

FELONY SENTENCING AFTER REALIGNMENT

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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.” (P.C. § 17.5, subd. (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:

1) *Defendants committed to county jail (P.C. § 1170, subd. (h)(5))*

Section 1170, subdivision (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, subd. (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, subdivision (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, subd. (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, subdivision (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, subdivision (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, subd. (h)(3).)

- Where the defendant has a prior or current serious felony conviction under section 1192.7, subdivision (c), a violent felony conviction under section 667.5, subdivision (c), or an out-of-state felony conviction of a crime that would qualify as a serious or violent felony under California law;

- 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, subdivision (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.” (Section 18, subd. (a).)

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

4) *Conflicts in the designation of punishment*

At times the designation of punishment for a particular offense under section 1170, subdivision (h), appears to be in direct conflict with an exclusion. Section 288.2, distribution of lewd material to a minor, for example, has been shifted to punishment under section 1170, subdivision (h). Yet section 288.2 is a registerable sex offense, which would require punishment in state prison because of the exclusions in section 1170, subdivision (h)(3). Similarly, sections 191.5, subdivision (c)(2), vehicular manslaughter while intoxicated, and 243, subdivision (d), battery with serious bodily injury, are punishable under section 1170, subdivision (h). The required level of injury makes these crimes serious felonies under section 1192.7, subdivision (c)(8), thus excluded under section 1170, subdivision (h)(3). It is not clear whether the statute defining the crime or the exclusion controls. This issue may be resolved by 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.

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

- The defendant commits two crimes normally punished under section 1170, subdivision (h), but the second crime was committed while “out on bail” within the meaning of section 12022.1. Section 12022.1, subdivision (b), imposes “an additional term of two years in *state prison*.” (Emphasis added.) Must all crimes be sentenced to prison?
- The defendant is convicted of transportation of a controlled substance in violation of Health and Safety Code section 11352, subdivision (a), punishable under section 1170, subdivision (h), and an enhancement under Health and Safety Code section 11356.5, subdivision (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.) Where is the sentence served?

- Additional enhancements which specify additional time in state prison include Health and Safety Code section 11379.7, manufacturing PCP with children present, and Penal Code section 422.75, subdivision (a), committing a felony that is also a hate crime.
- Does it matter that the enhancement is a status enhancement added once at the end of the case (such as the “out on bail” enhancement), or a count-specific conduct enhancement (such as the hate crime enhancement)?

Again, it may be that the specific statute will control over the general statute. As discussed previously, is the base crime the specific statute, or does the enhancement have a more narrow focus?

Does it make a difference that the conflict is between the punishment specified for the base term and an *exclusion* under section 1170, subdivision (h)(3), as opposed to the conflict for the *designated punishment* for the base term and enhancement?

B. Alternatives to commitment to jail or prison

Section 1170, subdivision (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, subdivision (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, subdivision (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, subd. (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, subd. (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, subd. (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, subdivision (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, subdivision (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, subdivision (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) For a full term in custody 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. 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.”

Sentences imposed under section 1170, subdivision (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, subdivision (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.

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, subdivision (d). (See discussion below.)

- 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, subdivision (h), 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. Presumably 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.

The court is given the ability to terminate the supervision period prior to expiration of the imposed sentence. 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, subdivision (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.”

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.

It is likely that once the court places the defendant on mandatory supervision, the responsibility to supervise the defendant will remain in the sentencing county. Section 1203.9, as implemented by California Rule of Court, Rule 4.530, only

relates to the transfer of probation supervision. The mandatory supervision allowed by section 1170, subdivision (h)(5)(B), is not probation.

1) ***Practical application***

The application of section 1170, subdivision (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, subdivision (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, subdivision (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, subdivision (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, subdivision (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) *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. (P.C. §§ 1203.016, subd. (a), and 1203.017, subd. (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, subdivision (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.

The court's authority

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.)

Custody credits

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, subdivision (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, subdivision (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, subdivision (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.

4) *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, subdivision (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, subdivision (h), are treated like prison terms, misdemeanor sentences should be ordered served separately from the felony. Whether the misdemeanor is part of the 1170, subdivision (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.

E. Effective date of section 1170, subdivision (h)

Section 1170, subdivision (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. 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.

F. Multiple counts, mixed punishment

Section 1170.1, subdivision (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.”

Section 1170.1, subdivision (a), only makes reference to “principal or subordinate” terms, language applicable to consecutive sentences. It can be argued these phrases have no application to concurrent terms. It is not clear whether this distinction is significant. It is unlikely the Legislature intended to require that mixed consecutive sentences be served in state prison, while giving courts discretion when sentencing crimes concurrently to allow one crime to be served in state prison and the other in county jail. The purpose of the statutory language suggests that if the sentence for one crime must be served in prison, all sentences must be served in prison, whether the sentences are being served concurrently or consecutively. The imposition of concurrent county jail terms to state prison commitments, however, is not unheard of. The practice is regularly used in the disposition of misdemeanor crimes being sentenced with felonies. While there is an argument that the plain language of the statute applies only to consecutive sentences, the argument seems contrary to the underlying purpose of the provision.

It is also not clear where the defendant is to serve a sentence if the base term specifies disposition in county jail under section 1170, subdivision (h), but an enhancement specifies the additional term is to be served in state prison. Section 12022.1, for example, imposes a two-year term in *state prison* if a crime is committed while out on bail or own recognizance. If the underlying crime is burglary in the second degree, a crime which specifies punishment in county jail under section 1170, subdivision (h), a question remains as to where is the sentence to be served.

G. 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.

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, subdivision (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, subdivision (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.)

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, subdivision (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.

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, subdivision (h), the realignment legislation must be read with the provisions of the Three Strikes law. Section 1170.12, subdivision (a) 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, subdivision (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, subdivision (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."

Whether disqualifying conditions must be pled and proved

As noted above, a commitment to county jail under section 1170, subdivision (h), is unavailable to defendants who have current or prior violent or serious felony convictions listed in sections 667.5, subdivision (c), and 1192.7, subdivision (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, subd. (h)(3).) As the legislation now reads, it is not clear whether the People must "plead and prove" the disqualifying factors.

One portion of section 1170 may suggest a duty to plead and prove any disqualifying factor. Section 1170, subdivision (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. It is obviously the purpose of this provision to prevent trial courts from dismissing disqualifying factors to allow a defendant to be committed to county jail. It is not likely the Legislature intended the statute to impose a pleading and proof requirement. When such a requirement is intended, the Legislature clearly knows how to express it. (See, e.g., § 1170.12, subdivision (a).)

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, will be an issue in all other circumstances. *People v. Lara* (2011) 193 Cal.App.4th 1393, and *People v. Jones* (2010) 188 Cal.App.4th 165, holding there is a pleading and proof requirement to be excluded from the enhanced custody credit provisions, have been granted review or depublished by the Supreme Court. *People v. James* (2011) 196 Cal.App.4th 1102, and *People v. Voravongsa* (2011) 197 Cal.App.4th 657, conclude there is no requirement to plead and prove the existence of a prior disqualifying strike; both have been granted review.

A similar “pleading and proof” dispute arose 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, subd. (b)(1).) *In re Varnell* (2003) 30 Cal.4th 1132, 1143, 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 appellate decisions regarding the pleading and proof requirement for a denial of enhanced custody credit may be helpful, there is a significant difference between that issue and the exclusion of a defendant from sentencing under section 1170, subdivision (h). As both *Jones* and *Lara* observe, the reduction of custody credit 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. Courts may be less willing to find a pleading and proof requirement under these circumstances, particularly in the absence of express legislation imposing such a duty.

Use of section 1385 to dismiss disqualifying factors

As noted above, 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.” Clearly the Legislature intends that judges generally not be permitted to dismiss disqualifying factors to make a defendant eligible for a county jail commitment under section 1170, subdivision (h). Nothing in the legislation, however, suggests any intent to otherwise restrict the exercise of the court’s discretion 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, subdivision (h). Because section 1170, subdivision (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 section 1170, subdivisions (d) and (e)*

Section 1170, subdivision (d), permits the court to recall a commitment to state prison within 120 days of the date of sentencing. Section 1170, subdivision (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, subdivision (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, subdivision (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, subdivision (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***

Section 1170.1, subdivision (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, subdivision (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, subdivision (h), the court could only impose a traditional consecutive sentence, generally limited to one-third the mid-base term.

4) ***Reconciliation of realignment legislation with probation ineligibility statutes***

A number of statutes prohibit the granting of probation for certain crimes or offenders. (See, e.g., §§ 1203.07, subd. (a), and 1203.073, subd. (b) [specified drug offenses].) Nothing in the realignment legislation appears inconsistent with these statutes. A commitment under section 1170, subdivision (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, subdivision (b), makes commitments under section 1170, subdivision (h), priorable as an enhancement, a consequence not applicable to traditional grants of probation. Supervision under a “split” or “blended” sentence under section 1170, subdivision (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 post-release supervision by the probation officer does not mean the court is granting probation in violation of the statutes that prohibit such a disposition.

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, subdivision (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, subdivision (h)(3).

5) ***Exercise of discretion under section 17, subdivision (b)***

Since the realignment legislation changes only the place where a sentence is to be served, there will no change in the court’s ability to specify “wobbler” offenses as a misdemeanor under section 17, subdivision (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, subdivision (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, subdivision (h), or the court suspends execution of a state prison sentence or a sentence under section 1170, subdivision (h), the court will have no jurisdiction later to specify an offense as a misdemeanor.

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, but the crime is now punishable under section 1170, subdivision (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. Certainly the decision not to reinstate a defendant on probation and order into execution a suspended state prison sentence is a sentencing proceeding. Furthermore, if the change from a state prison commitment to a county jail commitment is perceived as a less onerous sanction, a defendant may well be entitled to the benefits of the change as a matter of equal protection.

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, subdivision (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, subdivision (d), may constitute a sentencing proceeding for the purpose of applying the new law to the case. 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. Such arguments have not been favorably received. (See, e.g., *In re Stinnette* (1979) 94 Cal.App.3d 800, 804-805.)

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, subdivision (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, subdivision (h)(5) as a “prior” under section 667.5, subdivision (b)***

Section 667.5, subdivision (b), has been amended to specify that commitments under section 1170, subdivision (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, subdivision (b), expressly provides that a “split” or “blended” sentence imposed under section 1170, subdivision (h)(5)(B), qualifies as a chargeable prior conviction.

It is not entirely clear how the five-year “washout” under section 667.5 is calculated when the court imposes a blended sentence under section 1170, subdivision (h)(5)(B). The statute 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.) It is unclear whether the five-year period starts to run when the split sentence is “imposed,” as suggested by a literal application of the statute, or does it mean after the actual custody portion is served, or only after the entire sentence has been served, including any period of mandatory supervision. The statute references being free from custody, which suggests the period might start with the end of the custody portion of the sentence. But mandatory supervision is not the same as parole because in the former situation the supervision period is considered part of the sentence being served.

Section 1213, subdivision (a), has been amended to require the preparation of appropriate documentation for all county jail commitments under section 1170, subdivision (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, subdivision (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, subdivision (h). Accordingly, prior convictions obtained in other jurisdictions may be used for commitments under section 1170, subdivision (h), as if the prior conviction had occurred in California.

11) ***Restitution fines***

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

Misdemeanors

No change in the current law.

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 \$200 to \$10,000 under section 1202.4, subdivision (b). The court will impose a probation revocation fine in the same dollar amount under section 1202.44.

If the court imposes a suspended *state prison* sentence, the court should impose the basic assessment under section 1202.4, subdivision (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 imposes a suspended term under *section 1170, subdivision (h)*, whether or not a “split” sentence, the court should impose only the basic restitution fine under section 1202.4, subdivision (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, subdivision (h).

Felonies when defendant committed to state prison or under section 1170, subdivision (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, subdivision (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, subdivision (h), whether or not a “split” sentence, the court should only impose the basic restitution fine under section 1202.4, subdivision (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, subdivision (a), to permit county boards of supervisors to expand the use of home detention programs. Previously these programs were 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***

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.

14) *Cases from multiple jurisdictions*

The realignment legislation is wholly silent on the issue of sentences from multiple jurisdictions. 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 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. The process is not at all clear if the two counties sentence the defendant under section 1170, subdivision (h). Since the rules regarding the structure of the sentence under section 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, subdivision (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:

- Where is the sentence to be served if the second judge determines a consecutive sentence is appropriate? Is it the last county to sentence? Can the second judge impose the term, then remand the defendant to the first county to serve the first sentence?
- Where is the sentence to be served if the second judge determines a concurrent sentence is appropriate? Is the entire sentence served in the second 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 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, subdivision (h)(5)(A), but the other county imposes a “split” sentence under subdivision (h)(5)(B)?

There are no clear answers to any of these questions. Hopefully they will be addressed by the Legislature in further cleanup legislation.

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

Nothing in the realignment legislation appears to limit the ability of the court to commit a defendant to the California Rehabilitation Center (C.R.C.) as a narcotics offender. Welfare and Institutions Code, section 3051 provides, in relevant part, “Upon conviction of a defendant for a felony, or following revocation of probation previously granted, and upon imposition of sentence, if it appears to the judge that the defendant may be addicted or by reason of repeated use of narcotics may be in imminent danger of becoming addicted to narcotics the judge shall suspend the execution of the sentence and order the district attorney to file a petition for commitment of the defendant to the Director of Corrections for confinement in the narcotic detention, treatment, and rehabilitation facility unless, in the opinion of the judge, the defendant’s record and probation report indicate such a pattern of criminality that he or she does not constitute a fit subject for commitment under this section.”

Nothing in section 3051 conditions the defendant’s qualification on a potential commitment to state prison. If after hearing the court determines the defendant is not qualified for commitment as a narcotics offender, section 3051 specifies the defendant is to be returned to court “for the ordering of execution of sentence.” Again, state prison is not mentioned. The only other instance where state prison is a potential factor in the sentence relates to a defendant’s ineligibility for commitment to C.R.C. Section 3052, subdivision (a)(2), excludes any defendant who has a sentence that “exceeds six years’ imprisonment in state prison.” It is not clear whether a sentence to county jail under section 1170, subdivision (h), would trigger the six-year limit. At the very most, it may be implied that the sentence under section 1170, subdivision (h), must not be longer than six years.

Unless the defendant is otherwise excluded from C.R.C. because of a factor listed in section 3052 or because of excessive criminality, there appears no reason to deny a defendant a commitment as a narcotic addict for any crime which remains punishable in state prison. For the reasons indicated above, defendants convicted of crimes punishable under section 1170, subdivision (h), also appear to be eligible for such a commitment.

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, subdivision (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, subdivision (h), are otherwise being treated as prison sentences, likely such sentences will be considered prison sentences for the purpose of determining the proper scope of restitution.

H. 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, subd. (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, sub. (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, subdivision (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, subdivision (h), for a crime committed on or after October 1, 2011. (§ 4019, subd. (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, subd. (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 four days of total credit for every two days served.

Section 2933, subdivision (b), governs *post-sentence* credit for 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, subd. (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, subdivision (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, subdivision (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.

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 Conduct Credits Under P.C. §§ 4019 and 2933 After October 1, 2011,” by Couzens and Bigelow.

1. APPENDIX I: Table of Crimes Requiring Commitment to County Jail

PLEASE NOTE: The following table was prepared with the assistance of Michael B. Silverman, Supervising Deputy District Attorney, County of Riverside. It is our attempt to locate all crimes that now include “punishment pursuant to subdivision (h) of Section 1170 of the Penal Code.” The material has been prepared from several different sources. It is incumbent upon the court and counsel to verify where a sentence imposed after October 1, 2011, must be served.

Penal Code

	156	271a
33	157	273.6(d),(e)
38	168	273.65(d),(e)
67.5(b)	171c(a)(1)	273d
69	171d	278
71	181	278.5
72	182	280(b)
72.5	186.10	284
76	186.28	288.2
95	191.5(c)(2)	290.4(c)(1)
95.1	193(b)	290.45(e)(1)
96	193.5(b)	290.46(j)(2)
99	210.5	311.9
107	217.1(a)	313.4
109	218.1	337.3
113	219.1	337.7
114	237(a)	337b
115.1	241.1	337c
126	241.4	337d
136.7	241.7	337e
137(b)	243(c),(d)	337f
139	243.1	350(a)(2),(b),(c)
140	243.6	367f
142	244.5	367g
146a(b)	245.6(d)	368(d),(e),(f)
146e(b)	246.3(a)	374.2
148(b),(c),(d)	247.5	374.8
148.1	261.5(c),(d)	375(d)
148.3(b)	265	382.5
148.4(b)	266b	382.6
148.10	266g	386
149	271	387
153(1), (2)		399.5
		404.6(c)

405b	560.4	2790
417.3	566	4011.7
417.6	570	4131.5
422.7	577	4502
453	578	4533
461(b)	580	4536
463	581	4550
464	587	4573
470a	587.1(b)	4573.6
470b	591	4573.9
473	593	4574(a),(b)
474	594(b)(1)	4600
478	594.3	11411(c),(d)
479	594.35	11413
480	594.4(a)	11419
481	597	12025(b)(1),(2),(5),(6)
483.5	597.5(a)	12035(d)(1)
484b	600(a), (c), (d)	12040
484i	601	12072(g)(2),(3),(4)
487b	610	12076
487d	617	12090
489(b)	620	12101
496	621	12220
496a	625b(b)	12280(a),(b)
496d	626.9(f),(h),(i)	12281
499c	626.95	12303.3
499d	626.10(a)(1), (b)	12303.6
500(b)(2)	629.84	12304
502(d)(1),(2)(B),(3)(C), (4)(B)	631	12312
506b	636	12320
520	637	12355
529	647.6(b),(c)	12370
529a	653f(a),(c),(d),(e)	12403.7
530.5(a),(c)(2),(3),(d)	653h	12422
532a(4)	653j	12520
532f	653s	18715
533	653t	18720
535	653u	18725
537e(a)(3)	653w(b)(1),(3)	18730
538.5	664(a)	18375(c)
548	666(a)	18740
549	666.5	20110
550(c)(1),(2)(A),(3)	836.6	22810
551(c),(d)	1320(b)	22910
560	1320.5	23900
	2772	25110(a)

25300	29700(a)	31360
25400(c)(5),(6)	30315	32625
25850(c)(6)	30600	33410
27590(b),(c),(d)	30605(a)	
28250(b)	30725	

Business & Professions Code

585
650(g)
654.1
655.5(f)
729(b)(3), (b)(4), (b)(5)
1282.3(b)
1701
1960
2052(a)
2315(b)
4324(a), (b)
5536.5
6126(b), (c)
6153
6788
7028.16
7739
10238.6
11020(b)
11023
11286 (b)
11287
11320
16755(a)(2)
17511.9(b)
17550.19(b)
22430(d)
25618

Civil Code

892(a),(b)
1695.8
1812.125
1812.217
2945.7
2985.2
2985.3

Corporations Code

2255(c)
2256
6811
6814
8812
8815
12672
12675
22002(c)
25540
25541
27202
28880
29102
29550(a), (b)
31410
21411
35301

Education Code

7054(c)

Election Code

18002
18100
18101
18102
18106
18200
18201
18203
18204
18205
18310
18311
18400

18403
18502
18520
18521
18522
18523
18524
18540
18544
18545
18560
18561
18564
18566
18567
18568
18573
18575
18578
18611
18613
18614
18620
18621
18640
18660
18661
18680

Finance Code

3510
3532
5300
5302
5303
5304
5305
5307
10004
12102
14752
17700
18349.5
18435
22753

22780
31880
50500

Fish & Game Code

20004(b)
20005(a)(2)

Food & Agriculture

17701
18932
18933
19440
19441
80174

Government Code

1368
1369
3108
3109
5954
6200
6201
8670.64(a), (c)
9056
27443
51018.7(a)

Harbors & Navigation Code

264(b)
310
668(c)(1),(g)

Health & Safety

1390
1522.01 (c)
1621.5(a)
7051
7051.5
8113.5(b)(2),(b)(3)

8785
11100 (f)(2)
11100.1(b)(2)
11105
11153(b)
11153.5(b)
11162.5(a)
11350(a),(b)
11351
11351.5
11352
11353.5
11353.6 (c)
11353.7
11355
11357(a)
11358
11359
11360 (a)
11366.5 (a),(b),(c)
11366.6
11366.8 (a),(b)
11370.6 (a)
11371
11371.1
11374.5 (a)
11377 (a)
11378
11378.5
11379
11379.5
11379.6 (a),(c)
11380.7 (a)
11382
11383 (a),(b),(c),(d)
11383.5 (a) thru (f)
11383.6 (a),(b),(c),(d)
11383.7 (a) thru (f)
12401
12700 (a),(b)(3),(b)(4)
17601(b)
18124.5
25180.7(c)
25189.5 (b), (c), (d), (e)
25189.6
25189.7(b), (c)

25190
25191(a)(2)
25395.13(b)
25515(a)
25541
42400.3(c)
44209
100895(b)
109335
115215(b), (c)
116730(b)
116750(a), (b)
118340(c), (d)
131130(b)

Insurance Code

700(b)
750(b)
833
1043
1215.10(d), (e)
1764.7
1814
1871.4(b)
10192.165(e)
11161
11162
11163
11760(a)
11880
12660
12845

Labor Code

227
6425(c)
7771

Military & Veterans Code

145
1318
1672(b)
1673

Public Contract Code

10283
10873

Public Resources Code

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

Public Utilities Code

7680
7724
7903
21407.6(b)

Revenue & Taxation Code

7093.6(n)
7093.6(j)
9278(n)
9278(j)
14251
16910
18631.7(d)(2)
19705
19708
30459.15
32471.5
32555
38800
40211.5
41171.5
43522.5
43606
45867.5
45955
46628
46705
50156.18
5532.5
55363

60637

Unemployment Insurance Code

2118.5

Vehicle Code

2478(b)
2800.4
4463(a)
10501(b)
10752 (c)
10801
10802
10803
10851
21464 (a)
21651 (c)
23104(b)
23105(a)
23109.1 (a)
23550(a)
42000

Water Code

13387

Welfare & Institutions Code

871.5 (a)
1001.5 (a)
1768.7 (b)
1768.85 (a)
3002
7326
8100(g)
8101 (a), (b)
8103(i)
10980(b),(c)(2), (d), (g),(h)(1)(A)-(C)
14107.2 (a)(2), (b)(2)
14107.3
14107.4 (b), (e)
17410

2. APPENDIX II: Table of Crimes Requiring Commitment to State Prison

PLEASE NOTE: The following table represents the authors' best attempt at identifying the crimes that must be sentenced to state prison. The material has been prepared from several different sources. It is incumbent upon the court and counsel to verify where a sentence imposed after October 1, 2011, must be served.

Penal Code

67	Bribing an executive officer
68	Executive or ministerial officer accepting a bribe
85	Bribing a legislator
86	Legislator accepting a bribe
92/93	Judicial bribery
141(b)	Peace officer intentionally planting evidence
165	Local official accepting a bribe
186.11	Felony conviction with aggravated theft enhancement
186.22	Criminal street gangs
186.26	Street gang activity
186.33	Gang registration violation
191.5(c)(1)	Vehicular manslaughter while intoxicated
222	Administering stupefying drugs to assist in commission of a felony
243.7	Battery against a juror
243.9	Gassing a peace officer or local detention facility employee
245	Assault with a deadly weapon or force likely to inflict GBI
245(d)	Assault on peace officer
266a	Abduction or procurement by fraudulent inducement for prostitution
266e	Purchasing a person for the purpose of prostitution or placing a person for immoral purposes
266f	Sale of a person for immoral purposes
266h	Pimping and pimping a minor
266i	pandering and pandering with a minor
266j	Procuring a child under 16 for lewd or lascivious acts
273a	Felony child abuse likely to cause GBI or death
273ab	Assault resulting in death of a child under age 8
273.4	Female genital mutilation
273.5	Felony domestic violence
290.018	Sex offender registration violations
298.2	Knowingly facilitating the collection of wrongfully attributed DNA specimens

299.5	Wrongful use of DNA specimens
347	Poisoning or adulterating food, medicine, drink, etc.
368b	Felony physical abuse of elder or dependent adult
417(c)	Brandishing firearm in presence of peace officer
417.8	Felony brandishing firearm or deadly weapon to avoid arrest
422	Criminal threats
424	Misappropriation of public funds
452	Arson of inhabited structure or property
455	Burning forest land or property
504/514	Embezzlement of public funds
598c	Possession or importation of horse meat
598d	Offering horse meat for human consumption
600(d)	Harming or interfering with police dog or horse causing GBI
646.9	Felony stalking
653f(b)	Solicitation for murder
666(b)	Petty theft with specified prior convictions
4501.1	Gassing
4530	Escape from prison facility
4532	Escape
11418	Use of weapon of mass destruction
12020	Possession of specified weapons
12021/12021.1	Possession of a firearm by prohibited person
12021.5(b)(3),(4)	Carrying firearm with detachable magazine
12022(b)	Using a deadly weapon in commission of felony
12022.5	Using a firearm in commission of felony
12022.9	Infliction of injury causing termination of pregnancy
12025(b)(3)	Carrying concealed firearm by gang member
12303.1/12303.2	Possession of an explosive or destructive device

Elections Code

18501	Public official who aids and abets voter fraud
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Government Code

1090/1097	Conflict of interest by public officer or employee
1195	Taking subordinate pay
1855	Destruction of documents

Health and Safety Code

11353	Employment of minor to sell controlled substance
11354	Employment of minor to sell controlled substance
11361(a) & (b)	Employment of minor to sell marijuana
11370.1	Possession of a controlled substance while armed with firearm
11380(a)	Use of minor to transport/possess/possess for sale

120291 Knowingly exposure of person to HIV

Vehicle Code

2800.2 Reckless evading a police officer
2800.3 Evading a peace officer causing death or serious bodily injury
20001 Hit and run driving causing death or injury
23109(f)(3) Causing serious bodily injury during speed contest
23110(b) Throwing object at motor vehicle with intent to cause GBI
23153 Driving under the influence causing injury
23550.5 Driving under the influence with designated priors

In addition to the foregoing specific crimes, any felony that does not specify punishment in accordance with section 1170, subdivision (h), is punished in state prison. (Section 18, subd. (a).)

In addition to the forgoing specific crimes, a defendant convicted of any felony under any of the following circumstances must be sentenced to state prison (P.C. § 1170(h)(3)):

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.