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14 **SUPERIOR COURT OF CALIFORNIA**

15 **COUNTY OF SAN DIEGO**

16 **The People of the State of California,**

17 Plaintiff,

18 vs.

19 **Jack Defendant,**

20 Defendant

Case number:

DA number:

**Motion to release from parole**  
(Penal Code, § 1170, subd. (a)(3))

Date:

Time:

Dept.:

21 Mr. Defendant was resentenced to 180 days for a petty theft with priors and  
22 placed on parole for a year. Because he earned 728 days of credit, he asks the Court  
23 to release him from parole.

24 **ISSUES PRESENTED**

25 Defendants are not sent to parole where “the in-custody credits equal the  
26 total sentence, including both confinement time and the period of parole.” (Pen.  
27 Code, § 1170, subd. (a)(3).) Here Mr. Defendant was resentenced to 180 days—the

1 maximum sentence—with 728 days of credit. Did the Court err in placing him on  
2 parole for a year where his custody credits eclipse his total sentence of 545 days—  
3 180 days plus 365 days of parole—by six months?

4 Proposition 47 requires that resentenced defendants receive credits for their  
5 time served and does not change how credits are calculated or what credits do.  
6 Before proposition 47, custody credits in excess of a sentence reduced the length of  
7 parole. Should Mr. Defendant’s 548 days of credit in excess of his maximum sentence  
8 of 180 days be applied to reduce the length of his one year of parole?  
9

#### 10 POINTS AND AUTHORITIES

- 11 **1. Because Penal Code section 1170, subdivision (a)(3), prohibits sending a**  
12 **defendant to parole where the total sentence is exceeded by custody credits, Mr.**  
13 **Defendant should not have been placed on parole.**

14 “The court shall advise the defendant that he or she shall serve a period of  
15 parole and order the defendant to report to the parole office closest to the  
16 defendant's last legal residence, **unless** the in-custody credits equal the total  
17 sentence, including both confinement time and the period of parole.” (Pen. Code §  
18 1170, subd. (a)(3), emphasis added.) So if the in-custody credits equal the total  
19 sentence—custody + parole—the court is not to send the defendant to parole.

20 The drafters of proposition 47<sup>1</sup> are presumed to be aware of Penal Code  
21 section 1170, subdivision (a)(3). In evaluating the meaning of new statutes “[t]he  
22 adopting body is presumed to be aware of existing laws and judicial construction  
23 thereof [citations omitted] and to have intended that its enactments be  
24 constitutionally valid. [citations omitted] We would, therefore, be compelled to  
25 ‘adopt an interpretation that, consistent with the statutory language and purpose,  
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27 <sup>1</sup> Implemented under Penal Code section 1170.18.

1 eliminates doubts as to the provision's constitutionality.'" (*In re Lance W.* (1985) 37  
2 Cal.3d 873, 891 fn. 11 citing *Bailey v. Superior Court* (1977) 19 Cal.3d 970, 978, fn. 10 &  
3 *In re Kay* (1970) 1 Cal.3d 930, 942.) Proposition 47 did nothing to change how credits  
4 are calculated or what their effects are.

5 At first glance, Proposition 47 appears to give unfettered discretion to the  
6 court about whether to place a resentenced defendant on parole. The statute states  
7 that a resentenced defendant "shall be subject to parole for one year following  
8 completion of his or her sentence, unless the court, in its discretion, as part of its  
9 resentencing order, releases the person from parole." (Pen. Code, § 1170.18, subd.  
10 (d).) But the beginning of that very same sentence declares that a "person who is  
11 resentenced pursuant to subdivision (b) shall be given credit for time served . . . ."  
12 (*Ibid.*) And courts "do not construe statutes in isolation, but rather read every statute  
13 'with reference to the entire scheme of law of which it is part so that the whole may  
14 be harmonized and retain effectiveness.'" (*People v. Thomas* (1992) 4 Cal.4th 206, 210.)  
15 So those two parts of section 1170.18, subdivision (d), must be harmonized with each  
16 other and with section 1170, subdivision (a)(3).

17 Section 1170.18, subdivision (d), gives no discretion for a court to deny  
18 credits—or to change what they apply to. It does **not** say that the year of parole is a  
19 trade-off for getting the charges reduced to misdemeanors and that therefore  
20 somehow the court does not have follow section 1170, subdivision (a)(3). The  
21 direction to place resentenced defendants on parole must be read in conjunction  
22 with the mandate that those defendants receive credit for the time served. And given  
23 that the imposition of parole is discretionary, that discretion is constrained by the  
24 mandate that credits be given.

25 Custody credits are earned. There are due process protections that must be  
26 followed before they can be taken away. When a state creates good time credits and  
27 has a process for taking those away there is a Fourteenth Amendment liberty right to

1 those credits covered by the Federal Due Process Clause. (*Wolff v. McDonnell* (1974)  
2 418 U.S. 539, 557 [94 S.Ct. 2963, 2975, 41 L.Ed.2d 935].) California created such rights  
3 and has its own Constitutional Due Process protections protecting the denial or loss  
4 of custody credits. (*In re Jackson* (1987) 43 Cal.3d 501, 511.) California requires  
5 disciplinary board rulings before credits may be taken away. (*Ibid.* citing Admin.  
6 Code, tit. 15, § 3315; Pen. Code, § 2932; Cal. Admin. Code, tit. 15, §§ 3315 & 3323.)  
7 Not applying credits in the manner that the law requires, in essence denies the  
8 credits and side-steps the Federal and California due process protections to those  
9 credits. And therefore an interpretation of section 1170.18, subdivision (d), allowing  
10 placement on parole irrespective of the credits is a violation of Federal and  
11 California due process protections.

12  
13 **2. Because Penal Code section 1170.18, subdivision (d) requires that a person**  
14 **resentenced receives credit for the time served—and does not change anything**  
15 **about credits—Mr. Defendant is entitled to receive credits under *In re Sosa*.**

16 Credits for good time and actual days apply to a defendant's period of parole.  
17 (*In re Sosa* (1980) 102 Cal.App.3d 1002, 1006.) And “[w]here the presentence credits  
18 exceed the total state prison term, the excess credits, commonly known as *Sosa*  
19 credits are deducted from the defendant's parole period.” (*People v. Espinoza* (2014)  
20 226 Cal.App.4th 635, 638 citing *In re Sosa* (1980) 102 Cal.App.3d 1002.) This  
21 interpretation is based on the language of section 1170, subdivision (a)(3). “In any  
22 case in which the amount of preimprisonment credit under Section 2900.5 or any  
23 other provision of law is equal to or exceeds any sentence imposed pursuant to this  
24 chapter, the entire sentence shall be deemed to have been served and the defendant  
25 shall **not** be actually delivered to the custody of the secretary” (Pen. Code § 1170,  
26 subd. (a)(3), emphasis added.) And the court shall order a period of parole “unless  
27 the in-custody credits equal the total sentence, including both confinement time and

1 the period of parole.” (Pen. Code § 1170, subd. (a)(3).) This is the language that *In re*  
2 *Sosa* interpreted to mean a defendant’s credits are applied to the parole portion of  
3 the sentence as well as the custody portion of the sentence. (*In re Sosa, supra*, 102  
4 Cal.App.3d at pp. 1005–1006.) Section 1170, subdivision (a)(3), was not changed by  
5 Proposition 47.

6 Proposition 47 requires that a resentenced defendant get their credits. “A  
7 person who is resentenced pursuant to subdivision (b) **shall** be given credit for time  
8 served. . . .” (Pen. Code, § 1170.18, subd. (d), emphasis added.) No part of section  
9 1170.18 changes how credits are calculated or what they do. And no discretion is  
10 given to a court to deny credits. As discussed above, these credits are earned and a  
11 defendant has Federal and California due process protections regarding them.

12 Section 1170.18, subdivision (d), requires that a defendant granted  
13 resentencing under the section “shall be subject to parole for one year following  
14 completion of his or her sentence, **unless** the court, in its discretion, as part of its  
15 resentencing order, releases the person from parole.” (Pen. Code § 1170.18, subd. (d),  
16 emphasis added.) There are two very important parts to this language. First, the  
17 court is given discretion to release the person from parole. This is different than  
18 language requiring—without exception—that a defendant receive credits. Second,  
19 the defendants are placed on parole—not post-release community supervision,  
20 probation, or mandatory supervision—but parole.

21 The sentence to parole instead of to another form of supervision is critical to  
22 the credits analysis. Credits under *In re Sosa* apply to parole, but they do not apply  
23 to post-release community supervision. (*People v. Espinoza, supra*, 226 Cal.App.4th at  
24 p. 639.) As with Penal Code section 1170, subdivision (a)(3), above—the drafters of  
25 proposition 47 are presumed to be aware of *In re Sosa* credits and the cases  
26 interpreting them. (*In re Lance W., supra*, 37 Cal.3d 873, 891 fn. 11.) Because  
27 proposition 47 did not include language changing the application of credits to

1 parole, they are presumed to leave the cases of *In re Sosa* and *People v. Espinoza* in  
2 place—and therefore the right to credits against the parole period in place.

3 Applying *In re Sosa* to Mr. Defendant's new sentence means that he has  
4 already completed the maximum allowed period of parole. On December 12, 2014,  
5 he had 728 days of credit. Subtracting his sentence—180 days—from his credits,  
6 leaves 548 days of credits. Subtracting those 365 days of parole from the 548 days,  
7 leaves 183 days in excess of his term of parole. Therefore—with the application of  
8 *Sosa* credits—Mr. Defendant's parole should be deemed complete as of December 12,  
9 2014.

### 11 CONCLUSION

12 Here Mr. Defendant's credits exceed his total new sentence by 6 months.  
13 Because it exceeds his total sentence, he should not have been sent to parole. And  
14 because the year of parole does not take into account Mr. Defendant's previously  
15 earned credits, the year term of parole violates Penal Code section 1170.18,  
16 subdivision (d). Therefore, the Court should release Mr. Defendant from parole.

17  
18 Dated February 4, 2015

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