

# POINTS AND AUTHORITIES

The District Attorney of Alameda County Presents a Weekly Video Survey of  
Criminal Law Approved for Credit Toward California Criminal Law Specialization: C437 --  
The Alameda County District Attorney's Office is a State Bar of California Approved MCLE Provider.

Week Of	Topic	Guests	General
Sept. 25, 2017	<b>BASIC FELONY SENTENCING Part II</b>	Richard Moore Micheal O'Connor	30 Min.

This Points and Authorities is a two-part episode explaining principles of basic felony sentencing, originally shown on March 28 and April 4, 2016, prior to the enactment of Proposition 57

Proposition 57 has no effect on the pronouncement of sentence or the calculation of the sentence actually imposed by the court. Thus, the discussion of sentencing calculation in these P&A episodes remains current. However, Proposition 57 affects the *length* of the actual sentence that the defendant may serve

This handout is revised to include additional material that discusses the possibility of additional conduct credits or early parole release as a result of Proposition 57.

The discussion in the P&A video also includes examples to illustrate the sentencing principles discussed. Because the discussion pre-dates Proposition 57, the sentencing calculation has not changed, although the actual time a defendant may serve could be potentially less. See July 17, 2017 P&A for a discussion of Proposition 57's impact on length of sentence and examples.

The P&A handout and accompanying attachment "Penalty Terms for Selected Felonies" is the same for Parts I and II.

## NEXT WEEK: PART II OF BASIC FELONY SENTENCING

Suggestions for future shows, ideas on how to improve P&A, and other comments or criticisms should be directed to Mary Pat Dooley at (510) 272-6249 or [marypat.dooley@acgov.org](mailto:marypat.dooley@acgov.org). Technical questions should be addressed to Gilbert Leung at (510) 272-6327. Participatory students: MCLE Evaluation sheets are available on location and certificates of attendance are constructively maintained in your possession in the Ala. Co. Dist.Atty computer banks.

# INTRODUCTION TO FELONY SENTENCING

Richard Moore  
Micheal O'Connor  
Assistant District Attorneys  
Alameda County District Attorney's Office

## I. FELONY SENTENCING: DETERMINATE AND INDETERMINATE CRIMES

Penal Code § 17(a) states: "A felony is a crime that is punishable with death, by imprisonment in the state prison, or ... by imprisonment in a county jail under the provisions of subdivision (h) of Section 1170."

### A. Determinate Sentencing Law (DSL)

1. Determinate sentences fixed in proportion to seriousness of offense
2. Created by Penal Code section 1170
3. "Triad sentencing range" which means that felonies are punishable by one of three possible terms of imprisonment (low or mitigated term, middle or mid-term, and upper or aggravated terms). The trial court selects one of these terms. *People v. Felix* (2000) 22 Cal.4th 651, 654.
4. The triad for any given felony is set forth by statute.

For example: "Carjacking is punishable by imprisonment in the state prison for a term of 3, 5, or 9 years." (3-5-9) (Penal Code section 215(b).)

- a. If the statute says only that the offense is a felony without specifying the term, then the felony is punishable by 16 months, 2 years, or 3 years in state prison (16-2-3). (Penal Code § 18.)
- b. Under Penal Code section 1170(h), some felonies are not ordinarily punishable in state prison, but rather by a triad punishable in the county jail. These are called "1170(h)" felonies.
- c. Attempted felonies are generally punishable by 1/2 the time of the crime. (§ 664(a)).

For example: attempted carjacking (215/664) is punishable by 1.5, 2.5 or 4.5 years in state prison.

Major exceptions:

- attempted life crime: 5/7/9 (§ 664(a))
- willful, deliberate, premeditated attempted murder: Life in prison (§ 664(a))
- attempted murder of peace officer/firefighter: Life in prison (§ 664(e).)
- willful, deliberate, premeditated attempted murder of a peace officer: 15 years to life in prison (§ 664(f))
- attempted robbery: 16/2/3 (§ 213(b))

## **B. Indeterminate Sentencing Law (Also called ISL or Life Crimes)**

1. No fixed term of imprisonment
2. Life or death sentences
3. Authority: Penal Code § 1168(b)
4. Must be computed separately from determinate crimes (*People v. Rodriguez* (2012) 207 Cal.App.4th 204, 211; *People v. Garza* (2003) 107 Cal.App.4th 1081, 1094.)
5. Examples of indeterminate sentencing
  - a. “Straight Life” Crimes  
Minimum Term/earliest parole date: 7 years to life  
(Penal Code § 3046(a).)  
E.g.: § 203: Torture (Life)
  - b. Life with minimum Term  
E.g.: § 187-2d (15 years to life)
  - c. Indeterminate Term by Conduct enhancement  
E.g.: 261(a)(2) + 667.61(d) (25 years to life)
  - d. Indeterminate Term by Prior Conviction  
E.g.: 3 Strikes  
any felony + two serious priors (25 years to life)
  - e. Indeterminate Term Enhancement  
E.g. 211 + 12022.53(d) (2-3-5 plus 25 years to life)
  - f. LWOP  
E.g. 261(a)(2)/667.61(d)(6)/667.61(j)(1)

## **II. FELONY SENTENCING OPTIONS**

### **A. Fines**

1. Standard fine up to \$10,000. (Penal Code § 672)
  - a. Attempts punishable by half the fine. (§ 664(c))
2. Restitution fund fine of \$300 - \$10,000. (§ 1202.4(b))
  - a. Must be imposed absent extraordinary reason  
-Inability to pay not a reason. (§ 1202.4(c))

### **B. Restitution**

**Court must order restitution in every case in which a victim has suffered an economic loss as a result of the defendant’s conduct. (§ 1202.4(f).)**

1. Who: victims, their families, business that suffer direct loss (S1202.4(k))
2. What: medical and mental health expenses; property damage; lost wages; funeral expenses etc.

#### **D. Diversion**

1. Prop. 36 and other drug diversions
2. Military Combat Veterans (Penal Code § 1170.9)
3. Other Deferred Entry of Judgment Programs (PC 1000 *et seq.*)

#### **E. Diagnostic Referral**

1. 90 day referral to state prison.
2. Defendant returned to court with Dept. of Corrections evaluation.
3. Court imposes actual sentence after reviewing report. (Penal Code § 1203.03.)

#### **F. Probation**

1. Court may impose reasonable conditions to rehabilitate defendant and protect the public. (Penal Code section 1203.1(j); *People v. Pointer* (1984) 151 Cal.App.3d 1128, 1137.)
2. Court has broad discretion. (*People v. Welch* (1993) 5 Cal.4th 228, 233.)
  - a. May limit constitutional rights if necessary (*People v. Bauer* (1989) 211 Cal.App.3d 937, 941.)
  - b. Condition must be narrowly drawn. (*People v. Hackler* (1993) 13 Cal.App.4th 1049, 1058.)
3. Probation condition presumed valid unless it
  - a. is unrelated to the underlying crime
  - b. relates to noncriminal conduct
  - c. requires or forbids conduct which is not reasonably related to future criminality. (*People v. Lent* (1975) 15 Cal.3d 481, 486.)
4. Jail or other jail-like setting may be required as condition of probation.

#### **G. Imprisonment**

The Penal Code defines a felony as one that is punishable by death or imprisonment. (See § 17(a), discussed above.)

1. Imprisonment may be in state prison.
2. Imprisonment may be in county jail as a condition of probation.
3. Imprisonment may be in county jail pursuant to 1170(h).
4. Changes in felony sentencing.

It has become increasingly difficult to know the actual length of a sentence of imprisonment, even when a specific term of years is negotiated with the defendant, due to the California Legislature's recent trend to retroactive changes in felony sentencing law.

- a. Continued viability of imprisonment for many crimes is open to question.

- b. Many existing or proposed laws reduce the length of current sentences
  - Prop 36 (§ 1170.126) reduced prison sentences for most non-violent three-strike offenders.
  - Realignment (§ 1170(h)) made specified non-violent felonies punishable only in county jail, and not in state prison.
  - Prop 47 reduced many theft and drug-related felonies to misdemeanors.
  - Governor's proposed ballot amendment authorizes prison officials to award service credits that could significantly reduce actual time served.

### III. SENTENCING DECISIONS

#### A. Probation Eligibility

##### 1. Probation Eligibility

##### a. Mandatory No-Probation Clauses

- “Probation shall not be granted” = mandatory prison
- Generally no authority to strike under 1385.  
*(People v. Tanner (1979) 24 Cal.3d 514.)*
- Generally must plead and prove.
- Examples:
  - \* *Prior Convictions:*  
*E.g., specified narcotics sales + sales prior (PC1203.07(a)(11).)*
  - \* *Weapon Use:*  
*E.g., use of firearm in specified felony (PC 1203.06(a)(1).)*
  - \* *Infliction of injury:*  
*E.g., personal & intentional infliction of GBI in specified crime (PC 1203.075(a).)*
  - \* *Specified Crimes:*  
*E.g., forcible sex crimes, pimping/pandering (PC 1203.065(a).)*  
***(See complete list of no probation clauses attached)***

##### b. Presumptive No-Probation Clauses

- No probation “except in unusual cases where the interests of justice would best be served.”
- Rule 4.413: unusual circumstances include:
  - \*Conduct in current offense less serious than in typical offense;
  - \*Facts of current offense less serious than the probation precluding prior;
  - \*Defendant greatly coerced or provoked;
  - \*Crime committed because of treatable mental condition;
  - \*Defendant is young or old and has insignificant record.

2. Granting probation to eligible defendants (Rule 4.414)

a. Facts relating to the crime:

- (1) The seriousness of the crime compared to other instances of the same crime;
- (2) Arming/ use of a weapon;
- (3) The vulnerability of the victim;
- (4) Physical or emotional injury;
- (5) Monetary loss to the victim;
- (6) Whether defendant was active or passive participant;
- (7) Unusual circumstance, such as great provocation
- (8) Sophistication of the crime;
- (9) Defendant's position of trust or confidence

b. Facts relating to the defendant:

- (1) Prior record
- (2) Past performance on probation or parole
- (3) Willingness to comply with the terms of probation;
- (4) Ability to comply with probation;
- (5) Effect of imprisonment on the defendant/dependents;
- (6) Adverse collateral consequences on defendant's life resulting from the felony conviction;
- (7) Remorse
- (8) Dangerousness.

**B. Term Selection**

1. Circumstances in aggravation (Rule 4.421)

a. Factors relating to the crime

- (1) level of violence;
- (2) Arming/use of weapon;
- (3) The victim was particularly vulnerable;
- (4) Defendant's leadership;
- (5) Defendant induced a minor to participate;
- (6) Defendant interfered with judicial process
- (7) Conviction of other crimes for which concurrent sentences are being imposed;
- (8) Sophistication of crime
- (9) Damage/loss of great monetary value;
- (10) Large quantity of contraband;
- (11) Defendant's position of trust
- (12) Hate crime where no enhancement imposed

b. Factors relating to the defendant

- (1) Violent conduct indicating serious danger to society;
- (2) Numerous or increasingly serious prior history
- (3) Prior prison term;
- (4) Defendant on probation or parole;
- (5) Poor performance on probation or parole.

- c. Other factors
    - (1) Any other statutory factors
- 2. Circumstances in mitigation (Rule 4.423)
  - a. Factors relating to the crime
    - (1) The defendant was a minor player;
    - (2) The victim was a willing participant or provoker;
    - (3) Unusual circumstance or provocation;
    - (4) Coercion/duress or other partial excuse not amounting to a defense;
    - (5) Defendant induced by others to participate;
    - (6) Defendant exercised caution to avoid harm;
    - (7) Mistaken belief that conduct was legal;
    - (8) Crime committed to provide necessities for family or self;
    - (9) Victim committed repeated acts of domestic abuse against defendant.
  - b. Factors relating to the defendant
    - (1) No significant prior record;
    - (2) Significant mental or physical condition;
    - (3) Defendant admits wrongdoing early on;
    - (4) The defendant is ineligible for probation and but for that ineligibility would have been granted probation;
    - (5) The defendant made restitution to the victim;
    - (6) Prior satisfactory performance on probation or parole.
- 3. “Dual Use” prohibition
  - a. Enhancement
 

Cannot use fact supporting enhancement to aggravate sentence if the enhancement is actually imposed. (§ 1170(b); Rule 4.425(b).)
  - b. Element of crime
 

Cannot use element of crime to aggravate sentence. (Rule 4.425(b).)
  - c. Dual use prohibition does not prevent multiple uses of priors.
 

***People v. Jones*** (2009) 178 Cal.App.4th 853, 860-64; ***People v. Nelson*** (1996) 42 Cal.App.4th 131.

But see ***People v. McFearson*** (2008) 168 Cal.App.4th 388—cannot use 667.5(b) prior both to aggravate and to enhance)
  - d. Dual use prohibition does not prevent court from relying on similar facts both to deny probation and to aggravate sentence. (***People v. Weaver*** (2007) 149 Cal.App.4th 1301, *disapproved on another ground in* ***People v. Cook*** (2015) 60 Cal.4th 922, 939 (finding victim vulnerability appropriate both to deny probation and as factor in aggravation).)
- 4. Choice of upper, lower or middle term is at court’s discretion. (§ 1170(b); Rule 4.420.)
  - a. Court may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision.

- b. Court may rely on the case record, the probation report, statements in aggravation or mitigation, and any evidence properly introduced at the sentencing hearing.
- c. Court's reasons must be stated orally on the record.
- d. One factor is sufficient to aggravate sentence.  
(*People v. Osband* (1996) 13 Cal.4th 622, 730.)

#### IV. ADDING TO PRISON SENTENCES

##### A. Prior Convictions

1. Definition
  - a. Date of conviction precedes date of offense. (*People v. Rojas* (1988) 206 Cal.App.3d 795, 802.)  
-This is different from the rule for DUI priors, which enhance punishment for multiple *violations* rather than convictions.  
(*People v. Albitre* (1986) 184 Cal.App.3d 895.)
  - b. Date of conviction means date of plea or verdict.  
(*People v. Laino* (2004) 32 Cal.4th 878, 896.)
2. Prior convictions must be pleaded. (§ 969.)
  - a. Need not prove at PX unless:
    - the prior is an element of the offense or
    - the prior changes the actual sentence for the crime.
 For example, section 666 changes the actual sentence for violations of section 484 and must be proved at PX. Section 667(a) does not change the sentence for the charged felony, but simply adds 5 years; it need not be proved at PX. See *Miranda v. Superior Court* (1995) 38 Cal.App.4th 902.
  - b. Must be proved at trial, but only if the prior conviction enhances the sentence.
3. Prosecution can charge felony prior even though offense reduced to a misdemeanor upon successful completion of probation. (§ 1203.4.)  
*But compare:* If the defendant's prior felony conviction is reduced to a misdemeanor pursuant to proposition 47, the prosecution cannot charge that conviction as a prior felony. (§ 1170.18(k).)
4. Sentence calculation consequences of most common prior related enhancements:
  - a. Added term of years to base term.
    - Serious felony + serious felony prior (§ 667(a))  
Adds 5 years  
Judge has no discretion to strike
    - Narcotic sales + narcotic sales prior (11370.2)  
Adds 3 years
    - Prior prison term (§667.5(b).)  
Adds 1 year



- c. New term creation, e.g.:
  - Three strikes offense (1170.12/667(b-i))
  - \*Any felony + Prior serious/violent felony prior:
    - Double the base term;
    - Enhancements are not doubled.
  - \* Current violent or serious felony + Two or more serious/violent felony priors:
    - Life in prison, with minimum term of:
      - Option one:* Triple the base term or
      - Option two:* 25 years or
      - Option three:* Term that would otherwise be imposed including all enhancements.
  - \*After selection of term, add all enhancements
    - This is true even if enhancements used to calculate the minimum term.
  - \*Judge has discretion to strike
- d. Excluding county jail sentence under section 1170(h).
  - Defendant who has suffered prior serious or violent felony conviction is ineligible for a “local prison” sentence in county jail, and must serve time in prison unless probation is granted. (§ 1170(h)(3).)

## B. Conduct Enhancements

1. The “Big Use” (12022.53)
  - a. Firearm use plus listed felony and
    - Use only
      - Add ten years. (§ 12022.53(b))
    - Use + intentional discharge
      - Add twenty years. (§ 12022.53(c))
    - Use + intentional discharge + great bodily injury
      - Add 25 years to Life. (§ 12022.53(d))
  - b. Listed felonies: murder; mayhem, kidnapping, robbery, carjacking, PC 220; PC 245(d); forcible sex crimes; PC 4500 (assault by life prisoner); PC 4501(assault by prisoner); PC 4503 (hostage taking by prisoner)
    - \*\*and note:** where the defendant inflicts GBI by gunshot, section 12022.53(d) (but not the (b) or (c) clause) applies to: *PC 246 (shooting at occupied car or building) and PC 26100(c) and (d) (malicious discharge from a vehicle)*
  - b. If convicted of this enhancement the defendant cannot be sentenced to probation.
  - c. The court may not strike this enhancement .

2. Other firearm use (12022.5(a))
  - a. Adds 3-4-10
  - b. May not charge 12022.5 if firearm use is an element of the offense.
  - c. Exception: the enhancement “shall be imposed” for any violation of section 245 with use of a firearm. (12022.5(d).)
3. Great bodily injury (120227)
  - a. Defendant must personally inflict the injury.
  - b. Injury must be substantial.
  - c. Penalty: adds 3 years to defendant’s sentence except that:
    - adds 5 years if victim is paralyzed or becomes comatose (§ 12022.7(b))
    - adds 5 years if the victim is 70 or older
    - adds 4-5-6 if victim is under 5
    - adds 3-4-5 in domestic violence cases
4. Narcotics Offenses.
  - a. Weight Enhancements
    - 11370.4(a) (cocaine & heroin): >1 kg=3 yrs; > 4 kg=5 yrs; > 10 kg = 10 yrs; > 20 kg=15 yrs.; >40 kg = 20 yrs; > 80 kg = 25 yrs
    - 11370.4(b) (meth/PCP): >1 kg=3 yrs; > 4 kg=5 yrs; > 10 kg = 10 yrs; > 20 kg=15 yrs
    - 11379.8 (Manufacturing specified substances): >1-lb/3 gal. = 3 yrs; > 3 lbs/10 gal. = 5 yrs; >10 lbs/25 gal. =10 yrs; > 44 lbs/105 gal.=15 yrs
  - b. Firearm possession
    - PC 12022(c) Commercial offense while personally armed (3-4-5).
    - PC 12022(d) Commercial offense knowing that codefendant is armed (1-2-3).
5. One-strike sex offense (667.61) Warning: consult an expert!!!
  - The charging of one/strike forcible sex crimes is complicated and exposures can range from 15 years to life to LWOP. A full understanding of sex charging is beyond the scope of this presentation. This summary is intended only to indicate the situations where expert knowledge is needed.
  - a. Applies to forcible sex crimes and lewd act on a child.
    - 261(a)(2) or (6); 262(a)(1) or (4); 264.1; 286(c)(2)(3); 286(d); 288(a) or (b); 288a(c)(2)(3); 288a(d); 288.5; 289(a);
  - b. Factors present in the sex crime that would trigger one-strike:
    - Major factors:**
      - Adult Victims: prior sex offense; aggravated kidnapping; aggravated mayhem or torture in present offense; sex-intent burglary; infliction of great bodily injury;
      - Child Victims: all of the above plus infliction of “bodily harm” on child under 14; note that penalties are steeper where victim is a minor between 14-17, and steeper still if the victim is a child under 14.
    - Minor factors:** simple kidnapping; burglary; use of firearm/deadly weapon; multiple victims; tying or binding; use of controlled substance.

## V. CONDUCT CREDIT IN FELONY CASES: AN APPROXIMATION

### 1. Statutory Conduct Credits.

The following credits reflect the conduct credits authorized by statute, before the passage of Proposition 57. While the statutes have not been changed as of September, 2017, the actual conduct credits awarded by the Department of Corrections & Rehabilitation is set by regulations promulgated by the DOC, as provided in Prop. 57. See the next paragraph for those regulations.

- **50%**            Unless otherwise specified, a state prisoner is entitled to day-for-day credit while serving a state prison sentence. (Penal Code Section 2933) They must serve half of their sentence.
- **20%**            Persons convicted of non-violent crimes (crimes not listed in 667.5(c)) but who do have a **prior strike conviction** (serious or violent felony) are entitled to 20% credit of their actual prison time. (Penal Code Section 667(c)(5).) They are entitled to day to day credit for presentence local time. (See below.) They must serve about 80% of the prison sentence.
- **15%**            Persons convicted of **violent** felonies (those listed in Penal Code section 667.5(c)) are entitled to 15% credit of both prison and presentence local time. (Penal Code Section 2933.1) This is true for the violent crime and for any enhancements or non-violent crimes attached to that same sentence. (*In re Reeves* (2005) 35 Cal.4th 765.)
- **0%**            Persons convicted of **life crimes** other than murder are entitled to no credit off the minimum life term, but do receive credit for the determinate portion of the term.
- **00%**            Persons convicted of **murder** are entitled no credit for any portion of their term, including determinate enhancements or offenses that are part of the same sentence. (Penal Code section 2933.2.)
- **Presentence custody credits** for all persons sentenced to non-violent determinate terms is currently 50%. (Penal Code section 4019.) For crimes occurring before October 1, 2011, prior law governs, and that law is not covered here.

## 2. Regulatory Conduct Credits.

Prop. 57 authorizes the CDCR to award conduct credits for good behavior. (Cal. Const., art. I, § 32 (a)(2).) The following credits reflect the conduct credits authorized by the Department of Corrections & Rehabilitation emergency regulations. Note that under the new regulations, a violent offender is anyone serving a term for a violent felony listed in PC 667.5(c); all other offenses, even serious offenses under PC 1192.7(c), are considered nonviolent.

### INCREASED GOOD CONDUCT CREDIT:

<b>Offender Type</b>	<b>New %</b>	<b>Statutory%</b>
LWOP/Death	0	0
ISL Violent Felons	20%	0%
DSL Violent Felons	20%	15%
ISL Nonviolent 3-Striker	33.33%	0
DSL Nonviolent 2 or 3 Strikers	33.33%	20%
Nonviolent offenders	50%	50%
Violent Felons/ Fire Camps	50%	15%
Nonviolent offenders/Fire camp	66.67%	50%
Nonviolent offenders in Minimum Security facility	66.67%	50%

### ADDITIONAL CONDUCT CREDITS AVAILABLE:

<b>Additional Custody Credit Opportunities</b>	<b>Credit Available</b>
Milestone Programs (academic, social, career, substance abuse etc.)	Up to 12 weeks annually
Rehabilitation Achievement (educational, behavioral, rehabilitative)	Up to 4 weeks annually
Educational Merit (GED, AA, BA or other degrees)	3-6 months
Extraordinary Conduct Credit (heroic or lifesaving events)	Up to 12 months

## VI. FELONY SENTENCE CALCULATION

### A. Single Felony

#### a. Minimum sentence calculation

-Generally, probation is the minimum sentence unless there is a mandatory no probation clause

#### b. Prison Sentence calculation.

-court has discretion to choose mitigated/low term, midterm, or aggravated/upper term. (§ 1170(b).)

#### c. Enhancements for conduct (PC 1170.11)

-unless otherwise specified, the court has discretion to strike an enhancement or the penalty for an enhancement. (§1385.)

-if the court does impose the penalty for an enhancement, the penalty must be added full term, consecutive to the prison term selected (§ 1170(d).)

#### d. The court then adds any time for prior convictions.

### B. Multiple Felonies.

#### a. Concurrent Sentences

-Where the defendant commits multiple felonies, the court chooses the terms for each sentence, and the defendant serves both terms simultaneously. Thus the defendant will serve the same amount of time for multiple crimes as he or she would serve for the single felony with the longest sentence.

#### b. Consecutive DSL sentences (§ 1170.1)

-Where the defendant commits multiple determinate felonies, the court sentences as follows:

Principal term + subordinate term + priors = aggregate term

-Principal term = base term (term selected for longest felony) + enhancement

-Subordinate term = 1/3 midterm of other felonies + 1/3

enhancements

## VII. PROP 57 AND THE LENGTH OF FELONY PRISON SENTENCES

Although Prop. 57 has no impact on the actual sentence imposed and calculated at the time of sentencing, Prop. 57 makes it likely that state prisoners will be paroled early because:

- 1) Nonviolent prisoners may be paroled after serving the base term for the principal offense;
- 2) CDCR regulations have increased state prison conduct credits;
- 3) State prisoners can earn additional conduct credit for programs and achievements.

### 1. EARLY PAROLE CONSIDERATION

- a. Applies to prisoners serving terms for nonviolent felonies;
  - i. Nonviolent felony is a felony not listed in PC667.5(c),
  - ii. This includes serious, but nonviolent felonies such as 245(a)(1) or 459-1st.
  - iii. Does not apply to 290 registrants.
- b. Prisoner becomes eligible for parole after serving base term on primary offense
  - i. Prop. 57 uses the phrase "full term for the primary offense@, defined as the longest term imposed for any single offense without reference to enhancements, consecutive sentences, or alternative sentences.
  - ii. Early parole consideration date for Nonviolent Offenders be unaffected by:
    - Two or even three prior strike sentences;
    - Multiple consecutive sentences;
    - Enhancements that do not make an offense violent (e.g. PC 667(a)).
- c. Prop. 57 does not affect terms imposed for violent felonies listed in PC 667.5(c).
  - i. An inmate serving time for both violent and non-violent offenses is reclassified as a nonviolent offender after completing the term for the violent offense.
- d. Does not apply to 1170(h) (local prison) offenses or to 290 registrants.

### 2. CDCR REGULATIONS INCREASE CONDUCT CREDITS:

	Current (DOC Regs):	Former (Statutory):
a. Life sentences:	20%	0
b. Violent Felonies:	20%	15%
c. Nonviolent, w. strike prior:	33%	20%
d. Other prison felonies:	50%	50%

### 3. NEW REGULATIONS CREATE PROGRAMS IN WHICH INMATES CAN EARN CREDITS IN ADDITION TO THOSE LISTED ABOVE.

- a. Examples: Educational programs; Fire camps; Substance abuse programs; career training; extraordinary or heroic conduct.

## MANDATORY PROBATION DENIAL CLAUSES

PC 550(d) [PC550 + prior]. . . . .	MNP
PC 667(c)(2) [ser./viol. prior fel convictions]. . . . .	MNP
<i>Dalite note: Automatically charged with 1170.12.</i>	
PC 667.61(h) [one strike sex offense]. . . . .	MNP
<i>Dalite note: Automatically charged with one strike allegation.</i>	
PC 667.71(e) [Habitual Sexual Offender]. . . . .	MNP
<i>Dalite note: Automatically charged with 667.71 allegation.</i>	
PC 1170.12(a) [2/3 strike allegations]. . . . .	MNP
<i>Dalite note: Automatically charged with 667.71 allegation.</i>	
PC 1203(k) [Ser./Viol. fel while on felony probation].. . . .	MNP
PC 1203.055(c) [Listed fel vs. transit worker or passenger + prior]. . . . .	MNP
PC 1203.06 [use of firearm in specified offense]. . . . .	MNP
<i>Dalite note: No need to charge; use 12022.5 or 12022.53 instead.</i>	
PC 1203.065 [Listed sex offenses]. . . . .	MNP
<i>Dalite note: Automatically charged with substantive offense.</i>	
PC 1203.066(a)(1)-(2) [288/288.5 + aggravating conduct]. . . . .	MNP
<i>Dalite note: No need to charge; use 667.61 instead.</i>	
PC 1203.066(a)(3) [288/288.5 + stranger/befriender].. . . .	MNP
PC 1203.066(a)(4)-(7) [Sex crimes plus aggravating conduct]. . . . .	MNP
<i>Dalite note: No need to charge; use 667.61.</i>	
PC 1203.066(a)(8) [288/288.5 + Substantial Sexual Conduct]. . . . .	MNP
PC 1203.066(a)(9) [288/288.5 + use of porn]. . . . .	MNP
PC 1203.07 [narcotics weight/prior commercial narcotics convictions].. . . .	MNP
PC 1203.075 [Specified felony + personal infliction of GBI].. . . .	MNP
<i>Dalite note: Use with 187 only and only if 12022.53 cannot be charged.</i>	
PC 1203.08 [Prior conv of specified offense w/i 10 yrs]. . . . .	MNP
<i>Dalite note: Use for 245(a)(4); otherwise charge under 3 strikes.</i>	
PC 1203.085(a) [Nonwobbler + on parole for ser fel]. . . . .	MNP
PC 1203.085(b) [Serious fel while on parole]. . . . .	MNP
PC 1203.09(a) [Listed fel + GBI + vic >60/disabled ]. . . . .	MNP
PC 12022.53(g) [10/20/Life use of firearm]. . . . .	MNP
<i>Dalite note: No need to charge; automatically charged with 12022.53(b), (c) or (d).</i>	
PC 18780 [Destructive devices]. . . . .	MNP
<i>Dalite note: No need to charge; automatically charged w. substantive offense.</i>	
HS 11370(a) [Narc. offense + prior commercial narc. offense]. . . . .	MNP

### **THE FELONY SENTENCING HEARING (RULE 4.433)**

- (a) In every case, at the time set for sentencing under section 1191, the sentencing judge must hold a hearing at which the judge must:
  - (1) Hear and determine any matters raised by the defendant under section 1201; and
  - (2) Determine whether a defendant who is eligible for probation should be granted or denied probation, unless consideration of probation is expressly waived by the defendant personally and by counsel.
- (b) If the imposition of a sentence is to be suspended during a period of probation after a conviction by trial, the trial judge must identify and state circumstances that would justify imposition of one of the three authorized prison terms referred to in section 1170(b) if probation is later revoked. The circumstances identified and stated by the judge must be based on evidence admitted at the trial or other circumstances properly considered under rule 4.420(b).
- (c) If a sentence of imprisonment is to be imposed, or if the execution of a sentence of imprisonment is to be suspended during a period of probation, the sentencing judge must:
  - (1) Determine, under section 1170(b), whether to impose one of the three authorized prison terms referred to in section 1170(b) and state on the record the reasons for imposing that term.
  - (2) Determine whether any additional term of imprisonment provided for an enhancement charged and found will be stricken;
  - (3) Determine whether the sentences will be consecutive or concurrent if the defendant has been convicted of multiple crimes;
  - (4) Determine any issues raised by statutory prohibitions on the dual use of facts and statutory limitations on enhancements, as required in rules 4.420(c) and 4.447; and
  - (5) Pronounce the court's judgment and sentence, stating the terms thereof and giving reasons for those matters for which reasons are required by law.
- (d) All these matters must be heard and determined at a single hearing unless the sentencing judge otherwise orders in the interests of justice.
- (e) When a sentence of imprisonment is imposed under (c) or under rule 4.435, the sentencing judge must inform the defendant, under section 1170(c), of the parole period provided by section 3000 to be served after expiration of the sentence in addition to any period of incarceration for parole violation.



## SENTENCING PROBLEMS

### Episode 1

#### Problem 1

##### **1) Robbery, 211-2d**

Probation Eligible?    yes  
Minimum Sentence:    Probation

#### Problem 2

##### **1) Robbery, 211-2d**

**-Enhancement: Use of firearm, 12022.53(b)**

Probation Eligible?    No  
Minimum Sentence:    State prison

#### Problem 3

##### **1) Kidnapping, 207**

##### **Prior: Robbery, 211-2d**

Probation Eligible?    No  
Minimum Sentence:    State prison

#### Problem 4

##### **1) False imprisonment, 236**

**-Enhancement: Use of knife, 12022(b)**

**-Presumptive No Probation clause, 1203(e)(2)**

Probation Eligible?    Yes, if court so finds  
Minimum Sentence:    Probation

Problem 5

**1) Car theft, VC 10851**

Triad: 16-2-3  
Minimum Sentence: Probation  
Maximum Sentence: 3 years under 1170(h)

Problem 6

**1) Assault w. deadly weapon, 245(a)(2)**  
**-Enhancement: Firearm use, 12022.5**

Probation Eligible? Yes  
Maximum Sentence: 14 years in state prison

Base term	2-3-4	4
Enhancement	3-4-10	<u>+ 10</u>
TOTAL		14

Problem 7

**1) Assault with force likely, 245(a)(4)**  
**-Enhancement: GBI, 12022.7**

Probation Eligible? Yes  
Maximum Sentence: 7 years in state prison

Base term	2-3-4	4
Enhancement		<u>+3</u>
TOTAL		7

Problem 8

**1) Assault with intent to commit rape, 220**  
**-Enhancement: GBI, 12022.7**  
**-MNP clause 1203.075**

Probation Eligible? No  
Maximum Sentence: 9 years in state prison

Base term	2-4-6	6
Enhancement		<u>+ 3</u>
TOTAL		9

## SENTENCING PROBLEMS

### Episode 2

#### Problem 1

- 1) Burglary of an outbuilding, 459-2d**  
**-Prior prison term 11351, 667.5(b)**

Probation Eligible? Yes  
Maximum Sentence: 4 years in state prison

Base term	16-2-3	3
Enhancement		<u>+1</u>
TOTAL		4

CONDUCT CREDIT: 50%

#### Problem 2

- 1) Residential Burglary, 459-1st**  
**Prior 459-1st, 667(a)**

Probation Eligible? No.  
Maximum Sentence: 17 years in state prison

Base term	2-4-6 x 2	12
Enhancement		<u>+ 5</u>
TOTAL		17

CONDUCT CREDIT 80%

### Problem 3

#### **1) Robbery, 211-2d**

**-Enhancement: Use knife, 12022(b)**

Probation Eligible? Yes

Maximum Sentence: 6 years in state prison

Base term	2-3-5	5
Enhancement		<u>+1</u>
TOTAL		6

CONDUCT CREDIT: 85%

### Problem 4

#### **1) First degree Murder, 187-1st**

**-1203.075/GBI MNP**

Probation Eligible? No.

Sentence: 25 years to Life

CONDUCT CREDIT: 0%

### Slide 5

**Aggregate Term (total term)**

**\*Aggregate Tm = Principal Tm + Subordinate Tm + priors**

**\*Principal Term = Base term + enhancements**

**-Court must chose longest prison sentence as principal term**

**\*Subordinate Term = 1/3rd midterm + 1/3 enhancements**

### Problem 6

#### **1) Residential Burglary, 459-1st**

#### **2) Grand Theft, 487**

Principal Term	2-4-6	6 yrs.
Subordinate Term	1/3 of 2	<u>+ 0 yrs. 8 mos.</u>
TOTAL		6 yrs. 8 mos.

CONDUCT CREDIT: 50%

Problem 7

**1) Kidnapping, 207**

**-Enhancement: Use Knife 12022(b)**

**2) Robbery, 211-2d**

Principal Term	3-5-8	8 yrs.
Enhancement		1
Subordinate Term	1/3 of 3	<u>+ 1</u>
TOTAL		10 yrs.

CONDUCT CREDIT: 15% (Serve 85%)

Problem 8

**1) Attempted murder, 187/664**

**-Enhancement: Use firearm, 12022.53(b)**

**2) Robbery, 211-2d**

**-Enhancement: GBI, 12022.7**

Principal Term	5-7-9	9 yrs.
Enhancement		+ 10
Subordinate Term	1/3 of 3	+ 1
Sub. Enhancement	1/3 of 3	<u>+ 1</u>
TOTAL		21 yrs.

CONDUCT CREDIT: 15% (Serve 85%)

Problem 9

**1) Attempted murder, 187/664**

**-Enhancement: Use firearm, 12022.53(b)**

**2) Robbery, 211-2d**

**-Enhancement: GBI, 12022.7**

**Prior 487 PC, State Prison 667.5(b)**

Principal Term	5-7-9	9 yrs.
Enhancement		+10
Subordinate Term	1/3 of 3	+ 1
Sub. Enhancement	1/3 of 3	+ 1
Prior Conviction		<u>+ 1</u>
TOTAL		22 yrs.

CONDUCT CREDIT: 15% (Serve 85%)

Problem 10

**1) Robbery, 211**

**2) Felony vandalism, 594(b)**

**Prior Strike conviction: 459-1st, 667(a)**

Principal Term	2-3-5 x 2	10 yrs.
Subordinate Term	(1/3 of 2) x 2	+ 1 yr. 4 mos.
Prior Conviction		<u>+ 5 yrs.</u>
TOTAL		16 yrs. 4 mos.

CONDUCT CREDIT: 15% (Serve 85%)

Problem 11

**1) Assault w. deadly weapon, 245(a)(1)**

**Prior Strike conviction: 459-1st, 667(a)**

**Prior Strike conviction: 422, 667(a)**

	ISL	DSL
Principal Term	25 to Life	
Prior Conviction		+ 5 yrs.
Prior Conviction		<u>+ 5 yrs.</u>
TOTAL	25 to life plus	10 yrs.