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FELONY SENTENCING FOLLOWING ENACTMENT OF 2011 REALIGNMENT LEGISLATION

J. Richard Couzens
Judge of the Placer County Superior Court (Ret.)

The 2011 Realignment Legislation made significant changes to the sentencing and supervision of persons convicted of felony offenses. AB 109 and AB 117 amended a broad array of statutes concerning where sentences are to be served and how defendants are 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.

I. Felony commitments

The realignment legislation creates a new level of punishment for a certain class of felony offenses. 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. Realignment comes into play when the court determines that the defendant should not be granted probation, either at the initial sentencing or as a result of a probation violation. In most circumstances it appears that 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 appears to be no change to the length of term or sentencing triad for any crime. The realignment legislation appears only to change where the sentence is to be served.

The realignment legislation divides felonies into three primary groups.

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

- Crimes where a penal statute does not specify a term of punishment. In such circumstances, the crime is punished by 16 months, two, or three years in county jail. (P.C. § 1170, subdiv. (h)(1).)
- Crimes where the statute now specifically requires punishment in the county jail, either as a straight felony commitment or as an alternative sentence as a wobbler. 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. (P.C. § 1170, subdiv. (h)(2).)

b. 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: (P.C. § 1170, subdiv. (h)(3).)

- Where the defendant has a prior or current serious or violent felony conviction under section 1192.7(c) or 667.5(c);
- Where the defendant is required to register as a sex offender under section 290; or
- Where the defendant is convicted of a felony with an enhancement for aggravated theft under section 186.11.

c. Felonies specifying punishment in state prison: The Legislature carved out specific crimes where the sentence must be served in state prison. These crimes, in excess of 60 in number, include aggravated assault under section 245, spousal abuse under section 273.5, and felony child abuse under section 273a. It will be incumbent on courts and counsel to verify the correct punishment for all crimes sentenced after the effective date of the realignment legislation.

II. Alternatives to commitment to jail or prison

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

III. No parole following release from county jail commitment

There is no formal parole period following a defendant's release from a commitment under section 1170, subdivision (h). Sections 3000, *et seq.*, governing the requirement of parole, only require parole if a defendant has been committed to state prison; the omission of commitments under section 1170, subdivision (h), was intentional. The legislation, however, provides a limited alternative to parole by way of supervision by the probation department. Section 1170, subdivision (h)(5), provides: "[a] judge, when imposing a sentence pursuant to this section, may order the defendant to serve a term in a county jail for a period not to exceed the maximum possible term of confinement or may impose a sentence that includes a period of county jail time and a period of mandatory probation not to exceed the maximum possible sentence." Although the statutory language is somewhat vague, it is the intent of the the realignment legislation to allow the court to impose a sentence to county jail for a term specified in the triad, then suspend execution of a concluding portion of that term, during which period the defendant would be supervised by the county probation officer. The length of the suspended term would be within the court's discretion.

The statute is silent regarding the mechanics of supervision, who may file a petition for revocation, or the specific consequences of a violation. Presumably the probation officer would 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.

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

Section 1170, subdivision (h)(6), specifies the subdivision will be effective for all persons *sentenced* on or after October 1, 2011. This effective date should not be confused with the effective date of changes made to the custody credit rules under section 4019, which are applicable only to *crimes committed* on or after October 1, 2011. Although the changes to section 1170 will be applicable to crimes committed prior to their effective date, there likely will be no ex post facto violation since the changes clearly result in a *reduction* of the penal consequences to many crimes.

V. Additional issues

There are a number of residual issues regarding the scope and application of the realignment legislation. These issues will require either clean-up legislation or court interpretation.

a. 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 serious or violent felony conviction, is required to register as a sex offender under section 290, or commits a crime with an enhancement for aggravated theft under section 186.11. This is an issue similar to exclusion from the enhanced custody credit provisions of sections 2933 and 4019. Accordingly, a review of the custody credit case law may be instructive.

(i) Sex crime registrants.

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

There is a question whether the exclusion will apply to persons who are required to register for a prior crime, and not because of the crime currently being sentenced. The plain language of the statute suggests that anyone required to register, whether or not for the current offense, will be excluded from sentencing under section 1170, subdivision (h). So, for example, a defendant sentenced for second degree burglary must be sentenced to state prison if he was previously convicted of a sex offense and is subject to the registration requirement. Given that the statutory wording is relatively clear and unambiguous, it seems likely that trial courts are required to follow its dictates. (*California Fed. Saving & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349.)

(ii) Defendants with current or prior serious or violent felony convictions.

Defendants who have a current or prior serious or violent felony conviction under sections 667.5(c) or 1192.7(c), must be sentenced to state prison. Because the statute limits the exclusion to defendants who have current or prior serious or violent felony "convictions," the restriction 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.)

(iii) Whether disqualifying conditions must be pled and proved.

A commitment to county jail under section 1170, subdivision (h), is unavailable to defendants who have current or prior violent or serious felony convictions listed in sections 667.5, subdivision (c), and 1192.7, subdivision (c), who are required to register as a sex offender, or who have a felony conviction with an enhancement for aggravated theft under section 186.11. (P.C. § 1170, subd. (h)(3).) The statute does not indicate whether these circumstances must be pled and proved.

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 "plead and prove" requirement, however, will be an issue in all other circumstances. *People v. Lara* (2011) 193 Cal.App.4th 1393, and *People v. Jones* (2010) 188 Cal.App.4th 165, holding there is a pleading and proof requirement to be excluded from the enhanced custody credit provisions, have been granted review or depublished by the Supreme Court. *People v. James* (2011) 196 Cal.App.4th 1102, and *People v. Voravongsa* (2011) ___ Cal.App.4th ___ [D.A.R.], conclude there is no requirement to plead and prove the existence of a prior disqualifying strike. There is no reason to suggest these cases are not equally applicable to other disqualifying factors.

A similar "pled and proof" dispute arose with a defendant's eligibility for Proposition 36 treatment. Except in limited circumstances, a defendant with a prior serious or violent felony conviction is not eligible for Proposition 36. (Pen. Code, § 1210.1, subd. (b)(1).) *In re Varnell* (2003) 30 Cal.4th 1132, 1143, concluded the prosecution is not required to plead and prove the disqualifying convictions. The court also concluded no such duty was compelled by *Apprendi v. New Jersey* (2000) 530 U.S. 466. (*Id.* at pp. 1141-1142.) Finally, it should be recalled that *Apprendi* and its progeny have only been applied in determining the maximum sentence a person is ordered to serve; it has never been applied to such things as calculation of the minimum term of custody. (See, *e.g.*, where *Blakely v. Washington* (2004) 542 U.S. 296, 304-305, expressly distinguished its circumstances from those in *McMillan v. Pennsylvania* (1986) 477 U.S. 79, where the court imposed a statutory *minimum* if particular facts were found.)

While the appellate decisions regarding the plead and proof requirement for a denial of enhanced custody credit may be helpful, there is a significant difference between that issue and the exclusion of a defendant from sentencing under section 1170, subdivision (h). As both *Jones* and *Lara* observe, the reduction of custody credit translates into a direct increase in the amount of time the defendant serves in custody. The realignment legislation, however, does not change the *amount* of time to be served, only *where* it is to be served. Courts may be less willing to find a plead and proof requirement under these circumstances, particularly in the absence of express legislation imposing such a requirement.

(iv) Effect of striking disqualifying factors under section 1385

The exercise of the court's discretion under section 1385 to dismiss disqualifying factors also will likely be a matter of some dispute. *People v. Jones* (2010) 188 Cal.App.4th 165, *People v. Koontz* (2011) 193 Cal.App.4th 151, and *People v. Lara* (2011) 193 Cal.App.4th 1393, which hold that such a dismissal does allow the court to grant enhanced custody credits, have been granted review or depublished. *People v. Voravongsa* (2011) ___ Cal.App.4th ___ [D.A.R.], concludes the court may not use section 1385 to dismiss factors that would disqualify a defendant from receiving the enhanced custody credit.

Again, this issue was discussed in *Varnell*. The court concluded no exercise of discretion under section 1385 will remove the serious or violent felonies for the purpose of qualifying the defendant for Proposition 36 treatment. (*Varnell* at pp. 1136-1139.) "[W]hen a court has struck a prior conviction allegation, it has not 'wipe[d] out' that conviction as though the defendant had never suffered it; rather, the conviction remains a part of the defendant's personal history, and a court may consider it when sentencing the defendant for other convictions, including others in the same proceeding." (*People v. Garcia* (1999) 20 Cal.4th 490, 499.)

b. Application of section 1170, subdivisions (d) and (e).

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

This issue may be resolved as a matter of jurisdiction. Absent the exercise of discretion under section 1170, subdivision (d), the court looses jurisdiction to modify a state prison sentence once the defendant is received in state prison custody. (See *Portillo v. Superior Court* (1992) 10 Cal.App.4th 1829, 1835-1836.) It is unclear whether the superior court looses jurisdiction over a defendant confined in a county jail under section 1170, subdivision (h).

c. Imposition of enhancements.

Section 1170, subdivision (d), mandates the court to impose any applicable enhancements. As this section currently reads, however, it only references commitments to prison; no mention is made of commitments under section 1170, subdivision (h). It is likely this is a legislative oversight. Section 667.5, subdivision (b) was specifically amended to require the imposition of the prior prison term enhancement for commitments under section 1170, subdivision (h), and also makes such commitments equivalent to a regular prison term if the defendant is again sent to prison or jail under section 1170, subdivision (h). Having determined the prior prison term enhancement should be imposed on jail commitments, the Legislature likely would intend to impose all applicable enhancements.

d. Crimes committed in county jail

Section 1170.1, subdivision (c), requires a full consecutive term for crimes committed in prison, not simply a subordinate consecutive term limited to one-third the mid-base term. Commitments under section 1170, subdivision (h) are not mentioned. It is not clear whether the omission is intentional or inadvertent.

VI. Change in calculation of conduct credits

The 2011 Realignment Legislation also made changes to the method by which custody conduct credits are computed. These changes must be viewed in context with all of the amendments to section 2933 and 4019. Please refer to the separate memorandum on custody credits: "Awarding Conduct Credits Under P.C. §§ 4019 and 2933 After October 1, 2011," by Couzens and Bigelow.