenced to six days in jail and two years probation.

In mid-October 1990, while still on parole, Pouncey was charged with conspiracy to commit murder and conspiracy to commit assault, both for the benefit of a criminal street gang. He was also charged with receiving stolen property. Police reports indicate that Pouncey and two accomplices were arrested after a traffic stop led to the recovery of a loaded stolen firearm. Pouncey told the police officers he was a gang member and that he and his accomplices were headed to a rival gang's territory to conduct a drive-by shooting in retaliation for a shooting earlier that day. As a result of this incident, Pouncey's parole was revoked and he was ordered to finish his prison term for the robbery conviction. In addition, Pouncey pleaded guilty to a lesser charge of conspiring to commit assault and, in April 1991, was sentenced to two years in state prison. Pouncey was apparently released on parole again because, in April 1992, he was found in violation and ordered to complete his prison term.

In mid-December 1992, following his release from prison, Pouncey was charged with another robbery (the second strike at issue here), and kidnapping and evading an officer with reckless driving. He pleaded guilty to robbery and admitted using a firearm during the commission of the offense. He was sentenced to 14 years in state prison.

In mid-August 13, 1993, the federal government charged Pouncey with distribution of cocaine. He was convicted and sentenced to federal prison for 151 months. His 14-year state robbery sentence was served concurrently with the federal sentence. At some point before May 2008, Pouncey was placed on federal supervised release. Thereafter, he was arrested several times on various charges, including arson and attempted murder. In May 2008, Pouncey was charged with violating his supervised release. He pleaded guilty in early June 2008, and was sentenced to time served. In early November 2008, Pouncey was again charged with violating his supervised release. He

pleaded guilty and, in mid-January 2009, was sentenced to 14 months. Pouncey committed the instant offenses on March 18, 2010.

In support of the *Romero* motion, Pouncey's counsel argued below, as he does here, that his first strike was 23 years old, and raised a question as to whether Pouncey was the shooter in that case since the description also fit his accomplice. He also argued that, because he pleaded to his second strike, it was not clear whether Pouncey was "actually the perpetrator"; he could have pleaded to the charges to get a deal. Pouncey's attorney also argued that Pouncey's conduct since his parole in 2004 parole was not "bad" because his parole violations resulted from noncompliance or nonthreatening conduct.

Two people spoke on Pouncey's behalf, a friend and Pouncey's sister. Pouncey's friend told the court Pouncey was his daughter's godfather. After his release from prison, Pouncey helped the friend coach youth sports and helped with his handyman business. Pouncey had also volunteered to give the friend, who was ill, a kidney, and had taken good care of Palmer's children during his relationship with her. The friend said Pouncey needed help for his alcoholism. Pouncey's sister described Pouncey as her "heart" and said he had taken care of their mother after their father died, and helped with her son who had special needs. The sister and her mother relied on Pouncey.

After considering the parties' written and oral arguments and the evidence, the court ruled as follows:

"I'm going to deny the *Romero* motion. I do so reluctantly because we're talking about a great deal of time. Nevertheless, if I'm simply to consider, even if I were only to consider the circumstances around the charges to which the defendant was convicted, the firearms and ammunition charges, the evidence presented at trial was that the defendant led the police on a high-speed chase that resulted in a collision. So it's not just your average, as you describe it, passive possession charge. It's aggravating. [¶] Beyond that, the defendant's record is more extensive than just his strikes which were both robberies. One of which involved the threat of extreme violence. He also has the federal drug

conviction. . . . So it's not as though his strikes are the only things in his prior record. [¶] So in light of those factors, I reluctantly deny the motion to strike the prior."

We reject Pouncey's contention that the trial court failed to consider that critical changes may have been taking place in his brain when, at the age of 18, he committed his first strike. We also reject the assertion that the court failed to consider the possibility that Pouncey committed that crime at a time when he was susceptible to the influence of an older accomplice.

The fact that Pouncey began a life of crime when he was quite young does not take him outside the spirit of the Three Strikes Law. Juvenile adjudications may qualify as prior strikes. (§§ 667, subd. (d)(3), 1170.12, subd. (b)(3); *People v. Fowler* (1999) 72 Cal.App.4th 581, 584–587.) As for the issue of Pouncey's changing brain chemistry when he was 18 years old, no evidence was presented on this point and the issue was never raised below. The trial court can hardly be faulted for failing to consider facts or matters not presented to it in ruling on a *Romero* motion. In addition, no evidence was presented about the degree of influence Pouncey's accomplice may have exerted on him in committing that carjacking. Indeed, the record suggests that Pouncey may have taken the lead there: it was Pouncey who pointed a sawed-off shotgun at the victim and demanded the vehicle, and Pouncey who fired at the victim as he and his accomplice drove away.

The trial court clearly considered the fact that the first strike was remote and found its dismissal was not warranted here. Pouncey, who was at least 41 years old at the time of trial, has led a life of crime for virtually all his adult life. Pouncey's "unrelenting record of recidivism, even while on parole or probation from previous felony convictions" makes him precisely "the kind of revolving-door career criminal for whom

the Three Strikes law was devised." (*People v. Gaston* (1999) 74 Cal.App.4th 310, 320; see also *People v. Pearson* (2008) 165 Cal.App.4th 740, 749.)[4]

The record shows the trial court was aware of its discretion to dismiss the first strike, carefully reviewed Pouncey's criminal record and the current offense, and the parties' papers and arguments and concluded that Pouncey did not fall outside the spirit of the Three Strikes Law. No discretion was abused in reaching that decision.

2. Ineffective assistance of counsel

Pouncey contends his trial counsel was ineffective because he failed to timely advise Pouncey of the prosecution's offer of a 15 years four months sentence in exchange for a guilty plea, and to advise him that failure to accept that deal would virtually guarantee Pouncey a sentence of 25 years to life if convicted. This assertion proceeds from an inaccurate factual premise.

a. The prosecution's offer

Pouncey claims his trial attorney (Mr. Rico) failed to inform him that the district attorney was prepared to try to resolve this case for a plea deal of 15 years four months. We read the record differently.

On Thursday, December 2, 2010 the judge (Judge Ryan) conducting the pretrial hearing asked the prosecutor (Mr. Hulefeld) what he had "offer[ed] to settle the case?" The prosecutor responded, "17 years, 4 months." When asked if the defense had a counteroffer, Mr. Rico, stated, "There is. Eight years." After conferring with Pouncey, Mr. Rico corrected himself to state that the defense counteroffer was six years.

The prosecutor pointed out that Pouncey had received a 14-year sentence for his last conviction, served concurrently with a federal trafficking term. After clarifying that

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[4] Pouncey also challenges the court's exercise of discretion based on the fact that the trial court failed to consider that he purportedly tried to accept a plea in this case but was forced to go to trial when the prosecutor abruptly withdrew the offer. For the reasons we discuss below in rejecting the assertion that Pouncey was denied effective assistance of counsel, this argument also lacks merit.

appellant's first strike conviction was a carjacking in which he used a shotgun and that his second strike conviction involved an attempted kidnapping and robbery, Judge Ryan stated, "I don't think I'm going to make a different offer. I've made a note that [Pouncey's] counteroffer is six years. Truthfully, I think 17 years, 4 months is a gift." Pouncey's counsel noted that the allegations in the instant case were that Pouncey shot up a car without any intent to hurt anyone, to which the court responded, "[T]hank God for that. I think—well, I can only give you my best—and I also say that—I think that, if he's convicted, the People are going to be asking for a life top term." The prosecutor affirmed that would be the case. The prosecutor also noted, for the record, that he was preparing to transport an out-of-state witness and said that, "if we get to the point where we bring this person to Los Angeles to try this case, then absent something unusual happening, there isn't going to be any offers after that."

The court stated its understanding that the plea offer would be "off the table" at that point. The prosecutor said, "Yes," and the court reiterated, "It will not be available."

On the morning of Wednesday, December 8, 2010 in the master calendar courtroom, the prosecutor asked the court, Judge Espinoza, for priority in order to discuss the pending settlement offer before his witness got on a plane that afternoon. The following exchanged occurred:

"The Court: . . . Both sides have announced ready. Has anybody told him, though, that once this witness gets on the plane, the offer is off the table?

"Mr. Rico: No.

"Mr. Hulefeld: For the record, I did state that on the record last appearance.

"The Court: Can we have Pouncey out? But they didn't think she was getting on the plane until tomorrow.

"Mr. Rico: Right, and I relied on that.

"The Court: I know. He is looking at 35 to life. He's had lots of time to think about his situation. . . .

"Mr. Hulefeld: And just for the record, nothing's changed from my perspective. What happened was for reasons related to the witness—I was not there the past two days.

The travel arrangements were scheduled for today when I'd asked for them to be made tomorrow."

Pouncey was brought into the courtroom and further discussion regarding the prosecution's settlement offer took place:

"The Court: . . . I'm getting ready to send you out for trial right now. Your trial will start probably in about 45 minutes with jury selection. And I wanted to bring you out because I know a little bit about your case and a little bit about you. Do I have your attention?

"[Pouncey]: Yes.

"The Court: Okay. And I want to make sure you're not making a mistake here. You're facing 35 to life in this case, and the People's position is that if the case goes to trial and you're convicted, they're definitely asking for a life sentence. Apparently, the last time you received a state prison commitment it was for 14 years. Is that accurate?

"[Pouncey]: 1993, yes.

"The Court: Yeah. You got a 14-year state prison commitment. They're offering you 17 years on this case today, which is slightly higher than the last time you were in.

"Now, I don't know anything about whether you did this crime or not, and I'm not expressing an opinion as to whether you committed this crime or not because I have no way of knowing.

"I do know that if you're convicted, it's entirely possible that you'll get a life sentence based on your record and the charges. It's entirely possible. The only thing I wanted to tell you was their witness in this case is somewhere out of state, and in about 15 minutes she's—Hello?

"[Appellant]: Okay.

"The Court: I really need you to focus. . . .[¶] . . . [¶]

"Once I send you out and they put that witness on the plane, and that was supposed to happen tomorrow, but for whatever reason it's happening today,—

"[Pouncey]: Correct.

"The Court:—they're taking the 17-year offer off the table and you're going to be facing a life sentence. Do you understand that?

"[Pouncey]: Yes.

"The Court: Are you interested in this offer?

"[Pouncey]: Seventeen years?

"The Court: Yeah.

"[Pouncey]: No.

"The Court: Okay. [¶] . . . [¶] . . . Good luck is all I can say.

"All right. This matter is assigned—they're not willing to accept a counter-offer of eight to ten years. That's just not going to be something they'll accept.

"I'm very worried that you're playing a game of cat and mouse here hoping to get a better offer, and you couldn't be making a bigger mistake because they're pretty adamant that once you leave here, they're not going to offer you 17 years. They're going to go forward as a third-strike life case. And again, I don't know very much about the case, and I don't know whether you're going to be convicted, but if you are, with your record it's very likely a case that you can catch a life sentence on.

"So, I'm not trying to scare you. I'm not trying to threaten you. But I'm trying to let you know sort of the urgency of you making this decision.

"And I should note for the record that this case has been pending since April, and this offer's been on the table for—at least a couple of months?

"Mr. Hulefeld: More than that.

"The Court: More than that.

"So, you've had time to think about it. What you now are doing is deciding whether you want to risk the possibility that the witness they're waiting for is actually going to get on the plane and show up and lay you out. If she does, you know, then the rest will be history, as they say."

When Judge Espinoza finished his remarks, Mr. Rico complained that the one-day change to the witness's flight schedule had shortened the time frame for Pouncey to make a decision regarding the prosecution's settlement offer. He said the prosecutor had

represented to him that there would still be "room to negotiate," and he thought it was "unfortunate that [he] never had the chance really today to tell Mr. Pouncey that today, you know, in [¶] . . . [¶] 19 minutes he would have to make a decision. [¶] . . . [¶] That was never made clear to him."

Judge Espinoza responded: "My understanding is that Mr. Hulefeld wanted the witness to leave wherever she is tomorrow, but he was gone and the travel arrangements were made, and they were made for today. So, you know, it's just an unfortunate circumstance for you, but the fact of the matter is that this offer has been pending for a number of months and it's about to go away." The judge then asked Pouncey if he wanted to "go in the back and talk to [his] lawyer for a minute," and told Mr. Rico to "Go back and talk to him."

Apparently, in the intervening period, Pouncey made a counteroffer because, when the proceedings resumed, the court noted that the prosecutor had taken Pouncey's "counter-offer to the D.A.'s management and they rejected it." The court told Pouncey, "so I'm going to send you out for trial. As soon as the words leave m[y] mouth, those 17 years are off the table. You're not interested in those 17 years?

"[Pouncey]: No, sir."

The matter was sent to Judge Dohi's courtroom for trial. On the record after an in camera session with counsel, Judge Dohi again raised the prosecution's settlement offer of seventeen years four months with Pouncey. The judge confirmed that Mr. Rico had informed Pouncey that his exposure was "in excess of 35 years to life "if he was convicted of multiple counts. By that time, Pouncey's counteroffer had risen to 12 years.

The following exchange occurred:

"The Court: Did you talk to your client about the possibility of—is it 15 years, four months, if he agrees to that, that's something Mr. Hulefeld could take to his supervisor to see if he can get authorization for that?

"Mr. Rico: Well, we did not discuss that exact number because Mr. Pouncey just didn't seem to want to make any sort of counter—[¶] . . . [¶] at all short of—aside from

the 12 years that were earlier offered. But I guess I'll make that clear to him right now. 15 years, four months is something that's been discussed as possible for you.

"[Pouncey]: Mm-hmm.

"Mr. Rico: If you wanted to—if you told the Court and you told Mr. Hulefeld now that you would take that, he could go to his boss and see if he can get approval for 15/4.

"[Appellant]: I understand, sir.

"The Court: Okay. And I take it Mr. Pouncey is not interested in 15/4 even though he is interested in 12; is that fair to say?

"Mr. Rico [to Pouncey]: Is that right?

"The Court: You would not—are you willing—

"Mr. Rico: Would you be willing to make a 15-year-four-month counteroffer?

"[Pouncey]: Ten years.

"The Court: Beg your pardon? Now we're going—

"Mr. Rico: Mr. Pouncey just made a counteroffer of ten years.

"The Court: I'm afraid—I take it that's a nonstarter, Mr. Hulefeld.

"Mr. Hulefeld: Yes, your Honor, it is."

At that point, Pouncey spoke directly to the judge about his prior convictions. The judge explained that the Three Strikes Law applied even though the priors occurred before 1994 and reiterated that the minimum sentence Pouncey faced on any single count was thirty-five years to life. Pouncey's counsel confirmed that he had given Pouncey the same information before, and had told Pouncey that his minimum exposure was a life sentence. Mr. Rico asked Pouncey again whether he wanted to make a 15/4 counteroffer.[5] Pouncey did not respond on the record. Mr. Rico conferred briefly with

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[5] The reporter's transcript reflects that Pouncey was asked if he wanted to make a "five-four counter." Under the circumstances, we assume this is a typographical error.

Pouncey and then asked whether Pouncey could have the benefit of the lunch hour to make a decision.

"The Court: I wish we could but I'm afraid—

"Mr. Hulefeld: Well, your honor, it's difficult for us. I'm not trying to—I understand this is an important decision for Mr. Pouncey.

"[Pouncey]: Very, very important sir.

"Mr. Hulefeld: And I appreciate that. However, this is an offer that's been pending, basically, for the life of this case. [¶] . . . [¶] And I'm speaking of 17 years, four months at this point. [¶] . . . [¶]

"[Pouncey]: "It's been that way since June the 29th."

The court reiterated that "something close to this has been on the table for a very long time. We really do need to know sooner rather than later." The judge gave Pouncey a few more minutes to make a decision while he discussed evidentiary issues with counsel. At noon, Judge Dohi told Pouncey the matter would proceed to trial if he did not make a decision. Pouncey did not respond. The prosecutor withdrew the offer.

After the lunch recess, Mr. Rico informed the court that Pouncey was willing to take 15 years. The court responded that it was too late, and any offer had expired at noon. Mr. Hulefeld clarified that the People had never made an offer of 15 years, four months. "It was always 17 years, four months. I said before lunch and before the witness was en route, if he would represent that he would take that, that I would ask my boss. But even then, there's no guarantees." The court agreed with Mr. Hulefeld's representation and brought the prospective jurors into the courtroom.

On the afternoon of the next day, December 9, 2010, Mr. Rico asked to make a record regarding the prosecution's withdrawn offer. He stated that he had been under the assumption that there would be "some cushion" for further negotiations before the prosecution's out-of-state witness traveled to California. He also said that his client appeared "very slow" and "doesn't seem to get it as immediately as the system would require him to" but was willing to accept responsibility. Mr. Rico asked the court to consider an open plea to the prosecution's former offer.

The prosecutor responded that the 17 year four month offer had been pending for a very long time and that Pouncey had an equally long time to consider it. He also noted that Pouncey was no stranger to the criminal justice system and had served a lengthy prison term that was itself the result of a negotiated disposition. The prosecutor repeated that the plea offer had been contingent on a pretrial acceptance and opined that it was unlikely a disposition could have been reached even if the out-of-state witness had arrived a day later as originally planned given Pouncey's history of unrealistic counteroffers.

Judge Dohi agreed that the prosecution had clearly communicated the offer had an expiration date (although it had been stretched out for an hour or so longer), and that the deadline had come and gone. Mr. Rico informed the court that he had "had numerous discussions with Mr. Pouncey trying to—encourage[e] him to make a realistic counteroffer to the People which he never seemed to want to do up until we really got to the 11th hour and things were too late." Pouncey then spoke directly to the court, stating that although the offer may have been on the table since June 29, 2010, it "never went down" despite Mr. Rico telling him he may be able to "get less" and "let's wait and see."

b. Legal framework

A criminal defendant has a right to the effective assistance of counsel. (U.S. Const., 6th Amend.; Cal. Const., art I, § 15.) To demonstrate constitutionally ineffective assistance of counsel, a defendant must prove two things. First, the defendant must show that counsel's performance was unreasonable when measured by prevailing professional norms. Second, the defendant must show there is a reasonable probability that but for counsel's acts or omissions, the result of the proceeding would have been more favorable to the defense. (*Strickland v. Washington* (1984) 466 U.S. 668, 687–688 [104 S.Ct. 2052, 80 L.Ed.2d 674].)

In the context of alleged ineffective assistance during plea negotiations, "defense counsel must communicate accurately to a defendant the terms of any offer made by the prosecution, and inform the defendant of the consequences of rejecting it, including the maximum and minimum sentences which may be imposed in the event of a conviction."

(*In re Alvernaz* (1992) 2 Cal.4th 924, 937 (*Alvernaz*).) "To establish prejudice, a defendant must prove there is a reasonable probability that, but for counsel's deficient performance, the defendant would have accepted the proffered plea bargain and that in turn it would have been approved by the trial court." (*Ibid*.) And, given "the ease with which a defendant, after trial, may claim that he or she received inaccurate information from counsel concerning the consequences of rejecting an offered plea bargain," a court reviewing such a claim "should scrutinize closely whether a defendant has established a reasonable probability that, with effective representation, he or she would have accepted the proffered plea bargain." (*Id*. at p. 938.)

"In determining whether a defendant, with effective assistance, would have accepted the offer, pertinent factors to be considered include: whether counsel actually and accurately communicated the offer to the defendant; the advice, if any, given by counsel; the disparity between the terms of the proposed plea bargain and the probable consequences of proceeding to trial, as viewed at the time of the offer; and whether the defendant indicated he or she was amenable to negotiating a plea bargain. In this context, a defendant's self-serving statement—after trial, conviction, and sentence—that with competent advice he or she *would* have accepted a proffered plea bargain, is insufficient in and of itself to sustain the defendant's burden of proof as to prejudice, and must be corroborated independently by objective evidence." (*Alvernaz*, *supra*, 2 Cal.4th at p. 938.) A reviewing court need not consider counsel's performance before examining the prejudice suffered. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*Strickland*, *supra*, 466 U.S. at p. 697.) Defendant must prove that prejudice is a "'demonstrable reality,' not simply speculation." (*People v. Williams* (1988) 44 Cal.3d 883, 937.)

Pouncey has not made a sufficient showing with respect to prejudice for any aspect of his ineffective assistance claim. First, he makes no effort to establish a reasonable probability that a 15 year four month plea agreement would have been approved by the trial court. Given Judge Ryan's comment that an offer of 17 years four

months was, in his opinion, "a gift," it is possible the court might have rejected an offer for a shorter sentence. "[W]e may not simply presume . . . that the trial court automatically would have approved a plea bargain negotiated by the prosecutor and the defense." (*Alvernaz*, *supra*, 2 Cal.4th at p. 941, italics omitted.)

More to the point, however, Pouncey's assertion that Mr. Rico's performance was deficient because he failed timely to advise him of the prosecution's offer of a 15 year four month sentence, or to advise him of the consequences of not accepting the deal fails because the record makes it clear no such offer was ever made to Pouncey and that he was fully advised of the consequences he faced at trial.

As Mr. Hulefeld stated after Pouncey attempted belatedly to renew the negotiation regarding a "fifteen year" sentence, any offer had expired. Moreover, "[t]here never was a 15-year four-month offer. It was always 17 years, four months. I said before lunch and before the witness was en route, if he would represent that he would take that, I would ask my boss. But even then, there's no guarantees." Judge Dohi agreed that was "exactly what [Mr. Hulefeld] said."

Indeed, Pouncey himself acknowledged the prosecution's offer was always 17 years and four months, and the record discloses he repeatedly rejected that offer. Shortly before trial, the possibility of a negotiated term of 15 years four months was raised as a possible defense counteroffer. But that particular counteroffer was never made because Pouncey offered 10 years instead.

It is clear no plea offer of 15 years four months was ever extended to or made by Pouncey. The only offer was for 17 years four months and, by his own account, that offer remained available to Pouncey from June 29, 2010 until it was withdrawn on December 8, 2010. Since no 15 years four months offer was made, Mr. Rico necessarily did not fail to advise Pouncey of the consequences of refusing it.

It is equally clear that, apart from his self-serving representation to the contrary, there is no evidence Pouncey would have accepted a plea of 15 years four months, had that offer been made. The record discloses that, when asked if he would be willing to make a 15 years four months counter offer, Pouncey confirmed that he understood the

decision he was facing, and unequivocally rejected the hypothetical "offer" in favor of his own offer for "ten years."

To establish prejudice resulting from a rejected plea, Pouncey must prove there is a reasonable probability that, but for his counsel's deficient performance, he would have accepted the proffered plea bargain and the plea would have been approved by the trial court. (*Alvernaz, supra*, 2 Cal.4th at pp. 940–941.) "'"'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'"' [Citation.]" (*People v. Lucas* (1995) 12 Cal.4th 415, 436.) A "defendant's self-serving statement—after trial, conviction, and sentence—that with competent advice he or she *would* have accepted a proffered plea bargain, is insufficient in and of itself to sustain the defendant's burden of proof as to prejudice, and must be corroborated independently by objective evidence." (*Alvernaz, supra,* at p. 938.) Pouncey failed to establish a reasonable probability that a 15 years four months plea offer was made, let alone that he would have accepted such an offer.

Under *Alvernaz*, Pouncey's claim of ineffective assistance of counsel fails because there is no reasonable probability he would have accepted the prosecution's actual plea offer or the hypothetical 15-years offer but for his attorney's ineffective representation.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.