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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **JAMES RUSSELL SCOTT,** **Defendant and Appellant.**	Case No. S211670

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

OPENING BRIEF ON THE MERITS

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ISSUE

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

A. The Realignment 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. (See Stats. 2011, ch. 15, § 1 (AB 109).) Sections 17.5 and 3450 of AB 109 reflect the purpose of the Act 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, ABX1 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); see Stats. 2011, ch. 39 (AB 117); Stats. 2011, ch. 40 (AB 118); Stats. 2011, ch. 136 (AB 116); Stats. 2011, 1st Ex. Sess., ch. 13 (ABX1 16); Stats. 2011, 1st Ex. Sess., ch. 12 (ABX1 17).) Such felons must be nonviolent, nonserious, and nonsexual offenders. (§ 1170, subd. (h)(3).)

The Realignment Act was an urgency measure that took effect the day it was signed, April 4, 2011. (Stats. 2011, ch. 15, § 638.) Its delayed operative date was October 1, 2011. 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."

B. Trial Court Proceedings

A May 7, 2009, information charged defendant 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 a prior conviction for 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, 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 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 [Penal Code section[1]] 1170.2(a) [*sic*] for a total of seven years. Court stays execution of that sentence and orders defendant placed on probation . . . .
>
> [¶] . . . [¶]

[1] All further citations to statute are to this code unless otherwise specified.

> 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.) The remaining charges and allegations were dismissed under section 1385. (1 CT 211.)

On October 4, 2011, the probation department filed a petition to revoke probation pursuant to section 1203.2. It alleged 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. (1 CT 273.) He acknowledged he faced a seven-year sentence. (4 RT 903.)

On December 13, 2011, the court stated 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.)

The district attorney opposed a county prison term under section 1170, subdivision (h)(1) and (2) of the Realignment Act and sought execution of the previously imposed state prison sentence. (1 CT 276-284.)

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

> [G]enerally I agree with the People's reasoning. And essentially, once a sentence is imposed, that sentence may not later be modified.

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

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.)

C. Decision of the Court of Appeal

On appeal, the People contended that the Realignment Act did not apply and, hence, that the trial court erred by committing defendant to county jail rather than to state prison.

The Court of Appeal disagreed. It 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." (Typed Opn. at p. 9.)

The Court of Appeal relied principally upon *People v. Clytus* (2012) 209 Cal.App.4th 1001. *Clytus* reasoned: "It is certainly true that in this case, defendant was sentenced before October 1, 2011, when the court imposed and suspended execution of sentence with probation. But that does

not mean defendant was not also a 'person sentenced' when the court executed the suspended sentence after October 1, 2011. (§ 1170, subd. (h)(6).) Whenever a sentence is imposed and suspended, it may be executed in the future after a revocation of probation if the trial court decides not to reinstate probation. The trial court must make and articulate the reasons for its discretionary choice not to reinstate probation and to execute the sentence, as the trial court did here. We see no reason why we should conclude defendant was a 'person sentenced' when the court stayed execution of the sentence but not when the court executed the previously suspended sentence." (*Clytus*, *supra*, 209 Cal.App.4th at pp. 1006–1007.)

This court granted the People's petition for review.

SUMMARY OF ARGUMENT

Section 1170, subdivision (h)(6) provides that "[t]he sentencing changes made by [the Realignment Act] shall be applied prospectively to any person sentenced on or after October 1, 2011." This provision constitutes a saving clause, one which prevents the application of the act to persons sentenced prior to the act's postponed operative date. (*People v. Cruz* (2012) 207 Cal.App.4th 664, 672-673; see also *People v. Rossi* (1976) 18 Cal. 3d 295, 299-300.)

Nothing in the saving clause reflects a meaning should be ascribed to the phrase "person sentenced" different from the ordinary one, nor can words be added to that phrase. Defendant is not a "person sentenced on or after October 1, 2011." Under settled law, a judgment of imprisonment in the state prison renders a person "sentenced," regardless of whether the execution thereof is suspended. Section 1203.2 subdivision (c) reflects that a revocation of probation results in the pronouncement of judgment only if the imposition of sentence was suspended to grant probation, not if judgment was pronounced and the execution thereof suspended as in this case. Accordingly, the Realignment Act saving clause excludes, by its

plain language, a defendant whose sentence was imposed and execution thereof suspended prior to October 1, 2011, whether or not the court afterward "revoke[d] the suspension and order[ed] that the judgment be in full force and effect." (§ 1203.2, subd. (c).)

Assuming any ambiguity attends the phrase "person sentenced," the legislative history does not suggest the Realignment Act was meant to revise judgments imposed on probationers before the saving clause date.

To say the revocation of an order suspending the execution of sentence when probation is terminated renders the "person sentenced" is to read the act as a directive to sentence failed probationers like defendant twice for the same offense—by barring the execution of the previously imposed judgment to state prison and requiring the imposition of a second judgment to county jail.

The saving clause cannot reasonably be read as commanding the court to vacate a state prison term despite a violation of probation so serious that public safety demands the execution of the previously stayed (yet, now barred) term in state prison. Such a revision of a prior judgment cannot be squared with section 1170, subdivision (h)(6)'s direction that the sentencing changes in the Act "shall be applied prospectively." If a second judgment directing a previously sentenced defendant *not* be delivered to the Director of Corrections (see § 1202a) is not a "sentencing change[] made by" the Act, it is difficult to see what would be. That interpretation of the Act directly undermines prior plea bargains between the parties, as well as indicated sentences by the court. These and other considerations strongly counsel against that construction of the Act.

The majority of the Courts of Appeal to have considered this question are in agreement. Consistent with *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,[3] and *People v. Moreno* (2013) 218 Cal.App.4th 846,[4] the Realignment Act does not apply where the trial court imposed and suspended the execution of a state prison sentence before the Act's operative date, and ordered the execution of that sentence after that date.

The court should reverse the judgment of the Court of Appeal.

ARGUMENT

I. BECAUSE THE TRIAL COURT IMPOSED A JUDGMENT OF IMPRISONMENT IN THE STATE PRISON PRIOR TO OCTOBER 1, 2011, THE PROVISIONS OF SECTION 1170, SUBDIVISION (H) DO NOT APPLY TO THIS CASE

Defendant's offense—possession of cocaine base for sale—is a qualifying felony under section 1170, subdivision (h)(1) and (2). (Health & Saf. Code, § 11351.5.) He is not, however, a "person sentenced on or after October 1, 2011." (§ 1170, subd. (h)(6).)

Section 1170, subdivision (h)(6) is a saving clause. The provision directs that the sentencing changes made by the Realignment Act "shall be applied prospectively." No ambiguity attends the use of that phrase. (*People v. Floyd* (2003) 31 Cal.4th 179, 182, 185-187 [plain meaning of saving clause in Proposition 136 stating its "provisions shall be applied prospectively" precluded its application, under *In re Estrada* (1965) 63 Cal.2d 740, to a defendant with a nonfinal judgment].) "'The rule in *Estrada*, of course, is not implicated where the Legislature clearly signals its intent to make the amendment prospective, by the inclusion of an express saving clause or its equivalent.' [Citation.]" (*Floyd, supra*, 31 Cal.4th at p. 185.)

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[3] A petition for review was filed in *Wilcox* on July 29, 2013, in case no. S212318.

[4] A petition for rehearing was denied in *Moreno* on August 27, 2013.

Here, the saving clause in the Realignment Act is even more clear than the one in *Floyd*. The instant saving clause specifies that prospective application consists of extending the changes in the law to "any person sentenced" on or after the operative date. Established legal principles reflect that a person is "sentenced" where, as here, a judgment of imprisonment is imposed, whether or not the execution thereof is suspended for a term of probation.

Even if, contrary to our argument, the language of the saving clause were considered ambiguous, nothing in the act or its legislative history reflects an intent that a revoked probationer be deemed a "person sentenced" on the date the court orders a previous judgment into full force and effect under section 1203.2, subdivision (c). A contrary interpretation is inconsistent with the purpose of the saving clause, introduces a procedural anomaly of double sentencing for the same offense, and results in unintended consequences not envisioned by the Legislature.

A. Principles of Statutory Construction

This court's task "is to determine the Legislature's intent and purpose for the enactment." (*People v. Yartz* (2005) 37 Cal.4th 529, 537.) "We look first to the plain meaning of the statutory language, giving the words their usual and ordinary meaning. [Citation.]" (*Ibid.*) Statutes dealing with the same subject matter as the one being construed—commonly referred to as statutes in pari materia—should be construed together. (*People v. Honig* (1996) 48 Cal.App.4th 289, 327.) "Where the statute is clear, courts will not 'interpret away clear language in favor of an ambiguity that does not exist.' [Citation.]" (*Hartford Fire Ins. Co. v. Macri* (1992) 4 Cal.4th 318, 326.)

"'However, if the statutory language permits more than one reasonable interpretation, courts may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative

history, public policy, and the statutory scheme encompassing the statute.' [Citations.]" (*People v. Yartz, supra*, 37 Cal.4th at p. 537.) "In such circumstances, [the court] must select the construction that comports most closely with the aim and goal of the Legislature to promote rather than defeat the statute's general purpose and avoid an interpretation that would lead to absurd and unintended consequences." (*McAllister v. California Coastal Commission* (2008) 169 Cal.App.4th 912, 928.)

It is a "general principle of statutory construction that specific statutory provisions relating to a particular subject will govern, as against a general provision, in matters concerning that subject. (See, e.g., Code Civ. Proc., § 1859; *In re Williamson* (1954) 43 Cal.2d 651, 654; *Div. of Labor Law Enforcement v. Moroney* (1946) 28 Cal.2d 344, 346.)" (*Bailey v. Superior Court* (1977) 19 Cal.3d 970, 976, fn. 8, parallel citations omitted.) Moreover, "[t]he Legislature . . . is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof. [Citation.] Where a statute is framed in language of an earlier enactment on the same or an analogous subject, and that enactment has been judicially construed, the Legislature is presumed to have adopted that construction. [Citation.]" (*People v. Yartz, supra*, 37 Cal.4th at p. 538.)

B. The Phrase "Person Sentenced," Is Unambiguous and the Plain Meaning of the Saving Clause Controls this Case

1. Defendant became a "person sentenced" on June 12, 2009 when the trial court imposed judgment

Under the Penal Code, the sentencing of a criminal defendant is synonymous with the trial court's pronouncement of judgment and imposition of sentence. (See §§ 12, 1191, 1202, 1202a, 1445; *People v. Karaman* (1992) 4 Cal.4th 335, 344, fn. 9 ["In a criminal case, judgment is

rendered when the trial court orally pronounces sentence"]; *People v. Perez* (1979) 23 Cal.3d 548, 549, fn. 2 ["judgment is synonymous with the imposition of sentence"]; *People v. Flores* (1974) 12 Cal.3d 85, 94, fn. 6 [noting that section 1191 interchangeably uses the term "pronouncing judgment" with the term "pronouncing sentence"].)

In assessing the meaning of the phrase "passing sentence" in section 1192, this Court has declared "there to be no distinction in the meaning of the phrases 'passing sentence,' '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, supra*, 12 Cal.3d at p. 94, fn. 6.)

Application of these principles make it apparent that defendant was sentenced on June 12, 2009, though he was not committed to the custody of the Director of Corrections to serve that term. On that date, the trial court pronounced judgment by imposing a state prison sentence and suspending execution of that sentence for a term of probation under sections 1203 and 1203.1. (*People v. Arguello* (1963) 59 Cal.2d 475, 476 [recognizing where a trial court imposes sentence and orders the execution thereof stayed, "a judgment of conviction has been rendered," citing *In re Phillips* (1941) 17 Cal.2d 55, 58]; see *People v. Banks* (1959) 53 Cal.2d 370, 384 (*Banks*) [in granting probation, court may either (1) "pronounce judgment and suspend its execution, i.e., refrain from issuing a commitment of the defendant to the adult or other prison authority pending administration of the probation plan," or (2) suspend pronouncement of judgment].)

It follows that defendant was a "person sentenced" within the saving clause of the Realignment Act when the court imposed the judgment of imprisonment. That the court also suspended the execution of the sentence has direct ramifications for this case because the court later revoked and terminated probation. *People v. Howard* (1997) 16 Cal.4th 1081 (*Howard*)

explains that an order directing the previous judgment into force is not subject to modification:

> [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.)

Accordingly, "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.]" (*Howard*, supra, 16 Cal.4th at p. 1087.) By contrast, when a trial court suspends the *imposition* of sentence and grants probation, "sentencing itself has been deferred . . . ." (*Ibid.*) In that situation, "no judgment is then pending against the probationer, who is subject only to the terms and conditions of probation. [Citation.]" (*Ibid.*)

In the present case, "'[u]pon pronouncement of 'sentence of imprisonment in a state prison for any term less than life' (Pen. Code, § 2600), the defendant acquire[d] the legal status of a person who has been both convicted of a felony and sentenced to such imprisonment.'" (*People v. Wagner* (2009) 45 Cal.4th 1039, 1056, fn, 7, quoting, *Banks*, *supra*, 53 Cal.2d at p. 385, second brackets added.)

2. Applying the plain meaning of the phrase "person sentenced" in the saving clause of the Realignment Act is consistent with the sentencing principle outlined in *Howard*

"[S]ection 1203.2, subdivision (c),[5] and rule 435(b)(2),[6] 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." (*People v. Howard*, *supra*, 16 Cal.4th at p. 1088, first italics added, parallel citations omitted.)

In this case, the trial court pronounced sentence on defendant before the saving clause's operative date. Hence, when the court later revoked and

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[5] Section 1203.2, subdivision (c) provides:

> Upon 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.

[6] 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."

terminated probation under section 1203.2, subdivision (c), defendant was already a "person sentenced" within the meaning of section 1170, subdivision (h)(6). He could not become a "person sentenced" to prison twice when the only lawful sentence was the previously imposed one.

The "exact sentence" (*Howard, supra*, 16 Cal.4th at p. 1088) imposed by the trial court in its June 12, 2009, judgment was seven years in state prison. It was not a sentence of seven years in county jail, regardless of any later changes in the law.

3. The phrase "person sentenced," is unambiguous—it refers to the date on which a defendant's sentence is imposed, regardless of whether it is executed on that date or at a later time

Based on the settled sentencing jurisprudence outlined above, the Court of Appeal in *Gipson* properly concluded: "In our view, the word 'sentenced' plainly means the time when the trial court first announced an imposed sentence as opposed to the time when the sentence was executed." (*People v. Gipson, supra*, 213 Cal.App.4th at p. 1529.) "[U]nder *Howard*, imposition of sentence is equated with entry of final judgment. When a final judgment is entered, 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." (*Id.* 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.)

People v. Amons (2005) 125 Cal.App.4th 855 did not involve interpreting a saving clause. Nonetheless, it is instructive on the proper application of the *Howard* rule in this case. In *Amons*, the defendant was sentenced in 1999 to a seven-year prison term. Execution of sentence was suspended with defendant placed on probation for four years. His

probation was revoked in 2004, and the court ordered into execution the previously imposed seven-year state prison sentence. (*Id.* at p. 860.) On appeal, the defendant argued he was entitled to the benefit of the new sentencing rules respecting aggravated terms compelled by *Blakely v. Washington* (2004) 542 U.S. 296.

The Court of Appeal held that those rules "do not apply retroactively upon revocation of defendant's probation to a final sentence that was previously imposed but suspended during his probationary period." (*Amons, supra*, 125 Cal.App.4th at p. 860.) The trial court's orders imposing sentence in 1999, suspending imposition of sentence, and granting probation, constituted a final judgment that became final when the defendant failed to appeal. (*Id.* at pp. 868-869.) The 2004 revocation and termination of probation "brought '"the former judgment into full force and effect . . . ."'" (*Id.* at p. 869, quoting *Howard, supra*, 16 Cal.4th at p. 1087.) "With the former judgment in full force and effect upon the revocation of defendant's probation, compliance with *Blakely* was not available to the trial court as an option." (*Amons, supra*, at p. 869.)

Similarly here, the trial court on revocation and termination of defendant's probation had no power to alter the judgment of conviction.[7] A judgment of imprisonment to state prison directs delivery of the defendant into the custody of the Department of Corrections and Rehabilitation. (See § 1202a.) Under *Howard*, the court's termination of probation (lifting of the stay of execution of sentence) brought the judgment into full force and effect. (*Howard, supra*, 16 Cal.4th at p. 1087; see also *People v. Allexy*

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[7] Of course, the court retained the power to reinstate probation on modified terms, rather than terminate probation. (*People v. Medina* (2001) 89 Cal.App.4th 318, 322-323.) Nonetheless, the court's exercise of such discretion does not render a previously sentenced defendant resentenced.

(2012) 204 Cal.App.4th 1358, 1360 [trial court erred in imposing additional sex offender registration requirement upon violation of probation and execution of previously-imposed sentence]; *People v. Garcia* (2006) 147 Cal.App.4th 913, 916-917 [trial court could not remove the section 290 registration requirement imposed previously and suspended]; *People v. Wood* (1998) 62 Cal.App.4th 1262, 1270-1271 [the court presiding over the revocation of probation had no authority to change the sentencing court's determination that a "wobbler" be treated as a felony]; *In re Quinn* (1988) 206 Cal.App.3d 179, 182 ["resentencing pursuant to Penal Code section 1170 relates back to the date of the original sentence"].)

4. The decision in *Clytus* is incorrect because it fails to apply the plain meaning of the saving clause

In *Clytus*, *supra*, 209 Cal.App.4th 1001, the Court of Appeal found the saving cause in the Realignment Act unambiguous. It read the provision as a clear mandate to the trial court to commit a defendant with a qualifying offense to county prison when it revokes probation and orders the previously suspended sentence executed after the saving clause date. The court said:

> The plain meaning of this statute is that *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, subdivision (h)(2). Nowhere in the Realignment Act is there any indication a different result if a prison sentence was imposed and suspended before October 1, 2011, and executed on or after October 1, 2011.
>
> . . . . We see no reason why we should conclude defendant was a "person sentenced" when the court stayed execution of the sentence but not when the court executed the previously suspended sentence.

(209 Cal.App.4th at pp. 1006-1007, italics added.)

Clytus reached its conclusion by ignoring the language of the saving clause. The phrase used in section 1170, subdivision (h)(6) is "any person sentenced," not "any sentence executed" after October 1, 2011. A court may not insert such words because it is a cardinal rule of statutory construction that courts may not add provisions to a statute. (*Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 827; Code Civ. Proc., § 1858.)

Clytus's holding also confounds logic. It reads the saving clause as requiring service in county jail of a previously-imposed sentence for a qualifying felony where the trial court "executed the previously suspended sentence," though, in reality, what had been previously suspended was a sentence to state prison.

The holding in *Clytus* confounds the very purpose of the saving clause. The clause ensures the sentencing changes made by the Realignment Act do not apply to any persons sentenced before its operative date. Yet, *Clytus* applies to a subset of such persons the core sentencing change made by the act, namely, the preclusion of state prison as punishment for a qualifying felony conviction.

Most importantly, the *Clytus* court "did not explain why the phrase 'sentenced on or after October 1, 2011' unambiguously has a meaning different from the traditional rule as discussed in *Howard*." (*People v. Kelly*, *supra*, 215 Cal.App.4th at p. 303.)

The court in *Clytus* did assert that *Howard* was "not authority for a proposition it did not consider," and that it could not assume that "the Legislature acquiesced to judicial precedent when enacting a new law." (*Clytus*, *supra*, 209 Cal.App.4th at p. 1008.) But that reasoning does not withstand analysis either. First, *Howard* is the progeny of *Banks*. The latter, as shown, makes clear that persons like defendant acquire the status of a sentenced person when the court imposes judgment with the execution thereof suspended. (*People v. Banks*, *supra*, 53 Cal.2d at p. 385.) Second,

Howard construed the relevant Penal Code statutes to mean the defendant's status as a sentenced person deprives a court of the power to alter the sentence following the revocation and termination of probation. "Where the language of a statute uses terms that have been judicially construed, the presumption is almost irresistible that the terms have been used in the precise and technical sense which had been placed upon them by the courts." (*People v. Weidert* (1985) 39 Cal.3d 836, 845-846.)

Clytus never reconciled the Realignment Act saving clause with the penal statutes regulating sentencing as construed by *Howard.* Under the plain language of the Realignment Act's saving clause, defendant was a "person sentenced" before its operative date. Accordingly, the sentencing changes made in the act do not apply to him.

C. Even if the Statutory Phrase "Person Sentenced" Is Ambiguous, There Is No Indication the Legislature Intended the Realignment Act to Apply When a Previously-Imposed Sentence Is Ordered Executed After the Saving Clause Date

1. Extrinsic aids in construction of the saving clause require rejection of the Court of Appeal's decision

"[I]f we accept that 'any person sentenced on or after October 1, 2011,' might have the meaning *Clytus* ascribes to it—i.e., that sentencing means any proceeding in which a sentence is either imposed or executed—the phrase becomes ambiguous because it is contrary to *Howard* and to section 1203.2, subdivision (c)." (*People v. Kelly*, *supra*, 215 Cal.App.4th at p. 305.)

As discussed above, in construing ambiguous statutory language, this court may "consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute." (*People v. Yartz*, *supra*, 37 Cal.4th at p. 537.)

One clear indication of legislative intent is the Realignment Act itself.

> [T]he Legislature did not repeal or amend section 1203.2, subdivision (c), when it enacted the Realignment Act, nor did it repeal or amend section 1203, subdivision (a), or section 1203.1, subdivision (a), both of which explicitly "preserve[] the distinction between suspended imposition and suspended execution types of probation." (*Howard, supra*, 16 Cal.4th at p. 1094.) The enactment of section 1170(h)(6) without either amending or repealing those statutes or providing a definition of "sentenced" in section 1170(h)(6) which differs from the rule enunciated in *Howard* can be interpreted to mean only that the Legislature did not intend to do so. Moreover, section 1170(h)(5) refers to imposing a term in county jail but suspending execution of a portion of the sentence and placing the defendant under the supervision of the county probation officer. (§ 1170(h)(5) [introductory sentence], (B)(i).) Thus, not only does the Act not explicitly abrogate *Howard* or create an exception to the rule discussed in *Howard*, it recognizes the distinction between imposition and execution of sentence.

(*People v. Kelly, supra*, 215 Cal.App.4th at pp. 305-306.)

Section 1203.2, subdivision (c), specifically mandates that upon revocation and termination of probation, a previously imposed "judgment shall be in full force and effect." To the extent the Court of Appeal's interpretation of the general savings clause for the Realignment Act conflicts with section 1203.2's specific regulation of the power the court has in that situation, the more specific statute controls. (See *Bailey v. Superior Court, supra*, 19 Cal.3d at p. 676, fn. 8.)

Furthermore, the Legislature has demonstrated that when an exception to the *Howard* rule is made so that the trial court may commit a previously sentenced defendant on termination of probation to custody other than state prison, it signifies that intention expressly, not by inference. Subsection (d) of section 1203.2 provides: "In any case of revocation and termination of probation, *including, but not limited to cases in which the judgment has been pronounced and the execution thereof has been suspended*, upon the

revocation and termination of probation, the court may, in lieu of any other sentence, commit the person to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities if he or she is otherwise eligible for such commitment." (Italics added.) Had the Legislature meant to ensure county jail as the appropriate place of custody for a revoked probationer with a qualifying felony conviction, notwithstanding a state prison sentence imposed with the execution thereof suspended before the operative date of the Realignment Act, it would have said so.

Additionally, significant differences exist between a state prison commitment and a realignment county jail commitment. In light of those differences, an interpretation of the saving clause that carves an exception to the *Howard* rule entails consequences the Legislature could not have intended.

A commitment to state prison is different than a commitment to county jail under the Realignment Act in several respects. For instance, the custody of a person actually committed to state prison term for seven years lasts seven years, less any applicable credits. By contrast, a person sentenced to county jail for seven years under realignment either is given (1) a straight term of seven years of local "incarceration" or (2) a split or hybrid term that includes some period of "incarceration" and the remainder of the term on noncustodial mandatory supervision. (§ 1170, subd. (h)(5)(A)-(B).) Also, recent amendments to the Realignment Act arguably allow a court to modify, revoke, or terminate mandatory supervision, thereby potentially shortening the sentence. (§ 1203.2, subd. (b)(1).) The potential for noncustodial mandatory supervision and a shortened term are not part of a state prison commitment.

Given such differences between the two forms of sentence, the legislative intent question is hardly limited to "where" the Legislature wanted failed probationers like defendant to serve their prison terms. If

such defendants are entitled to hybrid sentences and to shortened prison terms to the same extent as defendants whose sentences were imposed after the act's operative date, it would be an inexplicable oversight that the act contains no hint of any system for resentencing cases like defendant's. And if, instead, the broad class of previously sentenced failed probationers like defendant are entitled to nothing under realignment apart from a physical commitment to county jail to serve the previous sentence, and do not otherwise share in its new changes, the act might seem arbitrary. Of course, all that disappears if *Clytus* is wrong.

The prospect in view would entail retroactively undermining already executed plea bargains. And each and every such defendant has necessarily committed at least one violation of felony probation so serious that the court found public safety required termination of probation and the execution of the judgment.

It is anomalous to ascribe to the Legislature the view that an exception to the *Howard* rule was deserving in such cases. That is particularly true in cases like this one, where the exception involves the withdrawal of the consideration to the People for a plea agreement. (*People v. Collins* (1978) 21 Cal.3d 208, 214 ["The state, in entering a plea bargain, generally contemplates a certain ultimate result; integral to its bargain is the defendant's vulnerability to a term of punishment"]; *People v. Bean* (1989) 213 Cal.App.3d 639, 645 [after nullifying the defendant's guilty plea, the court refused defendant's request to modify the conviction to a misdemeanor because "the intent of the parties was to expose defendant to the possibility of a state prison sentence" and modification "would deny the People their bargain"].)

There is nothing to suggest the Legislature intended such far-reaching consequences when it enacted the Realignment Act. Here, in May 2009, the People bargained for a suspended state prison sentence, and defendant

agreed. The Court of Appeal's interpretation of the saving clause deprives the People of the benefit of their bargain.

2. The Legislature's desire to allow more offenders to serve their sentences in county jail is irrelevant to the question of whether the Realignment Act applies to those sentenced before October 11, 2011

The Court of Appeal found the saving clause "on its face seems unambiguous," but that "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." (Slip. Opn. at p. 6.) The court reviewed the legislative history of the Realignment Act and found that its statutory interpretation "satisfies the stated purposes of realignment: reducing recidivism by redirecting low-level felons . . . to county and other locally-based programs [and] to apportion prison space to more serious and violent offenders." (Slip. Opn. at p. 9.)

"If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature. . ." (*People v Sambia* (2011) 51 Cal.4th 965, 972.) Here, on its face, the Legislature, by making the Act expressly prospective, recognized that many low-level felons would *not* be redirected to county jail. The fact that, on its face, this class of felon includes individuals like defendant, whose sentence had been imposed but not executed before the act's operative date, creates no ambiguity in the statutory language at all.

Nor does the fact that some defendants predictably would violate the terms of probation so as to merit the execution of the previously imposed sentence at a later time have any bearing on the Legislature's ultimate aim of creating a cost-effective system for reducing recidivism and improving public safety. (See §§ 17.5, 3450.) Instead, its decision to make the sentencing changes prospective balanced the aims of the Realignment Act with the need to "maintain[] the integrity of sentences that were valid when

imposed and ensure[] the discretion exercised in the charging, plea bargaining, and sentencing decisions of the People and trial courts is not destabilized or nullified." (*People v. Cruz*, supra, 207 Cal.App.4th at pp. 679-680.)

The architects of realignment faced overhauling the largest system of incarceration in the nation. That system had been designed around a single state agency responsible for the incarceration and supervision of all prison offenders. The act redistributed anticipated prison populations to the 58 counties in the state. Financial redistribution of state funds attended the new population projections for felony offenders requiring local incarceration and supervision.[8] Persons already sentenced to a state prison commitment would have no reason to be added to the numbers for local incarceration. The California Department of Corrections and Rehabilitation (CDCR) and the Department of Finance issued projections for the number of inmates and offenders forecasted to be added to county populations. (See Public Safety Realignment: Populations Projections, at <http://www.cdcr.ca.gov/realignment/local_resources.html#Documents 10/18/12> [as of Sept. 16, 2013].)[9] The CDCR figures pointedly address

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[8] The California Department of Corrections and Rehabilitation describes the revenue sources and appropriations for Realignment on its website:

> The 2011 Realignment is funded with a dedicated portion of state sales tax revenue and Vehicle License Fees (VLF) outlined in trailer bills AB 118 and SB 89. The latter provides revenue to counties for local public safety programs and the former establishes the Local Revenue Fund 2011 (Fund) for counties to receive the revenues and appropriate funding for 2011 Public Safety Realignment.

(Cal. Dept. of Corrections and Rehabilitation, "Public Safety Realignment," at <http://www.cdcr.ca.gov/realignment>[as of Sept. 16, 2013].)

[9] The CDCR projections for "Realignment--Adult Inmate Average Daily Population Projections by County" only provide for a decrease in (continued...)

the "average number of jail beds or alternative custody solutions that a county may need to accommodate locally sentenced offenders per month for the next 24 months beginning October 2011." (*Ibid.*) The Legislature was operating within this framework in limiting realignment to its prospective application.

There is nothing in the legislative history to suggest that the Legislature intended the act to depart from the body of sentencing law relative to the execution of previously sentenced defendants after revocation and termination of probation. The Court of Appeal erred in concluding that defendant was entitled to serve his sentence in county jail.

(...continued)
local inmate populations as a result of court decisions. Significant increases in populations as a result of court decisions such as *Clytus* were not forecasted.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment of the Court of Appeal be reversed.

Dated: September 16, 2013 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached OPENING BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 6,816 words.

Dated: September 16, 2013

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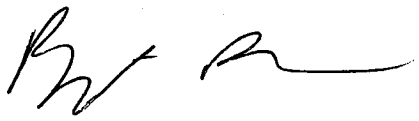

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. James Russell Scott**
No.: **S211670**

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 September 16, 2013, I served the attached **OPENING BRIEF ON THE MERITS** 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 September 16, 2013, at San Francisco, California.

Tan Nguyen
Declarant

Signature

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