

Sentencing Basics

CCAP Roundtable Event Presented on October 22, 2008

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I. The Basics

A. DSL & ISL

1. Terms of Art

a) DSL starting points

(1) 1170

(2) 1170.1

b) ISL

(1) Range

(2) Sentence to term prescribed by law

(3) For DSL, Reyes says all life sentences are indeterminate terms

(4) Old cases distinguish determinate life from indeterminate life

(a) Mattered on jury peremptories

(b) Yates said only straight life qualified for more peremptories

c) Significance

(1) DSL terms impact each other

(2) ISL calculated separately

(3) DSL term is served first (§ 669)

2. Base term

a) Triads

b) Base is the term selected, not including enhancements

c) Example: If triad is 2, 3, 4 years, and judge imposes 2 years, the base term is 2 years

3. Principal term

a) Base term plus enhancements specific to count

b) Inapplicable in concurrent sentences

c) § 1170.11 lists many specific crime related enhancements

d) Example of how to identify Principal term:

(1) Deft has 2nd degree burglary with use of a knife

(a) Exposure is 16 mo, 2 yr, 3 yr,

(b) 1 for knife enhancement

(2) Deft also has 1st degree burglary

(a) 2 yr, 4 yr, or 6 yr

(b) no other enhancement

(3) Judge imposes lower term on both crimes

(a) 16 months (2nd degree burglary) + 12 months (knife)

(b) 24 months (1st degree burglary)

(4) The base term is the 28 months for the 2nd degree burglary

(5) Total sentence would be 28 months + 1/3 of 48 months [1/3 middle term on the consecutive offense] = 28 + 16 = 44 months, or 3 years 8 months.

(6) Note the subordinate term is 1/3 middle term, not 1/3 of the term chosen

(a) But enhancements on subordinate terms are 1/3 of term chosen, if there is more than one term available

(b) § 12022.5 is an example of an enhancement that has more than one possible term

(7) Range of consecutive sentences under this example could be 3 years 4 months up to 7 years (consisting of upper term of 6 years for first degree burglary plus 1/3 middle term for second degree burglary (i.e., 8 months), plus 1/3 of knife enhancement (i.e., 4 months)

4. Subordinate term is the term for the other offense(s) that are run consecutively to the principal term--in the example, the 1/3 the middle term for the 1st degree burglary would be the subordinate term

5. But if judge imposes concurrent sentences on the two burglaries, the terms "principal" and "subordinate" have no meaning

II. What has changed under DSL?

A. DSL is not hard

1. Does require thought, more than grammar school effort
2. It's all statutory, look it up
3. After all, we get paid for reading

B. But prosecutors are wont to disagree

1. DSL seemed too complex and needed simplification
2. Legislature responded by simplifying

a) Removed limitations

(1) double the base term

(2) no enhancement to subordinate terms if not for violent felonies

(3) limit of 5 years on nonviolent subordinate terms

(a) Example of 40 counts of embezzlement

(i) Triad 16 mo, 2 yr, 3 yr

(ii) limit double the base term

(iii) maximum sentence = 6 years

(b) Example of one 1st degree and fifteen 2nd degree burglaries

- (i) 5 year limit on subordinate nonviolent felonies
 - (ii) maximum sentence = 6 years + 5 years (limit) = 11 years
- b) Changed subordinate enhancements from 1/3 middle term to 1/3 chosen term (that did clear up some confusion)
- 3. Irony is that the sentencing structure replacing a large part of the original DSL is now, indeed, very complex, comparatively speaking

III. Why dwell on the past?

- A. Some clients committed their crimes yesteryear
- B. Important to examine what the law was at time of crime
 - 1. Example, Murder in the Second Degree carried 5 yrs, 6 yrs, or 7 yrs if committed from 7/1/1977 through November 5, 1978
 - 2. Example, nothing could run consecutively with life terms ("straight life terms"), until law changed in 1979
 - a) *Boyce* allowed consecutively with pre-change life terms as to crimes committed after law changed
 - b) *Boyce* had virtually no analysis or authority cited in support of that claim
 - 3. Example, from 1959 to 1977, an adult defendant's conviction on a wobbler was immediately and automatically reduced to a misdemeanor if the judge committed the defendant to CYA [DJJ]
 - a) No need for judge to declare it or make a finding
 - b) No need for defendant to successfully complete CYA program
 - 4. Crimes committed at a time when the various DSL limitations were in effect must be sentenced under those more lenient provisions
- C. Important to examine reductions since that might apply
 - 1. Example, punishment for pre-DSL crimes had to be recalculated by the Board of Prison Terms, per § 1170.2, to a term in line with the then-new DSL

- a) Recall that second degree murder, which carried a life term prior to the DSL, carried only 5 yrs, 6 yrs, or 7 yrs, for that 16-month period 1977-1978, and thus had to be reconstructed in keeping with the new DSL standards
 - b) That is still the law today
 - c) BPT can give somewhat higher sentence, but still must follow spirit of DSL
2. *Estrada* may result in applying reduced penalties enacted post-offense date
- a) Court will look for intent of Legislature
 - b) Presumption is that laws operate prospectively (*Evangelatos*)
 - c) Normally/Always benefit accrues where case is not final, meaning time to petition for certiorari has not passed (*Vieira*)
3. Same rule may apply when conduct is decriminalized
- a) *Wright* (use of marijuana under Compassionate Use Act)
 - b) *Rossi* (sexual conduct between consenting adults)

IV. In-prison offenses

- A. If run consecutively (frequently, but not always required), they commence at end of term being served (§ 1107.1, subd. (c))
- B. But calculate all the new offenses under standard 1170.1 provisions and then apply that single term fully consecutive to the term being served
 - 1. *People v. McCart*
 - 2. *People v. Venegas*

V. *Cunningham*

- A. Until 3/30/07, California DSL unconstitutionally deprived defendant of jury trial right on factors relied on for upper term (unless related to recidivist factors)
 - 1. *Apprendi*
 - 2. *Blakely*
 - 3. *Cunningham*

4. *Black II*
5. *Sandoval*
6. *French*
7. SB 40

B. SB 40 changed DSL so that middle term is no longer the required term in absence of mitigation or aggravation

1. Judge is free to choose any of the three terms, using valid discretion
2. Judge must state reasons for term selected
3. *Sandoval* held that where error is prejudicial, remand for resentencing is proper but can apply the principles of SB 40
 - a) Consistent with *Booker*
 - b) Be careful what you ask for, as you might get it

C. Because of SB 40 and *Sandoval*, *Cunningham* probably does not have a long shelf life at this time

VI. What is "punishable by state prison"?

A. Where a specific term is not identified, it means 16 months, 2 years, or 3 years, per § 18

B. Thus, "imprisonment in the county jail not exceeding one year or in the state prison" means 1 year in the county jail or 16 months, 2 years, or 3 years in the state prison

VII. Wobblers

A. Crime section may indicate that it is punishable by either county jail or state prison

B. Penal Code section 17 describes how such an offense might be made a misdemeanor

VIII. "Imposition of sentence suspended" versus "execution of sentence suspended"

A. On revocation of probation, the judge under IOSS can choose any appropriate prison term

B. On revocation of probation, the judge under EOSS is limited to the sentence that was previously pronounced

1. After execution of sentence is ordered, however, judge can recall sentence under § 1170, subdivision (d)
2. Recall must be done within 120 days
3. New sentence cannot be greater than the recalled sentence
4. *Howard*

C. Choice of term after revocation must be based on circumstances at time of offense (or no later than latest reinstatement)

1. *Goldberg*
2. *Harris*
3. Rules of Court, rule 4.435(b)(1)

IX. Other sentencing schemes

A. Three Strikes (§ 667 and § 1170.12)

1. If third strike, term is life
 - a) Minimumest minimum is 25 years
 - b) Minimum may be higher if there is a way to get there
2. Violent and serious felonies are defined
 - a) § 667.5, subdivision (c)
 - b) § 1192.7
 - c) Original list was set as of 6/30/1993
 - d) Prop 21 in 2000 added to the list (*Maduley*)
 - e) Legislature added to the list in 2006
 - f) In absence of proper method of amendments, list is limited as of 2006 version
 - g) Can be a strike though not considered a strike at time of conviction of that strike (*James*)

B. One Strike (§ 667.61)

1. 15 to life
 2. 25 to life
 3. specified sex crimes and conduct
- C. Habitual Offender (§ 667.7)
1. 20 to life
 2. LWOP
 3. Specified recidivists
- D. Habitual Sex Offender (§ 667.71)
1. 25 to life
 2. sex offenses with prior sex offenses
- E. Penal Code section 269
1. 15 to life
 2. certain sex offenses on minor under 14 by someone at least 7 years older
- F. Others out there lurking

X. Dismantling the sentence given

- A. Appellate lawyers can look back at what happened
- B. Trial lawyers have to look ahead to what COULD happen
- C. Read the statute and the surrounding statutes
 1. Example: Arson
 - a) 451 defines arson
 - b) 451.1 and 451.5 increase with enhancements or separate scheme if certain factors apply
 - c) 457.1 requires registration
 2. Good idea to read Chapter of the Penal Code

XI. Pleading and proof

- A. Some sentencing factors must be pleaded and proved
 - 1. By statute that says so, such as § 667.61, subdivision (j)
 - 2. By due process (*Mancebo*)
- B. Others do not
 - 1. Factors that do not increase punishment but merely affect eligibility for favorable treatment
 - 2. *Varnell* (eligibility for Prop 36)
 - 3. *Dorsch* (eligibility for probation requires unusual case finding if two prior felony convictions)

XII. Sections that lead to other sections

- A. Study Penal Code sections beginning with "667"
 - 1. Note that numbers are not always in order
 - 2. Section 667.75 appears in the book before 667.15
- B. Study sections 1192.7 and 1192.8
- C. Study sections 1202.1 et seq.
- D. Study sections beginning with "1203"
- E. Study section 290
- F. Enhancements
 - 1. Add time to a sentence
 - 2. May be attached to counts
 - a) Armed with or use of weapons
 - b) Excessive taking
 - c) Infliction of bodily injury
 - 3. May be attached to the person
 - a) Prior prison terms
 - b) Prior serious felonies

- c) Prior convictions
- 4. *Tassell*
- G. Prior felonies can be used only once in connection with determinate sentences
 - 1. Not true on indeterminate sentences
 - 2. *Williams*
 - 3. *Misa*
- H. Read the statutes carefully because exceptions may abound
- I. Read sections beginning with "12022"
- J. Read Health and Safety Code sections 11370.4 et seq.
- K. Read Health and Safety Code section 11370.2

XIII. Monetary Sanctions

- A. Tons of provisions, Judiciary wants restructured for easy location
- B. Fees, assessments, all increase fine triple-fold, essentially
- C. Check to see if Board of Supervisors action is required
 - 1. e.g., § 1203.1b, subdivision (h), for installment payment collection fees
 - 2. e.g., § 1203.1c, subdivision (d), collection of cost of local incarceration
- D. [CCAP's Fines Chart](#)

XIV. Diversion and alternative treatment programs

- A. § 1000 (substance abuse)
- B. § 1000.12 (domestic violence)
- C. § 1210 Prop 36 (no jail or prison for certain drug offenses)

XV. Credit for time served

- A. 2900.5
 - 1. Actual time in jail, other qualifying facilities, including halfway houses

2. Plus conduct credits under § 4019
 3. No dual credit for consecutive sentences (2900.5, subd. (b))
 4. No dual credit for time spent serving another sentence
 - a) *Joyner*
 - b) *Rojas*
- B. 4019 Local jail conduct credits (**Note: this section updated since taping**)
1. Former Version
 - a) 4 days served shall be deemed to be 6
 - b) Must be committed for 6 days (confined vs. committed) (*Deick*)
 - c) 1/3 off commitment time
 - d) 1.5 times actual served presentence = roughly equivalent commitment time
 - (1) *Bobb/Smith*
 - (2) divide time served by 4, drop remainder, double quotient
 2. 4019 Amendment Effective Jan. 25, 2010
 - a) Items a through d above only apply to defendants required to register as sex offenders, those committed for serious felonies per Penal Code section 1192.7, or those with prior convictions for serious or violent felonies as defined under sections 1192.7 and 667.5
 - b) for all other defendants
 - (1) 2 days shall be deemed to be 4
 - (2) must be committed for 4 days
 - (3) ½ off confinement time
 - (4) 2 times actual served presentence
 - c) As of this update, the appellate courts are split on the question of whether the amendment to section 4019 applies retroactively. (Compare *Brown, House, Landon, Delgado, Norton, Pelayo, Keating*, and *Bacon* [retroactive application] with *Rodriguez, Otubuah, Hopkins*, and *Eusebio* [prospective application].)

On June 9, 2010, the California Supreme Court granted review in two cases involving the retroactivity of revised Penal Code section 4019. The lead case on the issue is *People v. Brown* (2010) 182 Cal.App.4th 1354, (S181963). The Court also granted review in *People v. Rodriguez* (2010) 182 Cal.App.4th 535 (S181808) on a grant and hold basis. On June 23, 2010, there were two more grant and holds: *People v. House* (2010) 183 Cal.App.4th 1049 and *People v. Landon* (2010) 183 Cal.App.4th 1096.

Counsel is advised to follow this developing issue in CCAP's [High Court Pending Issues page](#) and watch for the possibility of Supreme Court review granted on other cases.

d) *Rodriguez* and *Hopkins* also rejected equal protection arguments.

3. 4019 Amendment Effective September 28, 2010

a) Amended again, restoring the language of section 4019 to the way it read prior to January 25, 2010

b) But the effect of the January 25, 2010, amendments is now embodied in Penal Code section 2933, subdivision (e), for those eligible defendants whose prison sentence was actually executed.

c) Thus, eligible state prisoners get the benefit of an increase in their reduction credits for the time they spent in county jail.

d) It remains important to identify which version of section 4019 applies, as discussed in "Why dwell on the past," supra.

4. Limitations to 4019

a) 2933.1

(1) limits to 15% if convicted of violent felony

(2) applies only when sent to prison, but once sent, applies even to days served as condition of probation (*Daniels*)

b) 2933.2

(1) No conduct credit for murders after June 1998

(2) Applies to all counts, not just murder count (*McNamee*)

c) Three Strikes

(1) limits to 20%

(2) But limit only applies to worktime in prison, not to 4019 credits (*Philpot*)

- C. Appellate dispute over credits may require ruling from superior court
1. § 1237.1 requires correction in superior court first
 2. *Fares*
 3. *Clavel*
 4. Send letter to judge clearly showing entitlement and authority for judge to make such an order though on appeal
 5. If denied, must get actual order of denial (motion might be necessary)
 6. Acosta says can raise without 1237.1 compliance if there are other issues
 7. Still a good idea to go *Fares* letter route first

XVI. Out of state priors

- A. Must describe conduct with all the elements required that would be required in order to be a felony if committed in California (*Warner*)
1. Theft in California requires intent to deprive permanently
 2. Not necessarily so in other jurisdictions
 3. If their robbery requires theft, but theft there doesn't require California intent, may not be a valid prior for purposes of California

XVII. Cuevas and certificates of probable cause

- A. Plea bargain that reduces exposure simply by virtue of reduction in number of punishable charges
- B. Certificate of probable cause required
- C. Best if trial counsel gets it, and follows up with writ of mandate if denied
- D. Appellate counsel may be able to salvage it if defendant is in custody (constructive filing)

Appendix list of citations in approximate order of presentation

Penal Code sections 1170 and 1170.1
People v. Reyes (1989) 212 Cal.App.3d 852.
People v. Yates (1983) 34 Cal.3d 644
Penal Code section 669
Penal Code section 1170.11
Penal Code section 12022.5
Penal Code section 667.5, subdivision (c)
People v. Boyce (1982) 128 Cal.App.3d 85
Penal Code section 1170.2
In re Estrada (1965) 63 Cal.2d 740
Evangelatos v. Superior Court (1988) 44 Cal.3d 1188
People v. Vieira (2005) 35 Cal.4th 264
People v. Wright (2006) 40 Cal.4th 81
People v. Rossi (1976) 18 Cal.3d 295
People v. McCart (1982) 32 Cal.3d 338
People v. Venegas (1994) 25 Cal.App.4th 1731
Cunningham v. California (2007) 549 U.S. 270
Blakely v. Washington (2004) 542 U.S. 296
People v. French (2008) 43 Cal.4th 36
People v. Black (2007) 41 Cal.4th 799 (*Black II*)
People v. Sandoval (2007) 41 Cal.4th 825
Apprendi v. New Jersey (2000) 530 U.S. 436
SB 40
United States v. Booker (2005) 543 U.S. 220
Penal Code section 18
Penal Code section 17
People v. Howard (1997) 16 Cal.4th 1081
Penal Code section 1170, subdivision (d)
People v. Goldberg (1983) 148 Cal.App.3d 1160
People v. Harris (1990) 226 Cal.App.3d 141
California Rules of Court, rule 4.435(b)(1)
Penal Code section 667
Penal Code section 1170.12
Penal Code section 667.5, subdivision (c)
Penal Code section 1192.7
Penal Code section 667.1
Penal Code section 1170.125
Proposition 21
Manduley v. Superior Court (People) (2002) 27 Cal.4th 537
People v. James (2001) 91 Cal.App.4th 1147
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Penal Code section 667.7

Penal Code section 667.71
Penal Code section 269
Penal Code section 451
Penal Code section 451.1
Penal Code section 451.5
Penal Code section 457.1
Chapter 1 of Title 13 of the Penal Code
Penal Code section 667.61, subdivision (j)
People v. Mancebo (2002) 27 Cal.4th 735, 747
In re Varnell (2003) 30 Cal.4th 1132
People v. Dorsch (1992) 3 Cal.App.4th 1346
Penal Code section 667
Penal Code section 667.75
Penal Code section 667.15
Penal Code section 1192.7
Penal Code section 1192.8
Penal Code section 1202.1
Penal Code section 1203
Penal Code section 290
People v. Tassell (1984) 36 Cal.3d 77
People v. Ewoldt (1994) 7 Cal.4th 380
People v. Williams (2004) 34 Cal.4th 397
People v. Misa (2006) 140 Cal.App.4th 837
Penal Code section 12022
Health and Safety Code section 11370.4
Health and Safety Code section 11370.2
Penal Code section 1203.1b, subdivision (h)
Penal Code section 1203.1c, subdivision (d)
CCAP Fines Chart: http://www.capcentral.org/criminal/crim_fines.asp
Penal Code section 1000
Penal Code section 1000.12
Penal Code section 1210
Welfare and Institutions Code section 3051
Penal Code section 2900.5
In re Joyner (1989) 48 Cal.3d 487
In re Rojas (1979) 23 Cal.3d 152
Penal Code section 2900.5, subdivision (b)
Penal Code section 4019
People v. Dieck (2009) 46 Cal.4th 934
People v. Smith (1989) 211 Cal.App.3d 523
People v. Bobb (1989) 207 Cal.App.3d 88
People v. Brown (2010) 182 Cal.App.4th 1354 (rev. gr.)
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CCAP High Court > Pending Issues in the Calif. Supreme Court:
http://www.capcentral.org/high_court/pending_cal.aspx
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People v. Daniels (2003) 106 Cal.App.4th 736
Penal Code section 2933.2
People v. McNamee (2002) 96 Cal.App.4th 66
People v. Philpot (2004) 122 Cal.App.4th 893
Penal Code section 1237.1
People v. Fares (1993) 16 Cal.App.4th 954
People v. Clavel (2002) 103 Cal.App.4th 516
People v. Acosta (1996) 48 Cal.App.4th 411
People v. Warner (2006) 39 Cal.4th 548
People v. Cuevas (2008) 44 Cal.4th 374