FELONY SENTENCING AFTER REALIGNMENT

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September 2012

New to This Edition

The previously posted version of this memo was dated August 2012. This September 2012 version includes technical, non-substantive changes and the following updates:

Page 11 – Expanded discussion of the court's ability to terminate mandatory supervision.

Page 13 – Revised discussion of concurrent and consecutive sentencing.

Page 29 – Discussion of *People v. Lynch*.

Page 32 – Expanded discussion of multi-county sentencing.

Page 44 – Discussion of *People v. Kennedy*.

Page 49 – Expanded discussion of "flash incarceration."

Page 51 – Revised discussion of the detention of the defendant.

Page 55 – Application of Marcy's Law to section 1203.2.

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The Criminal Justice Realignment Act of 2011 makes significant changes to the sentencing and supervision of persons convicted of felony offenses. The new legislation amends a broad array of statutes concerning where a defendant will serve his or her sentence and how a defendant is to be supervised on parole. There are a number of issues related to this legislation, some of which will only be resolved by further changes by the Legislature or interpretation by the courts. The following is a discussion of some of the sentencing issues related to realignment *as the statutes currently exist* after the enactment of cleanup legislation.

In enacting the realignment legislation, the Legislature declared: "Criminal justice policies that rely on building and operating more prisons to address community safety concerns are not sustainable, and will not result in improved public safety. California must reinvest its criminal justice resources to support community-based corrections programs and evidence-based practices that will achieve improved public safety returns on this state's substantial investment in its criminal justice system. Realigning low-level felony offenders who do not have prior convictions for serious, violent, or sex offenses to locally run community-based corrections programs, which are strengthened through community-based punishment, evidence-based practices, improved supervision strategies, and enhanced secured capacity, will improve public safety outcomes among adult felons and facilitate their reintegration back into society." (Pen.Code, § 17.5(a)(3)-(5).[*])

A. Felony Commitments

With respect to felony sentencing, it appears the intent of the realignment legislation is merely to change the place where sentences for certain crimes are to be served. The legislation has not changed the basic rules regarding probation eligibility. Courts retain the discretion to place people on probation, unless otherwise specifically prohibited, under the law that existed prior to the realignment legislation. There is no intent to change the basic rules regarding the structure of a felony sentence contained in sections 1170 and 1170.1. Furthermore, there is no change in the length of term or sentencing triad for any crime. Realignment comes into play when the court determines the defendant should not be granted probation, either at the initial sentencing or as a result of a probation violation.

For the purposes of sentencing, the realignment legislation divides felonies into three primary groups:

[*] Unless otherwise indicated, all references are to the Penal Code.

1) Defendants committed to county jail (§ 1170(h)(5))

Section 1170(h) provides the following defendants must be sentenced to county jail if probation is denied:

- Crimes where a penal statute specifies the defendant "shall be punished by imprisonment pursuant to subdivision (h) of Section 1170" without the designation of a particular term of punishment. In such circumstances, the crime is punished by 16 months, two, or three years in county jail. (§§ 18 and 1170(h)(1).) Crimes in this category include most of the "wobblers," where the crime may be punished either as a misdemeanor or a felony.

- Crimes where the statute now requires punishment in accordance with section 1170(h) with a designated triad or term. The length of the term is not limited to 16 months, two, or three years, but will be whatever triad or punishment is specified by the statute. (§ 1170(h)(2).) It appears the longest possible single count term for a jail commitment is a second or subsequent conviction of a violation of Water Code section 13387(d)(1), discharging specified substances knowing they will place a person "in imminent danger of death or serious bodily injury," which provides for a term of 10, 20 or 30 years.

See Appendix I for a list of crimes now sentenced under section 1170(h).

2) Felonies excluded from county jail

Notwithstanding that a crime usually is punished by commitment to the county jail, the following crimes and/or defendants, if denied probation, must be sentenced to state prison: (§ 1170(h)(3).)

- Where the defendant has a prior or current serious felony conviction under section 1192.7(c), a violent felony conviction under section 667.5(c), or an out-of-state felony conviction of a crime that would qualify as a serious or violent felony under California law; the exclusion does not include juvenile strikes;

- Where the defendant is required to register as a sex offender under section 290; or

- Where the defendant is convicted of a felony and is sentenced with an enhancement for aggravated theft under section 186.11.

3) Felonies specifying punishment in state prison and felonies without a designated housing

The Legislature left over 70 specific crimes where the sentence must be served in state prison. It will be incumbent on courts and counsel to verify the correct

punishment for all crimes sentenced after the effective date of the realignment legislation.

Notwithstanding the shifting of hundreds of crimes from state prison commitments to county jail sentences under section 1170(h), section 18 designates state prison as the "default" sentence: "Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a felony is punishable by imprisonment for 16 months, or two or three years in the state prison unless the offense is punishable pursuant to subdivision (h) of Section 1170." (§ 18(a).)

See Appendix I for a list of crimes that remain punishable in state prison.

4) Conflicts in the designation of punishment

a. Conflicts between specification of punishment and an exclusion

At times the designation of punishment for a particular offense under section 1170(h) appears to be in direct conflict with an exclusion. Sections 191.5(c)(2), vehicular manslaughter while intoxicated, and 243(d), battery with serious bodily injury, for example, are punishable under section 1170(h). The required level of injury makes these crimes serious felonies under section 1192.7(c)(8), thus excluded under section 1170(h)(3). The answer to this apparent conflict is provided by the language of the statute. Paragraphs (h)(1) and (2) start with the qualification that "except as provided in paragraph (3)," the punishment shall be in county jail. Likewise, paragraph (3) starts with "[n]otwithstanding paragraphs (1) and (2)," where the defendant has any exclusions, punishment must be in state prison. While it may be somewhat confusing to have a conflict between a designated sentence under section 1170(h) and a statutory exclusion, the plain language of the statute clearly provides that the exclusions in paragraph (3) control over any other designation of punishment.

b. Conflicts between specification of punishment for the base term and punishment for an enhancement

Punishment also is not clear when the base term specifies a term under section 1170(h), but an enhancement requires punishment in state prison. For example:

- The defendant is convicted of transportation of a controlled substance in violation of Health and Safety Code section 11352(a), punishable under section 1170(h), and an enhancement under Health and Safety Code section 11356.5(a)(1) because the crime involved PCP with a value in excess of $500,000. The enhancement provides for an additional "one year in *prison*." (Emphasis added.) In such cases, it is unclear where the sentence is to be served. Unresolved is whether the enhancement follows the base term, such that the defendant is punished under section 1170(h), or whether the enhancement changes the punishment for the base term to a state prison sentence.

- SB 1023, effective June 27, 2012, amended section 12022.1, which provides an enhancement of two years for a crime committed while on bail. Under the new version of the statute, the enhancement follows the base term, whether it is to state prison or county jail under section 1170(h). Furthermore, section 12022.1(e) provides that if the primary offense is punishable in state prison, the secondary offense must be punished in state prison.

- It is not clear whether it matters that the enhancement is a status enhancement added once at the end of the case, or a count-specific conduct enhancement.

This issue may be resolved by the application of the rule of statutory interpretation that a specific provision acts as an exception to a conflicting general provision. (*In re Williamson* (1954) 43 Cal.2d 651, 654; *People v. Artis* (1993) 20 Cal.App.4th 1024, 1026-1027.) The question is which is the more specific provision – is it the base term or the enhancement?

Also unresolved is whether it makes a difference that the conflict is between the punishment specified for the base term and an *exclusion* under section 1170(h)(3), as opposed to the conflict between the *designated punishment* for the base term and an enhancement.

B. Alternatives to Commitment to Jail or Prison

Section 1170(h)(4) specifically provides that "[n]othing in this subdivision shall be construed to prevent other dispositions authorized by law, including pretrial diversion, deferred entry of judgment, or an order granting probation pursuant to Section 1203.1."

C. No Parole Following Release From Jail Commitment

There is no formal state parole period following a defendant's release from a commitment under section 1170(h). Sections 3000, *et seq*., governing the requirement of parole, only require parole if a defendant has been committed to state prison. These sections were not changed to include commitments under section 1170(h); the omission was intentional.

Nothing in the realignment legislation, however, appears to restrict the application of county parole under sections 3074, *et seq*. County parole boards are charged with creating rules and procedures for the release on parole of "any prisoner who is confined in or committed to any county jail, work furlough facility, industrial farm, or industrial road camp, or in any city jail, work furlough facility, industrial farm or industrial road camp under a judgment of imprisonment or as a condition of probation for any criminal offense . . . ." (§ 3076(b).) The parole board is authorized to "release any prisoner on parole for a term not to exceed two years upon those

conditions and under those rules and regulations as may seem fit and proper for his or her rehabilitation, and should the prisoner so paroled violate any of the conditions of his or her parole or any of the rules and regulations governing his or her parole, he or she shall, upon order of the parole commission, be returned to the jail from which he or she was paroled and be confined therein for the unserved portion of his or her sentence." (§ 3081(b).) The statute further provides that for the purpose of computing the unserved portion of the person's sentence, "no credit shall be granted for the time between his or her release from jail on parole and his or her return to jail because of the revocation of his or her parole." (§ 3081(d).)

The use of county parole depends on an application from the inmate. Because of the potential two-year parole "tail," it is unlikely an inmate will request parole status if the term imposed by the court is relatively short. Inmates committed for longer terms, however, may find county parole an appealing alternative to custody.

Although there appears to be no conflict in the statutory provisions governing commitments under section 1170(h) and county parole, it is not clear whether the process is available when the court has imposed a structured mandatory supervision program under subsection (h)(5)(B). The question remains whether county parole boards can or should override the court's well-structured plans.

D. Imposition of Sentence Under section 1170(h)(5)

The realignment legislation provides a limited alternative to parole by way of supervision by the probation department for a portion of the county jail term imposed by the court. Section 1170(h)(5) provides:

> "(5) The court, when imposing a sentence pursuant to paragraph (1) or (2) of this subdivision, may commit the defendant to county jail as follows:
> (A) For a full term in custody as determined in accordance with the applicable sentencing law.
> (B) (i) For a term as determined in accordance with the applicable sentencing law, but suspend execution of a concluding portion of the term selected in the court's discretion, during which time the defendant shall be supervised by the county probation officer in accordance with the terms, conditions, and procedures generally applicable to persons placed on probation, for the remaining unserved portion of the sentence imposed by the court. The period of supervision shall be mandatory, and may not be earlier terminated except by court order. Any proceeding to revoke or modify mandatory supervision under this subparagraph shall be conducted pursuant to either subdivisions (a) and (b) of Section 1203.2 or Section 1203.3. During the period when the defendant is under such supervision, unless in actual custody related to the sentence imposed by the court, the defendant shall be entitled to only actual time credit against the term of imprisonment imposed by the court. Any time period which is suspended because a person has absconded shall not be credited toward the period of supervision.

(ii) The portion of a defendant's sentenced term during which time he or she is supervised by the county probation officer pursuant to this subparagraph shall be known as mandatory supervision."

Sentences imposed under section 1170(h)(5)(B), have been characterized as “split” or “blended” sentences because they have both custody and non-custody elements. The length and circumstances of the suspended term are within the court’s discretion; presumably the court could suspend all or only a portion of the sentence. There are many sentencing strategies available to the court, depending on the defendant’s circumstances, hopefully enlightened by a current risk/needs assessment done by the probation department. The following represent just a few of the options available to the court:

- The court could impose a term from the triad, suspend a concluding portion of the term and set conditions of supervision. Such an alternative may be appropriate when the time in custody will be relatively short such that the case plan developed at sentencing will be reasonably current when the defendant converts to mandatory supervision.

- The court could impose a term from the triad, suspend a concluding portion of the term, but reserve jurisdiction to set the conditions of supervision shortly before the defendant is released from custody. Such an alternative may be appropriate when the court realizes that supervision is necessary, but because of a lengthy custody period may want to have a new risk/needs assessment at the time the defendant is ready to be released. Such a strategy will account for the changing nature of defendant’s risk and will make the case plan more relevant to defendant’s actual circumstances at the time he is ready for release.

- The court could choose to impose a sentence under the provisions of section 1170(h)(5)(B), but reserve jurisdiction to set the actual time and conditions of release at a later time. Such a strategy might be appropriate where the court wants to give the defendant encouragement to complete various custody programs and do well in custody, then set relevant terms when the court determines release is appropriate.

- Where there is no risk/needs assessment available for the court at time of sentencing, the court could order as a condition of supervision that the defendant submit to the assessment and observe the conditions of treatment that probation establishes from the assessment. Such a process would be useful in determining whether the defendant needs a particular level or type of treatment program.

- The court could structure the sentence to place the defendant on mandatory supervision for the entire term.

- If the sheriff or probation department have extensive out of custody programs, the court could sentence the defendant entirely to custody on the assumption that when the jail determines the defendant is ready for participation in programs, the defendant could be released without the need of further court involvement. If the defendant violates any of the conditions of his release, he would be subject to immediate arrest and detention on the original sentence.

In exercising these options, the court must observe three important points:

- Unless the court sets all of the timing and circumstances of release at the original sentencing proceeding, the court should **expressly reserve jurisdiction** to make these decisions at a later time.

- If the court does reserve jurisdiction to adjust the circumstances of release, such authority undoubtedly does not include the right to change the length of the original sentence. Once made, that is a sentencing decision that cannot be changed unless the court has the authority to recall the sentence under authority similar to section 1170(d). (See discussion, *infra*.)

- Regardless of how the sentence is structured, once the original term runs out, including both custody and non-custody time and any appropriate custody credits, the defendant is free of any supervision.

The legislation specifies that the supervision period is mandatory. The court will have the discretion to impose either a straight commitment to jail for the computed term, or to impose a "split" sentence. Since the commitment under section 1170(h) generally is the equivalent of a prison sentence, the defendant need not agree to the terms and conditions of supervision in the same manner as a sentence involving a grant of probation.

The terms, conditions and procedures of supervision will be similar to the traditional grant of probation. Presumably the probation officer and the district attorney will have the ability to petition the court for revocation of the post-sentence supervision. Presumably the court, after hearing, could reinstate the defendant under supervision or order into execution all or a portion of the remaining sentence. The defendant will have all of the due process rights of a probationer regarding notice, hearing and right to counsel. In any event, the supervision period will end with the expiration of the term originally imposed by the court.

Section 1170(h)(5)(B) suggests the court may have the ability to terminate the supervision period prior to expiration of the imposed sentence: "The period of supervision shall be mandatory, and may not be earlier terminated except by court order." No specific guidance is given for the exercise of the court's discretion in this regard, but presumably it would be similar to the discretion exercised regarding a request to terminate probation under section 1203.3(a): "The court may at any time when the ends of justice will be subserved thereby, and when the good conduct and

reform of the person so held on probation shall warrant it, terminate the period of probation and discharge the person so held." Furthermore, section 1203.2(b)(1) specifies: "Upon its own motion or upon the petition of the supervised person, the probation or parole officer or the district attorney of the county in which the person is supervised, the court may modify, revoke, or terminate supervision of the person pursuant to this subdivision. . . ."

The court undoubtedly has the authority to set the terms and conditions of defendant's period of mandatory supervision. While the conditions likely will resemble traditional terms of probation, some care should be exercised in selecting terms and conditions that will impact treatment and workload of the probation officer. Terms and conditions should only be set following a proper risk/needs assessment. If the period of actual custody time is very short, the assessment prepared in connection with the original judgment and sentence may be sufficient. If it is anticipated the custody period will be lengthy, however, courts may well be advised to simply reserve jurisdiction to set the conditions of supervision shortly before the defendant's actual release date. In that way a current, relevant risk/needs assessment can be made so that a realistic and effective case plan can be developed.

1) Practical application

The application of section 1170(h)(5) may be illustrated by the following example:

On October 5, 2011, the defendant commits and is arrested for a second degree burglary (16 – 2 – 3). He is convicted of the burglary on November 15, 2011, and a prison prior under section 667.5(b) (+1) is found true. The defendant has 42 days of actual custody credit. If the court chooses to deny probation and impose the middle base term for the burglary, the sentence under section 1170(h)(5) would be:

Commitment to the county jail for the middle base term of 2 years, plus 1 year for the prison prior under section 667.5(b), for an aggregate term of 3 years. Defendant would be granted custody credit of 42 days of actual time, plus 42 days of conduct credit, for total pre-sentence credit of 84 days.

The court must next decide between two sentencing schemes:

A) The court could order the sentence served straight time, in which case the defendant will serve a 3-year term in county jail, less applicable actual time and conduct credits. At the end of the term, in this case a maximum of 18 total months in custody, the defendant will be released from custody with no supervision.

B) The court could suspend a concluding portion of the term imposed, such as the concluding 300 days of the sentence (or any other number of days within the court's discretion), and place the defendant under the supervision of the probation officer for that period. The net effect of such a sentence is that the defendant will do a county jail sentence of 3 years, less credit of 84 days for pre-sentence credit, less actual time and conduct credits for the remaining term up to the point where 300 days remain on

the sentence - an additional 355 days. The total actual time in custody will be 397 days. At that point he will be released for the remaining 300 days under mandatory supervision by the probation officer. At the end of the 300 days, the defendant will be free from all forms of supervision. The defendant will receive only actual time credit against the remaining 300 days as they are served. If there is a violation of the terms of supervision, the court would have the discretion to place the defendant back in custody for all or any remaining portion of the 300 days after deduction for any accrued actual time credits.

2) Sentencing script

Although the legislation does not require any particular language for the commitment of a person to county jail under section 1170(h)(5)(B), the court might use language similar to the following:

> *Probation is denied. The court has denied probation because [state reasons]. Accordingly, it is the judgment of the court that for violation of Penal Code section 459, burglary in the second degree, as charged in Count One, that the defendant be committed under the provisions of Penal Code section 1170(h)(5)(B) to the ____ County Jail for the middle term of two years. The court has selected the middle term because [state reasons]. The defendant having admitted that he suffered a prior prison term within the meaning of section 667.5(b), the court orders the defendant to serve an additional and consecutive term of one year, for an aggregate term of three years. The court hereby suspends the* ***concluding*** *300 days of said term, during which time the defendant shall be supervised by the probation department. The conditions of supervision shall include . . . . [The court may state conditions or* ***reserve jurisdiction*** *to determine whether and under what conditions mandatory supervision will be imposed later in defendant's term.]*

3) Concurrent and consecutive sentences

The mechanics of imposing a concurrent and consecutive sentence under section 1170(h)(5) will be substantially the same as traditional state prison sentences under sections 1170 and 1170.1. Under the realignment legislation, the structure of sentences under section 1170(h)(5) is exactly the same as it has been for years for state prison commitments – only the place where the sentence is served has changed. Once the aggregate term has been determined after taking into account concurrent or consecutive sentencing, the court must then determine how much of the aggregate term, if any, will be served on mandatory supervision.

a) Concurrent sentences

Concurrent sentences will be imposed in accordance with the provisions of section 1170. The court will select an appropriate base term for each count, together with any applicable count-specific conduct enhancements. Status

enhancements will be added once at the end of the sentence. If the sentence is a straight term under section 1170(h)(5)(A), the full term for each count will be ordered served concurrently with any other sentence being served. If the sentence is a split sentence under section 1170(h)(5)(B), the court will order the terms imposed for each count served concurrently with any other sentence being served. After the total amount of time to be served has been calculated, the court then must determine how much of the term will be served on mandatory supervision. If, for example, the defendant is convicted of second degree burglary (§ 459) and the unlawful driving or taking of a vehicle (Veh.C. § 10851), with a prior prison term, the court might pronounce a concurrent sentence under section 1170(h)(5)(B) as follows:

> *Probation is denied. For violation of Penal Code section 459, burglary in the second degree, as charged in Count 1, the court hereby sentences the defendant under the provisions of section 1170(h)(5)(B) to the middle term of 2 years. For violation of Vehicle Code section 10851, the unlawful driving or taking of a vehicle, as charged in Count 2, the court hereby sentences the defendant under the provisions of section 1170(h)(5)(B) to the middle term of 2 years, to be served concurrently with any other term being served The defendant having suffered a prior prison term within the meaning of section 667.5(b), an additional and consecutive term of 1 year is ordered, for an aggregate term of 3 years. The court herby suspends the concluding 4 months of said term and places the defendant on mandatory supervision for the stayed term under the following terms and conditions . . . .*

Under this sentence, the defendant will be serve *actual* custody time of 16 months, and mandatory supervision time of 4 months. The actual custody time is computed by taking the total months of the sentence (36 months), subtract the period of mandatory supervision (4 months), and then subtract the conduct credits under section 4019 (16 months), which leaves the actual time to be served (16 months).

The foregoing example involves custody terms of the same length. If the terms are of different lengths, the court still will be suspending a portion of the aggregate term for mandatory supervision if a split sentence is imposed. For example, if Count 1 has a two year term and Count 2 has a three year term, the court may wish to impose the sentence as follows:

> *Probation is denied. For violation of Penal Code section 459, burglary in the second degree, as charged in Count 1, the court hereby sentences the defendant under the provisions of section 1170(h)(5)(B) to the middle term of 2 years. For violation of Vehicle Code section 10851, the unlawful driving or taking of a vehicle, as charged in Count 2, the court hereby sentences the defendant under the provisions of section 1170(h)(5)(B) to the upper term of 3 years, to be served*

concurrently with any other term being served The defendant having suffered a prior prison term within the meaning of section 667.5(b), an additional and consecutive term of 1 year is ordered, for an aggregate term of 4 years. The court herby suspends the concluding 1 year of said term and places the defendant on mandatory supervision for the stayed term under the following terms and conditions . . . .

Under this sentence, the defendant will serve *actual* custody time of 18 months, and mandatory supervision time of 12 months.

If the sentence involves multiple cases from different jurisdictions, the court will need to enter an order prescribing how the sentence will be served. (See the discussion of multiple jurisdiction cases in Section H(14), *infra*.)

b) Consecutive sentences

The structure of a consecutive sentence will be governed by section 1170.1. The court will select the base term for each count, plus any applicable count-specific conduct enhancements. The count with the longest sentence will be the principal term; the remaining counts will be subordinate consecutive terms, usually discounted to one-third the middle base term and one-third of any conduct enhancements. Any status enhancements are added once at the end of the sentence. If the sentences are straight terms imposed under section 1170(h)(5)(A), the court will simply order the aggregate term into execution. If the sentences are split terms under section 1170(h)(5)(B), the court will order into execution the aggregate term, allocated between custody and mandatory supervision time. If, for example, the defendant is convicted of second degree burglary (§ 459) and the unlawful driving or taking of a vehicle (Veh.C. § 10851), with a prior prison term, the court might pronounce the sentence as follows:

Probation is denied. For violation of Penal Code section 459, burglary in the second degree, as charged in Count 1, the court hereby sentences the defendant under the provisions of section 1170(h)(5)(B) to the middle term of 2 years, which the court designates as the principal term. For violation of Vehicle Code section 10851, the court hereby sentences the defendant under the provisions of section 1170(h)(5)(B) to the subordinate and consecutive term of 8 months, which is one-third the middle term. The defendant having suffered a prior prison term within the meaning of section 667.5(b), an additional and consecutive term of 1 year is ordered, for an aggregate term of 3 years and 8 months. The court herby suspends the concluding 6 months of said term and places the defendant on mandatory supervision for the stayed term under the following terms and conditions . . . .

Under this sentence, the defendant will serve *actual* custody time of 19 months, and mandatory supervision time of 8 months.

If the sentence involves multiple cases from different jurisdictions, the court will need to enter an order prescribing how the sentence will be served. (See the discussion of multiple jurisdiction cases in Section H(14), *infra*.)

4) The early release

Either because of federal consent orders that set a jail's capacity, or because of housing management decisions, there are times when defendants will be released from actual jail custody prior to the time set by the court's sentence. Some releases will be without restriction. Some will be on electronic home detention under sections 1203.016 or 1203.017. Regardless of the circumstances, the release on electronic monitoring is "in lieu of confinement in the county jail," and thus satisfies the custody portion of court's sentence. (§§ 1203.016(a), and 1203.017(a).) While the sheriff or custodial administrator may set some conditions on the release, it is unlikely the conditions will be as stringent as the ones ordered by the court for mandatory supervision. It is also likely that supervision will be minimal or non-existent. The most effective way of addressing this problem is to include a contingency provision in the original sentence. Failure to anticipate this problem may allow the defendant to be released into the community without any real supervision until the home release portion of the custody part of the sentence has been served. If this problem is not addressed as part of the original sentence, it is unlikely that the court will have the jurisdiction to modify the timing of the mandatory supervision. A court may wish to include the following language in the original sentencing order:

If the defendant is released for any reason from actual jail custody prior to the custody period ordered by the court, the defendant is hereby directed to report to the probation officer by the close of the next business day following release from custody to commence service of any period of mandatory supervision ordered by the court. The court reserves jurisdiction to modify the terms and conditions of mandatory supervision upon the occurrence of the defendant's early release.

The ____ County Sheriff is ordered to report all early releases of inmates sentenced under section 1170(h), to the _____ County Probation Department and the _____ County Superior Court. The sheriff shall direct the inmate, in writing, to appear in the _____ County Superior Court in Department ___ at 8:30 a.m. on the first Monday following the defendant's release from actual custody.

Although the defendant will be out of custody sooner than desired, at least he or she will be required to immediately start the period of mandatory supervision.

Courts should use caution prior to uniformly including the acceleration clause in the split sentence. The importance of having such a clause will depend on the extent of

supervision if a defendant is released early from custody by the sheriff. Some counties use the probation department to supervision persons on electronic monitoring. The level of supervision in such circumstances may be more intensive than persons on normal probation. Probation departments can require treatment, search and seizure, and drug testing while on EMP. If that is the case, there would be a disadvantage in "accelerating" the supervision period – it would needlessly shorten the overall jurisdiction over the defendant. On the other hand, some counties have defendants supervised by the jail or sheriff's department when released early from custody. Such supervision may be minimal, calculated only to assure the defendant has not removed the electronic monitoring equipment. In that circumstance, for the reasons discussed above, the court may find it in the public interest to shorten the overall jurisdictional period, but improve the level of supervision over the defendant.

a. The court's authority to prevent electronic monitoring

The authority of the court to prevent placement of a particular defendant on electronic monitoring is governed by statute. Subdivision (e) of sections 1203.016 and 1203.017 specify: "The court may recommend or refer a person to the correctional administrator for consideration for placement in the home detention program. The recommendation or referral of the court shall be given great weight in the determination of acceptance or denial. At the time of sentencing or at any time that the court deems it necessary, the court may restrict or deny the defendant's participation in a home detention program." (See also *People v. Superior Court (Hubbard)*(1991) 230 Cal.App.3d 287, 298.)

b. Custody credits on EMP

There is some question regarding the defendant's eligibility for conduct credits while on electronic monitoring ordered by the correctional administrator. There is no appellate case addressing entitlement to credits under section 1203.017 if the defendant is put on electronic monitoring involuntarily as a result of jail overcrowding. However, section 1203.017(a), provides: "Notwithstanding any other provision of law, upon determination by the correctional administrator that conditions in a jail facility warrant the necessity of releasing sentenced misdemeanor inmates prior to them serving the full amount of a given sentence due to lack of jail space, the board of supervisors of any county may authorize the correctional administrator to offer a program under which inmates committed to a county jail or other county correctional facility or granted probation, or inmates participating in a work furlough program, may be required to participate in an involuntary home detention program, which shall include electronic monitoring, during their sentence in lieu of confinement in the county jail or other county correctional facility or program under the auspices of the probation officer. Under this program, one day of participation shall be in lieu of one day of incarceration. *Participants in the program shall receive any sentence reduction credits that they would have received had they served their sentences in a county correctional facility.*" (Emphasis added.)

People v. Anaya (2007) 158 Cal.App.4th 608, denied conduct credits for persons placed on electronic monitoring under section 1203.016. The court observed that even if the defendant was serving a mandatory sentence, only actual time credit is allowed: "[Section 2900.5(f),] is not triggered unless a defendant both serves time *and* is sentenced under a statute requiring mandatory minimum jail time. Once the subdivision applies, it provides only that the time served qualifies as mandatory jail time, not any other time." (Id. at p. 614; emphasis original.) At the time *Anaya* was decided, however, placement on electronic monitoring under section 1203.016 was only *voluntary*; the realignment legislation added the provision allowing *involuntary* placement in the program. Although section 1203.016 does not contain a credit provision as found in section 1203.017(a), a defendant involuntarily placed on electronic monitoring under section 1203.016 may be able to assert a viable claim for a denial of equal protection if not granted the additional credit.

c. Early release authorization by the court

Section 4024.1 governs the procedure whereby the sheriff may obtain the permission of the court for the general authorization to release inmates when necessary to comply with restrictions on the capacity of the jail.

> "4024.1. (a) The sheriff, chief of police, or any other person responsible for a county or city jail may apply to the presiding judge of the superior court to receive general authorization for a period of 30 days to release inmates pursuant to the provisions of this section.
>
> (b) Whenever, after being authorized by a court pursuant to subdivision (a), the actual inmate count exceeds the actual bed capacity of a county or city jail, the sheriff, chief of police, or other person responsible for such county or city jail may accelerate the release, discharge, or expiration of sentence date of sentenced inmates up to a maximum of 30 days.
>
> (c) The total number of inmates released pursuant to this section shall not exceed a number necessary to balance the inmate count and actual bed capacity.
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> (d) Inmates closest to their normal release, discharge, or expiration of sentence date shall be given accelerated release priority.
>
> (e) The number of days that release, discharge, or expiration of sentence is accelerated shall in no case exceed 10 percent of the particular inmate's original sentence, prior to the application thereto of any other credits or benefits authorized by law."

SB 1023, effective June 27, 2012, increased the early release provisions in subdivision (b) from a maximum of five days to a maximum of 30 days. While these procedures do provide some guidance for the early release of inmates, it is likely they would not prevent the sheriff from going beyond the limits of section 4024.1 when necessary to meet a federal cap on jail capacity

5) Modification or termination of a sentence imposed under section 1170(h)

a. Straight sentence under section 1170(h)(5)(A)

Except for the possible recall of a sentence under section 1170(d) [discussed, *infra*], it does not appear the court has any authority to modify a straight sentence imposed under section 1170(h)(5)(A). Sections 1203.2 and 1203.3 give the court the authority to modify or revoke conditions of supervision. Section 1170(h)(5)(B) specifies: "Any proceeding to revoke or modify mandatory supervision under this subparagraph shall be conducted pursuant to either" sections 1203.2 or 1203.3. No similar provision is included in section 1170(h)(5)(A). Sections 1203.2(a) and 1203.3(a) specify their provisions apply to persons on some form of supervision -- probation, mandatory supervision, PRCS, or parole. No mention is made of straight sentences under section 1170(h)(5)(A).

b. Split sentence under section 1170(h)(5)(B)

SB 1023, effective June 27, 2012, added section 1170(h)(5)(B(i) to provide that all proceedings to modify, revoke or terminate mandatory supervision shall be in accordance with sections 1203.2(a) and (b), and 1203.3, the procedures traditionally used to modify, revoke or terminate probation. The uniform procedures under section 1203.2 will be used for all persons on regular probation, summary or informal probation, mandatory supervision, postrelease community supervision (PRCS), or revocation of parole supervision under section 3000.08 after July 1, 2013. (§ 1203.2(a).) Section 2(b) of SB 1023 provides: "By amending subparagraph (B) of paragraph (5) of subdivision (h) of Section 1170, subdivision (f) of Section 3000.08, and subdivision (a) of Section 3455 of the Penal Code to apply to probation revocation procedures under Section 1203.2 of the Penal Code, it is the intent of the Legislature that these amendments simultaneously incorporate the procedural due process protections held to apply to probation revocation procedures under *Morrissey v. Brewer* (1972) 408 U.S. 471, and *People v. Vickers* (1972) 8 Cal.3d 451, and their progeny." (2011 Realignment Legislation, SB 1023, Sec. 2(b), effective June 27, 2012.)

In general, the traditional procedures and practices for modification or termination of probation will be fully applicable to persons on mandatory supervision and PRCS. California Rules of Court, Rule 4.540 was adopted to cover the procedure for modification and termination of PRCS. With the consolidation of all modification and termination procedures under section 1203.2, however, there would seem no necessity for the rule. Rule 4.541, governing the content of petitions to revoke or terminate supervision, may now be applicable to all petitions under section 1203.2. Although the rule currently is limited to persons on PRCS, it is likely the rule will be modified to apply to all petitions for modification and termination under the uniform procedures in section 1203.2.

Just as with violations of probation, the court will have a number of options regarding violations of mandatory supervision. Presumably the court could modify treatment conditions to more effectively address the defendant's problems. The court could impose a disciplinary term in jail and reinstate on the same or modified conditions of mandatory supervision. The court could terminate supervision completely and impose any unserved time from the original sentence. As a matter of sentencing strategy, however, the court and the parties must understand there is no legal basis for extending the original sentence. The amount of custody time, therefore, is finite -- once it is gone, the whole sentence is completed and the defendant is released from any form of supervision.

6) Tolling of supervision period

Originally, section 1170(h) did not contain a tolling provision if the defendant absconded or violated any condition of mandatory supervision. Section 1170(h)(5)(B)(i), amended by SB 1023, effective June 27, 2012, provides that "[*a*]*ny time period which is suspended because a person has absconded shall not be credited toward the period of supervision.*" (Emphasis original.) Furthermore, section 1203.2(a), now applicable to mandatory supervision, provides that the "revocation [of mandatory supervision or PRCS], summary or otherwise, shall serve to toll the running of the *period of supervision.*" (Emphasis original.)

7) Transfer of supervision under section 1203.9

SB 1023, effective June 27, 2012, has amended section 1203.9 to allow for the transfer of mandatory supervision to the county of defendant's residence. The statute does not address the service of any sentence. California Rules of Court, Rule 4.530, governs the procedure for the transfer. Rule 4.530(g)(7) specifies that "[a]ny jail sentence imposed as a condition of probation prior to transfer must be served in the transferring county unless otherwise authorized by law." Presumably the rule will be amended to provide a similar provision for custody time ordered under section 1170(h)(5).

E. The Misdemeanor Sentence

It is common for defendants to have misdemeanor charges pending along with a felony. In many circumstances these crimes become "throw away" charges during plea negotiations over the felony. If misdemeanors survive the settlement of the case, and the defendant is sentenced to prison, they usually are ordered served in county jail concurrently with the felony state prison sentence. It is not clear what the court can or should do with misdemeanors when the defendant is sentenced under section 1170(h). Presumably the misdemeanor term can be imposed and the court would have the discretion to order the term served concurrently with or consecutively to the felony. If sentences under section 1170(h) are treated like prison terms, misdemeanor sentences should be ordered served separately from the felony. Whether the misdemeanor is part of the 1170(h) sentence, or is ordered served separately, it is

likely a distinction without much difference to the defendant. The prospect of incorporating misdemeanor dispositions into the settlement of the case, however, may give the court and counsel additional avenues to resolve issues of custody time, treatment, and mandatory supervision.

F. Effective Date of Section 1170(h)

Section 1170(h)(6) specifies the subdivision will be effective for all persons *sentenced* on or after October 1, 2011. This effective date should not be confused with the effective date of changes made to the custody credit rules under section 4019, which are applicable only to *crimes committed* on or after October 1, 2011.

People v. Cruz (2012) 207 Cal.App.4th 664, holds a defendant who is sentenced prior to October 1, 2011, but whose conviction is not final as of that date, is not entitled to the application of the realignment legislation. The court stressed that the realignment legislation contained an express savings clause that reflected the intent of the Legislature to make the new law applicable only to defendants sentenced on or after October 1, 2011. *Cruz* also determined the defendant was not entitled to be sentenced under the new law because of equal protection considerations. Although the Attorney General generally conceded defendant was similarly situated to persons sentenced after the effective date, the court found there was no material difference in the way the defendant is treated. "In our view, the sentencing changes created by section 1170, subdivision (h) do not directly affect a defendant's fundamental interest in liberty. His or her statutorily prescribed sentence is no greater under the law as it existed prior to the Act's operative date than under the Act's provisions. [Citations omitted.] We do not believe he or she has a protectable interest in serving that sentence in county jail as opposed to state prison. [Citations omitted.] Similarly, he or she has no fundamental interest in the possibility of a conditional early release via a hybrid sentence. [Citations omitted.]" (*Cruz*, at p. 677.) Finally the court found that limiting the application of the new law to persons sentenced after October 1, 2011, was reasonably related to the need for courts and counties to martial their resources to serve this new population, a purpose that would be frustrated with application to all inmates.

Although the changes to section 1170 will be applicable to crimes committed prior to their effective date, there likely will be no ex post facto concerns since the changes result in a potential *reduction* of the penal consequences to many crimes, assuming a county jail sentence is considered less punitive than a prison sentence. "[W]e will assume for our analysis that the [Realignment] Act has at least some mitigating effect on punishment." (*Cruz*, at p. 672, fn. 8.)

G. Multiple Counts, Mixed Punishment

Section 1170.1(a) provides in part: "Whenever a court imposes a term of imprisonment in the state prison, whether the term is a principal or subordinate term, the aggregate term shall be served in the state prison, regardless as to whether or not

one of the terms specifies imprisonment in the county jail pursuant to subdivision (h) of Section 1170." Accordingly, if a defendant is convicted of multiple counts and sentenced consecutively, if there is any count that requires a state prison sentence, all counts will be sentenced to prison, even though some of the crimes specify punishment under section 1170(h).

Section 1170.1(a) only makes reference to "principal or subordinate" terms, language applicable to consecutive sentences. Initially it was not clear where concurrent terms should be served. SB 1023, effective June 27, 2012, amended section 669(d) to provide: "*When a court imposes a concurrent term of imprisonment and imprisonment for one of the crimes is required to be served in the state prison, the term for all crimes shall be served in the state prison, even if the term for any other offense specifies imprisonment in a county jail pursuant to subdivision (h) of Section 1170.*" (Emphasis original.) The statutory change makes it clear that even if multiple counts are sentenced concurrently, as long as one count requires a state prison commitment, the sentences for all crimes are to be served in state prison.

H. Additional Issues

There are a number of residual issues regarding the scope and application of the realignment legislation. Some of these issues will require either further cleanup legislation or court interpretation.

1) Application of the exclusion provisions

As noted above, a defendant may not be sentenced to county jail under the realignment legislation if he has a prior or current California or out-of-state serious or violent felony conviction, is required to register as a sex offender under section 290, or is sentenced for a crime with an enhancement for aggravated theft under section 186.11. Because these exclusions are similar to the exclusions from the enhanced custody credit provisions of sections 2933 and 4019, a review of the custody credit case law may be helpful.

a. Sex Crime Registrants

The exclusion clearly will apply to all defendants who are being sentenced on a *current* crime where registration is either mandatory or required as a matter of discretion under section 290.006. Because the exclusion only applies if the defendant "is *required* to register as a sex offender," [emphasis added] the defendant would be entitled to be sentenced under section 1170(h) if the court exercised its discretion *not to* require registration under section 290.006.

There may be a question whether the exclusion will apply to persons who are required to register for a *prior* crime, and not because of the crime currently being sentenced. The plain language of the statute suggests that anyone required to register, whether or not for the current offense, will be excluded from sentencing under section 1170(h).

So, for example, a defendant sentenced for second degree burglary must be sentenced to state prison if he was previously convicted of a sex offense and is subject to the registration requirement. Given that the statutory wording is relatively clear and unambiguous, it seems likely that trial courts will be required to follow its dictates. (*California Fed. Saving & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349.)

b. Defendants with current or prior serious or violent felony convictions

Defendants who have a current or prior serious felony conviction under section 1192.7(c), a violent felony conviction under section 667.5(c), or an out-of-state conviction that would qualify as a serious or violent felony conviction under California law, must be sentenced to state prison.

c. Juvenile strikes

Because the statute limits the exclusion to defendants who have current or prior serious or violent felony "convictions," the restriction itself will not apply to defendants having only juvenile "adjudications" that will qualify as strikes under the Three Strikes law. (See *People v. Pacheco* (2011) 194 Cal.App.4th 343, 346.) Indeed, cleanup legislation originally included an exclusion based on California or out-of-state juvenile adjudications if the minor was 16 years old or older when the crime was committed. The language was deleted after further legislative hearings.

Although the Legislature clearly intended that juvenile strikes not exclude a defendant from a jail commitment under section 1170(h), the realignment legislation must be read in conjunction with with the provisions of the Three Strikes law. Section 1170.12(a) of the Three Strikes law provides, in relevant part: "*Notwithstanding any other provision of law*, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior felony convictions, as defined in subdivision (b) [including juvenile adjudications under subdivision (b)(3)], the court shall adhere to each of the following: (4) *There shall not be a commitment to any other facility other than the state prison.*" (Emphasis added.)

Accordingly, whether a defendant with a juvenile strike must be sentenced to prison or county jail, will depend on the court's handling of the strike. If the court *does not* dismiss the strike under section 1385, the defendant must be sentenced to state prison for the computed term, not because of the realignment exclusion, but because of the requirements of the Three Strikes law. If the court *does* dismiss the strike, then it would appear that the defendant would be eligible for a county jail commitment under section 1170(h).

It appears the court has the ability to dismiss a prior juvenile strike to make a defendant eligible for a commitment under section 1170(h). Subdivision (f) of section 1170 provides: "Notwithstanding any other provision of this section, for purposes of paragraph (3) of subdivision (h), any allegation that a defendant is

eligible for state prison due to a prior or current *conviction*, sentence enhancement, or because he or she is required to register as a sex offender shall not be subject to dismissal pursuant to Section 1385." (Emphasis added.) Because the legislation bars only the dismissal of strike "convictions," it would not seem to restrict the ability of the court to dismiss juvenile strike "adjudications."

d. Whether disqualifying conditions must be pled and proved

As noted above, a commitment to county jail under section 1170(h), is unavailable to defendants who have current or prior violent or serious felony convictions listed in sections 667.5(c), and 1192.7(c), who are required to register as a sex offender, or who have a felony conviction with an enhancement for aggravated theft under section 186.11. (§ 1170(h)(3).) As the legislation now reads, it is not clear whether the People must "plead and prove" the disqualifying factors.

The legislation does not contain an express requirement that the disqualifying factors must be pled and proved – any such requirement must be implied. Only one portion of section 1170 even suggests a duty to plead and prove any disqualifying factor. Section 1170(f) provides: "Notwithstanding any other provision of this section, for purposes of paragraph (3) of subdivision (h), any *allegation* that a defendant is eligible for state prison due to a prior or current conviction, sentence enhancement, or because he or she is required to register as a sex offender shall not be subject to dismissal pursuant to Section 1385." (Emphasis added.) Whether the single reference to "allegation" under these circumstances is sufficient to imply a pleading and proof requirement is open to interpretation.

There will be no issue if the defendant is actually charged with and found to have committed a prior serious or violent felony, is being sentenced for a current serious or violent felony, is being sentenced for a current crime that requires registration as a sex offender, or is currently being sentenced for an enhancement under section 186.11. The "pleading and proof" requirement, however, may be an issue in other circumstances.

A similar issue arose in the context of the disqualification of a defendant from receiving enhanced conduct credits because of the existence of one or more specific factors. The Supreme Court, in *People v. Lara* (2012) 54 Cal.4th 896, determined that the People are not required to plead or prove the factors that would bar the defendant from receiving enhanced conduct credits. It is likely *Lara* will carry significant weight when the court considers arguments relative to determining the housing of a sentenced inmate after realignment.

Lara relied heavily on *In re Varnell* (2003) 30 Cal.4th 1132, wherein the court considered a similar "pleading and proof" dispute regarding a defendant's eligibility for Proposition 36. Except in limited circumstances, a defendant with a prior serious or violent felony conviction is not eligible for Proposition 36. (§ 1210.1(b)(1).) *Varnell* concluded the prosecution is not required to plead and prove the disqualifying

convictions. The court also concluded no such duty was compelled by *Apprendi v. New Jersey* (2000) 530 U.S. 466. (*Id.* at pp. 1141-1142.) Finally, it should be recalled that *Apprendi* and its progeny have only been applied in determining the maximum sentence a person is ordered to serve; they never have been applied to such things as the calculation of the minimum term of custody, and certainly not when the only issue is *where* the term is to be served. (See, *e.g.*, where *Blakely v. Washington* (2004) 542 U.S. 296, 304-305, expressly distinguished its circumstances from those in *McMillan v. Pennsylvania* (1986) 477 U.S. 79, where the court imposed a statutory *minimum* if particular facts were found.)

While the Supreme Court decision regarding the pleading and proof requirement for a denial of enhanced custody credit is helpful, there is a significant difference between that issue and the exclusion of a defendant from sentencing under section 1170(h). The reduction of custody credit arguably translates into a direct increase in the amount of time the defendant serves in custody. The realignment legislation, however, does not change the *amount* of time to be served, only *where* it is to be served. In light of *Lara*, courts may be less willing to find a pleading and proof requirement for the purposes of the realignment legislation, particularly in the absence of express legislation imposing such a duty.

e. Use of section 1385 to dismiss disqualifying factors

As noted above, section 1170(f) provides: "Notwithstanding any other provision of this section, for purposes of paragraph (3) of subdivision (h), any allegation that a defendant is eligible for state prison due to a prior or current conviction, sentence enhancement, or because he or she is required to register as a sex offender shall not be subject to dismissal pursuant to Section 1385." Clearly the Legislature intends that judges not be permitted to dismiss disqualifying factors to make a defendant eligible for a county jail commitment under section 1170(h). Nothing in the legislation, however, suggests any intent to restrict the exercise of the court's discretion in other contexts under section 1385.

It appears the court has the ability to dismiss a prior juvenile strike to make a defendant eligible for a commitment under section 1170(h). Because section 1170(f) bars the dismissal of only strike "convictions," it would not seem to restrict the ability of the court to dismiss juvenile strike "adjudications."

2) Application of sections 1170(d) and (e)

Section 1170(d) permits the court to recall a commitment to state prison within 120 days of the date of sentencing. Section 1170(e) provides a process for the compassionate release of prisoners sentenced to prison at any time during the term. Neither of these statutory provisions mentions a commitment to county jail under section 1170(h). Although commitments to county jail are not mentioned, it is likely such defendants have a viable claim to the benefits of these provisions as a matter of equal protection. It seems illogical to deny these procedures to the less serious

offenders sent to county jail, but grant them to the more serious offenders sent to state prison.

This issue may be resolved as a matter of jurisdiction. Absent the exercise of discretion under section 1170(d), the court loses jurisdiction to modify a state prison sentence once imposed and the defendant is received in state prison custody. (See *Portillo v. Superior Court* (1992) 10 Cal.App.4th 1829, 1835-1836.) It is unclear whether the superior court loses jurisdiction over a defendant confined in a county jail under section 1170(h). Jurisdiction may remain if the sentence imposed is a "split" or "blended" sentence under the provisions of subdivision (h)(5)(B), where the court has jurisdiction to remand the defendant into further custody if there is a violation of the conditions of mandatory supervision or there is a need to modify the conditions of supervision.

3) Crimes committed in county jail while serving sentence under section 1170(h*)*

Section 1170.1(c) requires a full consecutive term for crimes committed in state prison, not simply a subordinate consecutive term limited to one-third the mid-base term. Commitments under section 1170(h) are not mentioned. It is not clear whether the omission is intentional or inadvertent. As the statute now reads, if a crime is committed while a defendant is committed under section 1170(h), the court could only impose a traditional consecutive sentence, generally limited to one-third the mid-base term.

A 2012 bill that would have made 1170.1(c), applicable to 1170(h) sentences failed to make it out of committee. It appears the Legislature wants traditional consecutive sentences for crimes committed while in custody for an 1170(h) crime.

4) Reconciliation of realignment legislation with probation ineligibility statutes

a. Probation eligibility

A number of statutes prohibit the granting of probation for certain crimes or offenders. (See, e.g., §§ 1203.07(a), and 1203.073(b) [specified drug offenses].) Nothing in the realignment legislation is inconsistent with these statutes. A commitment under section 1170(h) is the equivalent of a state prison commitment. It may only be ordered after probation is expressly denied by the court. The new sentencing provisions apply only when the court has determined not to grant probation, but to impose the statutory sentence. The amendment to section 667.5(b) makes county jail commitments under section 1170(h) priorable as an enhancement, a consequence not applicable to traditional county jail commitments ordered as part of a grant of probation. Supervision under a "split" or "blended" sentence under section 1170(h)(5)(B), unlike probation, is mandatory; the defendant may not legally refuse

the supervision. The fact that the sentence is served in county jail rather than state prison or allows supervision by the probation officer does not mean the court is granting probation in violation of the statutes that prohibit such a disposition. Merely because the probation officer is supervising the defendant does not make it "probation" any more than people being supervised by probation on Post-release Community Supervision following release from prison.

The original language of subdivision (h)(5) created an ambiguity because it specified the defendant was to serve "a period of mandatory *probation*." The reference to "probation" has been eliminated.

The potential conflict between the statutes prohibiting probation and section 1170(h)(5), if a conflict exists, likely is fairly limited. Defendants who would be ineligible for probation because of the Three Strikes law, use of guns, or specified sex crimes would be excluded in any event by the disqualifiers in section 1170(h)(3).

b. Ability to impose a split sentence under section 1170(h)(5)(B)

Less clear is the ability of the court to impose a split or blended sentence under section 1170(h)(5)(B), when there is a statute or enhancement that prohibits suspension of a felony commitment. Section 1203.073(b), for example, specifies: "Except as provided in subdivision (a), probation shall not be granted to, *nor shall the execution or imposition of sentence be suspended for*, any of the following persons . . . ." (Emphasis added.) The issue is whether statutes similar to section 1203.073 prohibit the court from exercising its discretion under section 1170(h)(5)(B) to impose a sentence in county jail, "but suspend execution of a concluding portion of the term."

The gravamen of statutes similar to section 1203.073 is to prohibit the granting of probation, or to somehow avoid the imposition of a felony sentence, for designated offenses. The procedure under section 1170(h)(5)(B) appears consistent with these statutes because the court, in fact, does fully impose a sentence from the applicable sentencing law after the court has expressly denied the granting of probation. An 1170(h) sentence, whether straight o blended, is considered the same as a sentence to state prison. The *manner* of service of a blended sentence, however, likely will be a mix of actual custody and mandatory supervision. The allocation of custody credit against the sentence varies (two days for actual custody and one day for mandatory supervision), but specific statutory credit is being given against the entire sentence imposed by the court. For example, a three-year sentence imposed under section 1170(h)(5)(B) with half in custody and half on mandatory supervision is still a three-year sentence; none of the *sentence* is suspended. Careful analysis of provisions of subdivision (h) suggests there is no violation of the provisions that prohibit the suspension or execution of a sentence.

5) Exercise of discretion under sections 17(b) and 1203.4

Since the realignment legislation changes only the place where a sentence is to be served, there will be no change in the court's ability to specify "wobbler" offenses as a misdemeanor under section 17(b). The court will have the ability to specify an offense as a misdemeanor under all of the traditional circumstances. For example, subdivision (b) now provides: "When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances: (1) After a judgment imposing a punishment other than imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170." Accordingly, so long as the court has not imposed either an actual or suspended sentence to state prison or under section 1170(h), the court retains jurisdiction to specify a wobbler as a misdemeanor. But if a defendant is either sentenced to state prison or county jail under section 1170(h), or the court suspends execution of a state prison sentence or a sentence under section 1170(h), the court will have no jurisdiction later to specify an offense as a misdemeanor.

Section 1203.4 is applicable only to persons who successfully complete *probation*; it has no application to people who are sentenced to state prison. (*People v. Borja* (1980) 110 Cal.App.3d 378.) There is no reason to suggest there would be a different rule applicable to sentences under section 1170(h). The focus of section 1203.4 is on people who observe all of the conditions of probation for the entire probationary period; not persons who are denied probation and are sentenced to prison or county jail.

6) Execution of a prior suspended sentence

It is common for courts to impose a state prison sentence, but suspend its execution pending satisfactory completion of probation. It is unclear what the court should do with these sentences if they are ordered into execution on or after October 1, 2011, where the crime is now punishable under section 1170(h). The traditional rule specifies that once imposed, a suspended sentence may not later be modified. (*People v. Howard* (1997) 16 Cal.4th 1081, 1095.) The realignment legislation, however, applies to all persons *sentenced* on or after October 1, 2011. (§ 1170(h)(6).) Certainly the decision not to reinstate a defendant on probation and order into execution a suspended state prison sentence is a sentencing decision – reasons for the decision must be stated on the record. If the court orders the executed sentence served under section 1170(h), it is not clear whether the court will have the option to impose a split sentence under section 1170(h)(5)(B). The prosecution might rightly argue the straight sentence under section 1170(h)(5)(A) most closely resembles the original sentence. If the suspended state prison term was the product of a negotiated disposition, the prosecution's argument would be even more compelling.

7) Status of defendants sentenced to state prison prior to October 1, 2011

As noted above, the realignment legislation relative to sentencing under section 1170(h), applies to all persons sentenced on or after October 1, 2011. The specification of the effective date constitutes a "savings clause" which prevents its application to sentencing proceedings prior to the designated date. (See *People v. Rossi* (1976) 18 Cal.3d 295.)

A timely application for recall of a sentence under section 1170(d) may constitute a "sentencing" for the purpose of applying the new law cases sentenced before October 1, 2011. Beyond that process, however, inmates sentenced under the old law only have a possible argument based on a denial of equal protection of the law. However, that argument has been rejected in *People v. Lynch* (2012) ___ Cal.App.4th ___.) The court there observed the Legislature has a right to "experiment" with different sentencing strategies, including the right to limit the size of the experiment to crimes committed after a specified date.

8) Crimes punishable by "state prison" or "pursuant to subdivision (h) of Section 1170"

Under the law prior to realignment, it has been well understood that if a statute specifies a crime punishable in "state prison" without a designated triad, the sentence is 16 months, 2, or 3 years in prison. (§ 18.) Following realignment legislation, section 18(a), now reads: "Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a felony is punishable by imprisonment for 16 months, or two or three years in the state prison unless the offense is punishable pursuant to subdivision (h) of section 1170." Accordingly, if the statute simply specifies punishment in "state prison" without a designated triad, the crime is punishable by 16 months, or two or three years in state prison. If the statute simply specifies punishment "pursuant to subdivision (h) of Section 1170," the crime is punishable by 16 months, or two, or three years in county jail.

9) Commitment under section 1170(h)(5) as a "prior" under section 667.5(b)

Section 667.5(b), has been amended to specify that commitments under section 1170(h) qualify for the one-year enhancement for prior "prison" terms, whether the person is committed to state prison or county jail. Section 667.5(b) expressly provides that a "split" or "blended" sentence imposed under section 1170(h)(5)(B), qualifies as a chargeable prior conviction.

Initially it was not entirely clear how the five-year "washout" under section 667.5 was to be calculated when the court imposed a blended sentence under section 1170(h)(5)(B). There also was a question concerning whether any time ordered for violations of supervision imposed on defendants on Post Release Community Supervision (PRCS) counted as part of the "washout" period. The question arose because section 667.5(b) provides, in relevant part: "no additional term shall be

imposed under this subdivision for any prison term or county jail term of more than one year imposed or when sentence is not suspended prior to a period of five years in which the defendant remained free of both the commission of an offense which results in a felony conviction, and *prison custody or the imposition of a term of jail custody of more than one year* or any felony sentence that is not suspended." (Emphasis added.)

SB 1023, effective June 27, 2012, amends section 667.5(d) to resolve the issue. It provides, in relevant part: "(d) For the purposes of this section, the defendant shall be deemed to remain in prison custody for an offense until the official discharge from custody, *including any period of mandatory supervision,* or until release on parole, *or postrelease community supervision,* whichever first occurs, including any time during which the defendant remains subject to reimprisonment *or custody in county jail* for escape from custody or is reimprisoned on revocation of parole *or postrelease community supervision*." (Emphasis original.)

a. Documentation from the court

Section 1213(a) has been amended to require the preparation of appropriate documentation for all county jail commitments under section 1170(h): "either a copy of the minute order or an abstract of the judgment as provided in Section 1213.5, certified by the clerk of the court, and a Criminal Investigation and Identification (CII) number shall be forthwith furnished to the officer whose duty it is to execute the probationary order or judgment, and no other warrant or authority is necessary to justify or require its execution." Presumably the abstract can be used by other courts and district attorneys in determining the existence of a county jail prior under section 667.5(b).

10) Prior convictions in another jurisdiction (§ 668)

Section 668, which deals with the use of prior convictions in other states, has been amended to specifically cross-reference commitments under section 1170(h). Accordingly, prior convictions obtained in other jurisdictions may be used for commitments under section 1170(h), as if the prior conviction had occurred in California.

11) Restitution fines

Imposition of restitution fines under sections 1202.4(b), 1202.44 and 1202.45 are different in some respects after October 1, 2011.

a. Misdemeanors

No change in the current law.

b. Felonies when defendant placed on probation

Where imposition of sentence has been suspended, there will be no change in the process. The court will impose the basic restitution fine of $240 to $10,000 under section 1202.4(b). The court will impose a probation revocation fine in the same dollar amount under section 1202.44.

If the court grants probation, but suspends execution of a *state prison* sentence, the court should impose the basic assessment under section 1202.4(b), a probation revocation fine in the same dollar amount under section 1202.44, and a parole revocation fine in the same dollar amount under section 1202.45.

If the court grants probation, but suspends execution of a sentence under *section 1170(h)*, whether or not a "split" sentence, the court should impose only the basic restitution fine under section 1202.4(b) and the probation revocation fine under section 1202.44. The parole revocation assessment should not be imposed because there is no parole on a commitment under section 1170(h). (*People v. Cruz* (2012) 207 Cal.App.4th 664, 672, fn.6.)

c. Felonies when defendant committed to state prison or under section 1170(h)

When the court denies probation and sentences the defendant to *state prison*, the court should impose the basic restitution fine under section 1202.4(b), and the parole revocation fine under section 1202.45. If the defendant had previously been on probation, the court should order into execution the probation revocation fine under section 1202.44.

Where the court denies probation and sentences the defendant to *county jail* under section 1170(h), whether or not a ""split" sentence, the court should only impose the basic restitution fine under section 1202.4(b). The probation revocation fine under section 1202.44 should not be imposed because there is no probation. The parole revocation fine under section 1202.45 should not be imposed because there is no parole. If the defendant had *previously* been on probation, the court should order into execution the *previously imposed* probation revocation fine under section 1202.44.

12) Expansion of home detention programs

The realignment legislation amended section 1203.016(a) to permit county boards of supervisors to expand the use of home detention programs. Previously these programs where limited to "minimum security inmates and low-risk offenders." Now, with the approval of the board of supervisors, the program may be made available to all inmates confined in the county jail. The program, which can either be voluntarily accepted by the inmate or imposed involuntarily, will be administered by the local "correctional administrator." The new provision allowing involuntary placement on home detention is in addition to the involuntary placement under section 1203.017 which is triggered by jail overcrowding.

13) Contracts with Department of Corrections and Rehabilitation and other counties

Penal Code section 2057 permits counties to contract with CDCR for the housing of any felon. There is no restriction on the type of felon that could be transferred to CDCR under this arrangement. The statute is silent as to any of the specific terms of the contract, including such matters as cost and length of the commitment. Presumably the contract could relate to a single individual or group of persons. There has been a suggestion that such arrangements may violate the equal protection clause if an inmate is singled out for special housing.

Section 4115.56 allows the counties to contract with CDCR for housing of prison inmates in the county jail during the final 60 days of their term for the purpose of providing "reentry and community transition" services. Such a transfer places the inmates under the exclusive jurisdiction of the local county facilities.

Section 4115.5 has been amended to allow the board of supervisors of one county to contract with the board of another county for housing of jail inmates. Previously the section had authorized such a practice only if the defendant was a probationer or a misdemeanant. The change will sunset July 1, 2015.

14) Cases from multiple jurisdictions

The realignment legislation is wholly silent on the issue of sentences from multiple jurisdictions. The issue will become significant because now counties must carry the cost of local incarceration with only minimal contribution from the state, and jail space is frequently very limited.

If a defendant is convicted of vehicle theft in County A, and later is convicted of second degree burglary in County B, it is unclear how the sentence is to be structured and where the custody time is to be served. The cases would be handled in the traditional manner if both counties granted probation; i.e., two probation departments would potentially supervise the defendant, but there would be no "aggregation" of any sentence. The process is not at all clear if the two counties sentence the defendant under section 1170(h)(5). Since the rules regarding the structure of the sentence under sections 1170 and 1170.1 have not been changed, the second sentencing judge will have the jurisdiction to determine whether there will be a consecutive or concurrent sentencing structure. Section 1170.1(a) governs multiple count and multiple case sentencing, whether the commitment is to state prison or county jail: "when any person is convicted of two or more felonies, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same or by a different court, and a *consecutive term of imprisonment is imposed under Sections 669 and 1170*, the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, the subordinate term, and any additional term imposed for applicable enhancements for

prior convictions, prior prison terms, and Section 12022.1." (Emphasis added.) Beyond that, however, there is no existing rule or procedure to answer the following questions:

- Section 1170.1 and California Rules of Court, Rule 4.452 require the second judge in a consecutive sentencing case to "resentence" the defendant on any prior case. Where is the sentence to be served if the last judge determines a consecutive sentence is appropriate? Is it in the last county to sentence? Can the last judge impose the term, then remand the defendant to the first county to serve both the first and second sentence?

- Where is the sentence to be served if the last judge determines a concurrent sentence is appropriate? Is the entire sentence served in the last county? Does custody follow the longest term?

- What if one county decides to contract with the Department of Corrections and Rehabilitation for the placement of the defendant in state prison? Must the other county pay for any of the costs of custody?

- What if one county imposes a straight term in custody under section 1170(h)(5)(A), but the other county imposes a split sentence under subdivision (h)(5)(B)? How is the sentence structured and where is it to be served?

- What happens if the defendant is sentenced in different counties under section 1170(h), but receives an early discharge by the sheriff in the first county? Does the sentence in the second county then start to run?

- How do multiple counties share the responsibilities of mandatory supervision under section 1170(h)(5)(B)?

Suggested procedure

Until the Legislature addresses the multi-jurisdiction problem, courts may wish to approach this logistical nightmare by assuming the proper and fair objective of the sentencing structure should be to have the sentences physically served in proportion to the amount of time ordered by each county. If County A orders 65% of the total custody time, then 65% should be served in County A. Similarly, if 45% of the mandatory supervision time is ordered by County B, then 45% of the time should be supervised by County B.

As long as the solution to the multi-jurisdiction problem is fundamentally fair, it probably is of no great concern what particular solution is selected. After all, sometimes a particular county will be the bug and sometimes it will be the windshield. The following suggested principals, however, would solve at least most of the foregoing issues.

It is the objective of the suggested sentencing principals and procedures to have counties share in the custody and supervision responsibilities in proportion to the length of custody and supervision time ordered by each county. In some instances the task is easy. For example, if County A imposes a three-year custody term and County B imposes an eight-month consecutive custody term, it would be logical for County A to house the defendant for three years and County B to house the defendant for eight months.

Allocation becomes a little more complicated with concurrent terms. How the terms are allocated between counties generally will not be of concern to the defendant. To the extent the terms are being served concurrently, he will be serving the sentences simultaneously. For example, if County A imposes a two-year term and County B imposes a concurrent two-year term, the defendant will be in custody for two years (less custody credits). But fairness would dictate that both counties should share in the cost of housing because both sentences are being served simultaneously. Ideally the custody terms should be served in proportion to the sentence imposed – in the latter example, half would be served in County A and half would be served in County B. The same allocation should apply to the time when a defendant is on mandatory supervision – supervision would be shared in proportion to the length of the supervision period imposed by each county.

California Rule of Court, Rule 4.452 explains the duty of the court in dealing with consecutive sentences:

> If a determinate sentence is imposed under section 1170.1(a) consecutive to one or more determinate sentences imposed previously in the same court or in other courts, the court in the subsequent case must pronounce a single aggregate term, as defined in section 1170.1(a), stating the result of combining the previous and current sentences. In those situations:
>
> (1) The sentences on all determinately sentenced counts in all of the cases on which a sentence was or is being imposed must be combined as though they were all counts in the subsequent case.
>
> (2) The judge in the subsequent case must make a new determination of which count, in the combined cases, represents the principal term, as defined in section 1170.1(a).
>
> (3) Discretionary decisions of the judges in the previous cases may not be changed by the judge in the subsequent case. Such decisions include the decision to impose one of the three authorized terms referred to in section 1170(b), making counts in prior cases concurrent with or consecutive to each other, or the decision that circumstances in mitigation or in the furtherance of justice justified striking the punishment for an enhancement.

The original objective of section 1170.1 and Rule 4.452 was to create a single sentence for CDCR, as reflected on a single abstract of judgment. In essence, the last

judge in line does a "resentencing" of all cases which combines everything done by prior judges and incorporates the last case in line. The requirement is reasonable and appropriate when the sentence is to be served in a single institution – state prison. When applied to a sentence to be served in different county jurisdictions, however, section 1170.1 and Rule 4.452 create the issues discussed above.

Suggested sentencing principals

Until such time as the Legislature amends the provisions of sections 1170 and 1170.1 to address this problem, it is suggested the courts impose multi-jurisdiction sentences in accordance with the following principals:

(A) Whenever a sentence is imposed on the same defendant by courts of different counties, the defendant will serve the un-stayed custody portion of the sentence in a particular county in the proportion that county's term of un-stayed custody bears to the total un-stayed custody time imposed by all counties on each charge and enhancement, whether the sentences are imposed concurrently or consecutively, or under section 1170(h)(5)(A) or (B).

(B) The custody portion of the sentence imposed by all counties will be served first, then the defendant will be required to complete any mandatory supervision time. The defendant will start the custody portion of the sentence in the county having the longest un-stayed custody time imposed. Upon discharge of the defendant from actual custody from the first period of un-stayed custody, the defendant shall be immediately transferred at the expense of the receiving county to the next or successive county to complete any remaining period of un-stayed custody in any remaining county.

(C) Upon discharge from actual custody from all un-stayed custody time imposed by all counties, the defendant will commence service of any periods of mandatory supervision imposed under section 1170(h)(5)(B). Whenever a period of mandatory supervision is imposed on the same defendant by courts of different counties, the defendant will serve the period of mandatory supervision in a particular county in the proportion that county's term of mandatory supervision bears to the total period of mandatory supervision imposed by each county, whether the sentences are imposed concurrently or consecutively.

(D) The defendant will start the period of mandatory supervision in the county having the longest period of mandatory supervision. Upon completion of the first period of mandatory supervision, the defendant’s supervision will be transferred to the next or successive county to complete any period of mandatory supervision in any remaining county. The location of supervision may be adjusted by transfer procedures authorized by section 1203.9.

(E) The computation of the percentages of custody and mandatory supervision will be made by the last judge to impose sentence on the defendant.

Examples of the application of the proposed principals

The examples omit any consideration of conduct credits.

Example 1: Consecutive straight sentences: If County A imposes a term of 3 years of custody and County B imposes 8 months of custody, and the terms are consecutive, the defendant will serve 3 years in County A and then serve 8 months in County B. The service of actual time is in proportion to the total sentence imposed.

Example 2: Concurrent straight sentences: If County A imposes a term of 3 years in custody and County B imposes a term of 2 years in custody, to be served concurrently, the two counties have separately imposed a total of 5 years in custody. Of that total time, County A has imposed 60% and County B 40%. From the defendant's perspective, the total custody time will be 3 years. Because the defendant is simultaneously serving sentences imposed by both counties, however, the proposed principals require an apportionment based on the percentage of the total time imposed. In this example, the defendant will serve 60% of the time in County A (approximately 22 months) and 40% of the time in County B (approximately 14 months).

Example 3: Concurrent and consecutive straight sentences: If County A imposes 3 years on a single count case and County B, in a multiple-count case, imposes a 2-year term on Count 1 and a consecutive 8-month term on Count 2, the total amount of time separately imposed by all the courts is 5 years and 8 months, or 68 months. Of that total, County A has imposed 53% and County B has imposed 47%. County B has determined to run its sentence concurrently with the term imposed by County A. To determine the place where the custody terms are to be served, the percentages will be applied to the actual custody time to be served by the defendant, taking into account the concurrent and consecutive sentencing structure. In this case the actual time to be served will be 3 years, or 36 months. 53% (approximately 19 months) will be served in County A and 47% (approximately 17 months) will be served in County B.

Example 4: Concurrent split sentences: Assume County A imposes a split sentence of 3 years, with 2 years of actual time and 1 year of mandatory supervision. Assume County B imposes a split sentence of 3 years, with 1 year of actual custody time and 2 years of mandatory supervision, concurrent with County A. The total custody time separately imposed by both courts is 3 years, or 36 months, with 67% imposed by County A and 33% by County B. Because the sentences are being served concurrently, however, the defendant will be in custody only 24 months. Accordingly, of the 24 months to be served, the defendant will serve 67% in County A (approximately 16 months), and 33% in County B (approximately 8 months). The percentages are

reversed when determining who is to provide mandatory supervision: 33% will be provided by County A and 67% by County B.

The problem of early kicks

It may be observed that the foregoing examples do not directly address the problem of the early release from jail. The amount of actual custody time served by a defendant may vary greatly between the counties depending on such things as jail capacity and federal caps. It is not reasonably possible to construct a formula to account for these differences. The most that can and should be assured is that one county will not be required to provide *more* custody services simply because the other county, for whatever reason, decides to release the defendant early. County A cannot be concerned that County B releases inmates after 10% of their sentence has been served, so long as County A is not unfairly allocated a higher percentage of the custody time because of that fact. The allocation principals base the percentage of custody and mandatory supervision time solely on what is ordered by the court; not on what a defendant might actually serve because of local custody circumstances.

How to pronounce the sentence

The following example illustrates the proper structure of a sentence that involves sentences imposed by multiple jurisdictions, assuming the foregoing sentencing principals are being observed.

If County A imposes 2 years under section 1170(h)(5)(A) on a single count case and County B, the second sentencing court, in a multiple-count case, wishes to impose a 3-year term on Count 1 and a consecutive 8-month term on Count 2, with a portion of the sentence to include a period of mandatory supervision, all to be served consecutively to the sentence imposed by County A, the court in County B would pronounce sentence as follows:

> *The record will reflect that we are proceeding in Case 1234 from County A and Case 5678 from County B. Probation in the Case 5678 is denied. With respect to case 5678, for Count 1, the court imposes the upper term of 3 years under the provisions of section 1170(h)(5)(B), which is hereby designed the principal term. For Count 2, the court hereby imposes a subordinate and consecutive term of 8 months under the provisions of section 1170(h)(5)(B), which is one-third the middle term. With respect to Case 1234, for Count 1, the court hereby re-sentences the defendant to a subordinate and consecutive term of 8 months under the provisions of section 1170(h)(5)(A), which is one-third the middle term, for an aggregate term of custody of 4 years and 4 months. With respect to the term imposed in Case 5678, the court hereby suspends execution of the*

concluding 12 months of said term and places the defendant on mandatory supervision under the following terms and conditions. . . .

The defendant is remanded to the custody of the sheriff of County B to serve the custody portion of the sentence imposed in Case 5678. After the service of 32 months [80% of the total custody time], including actual and conduct credits, or if the defendant is to be earlier released from actual custody for any reason, the Sheriff of County B shall notify the Sheriff of County A that the defendant should be transported forthwith to County A, by County A, for service of the sentence imposed by County A. Upon completion of the sentence imposed by County A, or if earlier released from custody for any reason, the defendant shall report within two business days of his release to the probation officer of County B to commence service of the period of mandatory supervision imposed in Case 5678.

15) Commitments to the California Rehabilitation Center (CRC) (Welf. & Inst. §§ 3050, et seq.)

SB 1021, effective June 27, 2012, has eliminated the Civil Addict program encompassed in Welfare and Institutions Code sections 3050, 3051, 3100, and 3100.6. As of July 1, 2012, CDCR will no longer accept commitments under the program. (Welf. & Inst. §§ 3050(c), 3051(d), 3100(b), 3100.6(g).) Civil addicts currently incarcerated in the program will remain in custody until the program is completed, or are rejected from the program due to failure, or until June 30, 2013, whichever is sooner. (Welf. & Inst. § 3201(c).) Beginning July 1, 2012, persons released from a commitment under section 3051 will not be placed on parole. (Welf. & Inst. § 3201(d).) If the defendant is serving a term of revocation or is in substance abuse treatment as of July 1, 2013, the custody term or treatment is to be completed at CRC. (Welf. & Inst. § 3201(c).) Beginning July 1, 2013, any civil addict not serving a term of revocation or in the custody of CDCR, will be released from the program and returned to the court that suspended execution of the defendant's sentence. (Welf. & Inst. § 3201(e).) The Civil Addict program must be fully phased out by April 1, 2014. (Welf. & Inst. § 3202.)

If a defendant has been committed to CRC under the law prior to October 1, 2011, the court was required to impose a suspended state prison term of not more than six years. If the defendant is thereafter terminated from CRC after October 1, 2011, and the underlying crime provides for 1170(h) disposition, it is likely the suspended or recomputed term will be served in county jail. When the defendant is returned to the committing court under these circumstances, the court has considerable sentencing discretion and is not bound by the original suspended term. The only limitation on sentencing discretion is the court may not sentence the defendant to a term longer than the original sentence. (*People v. Nubla* (1999) 74 Cal.App.4th 719, 725-726; *People v. Barnett* (1995) 35 Cal.App.4th 1.) Since the resentencing procedure appears

to be virtually the same as a full sentencing hearing, it is likely the defendant will be considered sentenced after the effective date of the realignment law, thus triggering the application of section 1170(h).

16) Restitution to the victim

The law imposes a different scope of victim restitution on the defendant depending on whether the defendant's sentence is to state prison or probation. Under section 1202.4, the restitution obligation is limited to the loss arising out of the criminal activity that formed the basis of the conviction. The restitution obligation under a grant of probation, however, can be much broader. In *People v. Anderson* (2010) 50 Cal.4th 19, 29, the Supreme Court observed: "Trial courts continue to retain authority to impose restitution as a condition of probation in circumstances not otherwise dictated by section 1202.4. In both sections 1203.1 and 1202.4, restitution serves the purposes of both criminal rehabilitation and victim compensation. But the statutory schemes treat those goals differently. When section 1202.4 imposes its mandatory requirements in favor of a victim's right to restitution, the statute is explicit and narrow. When section 1203.1 provides the court with discretion to achieve a defendant's reformation, its ambit is necessarily broader, allowing a sentencing court the flexibility to assist a defendant as the circumstances of his or her case require."

It is not clear from the realignment legislation that a sentence to county jail under section 1170(h) will be the equivalent of a state prison sentence for the purpose of victim restitution under section 1202.4. Because sentences under section 1170(h) are otherwise being treated as prison sentences, it is likely such sentences will be considered prison sentences for the purpose of determining the proper scope of restitution.

The realignment legislation made no provision for the collection of restitution for the victim when sentence is imposed under the provisions of section 1170(h). If the court chooses to impose a "split" sentence under section 1170(h)(5)(B), the probation officer undoubtedly will have the obligation to pursue restitution and the payment of all other fines and fees. If the defendant receives a straight sentence under section 1170(h)(5)(A), however, the jurisdiction of the court ends with the completion of the jail sentence -- there is no agency with legal authority to pursue the victim's claims, at least as to the criminal proceeding. Presumably the victim would have the right to convert the restitution claim to a civil judgment under sections 1202.4(i), 1214(b), and 1203(j). The victim also would have the right to enforce an income deduction under section 1202.42, and institute lien proceedings under section 1202.42(g).

17) Application of California Vehicle Code, § 41500

Vehicle Code section 41500 establishes a policy by which a defendant sentenced to state prison or a minor committed to the Youth Authority will not be prosecuted for non-felony motor vehicle violations pending at the time of commitment. Section 41500 provides, in relevant part: "(a) No person shall be subject to prosecution for any nonfelony offense arising out of the operation of a motor vehicle or violation of

this code as a pedestrian which is pending against him at the time of his commitment to the custody of the Director of Corrections or the Department of the Youth Authority. (b) Notwithstanding any other provisions of law to the contrary, no driver's license shall be suspended or revoked, nor shall the issuance or renewal of a license be refused as a result of a pending nonfelony offense occurring prior to the time a person was committed to the custody of the Director of Corrections or the Department of the Youth Authority or as a result of a notice received by the department pursuant to subdivision (a) of Section 40509 when the offense which gave rise to the notice occurred prior to the time a person was committed to the custody of the Director of Corrections or the Department of the Youth Authority."

The purpose for creating the policy behind section 41500 was discussed in *People v. Freeman* (1987) 225 Cal.App.3d Supp. 1, 3-4: "We are required to ascertain the intent of the Legislature in the enactment of Vehicle Code section 41500, and in so doing we balance several competing public interests. On the one hand there is a strong public policy that drinking drivers, particularly repeating drinking drivers, not drive a vehicle for specified periods of time, and not until they have complied with certain corrective conditions. On the other hand there is an equally strong public policy that allows felons sentenced to state institutions to obtain relief from detainers that might render their release date uncertain and thus adversely affect their eventual rehabilitation. This policy was expressly averted to by the Legislature in the enactment of section 41500. In amending the section in 1972, the Legislature noted that the purpose of section 41500 is to allow prisoners to leave prison with a clean record. (Sen. Amend. to Assem. Bill No. 749 (1972 Reg. Sess.) Apr. 25, 1972.) The Legislature further noted in 1975, when the section was amended to extend coverage to Youth Authority wards, that the rehabilitative process is aided by eliminating the interruptions due to arrest and prosecution for nonfelony traffic violations which occurred prior to commitment to the Youth Authority. (Sen. Amend. to Assem. Bill No. 1846 (1975-76 Reg. Sess.) May 14, 1975.) ¶ Furthermore, it is in the public interest that courts not be burdened with the prosecution of minor cases where the defendant has already been sentenced to serve a long term in prison or in the Youth Authority, and the additional prosecution will not substantially increase that term." (Footnotes omitted.)

Section 41500 as presently worded clearly does not include commitment of persons to county jail under section 1170(h). The policy reasons for enacting section 41500, however, apply with equal validity to persons committed for lengthy terms in county jail. Indeed, since the realignment legislation has generally treated sentences under section 1170(h) the same as state prison commitments, and because the policy considerations for dismissal of minor traffic charges are the same regardless of where the sentence is served, it would appear a defendant committed to county jail under section 1170(h) would have a strong equal protection argument for the benefits of section 41500.

18) Application of Section 1368 proceedings

Section 1367(a) provides that "[a] person cannot be tried or adjudged to punishment while that person is mentally incompetent." Section 1368(a) sets the procedural stage: "If, during the pendency of an action *and prior to judgment*, a doubt arises in the mind of the judge as to the mental competence of the defendant," the court is to institute proceedings to determine the mental status of the defendant. (Emphasis added.) *People v. Humphrey* (1975) 45 Cal.App.3d 32, 36-37, applied section 1368 procedures to a defendant who was before the court on a probation violation. The court observed that imposition of sentence had been suspended and the defendant had been placed on probation. Because sentence in the formal sense had not been imposed, the court was obligated to undertake a competency determination once a doubt had been declared.

It is not clear whether procedures under section 1368 will apply to persons on mandatory supervision, post-release community supervision, and parole supervision after July 1, 2013. All of these persons have been formally sentenced, yet unquestionably they face legal proceedings that may lead to punishment. The issue appears to be a matter of first impression. Possible guidance may be found in *Moore v. Superior Court (The People)* (2010) 50 Cal.4th 802. *Moore* holds the defendant has no due process right in an SVP proceeding to a determination of his competence to stand trial, and if not competent, to have proceedings implemented similar to section 1367. In *Moore,* the defendant contended the mental disorders that made him an SVP also impaired his trial competence. He argued that the state could not commit him as an SVP unless and until his trial competence was restored. The Supreme Court disagreed. In doing so, it applied the four-point analysis of due process in a civil case articulated in *People v. Allen* (2008) 44 Cal.4th 843, 862-863: "(1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail; and (4) the dignitary interest in informing individuals of the nature, grounds, and consequences of the action and in enabling them to present their side of the story before a responsible government official." (*Moore* at p. 819.) Although the court addressed all four factors, the court gave the greatest weight to the "government's interest" in protecting the public from sexually violent predators. The court concluded if defendant's position was correct, there would be certain defendants who could effectively bar the application of the SVP law, and thus prevent the state from treating these dangerous offenders. (*Moore* at p. 825.) The court also placed emphasis on the holdings in other states with similar laws: not one agreed with defendant's interpretation in similar circumstances.

I. Custody Credits

1) Sentences to county jail

The 2011 Realignment Legislation amends section 4019 to specify, *without any exclusion*, that inmates who are sentenced to four or more days are to receive two days of conduct credit for every four days of actual custody time served in county jail. (§ 4019(b) and (c).) In other words, for every two days of actual time in custody, four days will have been deemed served, or essentially half-time credit. (§ 4019(f).) The change is made effective for all crimes *committed* on or after October 1, 2011. The effective date of this change should not be confused with the effective date of the changes related to section 1170(h), which are effective as to all crimes *sentenced* after October 1, 2011.

The Legislature eliminated the exclusions based on the defendant having a prior adult serious or violent felony conviction, being sentenced for a serious felony, or being required to register as a sex offender under section 290.

The new provisions of section 4019 will be applicable to all sentences served in county jail, including misdemeanor sentences, all felony sentences imposed and served as a condition of probation, and all sentences imposed as a result of a violation of parole or Post-Release Community Supervision (PRCS), where the underlying crime occurred on or after October 1, 2011. The new provisions also will apply to all pre and post-sentence credit for persons serving a term in county jail under section 1170(h), for a crime committed on or after October 1, 2011. (§ 4019(a)(6).)

No conduct credit is given a defendant on PRCS who is serving a period of "flash incarceration" imposed by the probation officer under sections 3000.08 and 3454. (§ 4019(i).)

2) Sentences to state prison

Section 4019 will govern the defendant's entitlement to any *pre-sentence* credit. Unless otherwise limited by such statutes as sections 2933.1 [violent felony] and 2933.2 [murder], the pre-sentence credit for persons sent to state prison will be for every two days actually served, a total of four days will be awarded.

It is also important to note that the various rules regarding the calculation of custody credits have no effect on the credit awarded by CDCR to persons sentenced under the Three Strikes law. Sections 667(c)(5) and 1170.12(c)(5) specify that conduct credits are limited to 20 percent while the defendant is serving the prison sentence. The only statutes that further restrict conduct credits for strike commitments are section 2933.1 for violent offenders (15% limit), and 2933.2 for persons convicted of murder (no conduct credit).

Section 2933(b) governs *post-sentence* credit for most persons sent to state prison: for every six months of actual custody, the defendant is awarded an additional six months

of conduct credit. Unless otherwise limited, all inmates serving a sentence in state prison will receive the same credit. The realignment legislation eliminated the exclusions based on the fact the defendant has a prior adult serious or violent felony conviction, is being sentenced for a serious felony, or is required to register as a sex offender under section 290.

3) Credit for sentences imposed after October 1, 2011, for crimes committed prior to the effective date

As noted above, the new credit provisions are effective only as to crimes committed on or after October 1, 2011. Any custody credit earned prior to October 1, 2011, is to be governed by the applicable prior law. (§ 4019(h).) Accordingly, when sentencing a defendant after October 1, 2011, for a crime occurring prior to that date, the court must look to the formula applicable to the time when the crime was committed. In other words, the court should determine when the crime occurred (or in cases of a violation of probation, when the underlying crime occurred), then determine the applicable credit formula.

The only "gap" in the prior law concerns sentences imposed after October 1, 2011, where the defendant is sentenced to county jail under the provisions of section 1170(h); that section did not exist prior to October 1, 2011. In absence of further corrective legislation or appellate review, it is suggested the defendant receive pre and post-sentence credit based on the formula applicable to state prison commitments for the indicated period. Except as to where the sentence is served, commitments under section 1170(h), are being treated the same as state prison commitments. It would seem reasonable for the defendant to receive "state prison" credit during this transition period.

4) Violations of probation

Because the most recent changes to section 4019 are limited to crimes committed on or after October 1, 2011, the newest rules will have no application to violations of probation when the underlying crime occurred prior to that date. Courts must look to the prior law to determine the applicable formula. The new provisions, however, will apply to violations of probation when the underlying crime occurred on or after October 1, 2011.

5) Equal protection

Defendants who find they are receiving less conduct credit than some other class of defendant frequently challenge the disparity on equal protection grounds. The argument may have limited application, at least as to time served after the effective date of a statutory change increasing conduct credits.

a. Application to term served prior to effective date of new law

People v. Brown (2012) 54 Cal.4th 314, rejected any equal protection considerations as to time served prior to the effective date of a law increasing conduct credits. The court noted that conduct credits are intended to reward good behavior which happens *after* the entitlement to the credit, not conduct occurring prior to the existence of the credit. The court distinguished *In re Kapperman* (1974) 11 Cal.3d 542, on the basis that *Kapperman* concerned the equal protection right to *actual time* credit which is given irrespective of behavior by the defendant; in *Brown* the issue was *conduct* credit.

Similarly, *People v. Borg* (2011) 204 Cal.App.4th 1528, held the Equal Protection Clause did not apply to persons who committed crimes prior to October 1, 2011. The court reasoned: "While defendant proposes that 'there is no rational basis' for precluding a retroactive application of the more generous formula of conduct credits to some prisoners, based only on the dates their crimes were committed or credits were earned, we perceive a legitimate reason for limiting the extension of credits. The Legislature may have decided that the nature and scope of the fiscal emergency required granting additional credits to the specified classes of prisoners previously denied them – those who must register as sex offenders, or committed serious felonies, or had suffered a prior conviction for a serious or violent felony – only after the effective date of the amendments. That basis for the legislation is substantiated by the explicit articulation in subdivision (h) of section 4019 of a prospective application of the statutory amendments. Reducing prison populations by granting a prospective-only increase in conduct credits strikes a proper, rational balance between the state's fiscal concerns and its public safety interests." (*Id.* at p. 1538-1539.) Clearly *Borg* applies to credits earned prior to October 1, 2011. See the discussion below regarding its application to time served after the amendment.

It seems clear from *Brown* and *Borg* that the principles of equal protection of the law will have no application to time served prior to the effective date of a more generous credit statute. The primary rationale for these holdings is that custody credits are given for good conduct that occurs after the credit is created. It does not serve the purpose of the statute to award enhanced credits to custody time served prior to the effective date. For this reason, defendants who serve time *prior* to the effective date of the new law cannot demonstrate they are similarly situated to defendants who serve custody time *after* the effective date. (See also *In re Strick* (1983) 148 Cal.App.3d 906; *In re Stinnette* (1979) 94 Cal.App.3d 800; *In re Bender* (1983) 149 Cal.App.3d 380.)

b. Application to credits earned after effective date of new law

No case has directly discussed the application of equal protection to custody time served after the effective date of a new credits statute. However, several cases resolving issues in other contexts suggest these defendants should receive the same

credit for time served after the effective date as persons who commit crimes after the effective date.

In *Brown*, for example, the court specifically held a defendant who commits a crime prior to the effective date is entitled to enhanced credits earned after the effective date. (*Brown*, *supra*, at p. 322.) There was no mention of the Equal Protection Clause in that portion of the opinion. The portion of *Brown* that rejected the application of equal protection only addressed the claim for credits earned prior to the effective date; there was no mention of equal protection concerns for time served after the effective date.

People v. Kennedy (2012) ___ Cal.App.4th ___, holds the legislative change to credits effective for crimes committed on or after October 1, 2011, does not apply to persons who commit crimes prior to that date, even though they serve time after the effective date. The court expressly rejected any equal protection considerations.

People v. Borg holds so long as the Legislature has a rational basis for creating different credit rules for persons who commit crimes before and after the effective date of a new statute, equal protection has no application to a defendant who commits a crime prior to the effective date but is serving custody after the effective date. While *Borg* concedes that a defendant who commits a crime prior to the effective date but serves time after that date, is similarly situated to a person who commits a crime after the effective date and serves custody, the court found a rational basis for the distinction: "While defendant proposes that 'there is no rational basis' for precluding a retroactive application of the more generous formula of conduct credits to some prisoners, based only on the dates their crimes were committed or *credits were earned*, we perceive a legitimate reason for limiting the extension of credits. The Legislature may have decided that the nature and scope of the fiscal emergency required granting additional credits to the specified classes of prisoners previously denied them – those who must register as sex offenders, or committed serious felonies, or had suffered a prior conviction for a serious or violent felony – only after the effective date of the amendments. That basis for the legislation is substantiated by the explicit articulation in subdivision (h) of section 4019 of a prospective application of the statutory amendments. Reducing prison populations by granting a prospective-only increase in conduct credits strikes a proper, rational balance between the state's fiscal concerns and its public safety interests." (*Borg*, *supra*, at pp. 1538-1539; emphasis added.) To the extent *Borg* conflicts with *Brown*, however, the Supreme Court decision obviously will control.

c. Practical application

Assuming that equal protection does apply to persons who serve custody time after the effective date of a more liberal statute, custody credits will likely be awarded as follows:

- Time served up to January 24, 2010: Formula A.

- Time served between January 25, 2010, and September 27, 2010: Formula B (unless excluded, which means Formula A).

- Time served between September 28, 2010, and September 30, 2011: Formula B for defendants sentenced to county jail; Formula C for defendants sentenced to state prison; unless excluded (which means Formula A).

- Time served on and after October 1, 2011, Formula B

- All sentences to prison are limited by sections 2933.1 and 2933.2.

If the Equal Protection Clause applies to all persons serving a custody term after an increase in custody credits, it will mean that as to each block of custody time noted above, the credit is awarded at the highest rate given to any person serving time in that block, unless the defendant is otherwise excluded from the enhanced credit scheme or his credits are limited by such provisions as sections 2933.1 and 2933.2.

6) Additional material on custody credits

The changes made by the realignment legislation must be viewed in context with all of the amendments to section 2933 and 4019. Please refer to the separate memorandum on custody credits: "Awarding Custody Credits After Realignment," by Couzens and Bigelow.

J. Postrelease Community Supervision (PRCS) (§§ 3450-3465)

[The authors gratefully acknowledge the assistance of Hon. Phil Pennypacker, Santa Clara Superior Court, and Hon. Morris Jacobson, Alameda Superior Court, in the preparation of the materials on PRCS.]

The realignment legislation enacted in 2011 had two primary prongs: creating a new sentencing mechanism for defendants who are sentenced on and after October 1, 2011, and creating a new process whereby certain offenders being released from prison custody would no longer be supervised by the state parole system, but instead would be supervised by a local supervision agency. The new supervision system is called "postrelease community supervision," or "PRCS." PRCS does not shorten any prison term; it merely modifies the agency that will supervise the defendant after release.

1) Applicable crimes

PRCS applies to all persons being released from prison *except* for persons being released having served a prison term for the following crimes, or having received the following sentences: (§ 3451(b).)

- Serious felonies listed in section 1192.7(c).

- Violent felonies listed in section 667.5(c).

- A third strike sentence imposed under the Three Strikes law pursuant to sections 667(e)(2) or 1170.12(c)(2).

- Any sex crime where the person is classified as a High Risk Sex Offender. "High Risk Sex Offender" is not specifically defined by the statute. Presumably the designation results from the application of such assessment tools as the STATIC-99. (See §§ 290.04 – 290.07.)

- Any person who is required, as a condition of parole, to undergo treatment with the State Department of Mental Health under section 2960.

It appears the exclusions will not apply to persons who are being released from qualified prison terms, even though they have the foregoing sentencing circumstances as a result of some previous criminal activity. Section 3451(b) focuses on "any person released from prison after having served a prison term" for any of the excluded circumstances. In other words, merely because a defendant has a prior strike would not exclude him from PRCS, so long as the term he was serving was not a third strike offense. Unlike sentencing under section 1170(h), PRCS does not exclude persons who are registered sex offenders (unless they are a High Risk Sex Offender), or because they have committed a crime under section 186.11.

Persons who do not qualify for PRCS, will be subject to parole supervision by the Department of Corrections and Rehabilitation. Effective July 1, 2013, the superior courts will hear petitions to revoke parole and may impose local sanctions for these persons. (§ 3000.08(a).) CDCR, however, will retain jurisdiction over persons on parole for registered sex offenses who have a period of parole exceeding three years, and persons subject to a life term of parole under section 3000.1. (§ 3000.08(i).)

2) Length of PRCS

The period of supervision is not to exceed three years from the defendant's initial entry into the program. (§§ 3451(a) and 3455(e).) The period of supervision is tolled when PRCS is summarily revoked under section 1203.2(a), or when the defendant has absconded under section 3456(b). (§ 3455(e).)

The circumstances under which PRCS is terminated are listed in section 3456(a):

1. The defendant has been under supervision for three years.

2. The defendant has been on PRCS for six consecutive months without any violation resulting in a custodial sanction. Such persons may be considered for immediate discharge.

3. The defendant has been on PRCS for one year without any violation that resulted in a custodial sanction. Such persons must be discharged within 30 days.

4. Jurisdiction has been terminated by operation of law.

5. Jurisdiction has been transferred to another supervising county agency. (See § 3460, *infra*.)

6. Jurisdiction has been terminated by a hearing officer after petition by the supervising agency.

3) Conditions of PRCS

The conditions of supervision are detailed in section 3453, and are imposed without the need for the defendant's agreement. In addition to the usual reporting requirements, the duty to obey all laws, participation in treatment, and travel restrictions, the conditions must include the following:

> (f) The person, and his or her residence and possessions, shall be subject to search at any time of the day or night, with or without a warrant, by an agent of the supervising county agency or by a peace officer.
>
> (q) The person shall waive any right to a court hearing prior to the imposition of a period of "flash incarceration" in a county jail of not more than 10 consecutive days for any violation of his or her postrelease supervision conditions.
>
> (s) The person shall be subject to arrest with or without a warrant by a peace officer employed by the supervising county agency or, at the direction of the supervising county agency, by any peace officer when there is probable cause to believe the person has violated the terms and conditions of his or her release. (See also § 3465.)

The supervising agency also is free to impose additional conditions consistent with public safety, "including the use of continuous electronic monitoring as defined in Section 1210.7, order the provision of appropriate rehabilitation and treatment services, [and] determine appropriate incentives. . . ." (§ 3454(b).)

The justice system is encouraged to use "community-based" punishment. "'Community-based punishment' means evidence-based correctional sanctions and programming encompassing a range of custodial and noncustodial responses to

criminal or noncompliant offender activity. Intermediate sanctions may be provided by local public safety entities directly or through public or private correctional service providers and include, but are not limited to, the following:

(A) Short-term 'flash' incarceration in jail for a period of not more than 10 days.

(B) Intensive community supervision.

(C) Home detention with electronic monitoring or GPS monitoring.

(D) Mandatory community service.

(E) Restorative justice programs, such as mandatory victim restitution and victim-offender reconciliation.

(F) Work, training, or education in a furlough program pursuant to Section 1208.

(G) Work, in lieu of confinement, in a work release program pursuant to Section 4024.2.

(H) Day reporting.

(I) Mandatory residential or nonresidential substance abuse treatment programs.

(J) Mandatory random drug testing.

(K) Mother-infant care programs.

(L) Community-based residential programs offering structure, supervision, drug treatment, alcohol treatment, literacy programming, employment counseling, psychological counseling, mental health treatment, or any combination of these and other interventions." (§ 3450(b)(8).)

4) Violation of PRCS

The realignment legislation contemplates initial or low-level violations of PRCS will be addressed by the supervising agency. Only if those efforts are deemed "insufficient" is the supervising agency allowed to petition the court for further sanctions.

a. Action by the supervising agency

The supervising agency may "determine and order appropriate responses to alleged violations, which can include, but shall not be limited to, immediate, structured, and intermediate sanctions up to and including referral to a reentry court pursuant to Section 3015, or flash incarceration in a county jail. Periods of flash incarceration are encouraged as one method of punishment for violations of an offender's condition of

postrelease supervision. ¶ 'Flash incarceration' is a period of detention in county jail due to a violation of an offender's conditions of postrelease supervision. The length of the detention period can range between one and 10 consecutive days. Flash incarceration is a tool that may be used by each county agency responsible for postrelease supervision. Shorter, but if necessary more frequent, periods of detention for violations of an offender's postrelease supervision conditions shall appropriately punish an offender while preventing the disruption in a work or home establishment that typically arises from longer term revocations." (§§ 3454(b) and (c).)

It appears the language of the statute allows the sanction of "flash incarceration" to be applied successively to multiple violations, and is not limited to one period of flash incarceration for the entire term of supervision. Section 3452(q) references custody of up to ten days for "any violation." It is not clear, however, whether the supervising agency can impose up to 10 days for each individual violation, or whether it can only impose a maximum of 10 days for each "incident." It does not seem likely the Legislature contemplated a literal application of 10 days for each individual violation out of a single incident. For example, if the supervised person incurred four violations in a single incident, he potentially could receive 40 days in custody. The longer the number of days imposed, the less the time is a "flash incarceration" as contemplated by evidence-based practices. Additionally, sentences longer than 10 days may raise legitimate due process concerns because they are being imposed without court involvement.

Defendants serving time for "flash incarceration" will receive only actual time credit; no conduct credits are awarded. (§ 4019(i).)

b. Petition to the court

If the supervising agency determines the intermediate sanctions authorized by section 3454(b) are "not appropriate," the agency may petition the superior court to revoke, modify, or terminate PRCS.

The procedure for initiating a violation petition and determining whether a violation has occurred is now governed by section 1203.2. The procedure will be the same as that for probation violations. Because probation violations may be filed by the district attorney, presumably the district attorney also has the authority to file petitions to modify or revoke PRCS. Rule 4.540 of the California Rules of Court contains a detailed delineation of the violation procedures. But the rule was adopted at a time when the statutory law contained no such provisions. With the amendment of section 1203.2 to include persons on PRCS, it is unlikely Rule 4.540 will have further validity because statutory provisions control over court rules.

Rule 4.541 outlines the contents of the petition. The petition must include a written report that contains:

> "(1) Information about the supervised person, including:

(A) Personal identifying information, including name and date of birth;

(B) Custody status and the date and circumstances of arrest;

(C) Any pending cases and case numbers;

(D) The history and background of the supervised person, including a summary of the supervised person's record of prior criminal conduct; and

(E) Any available information requested by the court regarding the supervised person's risk of recidivism, including any validated risk-needs assessments;

(2) All relevant terms and conditions of supervision and the circumstances of the alleged violations, including a summary of any statement made by the supervised person, and any victim information, including statements and type and amount of loss;

(3) A summary of all previous violations and sanctions, including flash incarceration, and the reasons that the supervising agency has determined that intermediate sanctions without court intervention as authorized by [] section 3454(b) are not appropriate responses to the alleged violations; and

(4) Any recommendations."

Detention of the defendant

The defendant may be arrested or detained pending the hearing on an alleged violation of PRCS. The circumstances of the detention may vary depending on whether a petition to revoke or modify PRCS has been filed with the court.

- ***Before*** *a petition for revocation has been filed with the court:*

  Arrests – A peace officer who has probable cause to believe that a person subject to PRCS is violating any term or condition of release is authorized to arrest the person without a warrant and bring the person before the postrelease supervising county agency. (§ 3455(b)(1).)

  Warrants – An officer employed by the supervising agency is authorized to seek a warrant from a court, and the court or its designated hearing officer is authorized to issue a warrant for that person's arrest, regardless of whether a petition for revocation has been filed. (§ 3455(b)(1).)

- ***After*** *a petition for revocation has been filed with the court:*

  Warrants – The court or its designated hearing officer is authorized to issue a warrant for any person who is the subject of a petition for revocation of supervision who has failed to appear for a hearing on the petition, or for any reason in the interests of justice. (§ 3455(b)(2))

  Remand – The court or its designated hearing officer is authorized to remand to custody a person who does appear at a hearing on a petition for revocation of supervision or for any reason in the interests of justice. (§ 3455(b)(2).)

  Detention – A hearing on the petition for revocation shall be held within a reasonable time after the filing of the petition. The supervising agency is authorized to determine that a person should remain in custody until the first appearance on the petition to revoke, and may order the person confined, without court involvement, on a showing by a preponderance of the evidence that a person under supervision poses an unreasonable risk to public safety, the person may not appear if released from custody, or for any reason in the interests of justice. (§ 3455(c).) As in the probation context, courts presumably have sole discretion to decide custody status after the first appearance.

The hearing

The revocation hearing shall be held within a reasonable time after the filing of the revocation petition. (§ 3455(c).)

c. Sanctions by the court

At any time during the process the defendant may waive, in writing, his right to counsel, waive his right to a court hearing, admit the violation, and accept the proposed sanction. (§ 3455(a).)

If the defendant is found in violation of his conditions of PRCS after an admission or contested hearing, the court has three sentencing options: (3455(a).)

1. The court may reinstate the defendant on PRCS with a modification of his conditions, including incarceration in the county jail. The period of confinement, however, may not exceed 180 days for each custodial sanction. (§ 3455(d).) For every two days of actual custody served, the defendant will receive a total of four days of credit under section 4019(a)(5). There is no specific statutory limit on the number of 180-day intervals the court can impose. Presumably, however, the total of the custodial and supervision time cannot exceed three years. (§§ 3451(a) and 3455(e).)

2. The court may revoke and terminate PRCS, and commit the defendant to county jail. The period of confinement, however, may not exceed 180 days. (§ 3455(d).) For every two days of actual custody served, the defendant will receive a total of four days of credit under section 4019(a)(5). The total of the custodial and supervision time cannot exceed three years. (§§ 3451(a) and 3455(e).)

3. The court may refer the defendant to a reentry court pursuant to section 3015, or other evidence-based program in the court's discretion.

The court may not return the defendant to state prison as a result of any violation of PRCS. (§ 3458.)

5) Transfer of PRCS (§ 3460)

If the supervising agency of a county determines the defendant no longer has a permanent residence in the county, and a change in residence was approved by a supervising agency or the change did not violate any conditions of the defendant's PRCS, the agency is to transmit all information about the defendant to the new county within two weeks. (§ 3460(a).) Upon verification of residency, the receiving county must accept supervision over the defendant. (§ 3460(b).) "Residence" means "the place where the person customarily resides exclusive of employment, school, or other special or temporary purpose." (§ 3460(c).) "No supervising agency shall be required to transfer jurisdiction to another county unless the person demonstrates an ability to establish permanent residency within another county without violating the terms and conditions of postrelease supervision." (§ 3460(d).)

6) Legal issues related to PRCS

a. Application of Morrissey v. Brewer

Morrissey v. Brewer (1972) 408 U.S. 471, establishes the minimum due process requirements for a parole revocation proceeding. "They include (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact finders as to the evidence relied on and reasons for revoking parole. We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense. It is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial." (*Morrissey* at p. 488.) Our Supreme Court

has applied *Morrissey* standards to hearings involving probation violations. (*People v. Vickers* (1972) 8 Cal.3d 451, 458.)

Acknowledging *Morrissey* and *Vickers*, the Legislature in amending the realignment legislation to apply the procedures of section 1203.2 to mandatory supervision, PRCS and parole, observed: "By amending subparagraph (B) of paragraph (5) of subdivision (h) of Section 1170, subdivision (f) of Section 3000.08, and subdivision (a) of Section 3455 of the Penal Code to apply to probation revocation procedures under Section 1203.2 of the Penal Code, it is the intent of the Legislature that these amendments simultaneously incorporate the procedural due process protections held to apply to probation revocation procedures under *Morrissey v. Brewer* (1972) 408 U.S. 471, and *People v. Vickers* (1972) 8 Cal.3d 451, and their progeny." (2011 Realignment Legislation, SB 1023, Sec. 2(b), effective June 27, 2012.)

It would appear the procedures required in section 1203.2, as applied to PRCS, fully comply with the requirements in *Morrissey*. Many of the requirements are satisfied simply because petitions to revoke PRCS will be heard by the courts. Even the requirement of a written statement of decision is met by the court reporter's record. (*People v. Moss* (1989) 213 Cal.App.3d 532, 534.)

b. Violation preceding adjudication of underlying offense

Prosecutors and courts frequently negotiate the settlement of a case whereby the defendant admits and is sentenced on a violation of probation based on a new crime, without the separate prosecution of the new offense. The procedure has been upheld in *People v. Coleman* (1975) 13 Cal.3d 867, and *People v. Jasper* (1983) 33 Cal.3d 931. Furthermore, with proper notice to the defendant, a probation violation hearing may be conducted as part of a preliminary examination. (*In re Law* (10 Cal.3d 21.)

Presumably the practice may occur with defendants who are on PRCS. In light of the 180-day limit on incarceration under PRCS, however, the procedure likely will be used only with fairly minor criminal offenses.

c. Application of the Valdivia *consent decree*

In 1994 a federal class action lawsuit was filed in the U.S. District Court in the Eastern District of California, alleging that the then existing parole revocation procedures violated the due process rights of California parolees. The name of the case is *Valdivia, et al. v. Brown, et al.*, No Civ. S-94-671 (*Valdivia*). In 2004 the parties to the action entered into an agreement whereby the court entered a consent decree granting plaintiffs permanent injunction, including various procedural protections for parolees. There is a question whether the *Valdivia* consent decree applies to the courts in enforcing the terms of PRCS.

There are several reasons why many believe the decree does not apply to the judicial branch.

1. The courts and probation officers were not a party to the *Valdivia* action. (See *Local No. 93, Ass'n of Firefighters v. City of Cleveland* (1986) 478 U.S. 501, 529 ["And, of course, a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree."].)

2. The consent decree merely reflects the settlement of the parties and does not establish a constitutional mandate. The court in *Valdivia v. Schwarzenegger* (2010) 599 F.3d 984, 995, observed: "[W]hile the Injunction was put in place to remedy claimed constitutional violations, it is not clear that these procedures were *required* to remedy the violation of basic constitutional rights. The district court made this clear in the hearing prior to issuing the March 2009 order: '[I]n this case I never found any of the things that now everybody is concerned about, whether they were consistent with the Constitution of the United States or not. .... What I found was that the parties had agreed to get rid of this lawsuit. *There clearly were some procedures which were violative of the Federal Constitution*, and they said, "Look, we're going to solve this whole problem, and we, the plaintiffs, will give away some of our constitutional rights in order to gain these other rights."..... *It isn't really true* that this Court made a determination that these specific procedures *were required* by the Federal Constitution. The Court said, 'You guys are happy, I'm happy.' While these procedures were put in place in an attempt to remedy a claimed constitutional violation, they were not *necessary or required* by the Constitution. There is no indication anywhere in the record that these particular procedures are necessary for the assurance of the due process rights of parolees." (Emphasis original.)

3. The California courts are under a duty to construe the new statutory scheme in a manner that is constitutional. The *Valdivia* court has not seen nor ruled on the constitutionality of the statutory procedures applicable to PRCS. *Valdivia* simply is not authority for the resolution of the new issues that likely will arise as courts begin to implement the new PRCS procedures. The new procedures are entitled to a presumption of constitutionality and should be interpreted in a manner that is consistent with the requirements of the constitution. (See *Skilling v. United States* (2010) ___ U.S. ___, 130 S.Ct. 2896, 2928; *Braxton v. Municipal Court* (1973) 10 Cal.3d 138, 145.)

d. Application of Marcy's Law to PRCS and section 1203.2

Section 3044(a), enacted by Marcy's Law in 2008, designates the rights available to parolees subject to parole revocation proceedings. These rights include the following:

- The right to a probable cause hearing no later than 15 days following his arrest for the parole violation.

- The right to an evidentiary revocation hearing within 45 days following his arrest for the parole violation.

- The right to counsel on a limited basis.

- The violation must be proved by a preponderance of the evidence by testimony, documentary evidence, or "hearsay evidence offered by parole agents, peace officers, or a victim." (§ 3044(a)(5).)

A number of the rights and procedures outlined in section 3044 are not included in section 1203.2, the statute that now governs proceedings for revocation of PRCS. It is not clear whether section 3044 will apply to any persons on PRCS, or whether its terms will be strictly limited to persons released on actual parole.

Appendix I: Table of Crimes Punishable in State Prison or County Jail Under Section 1170(h)

Designations - Prison-eligible or 1170(h)
Prison-eligible crimes are underlined, crimes punishable under section 1170(h) are in normal font. When the proper designation is Unknown either because more information is required or because the law is unclear, it is designated in bold italics.

Subsections:
The table lists each code section identifying relevant subsections. If a code section includes several subsections, the section is listed first, followed by each applicable subsection separated by commas (e.g., 148(b),(c),(d)(all).) If a subsection has several subsubsections, those subsubsections appear in parentheses next to the subsection as reflected by "(all)" in the preceding example.

"(All)" means that all relevant subsections or subsubsections are included. If a subsection or subsubsection is treated differently, it is given a separate listing.

General Rules
Prison-eligible crimes are those felonies not punishable pursuant to 1170(h) (§ 18(a)), unless it is a Vehicle Code felony with no punishment specified; in such circumstances it is punishable by commitment to jail (Veh. Code § 42000.).

Section 1170(h)(3) further provides that prison is to be imposed if any of the following apply:
1. Conviction of a current or prior serious or violent felony conviction listed in sections 667.5(c) or 1192.7(c),
2. When the defendant is required to register as a sex offender under section 290; or
3. When the defendant is convicted and sentenced for aggravated theft under the provisions of section 186.11.

A careful reading of sections 1170(h)(1), (2) and (3), makes it clear that when an exclusion applies to a crime, it will override language in the specific statute that makes the crime punishable in county jail.

Enhancements
Enhancements sometimes specify "prison" where the term for the enhancement is to be served. It is unclear whether the enhancement would change where the sentence is to be served when attached to an 1170(h) crime. 1170.1(a) provides that if either the principal or subordinate term is prison-eligible, the entire sentence is to be served in prison. However, it says nothing about enhancements.

Acknowledgments
The authors gratefully acknowledge the willingness of the Hon. Russell Scott of the Monterey Superior Court to have us publish this reference material. Judge Scott was assisted by the Hon. Gale Kaneshiro of the San Diego Superior Court.

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31826
31827
31828
31829
31880
50500

Fish & Game

3009
4758
8685.5
8685.6
8685.7
8688
12001
12004(b)
12005(a)(2)

Food & Ag

6306
10786
12996(b)
17551(all)
17701
18841
18842
18843
18844
18845
18846
18847
18848
18849
18850
18851
18852
18853
18854
18855
18856
18857
18932
18933
19240
19260
19280
19300
19300.5
19306
19310
19313.5
19320
19340
19360
19363
19403
19440
19441
35283(all)
80072
80073
80111
80114
80151
80152
80174
18313,8

Government

1026
1090
1090.1(all)
1091(all)
1093
1094
1097
1195
1368
1369
1855(all)
3108
3109
5503(all)
5951
5954
6200(all)
6201
6254.21(b)
8214.2
8227.3
8670.64(a),(c)
8920(all)
8924
8925
8926
9050
9052
9053
9054
9056
9130.5
27443(all)
51012.3
51013
51013.5(all)
51014
51014.3
51014.5
51014.6
51015
51015.05
51015.2
51015.4
51015.5
51017.1 (all)
51017.2
51018
51018.7(a)

81004
91002

Harbors & Navigation

264(all)
302
304
305
306
310
655(f)
656.2
656.3
668(c)(1),(g)
668(k)

Health & Safety

1349
1390
1522.01(c)
1621.5(a)
7051
7051.5
7150.75
8113.5(b)(2),(3)
8785
11100(f)(2)
11100.1(b)(2)
11104
11105(all)
11106(j)
11153(all)
11153.5(a-b)
11154(all)
11155
11156(all)
11162.5(a)
11173(all)
11174
11350(a),(b)
11351
11351.5
11352(all)
11353(all)
11353.1(all)
11353.4(all)
11353.5
11353.6(b)
11353.6(c)
11353.7
11354
11355
11356.5(all)
11357(a)
11358
11359
11360(a)
11361(all)
11363
11364.7(b)
11366
11366.5(all)
11366.6
11366.7(all)
11366.8(a),(b)
11368
11370.1(all)
11370.2(all)
11370.4(all)
11370.6(a)
11370.9(all)
11371
11371.1
11374.5(a)
11375(b)(1)
11377(a)
11378
11378.5
11379(all)
11379.2
11379.5(all)
11379.6(a),(c)
11379.7(all)
11379.8(all)
11379.9(a)
11380(a)
11380.1(a)(all)
11380.7(a)
11382
11383(all)
11383.5(all)
11383.6(all)
11383.7(all)
11390
11391
11550(e),(f)
12305
12401
12700(b)(3),(4)
12761
17061(b)
18124.5
25160(all)
25161(all)
25162(all)
25163(a)
25180.7(c)
25186.5(all)
25189.5(all)
25189.6(all)
25189.7(b),(c)
25190(b)
25191(all felonies)
25395.13(b)
25507
25515(a)
25541
42400.3(c)
44209
100895(all felonies)
103800
109335
109370
115215(b)(1-2),(c)(1-2)
116730(all felonies)
116750(all)
118340(c),(d)
120291(a)
131130(b)

Insurance

700(b)
750(b)
827
828
829
830

833(all)
844
845
853
900.9
1043
1215.10(d),(e)
1760.5
1761
1763
1764
1764.1
1764.2
1764.3
1764.4
1764.7
1765.1
1765.2
1767
1780
1800
1800.75
1802.1
1810.7
1814
1871.4(all)
10192.165(e)
11160
11161
11162(all)
11163
11760(all)
11880(all)
12660
12815
12830
12835
12845
14080
15053

Labor

227
1778
3215
3218
3219(all)
6425(a),(b)
6425(b)
6425(c)
7770
7771

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421
616
1318
1670
1671
1672(a)
1672(b)
1673(a)

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33
37(a)
38
67
67.5(b)
68(all)
69
71(all)
72
72.5(all)
76(all)
85
86
92(all)
93(all)
95(all)
95.1
96
99
100
107
109
110
113
114
115(all)
115.1(all)
115.5(b)
116
117
118
118a
118.1
126
127
128
129
132
134
136.1(all)
136.2(d)(3)
136.5
136.7
137(a)
137(b)
138(all)
139(a)
139(b)
140(all)
141(b)
142(a)
146a(b)(all)
146e(b)
148(b),(c),(d)(all)
148.1(all)
148.3(b)
148.4(b)(all)
148.10(a)
149
151(a)(2)
153(1),(2)
154(b)
155(b)
155.5(b)
156
157
165
166(c)(4)
166(d)(1)
168(all)
171b(a)(all)
171c(a)(1)

171d(all)
181
182(all felonies)
182.5
186.10(all)
186.11(all)
186.22(all)
186.26(all)
186.28(all)
186.33(b)(all)
187(all)
189(all)
190(all)
191.5(a)
191.5(b)
191.5(c)(1)
191.5(c)(2)
191.5(d)
192(a)
192(b)
192(c)(1),(3)
192.5(a),(c)
192.5(b)
192.5(e)
193(a)
193(b)
193(c)(1),(3)
193.5(a),(c)
193.5(b)
203
204
205
206
206.1
207(all)
208(all)
209(all)
209.5(all)
210
210.5
211
212.5(all)
213(all)
214
215(all)
217.1(a)
217.1(b)
218
218.1
219
219.1
219.2
220(all)
222
236
236.1(a),(b),(c)
237(a),(b)
241.1
241.4
241.7
243(c)(all),(d)
243.1
243.3
243.4(a),(b),(c),(d),(j)
243.6
243.7
243.9(a)
244
244.5(all)
245(a)(all)
245(b)
245(c)
245(d)(all)
245.2
245.3
245.5(all)
245.6(d)
246
246.3(a)
247(a),(b)
247.5
261(a)(all)
261.5(c),(d)
262(all)
264(all)
264.1(all)
265
266
266a
266b
266c
266d
266e
266f
266g
266h(all)
266i(all)
266j
267
269(all)
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271
271a
273(c),(d),(e)
273a(a)
273ab(all)
273d(all)
273.4(a)
273.5(all)
273.6(d),(e)
273.6(g)(1)
273.65(d),(e)
278
278.5(a)
280(b)
281(all)
283
284
285
286(all)
288(all)
288a(all)
288.2(all)
288.3(all)
288.4(a)(2),(b)
288.5(all)
288.7(all)
289(all)
289.5(d)
289.6(all felonies)
290.018(all felonies)
290.4(c)(1)
290.45(e)(1)
290.46(j)(2)
298.2(all)

299.5(all)
311.1(all)
311.2(a)
311.2(b),(c),(d)
311.3(all)
311.4(all)
311.5
311.7
311.9(all)
311.10(all)
311.11(all)
313.4
314(1)
327
332(a)
334(a)
337
337a(all)
337b
337c
337d
337e
337f(all)
337i
337j
337.3
337.4
337.7
347(all)
350(a)(2),(b),(c)
367f(all)
367g(all)
368(b)(all)
368(d),(e),(f)
374.2(all)
374.8(b)
375(d)
382.5
382.6
386(all)
387(all)
399(all)
399.5(a)
401
404.6(c)
405a
405b
417(b),(c)
417.3
417.6(a)
417.8
422(a)
422.7(all)
422.75(all)
424
425
432
451(all)
451.1(all)
451.5(all)
452(a),(b),(c)
452.1(all)
453(all)
454
455(a)
459 1st
459 2nd
461(a)
461(b)
463(a)
463(b)
463(b)[Gun]
464
470(all)
470a
470b
471
472
473
474
475
476
476a
477
478
479
480(all)
481
481.1(a)
483.5(a),(f)
484b
484c
484c(Public funds)
484e(a),(b),(d)
484f(all)
484g
484h(all)
484i(b),(c)
484.1(a)
485
487(all, except (d)(2))
487(d)(2)
487a(all)
487b
487d
487e
487g
487h(all)
487i
487j
489(a)
489(b)
496(all)
496a(all)
496c
496d(all)
497
497 (Public funds)
498(any felony)
499(all)
499c(c)
499d
500(a)(all),(b)(2)
502(c)(1),(2),(4),(5)
502(c)(3)
502(c)(6),(7)
502(c)(8)
502(d)(1),(2)(B),(3)(C),(4)(D)
502.5
502.7(a)(all),(b)(all),(d)
,(g)
502.8(c) thru (f)
503
504/514
504a

504b
505
505 (Public funds)
506
506 (Public funds)
506b
507
508
514(except "public funds")
514(Public funds)
520
522
523
524
528
529(all)
529a
530
530.5(a),(c)(2),(3),(d)(all)
532(all)
532a(4)
532f(all)
533
534
535
537(a)(2)
537e(a)(3)
538
538.5
548(all)
549
550(all felonies)
550(c)(1),(2)(A),(3)
551(c),(d)
560
560.4
566
570
571
577
578
580
581
587
587.1(b)
588a
591
592(b)
593
593a(all)
593c
593d(b),(d)(2)(A),(B)
594(b)(1)
594.3(all)
594.35(all)
594.4(a)(all)
594.7
597(all)
597b(c)
597.5(a)(all)
598c(all)
598d(c)
600(a),(c)
600(d)
601(all)
607
610
617
620
621
625b(b)
625c
626.9(f)(all),(h),(i)
626.95(all)
626.10(a)(1),(b)
629.84
631(all)
632(all)
632.5(all)
632.6(all)
632.7(all)
634
635
636(all)
637
637.1
639
639a
641
641.3(all)
642
646.9(all)
647f
647.6(b),(c)(d)
648
653f(a),(d),(e)
653f(b), (c)
653h(all felonies)
653j(all)
653s(all)
653t(all felonies)
653u(all felonies)
653w(b)(1),(3)
664(a)(all)
664(e),(f)
666(a)
666(b)(all)
666.5(all)
667(a)
667.5(a)
667.5(b)
667.51(all)
667.6(all)
667.61(all)
667.7(all)
667.71(all)
667.75
667.8(all)
667.85
667.9(all)
667.10(all)
667.15(all)
667.16(all)
667.17
670(all)
674(all)
675(all)
836.6(if GBI)
1320(b)
1320.5
1370.5(all)
2042
2772
2790

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4131.5
4133
4500
4501
4501.1(all)
4501.5
4502(all)
4503
4530(all)
4532(all)
4533
4534
4535
4536(all)
4550(all)
4571
4573(all)
4573.5
4573.6(all)
4573.8
4573.9(all)
4574(a),(b)
4600(all)
11411(c),(d)
11412
11413(all)
11418(a)(1),(2)
11418(b)(all),(c),(d)(all)
11418.1
11418.5(a)
11419(all)
12020(all)
12021(a)(all),(b),(g)(1)
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12021.5(a)
12021.5(b)
12022(a)(1),(2)
12022(b)(all)
12022(c),(d)
12022.1(all)
12022.2(all)
12022.3(all)
12022.4(all)
12022.5(all)
12022.53(all)
12022.55
12022.6(all)
12022.7(all)
12022.75(a)
12022.75(b)(all)
12022.8
12022.85(all)
12022.9
12022.95
12023(all)
12025(a)(all)
12025(b)(1),(2),(5),(6)(all)
12025(b)(3),(4)
12031(a)(all)
12034(b),(c),(d)
12035(b)(1),(d)(1)
12040
12051(c)(all)
12072(g)(2)(all),(3)(all)
12072(g)(4)(all)
12076(b)(1),(c)(1)
12090
12101(all felonies)
12220(all)
12280(a)(all),(b)
12281(all)
12303
12303.1(all)
12303.2
12303.3
12303.6
12304
12308
12309
12310(all)
12312
12316(b)(1)
12320
12321
12355(all)
12370(all)
12403.7(g)
12422
12520
14166(all)
18710(all)
18715(all)
18720
18725(all)
18730
18735(all)
18740
18745
18750
18755(all)
19100
19200
20110
20310
20410
20510
20610
20710
20910
21110
21310
21810
22010
22210
22410
22810(all)
22910(all)
23900
24310
24410
24510
24610
24710
25100(a)
25110(a)
25300(all)
25400(a)(all)
25400(c)(1),(2),(3),(4)
25400(c)(5),(6)
25800(all)
25850(a)(all)
25850(c)(1),(2),(3),(4)
25850(c)(5),(6)
26100(b),(c),(d)

26180(b)(all)
27500(a),(b)
27505(all felonies)
27510
27515(all)
27520(all)
27540(a),(c),(d),(e),(f)
27545
27550(all)
27590(b),(c),(d)
28250(b)
29610
29650
29700(a)(all)
29800(all)
29805
29815(all)
29820(all)
29825(a)
29900(all)
30210
30305(a)(all)
30315
30320
30600(all)
30605(a)
30615
30720
30725(b)
31360
31500
32310
32625(all)
32900
33215
33410
33600

Probate

2253

Public Contract

10280
10281
10282
10283
10422
10423
10522
10523
10870
10871
10872
10873

Public Resource

5097.99(b),(c)
5190
14591(b)(2)
25205(g)
48650.5(d)
48680(b)(1)

Public Utilities

827(all)
2114
7676
7679
7680
7724(all)
7903
8285(a)
21407.6(b)

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7093.6(j),(n)
7153.5
8103
9278(j),(n)
9354.5
14251
16910
18631.7(d)(2)
19542.3
19705(all)
19706
19708
19721(all)
30459.15(p)(all)
30473
30475
30480
32471.5(p)(all)
32552
32553
32555
38800(l)(all)
40187
40211.5(l)(all)
41143.4
41171.5(p)(all)
43522.5
43604
43606
45867.5(l)(all)
45953
45955
46628(p)(all)
46703
46705
50156.18(n)
55332.5(p)
55363
60106.3
60503.2
60637(p)
60707

Streets & Hwys

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2101.5
2101.6
2102
2103
2104
2105
2106
2107
2108
2109
2110
2110.3
2110.5
2110.7
2111
2112
2114
2115
2116(all)
2117.5
2118.5

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2120
2121
2122

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1808.4(d)
2470
2472
2474
2476
2478(b)
2800.2(all)
2800.3(all)
2800.4
4463(a)(all)
10501(b)
10752(all)
10801
10802
10803(all)
10851(all)
20001(all)
21464(all felonies)
21651(c)
23104(b)
23105(all)
23109(f)(3)
23109.1(all)
23110(b)
23152(all)
23152(.per 23550.5)
23153(all)
23550(all)
23550.5(a),(b)
23554
23558
23560
23566(all)
38318(b)
38318.5(b)
42000

Water Code
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13376
13387(all)

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871.5(a)
871.5(b)
1001.5(a)
1001.5(b)
1152(b)
1768.7(all)w/o force
1768.7(all)with force
1768.8(b)
1768.85(a)
3002
6330
7326
8100(a),(b),(g)
8101(a),(b)
8103(i)
10980(all except (f))
10980(f)
11054
11482.5
11483
11483.5
14014
14025(all)
14107(a)
14107(all felonies)
14107.2(a)(2),(b)(2)
14107.3(all)
14107.4(all)
15656(a),(c)
17410

Appendix II: Summary of Sentencing Under PC § 1170(h)

SUMMARY OF SENTENCING UNDER PC § 1170(h)

[As of 8/17/12]

Crimes sentenced to jail under PC § 1170(h)

Crimes specifying section 1170(h) punishment
If no term specified: 16 mos – 2 yrs – 3 yrs in county jail

Crimes/ person excluded from PC § 1170(h)

Persons with prior or current serious or violent felony convictions
-including out of state serious or violent felonies
-not juvenile strikes
Persons required to register as sex offender under section 290
Persons convicted of aggravated theft under section 186.11
Exclusion will control over statutory designation under section 1170(h)

Crimes sentenced to state prison

Crimes designated for punishment in state prison
Crimes/defendants excluded from section 1170(h)
Crimes which specify crime is punished "as a felony," without specifying a term or place where time served
If any crime requires state prison, all go to prison whether concurrent or consecutive sentence

What has changed

The place where certain sentences must be served
Sentence under section 1170(h) is a "prior term" under section 667.5(b)
No parole when 1170(h) sentence completed

What has not changed

Probation eligibility
Ability to participate in alternative sentencing programs
How a sentence is structured under sections 1170 and 1170.1
Power to specify "wobblers" as a misdemeanor
The ability to suspend imposition of sentence, or impose sentence and suspend execution

Sentencing options under section 1170(h)

Straight sentence under section 1170(h)(5)(A)

-defendant will do full term in custody
-defendant will receive 4 days of credit for every 2 days served
-no supervision on release
-no criminal court process to require treatment, collect restitution or other fees and fines

Split or blended sentence under section 1170(h)(5)(B)

-defendant will do part of term in custody and part on supervision, at court's discretion
-terms of supervision may include all standard terms and conditions applicable to probation, including treatment and restitution
-supervision and conditions are mandatory
-length of the custody and supervision time cannot exceed the length of sentence imposed
-defendant will earn credit of 4 days for every 2 days served in custody; credit on supervision is only actual time credit
-supervision time tolled if defendant's supervision summarily revoked
-no supervision on completion of full term

Restitution fines

-if imposition of sentence suspended: 1202.4(b), 1202.44
-if execution of sentence suspended:
    -if S/P: 1202.4(b), 1202.44, 1202.45
    -if 1170(h): 1202.4(b), 1202.44

If probation denied and sentence imposed:

    -if S/P: 1202.4(b), 1202.45
    -if 1170(h): 1202.4(b)

Violations of mandatory supervision

Violations or modification of the terms of supervision are covered by section 1203.2
Transfer of supervision to another county is under section 1203.9