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In the Supreme Court of the State of California

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

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

REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

ARGUMENT

I. DEFENDANT WAS A "PERSON SENTENCED" PRIOR TO OCTOBER 1, 2011

Because his previously imposed sentence was executed after October 1, 2011, defendant contends that he is entitled to serve his sentence in county jail. He argues that: (1) the statutory language of the Penal Code section 1170, subdivision (h)(6)[1] is unambiguous, and that he was a person sentenced on or after October 1, 2011 (Resp. Answer Brief on the Merits [RABM] 7-15); and (2) even if the statutory language is ambiguous, the underlying purpose of the Realignment Act supports its application to individuals like him with previously imposed, but subsequently executed, prison sentences (RABM 16-25). We disagree.[2]

A. The Statute Unambiguously Applies to Those Whose Sentences Were Imposed but Not Executed Prior to October 1, 2011

According to defendant, the "issue is whether [he] qualifies as '*any* person sentenced on or after October 1, 2011." (RABM 8; see also RABM

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

[2] As discussed in our opening brief, the majority of the Courts of Appeal to have considered this question are in agreement with the People's position. (Opening Brief on the Merits [OBM] 6-7.) Since the opening brief was filed, two additional Courts of Appeal have addressed the issue: *People v. Montrose* (2013) __ Cal.App.4th ___, [2013 Cal.App.Lexis 867] agreed with the People's position, and *People v. Reece* (2013) 220 Cal.App.4th 204 (petn. for review pending, petn. filed November 13, 2013), agreed with defendant's position. *People v. Wilson* (2013) 220 Cal.App.4th 962 did not decide the issue presented here, but held that allowing a previously imposed but not executed sentence to be served in county jail violated the defendant's plea bargain.

In addition, this court denied review in *People v. Wilcox* (2013) 217 Cal.App.4th 618, and *People v. Moreno* (2013) 218 Cal.App.4th 846, without prejudice to any relief to which the defendants might be entitled based on this case.

4 ["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"]; 8 ["The word 'any' does not permit exceptions"]; 9 ["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"]; 10 ["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"]; 18 ["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"]; 21 [statute "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 . . . the Legislature had no need to amend section 1203.2"].) Defendant's focus on the word "any" is misplaced. We do not suggest that defendant is not "any" person; we contend that he is not any person "*sentenced* on or after October 1, 2011." (§ 1170, subd. (h)(6).)

Defendant contends that his reading of the term "any" must be adopted because it best effectuates the Legislature's purpose. He argues that the Realignment Act is meant to "reduce the number of defendants sent to prison," and that "there is no plausible reason" why the Legislature would have exempted a discrete class of nonviolent probationers but not another class (those who were not initially given suspended sentences). (RABM 9.) To the contrary, the Realignment Act's savings clause itself evidences such a "plausible reason." The Legislature designated a particular date for prospective implementation of the Realignment Act, fully aware that previously sentenced low-level felony offenders would be exempted from its application. Indeed, low-level offenders sentenced on

September 30, 2011, could make the same argument as defendant does—that other low-level felony offenders were given the benefits of realignment based solely on the luck of the calendar. Probation violators not previously sentenced are no different, in this respect, from defendants sentenced after October 1, 2011. And probation violators under a stayed sentence are no different, in this respect, from other defendants sentenced before that date.

Moreover, it was reasonable for the Legislature to distinguish between the two classes of probationers. "A defendant who has been placed on probation and who has then violated the terms and conditions of the probationary grant to such an extent that the court deems it appropriate to execute a previously imposed prison term, which the defendant knew he or she was facing in the event of noncompliance, has already proven him- or herself unamenable to the type of community-based programs and assistance envisioned by the realignment." (*People v. Montrose*, *supra*, 2013 Cal.App.Lexis at p. *11.)

By focusing only on the term "any," defendant ignores the more pertinent statutory phrase: "person sentenced." As discussed in our opening brief, defendant was a "person sentenced" on June 12, 2009. (OBM 9-15.) Contrary to defendant's contention, we do not "resort to a hypertechnical definition" of the term "sentenced." (RABM 11.) Settled case law defines a "sentence," as synonymous with a "judgment." (*People v. Flores* (1974) 12 Cal.3d 85, 94, fn. 6; *People v. Perez* (1979) 23 Cal.3d 548, 549, fn. 2.) On June 12, 2009, when the court imposed the seven-year state prison sentence, defendant was "sentenced," despite the fact that the execution of that sentence was suspended.

Indeed, defendant "concedes the People's premise: A 'sentencing' hearing was held on June 12, 2009 when a prison sentence was imposed, but not executed." (RABM 12.) However, defendant further asserts that another sentence was imposed on December 22, 2011. According to

defendant, "both proceedings constituted 'sentencing' hearings." (RABM 12.)

First, defendant's concession does nothing to assist in resolving the question before this court. If, according to defendant, he was sentenced on both June 12, 2009, and December 22, 2011, which date is relevant for purposes of the Realignment Act? To suggest that there can be two sentencing dates for one defendant simply creates an ambiguity in the statute; it does not support defendant's contention that the "words of section 1170, subdivision (h)(6) could not be clearer." (RABM 8.)

Moreover, defendant merely equates his own phrase "sentencing hearing" to the statutory phrase "person sentenced." Defendant argues that the "Legislature was presumably aware of the fact that a probation revocation proceeding has been commonly called a 'sentencing' hearing." (RABM 13.) We doubt this court could take judicial notice of that fact, because there is severe doubt whether the "legal vernacular" (to use defendant's term (RABM 4)) is not actually "probation revocation hearing," as used in a principal Supreme Court case cited by him. (*People v. Howard* (1997) 16 Cal.4th 1081, 1085 (*Howard*).) Even if true, the purported fact is irrelevant because the Legislature did not use "sentencing" or "sentencing hearing" in the savings clause; it used "person sentenced." That is, section 1170, subdivision (h)(6), does not apply to a "any sentencing hearing" conducted after October 1, 2011. It applies to "any person sentenced" after that date. As discussed in the People's opening brief, a person is not "sentenced" twice by execution of a stayed sentence. (See OBM 13.)

Defendant argues further that because the Legislature "used the word 'sentenced' in both subdivisions" (d)(1) and (h)(6) of section 1170, *Howard* "necessarily concluded that a defendant has been 'sentenced' when a previously suspended judgment has been executed." (RABM 14-15.) "If

this was not true, this court could not have held that a trial court retains authority [under section 1170, subdivision (d)(1)] to recall the sentence." (RABM 15.) This argument fails because it rests on a faulty premise—that section 1170, subdivisions (d)(1) and (h)(6) use "identical terminology." (RABM 14.) Section 1170, subdivision (d)(1), provides, in relevant part:

> 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.

Section 1170, subdivision (d)(1), grants the trial court jurisdiction to recall the sentence when a defendant "has been *sentenced* to be imprisoned in the state prison *and has been committed to the custody of the secretary*." (Italics added.) Subdivision (h)(6), on the other hand, states that the Realignment Act applies only to persons "sentenced" after October 1, 2011, not those sentenced *and* committed to the custody of the secretary. Contrary to defendant's contention, the statutes do not use "identical terminology."

Moreover, defendant's argument rests on a second faulty premise—that a sentence and a commitment to prison custody must be the same temporal event. Under subdivision (d)(1), a court cannot exercise its recall power until sentence has been imposed, *and* the defendant has been committed to prison custody. *Howard* does not indicate that those two events—sentencing and commitment—necessarily occur at the same time. As this court explained, when imposition of sentence is suspended, "*sentencing itself* has been deferred." (*People v. Howard*, *supra*, 16 Cal.4th at p. 1087, italics added.) On the other hand, where the trial court does not

defer sentencing, and the sentence becomes final, the court may only modify the previously imposed sentence "after defendant has been committed to custody." (*Id.* at p. 1088.)

Defendant recognizes that under *Howard* and other cases cited by the People—*People v. Amons* (2005) 125 Cal.App.4th 855, *People v. Allexy* (2012) 204 Cal.App.4th 1358, *People v. Garcia* (2006) 147 Cal.App.4th 913, *People v. Wood* (1998) 62 Cal.App.4th 1262, and *In re Quinn* (1988) 206 Cal.App.3d 179—a court generally may not alter the terms of a previously imposed sentence. He claims, however, that those cases do not control where "the Legislature enacted a new statute that *authorized* the court to alter the place where a previously imposed sentence was to be served." (RABM 21.) His argument presumes that the Realignment Act permits trial courts to alter previously imposed sentences. Yet, that is the precise issue before this court. The cases cited are therefore relevant because they reflect what it means to be "sentenced," and because they were decided before the Realignment Act's enactment. "[S]ection 1170, subdivision (h)(6), must be read in conjunction with the entire body of sentencing law." (*People v. Wilcox*, *supra*, 217 Cal.App.4th at p. 626.) "The 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." (*People v. Yartz* (2005) 37 Cal.4th 529, 538.) As discussed in the People's opening brief, had the Legislature wanted to create an exception to the general rule that a court cannot alter the terms of a previously imposed sentence, it would have expressly done so. It would not have buried such authority into the phrase "any person sentenced," via a savings clause directed at prospective application of the new law.

Defendant has not demonstrated that the term "any person sentenced" unambiguously refers to the date on which a previously imposed sentence is executed. To the contrary, under the plain language of the Realignment

Act's savings clause, defendant was a "person sentenced" at the time the trial court imposed a state prison sentence—June 12, 2009.

B. Even If the Phrase "Person Sentenced" Is Ambiguous, There Is No Indication that the Legislature Intended the Realignment Act to Apply When a Previously-Imposed Sentence Is Ordered Executed After October 1, 2011

Assuming the phrase "person sentenced" is ambiguous, defendant contends the phrase must be construed in his favor for two reasons. (RABM 15.) First, defendant claims that where an "ambiguous provision is subject to two reasonable interpretations, the construction favorable to the defendant must be adopted." (RABM 15.) However, "[t]he rule of statutory interpretation that ambiguous penal statutes are construed in favor of defendants is inapplicable unless two reasonable interpretations of the same provision stand in relative equipoise, i.e., that resolution of the statute's ambiguities in a convincing manner is impracticable." (*People v. Jones* (1988) 46 Cal.3d 585, 599.) As discussed in appellant's opening brief, an examination of the legislative intent and public policy behind the Realignment Act counsel against adopting defendant's construction of the statute. (OBM 17-20.) "It would be inappropriate to automatically conclude that, because a statute is ambiguous in some respect, we are not to attempt to construe its meaning and effect. Such overbroad reliance upon one principle of statutory construction would constitute an abdication of our responsibility as the final arbiter of the meaning of legislative enactments." (*Id.* at pp. 599-600.)

Second, defendant contends that the underlying purpose of the statute supports his construction. (RABM 16.) Citing *People v. Reece*, *supra*, 220 Cal.App.4th 204, he argues that the Legislature's goal of incarcerating low-level offenders in county jail supports a finding that his term should be served in county jail. (RABM 16.) However, as discussed in the People's

opening brief, the Legislature's desire to allow more offenders to serve their sentences in county jail is irrelevant to a determination whether the Realignment Act applies to defendant. If the only driving force behind the Realignment Act was the desire to allow the maximum number of low-level offenders to be housed in county jail, the Legislature could have omitted the savings clause and have the Realignment Act apply retroactively to all sentences currently being served. It did not. "The Legislature intended to limit the impact of the Realignment Act by mandating prospective application to only those felons sentenced on or after October 1, 2011." (*People v. Wilcox*, *supra*, 217 Cal.App.4th at p. 626.) As discussed, a person is "sentenced" when judgment is pronounced, even if the sentence is not executed.

Defendant attempts to harmonize his interpretation of the savings clause with section 1203.2, subdivision (c) by claiming that the term "judgment" in section 1203.2 refers only to the "length" of the sentence, not its location. (RABM 17; see also RABM 22 ["Since the two provisions are to be harmonized . . . the proper result is that the 'judgment' (i.e. length of the sentence) is to be served in county jail]".) First, defendant provides no support in case law or statutory language to support his definition of the term "judgment." Moreover, section 1202a requires that when the judgment is to state prison, the judgment "shall direct that the defendant be delivered into the custody of the Director of Corrections at the California State Prison at San Quentin," unless the Director by order designates a different place. San Quentin is *state prison*. (See also § 1216; *People v. Mendoza* (1918) 178 Cal.509, 511 [sentence to state prison can be suspended only under section 1203].) Finally, as discussed in the People's opening brief, the differences between a state prison commitment and a commitment to county jail under the Realignment Act demonstrate that the

location of the sentence is equally important as the *length* of the sentence. (OBM 19-20.)

Nonetheless, defendant contends that his strained reading of the term "judgment" is *required* because the People's interpretation would "render the word 'any' in section 1170, subdivision (h)(6) nugatory since some defendants would be excluded from the ambit of the statute." (RABM 18.) Not so. As discussed, the statute does not just apply to any defendant; it applies to "any person sentenced on or after October 1, 2011." That defendant does not happen to be such a person does not render the term "surplusage."

Finally, defendant contends that the People forfeited the argument that his interpretation of the statute would have the detrimental effect of undermining already executed plea bargains. (RABM 23.) However, it is the possible adverse effects on *all* previously-finalized plea bargains, not just defendant's, that presents a policy concern counseling against defendant's construction of the Realignment Act. (See OBM 20.) The issue of statutory construction was raised in the trial court, the appellate court, and is the precise issue presented to this court for review. No forfeiture has occurred.

Defendant also distinguishes his case from *People v. Wilson*, *supra*, 220 Cal.App.4th 962, which held that application of the Realignment Act to a defendant whose previously imposed sentence was executed after October 1, 2011 violated the People's plea bargain. (RABM 23-25.) The *Wilson* court specifically avoided the instant statutory construction issue, by finding that "sending appellant to county jail under the Realignment Act would alter a material term in the parties' plea agreement." (220 Cal.App.4th at p. 973.) We have not asked for such piecemeal relief. Regardless of whether the People might be entitled to *Wilson* relief on these

facts, it is the possibility of many *Wilson*-type plea bargain violations that requires a rejection of defendant's claim.

II. REMAND IS UNNECESSARY

Defendant contends that even if the People's interpretation of section 1170, subdivision (h) is correct, the proper remedy is a remand for the trial court to exercise its power to recall his sentence and resentence him under section 1170, subdivision (d). (RABM 26.) However, remand is unnecessary because the court's ruling was based purely on its assessment of the underlying legal question regarding the correct interpretation of the statute. The court did not indicate a preference for county jail or state prison. (6 RT 1502-1503.) Indeed, the court pointed out that it agreed with the People's general reasoning that once a sentence is imposed, it cannot be modified. (6 RT 1502.) If anything, to the extent the court may have believed state prison was the appropriate disposition, it felt constrained by its misconstruction of the savings clause.

Thus, there is no reasonable probability that the court would recall the sentence upon remand. (See *People v. White Eagle* (1996) 48 Cal. App. 4th 1511, 1521 ["we perceive no reasonable probability a remand for consideration of a motion to strike the enhancement would result in a benefit to appellant"].) This court should correct the sentence without further proceedings in superior court, save the correction of the abstract of judgment.

CONCLUSION

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

Dated: November 22, 2013

Respectfully submitted,

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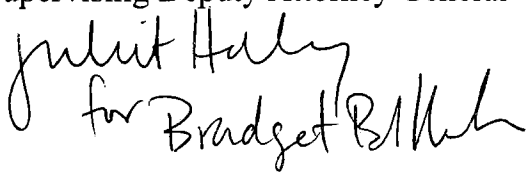

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CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 3,070 words.

Dated: November 22, 2013

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

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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 November 25, 2013, at San Francisco, California.

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