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In the Supreme Court of the State of California

SUPREME COURT
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JUN 28 2013

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Deputy

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Appellant,** **v.** **JAMES RUSSELL SCOTT,** **Defendant and Respondent.**

Case No. _____

Sixth Appellate District, Case No. H037923
Monterey County Superior Court, Case No. SS080912
The Honorable Mark E. Hood, Judge

PETITION FOR REVIEW

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Respondent respectfully petitions for review of the decision of the Court of Appeal for the Sixth Appellate District. The decision, attached as Exhibit A, was filed on May 23, 2013. It is published at 216 Cal.App.4th 848. Neither party sought rehearing. This petition is timely. (Cal. Rules of Court, rule 8.500(e).)

ISSUE PRESENTED

Whether the defendant is "sentenced on or after October 1, 2011," where the trial court suspends the execution of a prison sentence prior to the Realignment Act's operative date and later executes the sentence upon revoking probation after that date?

STATEMENT OF THE CASE

Defendant was charged by a May 7, 2009 information with sale of a controlled substance (Health & Saf. Code, § 11352, subd. (a); count 1), possession of cocaine base for sale (Health & Saf. Code, § 11351.5; count 2), possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a); count 3), misdemeanor possession of marijuana while driving (Veh. Code, § 23222, subd. (b); count 4), and misdemeanor possession of controlled substance paraphernalia (Health & Saf. Code, § 11364, subd. (a); count 5). (1 CT 182-184.) The information further alleged that defendant had previously been convicted of a controlled substance offense within the meaning of Health and Safety Code section 11370.2, subdivision (a). (1 CT 183.)

On May 7, 2009, defendant pleaded no contest to count 2 and admitted the prior conviction allegation, on condition that he be placed on felony probation with a seven-year suspended prison sentence. (1 CT 186-187, 191.)

On June 12, 2009, the trial court sentenced defendant to the California Department of Corrections and Rehabilitation (CDCR) for a period of seven years, suspended execution of sentence, and ordered defendant to serve three years' formal probation. (1 CT 210.) At the time of sentencing, the trial court stated:

> So as to Count 2, the Court imposes the middle term of four years. Court imposes an additional three years pursuant to 1170.2(a) [*sic*] for a total of seven years. Court stays execution of that sentence and orders defendant placed on probation . . . .
>
> [¶] . . . [¶]
>
> The Court orders defendant to serve 252 days in the county jail, credit for 252 days served—168 actual days and 84 conduct credit.
>
> It's not that—not that punishment could be warranted, I think the defendant's at a stage in his life where he can do time, and as much as you want to give him, it's not going to change a thing. He is where he is. And as you know, I'm sure much better than I do, *any [] time you don't get now you're going to get later if you mess it up so—that's the deal.*

(1 RT 8, 10, italics added.) The remaining charges and allegations were dismissed under Penal Code section 1385. (1 CT 211.)[1]

On October 4, 2011, the probation department filed a petition pursuant to section 1203.2. It alleged that defendant had violated his probation by failing to complete a drug treatment program. (1 CT 269.)[2]

On November 1, 2011, defendant admitted a violation of probation terms and conditions. (1 CT 273.) Defendant indicated that he understood that he faced a seven-year sentence. (4 RT 903.)

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[1] All further references are to the Penal Code unless otherwise noted.

[2] The defendant's probation had been revoked and reinstated two times prior to the October 2011 petition. (1 CT 236, 264.)

On December 13, 2011, the court indicated its intention to revoke probation and execute the previously-imposed prison sentence of seven years. (5 RT 1205.) The court continued the case for briefing on whether defendant should serve the sentence in prison or locally. (5 RT 1207.)

On December 20, 2011, the district attorney filed opposition to defendant serving the prison term in county jail under section 1170, subdivision (h)(1) and (2) of the Realigment Act. (1 CT 276-284.)

On December 22, 2011, the trial court revoked probation and ordered defendant to serve his sentence in county jail:

> All right. And generally I agree with the People's reasoning. And essentially, once a sentence is imposed, that sentence may not later be modified.
>
> However, recent legislation, 1170(h), technically applies to all persons sentenced on or after October 1st of this year.
>
> Because the decision whether or not to reinstate the defendant on probation or not in this case is essentially a sentencing proceeding, the Court finds that under 1170(h) that this as it is a sentencing proceeding, the defendant would qualify under 1170(h).
>
> In addition, because a commitment to county jail may be considered a less serious penalty than sentenced to state prison, although that may be subject to some argument by certain—depending on the individual, there's issues of equal protection under the law and the defendant should receive the benefit of any lesser penalty. Which again, a local commitment may be considered a lesser penalty in general than a state commitment.
>
> Because of that, the Court does find that sentencing the defendant to serve the execution sentence suspended does qualify under 1170(h) as to that issue.

(6 RT 1502-1503.)

On appeal, the People contended that the trial court erred by committing defendant to county jail rather than to state prison. The Court of Appeal disagreed. The Court of Appeal held that "the provisions of the

amended statute should apply to those qualifying defendants who committed a crime now subject to sentence in county jail prior to the passage of the Realignment Act, were placed on probation after execution of sentence was suspended, violated probation, and whose sentence was then executed *after* October 1, 2011." (Slip Opn. at p. 9.)

REASON FOR GRANTING REVIEW

Review should be granted to resolve whether the Realignment Act applies where a trial court has imposed and suspended the execution of a state prison sentence before the Act's operative date of October 1, 2011, and the trial court later revokes the defendant's probation and orders the execution of the sentence on or after October 1, 2011.

This issue requires review because it represents an important and recurring question of law that has divided appellate courts. This precise issue has resulted in a split of authority in the Courts of Appeal. *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, and *People v. Wilcox* (2013) __ Cal.App.4th __ [2013 Cal. App. LEXIS 508] held that the Realignment Act does not apply to sentences imposed before its effective date, even if the sentence is not executed until after its effective date. On the other hand, the Court of Appeal in this case agreed with the decision in *People v. Clytus* (2012) 209 Cal.App.4th 1001, that the Realignment Act applies to previously suspended sentences that are executed after the Act's operative date.

This split of authority, if unresolved, will lead inevitably to inconsistent results in the trial courts. Those courts must determine, upon probation revocation, whether defendants should be committed to state prison or county jail. Thus, in light of the importance of this issue to the orderly administration of the criminal justice system, respondent respectfully requests that this Court grant the petition for review.

I. REVIEW IS REQUIRED TO DETERMINE WHETHER THE REALIGNMENT ACT APPLIES WHEN A PREVIOUSLY-IMPOSED STATE PRISON SENTENCE IS ORDERED EXECUTED ON OR AFTER THE OPERATIVE DATE OF THE ACT

On April 4, 2011, Governor Brown signed AB 109, which redefined felonies and shifted responsibility for both supervising and housing certain felons and parolees from the state to the county. As stated in sections 17.5 and 3450, the purpose of AB 109 is to divert "low-level offenders" from state prison to locally run community-based corrections programs, with the goal of creating a more cost-effective system that reduces recidivism and improves public safety. AB 109 and its companion bills, AB 117, AB 118, AB 116, ABX 1 16, and ABX1 17 mandate that felony terms for approximately 500 different crimes be served in local custody instead of state prison. (§ 1170, subd. (h)(1) & (2).) Such felons must be nonviolent, nonserious, and nonsexual offenders. (§ 1170, subd. (h)(3).)

Defendant's offense of conviction—possession of cocaine base for sale—is a qualifying felony under section 1170, subdivision (h)(1) and (2). (Health & Saf. Code, § 11351.5.) However, section 1170, subdivision (h)(6) states: "The sentencing changes made by the act that added this subdivision shall be applied prospectively to any person *sentenced on or after October 1, 2011*." (Italics added.) Defendant was sentenced to seven years in the Department of Corrections and Rehabilitation on June 12, 2009, prior to the effective date of the Realignment Act. (1 CT 210.)

The trial court also suspended execution of defendant's sentence on June 12, 2009. It did not order the judgment into effect until December 22, 2011. The fact that the stay was lifted after October 1, 2011 does not bring defendant within the sentencing provisions of section 1170, subdivision (h). Rather, at all times, defendant remained a person sentenced to state prison as of June 12, 2009. *People v. Howard* (1997) 16 Cal.4th 1081 explained:

> [I]f the trial court has suspended *imposition* of sentence, it ultimately may select any available sentencing option. However, if, as here, the court actually imposes sentence but suspends its *execution*, and the defendant does not challenge the sentence on appeal, but instead commences a probation period reflecting acceptance of that sentence, then the court lacks the power, at the precommitment stage (see § 1170, subd. (d)), to reduce the imposed sentence once it revokes probation.

(*Id.* at p. 1084.) This is because "where a sentence has actually been imposed but its execution suspended, 'The revocation of the suspension of execution of the judgment brings the former judgment into full force and effect . . . .' [Citations.]" (*Id.* at p. 1087.) This court further stated in *Howard*:

> Therefore, section 1203.2, subdivision (c), and rule 435(b)(2),[3] by their terms, limit the court's power in situations in which the court chose to impose sentence but suspended its execution pending a term of probation. On revocation of probation, if the court previously had imposed sentence, the sentencing judge must order that *exact sentence* into effect (*People v. Chagolla* (1984) 151 Cal.App.3d 1045, 1050-1051; accord, *People v. Colado* (1995) 32 Cal.App.4th 260, 262-264), subject to its possible recall under section 1170, subdivision (d), *after* defendant has been committed to custody.

(*Id.* at p. 1088, first italics added, parallel citations omitted.)

The "exact sentence" (*Howard, supra*, 16 Cal.4th at p. 1088) imposed by the trial court on June 12, 2009 was seven years in state prison. As the *Gipson* court explained: "[U]nder *Howard*, imposition of sentence is equated with entry of final judgment. When a final judgment is entered,

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[3] Now Cal. Rules of Court, rule 4.435(b)(2): "On revocation and termination of probation under section 1203.2, when the sentencing judge determines that the defendant will be committed to prison: . . . (2) If the execution of sentence was previously suspended, the judge must order that the judgment previously pronounced be in full force and effect and that the defendant be committed to the custody of the Secretary of the Department of Corrections and Rehabilitation for the term prescribed in that judgment."

everything about a defendant's sentence is prescribed. It would be illogical to say he has not been sentenced. If we were to conclude that the word 'sentenced' means that sentence was both imposed and executed, we would force an extra meaning on the language it is not susceptible to." (213 Cal.App.4th at pp. 1529-1530; see also *People v. Mora*, *supra*, 214 Cal.App.4th at p. 1482; *People v. Kelly*, *supra*, 215 Cal.App.4th at pp. 305-306.)

When the trial court revoked defendant's probation on December 22, 2011, its discretion was limited under section 1203.2, subdivision (c) to ordering the previous judgment into "full force and effect." Nothing in the Realignment Act reflects an intent to abrogate section 1203.2, subdivision (c), or this court's decision in *Howard*. (See *People v. Kelly*, *supra*, 215 Cal.App.4th at p. 305 ["The rule of statutory construction that the Legislature is deemed to be aware of statutes and judicial decisions already in existence and to have enacted a statute in light of existing statutes and decisions . . . assists in resolving that potential ambiguity"].) In fact, when the Legislature amended Penal Code section 1170, it left unchanged the following language: "In sentencing the convicted person, the court shall apply the sentencing rules of the Judicial Council." (Pen. Code, § 1170, subd. (a)(3).) Thus, the Realignment Act confirms the interpretation *Howard* gave to former Rule 435(b)(2) (now Rule 4.435(b)(2)).

The distinction overlooked by the Court of Appeal in this case is that the judgment was only rendered once, i.e., when the trial court imposed sentence on June 12, 2009 and not when the court subsequently revoked probation and ordered execution of the sentence on December 22, 2011. (See § 1203.2, subd. (c); *People v. Robinson* (1954) 43 Cal.2d 143, 145 [if judgment is pronounced and probation granted, the subsequent order revoking probation is appealable as a post-judgment order affecting substantial rights].)

There is no distinction between passing or pronouncing sentence and pronouncing judgment: "All are deemed to occur at such time as the court imposes sentence, which act constitutes the rendition of judgment. [Citations.]" (*People v. Flores* (1974) 12 Cal.3d 85, 93, fn. 6.) The Legislature presumably meant "any person sentenced" in the Realignment Act to mean any person on whom judgment was pronounced on or after October 1, 2011.

In this case, the trial court had pronounced sentence over two years earlier, in 2009. The Court of Appeal's affirmance of the trial court's imposition of a sentence to county jail is inconsistent with the Legislature's decision that the Realignment sentencing changes apply prospectively. The Court of Appeal's ruling is also inconsistent with *Howard,* which required the trial court either to commit the defendant to state prison or to reinstate probation with the same suspended state prison sentence. The ruling also is inconsistent with *Flores*'s equation of the imposed sentence to the judgment.

Finally, review is needed because the decision by the Court of Appeal below, as in *Clytus*, incorrectly assumes that "the Realignment Act does not modify the punishment for the relevant crimes." (*People v. Wilcox*, *supra*, 2013 Cal.App.Lexis at p. *9; see Slip Opn. at p. 10.) "Although the Realignment Act appears not to lessen the term of confinement, it nonetheless reduces punishment for the relevant crimes. . . . [A] person sentenced to county jail under the Realignment Act may have a concluding portion of the sentence suspended in lieu of de facto probation, and is not subject to postrelease supervision. Since a person sentenced to state prison is not entitled to these benefits, the county jail provisions of the Realignment Act effectively reduce the punishment for the myriad of covered crimes. [Citation.]" (*Ibid.*)

"Applying the Realignment Act to a defendant's suspended state prison term would reduce the sentence and therefore modify the previously imposed term, contravening section 1203.2, subdivision (c). It would also alter the terms of the plea agreement where the suspended term was part of a stipulated sentence under the plea agreement. In most cases, including this one, application of the Realignment Act would alter a sentence that was final and binding on the trial court. (See *People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1421 [sentence imposed but execution suspended is an appealable order, if not challenged on appeal, is final and binding when probation is revoked].)" (*Id.* at pp. *9-*10.)

Considering the significant impact on the criminal justice system from the alteration of final sentences, the issue requires a speedy and definitive resolution. Accordingly, respondent respectfully requests that this Court grant the petition for review.

CONCLUSION

Accordingly, respondent respectfully requests that the petition for review be granted.

Dated: June 28, 2013

Respectfully submitted,

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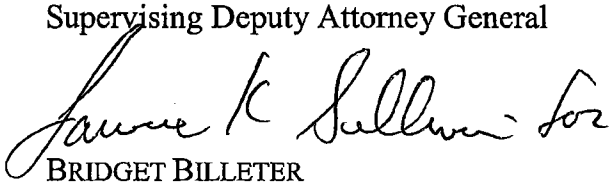

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CERTIFICATE OF COMPLIANCE

I certify that the attached PETITION FOR REVIEW uses a 13 point Times New Roman font and contains 2,635 words.

Dated: June 28, 2013

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EXHIBIT A

Filed 5/23/13

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Appellant, v. JAMES RUSSELL SCOTT, Defendant and Respondent.	H037923 (Monterey County Super. Ct. No. SS080912)

Defendant James Russell Scott pleaded no contest to the crime of possession of cocaine base for sale (Health & Saf. Code, § 11351.5) on May 7, 2009. The plea was entered on the condition that defendant be placed on felony probation with a suspended seven year prison sentence. Defendant admitted a violation of probation on November 1, 2011. The trial court then revoked defendant's probation and ordered defendant to serve his sentence in county jail under the Criminal Justice Realignment Act (hereafter the Act, or Realignment Act), which in part modified the provisions of Penal Code section 1170, subdivision (h)(1) and (2).[1] (Stats. 2011, 1st Ex. Sess. 2011-2012, ch. 12, § 1.) The People appeal the trial court's order sentencing defendant to county jail. For the reasons set forth below, we affirm the judgment.

PROCEDURAL BACKGROUND[2]

On May 7, 2009, defendant pleaded no contest to a count of possession for sale of cocaine base (Health & Saf. Code, § 11351.5) and admitted the allegation of a prior drug-

[1] All further unspecified statutory references are to the Penal Code.

[2] The facts of the underlying case are not relevant to the current appeal.

related conviction (*id.* § 11370.2, subd. (a)), on the condition that he be placed on felony probation with a seven-year suspended prison sentence. On June 12, 2009, the trial court sentenced defendant to the California Department of Corrections and Rehabilitation (CDCR) for a term of seven years, suspended execution of sentence, and placed defendant on three years probation.

On October 4, 2011, the probation department filed a probation violation petition pursuant to section 1203.2.[3] Defendant admitted the violation on November 1, 2011. On December 13, 2011, the trial court indicated its intention to revoke defendant's probation and impose a seven-year sentence in the county jail pursuant to section 1170, subdivision (h), as amended by the Realignment Act. The People objected to sentencing defendant to a term in the county jail under section 1170, subdivision (h), stating on the record that "the People's position is that the defendant has been already sentenced." After a sidebar discussion, the court continued the hearing to give both parties time to consider the issue and file briefs on whether or not defendant should be sentenced to state prison or county jail.

The People filed a brief on this point on December 20, 2011. In essence, the People argued that section 1170, subdivision (h) applies prospectively to cases where defendants are sentenced on or after October 1, 2011. The People contended that since defendant was sentenced on June 12, 2009, before the effective date of section 1170, subdivision (h), the court had no power to sentence defendant to county jail.

On December 22, 2011, the trial court, after review of the People's arguments, revoked defendant's probation and sentenced him to serve a seven-year sentence in county jail. During the hearing, the trial judge stated that "generally I agree with the People's reasoning. And essentially, once a sentence is imposed, that sentence may not

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[3] Defendant had already violated his probation twice before the October 4, 2011 petition, and both times his probation was revoked and reinstated by the trial court.

later be modified. [¶] However, the recent legislation, [section] 1170[, subdivision] (h), technically applies to all persons sentenced on or after October 1st of this year. [¶] Because the decision whether or not to reinstate the defendant on probation or not in this case is essentially a sentencing proceeding, the Court finds that under [section] 1170[, subdivision] (h) that this as it is a sentencing proceeding [*sic*], the defendant would qualify under [section] 1170[, subdivision] (h). [¶] In addition, because a commitment to county jail may be considered a less serious penalty than sentenced [*sic*] to state prison, although that may be subject to some argument . . . there's issues of equal protection under the law and the defendant should receive the benefit of any lesser penalty."

The People filed a timely notice of appeal over the imposed sentence on February 6, 2012.

DISCUSSION

On appeal, the People raise the sole argument that the trial court erred in sentencing defendant to county jail under the newly amended provisions of section 1170, subdivision (h), effectuated by the Realignment Act. For reasons we explain below, we disagree with the People's argument, and affirm the judgment.

Standard of Review and Principles of Statutory Construction

The question of whether or not the changes made to the Penal Code by the Legislature through the Realignment Act apply to those defendants whose sentence was imposed but suspended before the effective date of the Act, but whose sentence was executed *after* the effective date of the Act, is a question of law that we will review de novo. (*People v. Failla* (2006) 140 Cal.App.4th 1514, 1520.)

To properly construe a statute, we must " ' "ascertain the Legislature's intent so as to effectuate the purpose of the law." ' " (*People v. Canty* (2004) 32 Cal.4th 1266, 1276 (*Canty*).) The rules of statutory construction are well settled. "Our first task is to examine the language of the statute enacted as an initiative, giving the words their usual, ordinary meaning. [Citations.] If the language is clear and unambiguous, we follow the

plain meaning of the measure. [Citations.] '[T]he "plain meaning" rule does not prohibit a court from determining whether the literal meaning of a measure comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute.' " (*Ibid.*) "The language is construed in the context of the statute as a whole and the overall statutory scheme, and we give 'significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose. [Citation.]' [Citations.] The intent of the law prevails over the letter of the law, and ' "the letter will, if possible, be so read as to conform to the spirit of the act." ' " (*Id.* at pp. 1276-1277.) If the Legislature " 'has provided an express definition of a term, that definition ordinarily is binding on the courts.' " (*Id.* at p. 1277.)

The Realignment Act

The Realignment Act, enacted in 2011 and operative October 1, 2011, provides that certain defendants who would have received a sentence to prison prior to the enactment of the Act will now receive a sentence to county jail. (§ 1170, subd. (h)(1)-(3).) Certain defendants are excluded from this statutory scheme, including those who are required to register as sex offenders, or those who have prior serious or violent felony convictions. (*Id.* subd. (h)(3).) Under the sections of the Penal Code amended by the Realignment Act, defendants who plead guilty or are convicted of the same crime as defendant in this present case will now receive a term of commitment in county jail for their offenses. Section 1170, subdivision (h)(6), specifies that the amendments made by the Act apply prospectively to those defendants sentenced on or after October 1, 2011.

Defendant was Properly Sentenced Under the Realignment Provisions

The People contend that defendant was sentenced in 2009, when the trial court placed defendant on probation and suspended the execution of his seven-year prison sentence, and not when his sentence was actually executed in 2011 after his probation was revoked. It is the People's position that the trial court violated section 1203.2 and

Rules of Court, rule 4.435(b)(2), when it sentenced defendant to county jail instead of state prison, as originally imposed by the trial court in 2009.[4]

Defendant argues that the Second Appellate District, Division 8's decision in *People v. Clytus* (2012) 209 Cal.App.4th 1001 (*Clytus*), is instructive. In *Clytus*, the court held that a trial court that executes a suspended sentence after October 1, 2011, does not possess the discretion to send a defendant to state prison if he or she qualifies for confinement in county jail under the Realignment Act. (*Id.* at p. 1004.) The factual situation in *Clytus* is analogous to defendant's present case, as the *Clytus* defendant was sentenced prior to October 1, 2011, but had execution of his sentenced suspended, and was placed on probation. (*Ibid.*) Thereafter, the *Clytus* defendant violated his probation, which he admitted during a hearing on October 14, 2011, after the Realignment Act became operative law. (*Ibid.*)

The *Clytus* court acknowledged the California Supreme Court's decision in *People v. Howard* (1997) 16 Cal.4th 1081 (*Howard*), which held that "once imposed, a suspended sentence may not later be modified." (*Clytus*, *supra*, 209 Cal.App.4th at p. 1005.) However, the court found that *Howard* neither bound the court in any way nor guided the court in its interpretation of the Realignment Act. (*Id.* p. 1006.) The *Clytus*

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[4] Section 1203.2, subdivision (c), provides that "[u]pon any revocation and termination of probation the court may, if the sentence has been suspended, pronounce judgment for any time within the longest period for which the person might have been sentenced. However, if the judgment has been pronounced and the execution thereof has been suspended, *the court may revoke the suspension and order that the judgment shall be in full force and effect.* In either case, the person shall be delivered over to the proper officer to serve his or her sentence, less any credits herein provided for." (Italics added.) Rules of Court, rule 4.435(b), similarly states that: "(b) On revocation and termination of probation under section 1203.2, when the sentencing judge determines that the defendant will be committed to prison: [¶] . . . [¶] (2) If the execution of sentence was previously suspended, *the judge must order that the judgment previously pronounced be in full force and effect* and that the defendant be committed to the custody of the Secretary of the Department of Corrections and Rehabilitation for the term prescribed in that judgment." (Italics added.)

court concluded that under the plain meaning of section 1170, subdivision (h)(6), "any sentence executed on or after October 1, 2011, for a felony that is not prison eligible shall be served in county jail under section 1170." (*Clytus*, *supra*, at p. 1006.) The court further noted that nowhere in the statute was there any indication that the "Legislature intended a different result if a prison sentence was imposed and suspended before October 1, 2011, and executed on or after October 1, 2011." (*Id.* at pp. 1006-1007.) The court made the finding that though the *Clytus* defendant was sentenced prior to October 1, 2011, he was *still* a " 'person sentenced' " for the purposes of section 1170, subdivision (h)(6), when the court executed the suspended sentence after October 1, 2011. (*Clytus*, *supra*, at p. 1007.)

In coming to its conclusion, the *Clytus* court in part looked to the intent of the Legislature in passing the Realignment Act. (*Clytus*, *supra*, 209 Cal.App.4th at pp. 1006-1007.) Section 1170, subdivision (h)(6), on its face seems unambiguous, but an application of the section to the factual situation presented here requires an interpretation of what the Legislature meant by those "sentenced" on or after the effective date of the statute. We find that the intent of the Legislature proscribes an interpretation of the statute such that the provisions of the Act would apply to individuals in defendant's situation, where probation was granted, revoked, and the previously suspended sentence executed after the effective date of the Act.

The Legislature enacted the Realignment Act in response to growing rates of recidivism with the specific goal of increasing public safety while reducing costs. This intent was clear, as the Legislature's stated purpose for enacting the Realignment Act is codified in section 17.5. (Stats. 2011, ch. 39, § 5.) First, the Legislature declared that "[d]espite the dramatic increase in corrections spending over the past two decades, national reincarceration rates for people released from prison remain unchanged or have worsened. National data show that about 40 percent of released individuals are

reincarcerated within three years. In California, the recidivism rate for persons, who have served time in prison, is even greater than the national average." (§ 17.5, subd. (a)(2).)

Further, the Legislature declared that "[r]ealigning 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." (§ 17.5, subd. (a)(5).) The Realignment Act was therefore enacted with this particular framework and these particular purposes in mind.

These intentions are bolstered by the Legislative Analyst's Office report published on criminal justice realignment. In its report, the Legislative Analyst's Office analyzed that some of the benefits from realigning low-level offenders who commit certain drug-related crimes, like defendant here, to county jail instead of prison, are derived from the fact that state programs for drug offenders are lacking compared to community-based programs, as demonstrated by the efficacy of Proposition 36 drug probation. (Legis. Analyst's Off., 2009-2010 The Budget Analysis Series, Criminal Justice Realignment (2009-2010 Reg. Sess.) Jan. 27, 2009, pp. 11-15.)[5] The report also outlined that consolidating responsibility for these offenders to local authorities would foster innovation, as the state itself faces inherent obstacles in managing a substance abuse program in a prison setting. (*Id.* at p. 13.) The report additionally stated that realigning

[5] "To determine the purpose of legislation, a court may consult contemporary legislative committee analyses of that legislation, which are subject to judicial notice." (*In re J.W.* (2002) 29 Cal.4th 200, 211.) The Legislative Analyst's Office report, and the legislative history of the Realignment Act, is not a part of the record before us on appeal. Nonetheless, all are official government documents that are the proper subject of judicial notice. (Evid. Code, §§ 452, subd. (c), 459.) We therefore take judicial notice of the legislative history of the Realignment Act on our own motion.

low-level offenders would prioritize state prison spaces for serious and violent offenders. (*Id.* at p. 14.)

Notably, in passing the Act, the Legislature codified that the amendments made to the Penal Code were to be made prospective. In Assembly Bill No. 109, the Legislature initially included a provision, then located in section 1170, subdivision (h)(5), which specified that the amendments made to the statute would be made prospective only to those defendants sentenced on or after July 1, 2011. (Stats. 2011, ch. 15, § 450.) The Senate Rules Committee's third reading for Assembly Bill No. 109 on March 14, 2011, stated changes made by the Act would be "applied prospectively beginning July 1, 2011." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 109 (2011-2012 Reg. Sess.) Mar. 14, 2011, p. 4.)

Later, the language in section 1170, subdivision (h)(5) was renumbered to subdivision (h)(6) by Assembly Bill No. 117, to its present form where it now mandates that the changes made by the Realignment Act will apply prospectively to all those sentenced on or after October 1, 2011. (Stats. 2011, ch. 39, § 27.) In its analysis of the amendments made to the legislation, the Senate Rules Committee's third reading of Assembly Bill No. 117 stated that the operative date of the Act would change from July 1, 2011, to October 1, 2011. (Sen. Rules Com. Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 117 (2011-2012) as amended Jun. 28, 2011, p. 2.) From this, we glean that the Legislature intended that the changes to section 1170 be made prospective, which is why the Legislature included the language in section 1170, subdivision (h)(6). The question is thus whether or not the Legislature intended this prospective application to include defendants in the situation presented here.

We find that since the legislative intent of the Realignment Act was to direct certain low-level offenders from state prison to county jail and other community-based programs prospectively after October 1, 2011 (§ 1170, subd. (h)(6)), the Act is properly interpreted as to realign offenders in defendant's situation. Namely, we find the

provisions of the amended statute should apply to those qualifying defendants who committed a crime now subject to a sentence in county jail *prior* to the passage of the Realignment Act, were placed on probation after execution of sentence was suspended, violated probation, and whose sentence was then executed *after* October 1, 2011. This interpretation satisfies the stated purposes of realignment: reducing recidivism by redirecting low-level felons, such as defendant here, to county and other locally-based programs over state programs. This interpretation also furthers the Legislature's intent to apply the Act prospectively, to apportion prison space to more serious or violent offenders, and to reduce recidivism by directing offenders to locally-based programs. To draw a distinct line barring defendants whose sentence was executed after the effective date of the Act, but whose sentence was imposed prior to the act, from serving their terms in county jail fails to promote the Legislature's stated goals.[6]

We do not agree with the People's assertion that the California Supreme Court's decision in *Howard* controls. In *Howard*, the court determined that once a sentence is imposed, even if the execution of the sentence is thereafter suspended, that sentence may not be modified by the trial court. (*Howard, supra*, 16 Cal.4th at p. 1085.) "[I]f the court has actually imposed the sentence, and the defendant has begun a probation term representing acceptance of that sentence, then the court has no authority, on revoking probation, to impose a lesser sentence at the precommitment stage." (*Id.* at p. 1095.) Here, the People's argument is that once the sentence was imposed--seven years in state

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[6] Other amendments made to the Penal Code by the Realignment Act also underscore the Legislature's intent. For example, sections 3000.08 and 3451, added by the Legislature to address postrelease supervision for felony offenders released on or after October 1, 2011, specify that unless a parolee committed certain offenses, such as a serious or violent felony, the parolee would be subject to postrelease supervision by county authorities, not state authorities. Again, this furthers the legislative intent to shift responsibility for certain felony offenders, whether it be for postrelease supervision or for incarceration, from the state to local governments after October 1, 2011.

prison--the trial court had no authority to modify this sentence such that defendant would be sentenced to seven years in *county jail.*

As the court in *Howard* explained, there is a vital difference between a trial court suspending imposition of a sentence and suspending execution of a sentence prior to placing a defendant on probation. (*Howard, supra*, 16 Cal.4th at p. 1087.) In the former, no judgment has been imposed, and the defendant is only subject to the agreed-upon terms of probation. (*Ibid.*) In the latter, a judgment has been imposed, it is only that the execution of the sentence has been suspended. (*Ibid.*) Once probation is revoked, the judgment comes " 'into full force and effect' " (*ibid.*) such that the former sentence, with no modifications made by the trial court, will be executed. (*Id.* at pp. 1087-1088.)

In defendant's case here, the trial court suspended execution of defendant's seven-year state prison sentence in 2009. Under the rationale set forth in *Howard*, once the trial court revoked defendant's probation in 2011, the full force of the prior judgment should have taken effect. However, what the *Howard* court did not contemplate is the situation that is laid out before us here, in which through a legislative change of law the sentence proscribed is now a term in jail instead of prison. Since "cases are not authority for propositions not considered," we find that *Howard* does not control in this situation. (*People v. Brown* (2012) 54 Cal.4th 314, 330 (*Brown*).) Here, the trial court is not modifying a prior suspended sentence by reducing or otherwise ameliorating the term of commitment. Instead, it is following the letter of the new law.

We note that not all courts have followed this same rationale. The Fourth Appellate District recently published an opinion holding that *Howard* and section 1203.2, subdivision (c) control as the Legislature did not expressly abrogate or amend these sections when it enacted section 1170. (*People v. Kelly* (April 10, 2013, E055263) __ Cal.App.4th __ [2013 WL 1449756] (*Kelly*).) It is true that when the Legislature passes a new law, it is presumed to do so in light of existing cases and statutes. (*People v. Yartz* (2005) 37 Cal.4th 529, 538.) However, as we previously discussed *ante*, *Howard* is not

instructive in this particular case. It follows that simply because the Legislature did not expressly abrogate section 1203.2 or *Howard* when enacting the provisions of the Realignment Act does not necessarily render the amended portions of section 1170, subdivision (h), inapplicable to defendants in our situation. We therefore respectfully disagree with the *Kelly* court's conclusion in that regard.

Additionally, in *People v. Gipson* (Feb. 28, 2013, B241551) __ Cal.App.4th __ [2013 WL 746637] (*Gipson*), Division 2 of the Second Appellate District determined that a defendant is "sentenced" when the sentence is imposed, not when it is executed, for purposes of interpreting section 1170, subdivision (h)(6).[7] The court in *Gipson* disagreed with the holding in *Clytus*, and found *Howard* persuasive. In so doing, the *Gipson* court found that a defendant is sentenced when the judgment is imposed, but suspended, a defendant is not sentenced again when the sentence is executed. The analysis in *Gipson* focused primarily on the interpretation of the word "sentenced" in section 1170, subdivision (h)(6). (*Gipson, supra*, at p. *3.)

If we follow the rationale of the *Gipson* court, the resolution of this present case depends on what the Legislature intended when it limited the application of the Realignment Act to those defendants "sentenced" on or after the operative date of October 1, 2011. (§ 1170, subd. (h)(6).) We agree that the definition of "sentenced" intended by the Legislature is the crux of this particular issue. However, we must respectfully disagree with the *Gipson* court's interpretation of the Legislature's intent as

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[7] The Fourth Appellate District also recently published an opinion adopting the rationale set forth in *Gipson*, concluding that the provisions of the Realignment Act do not apply to a defendant who was sentenced and had execution of sentence suspended prior to the effective date of the Realignment Act, but whose sentence was executed after October 1, 2011. (*People v. Mora* (Mar. 29, 2013, D062007) __ Cal.App.4th __ [2013 WL 1277829].) Both *Mora* and *Kelly* were decided by the Fourth Appellate District, though *Mora* was decided by Division 1 of the Fourth Appellate District and *Kelly* was decided by Division 2 of the Fourth Appellate District.

to the word "sentenced." In *Gipson*, the court determined that *Howard* controlled and that "imposition of sentence is equated with entry of a final judgment" and since at that point "everything about a defendant's sentence is prescribed[,] [i]t would be illogical to say he has not been sentenced."[8] (*Gipson, supra*, __ Cal.App.4th __ at p. *3.) The court therefore concluded that to construe that "sentenced" meant that a sentence must be both imposed *and* executed would force extra meaning on the language of the statute, which it is not susceptible to. (*Ibid.*)

We do not find that such an interpretation would force extra meaning into the statutory language. Section 1170, subdivision (h)(6) specifies that the provisions of the Realignment Act would only apply to those who would be sentenced on or after October 1, 2011. If we were to examine this issue in a vacuum, without reference to the Legislature's intent, we would agree with the People that this definition would exclude individuals such as defendant here as he was "sentenced" prior to October 1, 2011. However, given the Legislature's intent was to reduce recidivism by redirecting low-level offenders to county and community-based programs, we find that such an interpretation

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[8] The *Gipson* court similarly found that *People v. Chagolla* (1984) 151 Cal.App.3d 1045 (*Chagolla*), bolstered its argument. In *Chagolla*, the court noted that "where sentence is imposed and execution thereof suspended, an appeal may be taken from the sentence to state prison as the final judgment or an order granting probation as an order made after judgment." (*Id.* at p. 1049.) Accordingly, the trial court is "without jurisdiction to modify or change the final judgment and is required to order into execution that judgment after revocation of probation. The attempted modification of [a] previously imposed sentence [is] beyond the trial court's jurisdiction and subject to review." (*Ibid.*) The *Gipson* court surmised that under the authority provided by *Chagolla* and *Howard*, "[h]ere, we fail to see how the trial court had jurisdiction to do anything other than order the execution of the previously imposed prison sentence." (*Gipson, supra*, __ Cal.App.4th at p. *3.) We find *Chagolla* is not instructive for similar reasons that we found *Howard* unpersuasive, as *Chagolla* concerned a trial court's improper modification of a suspended sentence, and did not contemplate a modification or change made due to an amendment to the statutory sentencing scheme. (*Chagolla, supra*, at pp. 1047-1048.)

of the word "sentenced" does not comport with our understanding of the statutory scheme of the Realignment Act. As the reviewing court, we not only look at the plain meaning of the statute, but at the spirit and intent of the Act, which we find is best understood as codifying the Legislature's intent to direct offenders in defendant's situation to county-based programs. (See *Canty*, *supra*, 32 Cal.4th at pp. 1276-1277 ["The intent of the law prevails over the letter of the law, and ' "the letter will, if possible, be so read as to conform to the spirit of the act." ' "].) Placing individuals, such as defendant, to prison over county jail when he or she would unequivocally be sentenced to county jail under the amended provisions of section 1170, subdivision (h), produces an anomalous situation that frustrates the purpose behind realignment.

We also do not agree with the People's contention that *People v. Amons* (2005) 125 Cal.App.4th 855 (*Amons*) is instructive. In *Amons*, the appellate court held the sentencing rules announced by *Blakely v. Washington* (2004) 542 U.S. 296 regarding the imposition of upper-term sentences did not apply to a criminal defendant whose sentence was imposed prior to the published date of the *Blakely* opinion, but executed after the published date of the opinion. (*Amons*, *supra*, at p. 860.) There, the appellate court noted that " '[w]hen a decision of [the United States Supreme] Court results in a "new rule," that rule applies to all criminal cases still pending on direct review.' (*Schriro v. Summerlin* (2004) 542 U.S. 348, 350-352.)" (*Id.* at p. 863.) The appellate court then concluded that the sentencing provisions in *Blakely* was not retroactive to defendants in Amons' situation, who was sentenced, had execution of sentence suspended, was placed on probation, and whose sentence was later executed after revocation of probation. (*Id.* at pp. 860, 869-870.) Here, unlike *Amons*, we are not concerned the retroactive application of a change in law due to a decision from our nation's highest court. We are concerned with a *legislative* change in the law, and the Legislature's intent in amending the Penal Code.

Given our understanding of the Legislature's intent in passing the Realignment Act, and it's intent in including the language in section 1170, subdivision (h)(6), we conclude that the benefits of the Act are properly construed to apply to the individuals in defendant's situation.

Section 1170, subdivision (h)(6) and the* Estrada *Rule

The People argue that the Legislature's inclusion of section 1170, subdivision (h)(6), functions as an express saving clause that prohibits retroactive application of the Realignment Act under the *Estrada* rule. We agree with the People's interpretation of the subdivision as a saving clause, but disagree with the People's understanding of what constitutes a prospective-only application of the Realignment Act.

The *Estrada* rule is derived from the California Supreme Court's decision in *In re Estrada* (1965) 63 Cal.2d 740, 742. In *Estrada*, the Supreme Court concluded that if the Legislature amends a statute to mitigate the punishment for a specific crime, it must be assumed that the Legislature intended that the statute be retroactively applied to all defendants whose judgments of conviction were not final at the time of the statute's operative date if there is no other evidence to the contrary. (*Id.* at pp. 742-748; *Brown supra*, 54 Cal.4th at p. 323.) The rule articulated by *Estrada* is inapplicable when the statute at hand contains an express saving clause, or its functional equivalent, which mandates a prospective application of the statute. (See *People v. Nasalga* (1996) 12 Cal.4th 784, 793.) The People argue that section 1170, subdivision (h)(6), functions as an express saving clause.

We agree that setting the operative date of the statute to October 1, 2011, and further specifying that the changes to section 1170 shall apply only to those defendants sentenced on or after October 1, 2011, functions as a saving clause. It is clear that it was not the Legislature's intention to retroactively apply the amended portions of section 1170 to all defendants who may qualify for sentences in county jail, such as those defendants who were already serving time in prison for their convicted offenses prior to

October 1, 2011. However, for the reasons we outlined above, it seems equally clear that the Legislature's goal behind enacting the Act was to shift low-level offenders convicted of certain felonies from state to county supervision in an effort to reduce recidivism and to conserve state fiscal resources. The interpretation most in line with this intent is to read section 1170, subdivision (h)(6), as including individuals in defendant's situation within the scope of the Realignment Act.

So while we agree with the People's contention that section 1170, subdivision (h)(6) functions as an express saving clause, we do not believe the section acts to exclude those in defendant's situation from sentencing under the Realignment Act.

The People's Equal Protection Argument

Lastly, the trial court indicated during the sentencing hearing that it believed that *not* sentencing defendant to county jail may be a violation of defendant's equal protection rights. Hence, the People argue here on appeal that sentencing defendant to prison would not violate the principles of equal protection. However, since we determine that defendant should be sentenced to county jail and not prison under the Realignment Act, we need not reach the issue of whether or not a sentence to prison would actually violate defendant's right to equal protection under the law.

DISPOSITION

The judgment is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.

Trial Court:	Monterey County Superior Court Superior Court No. SS080912
Trial Judge:	Hon. Mark E. Hood
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. James Russell Scott***

No.: _____

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On June 28, 2013, I served the attached **PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 28, 2013, at San Francisco, California.

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Declarant

Signature

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