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." (Pen.Code, § 17.5(a)(3)-(5).[*])

A. Felony Commitments

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

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

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

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

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

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

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

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

2) Felonies excluded from county jail

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

- Where the defendant has a prior or current serious felony conviction under section 1192.7(c), a violent felony conviction under section 667.5(c), or an out-of-state felony conviction of a crime that would qualify as a serious or violent felony under California law. The exclusion does not expressly include juvenile strikes. It must be noted, however, that if the defendant has a juvenile strike and the strike is part of the conviction at sentencing, the defendant must be sentenced to state prison as a strike offender, not because of the realignment legislation, but because of the Three Strikes law. (See discussion, *infra*.)

- Where the defendant is required to register as a sex offender under section 290, either for a current or past offense.

- Where the defendant is convicted of a felony and is sentenced with an enhancement for aggravated theft under section 186.11. It is likely this exclusion will apply if the defendant has a current or prior conviction with the enhancement 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 is incumbent on courts and counsel to verify the correct punishment for all crimes sentenced after the effective date of the realignment legislation.

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

A defendant convicted of driving under the influence of alcohol or drugs, with a prior felony conviction, pursuant to Vehicle Code, section 23550.5, is not eligible for a county jail commitment under section 1170(h). The statute specifies punishment is in state prison. (*People v. Guillen* (2013) 212 Cal.App.4th 992.) Similarly, a person convicted of reckless evading of a peace officer (Veh. Code § 2800.2), if denied probation, must be sent to state prison; the section was not amended by the realignment legislation to permit a sentence under section 1170(h). (*People v. Butcher* (2016) 247 Cal.App.4th 310.)

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

Effect of enhancement

Effective January 1, 2021, section 1170, subdivision (h)(9), specifies the service of a term imposed because of an enhancement will follow the base term. In other words, notwithstanding the language of the enhancement, if the sentence for the base crime is served in state prison, the enhancement is served in prison; but if the base term is served in county jail under section 1170, subdivision (h), the sentence on the enhancement also is served in county jail. The amendment was expressly enacted to overrule the holding in *People v. Vega* (2014) 222 Cal.App.4th 1374, which held If an enhancement specifies punishment in state prison, the entire term must be served in state prison, even though the base term specifies punishment under section 1170(h).

4) Conflicts in the designation of punishment

a. Conflicts between specification of punishment and an exclusion

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

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

Effective January 1, 2021, section 1170, subdivision (h)(9), specifies the service of a term imposed because of an enhancement will follow the base term. In other words, notwithstanding the language of the enhancement, if the sentence for the base crime is served in state prison, the enhancement is served in prison; but if the base term is served in county jail under section 1170, subdivision (h), the sentence on the enhancement also is served in county jail.

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

It is not clear whether it matters that the enhancement is a status enhancement added once at the end of the case, or a count-specific conduct enhancement. It is unlikely there is any significant difference between these two kinds of enhancements. If any enhancement requires state prison, the entire term is served in prison.

B. Alternatives to Commitment to Jail or Prison

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

C. No Parole Following Release From Jail Commitment

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

County parole

Nothing in the realignment legislation, however, appears to restrict the application of county parole under sections 3074, *et seq*. County parole boards are charged with creating rules and procedures for the release on parole of "any prisoner who is confined in or committed to any county jail, work furlough facility, industrial farm, or industrial road camp, or in any city jail, work furlough facility, industrial farm or industrial road camp under a judgment of imprisonment or as a condition of probation for any criminal offense . . . ." (§ 3076(b).) The parole board is authorized to "release any prisoner on parole for a term not to exceed two years upon those conditions and under those rules and regulations as may seem fit and proper for his or her rehabilitation, and should the prisoner so paroled violate any of the conditions of his or her parole or any of the rules and regulations governing his or her parole, he or she shall, upon order of the parole commission, be returned to the jail from which he or she was paroled and be confined therein for the unserved portion of his or her sentence." (§ 3081(b).) The statute further provides that for the purpose of computing the unserved portion of the person's sentence, "no credit shall be granted for the time between his or her release from jail on parole and his or her return to jail because of the revocation of his or her parole." (§ 3081(d).)

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

Although there appears to be no conflict in the statutory provisions governing commitments under section 1170(h) and county parole, it is not clear whether the process is available when the court has imposed a structured mandatory supervision

program under section 1170(h)(5)(B). The question remains whether county parole boards can or should override the court's well-structured plans.

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

The realignment legislation provides a limited alternative to parole by way of supervision by the probation department for a portion of the county jail term imposed by the court.

For persons sentenced prior to January 1, 2015, section 1170(h)(5) provides:

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

Effective for persons sentenced after January 1, 2015, section 1170(h)(5) provides:

> (5) (A) Unless the court finds that, in the interests of justice, it is not appropriate in a particular case, the court, when imposing a

sentence pursuant to paragraph (1) or (2) of this subdivision, shall suspend execution of a concluding portion of the term for a period selected at the court's discretion.

(B) The portion of a defendant's sentenced term that is suspended pursuant to this paragraph shall be known as mandatory supervision, and, unless otherwise ordered by the court, shall commence upon release from physical custody or an alternative custody program, whichever is later. During the period of mandatory supervision, the defendant shall be supervised by the county probation officer in accordance with the terms, conditions, and procedures generally applicable to persons placed on probation, for the remaining unserved portion of the sentence imposed by the court. The period of supervision shall be mandatory, and may not be earlier terminated except by court order. Any proceeding to revoke or modify mandatory supervision under this subparagraph shall be conducted pursuant to either subdivisions (a) and (b) of Section 1203.2 or Section 1203.3. During the period when the defendant is under such supervision, unless in actual custody related to the sentence imposed by the court, the defendant shall be entitled to only actual time credit against the term of imprisonment imposed by the court. Any time period which is suspended because a person has absconded shall not be credited toward the period of supervision.

The new provisions eliminate the straight commitment to county jail under former section 1170(h)(5)(A) as a discrete sentencing choice and require that a split sentence be imposed "[u]nless the court finds that, in the interests of justice, it is not appropriate in a particular case" to impose such a sentence. The conditions and length of the split sentence are left to the court's discretion. Although "interests of justice" is not specifically defined by statute, the Legislature directed the Judicial Council to adopt rules of court to guide the court's decision to "[d]eny a period of mandatory supervision in the interests of justice under paragraph (5) of subdivision (h) of Section 1170 or determine the appropriate period and conditions of mandatory supervision." (§ 1170.3(a)(5).) The changes in the sentencing of crimes under section 1170(h)(5) are expressly made prospective and applicable only to persons sentenced on or after January 1, 2015. (§ 1170(h)(7).)

In response to the legislative mandate, the Judicial Council adopted California Rules of Court, rule 4.415, effective January 1, 2015. The rule acknowledges that the changes to section 1170(h) create a presumption that a split sentence will be imposed by the court. "When imposing a term of imprisonment in county jail under section 1170(h), the court must suspend execution of a concluding portion of the term to be served as a period of mandatory supervision unless the court finds, in the

interests of justice, that mandatory supervision is not appropriate in a particular case. Because section 1170(h)(5)(A) establishes a statutory presumption in favor of the imposition of a period of mandatory supervision in all applicable cases, denials of a period of mandatory supervision should be limited." (Cal. Rules of Court, rule 4.415(a).)

Rule 4.415(b) specifies a non-exclusive list of criteria the court may consider in determining whether to deny mandatory supervision "in the interests of justice." "[T]he court's determination must be based on factors that are specific to a particular case or defendant." (*Id*.) The restriction is meant to exclude any consideration of generalized or philosophical objections to split sentences. The factors the court may consider are:

(1) "Consideration of the balance of custody exposure available after imposition of presentence custody credits." In considering this factor, for example, a sentencing court may conclude that because of significant pre-sentence custody credits, there is insufficient time to provide meaningful treatment services to the offender; that the public is best served by a straight sentence. The factor also may be considered in setting the conditions and length of mandatory supervision. (Cal. Rules of Court, Rule 4.415(c)(6).)

(2) "The defendant's present status on probation, mandatory supervision, postrelease community supervision, or parole." Consideration of this factor may include a finding by the court that there are other treatment and supervision programs in place, such that mandatory supervision may create a needless duplication of services. The factor also may be considered in setting the conditions and length of mandatory supervision. (Cal. Rules of Court, rule 4.415(c)(5).)

(3) "Specific factors related to the defendant that indicate a lack of need for treatment or supervision upon release from custody." The court may find, for example, that the offender has substantial support and other treatment services available upon release from custody, such that ordering additional services as a part of mandatory supervision will not benefit the defendant.

(4) "Whether the nature, seriousness, or circumstances of the case or the defendant's past performance on supervision substantially outweigh the benefits of supervision in promoting public safety and the defendant's successful reentry into the community upon release from custody." This factor will allow the court to consider the extent of services previously offered a defendant, and whether the defendant properly took advantage of them. The factor allows the court to reach a conclusion that "enough is enough," such that the sentencing should focus of straight accountability rather than treatment.

Rule 4.415(d) requires that "when a court denies a period of mandatory supervision in the interests of justice, *the court must state the reasons for the denial on the record*." (Italics added.) The rule specifies that the provisions of Rule 4.412(a), which allow the court to impose a stipulated sentence without giving reasons, will not obviate the need to specify the reasons on the record. Because the legislation includes a requirement that the court must "find" in the interests of justice that a split sentence is not appropriate, the court should not accept a stipulated disposition which does not include a period of mandatory supervision without making an independent determination that the disposition is in the interests of justice and making the necessary findings on the record.

The court should not suspend any portion of a sentence under section 1170(h) where the statute defining the punishment for a crime prohibits suspending execution of the sentence. Section 18780, for example, provides: "A person convicted of a violation of this chapter shall not be granted probation, and *the execution of the sentence imposed upon that person shall not be suspended by the court.*" (Emphasis added.) Suspending a portion of the sentence for the purpose of imposing mandatory supervision is inappropriate. (*People v. Borynack* (2015) 238 Cal.App.4th 958.)

As with the changes to section 1170(h)(5)(A), nothing in the rule specifies the conditions or length of mandatory supervision, leaving such matters to the discretion of the court. Rule 4.415(c), however, provides a non-exclusive list of factors the court may consider in setting these elements of supervision. The factors include:

(1) "Availability of appropriate community corrections programs." It is important to observe that the availability of supervision and treatment services may be considered in setting the specific conditions of mandatory supervision, but is not included in the list of factors that justify the denial of mandatory supervision "in the interests of justice."

(2) "Victim restitution, including any conditions or period of supervision necessary to promote the collection of any court-ordered restitution."

(3) "Consideration of length and conditions of supervision to promote the successful reintegration of the defendant into the community upon release from custody."

(4) "Public safety, including protection of any victims and witnesses."

(5) "Past performance and present status on probation, mandatory supervision, postrelease community supervision, and parole." This factor also may be considered in determining whether to deny mandatory supervision and impose a straight sentence. (Cal. Rules of Court, Rule 4.415(b)(2).)

(6) “The balance of custody exposure after imposition of presentence custody credits.” This factor also may be considered in determining whether to deny mandatory supervision and impose a straight sentence. (Cal. Rules of Court, Rule 4.415(b)(1).)

(7) “Consideration of the statutory accrual of post-sentence custody credits for mandatory supervision under section 1170(h)(5)(B) and sentences served in county jail under section 4019(a)(6).” This factor highlights the difference between custody and non-custody time under mandatory supervision. If the defendant is in custody, conduct credits accrue at the rate specified in section 4019(a)(6): for every two days that are served, the defendant is entitled to two days of actual time credit and two days of conduct credit – essentially half-time credit. If the defendant is out of physical custody while on mandatory supervision, the credits are limited to actual time only. (§ 1170(h)(5)(B).) Understanding this distinction will permit the court to strike a proper balance between the custody and supervision portions of mandatory supervision.

(8) “The defendant's specific needs and risk factors identified by a validated risk/needs assessment, if available.” This rule does not require the court to obtain a risk/needs assessment, but may consider the results, if they otherwise exist, in determining the appropriate conditions of mandatory supervision. The factor is not included in the provisions justifying the denial of mandatory supervision.

(9) “The likely effect of extended imprisonment on the defendant and any dependents.”

Sentences imposed under section 1170(h)(5) with a supervision period are characterized as “split” or “blended” sentences because they generally 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 split sentence under the provisions of section 1170(h)(5), but reserve jurisdiction to set the actual time and conditions of release at a later date. Such a strategy might be appropriate where the court wants to give the defendant encouragement to complete various custody programs and do well in custody, then set relevant terms when the court determines release is appropriate.

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

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

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

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

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

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

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

Section 1170(h)(5) specifies that the supervision period is mandatory. The defendant may not refuse mandatory supervision. (*People v. Rahbari* (2014) 232 Cal.App.4th 185, 194. The court will have the discretion to impose a "split" sentence under such terms and conditions as it considers appropriate for the defendant, without regard to the defendant's willingness to be supervised – the court need not ask whether the defendant "accepts" the conditions. Since the commitment under section 1170(h) generally is the equivalent of a prison sentence, the defendant need not agree to the terms and conditions of supervision in the same manner as a sentence involving a grant of probation.

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

The court undoubtedly has the authority to set the terms and conditions of the 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 the 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.

People v. Martinez (2014) 226 Cal.App.4th 759, addresses the standard for reviewing the validity of the conditions of mandatory supervision. "'[T]he Legislature has decided a county jail commitment followed by mandatory supervision imposed under section 1170, subdivision (h), is akin to a state prison commitment; it is not a grant of probation or a conditional sentence.' ([*People v. Fandinola* (2013) 221 Cal.App.4th 1415,] 1422.) Therefore, as the court in *Fandinola* recently found, 'mandatory supervision is more similar to parole than probation.' (*Id*. at p. 1423.) We will therefore analyze the validity of the terms of supervised release under

standards analogous to the conditions or parallel to those applied to terms of parole." (*Martinez* at p. 763.)

"The validity and reasonableness of parole conditions is analyzed under the same standard as that developed for probation conditions. (*In re Hudson* (2006) 143 Cal.App.4th 1, 9; *In re Stevens*, *supra*, 119 Cal.App.4th at p. 1233 ['[t]he criteria for assessing the constitutionality of conditions of probation also applies to conditions of parole'].) "'A condition of [parole] will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . .'" [Citation.] Conversely, a condition of [parole] which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality.' (*People v. Lent* (1975) 15 Cal.3d 481, 486, fn. omitted, superseded on another ground by Proposition 8 as stated in *People v. Wheeler* (1992) 4 Cal.4th 284, 290-292; see also *People v. Olguin* (2008) 45 Cal.4th 375, 379-380.) ¶ In general, the courts are given broad discretion in fashioning terms of supervised release, in order to foster the reformation and rehabilitation of the offender, while protecting public safety. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120; *People v. Urke* (2011) 197 Cal.App.4th 766, 774.) Thus, the imposition of a particular condition of probation is subject to review for abuse of that discretion. 'As with any exercise of discretion, the court violates this standard when it imposes a condition of probation that is arbitrary, capricious or exceeds the bounds of reason under the circumstances. [Citation.]' (*People v. Jungers* (2005) 127 Cal.App.4th 698, 702.)" (*Martinez* at p.764; accord *People v. Malago* (2017) 8 Cal.App.5th 1301, 1305.)

Any objections to the conditions of mandatory supervision should be resolved by the court at sentencing; they should not be deferred to the "mandatory supervision judge." (*Malago*, *supra*, at p. 1305.)

The *Martinez* court found, under the circumstances of the defendant's background, requiring him to report to the gang unit of the local police agency was properly related to the goals of supervision. The court also approved the following provision requiring the defendant to stay away from the courthouse: "You shall not be present at any criminal court proceeding or at any criminal courthouse building, including the lobby, hallway, courtroom, or parking lot that you know or reasonably should know involves either criminal street gang charges or a person associated with a criminal street gang (as defined in Penal Code section 186.22) as a member or witness, unless you are scheduled for a court hearing as a party, defendant, or subpoenaed as a witness to a criminal court proceeding, or have the express permission of your probation officer, or have other lawful business with the court or county administration." (*Martinez* at pp.767-768.)

In *People v. Relkin* (2017) 6 Cal.App.5th 1188, the court approved the following conditions of mandatory supervision: that defendant obtains written permission from the probation officer before leaving the state; and that the defendant reports any "arrests" or "incidents" involving peace officers. The court found the condition requiring the defendant report any "contacts" with law enforcement was unconstitutionally vague.

People v. Brand (2021) 59 Cal.App.5th 861, holds it was proper to require as a condition of mandatory supervision that the defendant report any contact with law enforcement to his probation officer within seven days. "In sum, the report-contact condition, when read in its entirety, would indicate to a reasonable person that Brand is not required to report casual, random interactions with law enforcement officers. Instead, the type of law enforcement contacts that must be reported are those in which Brand is questioned by law enforcement officers and is required to give identifying information, such as when he has been a witness to a crime or is suspected of possible involvement in a crime. Accordingly, we reject Brand's contention that the report-contact condition is unconstitutionally vague and overbroad." (*Brand*, *supra*, 59 Cal.App.5th at p. 871.)

1) Practical application

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

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

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

The court must next decide between two sentencing strategies:

A) 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 jurisdiction of the probation officer for that period on mandatory supervision. 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.

B) 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.

2) Sentencing script

Although the legislation does not require any particular language for the commitment of a person to county jail under section 1170(h)(5), 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) 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 subject to mandatory supervision by the probation department. The conditions of supervision shall include . . . . [The court may state conditions or* ***reserve jurisdiction*** *to determine whether and under what conditions mandatory supervision will be imposed later in defendant's term.]*

3) Concurrent and consecutive sentences

The mechanics of imposing a concurrent and consecutive sentence under section 1170(h)(5) will be substantially the same as traditional state prison sentences under sections 1170 and 1170.1. Under the realignment legislation, the structure of sentences under section 1170(h)(5) is exactly the same as it has been for years for

state prison commitments – only the place where the sentence is served has changed. Once the aggregate term has been determined after taking into account concurrent or consecutive sentencing, the court must then determine how much of the aggregate term, if any, will be served on mandatory supervision.

a. Concurrent sentences

Concurrent sentences will be imposed in accordance with the provisions of section 1170. The court will select an appropriate base term for each count, together with any applicable count-specific conduct enhancements. Status enhancements will be added once at the end of the sentence. If the sentence is a straight term, without a split sentence, the full term for each count will be ordered served concurrently with any other counts. If the judgment imposes a split sentence, the court will order the terms imposed for each count served concurrently with any other term being served. After the aggregate term to be served has been calculated, the court then must determine how much of the term will be served on mandatory supervision. If, for example, the defendant is convicted of second degree burglary (§ 459) and the unlawful driving or taking of a vehicle (Veh.C. § 10851), with a prior prison term, the court might pronounce a concurrent sentence under section 1170(h)(5) as follows:

> *Probation is denied. For violation of Penal Code section 459, burglary in the second degree, as charged in Count 1, the court hereby sentences the defendant under the provisions of section 1170(h)(5) to the middle term of 2 years. For violation of Vehicle Code section 10851, the unlawful driving or taking of a vehicle, as charged in Count 2, the court hereby sentences the defendant under the provisions of section 1170(h)(5) to the middle term of 2 years, to be served concurrently with any other term being served The defendant having suffered a prior prison term within the meaning of section 667.5(b), an additional and consecutive term of 1 year is ordered, for an aggregate term of 3 years. The court herby suspends the concluding 12 months of said term and places the defendant on mandatory supervision under the following terms and conditions . . . .*

Under this sentence, the defendant will serve *actual* custody time of 12 months, and mandatory supervision time of 12 months. The actual custody time is computed by taking the total months of the sentence (36 months), subtracting the period of mandatory supervision (12 months), and then subtracting the conduct credits under section 4019 (12 months), which leaves the actual time to be served (12 months).

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

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

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

If the concurrent sentence comes from multiple cases as part of a package disposition, the sentencing is the same as if all counts were charged in the same case. The sentencing will produce a single term with the base term and any conduct enhancements for each count run currently with all other counts, plus any status enhancements added once to the end of the sentencing for the case. If the concurrent sentence is being added to a defendant previously sentenced in another case, a resentencing normally is not required; the court need only specify that the new sentence is imposed concurrently with any other term previously imposed. If the new case sends the defendant to state prison, however, resentencing will be required to convert the previously imposed sentence under section 1170(h) to a state prison term as required by section 669(d).

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

b. Consecutive sentences

The structure of a consecutive sentence, whether the sentence is to county jail under section 1170(h) or state prison, will be governed by section 1170.1.

The court will select the base term for each count, plus any applicable count-specific conduct enhancements. The count with the longest sentence imposed will be the principal term; the remaining counts will be subordinate consecutive terms, usually discounted to one-third the middle base term and one-third of any conduct enhancements. Any status enhancements are added once at the end of the sentence. If the sentences are straight terms imposed without any period of mandatory supervision, the court will simply order the aggregate term into execution. If a split term is imposed, the court will order the aggregate term executed, allocated between custody and mandatory supervision time. If, for example, the defendant is convicted of second degree burglary (§ 459) and the unlawful driving or taking of a vehicle (Veh. Code § 10851), with a prior prison term, the court might pronounce a consecutive sentence as follows:

> *Probation is denied. For violation of Penal Code section 459, burglary in the second degree, as charged in Count 1, the court hereby sentences the defendant under the provisions of section 1170(h)(5) to the middle term of 2 years, which the court designates as the principal term. For violation of Vehicle Code section 10851, the court hereby sentences the defendant under the provisions of section 1170(h)(5) to the subordinate and consecutive term of 8 months, which is one-third the middle term. The defendant having suffered a prior prison term within the meaning of section 667.5(b), an additional and consecutive term of 1 year is ordered, for an aggregate term of 3 years and 8 months. The court herby suspends the concluding 6 months of said term and places the defendant on mandatory supervision under the following terms and conditions . . . .*
>
> Under this sentence, the defendant will serve *actual* custody time of 19 months, and mandatory supervision time of 6 months.

Multiple cases sentenced consecutively under section 1170(h)

Consecutive sentencing of multiple counts from multiple cases may appear daunting, particularly if the sentencing occurs in sequential proceedings. Consecutive sentencing with multiple cases generally occurs in two circumstances: the "package disposition" where the court imposes sentence on two or more open cases pending against the defendant, and the "sequential sentence" where the defendant is sentenced in a series of proceedings over a course of time.

The "package disposition" is the simplest to impose. Each of the counts, including any count-specific conduct enhancements, are sentenced together, as if all of the crimes had been charged in one proceeding. Section 1170.1(a)

dictates that there will be one principal term, and the balance of the counts will be subordinate consecutive terms. Any status enhancements are added once at the end of the sentence. If, for example, the defendant has a prior prison term enhancement under section 667.5(b), the one year term will be added only once in the final sentence, even though the enhancement was charged and found in more than one case. The sentencing proceeding will produce a single aggregate term incorporating the sentence imposed on all counts and cases.

Sequential sentencing follows the same provisions of section 1170.1(a). But because the sentencing of the crimes occurs at different times and possibly by different judges, the last judge in line must do a "resentencing" of all of the cases, incorporating the prior and current sentences into one final sentence on the current case. The resentencing must observe the restrictions of California Rules of Court, rule 4.452: (1) all of the counts will create a single aggregate term, as if all counts had been charged in a single proceeding – there will be one principal term and the balance will be subordinate consecutive terms; (2) when considering the sentence on the current case, the court may find it necessary to designate a new principal term; and (3) the current court may not change the discretionary decisions made in the earlier proceedings, including the term selected from the triad and the concurrent or consecutive sentencing structure. There is an exception to (3): because there can be only one principal term, if the court in the current proceeding determines one of its counts should be the new principal term, a previously designated principal term will become a subordinate one-third-the-middle-base-term by operation of law. When imposing consecutive sentences, the principal term must be the *longest term imposed*, including any count-specific conduct enhancements. (§ 1170.1(a).) As a result, when a court is called upon to resentence on multiple cases, selection of the principal term will require the court to calculate the term for each count being sentenced on the current case, compare the terms selected on the current case to the ones previously imposed in the prior proceeding, and select the longest term from the counts on all cases as the principal term. Finally, sequential sentencing also must determine the proper credits to be given the defendant, accounting for credits earned in the prior proceedings and those earned in the current case. The forgoing issues outlining the proper way to sentence consecutively with multiple cases may be illustrated with the following example:

> In Case A the defendant is convicted of two counts of burglary in the second degree, in violation of section 459. The court imposes the mid-base term on Count 1 of two years (the principal term) and a subordinate consecutive term on Count 2 of eight months. The defendant also has a prior prison term under section 667.5(b), for

which he is sentenced to an additional one year. The aggregate sentence of three years, eight months is ordered to be served two years in custody and one year, eight months on mandatory supervision. At the time of sentencing the defendant has 30 days of actual custody time credit. The defendant is ordered into custody on the sentence. After sentencing he will serve a custody term of 22 months (24 months, less actual and conduct presentence credits of two months), then be on mandatory supervision for one year, eight months.

The defendant completes the custody term and after six months on mandatory supervision he is arrested for another commercial burglary, Case B. He is held in custody for 30 actual days on both cases, pending sentencing. The court in Case B determines that the defendant should be sentenced to the upper-base term of three years on the new burglary, consecutive to the previous term. Also charged in Case B is the same section 667.5(b) prior prison term charged in Case A. Upon the resentencing of Case A and the sentencing of Case B, the final aggregate sentence is 5 years, 4 months:

Case B: 459-2° - upper-base term:	3 yrs (principal term)
Case A: Ct. 1 – 459-2° - subordinate:	8 mos
Ct. 2 – 459-2° - subordinate:	8 mos
Prior prison term – 667.5(b):	1 yr
Aggregate term:	5 yrs, 4 mos

As of the date of sentencing, the defendant is entitled to the following credits against the aggregate sentence:

Case A:	24 mos of custody on original sentence (12 mos actual + 12 mos conduct)
	6 mos actual time while on mandatory supervision
	2 mos of custody after arrest for crime in Case B (1 mo actual + 1 mo conduct)
	Total credit Case A: 32 mos
Case B:	No credit because all credits were awarded in Case A

The sentence is 64 months, less credit of 32 months = 32 months remaining. The court may then allocate the remaining 32 months of the sentence between custody and mandatory supervision.

The foregoing example is in compliance with section 1170.1 and California Rules of Court, rule 4.452. The resentencing of Case A and sentencing of Case B preserves the terms imposed for the two counts in Case A, subject to the effect of Count 1 becoming a subordinate term. It also keeps the consecutive sentencing structure of Case A, and the decision in Case A to have the sentence served partially in custody and partially on mandatory supervision.

What may be different is the actual allocation between the custody and mandatory supervision periods attributable to Case A. Such a difference appears justified, however, because the court in Case B is merely changing the *way* a sentence is served, not the *length* of sentence, a decision often handled administratively by custodial staff. Furthermore, there is no other practical means of preserving the same mathematical relationship between custody and mandatory supervision originally ordered in Case A without constructing an unreasonably complex algebraic formula.

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

Sentence to state prison

If the defendant is convicted of any count or that requires a state prison sentence, the sentence for all crimes must be served in state prison. (§§ 669(d) and 1170.1(a).) If the defendant was previously sentenced to county jail under section 1170(h), and the current case mandates state prison, the entire case must be resentenced to state prison to serve the balance of any remaining term. The process of resentencing involves restating the total sentence imposed in the prior proceeding, less any accrued credits. The court also will determine whether the current sentence is imposed concurrently with or consecutive to the prior term. The foregoing examples on concurrent and consecutive sentencing illustrate the potential structure of the sentence.

Custody credits

The defendant will be entitled to actual time and conduct credits under section 4019 for any custody time served, and actual time only for time served on mandatory supervision. The award of credits also will depend on whether the court chooses a concurrent or consecutive sentencing structure. If a consecutive sentence is imposed, the defendant is only entitled to one

period of credit for any given period of custody; duplicate credits are not permitted. (§ 2900.5(b); *In re Atiles* (1983) 33 Cal.3d 805, 810-811, disapproved on other grounds in *In re Joyner* (1989) 48 Cal.3d 487, 494-495.)

The claim of custody credit must have a connection, or nexus, with the case where it is earned. "[W]e hold that pursuant to section 1170, subdivision (h)(5)(B), an incarcerated defendant may not accrue section 4019 credits against a term of mandatory supervision unless the conduct resulting in the supervision was the 'true and only unavoidable basis' for the incarceration. (*People v. Bruner* (1995) 9 Cal.4th 1178, 1192, italics omitted (*Bruner*).) If the defendant's status and performance on mandatory supervision were merely factors the court considered in its decision to impose custodial time in another case, the defendant is entitled to only actual time credits against the term of mandatory supervision." (*People v. Samuels* (2018) 21 Cal.App.5th 962, 964[Footnote omitted].)

In *Samuels*, the defendant was sentenced for vehicle theft under section 1170(h) to a split sentence. While serving the mandatory supervision portion of the sentence, he committed a drug offense. He admitted the new offense and a violation of his mandatory supervision. The trial court sentenced the defendant to county jail on the drug case and released him back to mandatory supervision, out of custody, on the vehicle theft case. Defendant claimed section 4019 conduct credits against the vehicle theft case for the time in custody on the drug case. For the reasons noted above, the court rejected his entitlement to conduct credits because the custody status in the drug case had no nexus with the vehicle theft case.

Custody credits in multiple cases

It is well established that custody credits are case specific – they accrue only in the case where they are earned. (§ 2900.5(b); *In re Joyner* (1989) 48 Cal.3d 487.) The allocation of custody credit can be confusing when the court imposes one blended sentence stemming from multiple cases. For example, assume the defendant is sentenced in Case A to a term of 3 years and in Case B to a term of 8 months consecutive, for an aggregate term of 3 years and 8 months. Assume further the court orders the aggregate sentence to be served with 1 year in custody and 2 years and 8 months on mandatory supervision. If the defendant has 3 months of custody credit in Case A and 6 months of credit in Case B, the court must allocate that credit according to the case where the credit is earned. The defendant will have 3 months of credit against the term of 3 years imposed in Case A and 6 months of credit against the term of 8 months imposed in Case B. This will leave 2 years, 9 months of the sentence to serve in Case A, and 2 months of the sentence to serve in Case B. Taking into consideration the custody credits, of

the 3 year, 8 month aggregate blended term imposed by the court in both cases, the defendant will have 2 years, 11 months to serve. It will be served 3 months in custody and 2 years, 8 months on mandatory supervision.

It would not be appropriate to simply charge the accumulated credit against the aggregate blended sentence at the sentencing on the second case because some of the time may then be applied against a case where the credit was not earned.

If custody credits exceed the new sentence

Because of the effect of section 1170.1(a), it may be possible that the custody credits for a case will exceed the time ordered after resentencing. The problem may be illustrated by the following sentence imposed under section 1170(h):

Case A: the defendant is sentenced as follows:

Ct. 1: 459 – 2° - mid-base term: 2 yrs
To be served 1 year in custody and 1 year on mandatory supervision

Case B: [defendant is arrested for crime and violation of mandatory supervision in Case A 30 days after being released on mandatory supervision] The court in Case B imposes the following sentence under section 1170(h):

Case B, Ct. 1: 459 - 2° - upper term:	3 yrs
Case A, Ct. 1: 459 - 2° - consecutive	8 mos
Aggregate sentence:	3 yrs, 8 mos

Credits:

Case A: 182 days of actual time, plus 182 days of conduct credit for a total of 364 days for the custody portion of the sentence and 30 days of actual time on the mandatory supervision portion of the sentence, for a total credit of 394 days.

Case B: Credit could be awarded for any custody time between arrest and sentencing of Case B, but only to the extent it is not awarded in Case A.

Under the forgoing circumstances, it is clear that the allowable custody credits for Case A exceed the 8-month sentence ordered after imposition of

the new aggregate term at the time of sentencing of Case B. The excess credits are not transferrable to Case B because they were not earned in that case. The awarding of credits is case-specific. (§ 2900.5(b); *People v. Adrian* (1987) 191 Cal.App.3d 868, 877.) Furthermore, because there is no period of parole or PRCS following the completion of the sentence, the reduction of the parole period discussed in *In re Sosa* (1980) 102 Cal.App.3d 1002, is inapplicable.

If all of defendant's crimes are punishable under section 1170(h), it would seem that the court only has jurisdiction to apply the credits against any fees and fines pursuant to section 2900.5(a). That section permits excess credits to be "credited to any fine, including, but not limited to, base fines, on a proportional basis, that may be imposed, at the rate of not less than thirty dollars ($125) per day, or more, in the discretion of the court imposing the sentence." Except to the extent of relief under section 2900.5(a), the defendant looses the excess credits.

The outcome may be different if the defendant is sentenced to state prison on one of the cases. Depending on the nature of the crime, if the defendant is sentenced to state prison, he will be released either on parole pursuant to section 3000.08, or PRCS pursuant to section 3451. Whether the defendant is entitled to apply excess custody credits to reduce the period of parole or PRCS is a matter upon which the appellate courts disagree.

No reported case has dealt with this issue in the context of a direct sentence to state prison. It appears, however, that *Sosa* would at least apply to persons released on parole. Section 3451(a) provides: "Notwithstanding any other law and *except for persons serving a prison term for a crime described in subdivision (b)* [crimes requiring parole rather than PRCS], all persons released from prison on and after October 1, 2011, or, whose sentence has been deemed served pursuant to Section 2900.5 after serving a prison term for a felony shall, upon release from prison and for a period not exceeding three years immediately following release, be subject to community supervision provided by a county agency designated by each county's board of supervisors which is consistent with evidence-based practices, including, but not limited to, supervision policies, procedures, programs, and practices demonstrated by scientific research to reduce recidivism among individuals under postrelease supervision." (Emphasis added.) Section 3451(a) is unambiguous – it has no application to persons who must be placed on parole following the completion of a prison term. There is no reason to suggest that *Sosa* has in any way been abrogated by the realignment legislation.

The law is less clear with respect to persons placed on PRCS. While there is no published opinion concerning the issue as it relates to an original commitment to state prison, a similar issue has been discussed in the context of resentencing pursuant to Propositions 36 and 47. When relief is granted under either proposition, the defendant frequently receives a new sentence which has been fully satisfied by custody credits. The issue is whether any excess credits may apply to reduce the term of PRCS. *People v. Espinoza* (2014) 226 Cal.App.4th 635, a Proposition 36 case, holds that section 3451(a) is unambiguous: "*Notwithstanding any other law* and except for persons serving a prison term for [crimes requiring parole rather than PRCS], all persons released from prison on and after October 1, 2011, . . . after serving a prison term for a felony shall, upon release from prison and for a period not exceeding three years immediately following release, be subject to community supervision. . . ." (Emphasis added.) The court expressly rejected any application of *Sosa*, which holds that excess custody credits reduce any applicable *parole* period. *Espinoza* observed: "PRCS serves an important public interest to 'improve public safety outcomes' and facilitate 'successful reintegration back into society.' (§ 3450, subd. (a)(5); see *People v. Torres* (2013) 213 Cal.App.4th 1151, 1158.) Both the community and appellant will benefit from PRCS. The trial court said that the '[S]tate of California actually doesn't want Mr. Espinoza to return to custody. . . . To take so many years of incarceration and then fling the doors open and say, well, good luck, hope it all works out is likely to just result in a disaster.' We are hopeful that PRCS reduces the chance of disaster." (*Espinoza*, at pp. 641-642.) Generally in accord with *Espinoza* is *People v. Tubbs* (2014) 230 Cal.App.4th 578. *Tubbs* also holds that CDCR is not the only agency with the authority to determine whether a discharged defendant should be placed on PRCS; the court also has such authority in the context of ruling on a request for resentencing under section 1170.126. (*Id*. at pp. 586-587.)

People v. Morales (2016) 63 Cal.4th 399, a Proposition 47 case, holds the excess credit may not be used to reduce the parole period. *People v. Hickman* (2015) 237 Cal.App.4th 984, extends *Espinoza* and *Tubbs* to section 1170.18. In *Hickman,* the defendant was on parole when Proposition 47 was enacted. The trial court granted defendant's request for resentencing, but ordered the defendant to serve a one-year period of parole under section 1170.18(d). The trial court refused to apply any excess custody credits to reduce the period of parole. The sentence was affirmed. *Hickman* held the parole period authorized by section 1170.12(d) is *in addition* to any term of punishment. *Sosa* has no application to the parole period authorized by section 1170.12(d). (*Hickman*, at pp. 988-989.) *Hickman* has been granted review.

Espinoza and *Tubbs* hold that excess credits may not be applied to reduce the three-year term required for postrelease community supervision under section 3451. However, effective January 1, 2016, section 1170(a)(3) was amended to provide: "[i]n any case in which the amount of preimprisonment credit under Section 2900.5 or any other law is equal to or exceeds any sentence imposed pursuant to this chapter, except for the remaining portion of mandatory supervision pursuant to [section 1170(5)(B)], the entire sentence shall be deemed to have been served, except for the remaining period of mandatory supervision. . . ." Section 3451(a) exempts from its provisions any person "whose sentence has been deemed served pursuant to Section 2900.5 after serving a prison term for a felony. . . ." Because the defendant is credited with the excess time at the time of sentencing, *except for mandatory supervision*, the entire term is satisfied; *Espinoza* and *Tubbs* likely are no longer valid.

4) Use of flash incarceration (§ 1203.35)

When the realignment law was first enacted, the use of "flash incarceration" was limited to persons coming out of state prison on postrelease community supervision (PRCS) or parole. (§§ 3454(b) and 3000.08(d).) Effective January 1, 2017, and until January 1, 2021, the probation officer has limited authority to impose flash incarceration on persons on probation or on mandatory supervision because of a sentence imposed under section 1170(h). (§ 1203.35(a)(1).)

Authority to impose flash incarceration is obtained by the defendant's waiver of a right to a hearing prior to the imposition of the sanction. The statute contemplates the waiver being made "at the time of granting probation or ordering mandatory supervision." (§ 1203.35(a)(1).) Since the whole process is triggered by the defendant's agreement to flash incarceration, the waiver also can be obtained at a subsequent modification of the terms of supervision. Although section 1203.35(a)(1) does not specifically require a written waiver, it also provides that probation is not to be denied "for refusal to sign the waiver." (*Id*.) The better practice would be to obtain an "informed" waiver signed by the defendant and his attorney.

Section 1203.35 requires the probation department to utilize a "response matrix" to determine the appropriate action taken on a violation, including the use of flash incarceration (§ 1203.35(a)(2)), the term of the flash incarceration must have prior approval of a probation supervisor (§ 1203.35(a)(3)), and he determines the sanction is appropriate, the probation officer must "notify the court, public defender [which presumably means the defendant's attorney of record], district attorney and sheriff" (§ 1203.35(a)(4)) of each intended use. Although the defendant may initially agree to the use of flash incarceration, he is not required to accept the sanction for a particular violation. If the defendant refuses to accept the sanction, the probation

officer is authorized to address the violation in a formal petition to the court. (§ 1203.35(a)(5).)

"Flash incarceration" is defined as "a period of detention in a county jail due to a violation of an offender's conditions of probation or mandatory supervision. The length of the detention period may range between one and 10 consecutive days. Shorter, but if necessary more frequent, periods of detention for violations of an offender's conditions of probation or mandatory supervision shall appropriately punish an offender while preventing the disruption in a work or home establishment that typically arises from longer periods of detention. In cases where there are multiple violations in a single incident, only one flash incarceration booking is authorized and may range between one and 10 consecutive days." (§ 1203.35(b).)

The sanction is not authorized for persons on a Proposition 36 (drug) program. (§ 1203.35(c).)

While a defendant is serving a period of flash incarceration, he is not entitled to conduct credits against the term. (§ 4019(i)(1).) However, section 4019(i)(2) provides that "[c]redits earned pursuant to [section 4019] for a period of flash incarceration pursuant to Section 1203.35 shall, if the person's probation or mandatory supervision is revoked, count towards the term to be served." "Revoked" is not further defined. It is not clear whether conduct credits are allowed only when supervision is finally and fully revoked and the defendant is sentenced to state prison or under section 1170(h), or whether conduct credits are allowed after a court summarily revokes probation when a petition is filed. It seems most likely the Legislature intends conduct credits to be awarded only after the court has decided to terminate supervision and impose a prison or section 1170(h) sentence. Nothing in the legislation suggests an intent to grant credits because of a technical revocation utilized to preserve the court's jurisdiction over the defendant after an alleged violation.

5) The early release

Either because of federal consent orders that set a jail's capacity, or because of jail 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 an electronic monitoring program (EMP) 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 will satisfy the custody portion of court's sentence. (§§ 1203.016(a), and 1203.017(a).) While the sheriff or custodial administrator may set some conditions on the release, the conditions might not be as stringent as the ones ordered by the court for mandatory supervision. It may be that actual supervision will be minimal or non-existent. Failure to anticipate this problem may allow a defendant to be released

into the community without any real supervision until the electronic monitoring 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 not clear that the court will have the jurisdiction to modify the timing of the mandatory supervision portion of the sentence.

In a budget trailer bill effective July 1, 2013, the Legislature attempted to address the problem of early release by amending section 1170(h)(5)(B)(ii) to provide that mandatory supervision "shall begin upon [the defendant's] release from custody." The amendment did not define the meaning of "custody." It was not clear, for example, whether the term included when the defendant is released to home supervision or on electronic monitoring, situations which would at least be constructive custody. An analysis prepared by the Senate Rules Committee, Office of Senate Floor Analysis, indicates that SB 76 "clarifies that mandatory supervision shall begin upon release from jail custody." (Bill Analysis of SB 76, June 13, 2013, page 2.) The analysis suggests the intent of the legislation was to trigger mandatory supervision when the defendant is no longer in actual jail custody. The amendment also does not address the disposition of the unserved custody time. Presumably the custody portion of the sentence will continue to run so long as the defendant observes the conditions of his release, but it is not clear whether the court has the ability to roll the unserved custody time into the mandatory supervision period.

The legislation also did not address the potential overlap of the custody and mandatory supervision periods, which would shorten the overall length of the sentence. In other words, so long as the defendant is complying with the conditions of early release, the "custody" portion of the sentence continues to run, even though the change to section 1170(h)(5)(B)(ii) has also triggered the start of the mandatory supervision portion of the sentence because the defendant has been released from actual custody. To the extent the custody and non-custody portions of the sentence are being served concurrently, it shortens the total period the court has jurisdiction over the defendant.

An amendment effective January 1, 2015, addressed this issue. Section 1170(h)(5)(A), in relevant part, was amended to read: "The portion of a defendant's sentenced term that is suspended pursuant to this paragraph shall be known as mandatory supervision, and, *unless otherwise ordered by the court*, shall commence upon release from physical custody or an alternative custody program, whichever is later." (Emphasis added.) The legislation allows for greater flexibility in setting the start of mandatory supervision to correspond with the realities of supervision in a particular county. If the court makes no special order, the "default" rule is that mandatory supervision will start when the defendant is no longer in actual or constructive custody, whichever is later. However, if the court wants the defendant to observe the more stringent conditions and treatment required by mandatory supervision if he is released from actual custody, the court may want to "accelerate"

the start of supervision, even though the defendant remains in constructive custody while on EMP for the balance of the custody portion of the sentence.

These supervision issues may be addressed with the use of an "acceleration clause" which advances the start of mandatory supervision to correspond to the defendant's release from actual custody. 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 service of the full 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 the defendant's early release 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.*

The net effect of this acceleration clause will be to allow the concurrent service of EMP and mandatory supervision periods of the sentence. Under this provision, the total jurisdiction over the defendant will be reduced to the extent these two portions of the sentence overlap. Although the defendant will serve a shorter sentence overall, at least he or she will be required to immediately start the period of mandatory supervision upon release from actual custody.

Alternatively, the court may choose to impose an acceleration clause that deals with these supervision issues and avoids the overlapping of the two portions of the sentence by converting any unserved custody time to mandatory supervision. The following alternative acceleration clause accounts for the early release of the defendant by providing a corresponding automatic increase of the portion of the sentence being served on mandatory supervision. Unlike the previous version of the acceleration clause, this provision will preserve the original length of the full sentence because the custody and mandatory supervision periods will not overlap. Although the defendant will not receive a reduction in the sentence as contemplated by the first alternative clause, there is no prejudice to the defendant because the original length of the sentence remains the same, only that more is served out of custody on mandatory supervision, a less restrictive status.

> *If the defendant is released for any reason from actual jail custody prior to the service of the full 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. Under such circumstances, the number of days from the date of defendant's release from actual custody to the end of the original custody term ordered by the court are hereby converted and added to the term of mandatory supervision previously 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.

Courts should use caution prior to uniformly including an acceleration clause in a split sentence. The importance of having such a clause will depend on the extent of supervision if a defendant is released early from custody. Some counties use the probation department to supervise persons on electronic monitoring. The level of supervision in such circumstances may be equal to or more intensive than persons on normal probation. Probation departments can require treatment, search and seizure, and drug testing while on EMP. If that is the case, there would be a disadvantage in "accelerating" the supervision period (unless the unserved time is converted to mandatory supervision) – it would needlessly shorten the overall jurisdiction over the defendant. On the other hand, some counties have defendants supervised by the jail or sheriff's department when released early from custody. Such supervision may be minimal, calculated only to assure the defendant has not removed the electronic monitoring equipment. In that circumstance, if the court is unable to convert the unserved portion of the custody term to mandatory supervision, for the reasons discussed above, the court may find it in the public interest to shorten the overall jurisdictional period, but improve the level of supervision over the defendant.

a. The court's authority to prevent electronic monitoring

The authority of the court to prevent placement of a particular defendant on electronic monitoring is governed by statute. Subdivision (e) of sections 1203.016 and 1203.017 specify: "The court may recommend or refer a person to the correctional administrator for consideration for placement in the home detention program. The recommendation or referral of the court shall be given great weight in the determination of acceptance or denial. At the time of sentencing or at any time that the court deems it necessary, the court may restrict or deny the defendant's participation in a home detention program." (See also *People v. Superior Court (Hubbard)*(1991) 230 Cal.App.3d 287, 298; *cf.* section 1170.06, discussed, *infra*, which gives the sheriff or county director of corrections the limited authority to grant electronic monitoring "notwithstanding any other law.")

b. Custody credits on EMP

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

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

c. Early release authorization by the court

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

"4024.1. (a) The sheriff, chief of police, or any other person responsible for a county or city jail may apply to the presiding judge of the superior court to receive general authorization for a period of 30 days to release inmates pursuant to the provisions of this section.

(b) Whenever, after being authorized by a court pursuant to subdivision (a), the actual inmate count exceeds the actual bed capacity of a county or city jail, the sheriff, chief of police, or other person responsible for such county or city jail may accelerate the release, discharge, or expiration of sentence date of sentenced inmates up to a maximum of 30 days.

(c) The total number of inmates released pursuant to this section shall not exceed a number necessary to balance the inmate count and actual bed capacity.

(d) Inmates closest to their normal release, discharge, or expiration of sentence date shall be given accelerated release priority.

(e) The number of days that release, discharge, or expiration of sentence is accelerated shall in no case exceed 10 percent of the particular inmate's original sentence, prior to the application thereto of any other credits or benefits authorized by law."

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

d. When custody credits exceed actual time ordered by the court

There may be rare circumstances when the defendant's custody credits exceed the custody portion of the sentence imposed by the court. If such a circumstance occurs with a normal state prison sentence, *In re Ballard* (1981) 115 Cal.App.3d 647, holds that the excess custody credits are to be used to reduce the parole period. Effective January 2016, section 1170(a)(3) has been amended to provide that if presentence credits exceed the sentence imposed by the court, the entire sentence is deemed satisfied, "except for the remaining period of mandatory supervision," and the defendant is not to be delivered to custody in the jail.

e. Sheriff's voluntary alternative custody program

Effective January 1, 2015, section 1170.06 provides a voluntary alternative custody program for specified persons serving county jail sentences. The program operates under the sole discretion of the sheriff or county director of corrections, and is offered in lieu of the custody term ordered by the court, "notwithstanding any other law." (§ 1170.06(a).) "The sheriff or his or her designee or the county director of corrections or his or her designee shall have the *sole discretion* concerning whether

to permit program participation as an alternative to custody in a county jail." (§ 1170.06(i)(2); emphasis added.) Because section 1170.06 operates "notwithstanding any other law," and because the sheriff or county director of corrections is given sole discretion to permit the alternative program, it is unlikely the court has any jurisdiction to prevent its use in a given case, or the right to prevent the use of electronic monitoring with the use of sections 1203.016(e) and 1203.017(e).

"An inmate participating in this program shall voluntarily agree to all of the provisions of the program in writing, including that he or she may be returned to confinement at any time with or without cause, and shall not be charged fees or costs for the program." (§ 1170.06(m).)

Eligibility

"[I]nmates sentenced to a county jail for a determinate term of imprisonment pursuant to a misdemeanor or a felony pursuant to subdivision (h) of Section 1170, and only those persons, are eligible to participate in the alternative custody program authorized by this section." (§ 1170.06(c).) It is clear that this alternative program is not available to persons on probation. It is also clear that the program is available to persons receiving a straight determinate term under section 1170(h)(5). However, it is unclear whether it is intended to apply to the custody portion of a split sentence. Use of the phrase "sentenced to a county jail for a determinate term of imprisonment pursuant to . . . a felony pursuant to" section 1170(h) suggests the alternative sentencing provisions are not available to inmates who are given a split sentence under section 1170(h)(5). It seems unlikely the Legislature would have intended to give the jail the authority to create its own split sentence within the split sentence ordered by the court.

The following persons, however, are excluded from the program under section 1170.06(d):

> "(1) The person was screened by the sheriff or the county director of corrections using a validated risk assessment tool and determined to pose a high risk to commit a violent offense.
>
> (2) The person has a history, within the last 10 years, of escape from a facility while under juvenile or adult custody, including, but not limited to, any detention facility, camp, jail, or state prison facility.
>
> (3) The person has a current or prior conviction for an offense that requires the person to register as a sex offender as provided in Chapter 5.5. (commencing with Section 290) of Title 9 of Part 1."

"This section shall not be construed to require a sheriff or his or her designee, or a county director of corrections or his or her designee, to allow an inmate to participate in this program if it appears from the record that the inmate has not satisfactorily complied with reasonable rules and regulations while in custody. An inmate shall be eligible for participation in an alternative custody program only if the sheriff or his or her designee or the county director of corrections or his or her designee concludes that the inmate meets the criteria for program participation established under this section and that the inmate's participation is consistent with any reasonable rules prescribed by the sheriff or the county director of corrections." (§ 1170.06(i).)

"A risk and needs assessment shall be completed on each inmate to assist in the determination of eligibility for participation and the type of alternative custody." (§ 1170.06(i)(2).)

The alternative program

"As used in this section, an alternative custody program shall include, but is not limited to, the following:

> (1) Confinement to a residential home during the hours designated by the sheriff or the county director of corrections.
>
> (2) Confinement to a residential drug or treatment program during the hours designated by the county sheriff or the county director of corrections.
>
> (3) Confinement to a transitional care facility that offers appropriate services.
>
> (4) Confinement to a mental health clinic or hospital that offers appropriate mental health services." (§ 1170.06(b).)

While the first three of the foregoing alternatives are quite straightforward and appropriate, the fourth alternative, regarding the commitment of a defendant to a mental health facility, may raise procedural or due process concerns. Likely there will be no such issues if the defendant voluntarily agrees to participate in an inpatient mental health program. Serious questions arise, however, if the attempt to commit the defendant is involuntary or is made under the threat of terminating the alternative sentencing program. The involuntary mental health commitment of a criminal defendant traditionally has only been accomplished with the strict observance of such procedural due process rights as representation by counsel and a determination by a judge or jury. (See §§ 1026(a) and 1369.) None of these protections are evident in section 1170.06(b)(4) – indeed, the statutory provisions

purport to give the custodial administrator "*sole discretion* concerning whether to permit program participation." (§ 1170.06(i)(2); emphasis added.)

"An alternative custody program may include the use of electronic monitoring, global positioning system devices, or other supervising devices for the purpose of helping to verify a participant's compliance with the rules and regulations of the program. The devices shall not be used to eavesdrop or record any conversation, except a conversation between the participant and the person supervising the participant, in which case the recording of the conversation is to be used solely for the purposes of voice identification." (§ 1170.06(e).)

"In order to implement alternative custody for the population specified in subdivision (c), the sheriff or the county director of corrections shall create, and the participant shall agree to and fully participate in, an individualized treatment and rehabilitation plan. When available and appropriate for the individualized treatment and rehabilitation plan, the sheriff or the county director of corrections shall prioritize the use of evidence-based programs and services that will aid in the participant's successful reentry into society while he or she takes part in alternative custody. Case management services shall be provided to support rehabilitation and to track the progress and individualized treatment plan compliance of the inmate." (§ 1170.06(f)(1).)

"The sheriff or his or her designee or the county director of corrections or his or her designee shall permit program participants to seek and retain employment in the community, attend psychological counseling sessions or educational or vocational training classes, participate in life skills or parenting training, utilize substance abuse treatment services, or seek medical, mental health, and dental assistance based upon the participant's individualized treatment and release plan. Participation in other rehabilitative services and programs may be approved by the case manager if it is specified as a requirement of the inmate's individualized treatment and rehabilitative case plan." (§ 1170.06(j)(1).)

Rules of the program

"The sheriff or the county director of corrections shall prescribe reasonable rules to govern the operation of the alternative custody program. Each participant shall be informed in writing that he or she is required to comply with the rules of the program, including, but not limited to, the following rules:

> (1) The participant shall remain within the interior premises of his or her residence during the hours designated by the sheriff or his or her designee or the county director of corrections or his or her designee.

(2) The participant shall be subject to search and seizure by a peace officer at any time of the day or night, with or without cause. In addition, the participant shall admit any peace officer designated by the sheriff or his or her designee or the county director of corrections or his or her designee into the participant's residence at any time for purposes of verifying the participant's compliance with the conditions of his or her detention. Prior to participation in the alternative custody program, each participant shall agree in writing to these terms and conditions.

(3) The sheriff or his or her designee, or the county director of corrections or his or her designee, may immediately retake the participant into custody to serve the balance of his or her sentence if an electronic monitoring or supervising device is unable for any reason to properly perform its function at the designated place of detention, if the participant fails to remain within the place of detention as stipulated in the agreement, or if the participant for any other reason no longer meets the criteria under this section." (§ 1170.06(g).)

"Whenever a peace officer supervising a participant has reasonable suspicion to believe that the participant is not complying with the rules or conditions of the program, or that a required electronic monitoring device is unable to function properly in the designated place of confinement, the peace officer may, under general or specific authorization of the sheriff or his or her designee, or the county director of corrections or his or her designee, and without a warrant of arrest, retake the participant into custody to complete the remainder of the original sentence." (§ 1170.06(h).)

Custody credits

"Under this program, one day of participation is in lieu of one day of incarceration in a county jail. Participants in the program shall receive any sentence reduction credits that they would have received had they served their sentence in a county jail, and are subject to denial and loss of credit pursuant to subdivision (d) of Section 4019." (§ 1170.06(a).)

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

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

Except for the recall of a sentence under section 1170(d) (discussed, *infra*), the court has no authority to modify a straight sentence imposed under section 1170(h)(5). (*People v. Antolin* (2017) 9 Cal.App.5th 1176.) Sections 1203.2 and 1203.3 give the court the authority to modify or revoke conditions of supervision. Section

1170(h)(5)(B) specifies: "Any proceeding to revoke or modify mandatory supervision under this subparagraph shall be conducted pursuant to either" sections 1203.2 or 1203.3. No similar provision is included in section 1170(h)(5)(A). Sections 1203.2(a) and 1203.3(a) specify their provisions apply to persons on some form of supervision -- probation, mandatory supervision, PRCS, or parole. No mention is made of straight sentences under section 1170(h)(5)(A).

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

SB 1023, effective June 27, 2012, added section 1170(h)(5)(B(i) to provide that all proceedings to modify or revoke mandatory supervision shall be in accordance with sections 1203.2(a) and (b), or 1203.3, the procedures traditionally used to modify or terminate probation.

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

The extent of the court's authority to terminate mandatory supervision is not entirely clear. There appears little question that the court has the authority to end mandatory supervision short of the full term originally ordered. Section 1203.2(b)(1), applicable to all forms of supervision, provides "[u]pon its own motion or upon the petition of the supervised person, the probation or parole officer or the district attorney of the county in which the person is supervised, the court may modify, revoke, or terminate supervision of the person pursuant to this subdivision. . . ." Similarly, the corresponding, but separate provisions of section 1203.3(a), provide "[t]he court shall also have the authority at any time during the term of mandatory supervision pursuant to subparagraph (B) of paragraph (5) of subdivision (b) of Section 1170 to revoke, modify, or change the conditions of the court's order suspending the execution of the concluding portion of the supervised person's term." The issue is whether the court's authority to terminate mandatory supervision is limited only to the suspended portion of the sentence such that the defendant would be required to serve the balance of the suspended portion in custody, or whether it applies to the full sentence originally imposed by the court. In other words, if the court terminates the mandatory supervision portion of the sentence prior to the full period having been served, must any unserved portion of the sentence be served in custody?

People v. Camp (2015) 233 Cal.App.4th 461, discusses termination and modification of a split sentence because of the defendant's deportation status. In that case, the defendant negotiated and received a sentence of 28 months, half to be served in custody and half to be served on mandatory supervision. Shortly after the defendant was sentenced, the probation officer determined the defendant was subject to deportation and could not serve any portion of the supervision term. The court modified the sentence by terminating mandatory supervision and imposing a total straight term of 364 days in the county jail. The People argued the court only was permitted to convert the remaining mandatory supervision time to straight time, or allow the defendant to withdraw his plea. The Court of Appeal disagreed. It found the termination and modification was consistent with the provisions of section 1170(h)(5)(B)(i), and 1203.3 to terminate and modify supervision. The court was not required to impose the stayed portion of the sentence.

Section 1203.3 traditionally has been used to terminate probation when the defendant has demonstrated good behavior: "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." (§ 1203.3(a).) When addressing the termination of probation, the statute expressly provides for discharge of the defendant; there is no provision providing for the "discharge" of a person on mandatory supervision. Furthermore, section 1203.3(b) appears to distinguish between termination of probation and termination of mandatory supervision: "The exercise of the court's authority in subdivision (a) to revoke, modify, or change probation or mandatory supervision, or to terminate probation," is limited to specified conditions. Although these provisions may suggest the Legislature has not given the court the authority to discharge a person on mandatory supervision, such a conclusion obviously is inconsistent with the traditional purpose of section 1203.3 – rewarding good behavior generally does not translate into additional custody time. It is not logical to conclude the Legislature intended that a court must order a defendant into custody once he has shown the interests of justice no longer demonstrate a need for further supervision. It is logical for the Legislature to grant the court authority to terminate mandatory supervision early when the defendant has reformed and because the mandatory supervision portion of the sentence occurs after the custody portion has been completed. *Camp* concurs with this interpretation. (*People v. Camp*, *supra*, 233 Cal.App.4th, at pp. 474-475.) Finally, when the Legislature desires to restrict the court's authority to terminate a form of supervision, it knows how to do it. (See, *e.g.*, sections 1203.2(a) and (b)(1): "the court shall not terminate parole pursuant to this" section.) Neither section 1203.2 nor 1203.3 contain such an express restriction on the court's authority.

In conflict with apparent authority of the court to terminate mandatory supervision under section 1170(h)(5) is the Victim's Bill of Rights embodied in Article 1, section

28(a)(5) of the Constitution, which provides: "Victims of crime have a collectively shared right to expect that persons convicted of committing criminal acts are sufficiently punished in both the manner and the length of the sentences imposed by the courts of the State of California. This right includes the right to expect that the punitive and deterrent effect of custodial sentences imposed by the courts will not be undercut or diminished by the granting of rights and privileges to prisoners that are not required by any provision of the United States Constitution or by the laws of this State to be granted to any person incarcerated in a penal or other custodial facility in this State as a punishment or correction for the commission of a crime." Although section 28(a)(5) primarily focuses on shortening of custody time, certainly the spirit of the provision is that once imposed by the court, sentences are not to be shortened.

7) Violations of mandatory supervision

SB 1023, effective June 27, 2012, added section 1170(h)(5)(B(i) to provide that all proceedings to modify or revoke mandatory supervision shall be in accordance with sections 1203.2(a) and (b), and 1203.3, the procedures traditionally used to modify, revoke or terminate probation. The uniform procedures under section 1203.2 will be used for all persons on regular probation, summary or informal probation, mandatory supervision, postrelease community supervision (PRCS), or revocation of parole supervision under section 3000.08. (§ 1203.2(a).)

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

Procedures

In general, the traditional procedures and practices under section 1203.2 and 1203.3 for modification or termination of probation will be fully applicable to persons on mandatory supervision, PRCS, and parole. Rule 4.541, governing the content of petitions to revoke or terminate supervision, is now applicable to all petitions under section 1203.2. The Judicial Council has approved the *Petition for Revocation (Form CR-300)* for petitions to revoke PRCS and parole.

Determination of probable cause for detention

For a full discussion of the issue of the determination of probable cause for detention, see Section P, *infra*.

The court has the ability to order the release of any person being held in custody for a violation of supervision, under such terms as the court deems appropriate. (§ 1203.2(a).)

Use of hearsay evidence

Violation proceedings likely will involve the limited use of hearsay evidence. For a full discussion of the use of such evidence, see Section Q, *infra*.

Sentencing options

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

If the court chooses to impose a custody sanction, the court will have the ability to use any unserved time remaining on the original sentence. Generally this will be time remaining for mandatory supervision. In most instances, the calculation of the remaining time is simple. Even with multiple cases, a violation of any condition will expose the defendant to the use of any of the time remaining on the total sentence. This is so because the defendant is serving a single global sentence – the sentence is not allocated between particular cases. Nothing in sections 1170 and 1170.1 specify the sentence is to be served separately for each case. There will be a single aggregate sentence, allocated between actual custody and mandatory supervision; there will be a single set of conditions of supervision applicable to the entire period of supervision. Accordingly, violation of any condition of supervision will trigger the possibility of actual custody for the entire unserved portion of the sentence.

If the court permanently revokes mandatory supervision and commits the defendant to county jail for any remaining term of the original sentence, the court should order into execution any mandatory supervision revocation fine ordered as part of the original sentence under section 1202.45(b).

People v. Catalon (2014) 228 Cal.App.4th 173, held the trial court did not abuse its discretion when it imposed 550 days in custody from the 783 days remaining from defendant's period of mandatory supervision for a violation of the conditions of supervision. The court found the sentence did not conflict with the objectives of the realignment legislation as expressed in section 17.5. It was of no consequence that persons who violate parole can be sanctioned only up to 180 days for each violation.

Resolution of a violation without hearing

If the supervised person agrees in writing to the terms of any modification or termination of supervision, personal appearance in court may be waived. The supervised person must be advised of the right to consult with counsel, including the right to appointed counsel. A written waiver is required if the supervised person waives the right to counsel. If the supervised person consults with counsel and subsequently agrees to the modification or termination, and waives his appearance, the agreement must be signed by counsel. (§ 1203.2(b)(2).) Sections 3000.08(f) and 3455(a) provide that persons supervised under PRCS or parole may at any point during the adjudication waive, in writing, the right to counsel, admit the violation, waive a court hearing, and accept the proposed modification. Unlike section 1203.2(b)(2), there is no requirement that defense counsel sign off on the agreement. (For a discussion of the procedural requirements of a waiver and the authority of the court upon entry of a stipulated disposition, see discussion in Section M, *infra*.)

Information about the defendant

The Department of Justice is required to maintain a summary of historical criminal information about a defendant. This information is available to "[a] public defender or attorney of record when representing a person in a criminal case, or a parole, mandatory supervision pursuant to paragraph (5) of subdivision (h) of Section 1170, or postrelease community supervision revocation or revocation extension proceeding, and if authorized access by statutory or decisional law." (§ 11105(b)(9).)

8) Tolling of supervision period

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

For a full discussion of tolling the period of supervision, see Section R, *infra*.

9) Transfer of supervision under section 1203.9; transfer to another state

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

Determination of victim restitution

If victim restitution has been ordered, the transferring court is to determine the amount of the restitution before the transfer, "unless the court finds that the determination cannot be made within a reasonable time from when the motion for transfer is made." (§ 1203.9(a)(3).) If restitution is not determined prior to transfer, the transferring court retains jurisdiction for that purpose and must complete the determination "as soon as practicable." (*Id.*)

Interstate transfer

Persons on mandatory supervision may seek transfer of supervision to another state under the provisions of the Interstate Compact for Adult Offender Supervision. (§ 11180; *Wofford v. Superior Court* (2014) 230 Cal.App.4th 1023.) "Turning to California's Realignment Act, there are no provisions prohibiting application of the Compact to mandatory supervision releasees, and there is nothing in the Realignment Act suggesting that the Legislature intended to exclude mandatory supervision releasees from Compact eligibility. The community-based punishment concept described in the Realignment Act focuses on keeping the offender *in the local community under supervision,* but it does not mandate that the community

affording this support and supervision must necessarily be a *California* community. Also, the discretionary availability of a transfer to another state could well serve the goals of the Realignment Act. As one court observed, '[i]t is apparent ... that the overall purpose of the [Realignment] Act is to reduce recidivism and improve public safety, while at the same time reducing corrections and related criminal justice spending.' (*People v. Cruz* [(2012) 207 Cal.App.4th 664,] 679.) If an offender released on mandatory supervision shows that he or she has a better chance of *avoiding recidivism in another state,* it would advance the goals of the Realignment Act if the offender could seek transfer under the Compact. ¶ Further, the fact that approval of a supervised offender's request for out-of-state transfer is *fully within the discretion* of the relevant California authorities ensures that the goals of the Realignment Act will not be undermined by application of the Compact to mandatory supervision releasees. First, based on the mandatory supervision condition requiring court and probation officer consent to an out-of-state move, the superior court serves as a gatekeeper with discretion to decline permission to pursue a transfer request with the Compact office. Thus, Compact eligibility does not lessen the trial court's discretionary power to keep an offender within the state because without the court's approval there can be no transfer. Second, the Compact office can decline the transfer request even if the court and probation officer consented. Thus, if there is a concern that an offender released on mandatory supervision might *not* receive the appropriate level or type of supervision in the other state, California has full authority to keep the offender within its borders. Also, if a transferred offender does not perform well in the receiving state, the Compact Rules allow the offender to be returned to California." (*Wofford*, pp. 1035-1036; emphasis in original; footnote omitted.)

E. The Misdemeanor Sentence

It is common for defendants to have misdemeanor charges pending along with a felony. In many circumstances these crimes become "throw away" charges during plea negotiations over the felony. If misdemeanors survive the settlement of the case, and the defendant is sentenced to prison, they usually are ordered served in county jail concurrently with the felony state prison sentence. It is not clear what the court can or should do with misdemeanors when the defendant is sentenced under section 1170(h). Presumably the misdemeanor term can be imposed and the court would have the discretion to order the term served concurrently with or consecutively to the felony. If sentences under section 1170(h) are treated like prison terms, misdemeanor sentences should be ordered served separately from the felony. Whether the misdemeanor is part of the 1170(h) sentence, or is ordered served separately, it is likely a distinction without much difference to the defendant. The prospect of incorporating misdemeanor dispositions into the settlement of the case, however, may give the court and counsel additional avenues to resolve issues of custody time, treatment, and mandatory supervision.

F. Effective Date of Section 1170(h)

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

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

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

G. Multiple Counts, Mixed Punishment

Section 1170.1(a) provides in part: "Whenever a court imposes a term of imprisonment in the state prison, whether the term is a principal or subordinate term, the aggregate term shall be served in the state prison, regardless as to whether or not one of the terms specifies imprisonment in the county jail pursuant to subdivision (h) of Section 1170." Accordingly, if a defendant is convicted of

multiple counts and sentenced consecutively, if there is any count that requires a state prison sentence, all counts will be sentenced to prison, even though some of the crimes specify punishment under section 1170(h).

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

Even before the amendment to section 669(d), *People v. Torres* (2013) 213 Cal.App.4th 1151, held that mixed concurrent sentences should be served in state prison. The defendant had been sentenced to state prison by one county prior to October 1, 2010. After the effective date of the realignment law she was sentenced by a second county to county jail under section 1170(h), the term to be served concurrently with the state prison term. The parties contemplated that upon completion of the prison term, the defendant would be returned to the second county to complete the section 1170(h) commitment in county jail. The appellate court disagreed, holding that "when a sentence that otherwise would have been served in county jail pursuant to section 1170, subdivision (h) is ordered to run concurrently to a sentence already being served in state prison, the entire sentence must be served in state prison. This is so even though the sentence that was imposed first would have been served in county jail had it been imposed on or after October 1, 2011." (*Id*. at p. 1153.)

There are times when the defendant is first sentenced to county jail under section 1170, subdivision (h), then is sentenced to state prison in a subsequent and unrelated proceeding. Whether the second court sentences the defendant concurrently with or consecutive to the first sentence, it is clear the previous sentence under section 1170, subdivision (h), must be served in prison. The only procedural question is whether the second court must return the defendant to the first court to convert the remaining county jail sentence to a prison term. It seems unlikely such a step is necessary. Conversion of the jail sentence to a prison term is mandatory and occurs by operation of law, not because of any discretionary decision by the first or second judge. It would seem the second judge could handle both cases. The first sentence is converted to a prison term and run concurrently with or consecutive to the second case. The second court only needs to update any custody credits in the first case and include both cases in the abstract of judgment.

The realignment legislation does not address the role of section 654 as it may relate to where a sentence is to be served. For example, if the court sentences the defendant for one count to county jail under section 1170(h), and to state prison on a second count, but suspends the second term under section 654, it is not entirely clear where the sentence is to be served. It could be argued that the sentence to state prison stayed under section 654 should not affect where the sentence is served. When the sentence includes consecutive terms, section 1170.1(a) specifies that "[w]henever 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. . . ." (Emphasis added.) Terms stayed under section 654 are not included in the calculation of the "aggregate term," defined as "the sum of the principal term, the subordinate term, and any additional term imposed for applicable enhancements. . . ." (§ 1170.1(a).) So long as neither the principal nor any subordinate term requires state prison, it can be argued that any state prison term stayed under section 654 should not change the outcome.

H. Additional Issues

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

1) Application of the exclusion provisions

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

a. Sex Crime Registrants

"Notwithstanding paragraphs (1) and (2) [of section 1170h)], where the defendant . . . (C) is required to register as a sex offender pursuant to Chapter 5.5 (commencing with Section 290) of Title 9 of Part 1, . . . an executed sentence for a felony punishable pursuant to this subdivision shall be served in state prison." (**§** 1170(h)(3).)

The exclusion clearly will apply to all defendants who are being sentenced on a *current* crime where registration is either mandatory or required as a

matter of discretion under section 290.006. Because the exclusion only applies if the defendant "is *required* to register as a sex offender," [emphasis added] the defendant would be entitled to be sentenced under section 1170(h) if the court exercised its discretion *not to* require registration under section 290.006.

People v. Hofsheier (2006) 37 Cal.4th 1185, held registration for a conviction of section 288a(b)(1), oral copulation of a person under 18, was not mandatory, but rather discretionary under section 290.006. The decision was based on a denial of equal protection – that there was no rational basis for requiring registration for consensual sexual offenses, such as section 288a(b)(1), but not for unlawful sexual intercourse. Cases following *Hofsheier* extended its holding to a number of other sexual offenses where the activity was essentially consensual between the persons involved. The Supreme Court overruled *Hofsheier* in *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, finding there is indeed a rational basis for not mandating registration for unlawful sexual intercourse, but requiring it in other non-forcible sexual offenses. The court disapproved the following cases to the extent they were inconsistent with *Johnson*: *People v. Garcia* (2008) 161 Cal.App.4th 475; *People v. Hernandez* (2008) 166 Cal.App.4th 641*; In re J.P.* (2009) 170 Cal.App.4th 1292; *People v. Ranscht* (2009) 173 Cal.App.4th 1369; *People v. Luansing* (2009) 176 Cal.App.4th 676; *People v. Thompson* (2009) 177 Cal.App.4th 1424; and *People v. Ruffin* (2011) 200 Cal.App.4th 669. (*Johnson*, at p. 888.)

The court made the holding in *Johnson* fully retroactive. (*Johnson*, at p. 889.) While the full implications of retroactivity may not be entirely clear, it is likely the decision will apply to previous cases where the court did not order registration or granted a request to end the registration requirement based on *Hofsheier* or its progeny.

The exclusion also applies to a defendant required to register because of a *prior* crime. (*People v. Sheehy* (2014) 225 Cal.App.4th 445.) 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.

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

"Notwithstanding paragraphs (1) and (2), where the defendant (A) has a prior or current felony conviction for a serious felony described in subdivision (c) of Section 1192.7 or a prior or current conviction for a violent felony described in subdivision (c) of Section 667.5, (B) has a prior felony conviction in another jurisdiction for an offense that has all the elements of a serious

felony described in subdivision (c) of Section 1192.7 or a violent felony described in subdivision (c) of Section 667.5, . . . an executed sentence for a felony punishable pursuant to this subdivision shall be served in state prison." (§ 1170(h)(3).)

c. Juvenile strikes

If the defendant has a juvenile adjudication for a strike offense, the defendant must be sentenced to state prison. (*People v. Delgado* (2013) 214 Cal.App.4th 914.) In *Delgado* the defendant was convicted of felony resisting an executive officer (§ 69), with two prior juvenile strike adjudications. The trial court struck one of the strikes and sentenced the defendant to state prison as a second strike offender. The commitment to state prison was affirmed. Although offenders with a prior juvenile strike may be sentenced to county jail under section 1170(h), the Three Strikes law mandates a state prison commitment under such circumstances and takes precedence. Section 1170.12(a) of the Three Strikes law provides, in relevant part: "*Notwithstanding any other provision of law*, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior felony convictions, as defined in subdivision (b) [including juvenile adjudications under subdivision (b)(3)], the court shall adhere to each of the following: (4) *There shall not be a commitment to any other facility other than the state prison.*" (Emphasis added.) *Delgado* acknowledged, however, that "[w]here justice requires housing such an offender in county jail, the trial court retains discretion to strike prior juvenile adjudications. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 504.)" (*Delgado*, at p. 919.)

Because the realignment statute only excludes defendants who have current or prior serious or violent felony "convictions," the exclusion itself will not apply to defendants having only juvenile "adjudications" that will qualify as strikes under the Three Strikes law. (See *People v. Pacheco* (2011) 194 Cal.App.4th 343, 346.) Indeed, cleanup legislation originally included an exclusion based on California or out-of-state juvenile adjudications if the minor was 16 years old or older when the crime was committed. The language was deleted after further legislative hearings. Although the Legislature clearly intended that juvenile strikes not exclude a defendant from a jail commitment under section 1170(h), as observed in *Delgado*, the realignment legislation must be read in conjunction with the provisions of the Three Strikes law.

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

strike is pled and proved and 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 or the strike has not been pled and proved, then the defendant is eligible for a county jail commitment under section 1170(h).

It appears the court has the ability to dismiss a prior juvenile strike to make a defendant eligible for a commitment under section 1170(h). Section 1170(f) provides: "Notwithstanding any other provision of this section, for purposes of paragraph (3) of subdivision (h), any allegation that a defendant is eligible for state prison due to a prior or current *conviction*, sentence enhancement, or because he or she is required to register as a sex offender shall not be subject to dismissal pursuant to Section 1385." (Emphasis added.) Because the legislation bars only the dismissal of strike "convictions," it would not seem to restrict the ability of the court to dismiss juvenile strike "adjudications."

d. Whether disqualifying conditions must be pled and proved

As noted above, a commitment to county jail under section 1170(h), is unavailable to defendants who have current or prior violent or serious felony convictions listed in sections 667.5(c), and 1192.7(c), who are required to register as a sex offender, or who have a felony conviction with an enhancement for aggravated theft under section 186.11. (§ 1170(h)(3).) The legislation does not contain any express requirement that the disqualifying factors must be pled and proved – any such requirement must be implied. Only one portion of section 1170 even suggests a duty to plead and prove a disqualifying factor. Section 1170(f) provides: "Notwithstanding any other provision of this section, for purposes of paragraph (3) of subdivision (h), any *allegation* that a defendant is eligible for state prison due to a prior or current conviction, sentence enhancement, or because he or she is required to register as a sex offender shall not be subject to dismissal pursuant to Section 1385." (Emphasis added.)

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

The "plead and prove" issue is addressed in *People v. Griffis* (2013) 212 Cal.App.4th 956. Relying heavily on two California Supreme Court cases, *In re Varnell* (2003) 30 Cal.4th 1132, and *People v. Lara* (2012) 54 Cal.4th 896, *Griffis* concludes the exclusions under section 1170(h)(3) are merely "sentencing factors" that do not require pleading and proof. The exclusions set forth in the realignment legislation do not change the *amount* of time to be served, only *where* it is to be served. Pleading requirements generally are implied only where additional time in jail is required. The court also determined section 1170(f), concerning the inability to use section 1385 to strike a disqualifying factor, did not imply such a requirement.

The Supreme Court in *Lara* determined that the People are not required to plead or prove the factors that would bar a defendant from receiving enhanced conduct credits. *Lara* relied heavily on *Varnell* wherein the court considered a similar "pleading and proof" dispute regarding a defendant's eligibility for Proposition 36. Except in limited circumstances, a defendant with a prior serious or violent felony conviction is not eligible for Proposition 36. (§ 1210.1(b)(1).) *Varnell* concluded the prosecution is not required to plead and prove the disqualifying convictions. The court also determined 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 length of a sentence a person is ordered to serve; they never have been applied when the only issue is *where* the term is to be served. It is unlikely that *Alleyne v. United States* (2013) 570 U.S. 99, extending *Apprendi* to the determination of the minimum term of custody, will apply to this issue.

e. Use of section 1385 to dismiss disqualifying factors

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

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

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

Section 1170(d) originally permitted the court to recall a commitment to state prison within 120 days of the date of sentencing. Effective January 2016, the ability to recall a sentence has been extended to commitments under section 1170(h).

Section 1170(e), allowing for compassionate release of inmates sentenced to state prison, does not include any reference to inmates committed to county jail under section 1170(h). Government Code, sections 26605.6 and 26605.7, however, provide an alternative release procedures for all inmates sentenced to county jail, including those committed under section 1170(h).

Government Code, section 26605.6 provides "[t]he sheriff, or his or her designee, has the authority, after conferring with a physician who has oversight for providing medical care at a county jail, or that physician's designee, to release from a county correctional facility, a prisoner sentenced to a county jail if the sheriff determines that the prisoner would not reasonably pose a threat to public safety and the prisoner, upon diagnosis by the examining physician, is deemed to have a life expectancy of six months or less."

Government Code, section 26605.7 provides "[t]he sheriff, or his or her designee, after conferring with the physician who has oversight for providing medical care, or the physician's designee, may request the court to grant medical probation or to resentence a prisoner to medical probation in lieu of jail time for any prisoner sentenced to a county jail under either of the following circumstances: (1) The prisoner is physically incapacitated with a medical condition that renders the prisoner permanently unable to perform activities of basic daily living, which has resulted in the prisoner requiring 24-hour care, if that incapacitation did not exist at the time of sentencing. (2) The prisoner would require acute long-term inpatient rehabilitation services."

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

remand the defendant into further custody if there is a violation of the conditions of mandatory supervision or there is a need to modify the conditions of supervision.

People v. Servin (2019) 31 Cal.App.5th 731 (*Servin*), reviewed the scope of the court's discretion in determining whether to exercise its discretion to grant a request for compassionate release under section 1170(e). The court found the only factors the trial court may consider are whether the defendant poses a risk to the public if released and whether the defendant has no more than six months to live. The court held it inappropriate for the trial court to consider whether the defendant "deserves" to be released. The court further observed that because of the nature of the application, if one of the parties wishes to appeal the court's decision, it is appropriate to request preferential review. "In order to ensure that such cases may be resolved fully and expeditiously, we urge any party or counsel appealing from a trial court's order under section 1170(e) to advise the appellate court at the earliest possible time of the nature of the issues on appeal and the date on which a medical professional determined the defendant had no more than six months to live, and to seek calendar preference. (Cal. Rules of Court, rule 8.240.)" (*Servin*, at p. 737.) Because section 1170(e) and Government Code, section 26605.6 contain the same factors for consideration by the court, it is likely *Servin* also applies to section 26605.6.

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

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

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

4) Reconciliation of realignment legislation with probation ineligibility statutes

a. Probation eligibility

A number of statutes prohibit the granting of probation for certain crimes or offenders. (See, e.g., §§ 1203.07(a), and 1203.073(b) [specified drug offenses].) Nothing in the realignment legislation is inconsistent with these

statutes. A commitment under section 1170(h) is the equivalent of a state prison commitment. It may only be ordered after probation is expressly denied by the court. The new sentencing provisions apply only when the court has determined not to grant probation, but to impose the statutory sentence. The amendment to section 667.5(b) makes county jail commitments under section 1170(h) priorable as an enhancement, a consequence not applicable to traditional county jail commitments ordered as part of a grant of probation. Supervision under a "split" or "blended" sentence under section 1170(h)(5)(B), unlike probation, is mandatory; the defendant may not legally refuse the supervision. The fact that the sentence is served in county jail rather than state prison or allows supervision by the probation officer does not mean the court is granting probation in violation of the statutes that prohibit such a disposition. Merely because the probation officer is supervising the defendant does not make it "probation" any more than people being supervised by probation on postrelease community supervision following release from prison.

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

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

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

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

The gravamen of statutes similar to section 1203.073 is to prohibit the granting of probation, or to somehow avoid the imposition of a felony sentence, for designated offenses. The procedure under section 1170(h)(5) appears consistent with these statutes because the court, in fact, does fully

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

5) Exercise of discretion under sections 17(b), 1203.4, and 1203.41

Section 17(b)

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

Section 1203.4

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

prison or county jail. Accordingly, if the court imposes a sentence under section 1170(h), whether it is a straight or split sentence, and orders the sentence into execution, the defendant will no longer be eligible for relief under section 1203.4. If, however, the court suspends execution of an 1170(h) sentence and the defendant satisfactorily completes probation, the defendant would be entitled to relief under section 1203.4.

Section 1203.41

Section 1203.41 gives the court discretion to dismiss charges in a manner similar to section 1203.4, but for persons sentenced under the provisions of section 1170(h)(5). The court's authority is entirely discretionary, unlike section 1203.4, which is mandatory if the defendant satisfactorily completes probation or probation is terminated early. Relief may be granted by the court "in its discretion and in the interests of justice." (§ 1203.41(a).) Section 1203.41 applies to convictions obtained either by plea or after trial. (§ 1203.41(a)(1).) Similar to section 1203.4, relief under section 1203.41, subject to certain exceptions, releases the defendant "from all penalties and disabilities resulting from the offense of which he or she has been convicted, except as provided in Section 13555 of the Vehicle Code [driving on a suspended license]." (§ 1203.41(a)(1).)

The relief under section 1203.41 is available after one year from the completion of a split sentence, and two years after completion of a straight sentence. (§ 1203.41(a)(2).) The statute expressly excludes any defendant who is under supervision pursuant to section 1170(h)(5)(B), who is serving any sentence, who is on probation for any offense, or who is charged with any offense. (§ 1203.41(a)(3).)

Like section 1203.4, relief under section 1203.41 does not bar the use of the conviction as a prior offense in a subsequent prosecution, does not relieve the defendant of the duty to disclose the conviction in an application for public office or license, does not permit the person to possess firearms, and does not permit the person to hold public office if otherwise excluded. (§ 1203.41(b).)

The defendant may be charged a fee of up to $150 to cover the costs of the court proceedings. "The court may order reimbursement in any case in which the petitioner appears to have the ability to pay, without undue hardship, all or any portion of the costs for services established pursuant to this subdivision." (§ 1203.41(d).)

The district attorney must be given 15 days' notice of the hearing on the petition for relief. It is presumed proper notice was given if the proof of service is filed with the court. If after receiving notice, the district attorney fails to appear and object to the relief, the district attorney may not thereafter seek to set aside or appeal the granting of relief. (§ 1203.41(e).)

6) Execution of a prior suspended sentence

Courts often impose a state prison sentence, suspend its execution, and place the defendant on probation. If the sentence was imposed prior to enactment of the realignment legislation, but the probation status was revoked after October 1, 2011, and the crime now qualifies for sentencing to county jail under section 1170(h), appellate courts disagreed where the defendant should serve the executed sentence. That issue has now been resolved by the Supreme Court in *People v. Scott* (2014) 58 Cal.4th 1415: the defendant serves the sentence in prison in accordance with the original sentence imposed by the court. Generally in accord with *Scott* are *People v. Gipson* (2013) 213 Cal.App.4th 1523, *People v. Mora* (2013) 214 Cal.App.4th 1477, *People v. Kelly* (2013) 215 Cal.App.4th 297, *People v. Wilcox* (2013) 217 Cal.App.4th 618, and *People v. Montrose* (2013) 220 Cal.App.4th 1242. *People v. Clytus* (2012) 209 Cal.App.4th 1001, which held the time is served in county jail, was disapproved.

Two cases address the role of a plea bargain in determining where the executed sentence is to be served. In *People v. Reece* (2013) 220 Cal.App.4th 204, and *People v. Wilson* (2013) 220 Cal.App.4th 962, the defendants had received suspended state prison sentences and were placed on probation. The original sentencing occurred prior to the effective date of the realignment legislation on October 1, 2011. After the effective date of realignment, the defendants violated their conditions of probation and were not reinstated on probation. *Reece* determined that the "state prison" aspect of the suspended sentence was not an integral part of the plea bargain since there was no difference in the custody term ultimately served. *Wilson*, however, concluded the "state prison" aspect of the suspended sentence was a material condition of the plea. *Wilson* reasoned the parties might have negotiated a different plea had they known the court was able to impose a split sentence. Although the Supreme Court granted review of both cases, likely the issue is now moot with the decision in *Scott*.

Imposition of sentence previously suspended

In *Scott* and all of the foregoing cases, the courts had imposed a state prison sentence and *suspended its execution*. Such a circumstance clearly is distinguishable from the situation where the court *suspends imposition of sentence*, places the defendant on probation, the defendant violates probation, and after October 1, 2011 the court does not reinstate the defendant on probation. Although in one sense the defendant has been "sentenced" when placed on probation, it can be argued the defendant will not be considered sentenced for the purposes of the realignment legislation because no term of imprisonment has been imposed. There are a number of circumstances where the defendant is not fully sentenced until such time as probation is denied and the court imposes a custody term specified by the Legislature. For the purposes of obtaining relief under section 17(b), for example,

the defendant is not considered sentenced until probation is denied and a felony sentence is imposed. Accordingly, if the court has suspended imposition of sentence, but sentences the defendant following a denial of probation after October 1, 2011, the term will be to county jail if the crime provides for punishment under section 1170(h).

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

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

A timely application for recall of a sentence under section 1170(d) may constitute a "sentencing" for the purpose of applying the new law to cases sentenced before October 1, 2011. Beyond that process, however, inmates sentenced under the old law only have a possible argument based on a denial of equal protection of the law. However, that argument has been rejected in *People v. Lynch* (2012) 209 Cal.App.4th 353.) "The Realignment Act is, if nothing else, a significant experiment by the Legislature. Prospective application is reasonably related to the Legislature's rational interests in limiting the potential costs of its experiment. Nothing prevents the Legislature from extending the Realignment Act to all criminal defendants if it later determines that policy to be worthwhile." (*Id*. at p. 361.)

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

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

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

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

Initially it was not entirely clear how the five-year "washout" under section 667.5 was to be calculated when the court imposed a blended sentence. There also was a question concerning whether any time ordered for violations of supervision imposed on defendants on postrelease community supervision (PRCS) counted as part of the "washout" period. The question arose because section 667.5(b) provides, in relevant part: "no additional term shall be imposed under this subdivision for any prison term or county jail term of more than one year imposed or when sentence is not suspended prior to a period of five years in which the defendant remained free of both the commission of an offense which results in a felony conviction, and *prison custody or the imposition of a term of jail custody of more than one year* or any felony sentence that is not suspended." (Emphasis added.)

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

With the amendment of section 667.5(d), it seems clear that so long as the defendant is subject to reimprisonment, the defendant does not have a "prison prior" based on the term he is then serving. Accordingly, if the defendant re-offends while on mandatory supervision, he is not subject to an enhancement in the new case under section 667.5(b) for the term he is then serving on mandatory supervision.

a. Documentation from the court

Section 1213(a) has been amended to require the preparation of appropriate documentation for all county jail commitments under section 1170(h): "either a copy of the minute order or an abstract of the judgment as provided in Section 1213.5, certified by the clerk of the court, and a Criminal Investigation and Identification (CII) number shall be forthwith furnished to

the officer whose duty it is to execute the probationary order or judgment, and no other warrant or authority is necessary to justify or require its execution." Presumably the abstract can be used by other courts and district attorneys in determining the existence of a county jail prior under section 667.5(b).

If the defendant is committed to state prison, having previously been sentenced under section 1170(h) or has a combination of state prison and 1170(h) offenses, the abstract should include all terms imposed, including the terms normally imposed under section 1170(h). Once a person is sentenced to state prison for any reason, all active prison or 1170(h) terms are served in prison. . (§§ 669(d) and 1170.1(a).)

10) Prior convictions in another jurisdiction (§ 668)

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

11) Collection of victim restitution

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, governing commitments to state prison, 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."

The issue was resolved in *People v. Rahbari* (2014) 232 Cal.App.4th 185, 196: "[W]e conclude victim restitution ordered as part of a sentence to county jail followed by mandatory supervision pursuant to section 1170(h) is an order pursuant to section 1202.4 and its scope is limited 'to those losses arising out of the criminal activity that

formed the basis of the conviction.' ([*People v. Woods* (2008) 161 Cal.App.4th 1045,] 1049.)"

The collection of victim restitution was not initially addressed in the realignment legislation, but was addressed in cleanup legislation effective January 1, 2013. If the defendant is confined in the county jail under section 1170(h), whether it is for a straight or blended sentence, victim restitution may now be collected by an agency designated by the county board of supervisors under section 2085.5(d). If the county designates the sheriff as the agency, the board of supervisors must first obtain the sheriff's concurrence. (§ 2085.5(b)(2).) The designated agency is then authorized to deduct restitution from a defendant's jail wages and trust account deposits up to 20 percent or the balance owed, whichever is less, up to a maximum of 50 percent, unless prohibited by federal law. (§ 2085.5(d).)

Section 1203c has been amended to extend the probation department's ability to facilitate collection of victim restitution to persons committed to jail under section 1170(h), or who are on mandatory supervision or postrelease community supervision. The collection process is outlined in section 2085.6.

Presumably the victim will have the right to convert the restitution claim arising out of a sentence under section 1170(h) to a civil judgment under sections 1202.4(i), 1214(b), and 1203(j). The victim also would have the right to enforce an income deduction under section 1202.42, and institute lien proceedings under section 1202.42(g).

12) Restitution fines

Imposition of restitution fines under sections 1202.4(b), 1202.44 and 1202.45 are different in some respects after October 1, 2011; the following overview highlights what has and has not changed.

a. Misdemeanors

No change in the current law.

b. Felonies when defendant placed on probation

Where imposition of sentence has been suspended, there is no change in the traditional assessments. For crimes committed on or after January 1, 2014, the court must impose the basic restitution fine of $300 to $10,000 under section 1202.4(b). The court must also impose and stay a probation revocation fine in the same dollar amount under section 1202.44, pending the defendant's satisfactory completion of probation.

If the court grants probation, but suspends execution of a *state prison* sentence, the court must impose the basic assessment under section 1202.4(b), and a probation revocation fine in the same dollar amount under section 1202.44. Depending on the nature of the defendant's crimes, the court must also impose either a parole or postrelease community supervision (PRCS) revocation fine in the same dollar amount under section 1202.45 as follows: (See *People v. Tye* (2000) 83 Cal.App.4th 1398.)

- PRCS revocation fine (§ 1202.45(b)) for all PRCS-eligible crimes committed on or after January 1, 2013.

- Parole revocation fine (§ 1202.45(a)) for all parole-eligible crimes, regardless of when committed.

If the defendant violates probation and the court chooses not to reinstate, the court should order into execution the probation revocation fine, but continue the stay on the parole or PRCS revocation fine.

For crimes committed prior to January 1, 2013

For crimes committed prior to January 1, 2013, if the court grants probation, but suspends execution of a sentence under *section 1170(h)*, whether or not a "split" sentence, the court should impose only the basic restitution fine under section 1202.4(b) and the probation revocation fine under section 1202.44. The parole revocation assessment should not be imposed because there is no parole on a commitment under section 1170(h). (*People v*. *Cruz* (2012) 207 Cal.App.4th 664, 672, fn.6; *People v. Isaac* (2014) 224 Cal.App.4th 143.) To impose the new PRCS revocation fine to crimes committed prior to January 1, 2013, would violate the *ex post facto* prohibition. (*Id.,* at p. 147.)

For crimes committed after January 1, 2013

For crimes committed on or after January 1, 2013, if the court has suspended execution of a split sentence under section 1170(h)(5)(B), the court must also impose a "mandatory supervision revocation restitution fine" under section 1202.45(b). (See *People v. Tye* (2000) 83 Cal.App.4th 1398.) The fine will be in the same amount as assessed under section 1202.4(b) and will be stayed unless mandatory supervision is revoked. It may be collected by the agency designated by the board of supervisors under section 2085.5(b) where the defendant is incarcerated. Once the defendant is no longer on mandatory supervision, any remaining unpaid restitution fines may be collected by the California Victim Compensation and Government Claims Board under section 1214(a).

The Legislature did not further define what is meant by mandatory supervision being "revoked." Presumably it will be given the same meaning as the trigger for the probation revocation fine under section 1202.44: when the supervision is fully and finally revoked and the full remaining sentence is imposed. (See *People v. Guiffre* (2008) 167 Cal.App.4th 430, 434.)

Because of *ex post facto* considerations, the mandatory supervision revocation fine may only be imposed for crimes committed on or after January 1, 2013, the effective date of the legislation authorizing the fine. (See *People v. Flores* (2009) 176 Cal.App.4th 1171.)

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

When the court denies probation and sentences the defendant to *state prison*, the court should impose the basic restitution fine under section 1202.4(b). Depending on the nature of the defendant's crimes, the court must also impose either a parole or postrelease community supervision (PRCS) revocation fine in the same dollar amount under section 1202.45 as follows:

- PRCS revocation fine (§ 1202.45(b)) for all PRCS-eligible crimes committed on or after January 1, 2013.

- Parole revocation fine (§ 1202.45(a)) for all parole-eligible crimes, regardless of when committed.

Crimes committed prior to January 1, 2013

For crimes committed prior to January 1, 2013, when the court denies probation and sentences the defendant to *county jail* under section 1170(h), whether or not a “”split” sentence, the court should only impose the basic restitution fine under section 1202.4(b). The probation revocation fine under section 1202.44 should not be imposed because there is no probation. The parole revocation fine under section 1202.45 should not be imposed because there is no parole.

Crimes committed after January 1, 2013

For crimes committed on or after January 1, 2013, if the court has imposed a split sentence under section 1170(h)(5), the court must also impose a mandatory supervision revocation restitution fine under section 1202.45(b). The fine will be in the same amount as assessed under section 1202.4(b).

However, if the court imposes a straight sentence without any period of supervision, the court should not impose a mandatory supervision revocation fine. (*People v. Butler* (2016) 243 Cal.App.4th 1346, 1351-1352.)

d. Collection of restitution fines

Probation, mandatory supervision and PRCS revocation fines are collected by the agency designated by the county board of supervisors for that purpose under section 2085.5. Prior to realignment, CDCR was responsible for the collection of parole revocation fines. It is not clear which agency will be responsible for collection of the parole revocation fines after July 1, 2013; the matter is under discussion with the Legislature and Governor's office.

13) Expansion of home detention programs

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

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

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

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

Section 4115.5 has been amended to allow the board of supervisors of one county to contract with the board of another county for housing of jail inmates. Previously

the section had authorized such a practice only if the defendant was a probationer or a misdemeanant. The change will sunset July 1, 2021.

15) Cases from multiple jurisdictions

The original realignment legislation did not address the situation where two counties imposed a concurrent or consecutive sentence under section 1170(h). No statutory provision specified how custody and supervision time was to be allocated between the counties. Effective January 1, 2018, section 1170, subdivision (h)(6), specifies: "When the court is imposing a judgment pursuant to this subdivision concurrent or consecutive to a judgment or judgments previously imposed pursuant to this subdivision in another county or counties, the court rendering the second or other subsequent judgment shall determine the county or counties of incarceration and supervision of the defendant." While the legislation directs which court makes the allocation decision, it does not address how the allocation decision is made. The Judicial Council was directed to prepare a Rule of Court offering guidance in making the decision. (§ 1170.3, subd. (a)(7).)

In response to the legislative directive, the Judicial Council amended rule 4.452 to require consideration of specified factors in determining where a sentence is to be served and which court is required to make the decision. Rule 4.452 provides as follows:

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

term after the resentencing, the subordinate term will be limited to one-third the middle base term as provided in section 1170.1(a).

(4) The second or subsequent judge has the discretion to specify whether a previous sentence is to be served in custody or on mandatory supervision and the terms of such supervision, but may not, without express consent of the defendant, modify the sentence on the earlier sentenced charges in any manner that will (i) increase the total length of the sentence imposed by the previous court; (ii) increase the total length of the actual custody time imposed by the previous court; (iii) increase the total length of mandatory supervision imposed by the previous court; or (iv) impose additional, more onerous, or more restrictive conditions of release for any previously imposed period of mandatory supervision.

(5) In cases in which a sentence is imposed under the provisions of section 1170(h) and the sentence has been imposed by courts in two or more counties, the second or subsequent court must determine the county or counties of incarceration or supervision, including the order of service of such incarceration or supervision. To the extent reasonably possible, the period of mandatory supervision must be served in one county and after completion of any period of incarceration. In accordance with rule 4.472, the second or subsequent court must calculate the defendant's remaining custody and supervision time.

(6) In making the determination under subdivision (a)(5), the court must exercise its discretion after consideration of the following factors:

(A) The relative length of custody or supervision required for each case;

(B) Whether the cases in each county are to be served concurrently or consecutively;

(C) The nature and quality of treatment programs available in each county, if known;

(D) The nature and extent of the defendant's current enrollment and participation in any treatment program;

(E) The nature and extent of the defendant's ties to the community, including employment, duration of residence, family attachments, and property holdings;

(F) The nature and extent of supervision available in each county, if known;

(G) The factors listed in rule 4.530(f); and

(H) Any other factor relevant to such determination.

(7) If after the court's determination in accordance with subdivision (a)(5) the defendant is ordered to serve only a custody term without supervision in another county, the defendant must be transported at such time and under such circumstances as the court directs to the county where the custody term is to be served. The defendant must be transported with an abstract of the court's judgment as required by section 1213(a), or other suitable documentation showing the term imposed by the court and any custody credits against the sentence. The court may order the custody term to be

served in another county without also transferring jurisdiction of the case in accordance with rule 4.530.

(8) If after the court's determination in accordance with subdivision (a)(5) the defendant is ordered to serve a period of supervision in another county, whether with or without a term of custody, the matter must be transferred for the period of supervision in accordance with provisions of rule 4.530(f), (g), and (h).

Suggested procedure for allocation of multi-jurisdictional custody time

In determining where multi-county custody terms are to be served, courts may wish to approach this logistical nightmare by assuming the proper and fair objective of the sentencing structure should be to have the sentences physically served in proportion to the amount of time ordered by each county. If County A orders 65% of the total custody time, then 65% should be served in County A.

As long as the solution to the multi-jurisdiction problem is fundamentally fair, it probably is of no great concern which particular solution is selected. After all, sometimes a particular county will be the bug and sometimes it will be the windshield.

In some instances the task of allocating custody time is easy. For example, if County A imposes a three-year custody term and County B imposes an eight-month consecutive custody term, it would be logical for County A to house the defendant for three years and County B to house the defendant for eight months.

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

Examples of allocated custody time

The examples omit any consideration of conduct credits.

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

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

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

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

The problem of early releases

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

How to pronounce the sentence

The following example illustrates the proper structure of a sentence that involves sentences imposed by multiple jurisdictions.

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

> *The record will reflect that we are proceeding in Case 1234 from County A and Case 5678 from County B. Probation in the Case 5678 is denied. With respect to case 5678, for Count 1, the court imposes the upper term of 3 years under the provisions of section 1170(h)(5), which is hereby designed the principal term. For Count 2, the court hereby imposes a subordinate and consecutive term of 8 months under the provisions of section 1170(h)(5), which is one-third the middle term. With respect to Case 1234, for Count 1, the court hereby re-sentences the defendant to a subordinate and consecutive term of 8 months under the provisions of section 1170(h)(5), which is one-third the middle term, for an aggregate term of custody of 4 years and 4 months. With respect to the term imposed in Case 5678, the court hereby suspends execution of the concluding 12 months of said term and places the defendant on mandatory supervision under the following terms and conditions. . . .*
>
> *The defendant is remanded to the custody of the sheriff of County B to serve the custody portion of the sentence imposed in Case 5678. After the service*

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

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

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

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

17) Application of California Vehicle Code, § 41500

Vehicle Code section 41500 establishes a policy by which a defendant sentenced to state prison or county jail under section 1170(h), or a minor committed to the Youth Authority will not be prosecuted for a non-felony motor vehicle violations pending at the time of commitment. Section 41500 provides, in relevant part: "(a) A person shall not be subject to prosecution for a nonfelony offense arising out of the operation of a motor vehicle or violation of this code as a pedestrian that is pending against him or her at the time of his or her commitment to the custody of the Secretary of the Department of Corrections and Rehabilitation, the Division of Juvenile Justice in the Department of Corrections and Rehabilitation, or to a county jail pursuant to subdivision (h) of Section 1170 of the Penal Code." The statute does not apply to persons charged with violations of section 23103 (reckless driving), 23152 (driving under the influence of alcohol or drugs), or section 23153 (driving under the influence of alcohol or drugs causing injury. (CVC § 41500(f).)

People v. Lopez (2013) 218 Cal.App.4th Supp. 6, which held Vehicle Code section 41500 did not apply to persons committed under section 1170, subdivision (h), was abrogated by a statutory change in 2016.

18) Application of Section 1368 proceedings

See discussion in Section N, *infra*.

19) Parole/ PRCS advisement at sentencing

Section 1170(c) and California Rules of Court, Rule 4.433(e) require the court to advise the defendant at the time of being sentenced to state prison of the applicable period of parole under section 3000. Rule 4.433(e) additionally requires the defendant to be advised of any period of incarceration for a parole violation. Neither the statute nor the rule have been amended to require similar advisements for sentences imposed where the defendant may be released on postrelease community supervision (PRCS). Until the matter is addressed by the Legislature or the appellate courts, it is suggested that defendants being sentenced to state prison be advised of the period of supervision on PRCS and the potential sentence for violations of supervision. A suggested advisement for parole and PRCS is attached as Appendix IV.

20) Attorney fees

Section 987.8(g)(2)(B) establishes a presumption that a defendant sentenced to state prison has no ability to reimburse the county for attorney fees. *People v. Prescott* (2013) 213 Cal.App.4th 1473, held the presumption has no application to

defendants sentenced to county jail under section 1170(h). Section 987.8 was repealed effective July 1, 2021.

21) Supervision fees

Section 1203.1(a), which authorizes the court to pay the reasonable costs of probation supervision has no application to the mandatory supervision portion of a sentence imposed under section 1170(h)(5). Section 1203.1(a) is limited to grants of probation or a conditional sentence. (*People v. Fandinola* (2013) 221 Cal.App.4th 1415; *People v. Ghebretensae* (2013) 222 Cal.App.4th 741.)

Section 1203.1b, however, has been amended to include the ability of the probation department to collect the costs of mandatory supervision, subject to the defendant's ability to pay.

22) Affordable Healthcare Act

Section 4011.11 has been enacted to facilitate the ability of inmates to obtain coverage under the Affordable Healthcare Act. "It is the intent of the Legislature in enacting this act to, among other things, ensure that county human services agencies recognize that (a) federal law generally does not authorize federal financial participation for Medi-Cal when a person is an inmate of a public institution, as defined in federal law, unless the inmate is admitted as an inpatient to a noncorrectional health care facility, (b) federal financial participation is available after an inmate is released from a county jail, and (c) the fact that an applicant is currently an inmate does not, in and of itself, preclude the county human services agency from processing the application submitted to it by, or on behalf of, that inmate." (Section 1, AB 720, Ch 646.)

The board of supervisors in each county is to designate the sheriff or a community-based organization to assist inmates with submitting an application for healthcare benefits. (§ 4011.11(a).)

"Consistent with federal law, a county jail inmate who is currently enrolled in the Medi-Cal program shall remain eligible for, and shall not be terminated from, the program due to his or her detention unless required by federal law, he or she becomes otherwise ineligible, or the inmate's suspension of benefits has ended pursuant to Section 14011.10 of the Welfare and Institutions Code." (§ 1011.11(c).) "The fact that an applicant is an inmate shall not, in and of itself, preclude a county human services agency from processing an application for the Medi-Cal program submitted to it by, or on behalf of, that inmate." (§ 4011.11(e).)

23) Work furlough programs

Effective January 1, 2014, section 1208 has been expanded to allow felons sentenced to county jail to be eligible for work furlough programs. The new provisions apply when "a person is convicted and sentenced to the county jail, or is imprisoned in the county jail for nonpayment of a fine, for contempt, or as a condition of probation for any criminal offense. . . ." (§ 1208(b).) According to the Legislative Counsel's Digest, the change is intended to include persons serving a sentence imposed under section 1170(h) and for violations of postrelease community supervision. It is not clear whether the intent is to include persons serving a sentence for a parole violation, although the plain language of the statute would suggest that it does apply.

24) Application of section 1203.2a to commitments under section 1170(h)

Section 1203.2a provides a means by which a person on probation in one case may request sentencing if committed to prison in this or another state because of a second conviction. "If any defendant who has been released on probation is committed to a prison in this state or another state for another offense, the court which released him or her on probation shall have jurisdiction to impose sentence, if no sentence has previously been imposed for the offense for which he or she was granted probation, in the absence of the defendant, on the request of the defendant made through his or her counsel, or by himself or herself in writing, if such writing is signed in the presence of the warden of the prison in which he or she is confined or the duly authorized representative of the warden, and the warden or his or her representative attests both that the defendant has made and signed such request and that he or she states that he or she wishes the court to impose sentence in the case in which he or she was released on probation, in his or her absence and without him or her being represented by counsel."

The procedural rights created by section 1203.2a apply to commitments to county jail under the provisions of section 1170(h). (*People v. Mendoza* (2015) 241 Cal.App.4th 764, 779-781.) Accordingly, if a defendant is sentenced under section 1170(h), he may petition for sentencing of any other cases where probation has been granted.

If notified of the new commitment by the defendant, the probation officer must report the commitment to the court within 30 days." Failure of the probation officer to timely report the commitment will result in the loss of the court's jurisdiction. (*In re Hoddinott* (1996) 12 Cal.4th 992.) Section 1203.2a further specifies: "If the case is one in which sentence has previously been imposed, the court shall be deprived of jurisdiction over defendant if it does not issue its commitment or make other final order terminating its jurisdiction over defendant in the case within 60 days after being notified of the confinement. If the case is one in which sentence has not

previously been imposed, the court is deprived of jurisdiction over defendant if it does not impose sentence and issue its commitment or make other final order terminating its jurisdiction over defendant in the case within 30 days after defendant has, in the manner prescribed by this section, requested imposition of sentence."

Courts generally have required strict adherence to the statutory requirements when a defendant seeks relief under section 1203.2a. (*People v. Wagner* (2009) 45 Cal.4th 1039, 1054.) With respect to the requirement that the triggering commitment be to state prison, however, the courts have not been very consistent. The procedure was found inapplicable to commitments to county jail. (*People v. Madrigal* (2000) 77 Cal.App.4th 1050, 10545.) *Madrigal*, however, obviously was written long before the enactment of the realignment legislation. Section 1203.2a was applied to a defendant committed to state prison as a "sexual psychopath." (*In re Perez* (1966) 65 Cal.2nd 224.) The process was unavailable to a person committed to the California Rehabilitation Center. (*People v. Vasquez* (1971) 16 Cal.App.3d 897.) Finally, section 1203.2a was held applicable to persons committed to the California Youth Authority. (*People v. Carr* (1974) 43 Cal.App.3d 441.)

The purpose of section 1203.2a is well defined. "Penal Code section 1203.2a [footnote omitted] establishes a procedure by which one committed to prison in California can obtain relief from the harmful uncertainty of other outstanding California convictions as to which he has been granted probation with imposition or execution of sentence suspended. That procedure benefits both the prisoner and the state. 'Fairness to one committed to a state prison and proper administration by the prison officials and the Adult Authority require that such outstanding convictions be reduced to judgment or be otherwise finally disposed of by termination of the trial court's jurisdiction.' (*In re Perez* (1966) 65 Cal.2d 224, 228.) When the prisoner requests imposition of sentence under section 1203.2a he receives the benefit of the possibility of concurrent sentences. (*In re White* (1969) 1 Cal.3d 207, 211.) The trial court and its clerk and probation officer are afforded the convenience of closing their files in a case which otherwise might remain undisposed of for years. Moreover, the procedure seeks to give prisoners the benefit of prompt sentencing or other final disposition while avoiding the government's expenditure of time and funds to produce imprisoned defendants for unnecessary court appearances. (*People v. Ford* (1966) 239 Cal.App.2d 944, 946; Senate Fact Finding Com. on Judiciary Report, Post-Conviction Procedures (Jan. 1963) p. 51, Appendix to Journal of Sen. (1963 Reg. Sess.) vol. 1, hereafter cited as Sen. Com. Rep.)" (*Hayes v. Superior Court* (1971) 6 Cal.3d 216, 222.)

White also observed: "The purpose of section 1203.2a is to prevent a defendant from inadvertently being denied the benefit of Penal Code section 669 that sentences be concurrent unless the court exercises its discretion to order that a subsequent sentence be consecutive to a prior sentence. [Footnote omitted] Before

section 1203.2a was enacted, if the court that granted probation was unaware of a defendant's subsequent incarceration for another offense and had therefore failed to revoke probation, the defendant might serve the entire term for the other offense but still be subject, on revocation of probation, to serving the term for the offense for which he had been given probation. Serving of any sentence after such revocation of probation could obviously not run concurrently with the sentence for the offense that had already been served. By authorizing a defendant on probation who had been committed for another offense to request revocation of probation and imposition of sentence and by requiring his probation officer to notify the court of the subsequent commitment, section 1203.2a affords a procedure for requiring the court to consider imposing a concurrent sentence. It also precludes inadvertent imposition of consecutive sentences by depriving the court of further jurisdiction over the defendant in the case in which probation was granted, if it fails to act within 30 days of being informed of the relevant facts." (*White*, at p. 211.)

It is important to note that section 1203.2a is not the only means by which a defendant may request a court to impose sentence. As held in *People v. Wagner*, the defendant may also request relief under section 1381. "Nothing in the language of section 1203.2a precludes the Legislature from providing an alternative procedure in which an incarcerated probationer may demand speedy sentencing while retaining his or her right to be present with counsel when sentence is imposed. Section 1381 now provides that an incarcerated defendant can demand to be brought to any court in which he or she has pending 'any criminal proceeding wherein the defendant remains to be sentenced.' The plain language of section 1381 encompasses a defendant placed on probation with imposition of sentence suspended and subsequently incarcerated for another offense because, 'if the trial court at a sentencing hearing suspended imposition of sentence and places the defendant on probation, the defendant has not yet been sentenced.' ([*People v. Broughton* (2003) 107 Cal.App.4th 307,] 311.) Moreover, it would make sense for the Legislature to give incarcerated probationers the choice between the quick and easy procedure of section 1203.2a, or the slower procedure of section 1381 under which the probationer retains the right to appear with counsel." (*Wagner*, p. 1054; emphasis in original.)

5) Application of *People v. Leiva*

People v. Leiva (2013) 56 Cal.4th 498, addresses the jurisdiction of the court to adjudicate an alleged violation of probation that occurs after the original probation term expires, but during a time when the defendant's probationary period is summarily revoked.

The defendant was placed on probation for three years on April 11, 2000. His conditions of probation required that he obey all laws, not enter the country illegally, and report to the probation officer upon his release from custody and upon

his entry into this country. Defendant completed his original custody term and was released from custody. Because he had previously entered the country illegally, however, he was immediately deported prior to any opportunity to report to his probation officer. Thereafter the probation department filed a revocation petition based solely on the failure to report. When the defendant failed to appear at a revocation hearing in September 2001, the court summarily revoked defendant's probation and issued a warrant. The defendant was arrested on the warrant in November 2008. The trial court determined there was no willful violation of the terms of probation as alleged in the initial revocation petition because the defendant was deported prior to having an opportunity to contact the probation officer. However, the trial court also found the defendant violated his terms of probation in 2007 when he reentered this country without notifying the probation officer. Based on the second alleged violation, the court reinstated the defendant on probation and extended its term to June 2011. The defendant appealed the reinstatement and extension. While the appeal was pending, the defendant again was deported, and again he reentered this country illegally. Based on the third alleged violation, the court revoked probation and committed the defendant to state prison for two years. The defendant appealed the revocation and state prison commitment based on the illegality of the first revocation proceeding. (*Leiva*, at pp. 502-504.)

The decision in *Leiva* turns on the application of that portion of section 1203.2(a) which provided at the relevant times in this case: "[t]he revocation [of probation], summary or otherwise, shall serve to toll the running of the probationary period." The court determined this language was adopted by the Legislature to preserve the court's jurisdiction to adjudicate violations that occur within the original term of probation, but not those that occur after. "[W]e conclude summary revocation of probation preserves the trial court's authority to adjudicate a claim that the defendant violated a condition of probation during the probationary period. As noted, the purpose of the formal proceedings 'is not to revoke probation, as the revocation has occurred as a matter of law; rather, the purpose is to give the defendant an opportunity to require the prosecution *to prove the alleged violation occurred and justifies revocation.*' (*People v. Clark* [(1996) 51 Cal.App.4th 575,] 581, italics added.) We therefore agree with the court in ([*People v. Tapia* (2001) 91 Cal.App.4th 738,] that 'the [authority] retained by the court is to decide *whether* there has been a violation during the period of probation and, if so, *whether* to reinstate or terminate probation.' (*Tapia*, *supra*, 91 Cal.App.4th at pp. 741–742.) [Footnote omitted.] Accordingly, a trial court can find a violation of probation and then reinstate and extend the terms of probation 'if, and only if, probation is reinstated based upon a violation that occurred during the unextended period of probation.' (*Tapia, supra,* 91 Cal.App.4th at p. 741.) This result fairly gives the defendant, if he prevails at the formal violation hearing, the benefit of the finding that there was no violation of probation during the probationary period. [Footnote omitted.] ¶ On the other hand, if the prosecution, at the formal violation hearing

held after probation normally would have expired, is able to prove that the defendant did violate probation before the expiration of the probationary period, a new term of probation may be imposed by virtue of section 1203.2, subdivision (e), and section 1203.3. This result fairly gives the prosecution, if it prevails at the formal violation hearing, the benefit of the finding that there was a violation of probation during the probationary period." (*Leiva*, at pp. 515-516; emphasis in original.)

Justice Baxter, in concurring with the result reached by the majority, made the following additional observation: "Of primary concern is the fact that a summary revocation left unresolved by the probationer's absence interferes with the *supervised* form of release that probation is intended to represent. (See, e.g., §§ 1202.8, subd. (a), 1203, subd. (a).) Imposition of probation for a specified period contemplates that the probationer will be subject to supervision by the court and probation authorities for that *entire amount or length of time,* even if he or she commits *no* violations in the interim. Supervision for the entire probationary period, as agreed between the probationer and the court, is a fundamental prerequisite to the successful and lawful completion of a grant of *supervised* probation. . . . ¶ Under these circumstances, the probationer should not be absolved of a portion of the originally contemplated *length* of supervised release simply because his or her absence extended beyond the originally imposed *calendar period* of probation. On the contrary, whenever the court regains physical custody over the probationer, the period of his or her absence should not necessarily be counted in determining whether the probationary time of *supervised* release has lapsed. If it has not, the court should retain full authority, in the interests of justice, and within the limits of the relevant statutory provisions, to determine what probationary consequences should flow from conduct the probationer has committed in the interim. The current version of section 1203.2(a) should expressly so recognize." (*Leiva*, at pp. 519-520; emphasis in original.)

Application of *Leiva* to mandatory supervision

Leiva concerns the jurisdiction of the court to adjudicate *probation violations* after the expiration of the original term imposed by the court. For the reasons discussed below, it is unlikely the case has any application to revocation proceedings related to *mandatory supervision*.

Central to *Leiva* is the determination by the Supreme Court that the tolling provisions of section 1203.2(a) were only intended by the Legislature to allow the court to adjudicate a violation of probation occurring during the period of supervision by the court, but the hearing is conducted after the term has expired. *Leiva* held there was no intent to extend the supervision period indefinitely pending the apprehension of the defendant. Because the revocation and modification procedures in section 1203.2 now apply to mandatory supervision, PRCS and parole, without additional statutory provisions indicating a different legislative intent, *Leiva*

likely would apply to these other forms of supervision. The Legislature, however, has, in fact, adopted additional provisions relating to mandatory supervision, PRCS and parole that reflect an intent to preserve the original supervision period when the defendant has absconded.

Section 1170(h)(5)(B)(i), with respect to mandatory supervision, provides that "[a]ny time period which is suspended because a person has absconded shall not be credited toward the period of supervision." Similarly, with respect to PRCS, section 3456(b) provides that the "[t]ime during which a person on postrelease supervision is suspended because the person has absconded shall not be credited toward any period of postrelease supervision." Section 3455(e), also with respect to PRCS, provides "[a] person shall not remain under supervision or in custody pursuant to this title on or after three years from the date of the person's initial entry onto postrelease community supervision, except when his or her supervision is tolled pursuant to Section 1203.2 or subdivision (b) of Section 3456." Finally, section 3000(b)(6), with respect to parole, provides the "[t]ime during which parole is suspended because the prisoner has absconded or has been returned to custody as a parole violator shall not be credited toward any period of parole unless the prisoner is found not guilty of the parole violation." In each of these categories of supervision, the Legislature has made it clear that the period of supervision is not reduced by any of the time when the defendant is at large.

Indeed, these sections, not applicable to persons on probation, appear to directly address Justice Baxter's concerns raised in his concurring opinion in *Leiva*: "[W]henever the court regains physical custody over the probationer, the period of his or her absence should not necessarily be counted in determining whether the probationary time of *supervised* release has lapsed. If it has not, the court should retain full authority, in the interests of justice, and within the limits of the relevant statutory provisions, to determine what probationary consequences should flow from conduct the probationer has committed in the interim. The current version of section 1203.2(a) should expressly so recognize." (*Leiva*, at p. 520; emphasis in original.)

Practical effect of *Leiva*

It is doubtful *Leiva* will seriously impact the ability of the court to adjudicate probation violations. Reduced to its essential holding, *Leiva* stands for the proposition that a court looses jurisdiction to adjudicate a violation of supervision that occurs after the original period of supervision has expired. *Leiva*, however, confirms the ability of the court to adjudicate a violation that occurs during the period of supervision, even though the defendant may not be apprehended on the violation until after the original supervision period has elapsed. It will be a rare case that there is no violation during the original period of supervision – indeed, the defendant's abscond status is itself usually a violation of the conditions of

supervision. Adjudication of the violation will permit the court to "again place the person on probation for that period and with those terms and conditions as it could have done immediately following conviction." (§ 1203.2(e).) In other words, the court will have the ability to impose a full new term of probation with conditions of supervision that will address the original crime and any violations that occur during the original period of supervision.

Finally, it is important to observe that *Leiva* likely will apply only to persons on probation. As noted above, probation violations are governed by section 1203.2(a), which provides for the "tolling" of supervision in the event it is summarily revoked. The provisions governing PRCS are mixed. Section 3456(b) provides that the "[t]ime during which a person on postrelease supervision is suspended because the person has absconded shall not be credited toward any period of postrelease supervision." Section 3455(e) provides "[a] person shall not remain under supervision or in custody pursuant to this title on or after three years from the date of the person's initial entry onto postrelease community supervision, except when his or her supervision is tolled pursuant to Section 1203.2 or subdivision (b) of Section 3456." Section 3000(b)(6), with respect to parole violations, specifies the "[t]ime during which parole is suspended because the prisoner has absconded or has been returned to custody as a parole violator shall not be credited toward any period of parole unless the prisoner is found not guilty of the parole violation."

26) Violations occurring during period when mandatory supervision is not active

Section 1170(h)(5), with certain exceptions, requires the court to impose a split sentence on a qualified crime, a portion of the term being served in custody and a portion on mandatory supervision. Clearly the court has jurisdiction under section 1203.2 to adjudicate violations occurring when the defendant is being actively supervised. However, it is unclear whether the court can adjudicate a violation of the conditions of supervision occurring during the custody portion of the sentence. For example, if a defendant commits a new crime while serving the custody portion of a sentence under section 1170(h)(5), may the court use that violation to convert a portion of the supervision period into additional custody time?

Two courts have characterized the conditions of mandatory supervision as being most similar to conditions of parole. *People v. Martinez* (2014) 226 Cal.App.4th 759, addresses the standard for reviewing the validity of the conditions of mandatory supervision. "'[T]he Legislature has decided a county jail commitment followed by mandatory supervision imposed under section 1170, subdivision (h), is akin to a state prison commitment; it is not a grant of probation or a conditional sentence.' ([*People v. Fandinola* (2013) 221 Cal.App.4th 1415,] 1422.) Therefore, as the court in *Fandinola* recently found, 'mandatory supervision is more similar to parole than

probation.' (*Id*. at p. 1423.) We will therefore analyze the validity of the terms of supervised release under standards analogous to the conditions or parallel to those applied to terms of parole." (*Martinez* at p. 763.) Sentences imposed under section 1170(h)(5) are also similar to prison terms for the purposes of restricting the application of section 17(b) and imposing liability for a "prison prior" enhancement under section 667.5(b). If the conditions of mandatory supervision are analogous to conditions of parole, it would suggest that they are "active" only during the supervision period ordered by the court.

But section 1170(h)(5) also specifies that "[d]uring the period of mandatory supervision, 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 first phrase of the statute suggests the conditions of mandatory supervision, like conditions of probation, will be active during any period when the sentence is being served; the second phrase suggests the conditions will be active only during the concluding portion of the sentence.

What distinguishes conditions of mandatory supervision from conditions of parole is that unlike parole, the conditions of mandatory supervision are crafted *by the court* as an integral part of the total sentence being imposed on the defendant. The custody and non-custody portions of the sentence have been created in relationship to each other to maximize the rehabilitation of the defendant and to protect the public. Viewed in this manner, the two segments of the sentence should not be treated as discrete "boxes," each isolated from the other. The violation of a term of the sentence, so long as it occurs during the time when the sentence is being served, likely will give the court jurisdiction to modify both the custody and non-custody portions of the sentence within the original overall term imposed by the court.

27) Ability of the court to issue a criminal protective order

For a full discussion of the court's authority to issue a protective order under section 136.2 during the pendency of a proceeding to determine whether there has been a violation of the terms of supervision, see Section L, *infra*.

28) Sentencing violations of section 4573 and 4573.5; denial of equal protection

Section 4573, knowingly bringing a controlled substance or paraphernalia for consuming a controlled substance into a custody facility, specifies punishment in county jail under section 1170(h). On the other hand, section 4573.5, knowingly bringing alcohol or noncontrolled substances and paraphernalia for consuming such

substances into a custody facility, specified punishment in state prison. *People v. Noyan* (2014) 232 Cal.App.4th 657, 663-664, found the distinction was without a rational basis and denied defendant equal protection of the law. "Based on our analysis, it appears the differences in language between sections 4571, 4573.5, and 4573.8 and the other nonviolent felony offense statutes in title 5 of the Penal Code do not reflect a thoughtful effort to distinguish between different offenses but are simply a legislative oversight. Prior to the Realignment Legislation, the other nonviolent felony statutes included the phrase 'in the state prison' while sections 4571, 4573.5, and 4573.8 did not include that phrase. The Realignment Legislation amended sections 4502, 4550, 4573, 4573.6, 4573.9, 4574, and 4600 to replace 'in the state prison' with 'pursuant to subdivision (h) of Section 1170.' Rather than signaling a distinction between these two categories of nonviolent felonies, this was simply a failure of the Legislature in the drafting of the Realignment Legislation to identify sections 4571, 4573.5, and 4573.8 as similar statutes in need of amendment. Such an oversight cannot be supported on any rational basis. (See *Newland [v. Board of Governors* (1977) 19 Cal.3d 705,] 712–713 [statutory classification lacking rational relationship to legitimate state purpose violates equal protection even when it results from legislative oversight].)" (*Noyan*, at p. 671.) To remedy the equal protection violation, the court reformed section 4573.5 to provide for punishment under section 1170(h). (*Noyan*, at p. 672.)

29) Certificate of rehabilitation

Effective January 2016, defendants committed to county jail under the provisions of section 1170(h) are eligible to apply for a certificate of rehabilitation. (§ 4852.01(a).)

30) Mitigating change in law applicable if case on appeal from order revoking split sentence

Based on the application of *In re Estrada* (1965) 63 Cal.2d 740, a defendant is entitled to the benefits of a statute that became effective during an appeal from an order revoking mandatory supervision. (*People v. Diaz Martinez* (2020) 54 Cal.App.4th 885 (*Diaz Martinez*).) The court equated mandatory supervision with probation. Like probation, a judgment imposing probation is not final until probation is terminated or sentence is imposed. "There is a ' "substantial and pertinent difference between an order granting probation and a final judgment." ' [Citation.] A criminal action does not terminate 'when "the court orders a grant of probation." ' [Citation.] Rather, a ' "criminal action"—and thus the trial court's jurisdiction to impose a final judgment—"continues into and throughout the period of probation" and expires only "when the probation period ends." [Citation.]' [Citation.] It is 'irrelevant that ... "an order granting probation is deemed a 'final judgment' for the purpose of taking an appeal." [Citation.]' [Citation.]' "[S]uch an order" has only "limited finality" and" 'does not have the effect of a judgment for

other purposes,' " ' such as determining whether a new ameliorative statute is retroactive under *Estrada*. [Citation.]" (*Diaz Martinez*, *supra*, 54 Cal.App.5th at p. 415.)

31) Person on mandatory supervision resentenced after violent felony

There will be cases where a defendant who has been sentenced under section 1170, subdivision (h), with a period of mandatory supervision is subsequently convicted of a violent felony before the completion of the entire term. Frequently such a person will not receive probation for the violent felony, but will be sentenced to state prison. Under such circumstances the court must determine whether to sentence the previous and current crimes concurrently or consecutively. In either case, if probation is denied on the new violent felony, the defendant is ineligible for sentencing under section 1170, subdivision (h), and must be sent to state prison. (§§ 1170, subd. (h)(3), 1170.1, subd. (a), and 669, subd. (d).) When the defendant is sentenced on the violent felony, of necessity there is a resentencing of the non-violent felony previously sentenced under section 1170, subdivision (h). At a minimum, the resentencing will include a commitment to state prison and an update of the defendant's custody credits. If the resentencing involves the imposition of a consecutive sentence for either crime, it may be necessary to change the non-violent crime from a standalone principal term to a subordinate consecutive term.

Updating the custody credits for the non-violent crime must distinguish between actual custody time served and time served on mandatory supervision. When a person who has been serving a sentence on probation or in county jail is later resentenced to state prison because of a violent felony, the custody credits are recomputed under the 15% conduct credit limitations of section 2933.1. (See *People v. Daniels* (2003) 106 Cal.App.4th 736, 740.) The process may be illustrated by the following example:

The defendant is sentenced under section 1170, subdivision (h), to the upper term of three years for violation of section 459, burglary in the second degree. The sentence is split between one year in custody and two years on mandatory supervision. The defendant completes the custody term and begins serving the mandatory supervision portion of the sentence. After 90 days on mandatory supervision he commits and is arrested for a robbery, a violent felony. Bail is set on the robbery, which he cannot post. On the day of his arrest his mandatory supervision status is summarily revoked and he is held in custody on the violation.

Ultimately the defendant is convicted, and is sentenced 60 days later to state prison on the robbery to the upper term of five years. The sentence for the burglary is

ordered to run consecutively at 8 months (1/3 the mid-base term). The aggregate prison term, therefore, is 5 years, 8 months, less any earned custody credit. The court accords the robbery case with all available credits. The custody credit in each case would be calculated as follows:

- *Credits for the robbery case*: Under the foregoing facts, defendant will be entitled to 60 days of actual time and 9 days of conduct credit against the robbery sentence. Because the robbery is a violent felony, conduct credits are limited to 15% under section 2933.1. If the revocation of mandatory supervision is based *solely* on the robbery, the defendant likely will be entitled to the custody credit in accordance with *In re Atiles* (1983) 33 Cal.3d 805 – his remand to custody is attributable to the robbery for the purposes of section 2900.5, subdivision (b). However, if the remand on the mandatory supervision is based on the robbery *and any other reason* (such as failing to report to the probation officer, a positive test for drugs, etc.), the defendant will have no presentence custody credit on the robbery. Although the defendant was arrested on the robbery, his custody status is controlled by the sentence on the burglary. He can post bail on the robbery, but he will remain in custody because he is now in custody on the sentence imposed for the burglary. Because his custody status on the burglary sentence is based on more than the robbery, there is no nexus between his custody status and the robbery for the purposes of section 2900.5, subdivision (b). (See *In re Joyner* (1989) 48 Cal.3d 487.)

- *Credits for the burglary case*: For the original custody portion of the sentence under section 1170, subdivision (h), he would receive 183 days of actual time, plus 27 days of conduct credit (15% of the actual time of 183 days in accordance with section 2933.1), for a total credit of 210 days. Because of the violent felony conviction, the defendant's conduct credits are no longer calculated under section 4019, resulting in a loss of 155 days of conduct credit.

For the mandatory supervision portion of the sentence up to the date of his arrest, the defendant would receive 90 days of actual time credit only – under section 1170, subdivision (h)(5)(B), no conduct credit accrues against the mandatory supervision portion of the sentence.

For the 60 days he is in custody pending the resolution of the robbery case, the defendant will be entitled to no actual or conduct credits in the burglary case if the credits are awarded to the robbery. If the cases are sentenced consecutively, the defendant is entitled to only one grant of credit for any single period in custody. (§ 2900.5, subd. (b); *In re Atiles* (1983) 33 Cal. 3d 805, 810–811; *In re Rojas* (1979) 23

Cal. 3d 152.) Because the credit for this period of time in custody was given to the robbery case, the defendant is not entitled to credit in the burglary case. [Note: If, contrary to the hypothetical facts, the defendant is sentenced concurrently on the two cases, he would be entitled to 60 days of actual time and 9 days of conduct credit on this portion of the burglary sentence. Furthermore, if the credits were only awarded in the burglary case with a consecutive sentence, there would be no credit for this period in the robbery case.]

Assuming a consecutive sentence structure, the credit against the burglary sentence is 273 days of actual time, plus 27 days of conduct credit, for a total custody credit of 300 days.

The credits will first be applied to the 8-month custody term, 240 days, leaving an excess credit of 60 days. Because credits are case-specific, the excess credits may not be applied to the sentence for the robbery – they were not earned in that case. However, the credits may be used to reduce the period of parole or postrelease community supervision (PRCS). (§ 1170, subd. (a)(3).)

I. Custody Credits

1) Sentences to county jail

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

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

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

under section 1170(h), for a crime committed on or after October 1, 2011. (§ 4019(a)(6).)

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

2) Sentences to state prison

Section 4019 will govern the defendant's entitlement to any *pre-sentence* credit for a commitment to state prison. 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 a total of four days for every two days actually served.

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

Section 2933(b) governs *post-sentence* credit for most persons sent to state prison: for every six months of actual custody, the defendant is awarded an additional six months of conduct credit. Unless otherwise limited, all inmates serving a sentence in state prison will receive the same credit. The realignment legislation eliminated the exclusions based on the fact the defendant has a prior adult serious or violent felony conviction, is being sentenced for a serious felony, or is required to register as a sex offender under section 290.

Awarding of conduct credits by CDCR to persons in state prison now will be governed by the provisions of Proposition 57, enacted by the voters on November 8, 2016. For a full discussion of "The Public Safety and Rehabilitation Act of 2016," see Couzens, Bigelow and Prickett, "Sentencing of California Crimes," Chapter 26 (The Rutter Group).

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

As noted above, the new credit provisions are effective only as to crimes committed on or after October 1, 2011. Any custody credit earned prior to October 1, 2011, is to be governed by the applicable prior law. (§ 4019(h).) Accordingly, when sentencing a defendant after October 1, 2011, for a crime occurring prior to that

date, the court must look to the formula applicable to the time when the crime was committed. In other words, the court should determine when the crime occurred (or in cases of a violation of probation, when the underlying crime occurred), then determine the applicable credit formula.

The only "gap" in the prior law concerns sentences imposed after October 1, 2011, where the defendant is sentenced to county jail under the provisions of section 1170(h); that section did not exist prior to October 1, 2011. When the court sentences the defendant under section 1170(h) when credit has been earned prior to October 1, 2011, the credits should be based on what the defendant would have received under section 2933 had he been sentenced to state prison. (*People v. Hul* (2013) 213 Cal.App.4th 182.) Except as to where the sentence is served, commitments under section 1170(h), are being treated the same as state prison commitments. It is reasonable for the defendant to receive "state prison" credit during this transition period. (*Id*. at pp. 186-187.) Notwithstanding the credits are listed in section 2933, a code section applicable to state prison commitments, the credits must be calculated by the trial court. (*People v. Tinker* (2013) 212 Cal.App.4th 1502.)

4) Violations of probation

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

5) Equal protection

Defendants who find they are receiving less conduct credit than some other class of defendant frequently challenge the disparity on equal protection grounds. The argument has not been favorably received on appeal.

People v. Brown (2012) 54 Cal.4th 314, rejected any equal protection considerations as to time served prior to the effective date of the January 25, 2010, law increasing conduct credits. The court noted that conduct credits are intended to reward good behavior which happens *after* the entitlement to the credit, not conduct occurring prior to the existence of the credit. The court distinguished *In re Kapperman* (1974) 11 Cal.3d 542, on the basis that *Kapperman* concerned the equal protection right to *actual time* credit which is given irrespective of behavior by the defendant. (See also *In re Strick* (1983) 148 Cal.App.3d 906; *In re Stinnette* (1979) 94 Cal.App.3d 800; and *In re Bender* (1983) 149 Cal.App.3d 380.)

Brown also held, at least as to custody served after January 25, 2010, the defendant will receive the enhanced credits even though the crime was committed prior to the effective date. This aspect of the decision was not based on the Equal Protection clause. The statutory change contained no savings clause making it effective only for crimes committed after a particular date.

People v. Verba (2012) 210 Cal.App.4th 991, holds a defendant has no equal protection right to the calculation of custody credits based on the formula effective October 1, 2011, if the crime was committed prior to that date. *Verba* observed there was an express savings clause in the legislation. Although the defendant was similarly situated to persons who commit crimes after October 1, 2011, the Legislature had a rational basis for applying different credit formulas.

People v. Kennedy (2012) 209 Cal.App.4th 385, holds the legislative change to credits effective for crimes committed on or after October 1, 2011, does not apply to persons who commit crimes prior to that date, even though they serve time after the effective date. The court expressly rejected any equal protection considerations. (*Id*. at 397-399.) Similarly, *People v. Rajanayagam* (2012) 211 Cal.App.4th 42, held that although defendants who serve custody after October 1, 2011, for crimes committed either before or after that date are similarly situated, the Legislature had a legitimate state interest in reducing incarceration costs with the use of enhanced credits after October 1, 2011; there was no denial of equal protection.

6) Summary of rules governing calculation of credits

While there have been a number of cases addressing a defendant's entitlement to custody credits, and there likely will be more, if the trend of the current cases continues, selection of the correct custody credit formula may be summarized as follows:

- For crimes committed prior to January 25, 2010, and up to August 28, 2010, the correct credit formula is the one applicable **when the custody is served**. The specific calculation of credits for these crimes is not governed by when the crime was committed.

- For crimes committed on and after August 28, 2010, the correct credit formula is the one applicable **when the crime was committed**.

7) Specialized work credits

One and a half days of work credit

Section 4019(b) grants inmates confined in the county jail the basic "work time" credit of one day for every four days served in custody. The sheriff or county director of corrections has additional discretion to award one and a half days of work credit if the inmate participates in an in-custody work or job training program other than those specified in section 4019.2 (see discussion, *infra*), and the inmate "is eligible to receive one day of credit for every one day of incarceration pursuant to Section 4019." (§ 4019.1(a).) As used in section 4019.1, "a work or job training program" includes, but is not limited to "any inmate working on an industrial farm or industrial road camp as authorized in Section 4101, an environmental improvement and preservation program, or projects such as forest and brush fire prevention, forest, brush, and watershed management, fish and game management, soil conservation, and forest and watershed revegetation." (§ 4019.1(b).)

The requirement in section 4019.1(a) that the inmate must qualify for "one day of credit for every one day of incarceration pursuant to Section 4019" appears to be a drafting error; no such provision exists. There is a similar requirement in section 4019.2. The Legislature may have intended to incorporate the formula in section 4019(f): "It is the intent of the Legislature that if all days are earned under this section, a term of four days will be deemed to have been served for every two days spent in actual custody." The section has a different intent, but the math suggests the Legislature had this provision in mind when it added section 4019.1. Notwithstanding the potential drafting error, it seems clear that if the inmate qualifies for the normal work credit, the inmate is eligible for the enhanced credits if there is participation in the required work programs.

Two days of work credit

Section 4019.2 grants additional work credit to county jail inmates participating in firefighting activities. An inmate may earn two days of work credit if the inmate is entitled to earn one day of work credit and (a) is assigned to a conservation camp (§ 4019.2(a)), or (b) completes training as an inmate firefighter or is assigned to a state or county correctional institution as an inmate firefighter (§ 4019.2(b)). "In addition to credits pursuant to [section 4019.2(a) or (b)], inmates who have successfully completed training for firefighter assignments shall receive a credit reduction from his or her term of confinement." (§ 4019.2(c).) The credits authorized under sections 4019.2(b) and (c) only apply to inmates who are eligible after October 1, 2011. (§ 4019.2(d).)

8) Credits and parole eligibility as a result of a federal court order

Two actions have been filed in the Eastern and Northern Federal District Courts challenging California's chronic prison over-crowding: *Coleman v. Brown*, 2:90-cv-00520 (E.D.Cal. filed April 23, 1990) and *Plata v. Brown*, 3:01-cv-01351-TEH (N.D.Cal.

filed April 5, 2001). In August 2009, the federal court ordered the state to reduce its prison population to 137.5% of design capacity. On February 10, 2014, the court granted the state an additional two years, to February 28, 2016, to meet the required population level. As part of the order of extension, the court required the state to meet specified population "benchmarks," and to "immediately implement" the following additional measures:

> "(a) Increase credits prospectively for non-violent second-strike offenders and minimum custody inmates. Non-violent second-strikers will be eligible to earn good time credits at 33.3% and will be eligible to earn milestone credits for completing rehabilitative programs. Minimum custody inmates will be eligible to earn 2-for-1 good time credits to the extent such credits do not deplete participation in fire camps where inmates also earn 2-for-1 good time credits;
>
> (b) Create and implement a new parole determination process through which non-violent second strikers will be eligible for parole consideration by the Board of Parole Hearings once they have served 50% of their sentence;
>
> (c) Parole certain inmates serving indeterminate sentences who have already been granted parole by the Board of Parole Hearings but have future parole dates;
> (d) In consultation with the Receiver's office, finalize and implement an expanded parole process for medically incapacitated inmates;
>
> (e) Finalize and implement a new parole process whereby inmates who are 60 years of age or older and have served a minimum of twenty-five years of their sentence will be referred to the Board of Parole Hearings to determine suitability for parole;
>
> (f) Activate new reentry hubs at a total of 13 designated prisons to be operational within one year from the date of this order;
>
> (g) Pursue expansion of pilot reentry programs with additional counties and local communities; and
>
> (h) Implement an expanded alternative custody program for female inmates."

The federal court order clearly modifies the statutory rate of custody credits being awarded to non-violent second strike offenders and their eligibility for parole. The order itself does not address how long these measures will be applied. Because the order was entered by the court to facilitate the reduction of the number of state prison inmates, it is unlikely the order will have effect beyond the time when the

federal order is active. In other words, once California's prison population has been reduced to 137.5% of design capacity, and "it is firmly established that [the state's] compliance with the 137.5% benchmark is durable," the federal court order likely will be dissolved.

9) Custody credits for crime committed while on mandatory supervision

In most circumstances, a defendant will receive full actual time and conduct custody credits from the date of arrest through the date of sentencing. (§ 4019(a)(1).) An exception to the general rule is when the defendant is serving a sentence in another matter. Once the defendant begins the service of a sentence in one case, there are no further pre-sentence credits awarded in any other case. (*In re Joyner* (1989) 48 Cal. 3d 487; *People v. Adrian* (1987) 191 Cal. App. 3d 868.) This is so because there is no causal connection or nexus between the defendant's custody status and the second case – the service of the jail commitment controls the defendant's custody status in every other case. It is unlikely that this principle will have any application to crimes committed while on mandatory supervision, at least up to the point a court recommits the defendant to physical custody on the judgment imposed under section 1170(h).

The lynchpin to the *Joyner* analysis is that the defendant is *in custody* as a result of a sentence imposed in another case. The defendant could post bail in the second case, but he will not be released because of the service of the sentence imposed in the first case. There is no nexus between the custody status of the defendant and the second case. Such is not the case, however, when the defendant is serving a portion of the sentence on mandatory supervision. Although mandatory supervision is part of a sentence, the defendant is not in actual custody. Unless and until a court changes the defendant's custody status under the judgment, the defendant is in no different a position for purposes of custody credits than if the second crime was committed while the defendant was on probation. Accordingly, it would appear that until the defendant is recommitted on the original sentence imposed under section 1170(h), he will be entitled to normal pre-sentence credits allowed by section 4019 for any crime committed while on mandatory supervision.

10) Additional material on custody credits

The changes made by the realignment legislation must be viewed in context with all of the amendments to section 2933 and 4019. Please refer to the full discussion of custody credits in "Sentencing California Crimes," by Couzens, Bigelow and Prickett (The Rutter Group).

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

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

1) Applicable crimes

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

- Serious felonies listed in section 1192.7(c).

- Violent felonies listed in section 667.5(c).

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

- Any crime where the inmate is classified as a "High Risk Sex Offender." Although not specifically referenced in section 3000.08(a)(4), section 13885.4 defines “high risk sex offenders” as “those persons who are required to register as sex offenders pursuant to the Sex Offender Registration Act and who have been assessed with a score indicating a ‘high risk’ on the SARATSO identified for that person's specific population as set forth in Section 290.04, or who are identified as being at a high risk of reoffending by the Department of Justice, based on the person's SARATSO score when considered in combination with other, empirically based risk factors.” The STATIC-99 is the approved assessment tool for adult males. A STATIC-99 score of 6 points or more constitutes a “high risk” of reoffending.

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

The listed crimes are for the *current* crime of commitment, not the defendant's *prior* crimes.

Except as to the foregoing exclusions, therefore, PRCS will apply to all persons who did not qualify for sentencing under section 1170(h). Such persons include non-serious and non-violent second strike offenders; crimes where the Legislature specified state prison as the punishment (*e.g.*, non-weapon violations of section 245, and certain felony violations of driving under the influence); registered sex offenders not considered high risk; and violations of section 186.11.

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

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

Persons who should have been released to parole

If an inmate is released from prison, but wrongfully placed on PRCS instead of on parole, there is a 60-day window within which a correction must occur. "Any person released to postrelease community supervision pursuant to subdivision (a) shall, regardless of any subsequent determination that the person should have been released to parole pursuant to section 3000.08, remain subject to subdivision (a) after having served 60 days under subdivision (a)." (§ 3451(d).) A similar rule is provided by section 3000.08(l) for persons wrongfully released to parole.

The 60-day time limit appears to establish a jurisdictional "cut-off" of the court's authority to change the person's custody status. Accordingly, the matter should be noticed and heard, and the court's order entered prior to the end of the 60-day custody period.

People v. Ruiz (2020) 59 Cal.App.5th 372 (*Ruiz*), holds section 3000.08(l) was unconstitutional as applied to defendant because he was not give notice of the 60-day limitation. "Applying the 60-day limitation of section 3000.08, subdivision (*l*) to bar a challenge to a classification error without requiring notice of either the supervision classification or the ability to challenge the classification will result in deprivation of parolees' conditional liberty interests." (*Ruiz*, *supra*, 59 Cal.App.5th at p. 503."

2) Length of PRCS

The period of supervision is not to exceed three years from the defendant's initial entry into the program. (§§ 3451(a) and 3455(e).) "A person shall not remain under supervision or in custody pursuant to this title on or after three years from the date of the person's initial entry onto postrelease community supervision. . . ." (§ 3455, subd. (e).) The period of supervision is tolled when PRCS is summarily revoked under section 1203.2(a), or when the defendant has absconded under section 3456(b). (§ 3455(e).) For a full discussion of tolling the period of supervision, see Section R, *infra*.

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

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

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

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

4. Jurisdiction has been terminated by operation of law.

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

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

The meaning of "custodial sanction" in the context of early termination of supervision has been subject to question. Section 3456(a) provides that supervision

may terminate before the expiration of three years in a number of circumstances, including: "(2) Any person on postrelease supervision for six consecutive months with no violations of his or her conditions of postrelease supervision *that result in a custodial sanction* may be considered for immediate discharge by the supervising county. (3) The person who has been on postrelease supervision continuously for one year with no violations of his or her conditions of postrelease supervision *that result in a custodial sanction* shall be discharged from supervision within 30 days." (Emphasis added.) Unquestionably, if the court imposes time in custody as a result of a violation of PRCS, the defendant has received a "custodial sanction" and would be disqualified from receiving early termination from supervision under sections 3456(a)(2) and (3), at least until another period where the person remains free of custody sanctions.

There was a question whether "flash incarceration" imposed by the probation officer qualifies as a "custodial sanction" under section 3456(a). "Flash incarceration" is variously described as a "sanction," a "punishment," and a "detention." Section 3454(b) states the probation officer may order "immediate, structured, and intermediate *sanctions* up to and including . . . flash incarceration in a county jail. Periods of flash incarceration are encouraged as one method of *punishment* for violations of an offender's conditions of postrelease supervision." (Emphasis added.) Section 3454(c) defines "flash incarceration" as "a period of *detention* in county jail due to a violation of an offender's conditions of postrelease supervision. The length of the *detention* period can range between one and 10 consecutive days. . . . Shorter, but if necessary more frequent, periods of *detention* for violations of an offender's postrelease supervision conditions shall appropriately *punish* an offender while preventing the disruption in a work or home establishment that typically arises from longer term revocations." (Emphasis added.) *People v. Superior Court (Ward)*(2014) 232 Cal.App.4th 345 (*Ward*), held that "flash incarceration" has the same legal effect as custody sanctions imposed by the court. "Under the [Postrelease Community Supervision Act of 2011] the supervising officer may also request, and the court may impose, up to 180 days in jail, and this is specifically described as a 'custodial sanction.' (§ 3455, subd. (d).) But section 3454, subdivision (b), also explains that '[s]horter, but if necessary more frequent, periods of detention for violations of an offender's postrelease supervision conditions shall appropriately punish an offender while preventing the disruption in a work or home establishment that typically arises from longer term revocations.' Thus, it is clear that the Legislature did not think of flash incarceration as different from custody served after a court-ordered revocation; it is simply different in degree but serves the same purpose. We find that there is nothing ambiguous about 'custodial sanction,' and that it applies equally to formal revocation terms and flash incarceration, as confirmed by the acknowledgement that the two serve the same purpose." (*Ward*, at p. 350; footnote omitted.)

Ward also addressed the validity of a written waiver of rights to a judicially supervised hearing. "Parole agents and supervising officers have the power to arrest or procure the warrantless arrest of a parolee or offender under community supervision. (See §§ 3000.08, subd. (d), 3455, subd. (b).) Given the routine delays involved in bringing the matter to the court or parole board for resolution, the Legislature could logically find that authorizing flash incarceration represented no significant comparative infringement on the offenders' rights. And although the People argue that the written waiver is unnecessary because the right to a hearing is statutorily waived, we are not at all convinced that it was inadequate if it *was* necessary. It clearly informed Ward that the flash incarceration would count as a custodial sanction and that if he wished to contest it, a formal revocation petition would be filed with the court. We are not persuaded that counsel was required to be appointed before this decision was made." (*Ward*, at pp. 352-353; emphasis in original; footnotes omitted.) The court expressly declined to address the constitutionality of flash incarceration. (*Id.*, at p. 352, fn. 11.)

3) Conditions of PRCS

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

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

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

The justice system is encouraged to use "community-based" punishment. "'Community-based punishment' means evidence-based correctional sanctions and programming encompassing a range of custodial and noncustodial responses to criminal or noncompliant offender activity. Intermediate sanctions may be provided by local public safety entities directly or through public or private correctional service providers and include, but are not limited to, the following:

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

(B) Intensive community supervision.

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

(D) Mandatory community service.

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

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

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

(H) Day reporting.

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

(J) Mandatory random drug testing.

(K) Mother-infant care programs.

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

Section 3453(t) provides that persons on PRCS are to pay victim and court-ordered restitution in the same manner as persons on probation. The collection process is outlined in section 2085.6.

4) PRCS revocation fine

Based on legislation effective January 1, 2013, courts are required to assess a "postrelease community supervision revocation restitution fine" under section

1202.45(b). The fine is to be imposed at the same time and in the same amount as assessed under section 1202.4(b), and is to apply to all persons convicted of a crime committed on or after January 1, 2013, who are "subject to" PRCS.

The PRCS restitution fine may be collected by the agency designated by the board of supervisors under section 2085.5(b) where the defendant is incarcerated. Once the defendant is no longer on PRCS, any remaining unpaid restitution fines may be collected by the California Victim Compensation and Government Claims Board under section 1214(a).

5) Violation of PRCS

The realignment legislation contemplates initial or low-level violations of PRCS will be addressed by the supervising agency. Only if intermediate sanctions are deemed no longer appropriate is the supervising agency allowed to petition the court for higher levels of punishment.

a. Action by the supervising agency

The supervising agency may "determine and order appropriate responses to alleged violations, which can include, but shall not be limited to, immediate, structured, and intermediate sanctions up to and including referral to a reentry court pursuant to Section 3015, or flash incarceration in a county jail. Periods of flash incarceration are encouraged as one method of punishment for violations of an offender's condition of postrelease supervision. ¶ 'Flash incarceration' is a period of detention in county jail due to a violation of an offender's conditions of postrelease supervision. The length of the detention period can range between one and 10 consecutive days. Flash incarceration is a tool that may be used by each county agency responsible for postrelease supervision. Shorter, but if necessary more frequent, periods of detention for violations of an offender's postrelease supervision conditions shall appropriately punish an offender while preventing the disruption in a work or home establishment that typically arises from longer term revocations." (§§ 3454(b) and (c).)

It appears the language of the statute allows the sanction of "flash incarceration" to be applied successively to multiple violations, and is not limited to one period of flash incarceration for the entire term of supervision. Section 3452(q) references custody of up to ten days for "any violation." It is not clear, however, whether the supervising agency can impose up to 10 days for each individual violation, or whether it can only impose a maximum of 10 days for each "incident." It does not seem likely the Legislature contemplated a literal application of 10 days for each individual violation out of a single incident. For example, if the supervised person incurred four

violations in a single incident, he potentially could receive 40 days in custody. The longer the number of days imposed, the less the time is a "flash incarceration" as contemplated by evidence-based practices. Additionally, sentences longer than 10 days may raise legitimate due process concerns because they are being imposed without court involvement.

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

It is doubtful that "flash incarceration" may be imposed on persons on PRCS if the violation is a non-violent drug possession offense (NVDP). *People v. Armogeda* (2015) 233 Cal.App.4th 428, holds the authorization in section 3455(a) to impose custody sanctions, to the extent they are applied to NVDP offenses, violates the provisions in section 3063.1 of Proposition 36 (the drug initiative) which in most instances requires treatment instead of incarceration. Section 3455(a), enacted by the Legislature as part of the realignment legislation, impermissibly restricts the application of section 3063.1 enacted by the voters. Although "flash incarceration" is authorized in section 3454, a provision not addressed in *Armogeda*, it is the use of incarceration that the court found offense to the statutory scheme created by Proposition 36.

In *People v. Gonzalez* (2017) 7 Cal.App.5th 370, the defendant was a homeless person on PRCS, and was released from a mental health hold under Welfare and Institutions Code, section 5150. He was still homeless after his release. He was charged with failing to notify the probation officer of his change of address and failing to report to the probation officer. The appellate court found the statutes governing PRCS contained no definition of "residence." Accordingly, the defendant could not be in violation because he failed to report his change of residence. The defendant, however, could be found to have violated his conditions of release for failing to report to the probation officer.

b. Petition to the court

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

People v. Osorio (2015) 235 Cal.App.4th 1408, reversed the trial court's decision to overrule a demur challenging the sufficiency of a petition to revoke a person's parole. In making a recommendation that parole be revoked and the parolee be sentenced to 180 days, DAPO's petition stated

that it relied on the Parole Violation Decision Making Instrument (PVDMI). The appellate court found such exclusive reliance failed to comply with the requirement in section 3000.08(f) and Rule 4.541 that the petition must "'include the reasons for [the Department]'s determination that intermediate sanctions without court intervention ... are inappropriate responses to the alleged violations' (Cal. Rules of Court, rule 4.541(e))." (*Osorio*, at p. 1415.) Furthermore, the court held the defect was not curable within the time periods specified in *Superior Court v. Williams* (2014) 230 Cal.App.4th 636, 643. The delay attendant with the resubmission of the petition would be a violation of the parolee's due process rights. (*Id*.) Nothing in *Osorio* suggests its reasoning would not be fully applicable to petitions to revoke PRCS.

People v. Gutierrez (2016) 245 Cal.App.4th 393, declined to determine whether *Williams* applied to PRCS revocation proceedings because the defendant failed to show prejudice from any delay.

People v. Byron (2016) 246 Cal.App.4th 1009, expressly declined to extend *Williams* to PRCS revocation proceedings. The court found the procedures used by the court complied with the due process requirements specified in *Morrissey*. "[The process] was the functional equivalent of an arraignment and a probable cause ruling in superior court. Appellant was advised of the alleged PRCS violations and the recommended PRCS modification, and advised of her right to counsel if she elected not to accept the PRCS modification. ¶ On January 26, 2015, 13 days after her arrest, appellant appeared with counsel and moved to dismiss the petition to revoke PRCS, which was denied the same day. The hearing on the motion to dismiss was tantamount to a second probable cause hearing, this time heard by the superior court. In terms of a timely hearing, appellant was provided greater procedural protections than required by *Morrissey*, or *Vickers*. Although PRCS revocations must afford general *Morrissey*/*Vickers* protections, there is no requirement that the PRCS revocations and parole revocations use the identical procedure or timeline. The requirement for a formal arraignment in the superior court within 10 days of arrest, as discussed in *Williams*, does not apply to PRCS revocations." (*Byron*, at p. 1017.)

The procedure for initiating a violation petition and determining whether a violation has occurred is now governed by section 1203.2. The procedure will be the same as that for probation violations. Because probation violations may be filed by the district attorney, presumably the district attorney also has the authority to file petitions to modify or revoke PRCS.

The supervised person is not permitted to petition for early termination of PRCS under section 1203.2. Such a request, however, may be made by the supervising agency or the court on its own motion. (§ 1203.2(b)(1).)

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

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

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

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

(C) Any pending cases and case numbers;

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

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

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

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

(4) Any recommendations."

Petition by the district attorney

The district attorney may file a petition for revocation of parole directly with the court without first using intermediate sanctions. (*People v. Zamudio* (2017) 12 Cal.App.5th 8 (*Zamudio*).) In *Zamudio* the district attorney, using Judicial Council Form CR-300, filed a petition to revoke the defendant's parole. The petition did not state the reasons why intermediate sanctions would be inappropriate as required by section 3000.08(f) and California Rules of Court, Rule 4.541(e). The appellate court found the petition proper. It held the requirements of section 3000.08(f) regarding the use of intermediate sanctions apply only to petitions filed by the supervising agency, not to petitions filed by the district attorney. If such a petition is filed,

however, the court must refer the matter to the supervising agency for a report under section 1203.2(b)(1). The report should include "an intermediate sanction assessment." "Even if not required by statute or the Rules of Court, the best practice would be for the parole officer to address the appropriateness of intermediate sanctions to assist the court in exercising its discretion in the interest of justice. Such an assessment would also serve as a check on potentially overzealous deputy district attorneys or parole officers." (*Zamudio*, at p. 14.)

In *People v. Castel* (2017) 12 Cal.App.5th 1321, 1325-1326, the court of appeal likewise determined that the written report required to be filed with petitions brought by a parole or probation officer are not required with petitions filed by the district attorney. However, the court must refer the matter to the probation officer for a report pursuant to section 1203.2, subdivision (b)(1). "If the petition [for a supervision violation] is filed by the parole or probation officer, the petition must 'include a written report that contains additional information regarding the petition.' (§ 3000.08, subd. (f).) That additional information includes: (1) 'the relevant terms and conditions of parole' or postrelease community supervision, (2) 'the circumstances of the alleged underlying violation,' (3) 'the history and background of the parolee,' (4) 'recommended sanctions,' and (5) 'the reasons for [the] agency's determination that intermediate sanctions without court intervention'—such as electronic monitoring, additional services or incentives, or "flash incarceration' (that is, a short stint in jail for up to 10 consecutive days)—'are inappropriate responses to the alleged violations.' (§§ 3000.08, subds. (e), (f) & 3454, subd. (b); Cal. Rules of Court, rule 4.541(c), (e).) ¶ If the petition is filed by the district attorney, no such written report is required. (Cf. § 3000.08, subd. (f); Cal. Rules of Court, rule 4.541.) Instead, the court will 'refer ... the petition to the probation or parole officer,' who must then prepare and submit a written report to the court. (§ 1203.2, subd. (b)(1).) ¶ A supervising agency's failure to include the statutorily required written report with a petition for revocation renders the pleading deficient and subject to demurrer. (*Osorio*, *supra*, 235 Cal.App.4th at pp. 1412-1415, 185 Cal.Rptr.3d 881; see also *People v. Hronchak* (2016) 2 Cal.App.5th 884, 891-892, 206 Cal.Rptr.3d 483 [applying this rule to information that California Rules of Court, rule 4.541 specifies must be included in the written report].) ¶ The trial court correctly overruled the demurrer in this case. The pertinent statutes detailed above do not require a petition to revoke parole or postrelease community supervision filed by a district attorney to be accompanied by a written report. Accordingly, the district attorney's failure to include such a report does not render the pleading deficient."

Acceptance of sanctions, waiver of hearing

If the supervised person agrees in writing to the terms of any modification or termination of supervision, personal appearance in court may be waived. The supervised person must be advised of the right to consult with counsel, including the right to appointed counsel. A written waiver is required if the supervised person

waives the right to counsel. If the supervised person consults with counsel and subsequently agrees to the modification or termination, and waives his appearance, the agreement must be signed by counsel. (§ 1203.2(b)(2).) Sections 3000.08(f) and 3455(a) provide that persons supervised under PRCS or parole may at any point during the adjudication waive, in writing, the right to counsel, admit the violation, waive a court hearing, and accept the proposed modification. Unlike section 1203.2(b)(2), there is no requirement that defense counsel sign off on the agreement. (For a discussion of the procedural requirements of a waiver and the authority of the court upon entry of a stipulated disposition, see discussion in Section M, *infra*.)

Detention of the defendant

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

The court has the ability to order the release of any person being held in custody for a violation of supervision, under such terms as the court deems appropriate, except when the person is serving a period of flash incarceration. (§ 3455(b)(3).)

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

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

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

  Arraignment – Although no specific time is set by section 3455 for arraignment on an alleged violation of PRCS, a prudent court may wish to require the arraignment no later than 10 days after arrest. *Williams v. Superior Court* (2015) 230 Cal.App.4th 636, 663-664, established such a limit for arraignment on petitions to revoke parole. *People v. Byron* (2016) 246 Cal.App.4th 1009, expressly declined to extend *Williams* to PRCS revocation proceedings. The court found the procedures used by the court complied with the due process requirements specified in *Morrissey*. "[The process] was the functional equivalent of an arraignment and a probable cause ruling in superior court. Appellant was advised of the alleged PRCS violations and the recommended PRCS modification, and advised of her right to counsel if

she elected not to accept the PRCS modification. ¶ On January 26, 2015, 13 days after her arrest, appellant appeared with counsel and moved to dismiss the petition to revoke PRCS, which was denied the same day. The hearing on the motion to dismiss was tantamount to a second probable cause hearing, this time heard by the superior court. In terms of a timely hearing, appellant was provided greater procedural protections than required by *Morrissey*, or *Vickers*. Although PRCS revocations must afford general *Morrissey*/*Vickers* protections, there is no requirement that the PRCS revocations and parole revocations use the identical procedure or timeline. The requirement for a formal arraignment in the superior court within 10 days of arrest, as discussed in *Williams*, does not apply to PRCS revocations." (*Byron*, at p. 1017.)

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

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

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

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

  Williams v. Superior Court (2015) 230 Cal.App.4th 636, 664, requires a hearing on the merits of a petition to revoke parole within 45 days of arrest. Although nothing in *Williams* expressly applies to PRCS, a prudent court may wish to hold hearings on alleged violations of PRCS within 45 days, unless time is waived by the supervised person. *People v. Gutierrez* (2016) 245 Cal.App.4th 393, declined to determine whether *Williams* applied to PRCS revocation proceedings because the defendant failed to so prejudice from any delay. *People v. Byron* (2016) 246 Cal.App.4th 1009, expressly declined

to extend *Williams* to PRCS revocation proceedings. The court found the procedures used by the court complied with the due process requirements specified in *Morrissey*. (*Byron*, at p. 1017; see full discussion, *supra*.)

Probable cause determination – for a discussion of whether the defendant is entitled to a probable cause hearing at time of arrest, see Section P, *infra*.

Non-violent drug possession offenses (NVDP)

It is doubtful that persons on PRCS should be detained if the alleged violation is a non-violent drug possession offense (NVDP). *People v. Armogeda* (2015) 233 Cal.App.4th 428, holds the authorization in section 3455(a) to impose custody sanctions, to the extent they are applied to NVDP offenses, violates the provisions in section 3063.1 of Proposition 36 (the drug initiative) which in most instances requires treatment instead of incarceration. Section 3455(a), enacted by the Legislature as part of the realignment legislation, impermissibly restricts the application of section 3063.1 enacted by the voters. Although detention is authorized in section 3455(c), a provision not addressed in *Armogeda*, it is the use of incarceration that the court found offense to the statutory scheme created by Proposition 36.

Criminal history

The Department of Justice is required to maintain a summary of historical criminal information about a defendant. This information is available to "[a] public defender or attorney of record when representing a person in a criminal case, or a parole, mandatory supervision pursuant to paragraph (5) of subdivision (h) of Section 1170, or postrelease community supervision revocation or revocation extension proceeding, and if authorized access by statutory or decisional law." (§ 11105(b)(9).)

The hearing

The revocation hearing shall be held within a reasonable time after the filing of the revocation petition. (§ 3455(c).) Presumably the courts will follow the same procedures and rules of evidence applicable to probation violation hearings conducted under section 1203.2.

The hearing officer

"[T]o afford the courts the maximum flexibility to manage the [PRCS and parole violation] caseload in the manner that is most appropriate to each court," Government Code, section 71622.5 authorizes each court to "appoint as many hearing officers as deemed necessary to conduct parole revocation hearings" and hearings on violations of PRCS.

In absence of a stipulation, however, the use of a subordinate judicial officer may not be valid. Although it is a parole violation case, *People v. Berch* (2018) 29 Cal.App.5th 966 (*Berch*), found it improper to use a court commissioner over the defendant's objection. "Government Code section 71622.5 authorizes commissioners to conduct parole revocation hearings as a necessary part of the implementation of the Criminal Justice Realignment Act of 2011. However, article VI, sections 21 and 22 of the California Constitution limit commissioners to the performance of 'subordinate judicial duties' in the absence of a stipulation by the parties. ¶ We hold that revoking parole and committing a defendant to jail for violation of parole are not subordinate judicial duties that may be performed by a commissioner in the absence of a stipulation by the parties. As has long been recognized: 'the issuance of an order which can have the effect of placing the violator thereof in jail is not a 'subordinate judicial duty." ' (*In re Plotkin* (1976) 54 Cal.App.3d 1014, 1017, 127 Cal.Rptr. 190.) Because defendant did not stipulate to the commissioner revoking his parole and committing him to jail, the postjudgment order must be reversed." (*Berch, supra,* at p. 970.)

c. Sanctions by the court

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

1. The court may reinstate the defendant on PRCS with a modification of his conditions, including incarceration in the county jail. The period of confinement, however, may not exceed 180 days for each custodial sanction. (§ 3455(d).) For every two days of actual custody served, the defendant will receive a total of four days of credit under section 4019(a)(5). There is no specific statutory limit on the number of 180-day intervals the court can impose. However, a "person shall not remain under supervision or in custody pursuant to this title on or after three years from the date of the person's initial entry onto postrelease community supervision. . . ." (§ 3455, subd. (e).) Presumably this means the court may impose any number of separate 180-day or less sanctions during the three-year term of supervision. But once the three-year term ends, unless the time has been tolled under sections 1203.2 or 3456, subdivision (b), the defendant must be released from supervision and discharged from custody, even if there is a remaining portion of a sanction to serve.

2. The court may revoke and terminate PRCS, and commit the defendant to county jail. The period of confinement, however, may not

exceed 180 days. (§ 3455(d).) For every two days of actual custody served, the defendant will receive a total of four days of credit under section 4019(a)(5). The total of the custodial and supervision time cannot exceed three years. (§§ 3451(a) and 3455(e).) The court should order into execution any PRCS revocation fine imposed under section 1202.45(b).

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

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

Non-violent drug possession offenses (NVDP)

Custody sanctions may not be imposed on persons on PRCS if the violation is a non-violent drug possession offense (NVDP), unless authorized by section 3063.1. *People v. Armogeda* (2015) 233 Cal.App.4th 428, holds the authorization in section 3455(a) to impose custody sanctions, to the extent they are applied to NVDP offenses, violates the provisions in section 3063.1 of Proposition 36 (the drug initiative) which in most instances requires treatment instead of incarceration. Section 3455(a), enacted by the Legislature as part of the realignment legislation, impermissibly restricts the application of section 3063.1 enacted by the voters. The court found no legal distinction between persons released from prison on PRCS and those released on parole.

Protective order

For a full discussion of the court's authority to issue a protective order under section 136.2 during the pendency of a proceeding to determine whether there has been a violation of the terms of supervision, see Section L, *infra*.

Whether court may impose consecutive time

The court may not impose a term in jail as a sanction for violation of PRCS, then impose a new substantive term consecutive to the PRCS term. (*People v. Garcia* (2018) 22 Cal.App.5th 1061, 1065.) Th issue was fully addressed in *People v. Mathews* (1980) 102 Cal.App.3d 704, 713: "Penal Code section 669 confers jurisdiction on the sentencing court to determine whether a new term of imprisonment should run consecutive to the previous terms imposed. Here the court ordered the new term to run consecutive to a parole revocation period. However, as previously discussed, Penal Code section 3000 makes a distinction between the *expiration of a term of*

imprisonment as opposed to release on parole or confinement on revocation of parole. (*People v. Espinoza* [(1979)] 99 Cal.App.3d 59, 72-73.) As respondent argues, it would be anomalous to find appellant's prior prison term “completed” for enhancement purposes, and then to characterize it as 'currently running' for the purpose of imposing consecutive sentences. Logically, when a person has served a determinate sentence and is reimprisoned upon revocation of parole, he has not returned to prison for the purpose of serving the balance of his original term. (Pen. Code, § 3000, subd. (a); *People v. Espinoza*, *supra.*, 99 Cal.App.3d 59; *Community Release Board v. Superior Court* (1979) 91 Cal.App.3d 814, 817.) Rather, he is reimprisoned for the purpose of serving a maximum of 12 months for violating his parole. (Pen. Code, § 3057, subd. (a).) Therefore, we conclude that while the enhancement is valid, the consecutiveness of the sentence should be stricken." (Emphasis in original.) Although *Mathews* is a parole violation case, it is equally applicable to violations of PRCS since they are the functional equivalent of parole violations. (*Garcia*, *supra*.)

6) Transfer of PRCS (§ 3460)

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

7) Demands for production/due process right to timely disposition

Defendants confined in out-of-county jails are making demands under section 1381 to be produced to the county where the defendant is subject to supervision on PRCS. Presumably the procedure is calculated to precipitate an early resolution of any alleged violation of PRCS so that any tolling period is minimized. Section 1381 does not apply to these defendants. (*People v. Murdock* (2018) 25 Cal.App.5th 429, 433-434.) However, there is a due process obligation to produce the defendant within a "reasonable time" once the court becomes aware of defendant's circumstances. (*Id*.) Whether there has been a due process violation in the production of a defendant charged with a PRCS violation will depend on the

application of the variables set forth in *Mathews v. Eldridge* (1976) 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (*Matthews*). " '[D]ue process is flexible and calls for such procedural protections as the particular situation demands." [Citation.] Accordingly, resolution of the issue whether the ... procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. [Citations.] More precisely, ... identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [Citation.]' (*Id.* at pp. 334-335, 96 S.Ct. 893.)" (*Murdock*, *supra*, at pp. 435-436.)

8) Application of Section 1368 proceedings

See discussion in Section N, *infra*.

9) Legal issues related to PRCS

a. Application of Morrissey v. Brewer

Morrissey v. Brewer (1972) 408 U.S. 471, establishes the minimum due process requirements for a parole revocation proceeding. "They include (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact finders as to the evidence relied on and reasons for revoking parole. We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense. It is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial." (*Morrissey* at p. 488.) Our Supreme Court has applied *Morrissey* standards to hearings involving probation violations. (*People v. Vickers* (1972) 8 Cal.3d 451, 458.)

Acknowledging *Morrissey* and *Vickers*, the Legislature in amending the realignment legislation to apply the procedures of section 1203.2 to mandatory supervision, PRCS and parole, observed: "By amending subparagraph (B) of paragraph (5) of subdivision (h) of Section 1170, subdivision (f) of Section 3000.08, and subdivision (a) of Section 3455 of the

Penal Code to apply to probation revocation procedures under Section 1203.2 of the Penal Code, it is the intent of the Legislature that these amendments simultaneously incorporate the procedural due process protections held to apply to probation revocation procedures under *Morrissey v. Brewer* (1972) 408 U.S. 471, and *People v. Vickers* (1972) 8 Cal.3d 451, and their progeny." (2011 Realignment Legislation, SB 1023, Sec. 2(b), effective June 27, 2012.)

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

b. Violation preceding adjudication of underlying offense

Prosecutors and courts frequently negotiate the settlement of a case whereby the defendant admits and is sentenced on a violation of probation based on a new crime, without the separate prosecution of the new offense. The procedure has been upheld in *People v. Coleman* (1975) 13 Cal.3d 867, and *People v. Jasper* (1983) 33 Cal.3d 931. Furthermore, with proper notice to the defendant, a probation violation hearing may be conducted as part of a preliminary examination. (*In re Law* (1973) 10 Cal.3d 21.)

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

c. Application of the Valdivia consent decree

The parties to *Valdivia v. Schwarzenegger* appear to concede that persons released on PRCS are not part of the class of plaintiffs in the litigation. (Order entered in CIV-S-94-671, July 3, 2013, page 12.) In any event, the federal court has dismissed the *Valdivia* action because it is moot after the new parole revocation procedures became effective on July 1, 2013. (See discussion of *Valdivia* in Section O, infra.)

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

There may be a conflict between the provisions of section 1203.2 and Marsy's Law. See discussion in Section K, *infra*.

e. Application of the Sex Offender Containment Model

The Sex Offender Containment Model, as required by sections 290.09, 1203.067, 3008, and 9003, applies only to persons on probation or parole. The model does not apply to persons on Post-release Community Supervision (PRCS). (*People v. Toussain* (2015) 240 Cal.App.4th 974, 980-981.)

f. Application of Wende *to PRCS appeals*

People v. Freeman (2021) 61 Cal.App.5h 126, holds *People v. Wende* (1979) 25 Cal.3d 436, has no application to appeals from an order revoking PRCS.

g. Determining period PRCS is tolled if defendant absconds

Section 3456, subdivision (b), provides: "Time during which a person on postrelease supervision is suspended because the person has absconded shall not be credited toward any period of postrelease supervision." The start of the period of suspension is clear: section 1203.2, subdivision (a), provides the revocation of supervision, summary or otherwise, of a person on PRCS "shall serve to toll the running of the period of supervision." (See also *People v. Sem* (2014) 229 Cal.App.4th 1176, 1191-1192.)

There is some question whether the tolling ends at the point of defendant being taken back into custody or only when the court formally reinstates the defendant on PRCS supervision. It is the latter. Whether a person will be reinstated on supervision is a matter exclusively in the court's discretion. After a violation of supervision has been determined, the court may reinstate the person on supervision without modification, reinstate the person on supervision with modification of the terms or conditions of supervision, or the court may deny reinstatement by permanently revoking the supervision status and imposing an authorized sentence. It is wholly inconsistent with the court's authority to effectively restart the supervision period before the violation has even been adjudicated. Reinstatement on supervision can only occur with an order from the court. Until the order of reinstatement is made, the period of PRCS supervision remains tolled.

People v. Murdock (2018) 25 Cal.App.5th 429 (*Murdock*), has been cited in support of the proposition that the defendant is entitled to credit against the supervision period from the date of arrest. *Murdock*, if fact, found the opposite. The court found the defendant was denied due process of law because officials failed to timely produce the defendant from another county for a violation of PRCS. "The authorities in Ventura County violated

appellant's due process rights by refusing his demand for a timely resolution of his alleged PRCS violation. Moreover, appellant plainly suffered prejudice as a result of the due process violation: *his PRCS continued to be tolled*, and he was deprived of concurrent sentencing on the 120-day jail term that was subsequently imposed as a sanction for the PRCS violation." (*Murdock*, *supra*, 25 Cal.App.5th at p. 437; italics added.) It was the very fact the defendant would not get credit for his time in the other county against the supervision period in Ventura County that created the prejudice found by the appellate court.

10) Affordable Healthcare Act

Section 4011.11 has been enacted to facilitate the ability of inmates to obtain coverage under the Affordable Healthcare Act. "It is the intent of the Legislature in enacting this act to, among other things, ensure that county human services agencies recognize that (a) federal law generally does not authorize federal financial participation for Medi-Cal when a person is an inmate of a public institution, as defined in federal law, unless the inmate is admitted as an inpatient to a noncorrectional health care facility, (b) federal financial participation is available after an inmate is released from a county jail, and (c) the fact that an applicant is currently an inmate does not, in and of itself, preclude the county human services agency from processing the application submitted to it by, or on behalf of, that inmate." (Section 1, AB 720, Ch 646.)

The board of supervisors in each county is to designate the sheriff or a community-based organization to assist inmates with submitting an application for healthcare benefits. (§ 4011.11(a).)

"Consistent with federal law, a county jail inmate who is currently enrolled in the Medi-Cal program shall remain eligible for, and shall not be terminated from, the program due to his or her detention unless required by federal law, he or she becomes otherwise ineligible, or the inmate's suspension of benefits has ended pursuant to Section 14011.10 of the Welfare and Institutions Code." (§ 1011.11(c).) "The fact that an applicant is an inmate shall not, in and of itself, preclude a county human services agency from processing an application for the Medi-Cal program submitted to it by, or on behalf of, that inmate." (§ 4011.11(e).)

11) Work furlough programs

Effective January 1, 2014, section 1208 has been expanded to allow felons sentenced to county jail to be eligible for work furlough programs. The new provisions apply when "a person is convicted and sentenced to the county jail, or is imprisoned in the county jail for nonpayment of a fine, for contempt, or as a

condition of probation for any criminal offense. . . ." (§ 1208(b).) According to the Legislative Counsel's Digest, the change is intended to include persons serving a sentence imposed under section 1170(h) and for violations of postrelease community supervision. It is not clear whether the intent is to include persons serving a sentence for a parole violation, although the plain language of the statute would suggest that it does apply.

12) Contracts for medical services

Section 3073.1 provides "Counties are hereby authorized to contract with the Department of Corrections and Rehabilitation in order to obtain correctional clinical services for inmates with mental health problems who are released on postrelease community supervision with mental health problems."

13) Application of *People v. Leiva*

People v. Leiva (2013) 56 Cal.4th 498, addresses the jurisdiction of the court to adjudicate an alleged violation of probation that occurs after the original probation term expires, but during a time when the defendant's probationary period is summarily revoked.

The defendant was placed on probation for three years on April 11, 2000. His conditions of probation required that he obey all laws, not enter the country illegally, and report to the probation officer upon his release from custody and upon his entry into this country. Defendant completed his original custody term and was released from custody. Because he had previously entered the country illegally, however, he was immediately deported prior to any opportunity to report to his probation officer. Thereafter the probation department filed a revocation petition based solely on the failure to report. When the defendant failed to appear at a revocation hearing in September 2001, the court summarily revoked defendant's probation and issued a warrant. The defendant was arrested on the warrant in November 2008. The trial court determined there was no willful violation of the terms of probation as alleged in the initial revocation petition because the defendant was deported prior to having an opportunity to contact the probation officer. However, the trial court also found the defendant violated his terms of probation in 2007 when he reentered this country without notifying the probation officer. Based on the second alleged violation, the court reinstated the defendant on probation and extended its term to June 2011. The defendant appealed the reinstatement and extension. While the appeal was pending, the defendant again was deported, and again he reentered this country illegally. Based on the third alleged violation, the court revoked probation and committed the defendant to state prison for two years. The defendant appealed the revocation and state prison commitment based on the illegality of the first revocation proceeding. (*Leiva*, at pp. 502-504.)

The decision in *Leiva* turns on the application of that portion of section 1203.2(a) which provided at the relevant times in this case: "[t]he revocation [of probation], summary or otherwise, shall serve to toll the running of the probationary period." The court determined this language was adopted by the Legislature to preserve the court's jurisdiction to adjudicate violations that occur within the original term of probation, but not those that occur after. "[W]e conclude summary revocation of probation preserves the trial court's authority to adjudicate a claim that the defendant violated a condition of probation during the probationary period. As noted, the purpose of the formal proceedings 'is not to revoke probation, as the revocation has occurred as a matter of law; rather, the purpose is to give the defendant an opportunity to require the prosecution *to prove the alleged violation occurred and justifies revocation.*' (*People v. Clark* [(1996) 51 Cal.App.4th 575,] 581, italics added.) We therefore agree with the court in ([*People v. Tapia* (2001) 91 Cal.App.4th 738,] that 'the [authority] retained by the court is to decide *whether* there has been a violation during the period of probation and, if so, *whether* to reinstate or terminate probation.' (*Tapia*, *supra*, 91 Cal.App.4th at pp. 741–742.) [Footnote omitted.] Accordingly, a trial court can find a violation of probation and then reinstate and extend the terms of probation 'if, and only if, probation is reinstated based upon a violation that occurred during the unextended period of probation.' (*Tapia, supra,* 91 Cal.App.4th at p. 741.) This result fairly gives the defendant, if he prevails at the formal violation hearing, the benefit of the finding that there was no violation of probation during the probationary period. [Footnote omitted.] ¶ On the other hand, if the prosecution, at the formal violation hearing held after probation normally would have expired, is able to prove that the defendant did violate probation before the expiration of the probationary period, a new term of probation may be imposed by virtue of section 1203.2, subdivision (e), and section 1203.3. This result fairly gives the prosecution, if it prevails at the formal violation hearing, the benefit of the finding that there was a violation of probation during the probationary period." (*Leiva*, at pp. 515-516; emphasis in original.)

Justice Baxter, in concurring with the result reached by the majority, made the following additional observation: "Of primary concern is the fact that a summary revocation left unresolved by the probationer's absence interferes with the *supervised* form of release that probation is intended to represent. (See, e.g., §§ 1202.8, subd. (a), 1203, subd. (a).) Imposition of probation for a specified period contemplates that the probationer will be subject to supervision by the court and probation authorities for that *entire amount or length of time,* even if he or she commits *no* violations in the interim. Supervision for the entire probationary period, as agreed between the probationer and the court, is a fundamental prerequisite to the successful and lawful completion of a grant of *supervised* probation. . . . ¶ Under these circumstances, the probationer should not be absolved of a portion of the originally contemplated *length* of supervised release simply because his or her absence extended beyond the originally imposed *calendar period* of probation. On

the contrary, whenever the court regains physical custody over the probationer, the period of his or her absence should not necessarily be counted in determining whether the probationary time of *supervised* release has lapsed. If it has not, the court should retain full authority, in the interests of justice, and within the limits of the relevant statutory provisions, to determine what probationary consequences should flow from conduct the probationer has committed in the interim. The current version of section 1203.2(a) should expressly so recognize." (*Leiva*, at pp. 519-520; emphasis in original.)

Application of *Leiva* to PRCS

People v. Johnson (2018) 29 Cal.App.5th 1041 (*Johnson*), extends the holding of *Leiva* to violations of PRCS occurring after expiration of the period of supervision. "Although *Leiva* was concerned with probation, section 1203.2, subdivision (a), applies to PRCS as well, and it would be anomalous to view the tolling provision as having a different meaning in the context of PRCS. Section 1203.2 was amended in 2012 to make its provisions regarding revocation of supervision, which previously had applied only to probation, apply also to mandatory supervision, PRCS and parole. (Stats. 2012, ch. 43, § 30.) The Legislature's 'stated intent was "to provide for a uniform supervision revocation process for petitions to revoke probation, mandatory supervision, postrelease community supervision, and parole." (Stats. 2012, ch. 43, § 2, subd. (a).)' (*People v. DeLeon, supra,* 3 Cal.5th at p. 647, 220 Cal.Rptr.3d 784, 399 P.3d 13.) ¶ *Leiva, supra*, 56 Cal.4th at page 518, footnote 7, 154 Cal.Rptr.3d 634, 297 P.3d 870, leads us to conclude that when PRCS is revoked and later reinstated, the period of revocation does not automatically extend the length of the originally imposed period of supervision." (*Johnson*, at pp. 1048-1049.) "In sum, we believe that a reasonable reading of *Leiva* compels the conclusion that the length of the supervisory period is not automatically extended when PRCS is reinstituted after revocation, although a trial court may choose to extend the original expiration date for PRCS within the maximum statutory period." (*Johnson*, at p. 1050.)

K. Adjudication of Parole Violations (§ 3000.08, effective July 1, 2013)

[The authors gratefully acknowledge the assistance of Hon. Dylan M. Sullivan, of the Superior Court of El Dorado County, in the preparation of these materials.]

The realignment legislation modified traditional parole supervision for most inmates being released from prison by creating postrelease community supervision, discussed above. PRCS, however, does not apply to prisoners being released from prison after service of terms for certain of the more dangerous and violent crimes. Jurisdiction over these offenders remains with the Department of Corrections and

Rehabilitation (CDCR), Division of Adult Parole Operations (DAPO). Beginning July 1, 2013, however, most of these offenders will "be subject to parole supervision by the Department of Corrections and Rehabilitation and the jurisdiction of the court in the county where the parolee is released, resides, or in which an alleged violation of supervision has occurred, for the purpose of hearing petitions to revoke parole and impose a term of custody. . . ." (§ 3000.08(a).) After July 1, 2013, DAPO will continue to be responsible for the supervision of persons placed on parole. Revocation proceedings, however, will no longer be administrative proceedings under the jurisdiction of the Board of Parole Hearings (BPH). Instead, parole revocation proceedings will be adversarial judicial proceedings conducted in the superior courts under section 1203.2.

1) Inmates subject to new procedure

Inmates released from state prison after serving a term or whose prison sentence was deemed served under section 2900.5 for the following crimes will be under the jurisdiction of the court for purposes of adjudicating parole violations: (§ 3000.08(a).)

- Serious or violent felonies described in sections 1192.7(c) and 667.5(c).

- Crimes sentenced under sections 667(e)(2) or 1170.12(c)(2) - defendants sentenced as third strike offenders under the Three Strikes law.

- Any crime where the inmate is classified as a "High Risk Sex Offender." Although not specifically referenced in section 3000.08(a)(4), section 13885.4 defines “high risk sex offenders” as “those persons who are required to register as sex offenders pursuant to the Sex Offender Registration Act and who have been assessed with a score indicating a ‘high risk’ on the SARATSO identified for that person's specific population as set forth in Section 290.04, or who are identified as being at a high risk of reoffending by the Department of Justice, based on the person's SARATSO score when considered in combination with other, empirically based risk factors.” The STATIC-99 is the approved risk assessment tool for adult male sex offenders. A STATIC-99 score of 6 points or more constitutes a “high risk” of reoffending.

- Any crime where the inmate is required as a condition of parole to undergo treatment by the Department of State Hospitals. These are persons with a severe mental disorder not in remission as described in section 2962.

All other inmates are to be released to PRCS. (§ 3000.08(b).)

People v. Toussain (2015) 240 Cal.App.4th 974, discusses the nature of the determination that an inmate is a "high risk sex offender." *Toussain* concludes that whether a person is a "high risk sex offender" does not depend on the precise reason the person has most recently been committed to CDCR. It is based on CDCR's determination of risk that the defendant will commit a sexually violent offense. "The core flaw in Toussain's construction is his assumption the 'crime for which the person is classified as a high-risk sex offender' is the same crime for which he or she is released from a current prison commitment. But the statutory language does not tie the high-risk classification to the person's current commitment or release from prison. Rather, parole supervision is required based on having served a prison term for '*Any* crime' resulting in high-risk sex offender classification. (§ 3000.08, subd. (a)(4), italics added.) And nothing suggests the classification must be reevaluated with each pending release for subsequent commitment offenses. To the contrary, classification is not tethered to an inmate's release, as Toussain suggests. Rather, every 'eligible person' is classified either upon incarceration or *after* his or her release on parole. (§ 290.06, subds. (a)(1), (2).) ¶ No criminal statute automatically 'classifies' someone as a high-risk sex offender. Indeed, the only statutory definition of a high-risk sex offender appears in a Penal Code chapter other than that containing section 3000.08. Section 13885.4 defines ' "high risk sex offender" ' as a person who is required to register as a sex offender, *and* he or she has been "assessed with a score indicating a "high risk" on" the State Authorized Risk Assessment Tool for Sex Offenders (SARATSO) *or* the person is 'identified as being at a high risk of reoffending by the Department of Justice, based on the person's SARATSO score when considered in combination with other, empirically based risk factors.' (§ 13885.4.) This definition of 'high risk sex offender' applies '[a]s used in' Chapter 9.5 (Statewide Sexual Predator Apprehension Team), of Title 6 (California Council on Criminal Justice), Part 4 (Prevention of Crimes and Apprehension of Criminals of the Code), which does not include section 3000.08. But our review of the statutory scheme as a whole governing sex offenders convinces us section 3000.08, subdivision (a)(4), requires parole supervision for all registered sex offenders released from prison, regardless of the person's current commitment offense, if CDCR has classified the person as high risk based on the person's SARATSO score." (*Toussain*, pp.981-982; emphasis in original.)

Toussain also observed that CDCR classifies a person as a "high risk sex offender" with a Static-99R score of 4 or more. "Administrative regulations adopted by CDCR define the term high-risk sex offender: 'Definition. High risk sex offender means a sex offender who, pursuant to [ ] section 290.04, has been assessed and deemed by the CDCR to pose a high risk to commit a new sex offense.' (Cal.Code Regs., tit. 15, § 3582, subd. (a).) The Attorney General includes on appeal, and we judicially notice, the CDCR's 'Static–99R' scoring categories, which are available online. (www.saratso.org/index.cfm?pid=467.) The designated categories include a score of 4–5 as 'Moderate–High Risk,' and 6 or above as 'High Risk.' ¶ The Attorney General also supplies and we judicially notice a CDCR memo dated September 15, 2014,

setting forth 'The Division of Adult Parole Operations' Policy and Procedures for the Sex Offender Management Program.' The memo details CDCR's procedures for its Sex Offender Management Program (SOMP). The SOMP memo provides: '*An offender with a Static–99R score of four or greater shall be designated as a [high-risk sex offender or HRSO] for purpose of identifying re lease to parole supervision.* All sex offender parolees required to register pursuant to [section] 290 shall be assigned to and supervised on specialized caseloads.' (Italics added.)" (*Toussain*, pp. 983-984; emphasis in original.) The court found the classification as a "high risk sex offender" because of a score of four or more was within the discretion of CDCR.

Substantially in accord with *Toussain* is *People v. Williams* (2020) 47 Cal.App.5th 762 (*Williams*). "We find *Toussain* provides meaningful guidance on our issue. Like the *Toussain* court, we conclude the language in subdivision (a) of section 3000.08 is unambiguous. As relevant here, this subdivision requires a person to be supervised by parole if that person was 'released from state prison *prior to* . . . July 1, 2013, after serving a prison term ... for *any* of the following crimes,' which list includes a 'serious felony as described in subdivision (c) of Section 1192.7' (§ 3000.08, subd. (a)(1)); and a 'violent felony as described in subdivision (c) of Section 667.5.' (§ 3000.08, subd. (a)(2).) *If* the Legislature had wanted to limit subdivision (a)(1) and (2) to apply only when an offender is released from a current prison commitment that qualifies as a serious and/or violent felony, respectively, it easily could have included such language in the statute." (*Williams,* at p. 774; italics in original.)

For most inmates being released, the parole period will be three years. (§ 3000(b).) Some inmates sentenced to life terms will be subject to a parole period of five or ten years. (§§ 3000(b)(1) and (b)(3).) The following inmates, however, will remain on parole for three years, or the prescribed term, whichever is greater: (§ 3000.08(i).)

- A person required to register as a sex offender who was subject to a period of parole longer than three years at the time the underlying offense was committed.

- A person subject to parole for life under section 3000.1 at the time the underlying offense was committed.

In addition to the basic parole term, the inmate also may be subjected to an extended term because of absconding or serving time in custody on a violation. When an inmate absconds, no time in that status until the inmate returns to custody is credited against the term of parole. (§ 3064.) Furthermore, no time spent in custody on a parole violation is credited against the parole term. (§ 3000(b)(6).) (For a full discussion of the tolling of the supervision period, see Section R, *infra*.) In such circumstances, however, the overall parole period for persons serving a three-year term cannot exceed four years from the initial parole. (§ 3000(b)(6)(A).) For persons serving a five-year term, the period may not exceed seven years. (§

3000(b)(6)(B). For persons serving a ten-year term, the period may not exceed 15 years. (§ 3000(b)(6)(C).)

The court will be required to adjudicate parole violations for all parolees, regardless of the length of the term.

Inmates who have a pending adjudication for a parole violation as of July 1, 2013, or who have a prior parole proceeding reopened after July 1, 2013, will remain subject to the jurisdiction of the BPH. (§ 3000.08(j).)

Persons who should have been released to PRCS

If an inmate is released from prison, but wrongfully placed on parole instead of on PRCS, there is a 60-day window within which a correction must occur. "Any person released to parole supervision pursuant to subdivision (a) shall, regardless of any subsequent determination that the person should have been released [on PRCS] pursuant to subdivision (b), remain subject to subdivision (a) after having served 60 days under subdivision (a)." (§ 3000.08(l).) A similar rule is provided by section 3451(d) for persons wrongfully released on PRCS.

In *People v. Johnson* (2020) 45 Cal.App.5th 379 (*Johnson*), the defendant had mistakenly been classified as a "high risk" sex offender and, thus, was subject to parole supervision on release from prison. The appellate court concluded the trial court had jurisdiction to consider the issue. "[W]e conclude that the trial court has the authority in a parole revocation proceeding to consider the issue of whether the defendant was improperly placed on parole supervision rather than PRCS and, if appropriate, to order that supervision be transferred from parole to PRCS under the provision allowing it to 'modify ... supervision of the person.' (§ 1203.2, subd. (b)(1).)" (*Johnson*, *supra*, at p. 402.)

The court further concluded the 60-day limit specified in section 3000.08, subdivision (l), does not bar the transfer. Time spent in jail on parole violations is not counted toward the 60-day limit. "Section 3056 states, 'When a parolee is under the legal custody and jurisdiction of a county facility awaiting parole revocation proceedings or upon revocation, he or she shall not be under the parole supervision or jurisdiction of the department.... When released from the county facility or county alternative custody program following a period of custody for revocation of parole or because no violation of parole is found, the parolee shall be returned to the parole supervision of the department for the duration of parole.' (§ 3056, subdivision (a).) This provision squarely resolves the issue presented, namely, whether the period that a person spends in jail custody because of a parole violation is counted in determining whether the person has 'served 60 days under supervision' as stated in section 3000.08, subdivision (l). According to section 3056, a person in custody in a county facility because of a parole violation 'shall not be

under the parole supervision or jurisdiction of the department' and only when the person is released from the county facility is he 'returned to ... parole supervision.' (§ 3056, subd. (a).) This language was added to section 3056 in 2012 (Stats. 2012, ch. 43 (Sen. Bill 1023), § 43, eff. June 27, 2012), and thus was in effect *prior* to the Legislature's enactment of the 60-day rule in 2013. (Stats. 2013, ch. 32 (Sen. Bill 76), § 9, eff. June 27, 2013.) We therefore presume that in enacting the 60-day rule in 2013, when the Legislature was referring to a parolee having 'served 60 days under supervision,' it meant to incorporate the definition of being 'under ... parole supervision' already set forth in section 3056, subdivision (a). (*Meza v. Portfolio Recovery Associates, LLC* (2019) 6 Cal.5th 844, 862-863, 243 Cal.Rptr.3d 569, 434 P.3d 564 ['We presume that the Legislature is aware of laws in existence when it enacts a statute.'].)" (*Johnson*, at p. 404.)

People v. Ruiz (2020) 59 Cal.App.5th 372 (*Ruiz*), holds section 3000.08(l) was unconstitutional as applied to defendant because he was not given notice of the 60-day limitation. "Applying the 60-day limitation of section 3000.08, subdivision (*l*) to bar a challenge to a classification error without requiring notice of either the supervision classification or the ability to challenge the classification will result in deprivation of parolees' conditional liberty interests." (*Ruiz*, *supra*, 59 Cal.App.5th at p. 503."

2) Supervision procedure by agency

Arrest of parolee

If at any time during the parole period a parole agent or peace officer has probable cause to believe the parolee has violated his parole, the parolee is subject to arrest without a warrant or other process. Specifically, "at any time until the final disposition of the case, [the parole agent or peace officer may] arrest the person and bring him or her before the court, or the court may, in its discretion, issue a warrant for that person's arrest pursuant to Section 1203.2." (§ 3000.08(c).)

Issuance of arrest warrants

The authority to issue warrants for parolees generally derives from section 1203.2. (§ 3000.08(c): "the court may, in its discretion, issue a warrant for [a parolee's] arrest pursuant to Section1203.2." The legislation that applied section 1203.2 to parole revocations was expressly designed to "simultaneously incorporate the procedural due process protections held to apply to probation revocation procedures under *Morrissey v. Brewer* (1972) 408 U.S. 471, and *People v. Vickers* (1972) 8 Cal.3d 451, and their progeny." (2011 Realignment Legislation, SB 1023, Sec. 2(b), effective June 27, 2012.) Section 1203.2(f) defines the "court" to include a

judge, magistrate or revocation hearing officer as described in Government Code, section 71622.5.

After July 1, 2013, the sole authority to issue warrants for the return to actual custody of any state prisoner released on parole rests with the court pursuant to Section 1203.2. The only exception is for an escaped state prisoner or a state prisoner released prior to his or her scheduled release date who should be returned to custody. (§ 3000(b)(9)(A).) However, any warrant issued by the Board of Parole Hearings prior to July 1, 2013, must remain in full force and effect until the warrant is served or it is recalled by the board. All prisoners on parole arrested pursuant to a warrant issued by the board shall be subject to a review by the board prior to the department filing a petition with the court to revoke the parole of the inmate. (§ 3000(b)(9)(B).)

Under probation case law, warrants for probationers are not considered traditional "arrest warrants" governed by sections 813 to 829. Instead, warrants for probationers are characterized as "bench warrants" (*People v. Hawkins* (1975) 44 Cal.App.3d 958, 966), and courts are vested with wide discretion to order warrants upon review of reports from probation officers. The court in *Hawkins*, for example, described the court's discretion as follows: "In the case at bench we hold the court had the power and duty to summarily revoke . . . probation on the information supplied by the probation officer and to issue a bench warrant as the only practical and expeditious way to bring the defendant swiftly before the court, to give him notice of the claimed violations and to afford him a hearing. The efficient administration of criminal justice and the credibility and viability of the probation system demand that the court have the power to so act. To hold otherwise would be to drastically … make a mockery of the court and its conditions of probation, and reduce the whole probation scheme to shambles." (*Hawkins*, at p. 966.)

The characterization of probation warrants was affirmed in *People v. Woodall* (2013) 216 Cal.App.4th 1221, 1230-1231: "To effectuate the arrest of a probationer who has violated probation, section 1203.2 provides . . . [that] a court may issue a warrant for the arrest of a probationer. Typically, a court will issue a bench warrant for the probationer's arrest when the authorities report to the court that a probation violation has occurred. [Citations.] There is nothing in the express language of section 1203.2 requiring that the report to the court be made by oath or affirmation. [Citations.]" *Woodall* goes on to emphasize that probationer warrants are not scrutinized in the same manner as traditional arrest warrants because probationers have diminished liberty expectations in contrast to other citizens. Probation warrants, for example, need not be based on a probation report made under oath or affirmation because section 1203.2 does not expressly require it. (*Woodall*, at pp. 1231-1232.) Nor do federal due process requirements for warrants, including the "warrant clause," apply to the arrest of probationers: "A probationer, by the very nature of the probation grant, is on notice that he or she is subject to the

supervision of the government and that the liberty granted by the government is conditioned on compliance with probation conditions. To effectively supervise a probationer, the government needs to be able to expeditiously arrest the probationer in the event of noncompliance with probation conditions. Considering the government's need to act expeditiously while monitoring the probationer and the probationer's reduced expectation of liberty, we conclude a probationer falls outside the ambit of the warrant clause." (*Woodall*, at p. 1233.)

While requests for warrants usually will be processed during normal business hours, in the unusual circumstance where there is an after-hours urgency, courts likely will be obligated to process the warrant in accordance with the on-call magistrate procedure established by section 810.

Section 3000.08(d), governing intermediate sanctions for parole violations, does not require the parole agent to file a petition or report in connection with a request for a warrant. Indeed, section 3000.08(c) expressly allows the arrest of an inmate with or without a warrant. While no petition is required for the issuance of a warrant, the warrant process itself presumes a judicial officer will make at least a preliminary determination that there is probable cause for arrest. (See § 813(a).) Accordingly, the request for a warrant should be accompanied by at least a minimal declaration of the nature of the violation. The Judicial Council's Criminal Law Advisory Committee has directed AOC staff to develop a warrant request form for these purposes. If eventually approved by the Judicial Council, any such form will be made available for use by DAPO and the courts.

If DAPO seeks a warrant in connection with a violation that will be handled informally, the court may be asked later to recall the warrant. The request should be handled administratively, without the need for any court hearing.

Because parole revocation proceedings are governed by section 1203.2, most likely the court should summarily revoke parole when issuing a warrant in the same manner as summarily revoking probation or other forms of supervision. Summary revocation will have the effect of suspending the remaining supervision period. (§1203.2(a).)

Use of parole holds

Parole holds may be placed by the supervising parole agent pending resolution of an alleged parole violation pursuant to section 3056. Although there is no language in section 3056 expressly allowing holds, the section does provide that "[a] parolee awaiting a parole revocation hearing may be housed in a county jail awaiting revocation proceedings." CDCR and local jails have treated the provision as authorizing the hold. Holds placed under these circumstances will not involve the courts.

The parole hold will be lifted when the court imposes any sanctions or when the inmate is released after serving any time ordered on revocation of parole. The court will have the ability to override the hold by setting bail or releasing the parolee on his own recognizance, once the matter is before the court on a petition to revoke parole.

The determination of a parolee's custody status by the court and DAPO

Background

Prior to the enactment of the realignment legislation, once a defendant was sentenced to state prison, with only limited exceptions, the trial court generally lost jurisdiction over the defendant. (See *Dix v. Superior Court* (1991) 53 Cal.3d 442,455.) When the defendant was released on parole after service of the sentence, he was under the exclusive jurisdiction of CDCR and its administrative parole procedures. If a parolee was arrested on a suspected violation and a hold was placed under section 3056, the parolee was held in custody independent from any court proceedings. The realignment legislation may have changed the relationship between the parolee, CDCR and the courts with respect to determination of a parolee's custody status pending adjudication of a parole violation.

Sections 1203.2 and 3000.08(c)-(h) establish the mechanism for adjudicating violations of parole. Parole violation proceedings generally commence with the parolee's arrest, either with or without a warrant. "At any time during the period of parole of a person subject to this section, if any parole agent or peace officer has probable cause to believe that the parolee is violating any term or condition of his or her parole, the agent or officer may, without warrant or other process and at any time until the final disposition of the case, arrest the person and bring him or her before the court, or the court may, in its discretion, issue a warrant for that person's arrest pursuant to Section 1203.2." (§ 3000.08(c).)

Thereafter, the Division of Adult Parole Operations (DAPO) first is required to use intermediate sanctions in dealing with a violation. Among other things, the sanctions may include up to ten days of "flash incarceration" imposed at the discretion of DAPO. (§ 3000.08(d).) The legislation compels DAPO to bring the matter to the court if such sanctions are considered no longer "appropriate." (§ 3000.08(f).) In such circumstances DAPO is directed to petition the court under section 1203.2 to revoke or modify the conditions of supervision.

Section 1203.2(a) provides, in relevant part, that "[a]t any time during the period of supervision . . . , if any probation officer, parole officer, or peace officer has probable cause to believe that the supervised person is violating any term or condition of his or her supervision, the officer may, without warrant or other process and at any time until the final disposition of the case, rearrest the supervised person and bring him or her before the court or the court may, in its discretion, issue a warrant for his or her rearrest."

Section 3056 provides, in relevant part: "A parolee awaiting a parole revocation hearing may be housed in a county jail while awaiting revocation proceedings." Section 3056 has commonly been understood to constitute a "parole hold" for persons arrested on an alleged parole violation. Prior to realignment, such holds were imposed by DAPO as a part of the administrative adjudication of parole violations and were considered to control an inmate's custody status apart from the court's ability to set bail. Section 3056 was not eliminated by the realignment legislation.

Effective January 2016, sections 3000.08(c) and 3056(a) were amended to expressly provide that notwithstanding a parole hold, the court has the ability to order the release of any person being held in custody for a violation of supervision, under such terms as the court deems appropriate, except as to any period when the parolee is subject to flash incarceration.

Time limit within which the parolee must be brought before the court

Neither sections 1203.2 nor 3000.08 specify when the parolee must be brought to court or when a petition to revoke supervision must be filed. Initially, *Williams v. Superior Court* (2015) 230 Cal.App.4th 636, required that parolees be arraigned no later than 10 days after arrest.

However, the Supreme Court, in *People v. DeLeon* (2017) 3 Cal.5th 640 (*DeLeon*), rejected the strict time limits imposed by *Williams*. "DeLeon urges us to hold that due process requires that the preliminary hearing take place within 15 days of arrest. We decline this invitation as well. When faced with systemic constitutional violations, some courts have found it necessary to impose a mandatory time limit for conducting a *Morrissey* preliminary hearing. In *Williams*, *supra*, 230 Cal.App.4th 636, 178 Cal.Rptr.3d 685, the court found it 'manifest that the due process rights of parolees are being systematically violated in Orange County' (*id*. at p. 654, 178 Cal.Rptr.3d 685), based on a 2013 survey indicating that parolees averaged more than 16 days in custody before their first court appearance (*id*. at p. 646, 178 Cal.Rptr.3d 685). The *Williams* court adopted a rule requiring 'arraignment within 10 days of an arrest for a parole violation, a probable cause hearing within 15 days of the arrest, and a final hearing within 45 days of the arrest.' (*Id*. at p. 643, 178 Cal.Rptr.3d 685.) Similarly, a class action lawsuit filed against the

Department of Corrections and Rehabilitation in federal district court in 1994 established that parolees were denied a preliminary revocation hearing, and were detained an average of 35 days before receiving a final revocation hearing. (*Valdivia v. Davis*, *supra*, 206 F.Supp.2d at p. 1071 & fn. 7.) The district court adopted a remedial plan requiring, among other things, that parolees receive a probable cause hearing within 10 business days after service of a notice of charges and rights. (*Valdivia v. Brown*, *supra*, 956 F.Supp.2d at pp. 1127–1128.) The lawsuit was later dismissed as moot due to the passage of the Realignment Act. (*Valdivia v. Brown*, at pp. 1135–1140.) ¶ There is no evidence in this record of the timelines for conducting preliminary hearings in Solano County, or of systemic violations of parolees' constitutional rights. DeLeon points to a remark by defense counsel on the date set for the preliminary hearing that the prosecutor 'is well aware of this issue. I made the same objection last week. And it is an ongoing problem, and it is an easy fix.' After the trial court ordered briefing, however, defense counsel offered no argument or evidence that the *Morrissey* procedures had been systematically violated. Nor did the trial court make a finding in this regard. We agree with the federal district court's observation in *Valdivia* that '[w]hether the new system provides adequate due process must be demonstrated in practice, without untoward judicial interference until the need for intervention is clear.' (*Valdivia v. Brown*, *supra*, 956 F.Supp.2d at pp. 1136–1137.) Accordingly, we decline to resolve whether an outer time limit is constitutionally compelled. Instead, we reiterate *Morrissey*'s command that the preliminary hearing should occur 'as promptly as convenient after arrest.' (*Morrissey*, *supra*, 408 U.S. at p. 485, 92 S.Ct. 2593.)" (*DeLeon*, at pp. 658-659.)

The right to a preliminary hearing

The parolee has the right to a preliminary hearing on the parole violation. As observed in *People v. DeLeon* (2017) 3 Cal.5th 640, 652-654: "Over four decades ago, *Morrissey*, *supra*, 408 U.S. 471, 92 S.Ct. 2593, established the minimum due process protections for parolees facing revocation. There, two parolees complained that their parole had been revoked based on a written report but without a hearing. (*Id*. at p. 473, 92 S.Ct. 2593.) Holding that due process required a hearing, the court observed that "[i]mplicit in the system's concern with parole violations is the notion that the parolee is entitled to retain his liberty as long as he substantially abides by the conditions of his parole." (*Id*. at p. 479, 92 S.Ct. 2593; see also *id*. at p. 482, 92 S.Ct. 2593.) At the same time, however, the court emphasized that "revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations." (*Id*. at p. 480, 92 S.Ct. 2593.) ¶ The court identified "two important stages" of the

process. (*Morrissey*, *supra*, 408 U.S. at p. 485, 92 S.Ct. 2593.) First, "some minimal inquiry [must] be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available. [Citation.] Such an inquiry should be seen as in the nature of a 'preliminary hearing' to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions." (*Ibid*.) The determination must be made by someone uninvolved in the case. (*Id*. at pp. 485–486, 92 S.Ct. 2593.) The procedure is informal. (*Id*. at pp. 484–485, 92 S.Ct. 2593.) It requires notice to the parolee and a chance to appear and speak on his own behalf. (*Id*. at pp. 486–487, 92 S.Ct. 2593.) "[H]e may bring letters, documents, or individuals who can give relevant information to the hearing officer." (*Id*. at p. 487, 92 S.Ct. 2593.) At the parolee's request, witnesses to the parole violation must generally be available for questioning. (*Ibid*.)[9] The officer then decides whether probable cause supports continued incarceration pending a final revocation hearing. (*Morrissey*, at p. 487, 92 S.Ct. 2593.) The officer must prepare "a summary ... of what occurs at the hearing in terms of the responses of the parolee and the substance of the documents or evidence given" at the hearing, and shall " 'state the reasons for his determination and indicate the evidence he relied on....' " (*Ibid*.) However, " 'formal findings of fact and conclusions of law' " are not required. (*Ibid*.)

The hearing itself can be informal: "*Morrissey* does not require that a judge conduct the preliminary hearing. (*Morrissey*, *supra*, 408 U.S. at p. 486, 92 S.Ct. 2593.) Section 1203.2, subdivision (f) provides that the revocation proceedings may take place before a 'judge, magistrate, or revocation hearing officer described in Section 71622.5 of the Government Code.' That section authorizes the superior court to 'appoint as many hearing officers as deemed necessary to conduct parole revocation hearings pursuant to Sections 3000.08 and 3000.09....' (Gov. Code, § 71622.5, subd. (b).) Third, section 3000.08 contemplates review by the parole agency before the case is submitted to the superior court for revocation. (§ 3000.08, subds. (d), (f).) This review may satisfy *Morrissey*'s preliminary hearing requirement if it includes a probable cause determination, conducted reasonably near the place of the alleged parole violation or arrest, by someone not directly involved in the case, with notice to the parolee and an opportunity to appear and defend. (*Morrissey*, at pp. 485–487, 92 S.Ct. 2593.)" (*DeLeon*, *supra* at p. 658.)

Williams imposes on the trial court a duty to conduct a probable cause hearing within 15 days of a parolee's arrest. (*Williams*, at pp 659-660.) Drawing on *Morrissey v. Brewer* (1972) 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484, *Williams* defines the nature of the hearing: "*Morrissey*-

compliant probable cause hearings are required in post-realignment California, although a prompt unitary hearing may suffice. (But see *Gagnon [v. Scarpelli* (1973) 411 U.S. 778,] 781–782, 93 S.Ct. 1756 [two separate hearings are required].) A *Morrissey*-compliant probable cause hearing requires that the parolee be given the opportunity to 'appear and speak in his own behalf; he may bring letters, documents, or' witnesses, and may question any person 'who has given adverse information on which parole revocation is to be based….' (*Morrissey, supra,* 408 U.S. at p. 487, 92 S.Ct. 2593.) In our view, this would include the opportunity to present evidence of Parole's failure to comply with section 3000.08, subdivision (f), which requires parole agents to employ 'assessment processes' to determine whether intermediate sanctions are appropriate before petitioning for parole revocation." (*Williams*, at p. 656.)

DeLeon disagreed with the requirement that the preliminary hearing be held within 15 days. Rather, it should be held "as promptly as convenient after arrest." (*DeLeon*, *supra*, at p. 659.)

Authority to determine custody status from arrest to arraignment

Based on *Williams*, it seems likely that DAPO has at least primary jurisdiction over the custody status of the parolee from the time of arrest up to the arraignment. *Williams* specifically acknowledges the need of DAPO to have a reasonable time to determine whether informal sanctions should be imposed before the parolee must be brought before the court. "[I]f Parole decides relatively quickly to impose intermediate sanctions or additional parole conditions (without court intervention), the issue of a parolee's access to the court and counsel is obviated. Parole 'should be given a reasonable period of time to investigate and review the circumstances of a violation, and to determine the appropriate level of response, including "flash incarceration." A reasonable period should be allowed for the implementation of any intermediate sanction, such as acceptance into a suitable rehabilitation program.' (Couzens & Bigelow, *supra,* p. 93; at <www.courts.ca.gov/partners/documents/felony_ sentencing.pdf> [as of Sept. 23, 2014].) ¶ In this context, a reasonable period cannot be long, however. Under section 3000.08, subdivision (d), if a supervising parole agency finds good cause that a parolee has committed a violation and the agency decides to impose intermediate sanctions, it must do so *immediately.* We recognize that in cases like Williams's, where parole absconding is a real risk, the State has an interest in protecting the public and in keeping track of the parolee. But a parole hold cannot be maintained indefinitely consistent with due process." (*Williams*, at pp. 661-662; emphasis in original.)

As noted above, *DeLeon* disagreed with the strict time limits suggested by *Williams*, but suggested that at least as to the preliminary hearing, it be held "as promptly as convenient after arrest." (*DeLeon*, supra, at p. 659.)

Extension of parole term while defendant absconds

People v. Townsend (2020) 53 Cal.App.5th 888 (*Townsend*), addresses the extension of a parole term because the parolee has absconded. "There is a limit on the total amount of time a parolee can be on parole supervision or jailed on parole violations. Section 3000, subdivision (b)(6)(A) (section 3000(b)(6)(A)) reads, 'Except as provided in Section 3064, in no case may a prisoner subject to three years on parole be retained under parole supervision or in custody for a period longer than four years from the date of his or her initial parole.' This means that Townsend's parole extends past September 28, 2013 only 'as provided in Section 3064.' Section 3064 tolls the parole period while a parolee is at large. It reads, 'From and after the suspension or revocation of the parole of any prisoner and until his return to custody he is an escapee and fugitive from justice and no part of the time during which he is an escapee and fugitive from justice shall be part of his term.' " [¶] In *Pearl*, *supra*, 172 Cal.App.4th at p. 1290, 92 Cal.Rptr.3d 85 our colleagues in the Fourth District held a parolee is not a fugitive from justice under the language of section 3064 when that individual is in custody on parole violations. But a parolee is, by definition, a fugitive from justice when that individual is absconding from parole supervision. Therefore, under section 3000(b)(6)(A) a three-year 'parole term may not' be extended to 'exceed four years plus the amount of time the parolee had been a fugitive from justice ... regardless of how much time the parolee spends in confinement for parole revocations.' [Citation.] That is, time spent absconding from parole supervision suspends the parole period indefinitely, while ' "[t]ime spent in custody on a parole violation ... extends the parole period" ' such that a parolee ' "may not be retained on parole supervision or in custody on a parole violation for more than 4 years." ' [Citation.]" (*Townsend*, *supra*, 53 Cal.App.5th at pp. 893-894.)

Court authority to issue warrants after realignment

After July 1, 2013, courts are vested with sole authority to issue warrants for parolees "pursuant to Section 1203.2." (§ 3000(b)(9)(A).) Although, as noted above, courts generally have no power to act in a criminal matter without the filing of a complaint or other pleading that establishes the requisite subject matter jurisdiction, courts are statutorily authorized to issue warrants for parolees without the prerequisite of any formal pleading being filed. Section 3000.08(c) expressly provides that "the court may, in its discretion, issue a warrant for [a parolee's] arrest pursuant to Section 1203.2."

Section 1203.2 has been designated by the Legislature as the statute governing the revocation of all forms of supervision: probation, mandatory supervision, postrelease community supervision (PRCS), and parole. (§ 1203.2(a).) The legislation also is designed to "simultaneously incorporate the procedural due process protections held to apply to probation revocation procedures under *Morrissey v. Brewer* (1972) 408 U.S. 471, and *People v. Vickers* (1972) 8 Cal.3d 451, and their progeny." (Sen. Bill 1023 (Comm. on Budget); Stats. 2012, ch. 43, Sec. 2(b), p. 96.)

Under current case law, warrants for probationers under section 1203.2 are not considered traditional "arrest warrants" governed by sections 813 to 829; instead, they are considered "bench warrants" and courts are vested with wide discretion to order bench warrants for probationers upon review of reports from probation officers. (*People v. Hawkins* (1975) 44 Cal.App.3d 958, 966.) The court in *Hawkins*, for example, described the court's discretion as follows:

> In the case at bench we hold the court had the power and duty to summarily revoke the defendant's probation on the information supplied by the probation officer and to issue a bench warrant as the only practical and expeditious way to bring the defendant swiftly before the court, to give him notice of the claimed violations and to afford him a hearing. The efficient administration of criminal justice and the credibility and viability of the probation system demand that the court have the power to so act. To hold otherwise would be to drastically undermine the authority of the probation officer, laboring under burdening case loads, make a mockery of the court and its conditions of probation, and reduce the whole probation scheme to shambles. However, we hold that once the defendant is brought before the court 'he shall not be detained' pending 'the hearings mandated by *Morrissey* and *Vickers* for an 'undue time.''

(*Hawkins*, at p. 966, quoting from *People v. Gifford* (1974) 38 Cal.App.3d 89, 91.)

The characterization of warrants issued for probation violations under section 1203.2 was recently reaffirmed in *People v. Woodall* (2013) 216 Cal.App.4th 1221, 1230-1231: "To effectuate the arrest of a probationer who has violated probation, section 1203.2 provides . . . [that] a court may issue a warrant for the arrest of a probationer. Typically, a court will issue a bench warrant for the probationer's arrest when the authorities report to the court that a probation violation has occurred. [Citations omitted.] There is nothing

in the express language of section 1203.2 requiring that the report to the court be made by oath or affirmation. [Citations.]" *Woodall* goes on to emphasize that probationer warrants are not scrutinized in the same manner as traditional arrest warrants because probationers have diminished liberty expectations in contrast to other citizens. Probation warrants, for example, need not be based on a probation report made under oath or affirmation because section 1203.2 does not expressly require it. (*Woodall*, at pp. 1231-1232.) Nor do federal due process requirements for warrants, including the "warrant clause," apply to the arrest of probationers: "A probationer, by the very nature of the probation grant, is on notice that he or she is subject to the supervision of the government and that the liberty granted by the government is conditioned on compliance with probation conditions. To effectively supervise a probationer, the government needs to be able to expeditiously arrest the probationer in the event of noncompliance with probation conditions. Considering the government's need to act expeditiously while monitoring the probationer and the probationer's reduced expectation of liberty, we conclude a probationer falls outside the ambit of the warrant clause." (*Woodall*, at p. 1233.)

Because the Legislature has designated section 1203.2 as the statute governing the procedural process for revocation of all forms of post-conviction supervision, including parole, the principles discussed in *Hawkins*, *Gifford,* and *Woodall* appear fully applicable to warrants issued for violations of the conditions of parole.

Unlike arrest warrants, which may or may not result in a court appearance, bench warrants are usually orders to arrest and bring persons to the court, usually for some failure to appear. Under section 1203.2, when the court orders a warrant, the court may summarily revoke supervision, which tolls the supervision time. (§ 1203.2(a).) In addition: "Time during which parole is suspended because the prisoner has absconded or has been returned to custody as a parole violator shall not be credited toward any period of parole. . . ." (§ 3000(b)(6).)

Thus, if the court summarily revokes supervision when the warrant is issued, the period of supervision will most likely be tolled until such time as the court formally reinstates the person on supervision because only courts may revoke supervision. (*In re Gonzalez* (1974) 43 Cal.App.3d 616, 620 [discretion to revoke probation is "a judicial manifestation through the judge's personal examination of the case before him; it cannot be delegated to a nonjudicial agency"].) Summary revocation is "simply a device by which the defendant may be brought before the court and jurisdiction retained before formal revocation proceedings commence." (*People v. Pippitone* (1984) 152 Cal.App.3d 1112, 1117.)

The fact that courts may issue warrants, with or without a supporting pleading under oath, summarily revoke supervision, and toll time, seems to indicate that, *at least in the instances when parolees are arrested on warrants ordered by the court*, the court acquires limited subject matter jurisdiction over the custody status of the parolee, even though a petition has not yet been filed. If the court has the initial authority to issue a warrant, it must have the authority to recall the warrant and otherwise deal with the custody status of the parolee pending further proceedings. (See, e.g., § 978: "When his personal appearance is necessary, if [the person arrested on a bench warrant] is in custody, the Court may direct and the officer in whose custody he is must bring him before it to be arraigned.")

DAPO's authority to arrest after realignment

DAPO's authority to supervise parolees is expressly provided by statute.(§ 3000.08(a) [specifying that parolees "shall be subject to parole supervision by" DAPO].) Section 3000.08(c) gives the parole officer the authority to arrest the parolee if there is probable cause to believe the parolee is in violation of the terms of parole, "without a warrant or other process . . . and bring him or her before the court." The parole officer also may request a warrant pursuant to section 1203.2. Similarly, section 1203.2 provides that if a supervising officer has probable cause to believe that the supervised person is in violation of his or her conditions of supervision, the person may be arrested "without warrant or other process . . . and [brought] before the court."

Notably, during the period of county jail custody prior to the filing of a petition for revocation or some other appropriate pleading with the court, section 3056(a) provides that the local custody facility has legal custody and jurisdiction over the parolee:

> A parolee awaiting a parole revocation hearing may be housed in a county jail while awaiting revocation proceedings. . . . When housed in county facilities, parolees shall be under the sole legal custody and jurisdiction of local county facilities. A parolee shall remain under the sole legal custody and jurisdiction of the local county or local correctional administrator, even if placed in an alternative custody program in lieu of incarceration, including, but not limited to, work furlough and electronic home detention. When a parolee is under the legal custody and jurisdiction of a county facility awaiting parole revocation proceedings or upon revocation, he or she shall not be under the parole supervision or jurisdiction of [DAPO].

It is important to observe, however, that the reference in section 3056(a) to the "sole legal custody" being with the local custody facility likely is only meant to distinguish between the authority of the sheriff and DAPO; for the reasons discussed below, it cannot be meant to exclude the authority of the court to act in the matter.

DAPO's authority to issue parole holds under section 3056 was unchanged by the realignment legislation. Before realignment, the California Supreme Court described parole holds as follows:

> A 'parole hold' occurs when a parole agent or other representative of the [Adult] Authority causes a parolee to be restrained in custody independent of any action by the decision making component of the Authority. The situation occurs (1) when the parole agent believes that the parolee has violated a condition of parole, (2) when the parolee has been arrested on a new criminal charge—a prima facie violation of parole, or (3) when a parolee is completing a local jail sentence during which time the Authority may determine whether to maintain parole status in view of the conviction which resulted in the jail sentence. Common to all three situations is the power of the agent to have the parolee restrained merely by exercising his authority to take the parolee into custody and book him into a local jail or, in the event he is already in jail, prevent him from being released on bail, on his own recognizance or after the expiration of any sentence he may have been required to serve. The agent's authority to restrain the parolee stems from two sources: first, an administrative delegation of statutory power conferred on the Authority to, inter alia, 'order returned to prison any prisoner upon parole. . . .' (§ 3060; see also, §§ 3040, 3052 and 3056) and second, the status of a parole agent as a peace officer (see § 830.5). (See Robinson, Parole Holds: Their Effect on the Right of the Parolee and the Operation of the Parole System (1972) 19 U.C.L.A.L.Rev. 759.)

(*In re Law* (1973) 10 Cal.3d 21, 23, fn. 2.)

Despite the shift of some parole responsibilities from DAPO to the courts under realignment, DAPO continues to use parole holds to control the custody status of parolees pending revocation decisions. The precise nature of the court's authority in the absence of a revocation petition being filed is unclear because of DAPO's ability to issue such holds and the ambiguous nature of the applicable statues.

DAPO clearly has a duty toward the detained parolee apart from any action taken by the court. During the pre-filing period established by section 3000.08(d), DAPO is charged with the duty to determine whether there is "good cause" to believe the parolee has committed a violation of supervision and, if so, whether intermediate sanctions should be imposed. The "good cause" determination is made by a supervising parole agent, in compliance with the requirements of *Morrissey v. Brewer* (1972) 408 U.S. 471, that there be an early determination of probable cause for detention. DAPO must determine whether to "impose additional and appropriate conditions of supervision, including rehabilitation and treatment services and appropriate incentives for compliance. . . ." (§ 3000.08(d).) During this period, for example, the parole agent may determine that no custody sanction will be imposed; instead, the parolee may need residential drug treatment, but there may be a waiting period for admission into the program. DAPO may, but is not required to, use "flash incarceration" in dealing with the violation. It is only when DAPO has determined that intermediate sanctions are no longer appropriate that it must file a petition with the court. (§ 3000.08(f).) Thus, section 3000.08(d), in conjunction with traditional parole hold authority, clearly gives DAPO jurisdiction over the parolee that is independent of the court, including authority to determine the parolee's custody status pending the filing of petition under section 1203.2.

Summary of the court's jurisdiction to determine the custody status of parolees

It is apparent from the foregoing analysis that the Legislature has statutorily authorized both the court and CDCR to control the custody status of parolees, depending on the particular circumstances of the arrest. As explained above, after the filing of a petition for revocation, the court likely has exclusive jurisdiction over a parolee's custody status. The court's jurisdiction during the period between arrest and the filing of a revocation petition, if any, is defined by a mixture of case and statutory law, discussed above. It appears from the foregoing authorities that the court likely has the jurisdiction to determine the custody status of a parolee upon the filing of a petition to revoke whether or not he was arrested with or without a warrant, and whether or not DAPO has placed a section 3056 hold on the parolee.

It is likely the court has only limited jurisdiction over the custody status of the parolee between the date of arrest and the arraignment. As acknowledged in *Williams v. Superior Court* (2015) 230 Cal.App.4th 636, 663-664, DAPO is normally entitled to review the potential of imposing intermediate sanctions for a period of up to 10 days after arrest. The court would only have authority to override a parole hold if in the particular case the delay of the arraignment was unreasonable.

No right to bail

Parolees have no right to bail on a pending violation. (*In re Law* (1973) 10 Cal.3d 21, 26.) However, once the court has jurisdiction over a petition to revoke parole, the court could set bail or release the parolee on his own recognizance if deemed appropriate.

Use of intermediate sanctions

After finding good cause that the parolee has violated his conditions of parole, the parole agency may add additional conditions of parole, including treatment and rehabilitation services, incentives, and "immediate, structured, and intermediate sanctions. . . ." (§ 3000.08(d).) The intermediate sanctions may include up to 10 days of "flash incarceration" for each violation.

"'Flash incarceration' is a period of detention in county jail due to a violation of a parolee's conditions of parole. The length of the detention period can range between one and 10 consecutive days. Flash incarceration is a tool that may be used by each county agency responsible for postrelease supervision. Shorter, but if necessary more frequent, periods of detention for violations of a parolee's conditions of parole shall appropriately punish a parolee while preventing the disruption in a work or home establishment that typically arises from longer periods of detention." (§ 3000.08(c).) The sanction is imposed without any court involvement, and is within the discretion of the supervising agency. The sanction is served without any conduct credits. (§ 4019(i).) While section 3000.08(c) seems to apply to each violation, due process concerns may arise if the cumulative period of detention becomes protracted. By its very definition, "flash incarceration" means a short period of detention that will not unreasonably disrupt a parolee's family and employment situation.

Section 3000.08(f) requires the parole agency to determine that intermediate sanctions are not appropriate before filing a formal petition to revoke supervision. Sometimes, as in a situation where a new felony offense has been charged or where the parolee has absconded, the agency may make such a determination without actually having exhausted intermediate sanctions.

Notwithstanding the express authorization in section 3000.08(d) to use flash incarceration, CDCR/DAPO has decided not to use the sanction. Whenever a parole agent determines custody time should be imposed, the agent will be required to file a formal petition with the court. It will be left to the individual judge to determine in the context of the violation whether the prior failure to use any flash incarceration is an insufficient use of intermediate sanctions, justifying a denial of the petition.

3) Referral to court

If the supervising parole agency determines that intermediate sanctions are "not appropriate," the agency may file a petition pursuant to section 1203.2 for revocation of parole with the superior court where the parolee is being supervised. (§ 3000.08(f).) The parolee must be arraigned on the petition no later than ten days after arrest. (*Williams v. Superior Court* (2015) 230 Cal.App.4th 636, 663-664.)

The petition

"The petition shall include a written report that contains additional information regarding the petition, including the relevant terms and conditions of parole, the circumstances of the alleged underlying violation, the history and background of the parolee, and any recommendations. The Judicial Council shall adopt forms and rules of court to establish uniform statewide procedures to implement this subdivision, including the minimum contents of supervision agency reports." (§ 3000.08(f).) In response to this legislative mandate, the Judicial Council has modified form CR-300 to include parole revocation proceedings. California Rules of Court, Rule 4.541, which governs the contents of reports submitted in support of petitions to revoke probation, mandatory supervision, and PRCS now includes petitions to revoke parole. The Judicial Council also has amended the *Petition for Revocation (Form CR-300)* to include parole violations.

It has been suggested that the court has the authority to summarily reject a petition if it appears facially deficient in some respect. The grounds might include the judge's perception that the supervising agency failed to effectively use intermediate sanctions. However, other than the process of a demurrer, there is no procedure in the criminal code that permits a court to summarily "reject" a pleading, including a petition to revoke parole, based on a factual determination that there has been non-compliance with the code. Thus, the proper procedure would be to hear the petition on its merits, including any evidence or explanation offered by the supervising parole officer. If the court then concludes the agency did not appropriately use intermediate sanctions, the proper course is to find the petition "not true" and reinstate the inmate on parole.

People v. Osorio (2015) 235 Cal.App.4th 1408, reversed the trial court's decision to overrule a demur challenging the sufficiency of a petition to revoke a person's parole. In making a recommendation that parole be revoked and the parolee be sentenced to 180 days, DAPO's petition stated that it relied on the Parole Violation Decision Making Instrument (PVDMI). The appellate court found such exclusive reliance failed to comply with the requirements in section 3000.08(f) and Rule 4.541 that the petition must " 'include the reasons for [the Department]'s determination that intermediate sanctions without court intervention ... are inappropriate responses to the alleged violations' (Cal. Rules of Court, rule 4.541(e))." (*Osorio*, at

p. 1415.) Furthermore, the court held the defect was not curable within the time periods specified in *Superior Court v. Williams* (2014) 230 Cal.App.4th 636, 643. The delay attendant with the resubmission of the petition would be a violation of the parolee's due process rights. (*Id*.)

In *People v. Perlas* (2020 47 Cal.App.5th 826 (*Perlas*), the People appealed the trial court's dismissal of a parole violation petition following the defendant's demurrer for DAPO's failure to adequately consider intermediate sanctions in its report to the court. In reversing the order of dismissal, the court observed: "The report described the criminal conduct for which Perlas was sentenced to state prison. It also set forth the relevant terms of his parole and explained his alleged violations, including one for drinking alcohol, which he admitted, and another for assaulting and injuring his wife. In the evaluation section of the report, the Department stated expressly, 'Intermediate sanctions have been considered. However, they have been deemed not appropriate at this time.' According to the report, the Department used its evidence-based risk assessment instrument, the PVDMI, to determine the response to Perlas's violations. The PVDMI '[i]dentifies the appropriate response to each violation based on the offender's risk level and the severity of the violation.' [Citation.] Here, the PVDMI recommended revocation, the most intensive level of response. The Department's recommendation to revoke Perlas's parole was consistent with this PVDMI analysis. [¶] The report also provided specific reasons intermediate sanctions were inappropriate. In addition to identifying the PVDMI recommendation, the report described his drinking and allegedly striking his spouse in the context of the crimes of which he had been committed. The parole agent's statement in the report that '[d]omestic violence is a serious social problem and a national health concern' reflects his assessment that Perlas's alleged misbehavior was serious. In light of his concerns, he 'ha[d] no choice but to refer this matter to the court.' In context, this statement appears to be a colloquial expression of concern over Perlas's conduct and not a conclusion that the officer was legally bound to recommend revocation. These assertions were enough to defeat Perlas's demurrer." (*Perlas*, at pp. 833-834; footnotes omitted.)

Petition by the district attorney

The district attorney may file a petition for revocation of parole directly with the court without first using intermediate sanctions. (*People v. Zamudio* (2017) 12 Cal.App.5th 8 (*Zamudio*).) In *Zamudio* the district attorney, using Judicial Council Form CR-300, filed a petition to revoke the defendant's parole. The petition did not state the reasons why intermediate sanctions would be inappropriate as required by section 3000.08(f) and California Rules of Court, Rule 4.541(e). The appellate court found the petition proper. It held the requirements of section 3000.08(f) regarding the use of intermediate sanctions apply only to petitions filed by the supervising agency, not to petitions filed by the district attorney. If such a petition is filed, however, the court must refer the matter to the supervising agency for a report

under section 1203.2(b)(1). The report should include "an intermediate sanction assessment." "Even if not required by statute or the Rules of Court, the best practice would be for the parole officer to address the appropriateness of intermediate sanctions to assist the court in exercising its discretion in the interest of justice. Such an assessment would also serve as a check on potentially overzealous deputy district attorneys or parole officers." (*Zamudio*, at p. 15.)

In *People v. Castel* (2017) 12 Cal.App.5th 1321, 1325-1326, the court of appeal likewise determined that the written report required to be filed with petitions brought by a parole or probation officer are not required with petitions filed by district attorney. However, the court must refer the matter to the probation officer for a report pursuant to section 1203.2, subdivision (b)(1). "If the petition [for a supervision violation] is filed by the parole or probation officer, the petition must 'include a written report that contains additional information regarding the petition.' (§ 3000.08, subd. (f).) That additional information includes: (1) 'the relevant terms and conditions of parole' or postrelease community supervision, (2) 'the circumstances of the alleged underlying violation,' (3) 'the history and background of the parolee,' (4) 'recommended sanctions,' and (5) 'the reasons for [the] agency's determination that intermediate sanctions without court intervention'—such as electronic monitoring, additional services or incentives, or "flash incarceration' (that is, a short stint in jail for up to 10 consecutive days)—'are inappropriate responses to the alleged violations.' (§§ 3000.08, subds. (e), (f) & 3454, subd. (b); Cal. Rules of Court, rule 4.541(c), (e).) ¶ If the petition is filed by the district attorney, no such written report is required. (Cf. § 3000.08, subd. (f); Cal. Rules of Court, rule 4.541.) Instead, the court will 'refer ... the petition to the probation or parole officer,' who must then prepare and submit a written report to the court. (§ 1203.2, subd. (b)(1).) ¶ A supervising agency's failure to include the statutorily required written report with a petition for revocation renders the pleading deficient and subject to demurrer. (*Osorio*, *supra*, 235 Cal.App.4th at pp. 1412-1415, 185 Cal.Rptr.3d 881; see also *People v. Hronchak* (2016) 2 Cal.App.5th 884, 891-892, 206 Cal.Rptr.3d 483 [applying this rule to information that California Rules of Court, rule 4.541 specifies must be included in the written report].) ¶ The trial court correctly overruled the demurrer in this case. The pertinent statutes detailed above do not require a petition to revoke parole or postrelease community supervision filed by a district attorney to be accompanied by a written report. Accordingly, the district attorney's failure to include such a report does not render the pleading deficient."

People v. Kurianski (2020) 54 Cal.App.5th 777, holds when a parolee accepts a court's offer to admit a parole violation for a specified sentence and expressly waives his right to the preliminary and final parole hearings, he has waived his statutory right to have a written report from the parole agency. (*Id*., at pp. 782-783.)

The court procedure

In July 2012 the Governor signed into law budget trailer bills that included various statutory amendments designed to promote uniform revocation procedures for probation, mandatory supervision, postrelease community supervision, and parole. The legislation was also designed to "simultaneously incorporate the procedural due process protections held to apply to probation revocation procedures under *Morrissey v. Brewer* (1972) 408 U.S. 471, and *People v. Vickers* (1972) 8 Cal.3d 451, and their progeny." (2011 Realignment Legislation, SB 1023, Sec. 2(b), effective June 27, 2012.) As a result, courts generally will apply longstanding probation revocation procedures under section 1203.2 to parole revocations.

The use of electronic recording

Because parole revocation proceedings involve felony matters, electronic recording of the proceedings is not permitted. Government Code, section 69957 permits electronic recording only in limited matters where a court reporter is not available; felony matters are not included in the exceptions.

The hearing officer

Section 3000.08 only states that the "court" must conduct revocation proceedings pursuant to section 1203.2. Section 1203.2(f), however, clarifies that "court" means a "judge, magistrate, or revocation hearing officer described in Section 71622.5 of the Government Code." To be eligible to serve as a hearing officer under Government Code section 71622.5, the person must meet one of the following criteria: (a) He or she has been an active member of the State Bar of California for at least 10 years continuously prior to appointment, (b) He or she is or was a judge of a court of record of California within the last five years, or is currently eligible for the assigned judge program, or (c) He or she is or was a commissioner, magistrate, referee, or hearing officer authorized to perform the duties of a subordinate judicial officer of a court of record of California within the last five years. Each court may prescribe additional minimum qualifications and mandatory training for hearing officers. The superior courts of two or more counties may appoint the same person as a hearing officer.

"[T]he superior court of any county may appoint as many hearing officers as deemed necessary to conduct parole revocation hearings pursuant to Sections 3000.08 and 3000.09 of the Penal Code and to determine violations of conditions of postrelease supervision pursuant to Section 3455 of the Penal Code, and to perform related duties as authorized by the court. A hearing officer appointed pursuant to this section has the authority to conduct these hearings and to make determinations at those hearings pursuant to applicable law." (Govt. Code, § 71622.5(b).) The stipulation of the parties specified by Code of Civil Procedure, section 259(d) is not

required before a subordinate hearing officer may conduct revocation-related hearing.

Notwithstanding the provisions of Government Code, section 71622.5, however, use of a subordinate judicial officer to hear the violation of parole may only occur with a stipulation of the parties. "Government Code section 71622.5 authorizes commissioners to conduct parole revocation hearings as a necessary part of the implementation of the Criminal Justice Realignment Act of 2011. However, article VI, sections 21 and 22 of the California Constitution limit commissioners to the performance of 'subordinate judicial duties' in the absence of a stipulation by the parties. ¶ We hold that revoking parole and committing a defendant to jail for violation of parole are not subordinate judicial duties that may be performed by a commissioner in the absence of a stipulation by the parties. As has long been recognized: 'the issuance of an order which can have the effect of placing the violator thereof in jail is not a 'subordinate judicial duty." ' (*In re Plotkin* (1976) 54 Cal.App.3d 1014, 1017, 127 Cal.Rptr. 190.) Because defendant did not stipulate to the commissioner revoking his parole and committing him to jail, the postjudgment order must be reversed." (*People v. Berch* (2018) 29 Cal.App.5th 966, 970.)

The role of a judge serving in the Assigned Judges Program is not entirely clear. The Judicial Council suggests that because assigned judges serve solely in the discretion of the Chief Justice, they may not be hired as a hearing officer under Government Code section 71622.5. Furthermore, working for a specific court without assignment from the Chief Justice may be considered practicing law, an activity prohibited by the Assigned Judges Program. Courts and judges must proceeding with caution until the issue is fully resolved.

Time limit for holding the revocation hearing

If the violation cannot be resolved informally, the matter should be set for a contested evidentiary hearing. The Court of Appeal in *Williams v. Superior Court* (2015) 230 Cal.App.4th 636, 664, indicated the hearing must be set within 45 days of arrest, unless time is waived by the parolee. While the California Supreme Court in *People v. DeLeon* (2017) 3 Cal.5th 640, generally rejected the strict time lines directed by *Williams*, it did not directly discuss when the final hearing on the merits should be held. *DeLeon* determined only that the preliminary hearing should be held "as promptly as convenient after arrest." (*DeLeon*, *supra*, at p. 659.) Whether DeLeon can be interpreted to mean that the final hearing, also, should be held within a "reasonable time" is not clear. Until the issue is specifically resolved, courts are advised to hold the final violation hearing as soon as reasonably possible unless the parolee has waived time for the hearing.

The nature of the revocation hearing

Drawing from *Morrissey*, the Supreme Court in *People v. DeLeon* (2017) 3 Cal.5th 640, 654, observed that the parolee had a due process right to a final revocation hearing: "[T]he parolee must have an opportunity for a final hearing to determine if parole should be revoked. The minimum due process requirements for this hearing are: (1) written notice of the alleged parole violations; (2) disclosure of the evidence against the parolee; (3) an opportunity for the parolee 'to be heard in person and to present witnesses and documentary evidence'; (4) 'the right to confront and cross-examine adverse witnesses,' unless good cause exists to deny confrontation; (5) a ' "neutral and detached" hearing body'; and (6) a written decision regarding the evidence and the reasons for revoking parole. (*Morrissey*, *supra*, 408 U.S. at p. 489, 92 S.Ct. 2593.)"

People v. Martin (2020) 58 Cal.App.5th 189, holds there is no right to a jury determination of an alleged parole violation based on *United States v. Haymond* (2019) 588 U.S. ___, 139 S.Ct. 2369.

Jurisdiction for hearing parole violations

Jurisdiction over the parolee is established by section 3000.08(a): offenders will "be subject to parole supervision by the Department of Corrections and Rehabilitation and the jurisdiction of the court in the county where the parolee is released, resides or in which an alleged violation of supervision has occurred, for the purpose of hearing petitions to revoke parole and impose a term of custody. . . ." (§ 3000.08(a).) Sections 1203.2(b)(1) and 3000.08(f) provide that any petition to revoke parole may be heard either in the court in the county in which the parolee is being supervised or in the county where the alleged violation of supervision occurred. SB 75, Chapter 31 of Statutes 2013 initially amended the law to provide for jurisdiction in the county of arrest. SB 76, Chapter 32 of Statutes 2013 amended the provisions to grant jurisdiction in the county where the violation occurred. The language of Chapter 32 controls.

Permitting the adjudication of parole violations in the county of the alleged violation is consistent with the U.S. Supreme Court's requirement in *Morrissey* that the hearing be held physically close to the alleged violation so that witnesses will be available. (*Morrissey v. Brewer* (1972) 408 U.S. 471, 484.)

The statutes do not address which agency has the responsibility to transport the parolee to the proper county. It is unlikely that the burden will fall to the arresting county. Since physical supervision of the parolee is provided by DAPO, presumably the duty will fall to that agency to transport the offender to the county of supervision if the agency chooses to pursue prosecution of the violation. Certainly transportation issues may be subject to adjustment depending on whether the

arresting county also is pursuing an independent criminal prosecution against the parolee.

Right to counsel

Because the violation proceedings are being conducted in accordance with section 1203.2, the defendant will be entitled to counsel, including, if necessary, appointed counsel. (See *People v. Vickers* (1972) 8 Cal.3d 451, 461.) See also section 3000.08(f), which references the parolee's option of waiving the right to counsel.

Validity of the conditions of supervision

Depending on the nature of the violation, it may be necessary for the court to determine the validity of the specific condition that has formed the basis of the violation. The inmate may be subject to two broad categories of parole conditions. All inmates will be subject to "general" conditions of parole such as search and seizure, reporting requirements, non-possession of firearms and other weapons, and the duty to notify the parole agent of any change of employment or residence. The inmate may also be subject to "special" conditions of supervision, depending on the nature of underlying offense. Inmates convicted of sex offenses or gang crimes, for example, will be required to observe special conditions related to risk factors in connection with those crimes. Challenges to the validity of conditions of supervision most likely will arise with the special conditions.

If the condition imposes on a constitutional right, the condition must be reasonably related to the commitment offense, reasonable, and narrowly drawn. "This traverse of applicable law leads to these conclusions: (1) the probationer cannot be subjected on the 'voluntary consent' theory to *any* condition, *any* deprivation, of right, constitutional or not, the trial judge may conceive; (2) the probationer who has reduced his expectation of privacy by an appropriate waiver of his Fourth Amendment rights (as is authorized in a factual situation found in *People v. Mason*) is not left totally naked, bereft of all constitutional protection (*People v. Mason* [(1971)] 5 Cal.3d 759; *United States v. Consuelo-Gonzalez*, *supra.*, 521 F.2d 259; *People v. Superior Court (Stevens)*, 12 Cal.3d 858, 861; (3) the condition of probation must be 'directly' or 'reasonably' related to the crime proved to have been committed; (4) there must exist a 'reasonable relationship' between the condition imposed and deterring future similar criminality; (5) where the terms of probation authorize an invasion of a constitutional right, the condition must be 'narrowly drawn'; to the extent it is not reasonably related to the offense to which the probationer pleaded it is overbroad; (6) the broad power granted the sentencing judge does not authorize through a 'consent' or 'waiver' process the imposition of conditions of probation for ”rehabilitative“ purposes not related to the offense of which the probationer stands convicted, no matter how superficially rational they appear; and (7) both the statute and Constitution mandate the conditions be

reasonable, reasonable in proportion, as well as reasonably related, to the crime committed." (*People v. Keller* (1978) 76 Cal.App.3d 827, 838, disapproved on other grounds in *People v. Welch* (1993) 5 Cal.4th 228,237.)

The general rule has been stated by our Supreme Court in *People v. Lent* (1975) 15 Cal.3d 481, 486: "A condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality ....' (*People v. Dominguez* (1967) 256 Cal.App.2d 623, 627.) (3) Conversely, a condition of probation which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality." (Footnote omitted.)

Ability of the court to issue a protective order

For a full discussion of the ability of the court to issue a criminal protective order under section 136.2 during the pendency of a proceeding to determine whether there has been a violation of supervision, see Section L, *infra*.

Information about the parolee

The Department of Justice is required to maintain a summary of historical criminal information about a defendant. This information is available to "[a] public defender or attorney of record when representing a person in a criminal case, or a parole, mandatory supervision pursuant to paragraph (5) of subdivision (h) of Section 1170, or postrelease community supervision revocation or revocation extension proceeding, and if authorized access by statutory or decisional law." (§ 11105(b)(9).)

Sanctions imposed by the court

If the parolee is found in violation of his parole, the court has the authority to do any of the following:

- Return the person to parole supervision with a modification of conditions, if appropriate, including a period of incarceration in county jail of up to 180 days for each revocation. (§ 3000.08(f)(1).) For every two days of actual custody served, the defendant will receive a total of four days of credit under section 4019(a)(5).

- Revoke parole and order the person to confinement in the county jail for up to 180 days. (§ 3000.08(f)(2).) For every two days of actual custody served, the defendant will receive a total of four days of credit under section 4019(a)(5). Sections 3000.08(f)(1) and (f)(2) are functionally equivalent. The

original draft of section 3000.08(f)(2) referenced the court's ability to terminate parole. The Legislature later determined to leave such authority solely with the BPH. The reverence to "terminate" parole was dropped, but the remainder of the statute was left intact. Unlike section 3455(a)(2) for PRCS, section 3000.08(f)(2) does not contain language suggesting the court has the power to "terminate" parole. The traditional parole discharge provisions of section 3001 apply to these inmates. If the inmate's parole is fully revoked, the court should order into execution the parole revocation fine imposed under section 1203.45(a).

The court may not terminate parole under the general provisions of the realignment law, nor may it use section 1385 to accomplish the same result. However, the court may terminate *supervision* over the defendant. (*People v. VonWahlde* (2016) 3 Cal.App.5th 1187.)

- Refer the person to a reentry court pursuant to section 3015 or other evidence-based program in the court's discretion.

- Place the inmate on electronic monitoring as a condition of reinstatement on parole or as an intermediate sanction in lieu of returning the inmate to custody. (§ 3004(a).)

- Generally the court may not return the inmate to state prison. The only exception is section 3000.08(h), which allows only designated inmates returned to prison on a parole violation. If the parolee is subject to life parole under sections 3000(b)(4) and 3000.1 for murder or is required to register as a sex offender after committing a designated sex offense against a child under 14, and the court finds the parolee has violated the law or a condition of parole, the parolee "shall be remanded to the custody of the Department of Corrections and Rehabilitation and the jurisdiction of the Board of Parole Hearings for the purpose of future parole consideration." (§ 3000.08(h).)

- If the parole violation is a non-violent drug possession offense (NVDP), the court must observe the restrictions of Proposition 36 (the drug initiative) allowing treatment, but not incarceration until the third NVDP violation. (See *People v. Armogeda* (2015) 233 Cal.App.4th 428.)

- The trial court has no authority to terminate a parolee's supervision under section 1203.2, subdivision (b)(1). (*People v. Johnson* (2020) 58 Cal.App.5th 363.)

The application of section 1385 to parole violations

Section 1385, authorizing the court to dismiss certain matters in the interests of justice has no application to parole violation proceedings. (*People v. Wiley* (2019) 36 Cal.App.5th 1063 (*Wiley*). The court observed: "Simply put, a parole revocation proceeding is not an 'action or a part thereof as contemplated by section 1385.' (*Id.* at p. 1197, 220 Cal.Rptr.3d 337.) A criminal 'action' is defined as '[t]he proceeding by which a party charged with a public offense is accused and brought to trial and punishment.' (§ 683.) Parole revocation petitions and hearings do not fit within that definition, as they occur *after* the proceeding by which the defendant is brought to trial and punished. '[T]he revocation of parole is not part of a criminal prosecution.... Parole arises after the end of the criminal prosecution, including imposition of sentence.' [Citations.] Nor can such proceedings plausibly be classified as 'part' of an action, which for purposes of section 1385 means 'charges or allegations in an indictment or information.' (*People v. Hernandez* (2000) 22 Cal.4th 512, 523, 93 Cal.Rptr.2d 509, 994 P.2d 354 [holding sanity proceedings do not constitute an 'action' or part thereof for purposes of section 1385, subdivision (a)]; *Varnell, supra*, 30 Cal.4th at p. 1137, 135 Cal.Rptr.2d 619, 70 P.3d 1037 [sentencing factors not subject to section 1385 dismissal because they 'are not included as offenses or allegations in an accusatory pleading'; *VonWahlde*, *supra*, 3 Cal.App.5th at p. 1197, 220 Cal.Rptr.3d 337.) The conclusion from these authorities that probation revocation petitions are not actions or parts thereof for purposes of section 1385 is inescapable." (*Wiley*, at p. 1068.)

Whether court may impose consecutive time

It is unlikely the court has the ability to impose a term in jail as a sanction for violation of parole, then impose a new substantive term consecutive to the parole term. The issue was addressed in *People v. Mathews* (1980) 102 Cal.App.3d 704, 713: "Penal Code section 669 confers jurisdiction on the sentencing court to determine whether a new term of imprisonment should run consecutive to the previous terms imposed. Here the court ordered the new term to run consecutive to a parole revocation period. However, as previously discussed, Penal Code section 3000 makes a distinction between the *expiration of a term of imprisonment* as opposed to release on parole or confinement on revocation of parole. (*People v. Espinoza* [(1979)] 99 Cal.App.3d 59, 72-73.) As respondent argues, it would be anomalous to find appellant's prior prison term "completed" for enhancement purposes, and then to characterize it as 'currently running' for the purpose of imposing consecutive sentences. Logically, when a person has served a determinate sentence and is reimprisoned upon revocation of parole, he has not returned to prison for the purpose of serving the balance of his original term. (Pen. Code, § 3000, subd. (a); *People v. Espinoza*, *supra.*, 99 Cal.App.3d 59; *Community Release Board v. Superior Court* (1979) 91 Cal.App.3d 814, 817.) Rather, he is reimprisoned for the purpose of serving a maximum of 12 months for violating his parole. (Pen.

Code, § 3057, subd. (a).) Therefore, we conclude that while the enhancement is valid, the consecutiveness of the sentence should be stricken." (Emphasis in original.)

Early termination or modification of parole

A parolee cannot seek early termination or modification of parole. Specifically, section 1203.2(b)(1) provides that a "person supervised on parole . . . may not petition the court pursuant to this section for early release from supervision, and a petition under this section shall not be filed solely for the purpose of modifying parole. Nothing in this section shall prohibit the court from modifying parole when acting on its own motion or a petition to revoke parole."

The court may not terminate parole or parole supervision early. (*People v. Johnson* (2020) 58 Cal.App.5th 363.) Unlike section 3455(a)(2) for PRCS, section 3000.08(f)(2) does not contain language suggesting the court has the power to "terminate" parole. Furthermore, sections 1203.2(a) specifies the court shall have no authority under that section to terminate parole. Section 1202.3, which generally governs the modification and early termination of other forms of supervision, does not apply to persons on parole.

Parole services

If the court reinstates the inmate on parole, the inmate will continue under the supervision of the supervising parole agency. All treatment or other rehabilitative programs will be provided through the parole agency. These resources will vary with the regional parole office. An indication of available parole resources may be found at **http://www.cdcr.ca.gov/community_partnerships/resource_directory.aspx**. The request for information may be county specific. The treatment recommendations should be based on some validated risk assessment tool and the Parole Violation Decision Making Index (PVDMI).

Transfer of parole to different county

Although there is no formal statutory procedure for the transfer of an inmate's parole to a different county, DAPO regularly transfers parole supervision on an informal basis when deemed appropriate. The transfer process is not done under section 1203.9, which is limited to the transfer of persons on probation or mandatory supervision.

Parolee sentenced for new crime committed while on parole

What DAPO will do if the parolee is sentenced on a new crime while on parole will depend on the nature of the new crime. If the parolee is on parole and commits a

new crime punishable under section 1170(h), whether a straight or split sentence, DAPO will terminate its supervision so as not to duplicate supervision by county probation officers. Except for arrest on a suspected parole violation, "any person who is convicted of a felony that requires community supervision and who still has a period of state parole to serve shall discharge from state parole at the time of release to community supervision." (§ 3000.08(k).) Because of the nature of the criminal record of persons on parole after July 1, 2013, very few will qualify for sentencing under section 1170(h)(5). Most of the persons who commit a crime while on parole will fit an exclusion under section 1170(h)(3) and must be sentenced to state prison. Under such circumstances, DAPO will continue to supervise the parolee, adjusted to meet any new terms.

4) Acceptance of proposed sanctions

If the supervised person agrees in writing to the terms of any modification or termination of supervision, personal appearance in court may be waived. The supervised person must be advised of the right to consult with counsel, including the right to appointed counsel. A written waiver is required if the supervised person waives the right to counsel. If the supervised person consults with counsel and subsequently agrees to the modification or termination, and waives his appearance, the agreement must be signed by counsel. (§ 1203.2(b)(2).) Sections 3000.08(f) and 3455(a) provide that persons supervised under PRCS or parole may at any point during the adjudication waive, in writing, the right to counsel, admit the violation, waive a court hearing, and accept the proposed modification. Unlike section 1203.2(b)(2), there is no requirement that defense counsel sign off on the agreement. (For a discussion of the procedural requirements of a waiver and the authority of the court upon entry of a stipulated disposition, see discussion in Section M, *infra*.)

Because of the *Valdivia* consent decree, however, DAPO will not be making offers to resolve pending parole violations. (See section O, *infra*.) Early resolution, if it is to occur, likely will be at the arraignment on the petition for revocation. Because of the limited potential custody sanction available to the court, counsel generally will quickly resolve the matter.

5) Parole revocation fine

Courts are required to assess a "parole revocation restitution fine" under section 1202.45(a) at the time of sentencing on the underlying conviction that resulted in the prison term. The fine is to be imposed in the same amount as assessed under section 1202.4(b), and is to apply to all persons convicted of a crime sentenced to prison where the term will include a period of parole. The fine is stayed pending satisfactory completion of parole.

Prior to the realignment legislation, if there is a substantial interruption of an inmate's parole status because of incarceration, such as while serving time on a parole violation, the records division of DAPO would attempt collection of the fine. The process after July 1, 2013, is not clear. Consistent with its previous practice, DAPO has indicated an intent to ask for the fine if the court revokes parole and orders any significant custody time, even if parole is reinstated. It will not be put into play with flash incarceration or with a referral to a re-entry court. No existing statute addresses the actual collection of the fine. The matter is under review by the Governor's office and the Legislature.

6) Application of Section 1368 proceedings

See discussion in Section N, *infra*.

7) Potential conflict with Marsy's Law

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

- The right to a probable cause hearing no later than 15 days following his arrest for the parole violation.
- The right to an evidentiary revocation hearing within 45 days following his arrest for the parole violation.
- The right to counsel on a limited basis.
- The violation must be proved by a preponderance of the evidence by testimony, documentary evidence, or "hearsay evidence offered by parole agents, peace officers, or a victim." (§ 3044(a)(5).)

A potential conflict arises with the realignment legislation because a number of the rights and procedures outlined in section 3044 are not included in section 1203.2, the statute that now governs proceedings for revocation of parole.

The parole revocation procedures under section 3044 have been challenged in federal court. In the matter of *Valdivia v. Brown*, CIV S-94-671, the district court judge observed: "[Section] 3044(a) provides that California parolees are entitled only to an enumerated list of procedural rights that does not include all of the procedures that the Supreme Court has determined to be required under the Due Process Clause. Defendants argue that section 3044(a) merely makes clear that under California law, parolees are not entitled to any process other than the Constitutional minimums. Defendants assert 'although section 3044 does not exhaustively list in detail every hearing procedure required by due process, it

incorporates all due process requirements not specifically listed in the statute through the obligation to provide a "hearing."' Defendants' argument is untenable under a plain reading of the section. It is hard to see how the words 'no person shall be entitled to procedural rights other than the following,' followed by a short enumerated list can be interpreted as incorporating any procedures that aren't specifically listed. By its plain terms Proposition 9 precludes reading any additional procedural rights into the statute." The judge invalidated as unconstitutional sections 3044(a), 3044(a)(1) – (3), 3044(a)(5), and 3044(b), except the court has ordered that violation hearings be held within 45 days of the hold being placed.

Section 3044 applies to the Board of Prison Hearings, not the courts. (*People v. DeLeon* (2017) 3 Cal.5th 640, 649.) "The voters did make section 3044 applicable to BPH or 'its successor in interest.' (§ 3044, subd. (a).) However, the superior court, an arm of the judicial branch, is not a successor in interest to BPH, an agency of the executive. (See §§ 3044, subd. (b), 5075.) To conclude otherwise would ignore the distinct roles of these two branches of government and create anomalies in other portions of the statute. Subdivision (a) refers to BPH 'or its successor in interest' as the 'state's parole authority.' (§ 3044, subd. (a).) While the courts handle most revocation hearings postrealignment, they do not act as the 'state's parole authority' in other respects, including determining parole suitability and setting parole release dates. (See §§ 3040, 3041, 5075.1.) Nor do the superior courts 'report to the Governor' as required under section 3044, subdivision (b). A more reasonable reading of the 'successor in interest' provision is that it applies in the event that another administrative agency assumes responsibility for overseeing the parole process as the 'state's parole authority.' (§ 3044, subd. (a).) ¶ We also find no evidence that the Legislature intended to incorporate section 3044's procedures into the Realignment Act. The act inserted parole revocation provisions into section 1203.2, which falls under part 2, title 8, of the Penal Code (§ 1191 et seq.), governing 'Judgment and Execution' in the superior court. It did not cross-reference the provisions of section 3044. Rather, the Legislature stated its intent 'that these amendments simultaneously incorporate the procedural due process protections held to apply to probation revocation procedures under Morrissey v. Brewer (1972) 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484, and People v. Vickers (1972) 8 Cal.3d 451, 105 Cal.Rptr. 305, 503 P.2d 1313, and their progeny.' (Stats. 2012, ch. 43, § 2, subd. (b).)" (Footnote omitted.)

8) Potential application of *Valdivia* consent decree

For a full discussion of the potential application of the *Valdivia* consent decree to parole proceedings, see Section O, *infra*.

9) Affordable Healthcare Act

Section 4011.11 has been enacted to facilitate the ability of inmates to obtain coverage under the Affordable Healthcare Act. "It is the intent of the Legislature in enacting this act to, among other things, ensure that county human services agencies recognize that (a) federal law generally does not authorize federal financial participation for Medi-Cal when a person is an inmate of a public institution, as defined in federal law, unless the inmate is admitted as an inpatient to a noncorrectional health care facility, (b) federal financial participation is available after an inmate is released from a county jail, and (c) the fact that an applicant is currently an inmate does not, in and of itself, preclude the county human services agency from processing the application submitted to it by, or on behalf of, that inmate." (Section 1, AB 720, Ch 646.)

The board of supervisors in each county is to designate the sheriff or a community-based organization to assist inmates with submitting an application for healthcare benefits. (§ 4011.11(a).)

"Consistent with federal law, a county jail inmate who is currently enrolled in the Medi-Cal program shall remain eligible for, and shall not be terminated from, the program due to his or her detention unless required by federal law, he or she becomes otherwise ineligible, or the inmate's suspension of benefits has ended pursuant to Section 14011.10 of the Welfare and Institutions Code." (§ 1011.11(c).) "The fact that an applicant is an inmate shall not, in and of itself, preclude a county human services agency from processing an application for the Medi-Cal program submitted to it by, or on behalf of, that inmate." (§ 4011.11(e).)

10) Work furlough programs

Effective January 1, 2014, section 1208 has been expanded to allow felons sentenced to county jail to be eligible for work furlough programs. The new provisions apply when "a person is convicted and sentenced to the county jail, or is imprisoned in the county jail for nonpayment of a fine, for contempt, or as a condition of probation for any criminal offense. . . ." (§ 1208(b).) According to the Legislative Counsel's Digest, the change is intended to include persons serving a sentence imposed under section 1180(h) and for violations of postrelease community supervision. It is not clear whether the intent is to include persons serving a sentence for a parole violation, although the plain language of the statute would suggest that it does apply.

11) Application of *People v. Leiva*

People v. Leiva (2013) 56 Cal.4th 498, addresses the jurisdiction of the court to adjudicate an alleged violation of probation that occurs after the original probation

term expires, but during a time when the defendant's probationary period is summarily revoked.

The defendant was placed on probation for three years on April 11, 2000. His conditions of probation required that he obey all laws, not enter the country illegally, and report to the probation officer upon his release from custody and upon his entry into this country. Defendant completed his original custody term and was released from custody. Because he had previously entered the country illegally, however, he was immediately deported prior to any opportunity to report to his probation officer. Thereafter the probation department filed a revocation petition based solely on the failure to report. When the defendant failed to appear at a revocation hearing in September 2001, the court summarily revoked defendant's probation and issued a warrant. The defendant was arrested on the warrant in November 2008. The trial court determined there was no wilful violation of the terms of probation as alleged in the initial revocation petition because the defendant was deported prior to having an opportunity to contact the probation officer. However, the trial court also found the defendant violated his terms of probation in 2007 when he reentered this country without notifying the probation officer. Based on the second alleged violation, the court reinstated the defendant on probation and extended its term to June 2011. The defendant appealed the reinstatement and extension. While the appeal was pending, the defendant again was deported, and again he reentered this country illegally. Based on the third alleged violation, the court revoked probation and committed the defendant to state prison for two years. The defendant appealed the revocation and state prison commitment based on the illegality of the first revocation proceeding. (*Leiva*, at pp. 502-504.)

The decision in *Leiva* turns on the application of that portion of section 1203.2(a) which provided at the relevant times in this case: "[t]he revocation [of probation], summary or otherwise, shall serve to toll the running of the probationary period." The court determined this language was adopted by the Legislature to preserve the court's jurisdiction to adjudicate violations that occur within the original term of probation, but not those that occur after. "[W]e conclude summary revocation of probation preserves the trial court's authority to adjudicate a claim that the defendant violated a condition of probation during the probationary period. As noted, the purpose of the formal proceedings 'is not to revoke probation, as the revocation has occurred as a matter of law; rather, the purpose is to give the defendant an opportunity to require the prosecution *to prove the alleged violation occurred and justifies revocation.*' (*People v. Clark* [(1996) 51 Cal.App.4th 575,] 581, italics added.) We therefore agree with the court in ([*People v. Tapia* (2001) 91 Cal.App.4th 738,] that 'the [authority] retained by the court is to decide *whether* there has been a violation during the period of probation and, if so, *whether* to reinstate or terminate probation.' (*Tapia*, *supra*, 91 Cal.App.4th at pp. 741–742.) [Footnote omitted.] Accordingly, a trial court can find a violation of probation and

then reinstate and extend the terms of probation 'if, and only if, probation is reinstated based upon a violation that occurred during the unextended period of probation.' (*Tapia, supra,* 91 Cal.App.4th at p. 741.) This result fairly gives the defendant, if he prevails at the formal violation hearing, the benefit of the finding that there was no violation of probation during the probationary period. [Footnote omitted.] ¶ On the other hand, if the prosecution, at the formal violation hearing held after probation normally would have expired, is able to prove that the defendant did violate probation before the expiration of the probationary period, a new term of probation may be imposed by virtue of section 1203.2, subdivision (e), and section 1203.3. This result fairly gives the prosecution, if it prevails at the formal violation hearing, the benefit of the finding that there was a violation of probation during the probationary period." (*Leiva*, at pp. 515-516; emphasis in original.)

Justice Baxter, in concurring with the result reached by the majority, made the following additional observation: "Of primary concern is the fact that a summary revocation left unresolved by the probationer's absence interferes with the *supervised* form of release that probation is intended to represent. (See, e.g., §§ 1202.8, subd. (a), 1203, subd. (a).) Imposition of probation for a specified period contemplates that the probationer will be subject to supervision by the court and probation authorities for that *entire amount or length of time,* even if he or she commits *no* violations in the interim. Supervision for the entire probationary period, as agreed between the probationer and the court, is a fundamental prerequisite to the successful and lawful completion of a grant of *supervised* probation. . . . ¶ Under these circumstances, the probationer should not be absolved of a portion of the originally contemplated *length* of supervised release simply because his or her absence extended beyond the originally imposed *calendar period* of probation. On the contrary, whenever the court regains physical custody over the probationer, the period of his or her absence should not necessarily be counted in determining whether the probationary time of *supervised* release has lapsed. If it has not, the court should retain full authority, in the interests of justice, and within the limits of the relevant statutory provisions, to determine what probationary consequences should flow from conduct the probationer has committed in the interim. The current version of section 1203.2(a) should expressly so recognize." (*Leiva*, at pp. 519-520; emphasis in original.)

Application of *Leiva* to parole

Leiva concerns the jurisdiction of the court to adjudicate *probation violations* after the expiration of the original term imposed by the court. For the reasons discussed below, it is unlikely the case has any application to revocation proceedings related to *parole*.

Central to *Leiva* is the determination by the Supreme Court that the tolling provisions of section 1203.2(a) were only intended by the Legislature to allow the

court to adjudicate a violation of probation occurring during the period of supervision ordered by the court, but the hearing is conducted after the term has expired. *Leiva* held there was no intent to extend the supervision period indefinitely pending the apprehension of the defendant. Because the revocation and modification procedures in section 1203.2 now apply to mandatory supervision, PRCS and parole, without additional statutory provisions indicating a different legislative intent, *Leiva* likely would apply to these other forms of supervision. The Legislature, however, has, in fact, adopted additional provisions relating to mandatory supervision, PRCS and parole that reflect an intent to preserve the original supervision period when the defendant has absconded.

Section 1170(h)(5)(B)(i), with respect to mandatory supervision, provides that "[a]ny time period which is suspended because a person has absconded shall not be credited toward the period of supervision." Similarly, with respect to PRCS, section 3456(b) provides that the "[t]ime during which a person on postrelease supervision is suspended because the person has absconded shall not be credited toward any period of postrelease supervision." Section 3455(e), also with respect to PRCS, provides "[a] person shall not remain under supervision or in custody pursuant to this title on or after three years from the date of the person's initial entry onto postrelease community supervision, except when his or her supervision is tolled pursuant to Section 1203.2 or subdivision (b) of Section 3456." Finally, section 3000(b)(6), with respect to parole, provides the "[t]ime during which parole is suspended because the prisoner has absconded or has been returned to custody as a parole violator shall not be credited toward any period of parole unless the prisoner is found not guilty of the parole violation." In each of these categories of supervision, the Legislature has made it clear that the period of supervision is not reduced by any of the time when the defendant is at large.

Indeed, these sections, not applicable to persons on probation, appear to directly address Justice Baxter's concerns raised in his concurring opinion in *Leiva*: "[W]henever the court regains physical custody over the probationer, the period of his or her absence should not necessarily be counted in determining whether the probationary time of *supervised* release has lapsed. If it has not, the court should retain full authority, in the interests of justice, and within the limits of the relevant statutory provisions, to determine what probationary consequences should flow from conduct the probationer has committed in the interim. The current version of section 1203.2(a) should expressly so recognize." (*Leiva*, at p. 520; emphasis in original.)

L. Issuance of criminal protective orders for persons on mandatory supervision, PRCS or parole

Section 136.2(a) permits a court "with jurisdiction over a criminal matter" to issue a criminal protective order "[u]pon a good cause belief that harm to, or intimidation

or dissuasion of, a victim or witness has occurred or is reasonably likely to occur." It was well established that these protective orders, with certain exceptions, were authorized only during the pendency of a criminal proceeding and may not be issued as part of a post-disposition sentence. (*People v. Stone* (2004) 123 Cal.App.4th 153, 159-160; see generally *People v. Selga* (2008) 162 Cal.App.4th 113, 118; *People v. Ponce* (2009) 173 Cal.App.4th 378, 382-383; and *People v. Robertson* (2012) 208 Cal.App.4th 965, 995-996.) Section 136.2(i)(1) now provides: "In all cases in which a criminal defendant has been convicted of a crime involving domestic violence as defined in Section 13700 or in Section 6211 of the Family Code, a violation of Section 261, 261.5, or 262, or any crime that requires the defendant to register pursuant to subdivision (c) of Section 290, the court, at the time of sentencing, shall consider issuing an order restraining the defendant from any contact with the victim. The order may be valid for up to 10 years, as determined by the court. This protective order may be issued by the court regardless of whether the defendant is sentenced to the state prison or a county jail or subject to mandatory supervision, or whether imposition of sentence is suspended and the defendant is placed on probation. It is the intent of the Legislature in enacting this subdivision that the duration of any restraining order issued by the court be based upon the seriousness of the facts before the court, the probability of future violations, and the safety of the victim and his or her immediate family."

Pre-disposition orders during pendency of a proceeding to establish a violation of supervision

Upon the requisite showing, "a court with jurisdiction over a criminal matter may issue [protective] orders" under section 136.2(a). There is nothing in the express language of section 136.2 that precludes its availability in a proceeding to adjudicate a violation of probation, mandatory supervision, postrelease community supervision (PRCS) or parole. Such actions clearly are "criminal matters" over which the court has jurisdiction pending final disposition. The court derives its jurisdiction from section 1203.2(a) to adjudicate alleged violations of supervision. As with prosecution of new offenses, there may be victims and witnesses who will be critical to the proof of the alleged violation. Certainly the reason for the statute – to protect victims and witnesses – applies equally to pending violations of supervision as to pending prosecutions of new crimes. The court has the authority to issue the protective order if it has a "good cause belief" that there has been or is potential harm to or dissuasion of a victim or witness *in the revocation proceeding*. Violations of the order may be prosecuted under sections 136.2(b) or 136.1. The protective order will be operable up to the point the court adjudicates the merits of the violation of supervision and imposes sanctions. As indicated above, these orders generally are "operative only during the pendency of the criminal proceedings and as prejudgment orders." (*Selga*, at p.118.)

Post-disposition protective orders after adjudication of a violation of supervision

In most cases, based on *Stone*, *Selga*, *Ponce* and *Robertson* discussed above, any protective order issued under section 136.2(a) will expire once the defendant has been adjudicated on the violation of supervision. Nothing in the language of section 136.2 suggests there should be a different rule applicable to these violation than for new crimes. Whether the court may impose a post-adjudication protective order for violations of supervision will depend on the application of several narrow statutory exceptions to the general rule. Section 136.2 (i)(1) provides that "[i]n all cases in which a criminal defendant has been convicted of a crime of domestic violence as defined in Section 13700, a violation of Section 261, 261.5, or 262, or any crime that requires the defendant to register pursuant to subdivision (c) of Section 290, the court, at the time of sentencing, shall consider issuing an order restraining the defendant from any contact with the victim. The order may be valid for up to 10 years, as determined by the court. This protective order may be issued by the court regardless of whether the defendant is sentenced to the state prison or a county jail, or whether imposition of sentence is suspended and the defendant is placed on probation. It is the intent of the Legislature in enacting this subdivision that the duration of any restraining order issued by the court be based upon the seriousness of the facts before the court, the probability of future violations, and the safety of the victim and his or her immediate family." Similar post-adjudication protective orders are authorized for victims of spousal abuse (§ 273.5(j)) and stalking (§ 646.9(k)(1)).

It is unlikely the court has the authority to issue these post-adjudication protective orders based solely on a violation of probation, mandatory supervision, PRCS or parole. Each of the post-adjudication statutes appear to limit their application to the original sentencing proceeding on the underlying crime. Section 136.2(i)(1), for example, applies when the defendant has been "convicted" of a designated crime and the court exercises its discretion "at the time of sentencing." Similarly, section 273.5(j) authorizes the protective order upon the "conviction" of the defendant of spousal abuse, the discretion being vested in "the sentencing court." Finally section 646.9(k)(1) provides that "the sentencing court" shall consider issuing the protective order. While in one sense the defendant being adjudicated on a violation of supervision is "sentenced" on a true finding, the statutory scheme appears to vest discretion to issue these extended orders in the original sentencing court. Furthermore, it is doubtful that a finding on a violation of supervision is the same as a "conviction" of a designated crime, a necessary prerequisite to the court's authority to issue the post-adjudication protective order.

No inherent authority to issue protective orders under section 136.2

Courts do not have the "inherent authority" to issue protective orders because there already is an existing body of statutory law regulating such matters. Whether courts have the inherent authority to issue protective orders was addressed and rejected in *Ponce*. " ' "[I]nherent powers should never be exercised in such a manner as to nullify existing legislation...." ' (*People v. Municipal Court (Runyan)* (1978) 20 Cal.3d 523, 528, italics omitted.) Where the Legislature authorizes a specific variety of available procedures, the courts should use them and should normally refrain from exercising their inherent powers to invent alternatives. (*People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550.)" (*Ponce*, at p. 384.)

The use of a stay away order as a condition of supervision when the order is issued under section 136.2 is limited. In *People v. Corrales* (2020) 46 Cal. App. 5th 283 (*Corrales*), the court considered such an order when directed to the defendant after he was convicted of setting fire to a palm tree in a shopping mall. In striking the order directing the defendant to stay away from the mall, the court noted that section 136.2 only "authorizes protective orders which are operative only during the pendency of criminal proceedings and as prejudgment orders." (*Corrales*, at p. 286.) The underlying purpose is to "protect victims and witnesses in connection with the criminal proceeding in which the restraining order is issued in order to allow participation without fear of reprisal. . . . We emphasize for clarity that the postjudgment orders authorized by section 136.2, subdivision (i)(1), . . . are not applicable to this set of facts." (*Corrales,* at p. 286.) "While it may have been reasonable for the People to seek court intervention to protect the victims based on specific facts, section 136.2 is not the proper vehicle for obtaining a postjudgment restraining order because that statute authorizes protective orders only during the pendency of criminal proceedings, subject to inapplicable exceptions set out below. Nor are there any other statutes authorizing such unlimited postjudgment restraining orders based on the misdemeanor conviction appellate sustained." (*Id.* at p. 287.)

The court noted the following statutes authorize postjudgment stay away orders::

- Section 136.2, subdivision (i)(1), provides for postjudgment orders for convictions of domestic violence, human trafficking, rape, unlawful sexual intercourse, spousal rape, pandering, pimping, street terrorism, or any convictions of section 290, subdivision (c).
- Section 1203.1, subdivision (i)(2), authorizes a postjudgment non-contact order in a sex offense where registration applies and the sentence is probation.
- Section 1201.3, subdivision (a)(2), authorizes a no-contact postjudgment order where the defendant is convicted of a sex offense involving a minor victim.

- Section 646.9, subdivision (k)(1), authorizes a no-contact postjudgment order where the defendant is convicted of stalking.
- Section 368, subdivision (l), authorizes orders pertaining to crimes against the elderly and dependent adults.
- Sections 273.5, subdivision (j), and 1203.097, subdivision (a), authorize protective orders for crimes involving domestic violence.

(*Corrales*, at p. 287, fn. 3.)

Courts may order "stay-away" and "no contact" conditions of supervision

There is no question that the court is vested with broad discretion in fashioning appropriate conditions of supervision after a violation of probation, mandatory supervision, PRCS, and parole. Section 1203.2(b)(1) provides for the general authority of the court to modify the terms of any form of supervision: "Upon its own motion or upon the petition of the supervised person, the probation or parole officer, or the district attorney, the court may modify, revoke or terminate supervision of the person pursuant to this subdivision. . . ." Upon a finding of a violation of PRCS or parole, the court may return the person to supervision with modification of the terms of supervision. (§§ 3000.08(f)(1) and 3455(a)(1).)

If appropriate to the circumstances of the violation, the court clearly has the authority to include "stay-away" and "no contact" orders as a condition of supervision. (See *Selga*, pp. 117 – 118.) The main difference between conditions of supervision and protective orders under 136.2 is the consequence of a violation. "The criminal protective order itself advises that a violation of the restraining order may be punished as a contempt of court, a misdemeanor or a felony. By contrast, for conduct that is not otherwise criminal, . . . a stay-away order imposed as a condition of probation is not punishable as a separate offense. 'The ramifications of a violation of a condition of probation are stated by the court and established by statute, i.e., that probation may be revoked. Following revocation of probation, a defendant is to receive no greater sentence than that he could have received at the time probation was granted, and the length of a sentence shall be based on circumstances as they existed at the time probation was granted.' (*People v. Johnson* (1993) 20 Cal.App.4th 106, 112.)" (*Selga*, at p. 120.)

The authority of reentry courts to issue protective orders under section 136.2

It is likely that reentry courts have authority to issue orders under section 136.2 to protect victims and witnesses in pending proceedings to violate supervision. Section 3015(a) authorizes the creation of a "parole reentry accountability program," including a "reentry court program which shall "direct the treatment and supervision

of participants who would benefit from community drug treatment or mental health treatment." (§ 3015(e)(1).) The reentry court "shall have exclusive authority to determine the appropriate conditions of parole or postrelease supervision, order rehabilitation and treatment services to be provided, determine appropriate incentives, order appropriate sanctions, lift parole holds, and hear and determine appropriate responses to alleged violations. . . ." (§ 3015(d)(2).) While reentry courts were created as a vehicle to supervise certain offenders being released from prison, they clearly are given the authority to adjudicate violations and impose sanctions. In the broadest sense, these courts are given limited "jurisdiction" over a "criminal matter," and as such, they have the authority to protect victims and witnesses from harm during the adjudication process. As with all other criminal proceedings, as discussed above, any protective order issued by a reentry court would operate only during the pendency of a revocation proceeding initiated during the period of reentry court supervision. If the court desires to issue "stay-away" or "no contact" protections at any other point while the offender is under supervision, they could be ordered as a condition of supervision.

M. Entry of a stipulated order of modification after waiver of appearance

The supervising agency must file a petition for revocation or modification prior to the court entering an order after waiver of appearance

The question of whether a petition for revocation or modification of supervision must be filed before a court may enter an order after a waiver of appearance starts with an analysis of section 1203.2(b), which is the genesis of the language in sections 3455(a) and 3000.08(f). Section 1203.2(b)(1) permits the court to modify conditions of supervision on its own motion, or on petition by the DA, the supervising agency, or the supervised person. Subdivision (b)(1) further specifies that the court "shall give notice of its motion," and the supervising officer "shall give notice of his or her petition" to the supervised person. Section 1203.2(b)(2) provides that the required notice may be given at the defendant's first appearance in the proceeding. Subdivision (b)(2) then provides that "[u]pon the agreement by the supervised person in writing to the specific terms of a modification or termination of a specific term of supervision, any requirement that the supervised person make a personal appearance in court for the purpose of a modification or termination shall be waived." Although there appears to be no reported case that discusses the waiver provisions of section 1203.2(b)(2), the plain language of section 1203.2(b) assumes the process of modification or termination of conditions of supervision is initiated with a petition or motion, notice of the request is given to the supervised person, and, after hearing, the court enters its order. While a personal court appearance of the supervised person is normally required for these proceedings, if the supervised person (and, if necessary, the person's counsel) agrees to the modification, the requirement can be waived. The matter still must proceed to court for the entry of the order of modification, but the supervised person is not required to attend the

proceedings. Nothing in the statutory scheme would preclude the probation officer from preparing a "package" for simultaneous filing, which would contain the petition, the executed waiver of appearance and admission, and the proposed order of modification.

A similar waiver process is authorized for requests to modify PRCS (§ 3455(a)) and parole (§ 3000.08(f)). Section 3455(a), for example, provides, in relevant part: "If the supervising county agency has determined, following application of its assessment processes, that intermediate sanctions as authorized in subdivision (b) of Section 3454 are not appropriate, the supervising county agency shall petition the court pursuant to Section 1203.2 to revoke, modify, or terminate postrelease community supervision. At any point during the process initiated pursuant to this section, a person may waive, in writing, his or her right to counsel, admit the violation of his or her postrelease community supervision, waive a court hearing, and accept the proposed modification of his or her postrelease community supervision." Section 3000.08(f) contains a virtually identical provision for parole violations. These statutes, like section 1203.2(b), contemplate that the supervising agency will file a petition for modification or termination, but the matter may be resolved by agreement without the appearance of the supervised person in court. The matter would proceed to court for the purpose of accepting the waiver and admission by the supervised person, and the entry of the order of modification or termination. Several reasons support this interpretation. First, the waiver provisions in sections 3455(a) and 3000.08(f) immediately follow the direction to the supervising agency to file a petition when it determines intermediate sanctions are no longer appropriate. The order of the provisions suggests a two-step process: the petition is filed, then the supervised person waives the appearance and admits the violation. Second, as a matter of due process, it would seem necessary to file a petition prior to the admission and waiver so that there is a clear record of nature and scope of the violation the supervised person is admitting. Third, the waiver provisions begin with the phrase "[a]t any point during the process initiated pursuant to this section" – a direct reference back to the filing of a petition as required in the immediately preceding sentence. Fourth, interpreting sections 3455(a) and 3000.08(f) in this manner align them with the operative waiver provisions of section 1203.2(b). Finally, the requirement of a written petition is consistent with the due process procedure in section 1203.2(b)(2) that assures the supervised person has been advised of the right to counsel before there is a written waiver and admission. It provides the court with at least minimal evidence that the waiver and admission are knowing and voluntary.

For the foregoing reasons, the waiver of appearance provisions of sections 1203.2(b), 3455(a), and 3000.08(f) contemplate that the supervising agency must file a petition for modification or revocation prior to the court entering an order on a waiver agreement with the supervised person. As with section 1203.2(b), nothing in sections 3455(a) and 3000.08(f) would preclude the supervising agency from preparing a "package" for simultaneous filing, which would contain the petition, the

executed waiver of appearance and admission, and the proposed order of modification.

The role of the court when a stipulated sanction is agreed to between the supervising agency and the supervised person

The realignment legislation created two levels of sanctions with respect to violations of PRCS and parole. The first level authorizes the supervising agency to impose "intermediate sanctions." Section 3454(b), for violations of PRCS, permits the probation department to "determine and order appropriate responses to alleged violations, which can include, but shall not be limited to, immediate, structured, and intermediate sanctions up to and including referral to a reentry court pursuant to Section 3015, or flash incarceration in a city or county jail." Similarly, section 3000.08(f), for violations of parole, authorizes the parole agency to "impose immediate, structured, and intermediate sanctions for parole violations, including flash incarceration in a city or a county jail." "Flash incarceration" is defined as a period of one to ten consecutive days. (§§ 3454(c) and 3000.08(e).) These sanctions are imposed without the need for formal waivers by the supervised person and at the exclusive discretion of the supervising agency without any involvement by the court. As such, the Legislature has—by statute—limited the maximum custodial sanction that may be imposed by the supervising agency without court involvement at ten days in county jail.

Once the supervising agency determines intermediate sanctions are no longer appropriate, sections 3455(a) and 3000.08(f) direct the supervising agency to file a petition under section 1203.2. Accordingly, the supervising agency is *required* to petition the court for any sanction that exceeds what the agency may impose as an "intermediate sanction" without court involvement. In other words, the jurisdiction to impose a custodial sanction that exceeds the statutorily prescribed "intermediate sanction" of ten days of flash incarceration lies exclusively with the court.

While the question of sanctions ultimately may be settled between the parties with a waiver of appearance, it is the court that enters the appropriate order of modification or termination under section 1203.2(b): "[T]he *court* . . . may modify, revoke, or terminate the supervision of the supervised person upon the grounds set forth in subdivision (a) if the interests of justice so require." (Emphasis added.) The court is not obligated to accept the stipulated disposition simply because the parties agreed to it. It cannot reasonably be argued that in entering a modification of supervision on a waiver of appearance the court is merely engaging in a clerical function without any ability to evaluate the appropriateness and overall lawfulness of the modification. Just as with plea bargains under section 1192.5, the court has the ultimate authority to determine whether a proposed disposition is in the interests of justice. The court can reject a proposed disposition, in which case the parties should be given an opportunity to withdraw from the agreement. The

question of whether there has been a violation and the proper sanction if a violation has been shown would then proceed on the filed petition as a contested matter. Even where the court accepts the proposed disposition, such acceptance would not divest the court of jurisdiction to enter further modifications under the authority granted by section 1203.2(b).

N. Application of Section 1368 to Mandatory Supervision, PRCS and Parole

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

It was not clear whether procedures under section 1368 would apply to persons on probation with execution of sentence suspended, mandatory supervision, post-release community supervision (PRCS), or parole supervision. All of these persons have been formally sentenced, and, therefore, are not "prior to judgment" as set forth in section 1368(a). Unquestionably, however, they face legal proceedings that may lead to further punishment. This long-standing procedural gap has been corrected by the enactment of SB 1412, effective January 1, 2015. Sections 1367 and 1368 have been amended to extend proceedings to determine competency to all persons on supervision, including persons on probation, mandatory supervision, PRCS, and parole.

Section 1367(b) provides the procedural framework to determine and treat competency issues depending on the nature of the charges. The following sections define the specific procedures to be used according to the nature of the pending charge, the type of supervision, or the nature of the disability:

- Section 1370 – applies to new felonies, any violation of probation for a felony, or a violation of mandatory supervision.
- Section 1370.01 – applies to new misdemeanors or a violation of formal or informal probation for a misdemeanor.
- Section 1370.02 – applies to persons on PRCS or parole.
- Section 1370.1 – applies to all persons incompetent as a result of a developmental disability or mental disorder, but who is also developmentally

disabled.

Initiation of competency proceedings

Subject to some variation depending on the type of supervision, the procedural process for dealing with competency issues of persons under supervision are very similar to the historical process for persons facing new charges. The procedure is initiated by the court or counsel declaring a doubt as to the competence of the supervised person to participate in the determination of an alleged violation of supervision. (§ 1368.)

Determination of probable cause

Even when a doubt of competency is declared, the supervised person "may move to reinstate supervision on the ground that there is not probable cause to believe that the defendant violated the terms of his or her supervision." (§ 1368.1(c).) Presumably the determination of probable cause is through a process similar to a preliminary examination, as is provided for new felony offenses in section 1368.1(a).

Trial on competency

Unlike the right to a jury trial to determine competency for new charges, the parties to a competency proceeding in connection with a violation of supervision are entitled only to a court trial. (§ 1369(g).)

Term of commitment – violation of felony probation or mandatory supervision (§ 1370)

The defendant must be returned to court no later than three years, the maximum term provided for the underlying crime, or "the maximum term of imprisonment provided by law for a violation of probation or mandatory supervision, whichever is shorter, but no later than 90 days prior to the expiration of the defendant's term of commitment." (§ 1370(c)(1).)

If the defendant's competency on an alleged violation of probation is not restored, the court may dismiss the violation proceedings in the interests of justice under section 1385. If the defendant is on mandatory supervision, however, and a conservatorship is not established, "the court shall reinstate mandatory supervision and may modify the terms and conditions of supervision to include appropriate mental health treatment or refer the matter to a local mental health court, reentry court, or other collaborative justice court available for improving the mental health of the defendant." (§ 1370(d).)

Term of commitment – violation of PRCS or parole (§ 1370.02)

A defendant on PRCS or parole may not be detained in custody longer than 180 days from the date of arrest. (§ 1370.02(a).) If the defendant is found mentally competent during a PRCS or parole revocation hearing, the revocation proceedings must resume. If, however, the defendant is found incompetent, "the court shall dismiss the pending revocation matter and return the defendant to supervision." (§ 1370.02(b).) If the petition is dismissed, the court, "using the least restrictive option to meet the mental health needs of the defendant," may order any of the following:

> "(1) Modify the terms and conditions of supervision to include appropriate mental health treatment.
>
> (2) Refer the matter to any local mental health court, reentry court, or other collaborative justice court available for improving the mental health of the defendant.
>
> (3) Refer the matter to the public guardian of the county of commitment to initiate conservatorship proceedings pursuant to Sections 5352 and 5352.5 of the Welfare and Institutions Code. The public guardian shall investigate all available alternatives to conservatorship pursuant to Section 5354 of the Welfare and Institutions Code. The court shall order the matter to the public guardian pursuant to this paragraph only if there are no other reasonable alternatives to the establishment of a conservatorship to meet the mental health needs of the defendant." (§ 1370.02(b).)

If the supervised person is on parole, the court must order the person to undergo treatment for competency under section 1370, up to the maximum period of confinement. (§ 1370.02(c)(1).) If the parolee is returned to supervision, the court may order any of the additional conditions of supervision mentioned above. (§1370.02(c)(2).)

If a conservatorship is established for the defendant, neither the county nor CDCR is permitted to use the fact of a conservatorship to terminate the defendant from supervision for compassionate reasons. (§ 1370.02(d).)

Term of commitment – violation of supervision with developmental disability (§ 1370.1)

The term of commitment of a person with a developmental disability who is on probation or mandatory supervision is the maximum term provided by law for the underlying crime or the violation, whichever is shorter. (§ 1370.1(c)(1)(A).) If the defendant remains incompetent upon return to the court, he shall be subject to

placement under the Lanterman-Petris-Short Act (Welf. & Inst. Code, §§ 5000, *et seq*.), or commitment under Welfare and Institutions Code, section 6502. If the defendant is found not suitable for placement under either provision, "the court shall reinstate mandatory supervision and modify the terms and conditions of supervision to include appropriate mental health treatment or refer the matter to a local mental health court, reentry court, of other collaborative justice court available for improving the mental health of the defendant. Actions alleging a violation of mandatory supervision shall not be subject to dismissal under Section 1385." (§ 1370.1(c)(2)(B)

O. Application of *Valdivia* Consent Decree to Parole

In 1994 a federal class action lawsuit was filed in the U.S. District Court in the Eastern District of California, alleging that the then existing parole revocation procedures violated the due process rights of California parolees. The name of the case is currently *Valdivia, et al. v. Brown*., No CIV S-94-0671 (E.D.Cal. filed May 2, 1994) (*Valdivia*). In 2004, the parties to the action entered into an agreement whereby the court entered a consent decree granting plaintiffs a permanent injunction, including various procedural protections for parolees. Among them are: 1) the right to appointed counsel beginning when the parolee is offered a stipulated disposition; 2) not later than 48 hours after a parole hold, the parole agent must confer with his or her supervisor regarding probable cause to continue the hold; 3) a probable cause hearing held within 10 business days after the parolee is served with the notice of charges (by the third day after the placement of the hold); and 4) a final revocation hearing within 35 calendar days of placement of the parole hold (in recognition of Marsy's Law, the time limit for the hearing subsequently was modified to 45 days). Although *Valdivia* applied to CDCR and DAPO, there was a question whether the consent decree applied to courts implementing the terms of PRCS and, effective July 1, 2013, parole revocation proceedings.

Any questions regarding the application of *Valdivia* now appear moot. By an order entered July 3, 2013, the federal court determined that with the enactment of the new parole revocation procedures under the realignment legislation, the lawsuit became moot as of July 1, 2013. The court entered its intention to decertify the class and dismiss the action. (*Valdivia v. Brown* (E.D.Cal. 2013) 956 F.Supp.2d 1125, 1126.)

The court acknowledged the declaration filed by CDCR indicating its intent not to utilize flash incarceration. The court was not concerned that CDCR could change its policy. "The court need not weigh Mr. Viera Rosa's declaration, as its decision herein does not rest on whether DAPO has permanently forsworn flash incarceration." (*Valdivia, supra,* 956 F.Supp.2d at p. 1131, fn. 10.)

Ultimately the court concluded that potential constitutional violations, at this point, would be entirely speculative, and must be left to future litigation to establish. "[R]egardless of whether DAPO is prevaricating in its claim that it will not use flash incarceration, it would be premature for the court to rule on the measure's constitutionality, both because it is a single element of a complex new system and because its use by DAPO 'may not occur at all.'" (*Valdivia, supra,* 956 F.Supp.2d at p. 1138.)

Based on the action taken by the federal court, the injunction issued with the consent decree will no longer be enforced. The constitutionality of the new parole procedures will now be measured against the standards set in *Morrissey v. Brewer* (1972) 408 U.S. 471. The rights "include (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact finders as to the evidence relied on and reasons for revoking parole. We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense. It is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial." (*Morrissey* at p. 488.)

1) Scope of rights under section 1203.2

Aside from the arguments regarding the applicability of *Valdivia* to parole revocation proceedings, it is clear that under section 1203.2 and the cases discussing its application to probation revocation proceedings, the accused has the following rights which equal or exceed those required by *Morrissey*:

- A timely arraignment – including opportunity for probable cause determination
- Service of a written petition advising of the charges
- Appointment of counsel
- Discovery of the evidence against the accused
- Neutral and detached hearing officer
- Right to be present at all hearings on the violation
- Full adversarial evidentiary hearing
- A public hearing held in a courtroom
- An opportunity to be heard and present evidence
- Right to confront and cross-examine witnesses

- Preparation of a contemporaneous written record – transcript of proceedings is sufficient (*People v. Moss* (1989) 213 Cal.App.3d 532, 533.)

2) Application of *Armstrong* to court proceedings

A federal class action was brought on behalf of disabled parolees regarding the application of the Americans with Disabilities Act (ADA) to parole proceedings. (*Armstrong v. Brown*, 4:94-cv-2307-CW (n.D.Cal. filed June 29, 1994.) The action was brought against the Governor, the Secretary of the California Youth and Adult Corrections Agency, and the Chairman of the California Board of Prison Terms. A permanent injunction was issued in June 2002 that defines the relationship between the ADA and parole revocation procedures for disabled parolees, including conditions of facilities where revocation hearings are held. For the reasons discussed above in connection with the *Valdivia* case, the *Armstrong* injunction does not apply to the courts.

P. Determination of probable cause for detention

Parole violations

The right to a probable cause determination following an arrest for a parole violation has been established in *Williams v. Superior Court* (2015) 230 Cal.App.4th 636 (*Williams*). "*Morrissey*-compliant probable cause hearings are required in post-realignment California, although a prompt unitary hearing may suffice. (But see *Gagnon [v. Scarpelli* (1973) 411 U.S. 778,] 781–782, 93 S.Ct. 1756 [two separate hearings are required].) A *Morrissey*-compliant probable cause hearing requires that the parolee be given the opportunity to 'appear and speak in his own behalf; he may bring letters, documents, or' witnesses, and may question any person 'who has given adverse information on which parole revocation is to be based....' (*Morrissey, supra,* 408 U.S. at p. 487, 92 S.Ct. 2593.) In our view, this would include the opportunity to present evidence of Parole's failure to comply with section 3000.08, subdivision (f), which requires parole agents to employ 'assessment processes' to determine whether intermediate sanctions are appropriate before petitioning for parole revocation." (*Williams*, at p. 656.) The hearing must be held within 15 days of arrest. (*Id.* at pp. 659-660.)

Violations of probation, mandatory supervision and postrelease community supervision

Prior to *Williams*, California courts acknowledged only a limited right to the determination of probable cause. The right to a probable cause hearing is discussed

in the seminal case of *Morrissey v. Brewer* (1972) 408 U.S. 471. There, the U.S. Supreme Court ruled the parolee is entitled to a preliminary review by an independent officer, at or near the time and place of the parolee's arrest, to determine if "reasonable ground exists for revocation of parole. . . ." (*Id.* at p. 485.) The court did not require the determination be made by a judicial officer. (*Id*. at p. 486.) At the probable cause hearing the parolee must be given notice of the charges against him, an opportunity to speak or present evidence on his own behalf, and cross-examine any accusers. (*Id*. at pp. 486-487.) How these due process requirements are implemented, however, was left to the discretion of each state. (*Id.* at pp. 488-489.)

The California Supreme Court applied *Morrissey's* due process requirements, including probable cause determinations, to our state's probation revocation process. (*People v. Vickers* (1972) 8 Cal.3d 451.) Shortly thereafter, the Supreme Court ruled that because of the due process usually afforded by California's judicial procedure, courts need not conduct formal probable cause hearings for probation violations. (*People v. Coleman* (1975) 13 Cal.3d 867, 894-895.) "Since 'the precise nature of the proceedings for [probation] revocation need not be identical' to the bifurcated *Morrissey* parole revocation procedures, so long as 'equivalent due process safeguards' assure that a probationer is not arbitrarily deprived of his conditional liberty for any significant period of time (*People v. Vickers*, *supra*, 8 Cal.3d at p. 458), a unitary hearing will usually suffice in probation revocation cases to serve the purposes of the separate preliminary and formal revocation hearings outlined in *Morrissey*." (*Coleman*, at pp. 894-895; footnote omitted.)

The circumstances of the arrest and detention of a probation violator are discussed in *People v. Woodall* (2013) 216 Cal.App.4th 1221. In *Woodall*, the defendant raised two federal due process challenges to the provisions of section 1203.2. He first argued that a warrant issued under section 1203.2(a) must be supported by a statement under oath or affirmation. At the time of defendant's arrest, section 1203.2(a) provided, in relevant part, that if a probation or peace officer has "probable cause to believe that the [probationer] is violating any term or condition of his or her supervision, the officer may, without warrant or other process and at any time until the final disposition of the case, rearrest the [probationer] and bring him or her before the court or the court may, in its discretion, issue a warrant for his or her rearrest."

The court agreed section 1203.2 did not specifically require the warrant to be issued only on a statement under oath or affirmation. However, the court also found no federal due process violation in the issuance of a warrant without such a statement. "The inapplicability of the warrant clause to a probationer does not mean a probationer may be arrested without limitation under any circumstances. 'The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search [or seizure] is determined "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy [or liberty] and, on the other, the

degree to which it is needed for the promotion of legitimate governmental interests." ' (*U.S. v. Knights* [(2001) 534 U.S. 112,] 118-119; *People v. Schmitz* (2012) 55 Cal.4th 909, 921.) Under section 1203.2, the arrest of a probationer requires probable cause to believe he or she is violating the terms of probation, as determined by a probation or police officer or by a court that receives information from the authorities to this effect. Defendant has presented no argument or information to show that the statute does not reasonably balance the probationer's conditional liberty interest with the state's need to respond in an expedient fashion to a probationer's noncompliance with the terms and conditions of probation." (*Woodall*, at p. 1234.)

The defendant also challenged the unitary hearing procedures under section 1203.2. The defendant argued that the single evidentiary hearing on the violation does not meet the dual hearing procedure specified by *Morrissey*. Specifically, 1203.2 does not require an early probable cause hearing prior to the final evidentiary hearing on the merits. *Woodall* rejected the challenge.

The court found section 1203.2 was not unconstitutional on its face. "Under the reasoning of [*People v. Amor* (1974) 12 Cal.3d 20], there is no basis to find section 1203.2 constitutionally invalid on its face based solely on the fact that it does not spell out the requirement of a preliminary probable cause hearing. The courts have long recognized that a probationer is entitled to a probable cause hearing or its functional equivalent if he or she is to be detained for any significant period of time before a final revocation hearing. (*Coleman, supra*, 13 Cal.3d at pp. 894-895; *People v. Hawkins* [(1975) 44 Cal.App.3d 958,] 966; *People v. Gifford* (1974) 38 Cal.App.3d 89, 91; *People v. Andre* (1974) 37 Cal.App.3d 516, 521-522.) Given this well-established case authority, we construe section 1203.2 to impliedly require a probable cause hearing if there is any significant delay between the probationer's arrest and a final revocation hearing." (*Woodall*, pp. 1237-1238.)

Finally, *Woodall* also rejected the defendant's argument that section 1203.2 was unconstitutional "as applied." The defendant made no showing of prejudice due to the delay between his arrest and the final violation hearing. Furthermore, the facts of the violation were fully discussed at defendant's arraignment. The defendant's admission to the factual basis of the violation satisfied any requirement to determine probable cause for his arrest. (*Woodall*, pp. 1238-1240.)

Nothing in *Woodall* suggests its holding should not apply to any person under mandatory supervision or PRCS or parole.

The Legislature amended sections 1203.2 and 3000.08 to apply probation revocation procedures to PRCS and parole revocations. The legislation was intended to promote uniform revocation procedures and "simultaneously incorporate the procedural due process protections held to apply to probation revocation procedures under *Morrissey v. Brewer* (1972) 408 U.S. 471, and *People v. Vickers* (1972) 8 Cal.3d 451,

and their progeny." (2011 Realignment Legislation, SB 1023, Sec. 2(b), effective June 27, 2012.) Because courts need not conduct formal probable cause hearings for probation revocations, courts need not conduct them for PRCS or parole revocations.

It is important to observe the distinction between a probable cause "determination," and a probable cause "hearing." Probable cause "determinations" are made at a number of stages in the revocation process. Prior to taking action against a parolee, DAPO's internal procedures require a probable cause determination be made by a parole agent's supervisor. Intermediate sanctions may be imposed by the supervising agency "[u]pon review of the alleged violation and a finding of good cause that the parolee has committed a violation of law or violated his or her conditions of parole. . . ." (§ 3000.08(d).) To the extent courts are called upon to issue arrest warrants, a probable cause determination is made similar to the requirements of section 813(a). Finally, although a probable cause determination is not expressly required by section 1203.2, a prudent court may wish to make such a finding at the time of the arraignment on a violation of PRCS or parole, particularly when the arrest was not by warrant. The finding may be based on the petition or supporting report.

A number of the procedural rights enunciated in *Morrissey* formed the basis of a federal class action lawsuit brought against the state on behalf of parolees, including the right to a probable cause determination and hearing. (*Valdivia v. Brown,* No CIV S-94-0671 (E.D.Cal. filed May 2, 1994.) For reasons discussed above, *Valdivia* does not apply to the courts. (See discussion of *Valdivia*, *supra*.)

The express holding of *Williams* concerns violations of parole. While nothing in the opinion suggests its mandated procedures should be extended to other forms of supervision, its holding distinguishes the application of *Woodall* and *Coleman* to parolees. (*Williams*, at pp. 654-656.) Courts may anticipate a *Williams*-type challenge in circumstances where detention has become prolonged. Prudent courts may wish to implement uniform procedures for the arraignment and determination of probable cause for all persons arrested for violations of supervision.

Q. Use of hearsay

Our Supreme Court in *People v. Arreola* (1994) 7 Cal.4th 1144, discussed the application of the Confrontation Clause to parole and probation revocation proceedings. The court first observed that *Morrissey v. Brewer* (1972) 408 U.S. 471, established the due process rights for parole offenders. "In discussing the minimum constitutional requirements applicable to the final revocation proceeding, *Morrissey* held that due process requires '(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right *to confront and cross-examine adverse witnesses* (*unless the hearing officer specifically*

finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.' (*Morrissey v. Brewer*, *supra*, 408 U.S. at p. 489 [33 L.Ed.2d at p. 499], italics added.) At the same time, *Morrissey* emphasized that 'the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial' (408 U.S. at p. 489 [33 L.Ed.2d at p. 499]), and further explained that '[o]bviously a parolee cannot relitigate issues determined against him in other forums, as in the situation presented when the revocation is based on conviction of another crime.' (408 U.S. at p. 490 [33 L.Ed.2d at p. 499.)" (*Arreola* at pp. 1152-1153; emphasis in original.) *Gagnon v. Scarpelli* (1973) 411 U.S. 778, made *Morrissey* applicable to probation violations. The California Supreme Court, prior to *Gagnon*, adopted the same rule in *People v. Vickers* (1972) 8 Cal.3d 451.

Arreola reaffirmed the importance of confrontation and cross-examination, unless the hearing officer specifically finds good cause for not allowing confrontation. "Our clarification in [*People v. Maki* (1985) 39 Cal.3d 707], of the standard for the admission of *documentary* evidence at a revocation hearing did not purport to modify the rule we adopted in [*People v. Winson* (1981) 29 Cal.3d 711], governing the admission of a preliminary-hearing transcript as a substitute for the *live testimony* of an adverse witness at a revocation hearing. There is an evident distinction between a transcript of former live testimony and the type of traditional 'documentary' evidence involved in *Maki* that does not have, as its source, live testimony. (See 2 Witkin, Cal. Evidence (3d ed. 1986) § 901 et seq.) As we observed in *Winson*, the need for confrontation is particularly important where the evidence is testimonial, because of the opportunity for observation of the witness's demeanor. (29 Cal.3d at p. 717.) Generally, the witness's demeanor is not a significant factor in evaluating foundational testimony relating to the admission of evidence such as laboratory reports, invoices, or receipts, where often the purpose of this testimony simply is to authenticate the documentary material, and where the author, signator, or custodian of the document ordinarily would be unable to recall from actual memory information relating to the specific contents of the writing and would rely instead upon the record of his or her own action." (*Arreola*, at pp. 1156-1157; emphasis original.)

It is important to observe that the right to confrontation of witnesses at a probation or parole revocation proceeding comes from the 14th Amendment as a matter of due process, not from the 6th Amendment as a trial right. The 6th Amendment has no application to hearings on a violation of probation because these proceedings are not considered a "criminal prosecution." (*People v. Johnson* (2004) 121 Cal.App.4th 1409, 1411; *People v. Shepherd* (2007) 151 Cal.App.4th 1193, 1199, fn. 2.) Accordingly, *Crawford v. Washington* (2004) 541 U.S. 36, does not restrict the

admission of hearsay evidence at a hearing on a violation of probation. (*People v. Abrams* (2007) 158 Cal.App.4th 396, 400, fn. 1.)

Whether hearsay evidence is permitted must be determined on a case-by-case basis. "The broad standard of 'good cause' is met (1) when the declarant is "unavailable" under the traditional hearsay standard (see Evid. Code, § 240), (2) when the declarant, although not legally unavailable, can be brought to the hearing only through great difficulty or expense, or (3) when the declarant's presence would pose a risk of harm (including, in appropriate circumstances, mental or emotional harm) to the declarant. (See generally, Cohen et al., The Law of Probation and Parole (1983 ed.) § 9.32, at pp. 466-467.) In the *Winson* decision itself, we recited facts and circumstances, present in that case, which, in our view, considered together, demonstrated that the transcript had not been properly admitted into evidence: the testimony at issue was that of the sole percipient witness to the alleged probation violation, and there had been no showing that the witness was unavailable or that other good cause existed for not securing the live testimony of the witness. ¶ Thus, in determining the admissibility of the evidence on a case-by-case basis, the showing of good cause that has been made must be considered together with other circumstances relevant to the issue, including the purpose for which the evidence is offered (e.g., as substantive evidence of an alleged probation violation, rather than, for example, simply a reference to the defendant's character); the significance of the particular evidence to a factual determination relevant to a finding of violation of probation; and whether other admissible evidence, including, for example, any admissions made by the probationer, corroborates the former testimony, or whether, instead, the former testimony constitutes the sole evidence establishing a violation of probation. Several federal circuit courts have adopted a similar approach, balancing the defendant's need for confrontation against the prosecution's showing of good cause for dispensing with confrontation. (See, e.g., *U. S. v. Martin* (9th Cir. 1993) 984 F.2d 308, 311; *United States v. Bell* [(1986)] 785 F.2d 640, 643.)" (*Arreola*, at pp. 1159-1160; footnote omitted.)

Although not binding on state courts, the decision in *U.S. v Comito* (1999) 177 F.3d 1166, is instructive. "The weight to be given the right to confrontation in a particular case depends on two primary factors: the importance of the hearsay evidence to the court's ultimate finding and the nature of the facts to be proven by the hearsay evidence. As the *Martin* court emphasized, '[t]he more significant particular evidence is to a finding, the more important it is that the releasee be given an opportunity to demonstrate that the proffered evidence does not reflect "verified fact." ' So, too, the more subject to question the accuracy and reliability of the proffered evidence, the greater the releasee's interest in testing it by exercising his right to confrontation." (*Comito*, at p. 1171.) "The reasons that may constitute good cause for denying a releasee his right to confrontation in a revocation hearing vary, of course, depending on the specific circumstances. Whether a particular reason is sufficient cause to outweigh the right to confrontation will depend on the strength

of the reason in relation to the significance of the releasee's right. In some instances, mere inconvenience or expense may be enough; in others, much more will be required." (*Comito*, at p. 1172.)

R. Tolling of the supervision period

The rules governing the tolling of the period of supervision are complex and may depend, in part, on the type of supervision being utilized and the nature of the violation. It is also important to observe that, with one exception, there is no relationship between the time the person serves in custody on a supervision violation and the length of supervision – these two variables proceed on entirely separate tracks.

The statutory provisions governing tolling may be found in the following provisions of the Penal Code:

> **§ 1203.2(a): All forms of supervision [probation, mandatory supervision, PRCS and parole]:** "The revocation [of supervision], summary or otherwise, shall serve to toll the running of the period of supervision." Under this provision, the tolling is triggered by the revocation of supervision ***by a court***. Summary revocation can be ordered based on any violation of the terms of supervision. Typically the court will summarily revoke supervision at the time the supervising agency requests a warrant, and/or files a petition for revocation. The court can summarily revoke supervision without issuance of a warrant or at the arraignment on a petition for revocation. Tolling does not automatically occur with the person's arrest or by any action taken by the supervising agency. The period of supervision will be tolled until such time as the court formally reinstates the person on supervision.

The following provisions relate to specific types of supervision. While these provisions reference a different trigger for tolling supervision, they must be viewed cumulatively with section 1203.2, which the Legislature has designated as the law controlling violations of all forms of supervision. (§ 1203.2(a).)

> **§ 1170(h)(5)(B): Mandatory supervision:** "Any time period which is suspended because a person has absconded shall not be credited toward the period of supervision." Mandatory supervision is the one exception to the principle that time in custody has no relationship to the period of supervision. Under section 1170(h)(5)(B) the person receives normal section 4019 credits for time in actual custody, but only actual time credit when on mandatory supervision. All of the credits are applied against the total sentence ordered by the court. Accordingly, the relationship between custody and non-custody time has a direct bearing on the length of supervision – the longer the period of custody, the shorter the period of

supervision. For example, if the defendant receives a three-year sentence, with two years of custody and one year of mandatory supervision, the sentence will be satisfied two years from the date it is imposed. If, however, the defendant receives a three-year sentence, with one year of custody and two years of supervision, the sentence will be satisfied after two years and six months from imposition. In either situation, if the defendant violates supervision and is given custody time, for every two days served, the defendant will have four days taken off of the available supervision time.

§ 3456(b): Postrelease Community Supervision (PRCS): "Time during which a person on postrelease community supervision is suspended because the person has absconded shall not be credited toward any period of postrelease supervision."

§ 3000(b)(6): Parole: "Time during which parole is suspended because the prisoner has absconded or has been returned to custody as a parole violator shall not be credited toward any period of parole unless the parolee is found not guilty of the parole violation," subject to certain maximum terms of supervision. There is no specific provision in Penal Code section 3000.08 governing tolling. The statute merely makes a general reference to section 1203.2 for dealing with parole violations. (§ 3000.08(c).)

Tolling

If the person's supervision is revoked for *any reason* under the general provisions of section 1203.2 or he is a parole violator for *any reason* under section 3000(b)(6), until the person is reinstated on supervision, none of the time in revoked status will reduce the *period of supervision*. In other words, if a court summarily revokes supervision and the person is not reinstated on supervision until six months later, none of the six months will reduce the *supervision period*, even if the person is in custody because a warrant has been executed.

If the revocation is made *solely* under section 1170(h)(1)(B) for mandatory supervision, or under section 3456(b) for PRCS, and the revocation is not for absconding, the language of the statutes suggests the supervision period will not be tolled by the revocation. As noted above, however, these statutes must be considered with section 1203.2, which provides the overarching rule: the supervision period is tolled when in revoked status, regardless of the nature of the violation. In any event, the probation department likely will also file the violation under section 1203.2 to assure the supervision period is tolled.

The distinction between the period of supervision and custody credits

Although the supervised person may not receive any credit against his maximum supervision period because of the revoked status, the person is always entitled to

actual time credit and section 4019 conduct credits against any sentence imposed by the court for the violation. These credits are earned irrespective of and independently from the period of supervision. Accordingly, if the court imposes 60 days in custody for a violation, and the defendant has 10 days of actual time in custody while in the revoked status, 20 days will be credited against the 60-day sentence, even though the length of the supervision period is not changed by the revoked status.

Application of the foregoing rules

1. Assume a defendant receives a three-year split sentence under section 1170(h)(5)(B), with two years of custody and one year of mandatory supervision. Upon his release from the custody portion of his sentence he immediately commits a violation of supervision for any reason; a petition for revocation is filed under section 1203.2. His mandatory supervision status is revoked by the court and he is remanded to custody. The supervision status remains revoked for a total period of 30 days, from revocation to reinstatement. The court imposes a custody sanction of 90 days, with 30 days of actual time credit and 30 days of conduct credit against the sentence. At the time of the defendant's reinstatement on mandatory supervision, he will have 30 days of the sentence to serve (16 days actual time). The one-year period of mandatory supervision has been tolled from the date of revocation until the date the defendant is reinstated, but the supervision period has been shortened by 90 days because of the sentence to be served in actual custody – the original 12 months of supervision has been reduced to 9 months. In this example, the 9 months will run from the date of reinstatement on supervision. The change in the length of mandatory supervision is due to the unique structure of a sentence imposed under section 1170(h)(5)(B), not because the person was in a revoked status for 30 days.

2. Assume a person is to be supervised on PRCS or parole for the normal three-year period specified by statute. Upon his release from prison he immediately commits a violation of supervision for any reason; a petition for revocation is filed under section 1203.2. His supervision status is revoked by the court and he is remanded to custody. The supervision status remains revoked for a total period of 30 days, from revocation to reinstatement. The court imposes a custody sanction of 90 days, with 30 days of actual time credit and 30 days of conduct credit against the sentence. At the time of the person's reinstatement on supervision, he will have 30 days of the sentence to serve (16 days actual time). The three-year supervision period, however, has remained unchanged – whatever period remained at the time of initial revocation will resume when the defendant is reinstated on supervision. In this example, the entire three years of supervision will run from the date of reinstatement on supervision. Unlike a sentence imposed under section 1170(h)(5)(B), when the person is on PRCS or

parole, the time in custody has no effect on the period of supervision. Like persons on probation, time spent in custody for a violation of PRCS or parole does not reduce the period of supervision.

S. Review of court's decision

An order denying probation is reviewable on appeal. (*People v. Coleman* (1975) 13 Cal.3d 867, 871, fn. 1.) "An order granting probation and imposing sentence, the execution of which is suspended, is an appealable order. (§ 1237, subd. (a); cf. *People v. Preyer* (1985) 164 Cal.App.3d 568, 576; *People v. Chagolla* (1984) 151 Cal.App.3d 1045, 1049.) An order modifying the terms of probation is likewise appealable because it is an order following judgment that affects the substantial rights of the defendant. (§ 1237, subd. (b); see *People v. Douglas* (1999) 20 Cal.4th 85, 91; *In re Bine* (1957) 47 Cal.2d 814, 817.)" (*People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1421.) There is nothing to suggest that an order entered by the court concerning an inmate's parole or PRCS status is not appealable under section 1237(a) in the same manner, since it is an order entered after judgment and it affects the substantial rights of the parties.

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

Designations - Prison-eligible or 1170(h)

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

Subsections:

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

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

General Rules

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

Section 1170(h)(3) further provides that prison is to be imposed if any of the following apply:

1. Conviction of a current or prior serious or violent felony conviction listed in sections 667.5(c) or 1192.7(c),
2. When the defendant is required to register as a sex offender under section 290; or
3. When the defendant is convicted and sentenced for aggravated theft under the provisions of section 186.11.

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

Enhancements

Enhancements may specify punishment is to be served in state prison, or simply by an added term without designating where it is to be served. If no particular place for service of the enhancement is designated, then the term is to be served where the base term is served. (See, *e.g.*, section 12022.1, *infra*.) Effective January 1, 2021, section 1170, subdivision (h)(9), specifies the service of a term imposed because of an enhancement will follow the base term. In other words, notwithstanding the language of the enhancement, if the sentence for the base crime is served in state prison, the enhancement is served in prison; but if the base term is served in county jail under section 1170, subdivision (h), the sentence on the enhancement also is served in county jail.

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12022.2(all)
12022.3(all)
12022.4(all)
12022.5(all)
12022.53(all)
12022.55
12022.6(all)
12022.7(all)
12022.75(a)
12022.75(b)(all)
12022.8
12022.85(all)
12022.9
12022.95
12023(all)
12025(a)(all)
12025(b)(1),(2),(5),(6)(all)
12025(b)(3),(4)
12031(a)(all)
12034(b),(c),(d)
12035(b)(1),(d)(1)
12040
12051(c)(all)
12072(g)(2)(all),(3)(all)
12072(g)(4)(all)
12076(b)(1),(c)(1)
12090
12101(all felonies)
12220(all)
12280(a)(all),(b)
12281(all)
12303
12303.1(all)
12303.2
12303.3
12303.6
12304
12308
12309
12310(all)
12312
12316(b)(1)
12320
12321
12355(all)
12370(all)
12403.7(g)
12422
12520
14166(all)
18710(all)
18715(all)
18720
18725(all)
18730
18735(all)
18740
18745
18750
18755(all)
19100
19200
20110
20310
20410
20510
20610
20710
20910
21110
21310
21810
22010
22210
22410
22810(all)
22910(all)
23900
24310
24410
24510
24610
24710
25100(a)
25110(a)
25300(all)
25400(a)(all)
25400(c)(1),(2),(3),(4)
25400(c)(5),(6)
25800(all)
25850(a)(all)
25850(c)(1),(2),(3),(4)
25850(c)(5),(6)
26100(b),(c),(d)
26180(b)(all)
27500(a),(b)
27505(all felonies)
27510
27515(all)
27520(all)
27540(a),(c),(d),(e),(f)
27545
27550(all)
27590(b),(c),(d)
28250(b)
29610
29650
29700(a)(all)
29800(all)
29805
29815(all)
29820(all)
29825(a)
29900(all)
30210
30305(a)(all)
30315
30320
30600(all)
30605(a)
30615
30720

30725(b)
31360
31500
32310
32625(all)
32900
33215
33410
33600

Probate

2253

Public Contract

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

Public Resource

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

Public Utilities

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

Revenue & Tax

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

Unemployment Ins

2101
2101.5
2101.6
2102
2103
2104
2105
2106
2107
2108
2109
2110
2110.3
2110.5
2110.7
2111
2112
2114
2115
2116(all)
2117.5
2118.5
2119
2120
2121
2122

Vehicle Code

1808.4(d)
2470
2472
2474
2476
2478(b)
2800.2(all)
2800.3(all)
2800.4
4463(a)(all)
10501(b)
10752(all)
10801
10802

10803(all)
10851(all)
20001(all)
21464(all felonies)
21651(c)
23104(b)
23105(all)
23109(f)(3)
23109.1(all)
23110(b)
23152(all)
23152(.per 23550.5)
23153(all)
23550(all)
23550.5(a),(b)
23554
23558
23560
23566(all)
38318(b)
38318.5(b)
42000

Water Code

13375
13376
13387(all)

Welfare & Institutions

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

* Likely 1170(h) per *P v. Noyan* (2014) 232 CA4th 657

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

SUMMARY OF SENTENCING UNDER PC § 1170(h)
[As of 8/17/12]

Crimes sentenced to jail under PC § 1170(h)

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

Crimes/ person excluded from PC § 1170(h)

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

Crimes sentenced to state prison

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

What has changed

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

What has not changed

Probation eligibility
Ability to participate in alternative sentencing programs
How a sentence is structured under sections 1170 and 1170.1
Power to specify "wobblers" as a misdemeanor

The ability to suspend imposition of sentence, or impose sentence and suspend execution

Sentencing options under section 1170(h)

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

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

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

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

Restitution fines

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

If probation denied and sentence imposed:

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

Violations of mandatory supervision

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

Appendix III: Modification, Revocation, & Termination of Supervision

ACTIVITY	PROBATION	MANDATORY SUPERVISION	POSTRELEASE COMMUNITY SUPERVISION (PRCS)	PAROLE (Effective 7/1/13)
Applies to	Any felon eligible for and granted probation	Def on split sentence to jail per P.C. § 1170(h)	Def released from prison for P.C. § 1170(h) crime	Def released from prison for serious and violent crime
Authority	P.C. § 1203	P.C. § 1170(h)(5)(B)	P.C. §§ 3450-3465	P.C. § 3000.8
Setting Conditions	Court	Court	CDCR and probation; court on revocation	CDCR; court on revocation
Maximum Length of Supervision	5 years or maximum custody term	Length of original sentence imposed by court	3 years	Parole term
Revocation/ Modification	P.C. § 1203.2(a) - the court	P.C. § 1203.2(a) - the court	P.C. § 1203.2(a) - the court	P.C. § 1203.2(a) - the court
Termination	Yes - P.C. §§ 1203.2(b)(1); 1203.3(a)	Yes - P.C. §§ 1170(h)(5)(B)(i); 1203.2(b)(1)	Yes - P.C. § 1203.2(b)(1)	No - P.C. § 1203.2(b)(1)
Probable Cause Required on Summary Revocation	Yes- P.C. § 1203.2(a)	Yes- P.C. § 1203.2(a)	Yes- P.C. § 1203.2(a)	Yes- P.C. § 1203.2(a)
Hearing Required on Final Revocation or Modification	Yes- P.C. § 1203.2(b)(1)	Yes- P.C. § 1203.2(b)(1)	Yes- P.C. § 1203.2(b)(1)	Yes- P.C. § 1203.2(b)(1)
Scheduling Hearing	Reasonable time	Reasonable time	Reasonable time	45 days - P.C. § 3044(a)(2)(?)
Burden of Proof	Preponderance	Preponderance	Preponderance	Preponderance
Flash Incarceration by Supervising Agency	No	No	Up to 10 days per violation	Up to 10 days per violation
Sanctions by Court	Custody up to maximum	Custody up to unserved time on	1. Reinstate and up to 180 days jail	1. Reinstate and up to 180 days

	statutory term - either state prison or county jail depending on crime	original sentence - county jail only	2. Revoke/terminate and up to 180 days jail 3. Refer to reentry court	jail 2. Revoke and up to 180 days jail 3. Refer to reentry court 4. Place on EMP 5. Refer to CDCR for limited crimes per P.C. § 3000.1

Appendix IV: PRCS/Parole Advisement at Sentencing

(Pen. Code § 1170(c); Calif. Rules of Court, Rule 4.433(e))

It is my duty as a part of the judgment and sentence to inform you that upon completion of the custody term just imposed, depending on the nature of your conviction, you will be required to complete a period on postrelease community supervision or parole.

[The period of **postrelease community supervision** shall not exceed **3 years**.]

[The period of **parole** shall not exceed:

[**3 years** - determinate sentence - for maximum in custody or on parole of 4 years]

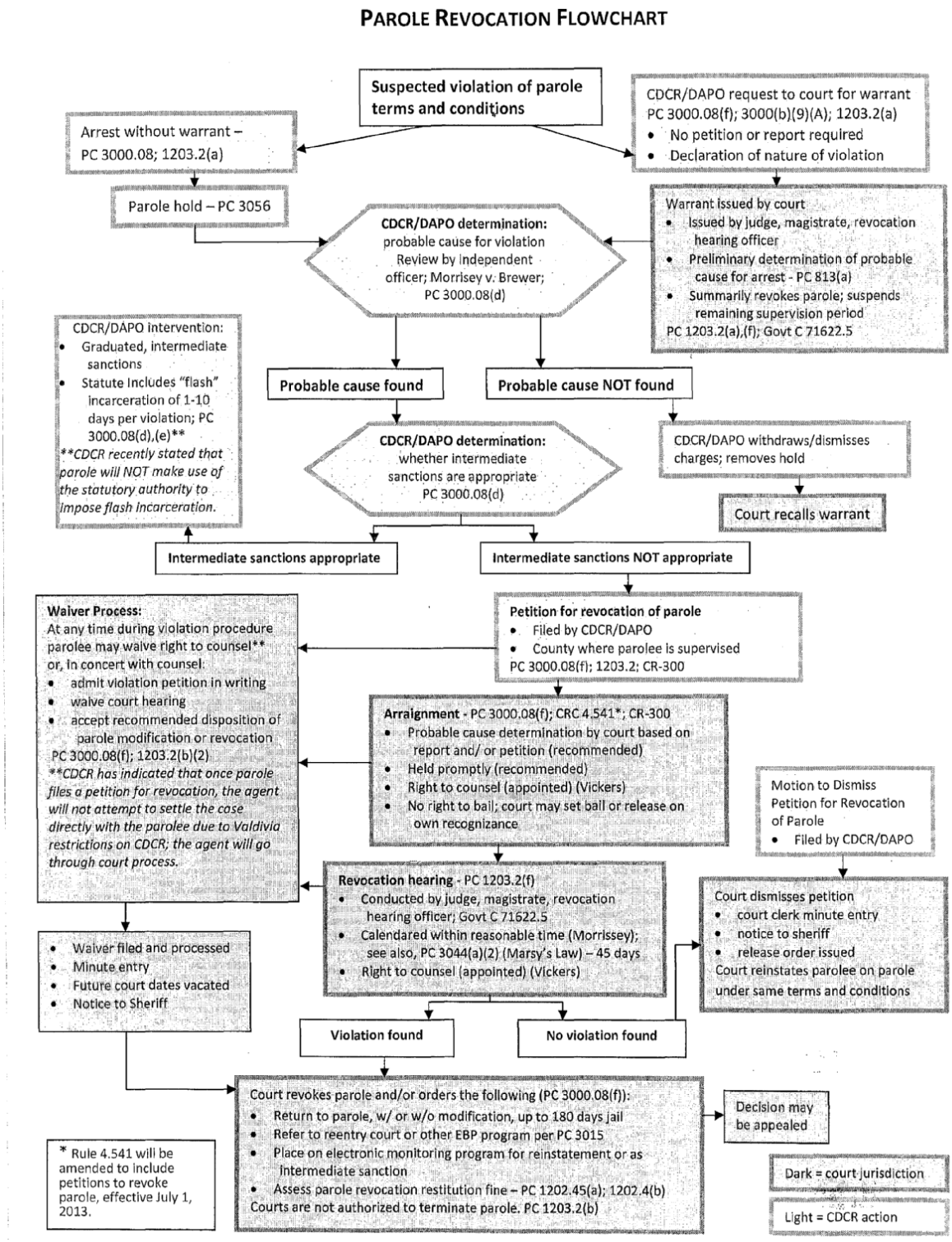
[**5 years** - indeterminate sentence - for a maximum in custody or on parole of 7 years]

[**10 years** - designated violent felonies per P.C. § 3000(b)(2)(B) and (b)(3) - for a maximum in custody or on parole of 15 years]

[**20 years** - designated violent sex crimes per P.C. § 3000(b)(4)(A)]

[**Life** - 1st or 2nd degree murder]

For each violation of postrelease community supervision or parole you may be returned to custody for up to 180 days, up to the maximum period of supervision. You are further subject to a period of flash incarceration of up to 10 days for each violation of postrelease community supervision or parole.

If you abscond, any period following suspension or revocation of postrelease community supervision or parole until you return to custody shall not apply to the limits of supervision.

Appendix V: Parole Violation Flow Chart