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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Appellant, v. **JAMES RUSSELL SCOTT,** Defendant and Respondent.	No. S211670 (Court of Appeal No. H037923) (Monterey County Superior Court No. SS080912A)

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ON APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT
COUNTY OF SAN BENITO, STATE OF CALIFORNIA,
THE HONORABLE MARK E. HOOD, JUDGE PRESIDING

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Appellant, v. **JAMES RUSSELL SCOTT,** Defendant and Respondent.	No. S211670 (Court of Appeal No. H037923) (Monterey County Superior Court No. SS080912A)

STATEMENT OF THE CASE

On May 7, 2009, respondent was charged in an amended information filed in the Superior Court for Monterey County. (1 CT 182-185.) In count 1, respondent was charged with the transportation of cocaine base (Health and Safety Code section 11352). (1 CT 182-183.) An enhancement for a prior drug conviction was alleged as to count 1 (Health and Safety Code section 11370.2). (1 CT 183.) In count 2, respondent was charged with the possession of cocaine base for sale (Health and Safety Code section 11351.5). (1 CT 183.) In count 3, respondent was charged with possession of cocaine base (Health and Safety Code section 11350). (1 CT 183.) In count 4, respondent was charged with the possession of marijuana while driving (Vehicle Code section 23222). (1 CT 184.) In count 5, respondent was charged with

possession of drug paraphernalia (Health and Safety Code Section 11364). (1 CT 184.)

On May 7, 2009, the parties entered a plea bargain. (1 CT 186-187.) In exchange for a grant of probation and a suspended prison term of 7 years, respondent pled guilty to a violation of Health and Safety Code section 11351.5 and admitted an enhancement pursuant to Health & Safety Code section 11370.2. (1 CT 186-187.)

On June 12, 2009, respondent was placed on probation. (1 CT 210.) The court imposed and then suspended a 7 year prison term. (1 CT 210.) The court imposed the middle term of 4 years for the Health and Safety Code section 11351.5 conviction and 3 years for the Health and Safety Code section 11370.2 enhancement. (1 CT 210.)

On October 4, 2011, a petition to revoke probation was filed. (1 CT 269.) The petition alleged that respondent had failed to complete a residential drug treatment program. (1 CT 269.) On November 1, 2011, respondent admitted that he was in violation of probation. (1 CT 273.)

On December 22, 2011, the court sentenced respondent to a term of seven years. (2 CT 304.) Respondent received the middle term of four years for the possession for sale conviction and three years for the prior conviction enhancement. (2 CT 304.) The court ordered that the sentence was to be served in the county jail. (2 CT 304.)

On February 6, 2012, the People filed a notice of appeal. (2 CT 305.) On May 23, 2013, the Court of Appeal issued its opinion. The court ruled that the trial court had correctly directed that respondent's term of confinement was to be served in the county jail. (Court of Appeal Opinion, pp. 4-14.)

STATEMENT OF FACTS

On February 16, 2008, the Salinas police stopped a motor vehicle driven by respondent. (1 CT 192.) A search of the vehicle revealed 6.1 grams of cocaine base, 1.1 grams of marijuana and a crack pipe. (1 CT 193.) A further search revealed .08 grams of cocaine base on respondent's person. (1 CT 193.)

SUMMARY OF ARGUMENT

In 2011, the Legislature enacted the Realignment Act which was to be "applied prospectively to *any* person sentenced on or after October 1, 2011." (Penal Code section 1170, subd. (h)(6), emphasis added.) Under the terms of the Act, nonviolent felons are to be incarcerated in county jail rather than prison. Since respondent was sentenced on December 22, 2011, the Act commanded that his term of confinement was to be served in county jail. (Penal Code section 1170, subd. (h)(1).)

The People contend that respondent's sentence must be served in state prison since the trial court imposed, but did not execute, a prison sentence

when probation was granted in June 2009. This claim fails under the primary principle of statutory construction that an enactment is to interpreted in a manner consistent with its purpose. (*People v. Hull* (1991) 1 Cal.4th 266, 271.) The plain meaning and purpose of the Realignment Act is to require a county jail sentence for "any" qualifying defendant sentenced on or after October 1, 2011. The People offer no explanation as to why their proposed result is consistent with this purpose.

The People argue that the word "sentenced" in section 1170, subdivision (h)(6) refers to the originally imposed, but not executed, sentence rather than the December 2011 sentencing hearing. However, in the common legal vernacular, the execution of a previously imposed judgment following the revocation of probation is deemed to occur at a "sentencing" hearing. (*People v. Howard* (1997) 16 Cal.4th 1081, 1088; *People v. Stuckey* (2009) 175 Cal.App.4th 898, 916; *People v. Medina* (2001) 89 Cal.App.4th 318, 320; California Rules of Court, rule 4.435.) There is no reason to believe that the Legislature was unfamiliar with this common usage when it enacted section 1170, subdivision (h)(6).

At worst, the statute is ambiguous. Since ambiguous statutes that allow for conflicting reasonable interpretations are to be construed in favor of a criminal defendant, the People's position must be rejected. (*People v. Jones*

(1988) 46 Cal.3d 585, 599.) This is especially true since an ambiguous statute must be interpreted in a manner consistent with its purpose. (*People v. Canty* (2004) 32 Cal. 4th 1266, 1277.) Since the People's construction of the statute is contrary to its purpose, it must be rejected.

The People contend that the previously imposed, but unexecuted, prison sentence must now be imposed pursuant to Penal Code section 1203.2, subdivision (c). This conclusion rests on *People v. Howard*, supra, 16 Cal.4th 1081 which construed section 1203.2, subdivision (c) and held that it requires the trial court to execute a previously imposed, but suspended, sentence when probation is not reinstated. (*Id.* at p. 1084.) This contention ignores a critical aspect of *Howard* and runs afoul of a controlling principle of statutory interpretation.

Howard held that a trial court that executes a previously suspended sentence retains the authority to recall the sentence pursuant to Penal Code section 1170, subdivision (d). Insofar as the Legislature used the identical word "sentenced" in both section 1170, subdivision (d) and section 1170, subdivision (h)(6), it is manifest that the execution of a previously imposed judgment constitutes a sentencing proceeding within the meaning of section 1170, subdivision (h)(6). This is necessarily so since *Howard* interpreted section 1170, subdivision (d) as applying to a sentence that was executed after

being previously imposed. (*People v. McCart* (1982) 32 Cal.3d 338, 344 [identical word used in different parts of a statute is presumed to have the same meaning throughout].)

Statutes are to be harmonized. (*People v. Hull*, supra, 1 Cal.4th 266, 272.) The proper result in this case is to accord meaning to both sections 1170, subdivision (h)(6) and 1203.2, subdivision (c) by holding that the previously imposed, but unexecuted, seven year sentence is to be served in county jail. This result does no violence to section 1203.2, subdivision (c) since the statutory term "judgment" means the length of the term of confinement and not the place where the term will be served.

By failing to raise the point below, the People have forfeited their claim that enforcement of the Realignment Act will serve to abrogate the original plea bargain that included imposition of a suspended seven year sentence. Even if the merits of the claim are entertained, it fails for two reasons. First, the terms of the plea bargain were properly subject to subsequent legislative enactments such as the Realignment Act. (*Doe v. Harris* (2013) 57 Cal.4th 64, 66.) Second, since the place of incarceration does not materially alter the terms of the plea bargain, the People are unable to state a cognizable harm. (*People v. Walker* (1991) 54 Cal.3d 1013, 1024, overruled on other grounds in *People v. Villalobos* (2012) 54 Cal.4th 177, 183 [only "significant" changes

in a plea bargain are subject to remedy].)

The Legislature has clearly indicated that county jail sentences are to be imposed for nonviolent felons. This court should follow the stated purpose of the Realignment Act and affirm the judgment.

I.

INSOFAR AS RESPONDENT WAS SENTENCED AFTER THE EFFECTIVE DATE OF PENAL CODE SECTION 1170, SUBDIVISION (h), THE TRIAL COURT CORRECTLY DIRECTED THAT HIS TERM OF CONFINEMENT WAS TO BE SERVED IN THE COUNTY JAIL.

On June 12, 2009, respondent was placed on probation. (1 CT 210.) The court imposed, but did not execute, a prison sentence of seven years. (1 CT 210.)

Subsequently, the Legislature enacted the Realignment Act. In material part, the Act provides that defendants who are convicted of non-serious felonies are to be sentenced to confinement in the county jail. (Penal Code section 1170, subd. (h)(1).) The Legislature specified that the changes made by the Act were to be "applied prospectively to any person sentenced on or after October 1, 2011." (Section 1170, subd. (h)(6).)

On December 22, 2011, respondent appeared for sentencing after admitting a violation of probation. The trial court believed that it was bound to commit respondent to the county jail since a "sentence" was being imposed

within the meaning of section 1170, subdivision (h)(6). (6 RT 1503.) The court reasoned that:

> "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)." (6 RT 1503.)

The Court of Appeal sustained the trial court's conclusion. After determining that the purpose of the Realignment Act was to redirect low level felons from state prison to county based programs, the court held that respondent was a person being "sentenced" within the meaning of section 1170, subdivision (h)(6). (Court of Appeal Opinion, pp. 12-13.)

The issue is whether respondent qualifies as "*any* person sentenced on or after October 1, 2011." (Section 1170, subd. (h)(6), emphasis added.) In the People's view, respondent is not "any" person since he was *previously* sentenced to a suspended seven year prison term. (AOBM 5-6.) As will be amply demonstrated below, the People's position fails under the controlling principles of statutory construction.

The primary rule of statutory construction is that the courts are to effectuate the purpose intended by the Legislature. (*People v. Hull*, supra, 1 Cal.4th 266, 271.) The legislative purpose is determined by examining the words of the statute and "giving them their usual and ordinary meaning.

[Citations.]" (*Ibid.*)

The words of section 1170, subdivision (h)(6) could not be clearer. The Realignment Act is to be applied "to *any* person sentenced on or after October 1, 2011." (Section 1170, subd. (h)(6), emphasis added.) The word "any" does not permit exceptions. By definition, section 1170, subdivision (h)(6) applies to all defendants sentenced on or after October 1, 2011.

This result is entirely consistent with the purpose of the Realignment Act. The purpose of the Act is to reduce the number of defendants sent to prison and redirect resources so that nonviolent felons are to be punished in the county jail and rehabilitated locally. (*People v. Reece* (2013) 220 Cal.App.4th 204, 207; *People v. Clytus* (2012) 209 Cal.App.4th 1001, 1004-1005.) Since the Act does not contain any express exception that requires the court to sentence certain low level offenders to prison, there is no reason to believe that the Legislature did not mean what it said (i.e. "any" qualifying defendant must be sent to county jail at a sentencing hearing held after October 1, 2011).

Significantly, the People have failed to provide any explanation as to why the Legislature would have intended to exempt a discrete class of nonviolent probationers from the overall purpose of the Act. This silence speaks volumes. As is readily apparent, there is no plausible reason why a small group of probationers should be deprived of the benefit of local

rehabilitation.

With regard to the last point, the People have conceded that a probationer subject to revocation after October 1, 2011 *is* entitled to the benefit of the Realignment Act if a prison sentence was not imposed when he was first placed on probation. (ABOM 11.) Thus, in the People's view, the Legislature intended to require prison sentences for one class of probationers (those with imposed but unexecuted sentences) but not another class (those who were not initially given suspended sentences). There is quite simply no logical justification for this distinction. Since the Legislature plainly intended that "any" low level felon sentenced after October 1, 2011 was to be committed to the county jail, there is no plausible basis for the discriminatory result sought by the People. (*People v. Leiva* (2013) 56 Cal.4th 498, 506 [a statutory interpretation that leads to absurd consequences must be avoided].)

The Court of Appeal agreed with respondent's thesis. The court reasoned: "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." (Court of Appeal Opinion, p. 13.)

Nonetheless, the People press on with their position by asserting that

the October 1, 2011 start date for the Realignment Act is a "savings clause" that authorizes the discrimination visited upon previously sentenced probationers. (ABOM 7-8.) The Court of Appeal in this case neatly disposed of this claim.

> "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."

(Court of Appeal Opinion, pp. 8-9, fn. omitted, emphasis in original.)

Since their position is belied by the legislative purpose of the Act, the People resort to a hypertechnical definition of the statutory term "any person sentenced on or after October 1, 2011." (Section 1170, subdivision (h)(6).) According to the People, respondent was "sentenced" on June 12, 2009 when

he was granted probation and the court imposed, but did not execute, a seven year prison term. (ABOM 12-15.) Since Penal Code section 1203.2, subdivision (c)[1]/ required any later court to execute the seven year sentence if probation was revoked and not reinstated, the People conclude that respondent could not have been "sentenced" in this case when the court revoked respondent's probation and committed him to county jail. (AOBM 12-15.) In the People's words, respondent "could not become a 'person sentenced' to prison twice when the only lawful sentence was the previously imposed one." (ABOM 13.) This claim fails for multiple reasons.

To start, respondent readily concedes the People's premise: A "sentencing" hearing was held on June 12, 2009 when a prison sentence was imposed, but not executed. However, the premise does not logically prove that a "sentencing" hearing was *not* held on December 22, 2011 when respondent was committed to the county jail. To the contrary, both proceedings constituted "sentencing" hearings.

With regard to the nature of the December 22, 2011 hearing, the trial court got it exactly right. A "sentencing" hearing is held after the court finds

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[1]In relevant part, section 1203.2, subdivision (c) provides: "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.

a violation of probation. (6 RT 1503.) This is so since a court necessarily considers standard "sentencing" factors in exercising its discretion as to whether probation should be reinstated or terminated with a consequent term of confinement. (6 RT 1503.) The common vernacular used by our courts and the Judicial Council supports this conclusion.

In *People v. Medina*, supra, 89 Cal.App.4th 318, the court considered the situation where probation was revoked after a prison sentence had been initially imposed but not executed. The court held that the trial court had the option to either reinstate probation or execute the previously imposed prison sentence. The court categorized the proceeding as a "sentencing on the probation violation . . . ." (*Id.* at p. 320.)

People v. Stuckey, supra, 175 Cal.App.4th 898 is to the same effect. There, the defendant was granted probation in 2004 and a prison sentence was imposed but not executed. In 2007, probation was revoked. The court referred to the 2007 proceeding as a "sentencing" hearing. (*Id.* at p. 916.)

This court has done the same. In *People v. Howard,* supra, 16 Cal.4th 1081, this court held that Penal Code section 1203.2, subdivision (c) requires the trial court to impose the exact sentence that was previously imposed, but not executed, if probation is not to be reinstated. The court categorized the action of the trial court in executing the prior judgment as that of a "sentencing

judge." (*Id.* at p. 1088.)

The Judicial Council has acted in the same manner as the courts. The rule of court that governs sentencing hearings held after the finding of a probation violation is entitled "Sentencing on revocation of probation." (California Rules of Court, rule 4.435.) The rule includes the situation where a sentence has been previously imposed, but not executed. (Rule 4.435 (b)(2).)

In enacting Penal Code section 1170, subdivision (h), the Legislature was presumably aware of the fact that a probation revocation proceeding has been commonly called a "sentencing" hearing. (*Estate of McDill* (1975) 14 Cal.3d 831, 839 [Legislature is deemed to be familiar with judicial decisions].) Given the common vernacular found in court opinions and rule 4.435, there is no reason to believe that the Legislature did not consider the execution of a previously imposed judgment following revocation of probation to be anything other than a "sentencing" hearing.

Although the People fail to appreciate this point, their reliance on *People v. Howard*, supra, 16 Cal.4th 1081 actually supports respondent's position. In the situation where a sentence has been imposed but not executed, Penal Code section 1203.2, subdivision (c) requires execution of the "exact sentence" upon revocation of probation "subject to its possible recall under section 1170, subdivision (d) . . . ." (*Id.* at p. 1088.) Significantly, section

1170, subdivision (d)(1)[2] and section 1170, subdivision (h)(6) use the identical terminology.

In material part, section 1170, subdivision (d)(1) comes into play when a defendant "has been sentenced . . . ." As has already been noted, section 1170, subdivision (h)(6) applies when a person has been "sentenced on or after October 1, 2011." As is readily apparent, the Legislature used the word "sentenced" in both subdivisions.

The controlling principle is that when "a word or phrase is repeated in a statute, it is normally presumed to have the same meaning throughout. [Citation.]" (*People v. McCart*, supra, 32 Cal.3d 338, 344.) In *Howard,* this court necessarily concluded that a defendant has been "sentenced" when a previously suspended judgment has been executed. If this was not true, this

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[2]Penal Code section 1170, subdivision (d)(1) provides:

"When a defendant subject to this section or subdivision (b) of Section 1168 has been sentenced to be imprisoned in the state prison and has been committed to the custody of the secretary, the court may, within 120 days of the date of commitment on its own motion, or at any time upon the recommendation of the secretary or the Board of Parole Hearings, recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence. The court resentencing under this subdivision shall apply the sentencing rules of the Judicial Council so as to eliminate disparity of sentences and to promote uniformity of sentencing. Credit shall be given for time served."

court could not have held that a trial court retains authority in this situation to recall the "sentence." Since the word "sentenced" also appears in section 1170, subdivision (h)(6), the conclusion is inescapable that it includes the circumstance where a previously imposed sentence is being executed.

Assuming that this court should nonetheless find that there is any ambiguity with regard to the meaning of "sentenced" as that word is used in section 1170, subdivision (h)(6), the term must be construed in respondent's favor. Two principles support this conclusion.

First, when an ambiguous provision is subject to two reasonable interpretations, the construction favorable to the defendant must be adopted. (*People v. Jones*, supra, 46 Cal.3d 585, 599.) Here, there is plainly a reasonable basis to believe that the phrase "sentenced on or after October 1, 2011" applies to a defendant whose previously suspended sentence is now being imposed.

Second, in construing an ambiguous statute, the court is to consider the underlying purpose of the statute in order to "ascertain the most reasonable interpretation. [Citations.]" (*People v. Canty*, supra, 32 Cal.4th 1266, 1277.) Once again, this principle supports respondent's construction of the statute. A recent Court of Appeal majority so held.

In *People v. Reece,* supra, 220 Cal.4th 204, the court found that the term

"sentenced" in section 1170, subdivision (h)(6) is ambiguous. (*Id.* at p. 211.) After applying the principle found in *Canty*, the court concluded that the term must be construed to require a county jail commitment.

> "When interpreted in the context of the Act as a whole, we conclude the Legislature intended to realign the incarceration of low-level offenders whose sentences would be imposed on or after October 1, 2011 as well as those whose suspended sentences would be executed after that date. One stated objective of the Realignment Act is to make local jails the commitment location for all felons convicted of nonserious, nonviolent, and nonsexual crimes. (§ 17.5, subd. (a)(5).) Because defendant is a low-level offender meeting the statutory prerequisites, interpreting section 1170, subdivision (h)(6), to include him and similarly situated offenders comports with the stated purposes and intent of the Realignment Act. (Accord *Clytus, supra,* 209 Cal.App.4th at pp. 1004-1007.)"

(*Reece,* supra, 220 Cal.App.4th at pp. 211-212.)

Notwithstanding the commonsense conclusion reached by the *Reece* majority, the People urge that Penal Code section 1203.2, subdivision (c) requires a different result. This is supposedly so since the provision mandates the imposition of the previously imposed seven year sentence. (ABOM 12-13.) This claim falls afoul of another well settled principle of statutory construction.

A statute must be construed in the context of the entire statutory scheme so as to achieve harmony among the various provisions. (*People v. Hull,* supra, 1 Cal.4th 266, 272.) Here, sections 1170, subdivision (h)(6) and 1203.2,

subdivision (c) may be readily harmonized.

Section 1203.2, subdivision (c) requires the court to impose the previously specified "judgment" when probation is not reinstated. When this provision is read together with the newly enacted section 1170, subdivision (h)(6), a simple result obtains. The previous "judgment" (i.e. the length of the term of confinement) is to be served in county jail. This result is entirely consistent with the language of section 1203.2, subdivision (c) since the statute does not equate "judgment" with "prison commitment."[3]/

Should there be any doubt that this result is correct, a separate rule of statutory construction comes into play. A court is required "to give meaning to every word and phrase in the statute to accomplish a result consistent with the legislative purpose . . . ." (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1159.) The interpretation advanced by the People would render the word "any" in section 1170, subdivision (h)(6) nugatory since some defendants would be excluded from the ambit of the statute. This conclusion is impermissible since the word "any" must be accorded its usual meaning and

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[3]Unlike section 1203.2, subdivision (c), California Rules of Court, rule 4.435(b)(2) provides that a defendant is to be "committed to the custody of the Secretary of the Department of Corrections and Rehabilitation" if a previously imposed sentence is executed. To the extent that rule 4.435(b)(2) is inconsistent with section 1203.2, subdivision (c), the statute must prevail. (*People v. Hall* (1994) 8 Cal.4th 950, 960 [rule of court has no force when it is inconsistent with a statute].)

cannot be deemed surplusage. (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 799 ["a construction that renders a word surplusage should be avoided. [Citations.]".].)

People v. Howard, supra, 16 Cal.4th 1081 does not compel a different conclusion. In *Howard*, this court construed section 1202.3, subdivision (c) and held that it requires the trial court to execute a previously imposed, but unexecuted, sentence when probation is not reinstated. (*Id.* at p. 1084.) Insofar as *Howard* was decided long before the Realignment Act was enacted, it offers no guidance as to how sections 1170, subdivision (h)(6) and 1203.2, subdivision (c) are to be harmonized. Indeed, the Second District has so held.

In *People v. Clytus,* supra, 209 Cal.App.4th 1001, the court found that *Howard* did not support the People's position since the "*Howard* court could not have anticipated realignment . . . ." (*Id.* at p. 1008.) The court concluded that the Realignment Act requires a sentencing court to impose a county jail sentence notwithstanding the prior imposition of an unexecuted prison sentence. (*Id.* at pp. 1008-1009.) In so holding, the court emphasized that its result was consistent with *Howard.*

> "*Howard* concluded that a trial court may not modify or change a sentence that was imposed and suspended. (*Howard,* supra, 16 Cal.4th at p. 1088.) In contrast, the Realignment Act does not modify or change the sentence for any felony. The Act directs that the court is to impose a 'term described in the underlying offense' and thus preserves the existing triad of terms for

> felonies (and also clarifies the triad shall be 16 months, or two years or three years when the term is not specified in the underlying offense). (§ 1170, subd. (h)(1) & (2.)" (*Clytus,* supra, 209 Cal.App.4th at pp. 1008-1009.)

People v. Reece, supra, 220 Cal.App.4th 204 reached exactly the same conclusion as *Clytus.* (*Id.* at p. 212-213.) Insofar as *Howard* contained no discussion of section 1170, subdivision (h)(6), the *Reece* court concluded that *Howard* was "inapplicable to the location of defendant's incarceration. [Citation.]" (*Id.* at p. 213.)

Respondent readily acknowledges that there are a slew of Court of Appeal opinions that have held that Penal Code section 1203.2, subdivision (c) trumps the Realignment Act and requires the imposition of a prison commitment for previously sentenced probationers. (*People v. Moreno* (2013) 218 Cal.App.4th 846, 849-851, ptn. for rv. pending; *People v. Wilcox* (2013) 217 Cal.App.4th 618, 622-627; *People v. Kelly* (2013) 215 Cal.App.4th 297, 301-306; *People v. Mora* (2013) 214 Cal.App.4th 1477, 1481-1482; *People v. Gipson* (2013) 213 Cal.App.4th 1523, 1528-1530; *People v. Montrose* (Oct. 29, 2013, F064261) __Cal.App.4th __ [2013 D.A.R. 14404, 14405-14406.) However, there is a central defect in all of these decisions. None of the opinions make any reference to the binding principle that statutes are to be harmonized and meaning is to be accorded to all provisions. Since respondent has established that sections 1170, subdivision (h)(6) and 1203.2, subdivision (c) can be readily read together, the cited Court of Appeal decisions must be

deemed unpersuasive and should be overruled.

People v. Amons (2005) 125 Cal.App.4th 855, cited by the People, does not aid their cause. In *Amons,* the court held that the jury trial right regarding sentencing factors announced in *Blakely v. Washington* (2004) 542 U.S. 296 could not be retroactively applied "upon revocation of defendant's probation to a final sentence that was previously imposed but suspended during his probationary period." (*Id.* at p. 860.) The court's reasoning was that the "judgment" regarding the length of the sentence was imposed prior to the issuance of *Blakely.* (*Id.* at pp. 868-870.) Plainly, *Amons* is inapposite to the case at bar.

Here, the Legislature enacted a new statute which expressly applies to those sentencing hearings held after a specified date. Insofar as respondent was sentenced after that date, he is entitled to the benefit of the statute. Unlike *Amons*, the retroactive effect of a new case precedent is not at issue.

Aside from *Amons,* the People also cite an array of other Court of Appeal decisions which stand for the proposition that a trial court may not alter the terms of a previously imposed sentence. (See *People v. Allexy* (2012) 204 Cal.App.4th 1358, 1360; *People v. Garcia* (2006) 147 Cal.App.4th 913, 916-917; *People v. Wood* (1998) 62 Cal.App.4th 1262, 1270-1271; *In re Quinn* (1988) 206 Cal.App.3d 179, 182.) These cases are inapposite for the same

reason as *Amons*. None of the cases involved a situation where the Legislature enacted a new statute that *authorized* the court to alter the place where a previously imposed sentence was to be served. The cases do not aid the People. (*People v. Brown* (2012) 54 Cal.4th 314, 330 [cases are not authority for propositions not there considered].)

The People contend that their position is strengthened by the fact that the Legislature made no changes to Penal Code section 1203.2 when it enacted the Realignment Act. (ABOM 18-19.) This inaction supposedly demonstrates that the Legislature did not intend an "exception to the *Howard* rule . . . ." (ABOM 18.) This contention is unpersuasive.

Penal Code section 1170, subdivision (h)(6) clearly and precisely states that "any" defendant sentenced on or after October 1, 2011 is to receive the benefit of the Realignment Act. Given this specific direction which applies to *all* cases, the Legislature had no need to amend section 1203.2.

The People next rely on the principle that a specific statute regarding a subject will govern as against a general provision. (*Bailey v. Superior Court* (1977) 19 Cal.3d 970, 977, fn. 8.) In the People's view, section 1203.2, subdivision (c) is the specific statute and section 1170, subdivision (h)(6) is the general provision. (ABOM 18.) This claim fails since it is simply untrue that one statute is more specific than the other.

As has already been discussed, section 1170, subdivision (h)(6) provides a specific directive that "any" qualifying defendant sentenced after October 1, 2011 is to be committed to county jail. Section 1203.2, subdivision (c) is no more specific since it merely provides that the previously imposed "judgment" is to be imposed. Since the two provisions are to be harmonized (*People v. Hull*, supra, 1 Cal.4th 266, 272), the proper result is that the "judgment" (i.e. length of the sentence) is to be served in county jail.

The People assert that the two statutory provisions cannot be reconciled since the Realignment Act allows the sentencing court to impose split (i.e. reduced) sentences which were not formerly permitted. (ABOM 19.) This is a red herring. Under respondent's harmonization of the statutes, the trial court is required to impose the same length sentence as was initially imposed, but not executed.

As their final claim, the People contend that the Legislature could not have intended that the Realignment Act would apply to previously imposed, but unexecuted, sentences since such a result would "retroactively" undermine "already executed plea bargains." (ABOM 20.) This contention fails for three reasons.

First, the People did not advance the argument in either the trial court or the Court of Appeal. The point has been forfeited. (*Gavaldon v. Daimler*

Chrysler Corp. (2004) 32 Cal.4th 1246, 1265 [as a general rule, this court will "address only issues that have been raised in the Court of Appeal. [Citation]; see also *People v. Collins* (2010) 49 Cal.4th 175, 256, fn. 35 [court declined to consider issues not discussed in Court of Appeal opinion and not briefed in the trial court].)

Second, when parties agree to a plea bargain, the terms of the bargain are deemed to include future "changes in the law that the Legislature has intended to apply to them." (*Doe v. Harris*, supra, 57 Cal.4th 64, 66.) Here, the Legislature clearly intended that the Realignment Act was to apply to previously imposed, but unexecuted, sentences arranged by plea bargain.

In *People v. Wilson* (Oct. 22, 2013, B244648) ____Cal.App.4th ____ [2013 D.A.R. 14076], the Court of Appeal held that the Realignment Act did not apply to a plea bargain negotiated on April 29, 2011 which specified the imposition of a suspended two year prison term in exchange for a grant of probation. The court offered two reasons in support of its conclusion: (1) the Realignment Act was not made retroactive; and (2) the parties were aware of the Realignment Act when they entered the plea bargain. (*Id.* at p. 14079.) The first reason is in error and the second reason has no application here.

As respondent has already established, the Legislature intended that the Realignment Act would apply to *any* sentencing hearing held after October 1,

2011 regardless of whether a prison sentence was previously imposed, but not executed. Thus, the People are not insulated from a change in the law that occurred after the original plea bargain was struck. (*Doe v. Harris*, supra, 57 Cal.4th 64, 66.) To the contrary, the People, like a criminal defendant, are bound by subsequent changes in the law that alter the consequences attending a plea bargain. (*Id.* at pp. 73-74.)

Moreover, unlike *Wilson* where the parties were aware of the terms of the Realignment Act, respondent had no clue about the Act when he entered his plea bargain in 2009. Since the Act had not been conceived at that time, respondent can scarcely be deemed to have waived the protection of the Act.

Third, a party is entitled to a remedy only when there has been a "significant" breach in a plea bargain. (*People v. Walker,* supra, 54 Cal.3d 1013, 1024.) Here, the People bargained for a seven year term of confinement if respondent was not successful on probation. There has not been a significant breach of the bargain merely because that term is being served in county jail rather than state prison. *People v. Reece*, supra, 220 Cal.App.4th 204 so holds:

> "We do not see that the benefit of the People's bargain in this case is diminished solely by defendant's incarceration in county jail instead of state prison. From a public safety standpoint, defendant will be separated from the public for the same amount of time as had he been sent to state prison. We do not view the change in location of defendant's incarceration,

> standing alone, as undermining the purpose or effect of the People's bargain." (*Id.* at p. 215, fn. omitted.)

Notwithstanding the inconsequential change that the defendant will be imprisoned in jail rather prison, the *Wilson* court reasoned that the People will also be deprived of postincarceration supervision since a "defendant under the Realignment Act is no longer subject to parole or postincarceration supervision, while he or she would have been upon release from state prison. [Citations.]" (*Wilson*, supra, 2013 D.A.R. 14076, 14079.) Once again, this change is insufficiently significant to warrant a remedy for the People.

In prior cases, it has been held that defendants were not entitled to relief when changes in the law allowed for dramatic new consequences flowing from convictions obtained by way of plea bargains. For example, such convictions can be used to impose life sentences under the Three Strikes law even though that law did not exist at the time of the plea bargain. (*Doe v. Harris,* supra, 57 Cal.4th 64, 70; *People v. Gipson* (2004) 112 Cal.App.4th 1065, 1068-1070.) By comparison, the lack of post-release supervision under the Realignment Act is a minor change that has little impact on the People's interests. (*People v. Reece*, supra, 220 Cal.App.4th 204, 215, fn. 8 [rejecting the "speculative" notion that the People would not have agreed to probation were it known that any future "sentence would be served in jail rather than prison."].)

The bottom line in this case is quite simple. The Realignment Act

expressly states that a nonviolent felon is to be committed to county jail when the sentencing hearing takes place after October 1, 2011. Insofar as respondent was sentenced after October 1, 2011, the trial court correctly committed him to county jail.

II.

IF THIS COURT SHOULD FIND THAT THE TRIAL COURT WAS REQUIRED TO IMPOSE A PRISON SENTENCE, THE CASE SHOULD BE REMANDED TO THE TRIAL COURT WITH DIRECTIONS THAT THE COURT MAY EXERCISE ITS AUTHORITY UNDER PENAL CODE SECTION 1170, SUBDIVISION (d)(1) TO RECALL THE SENTENCE.

If this court should sustain the People's position, the case should be remanded to the trial court with directions to: (1) impose the previously unexecuted prison sentence; and (2) consider whether to recall the sentence pursuant to Penal Code section 1170, subdivision (d)(1). As was explained in *People v. Howard*, supra, 16 Cal.4th 1081, a trial court may immediately recall a prison sentence that has been imposed under Penal Code section 1203.2, subdivision (c). (*Id.* at p. 1095.) In this case, the trial court may wish to exercise this option.

CONCLUSION

For the reasons expressed above, the judgment should be affirmed.

Dated: November 5, 2013

Respectfully submitted,

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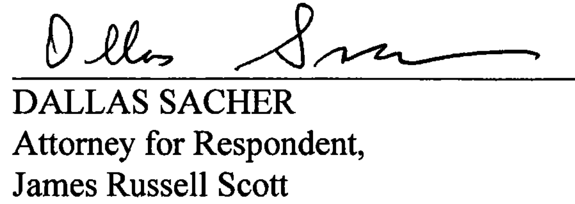
CERTIFICATE OF COUNSEL

I certify that this brief contains 6266 words.

Dated: November 5, 2013



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PROOF OF SERVICE

I declare that I am over the age of 18, not a party to this action and my business address is 100 N. Winchester Blvd., Suite 310, Santa Clara, California 95050. On the date shown below, I served the within ***RESPONDENT'S ANSWER BRIEF ON THE MERITS*** to the following parties hereinafter named by:

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I declare under penalty of perjury the foregoing is true and correct. Executed this 5th day of November, 2013, at Santa Clara, California.

Priscilla A. O'Harra