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15 **SUPERIOR COURT OF CALIFORNIA**  
16 **COUNTY OF SAN DIEGO**

17 **The People of the State of California,**  
18 Plaintiff,  
19 vs.  
20 **Amy Defendant,**  
21 Defendant

22 Case number:  
23 DA number:  
24 **Motion for release from parole**  
25 (Penal Code, § 1170.18)  
26 Date:  
27 Time:  
Dept.:

28 Ms. Defendant was sentenced to 2 years for possessing a narcotic controlled  
29 substance. Because the sentence was under Penal Code section 1170, subdivision  
30 (h)(5), the length of her supervision could not be longer than that two years minus  
31 her custody time and credits. But when Ms. Defendant was resentenced—with only  
32 11 days remaining on her entire sentence—the Court placed her on an additional  
33 one year of parole. Ms. Defendant requests that the Court reconsider that order and  
34 delete the parole requirement.

1 **ISSUES PRESENTED**

2 Proposition 47 prohibits resentencing to a longer sentence than previously  
3 given. Ms. Defendant’s sentence under Penal Code section 1170, subdivision (h), was  
4 for 2 years total, **including** the length of **supervision**. Given that—with Ms.  
5 Defendant’s credits—the maximum period of **supervision** under the prior sentence  
6 was 11 additional days from the date of resentencing, can the Court place Ms.  
7 Defendant on one year of parole?

8 Proposition 47 requires that resentenced defendants receive credits for their  
9 time served and does not change how credits are calculated or what credits do.  
10 Before proposition 47, custody credits in excess of a sentence reduced the length of  
11 parole. Should Ms. Defendant’s 355 days of credit in excess of her maximum  
12 sentence of 364 days be applied to reduce the length of her one year of parole?

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15 **PROCEDURAL HISTORY**

16 Ms. Defendant was arraigned May 15, 2013, on one count Health and Safety  
17 Code section 11350. She pled May 24, 2013, to drug court or a stipulated 2 year term  
18 under 1170, subdivision (h)(5). She was terminated from drug court on March 12,  
19 2014. She was then sentenced to 2 years, with 1 year in custody and 1 year on  
20 mandatory supervision. At the time she had 313 days of credit.

21 On November 24, 2014, she admitted her second violation of mandatory  
22 supervision. She was sentenced to serve her remaining 67 days in custody. On  
23 December 22, 2014—with 11 actual days remaining on her sentence—she was  
24 granted relief under proposition 47, sentenced to 364 days, and placed on 1 year of  
25 parole. She was calculated as having 719 days of credit. Two years is 730 days.  
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**POINTS AND AUTHORITIES**

1. **Because Penal Code section 1170.18, subdivision (e), prohibits a resentencing that creates a longer sentence, Ms. Defendant’s sentence cannot include a period of supervision longer than the maximum period of supervision under her earlier sentence.**

The period of parole is part of the sentence. (*People v. London* (1988) 206 Cal.App.3d 896, 910 citing Penal Code, §§ 3000 & 1170, subd. (c).) And so the length of supervision is included in calculating the total sentence. “The court shall advise the defendant that he or she shall serve a period of parole and order the defendant to report to the parole office closest to the defendant's last legal residence, unless the in-custody credits equal the **total sentence**, including both confinement time and the period of parole.” (Pen. Code § 1170, subd. (a)(3), emphasis added.)” Because the period of parole is a part of the total sentence, evaluating whether the term on a resentencing is longer than the term on the original sentence requires combining the new custody time and the parole period.

This fits with the common interpretation as parole as an extension of custody. This has been consistently found the case by both the California Supreme Court and the United States Supreme Court. (*People v. Lewis* (1999) 74 Cal.App.4th 662, 669-70 citing *Morrissey v. Brewer* (1972) 408 U.S. 471, 477, 480, 92 S.Ct. 2593, 33 L.Ed.2d 484 & *People v. Reyes* (1998) 19 Cal.4th 743, 752.) The period of parole is a form of constructive custody. (*In re Smith* (2008) 42 Cal.4th 1251, 1270 citing Pen.Code, § 3056 & 3 Witkin & Epstein, Cal.Criminal Law (3d ed. 2000) Punishment, § 631, pp. 828–829.) Because parole is constructive custody, it makes sense that credits should be applied against that constructive custody.

1           At first glance, Proposition 47<sup>1</sup> appears to give unfettered discretion to the  
2 court about whether to place a resentenced defendant on parole. The statute states  
3 that a resentenced defendant “shall be subject to parole for one year following  
4 completion of his or her sentence, unless the court, in its discretion, as part of its  
5 resentencing order, releases the person from parole.” (Pen. Code, § 1170.18, subd.  
6 (d).) But the section 1170.18 also requires that “[u]nder **no circumstances** may  
7 resentencing under this section result in the imposition of a term longer than the  
8 original sentence.” (Pen. Code § 1170.18, subd. (e), emphasis added.) And courts  
9 “do not construe statutes in isolation, but rather read every statute 'with reference to  
10 the entire scheme of law of which it is part so that the whole may be harmonized  
11 and retain effectiveness.'" (*People v. Thomas* (1992) 4 Cal.4th 206, 210.) So those two  
12 subdivisions of section 1170.18 must be harmonized with each other, with section  
13 1170, subdivision (c), and with the cases holding that parole is part of the sentence.

14           Section 1170.18, subdivision (e), gives no discretion for the court to impose a  
15 sentence longer than the initial sentence. It does **not** say that the year of parole is a  
16 trade-off for getting the charges reduced to misdemeanors and that therefore  
17 somehow the court can impose a longer total sentence. The direction to place  
18 resentenced defendants on parole must be read in conjunction with the mandate that  
19 those defendants not be given longer sentences. And given that the imposition of  
20 parole is discretionary, that discretion is constrained by the mandate that the  
21 sentence not be longer.

22           Defendants who are sentenced to state prison will never have the issue of the  
23 new sentence exceeding the original sentence. Their total sentence always includes  
24 an additional three year parole or a year of post-release community supervision.  
25 And therefore an additional year of parole cannot exceed the previous sentence. But  
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27           <sup>1</sup> As implemented by Penal Code section 1170.18.

1 it is different for defendants sentenced under Penal Code section 1170, subdivision  
2 (h).

3 Realignment created the sentencing scheme under section 1170, subdivision  
4 (h), where the sentence length includes the entirety of custody and supervision.  
5 "Trial courts have discretion to commit the defendant to county jail for a full term in  
6 custody, or to impose a hybrid or split sentence consisting of county jail followed by  
7 a period of mandatory supervision." (*People v. Catalan* (2014) 228 Cal.App.4th 173,  
8 178, review denied (Oct. 15, 2014).) "[A] defendant sentenced under section 1170,  
9 subdivision (h)—whether to a straight jail term or to a hybrid term—is not subject to  
10 a state parole period after his or her sentence is completed. (§ 3000, subd. (a)(1)  
11 [parole included in sentence resulting in imprisonment in the state prison]" (*People v.*  
12 *Cruz* (2012) 207 Cal.App.4th 664, 671-72.) "Instead, such offenders serve their  
13 sentences either entirely in county jail or partly in county jail and partly under the  
14 mandatory supervision of the county probation officer. (Pen.Code, § 1170, subd.  
15 (h)(2), (3), (5).) Felony offenders who are sentenced to county jail may be eligible for  
16 a county home detention program in lieu of confinement (§ 1203.016, subd. (a)) and  
17 are not subject to parole, which extends only to persons who have served state  
18 prison terms. (§ 3000 et seq.);" (*People v. Scott* (2014) 58 Cal.4th 1415, 1418-19.)

19 While individuals are on mandatory supervision the court has the authority  
20 to "revoke, modify, or change the conditions of the court's order suspending the  
21 execution of **the concluding portion** of the supervised person's term." (Pen. Code §  
22 1203.3, subd. (a), emphasis added.) But there is no authority to extend the portion of  
23 supervision or extend the length of sentence. This is one of the differences between  
24 mandatory supervision and probation, parole, or post-release community  
25 supervision.

26 The effect of this combination of custody and supervision time—without any  
27 ability to extend the supervision—creates several instances where an addition of one

1 year of parole to a misdemeanor sentence leads to a sentence greater than the initial  
2 sentence. For example, if a defendant was initially sentenced to 16 months and then  
3 resentenced to 364 days and a year of parole the court has added 8 months to the  
4 defendant's sentence. Or—as here—where a defendant was sentenced to 2 years, has  
5 credits for all but 11 days of those 2 years, and the Court resentences to 364 days and  
6 extends parole for a year, the Court has extended the defendant's total sentence by  
7 354 days. That result violates section 1170.18, subdivision (e).

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

12 Credits for good time and actual days apply to a defendant's period of parole.  
13 (*In re Sosa* (1980) 102 Cal.App.3d 1002, 1006.) And “[w]here the presentence credits  
14 exceed the total state prison term, the excess credits, commonly known as *Sosa*  
15 credits are deducted from the defendant's parole period.” (*People v. Espinoza* (2014)  
16 226 Cal.App.4th 635, 638 citing *In re Sosa* (1980) 102 Cal.App.3d 1002.) This  
17 interpretation is based on the language of section 1170, subdivision (a)(3). “In any  
18 case in which the amount of preimprisonment credit under Section 2900.5 or any  
19 other provision of law is equal to or exceeds any sentence imposed pursuant to this  
20 chapter, the entire sentence shall be deemed to have been served and the defendant  
21 shall **not** be actually delivered to the custody of the secretary” (Pen. Code § 1170,  
22 subd. (a)(3).) And the court shall order a period of parole “unless the in-custody  
23 credits equal the total sentence, including both confinement time and the period of  
24 parole.” (Pen. Code § 1170, subd. (a)(3).) This is the language that *In re Sosa*  
25 interpreted to mean a defendant's credits are applied to the parole portion of the  
26 sentence as well as the custody portion of the sentence. (*In re Sosa, supra*, 102  
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1 Cal.App.3d at pp. 1005–1006.) Section 1170, subdivision (a)(3), was not changed by  
2 Proposition 47.

3 Proposition 47 requires that a resentenced defendant get their credits. “A  
4 person who is resentenced pursuant to subdivision (b) **shall** be given credit for time  
5 served. . . .” (Pen. Code, § 1170.18, subd. (d), emphasis added.) No part of section  
6 1170.18 changes how credits are calculated or what they do. And no discretion is  
7 given to a court to deny credits.

8 Custody credits are earned. There are due process protections that must be  
9 followed before they can be taken away. When a state creates good time credits and  
10 has a process for taking those away there is a Fourteenth Amendment liberty right to  
11 those credits covered by the Federal Due Process Clause. (*Wolff v. McDonnell* (1974)  
12 418 U.S. 539, 557 [94 S.Ct. 2963, 2975, 41 L.Ed.2d 935].) California created such rights  
13 and has its own Constitutional Due Process protections protecting the denial or loss  
14 of custody credits. (*In re Jackson* (1987) 43 Cal.3d 501, 511.) California requires  
15 disciplinary board rulings before credits may be taken away. (*Ibid.* citing Admin.  
16 Code, tit. 15, § 3315; Pen. Code, § 2932; Cal. Admin. Code, tit. 15, §§ 3315 & 3323.)  
17 Not applying credits in the manner that the law requires, in essence denies the  
18 credits and side-steps the Federal and California due process protections to those  
19 credits. And therefore an interpretation of section 1170.18, subdivision (d), allowing  
20 placement on parole irrespective of the credits is a violation of Federal and  
21 California due process protections.

22 Section 1170.18, subdivision (d), requires that a defendant granted  
23 resentencing under the section “shall be subject to parole for one year following  
24 completion of his or her sentence, **unless** the court, in its discretion, as part of its  
25 resentencing order, releases the person from parole.” (Pen. Code § 1170.18, subd. (d),  
26 emphasis added.) There are two very important parts to this language. First, the  
27 court is given discretion to release the person from parole. This is different than

1 language requiring—without exception—that a defendant receive credits. Second,  
2 the defendants are placed on parole—not post-release community supervision,  
3 probation, or mandatory supervision—but parole.

4 The sentence to parole instead of to another form of supervision is critical to  
5 the credits analysis. Credits under *In re Sosa* apply to parole, but they do not apply  
6 to post-release community supervision. (*People v. Espinoza, supra*, 226 Cal.App.4th at  
7 p. 639.) The drafters of proposition 47 are presumed to be aware of *In re Sosa* credits  
8 and the cases interpreting them. In evaluating the meaning of new statutes “[t]he  
9 adopting body is presumed to be aware of existing laws and judicial construction  
10 thereof [citations omitted] and to have intended that its enactments be  
11 constitutionally valid. [citations omitted] We would, therefore, be compelled to  
12 ‘adopt an interpretation that, consistent with the statutory language and purpose,  
13 eliminates doubts as to the provision's constitutionality.’” (*In re Lance W.* (1985) 37  
14 Cal.3d 873, 891 fn. 11 citing *Bailey v. Superior Court* (1977) 19 Cal.3d 970, 978, fn. 10 &  
15 *In re Kay* (1970) 1 Cal.3d 930, 942.) Because proposition 47 did not include language  
16 changing the application of credits to parole, they are presumed to leave the cases of  
17 *In re Sosa* and *People v. Espinoza* in place—and therefore the right to credits against  
18 the parole period in place.

19 Applying *In re Sosa* to Ms. Defendant's new sentence means that she has  
20 already completed the maximum allowed period of parole. On December 22, 2014,  
21 she had 719 days of credit. Subtracting her sentence—364 days—from her credits,  
22 leaves 355 days of credits. Subtracting those 355 days from the 365 days of a year of  
23 parole, leaves 10 days. Therefore—with the application of *Sosa* credits—Ms.  
24 Defendant's parole should be deemed complete as of January 2, 2015.



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**CONCLUSION**

Here Ms. Defendant's entire sentence would have been completed 11 days after the date of resentencing if she had not been resentenced. That is if she had been released from custody the day of the resentencing. If she had not been released, her entire sentence would have been complete 6 days after the resentencing. Because the year of parole extends her total sentence, the year term of parole violates Penal Code section 1170.18, subdivision (e). And because the year of parole does not take into account Ms. Defendant's previously earned credits, the year term of parole violates Penal Code section 1170.18, subdivision (d). Therefore, the Court should release Ms. Defendant from parole.

Dated February 5, 2015

By: \_\_\_\_\_  
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