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December 5, 2011

County Clerk/Registrar of Voters (CC/ROV) Memorandum # 11134

TO: All County Clerks/Registrars of Voters

FROM: Lowell Finley
Chief Counsel

RE: Voter Registration: Status of Persons Convicted Under State's New Criminal Justice Realignment Statutes

Voting Status under Realignment of Offenders Convicted of Low-Level Felonies

To determine its impact on voting eligibility, the Secretary of State's office has reviewed the criminal justice realignment legislation (AB 109 and AB 117) passed by the Legislature and signed into law by Governor Brown earlier this year. The conclusions of the analysis are summarized in the advice below. For the legal analysis supporting this advice, please see the attached memorandum.

Under AB 109 and AB 117 (collectively, the Criminal Justice Realignment Act, CJRA or Act) and effective October 1, 2011, there are four scenarios under which a person convicted of a felony can be incarcerated. Under three of the scenarios, the person is ineligible to vote while incarcerated. Under one of the scenarios, the person retains the right to vote while incarcerated. The four scenarios are:

1. **Felony sentence to state prison:** No change. The person has been convicted of a felony and sentenced to state prison. While in state prison, the person is *ineligible to vote*. A person returned to state prison for violating the terms of their parole is also *ineligible to vote*.

2. **Felony sentence to state prison, served in county jail under contract between the state and a county:** No change. The person has been convicted of a felony and sentenced to state prison. Under a contract between the state and a county, the person is serving the state prison sentence in a county jail. While in county jail, the person is *ineligible to vote*.

3. **Felony sentence to county jail:** ***New.*** The person has been convicted of a CJRA-defined low-level felony and sentenced, on or after October 1, 2011, to a term of more than one year in county jail. While in jail, the person is *ineligible to vote*. A person returned to jail for violating the terms of their post release

community supervision, or for violating probation that was granted for the concluding part of the sentence, is also *ineligible to vote*.

4. **Jail commitment as a condition of probation in lieu of felony sentencing:** No change. The person has been convicted of a felony, but the judge has suspended imposition or execution of a felony sentence, instead placing the person on probation with the condition that the person serve one year or less in county jail. While in jail as a condition of this form of probation, the person *retains the right to vote* because the imposition or execution of the felony sentence was suspended.

Also effective October 1, 2011, there are three scenarios under which a person convicted of a felony and sentenced to state prison or county jail may be released, subject to supervision. Under all three scenarios, the person is ineligible to vote while remaining under supervision.

1. **Parole:** No change. A person who was convicted of a felony, sentenced to state prison, and subsequently placed on state-supervised parole upon release from state prison is, until the period of parole ends, *ineligible to vote.*

2. **Post Release Community Supervision:** ***New***. A person who was convicted and sentenced to state prison prior to October 1, 2011, for what is now defined by the CJRA as a low-level felony, and is released from state prison to county-supervised post release community supervision is, until the period of supervision ends, *ineligible to vote*.

3. **Court-approved service of the concluding portion of a felony county jail sentence on probation:** ***New.*** At the time a judge sentences a person to county jail for the conviction of a CJRA-defined low-level felony, the CJRA authorizes the judge to order that the person be released on probation for a specified, concluding portion of the term. This *post*-sentencing probation, which could last more than a year, continues until the end of the full sentence term. Until the period of this form of probation ends, the person is *ineligible to vote*.

Please feel free to contact me directly at (916) 653-7244 or Lowell.Finley@sos.ca.gov if you have any questions concerning this advice or the accompanying legal memorandum.

If you have any questions, please feel free to contact me at Lowell.Finley@sos.ca.gov or (916) 654-4666.

MEMORANDUM

The Voting Status of Offenders Convicted of Low-Level Felonies As Defined by the 2011 Realignment Legislation

INTRODUCTION

In 2011, Governor Brown proposed and the Legislature enacted a historic realignment from state government to local governments of the responsibility and funding for many governmental functions. An important component of that reform package was criminal justice realignment, also referred to as public safety realignment.

Assembly Bill 109, the Realignment Legislation of 2011 Addressing Public Safety, and Assembly Bill 117, the Criminal Justice Realignment Act of 2011 (referred to collectively as the Criminal Justice Realignment Act (CJRA or Act)), changes how felons convicted of defined "low-level" felonies are dealt with during imprisonment and mandatory post-imprisonment supervised release. The CJRA mandates that felons convicted of these "low-level" felonies, with no prior record of conviction for defined "serious" offenses, will serve their sentence in county jail. The CJRA authorizes the sentencing court, in its discretion, to suspend execution of a concluding portion of that sentence, with the remaining portion to be served under the supervision of county probation departments. Additionally, felons serving prison sentences for "low-level" felonies, regardless of prior convictions, are now subject to locally operated and supervised "post-release community supervision," in lieu of state-supervised parole. These changes raise questions about eligibility to vote for convicted felons on "post-release community supervision" rather than parole, as well as for convicted felons either serving a sentence for conviction of a "low-level" felony in county jail or under the supervision of the county probation department.

This memorandum addresses whether the changes made by the CJRA give offenders convicted and sentenced for CJRA-defined low-level felonies, who were formerly disqualified from voting, the right to vote because they are imprisoned in county jail rather than state prison. It also addresses whether offenders who were convicted of these CJRA-defined low-level felonies and confined in state prison, then released into a program of mandatory supervision that is not named "parole," remain disqualified from voting.

The Secretary of State's office concludes that the CJRA does not change the voting status of offenders convicted of CJRA-defined low-level felonies, either because they serve their felony sentences in county jail instead of state prison or because the mandatory supervision that is a condition of their release from prison is labeled

something other than "parole." Offenders convicted of CJRA-defined low-level felonies continue to be disqualified from voting while serving a felony sentence in county jail, while at the discretion of the court serving a concluding portion of that term on county-supervised probation, or while they remain under mandatory "post release community supervision" after release from state prison.

REALIGNMENT LEGISLATION

The following summary provides an overview of the criminal justice realignment legislation passed by the Legislature and signed into law by Governor Brown earlier this year. It is taken from the *2011 Public Safety Realignment Fact Sheet* issued by the California Department of Corrections and Rehabilitation (CDCR) on July 15, 2011, which can be found at www.cdcr.ca.gov/realignment/index.html.

> Earlier this year, Governor Edmund G. Brown Jr. signed Assembly Bill (AB) 109 and AB 117, historic legislation that will enable California to close the revolving door of low-level inmates cycling in and out of state prisons. It is the cornerstone of California's solution for reducing the number of inmates in the state's 33 prisons to 137.5 percent design capacity by May 24, 2013, as ordered by the U.S. Supreme Court.
>
> All provisions of AB 109 and AB 117 are prospective and implementation of the 2011 Realignment Legislation will begin October 1, 2011. ***No inmates currently in state prison will be transferred to county jails or released early***.
>
> Governor Brown also signed multiple trailer bills to ensure the 2011 Realignment secured proper funding before implementation could go into effect.
>
> . . .
>
> **Community, Local Custody**
>
> AB 109 allows non-violent, non-serious, and non-sex offenders to serve their sentence in county jails instead of state prisons. However, counties can contract back with the State to house local offenders.
>
> Under AB 109:
>
> • No inmates currently in state prison will be transferred to county jails.
> • No inmates currently in state prison will be released early.
> • All felons sent to state prison will continue to serve their entire sentence in state prison.

• All felons convicted of current or prior serious or violent offenses, sex offenses, and sex offenses against children will go to state prison.
• There are nearly 60 additional crimes that are not defined in Penal Code as serious or violent offenses but at the request of law enforcement were added as offenses that would be served in state prison rather than in local custody.
Please see the document "AB 109: Final Crime Exclusion List" for a complete listing of those crimes.

Post-Release (County-Level) Community Supervision

CDCR continues to have jurisdiction over all offenders who are on state parole **prior** to the implementation date of October 1, 2011. Prospectively, county-level supervision for offenders upon release from prison will include current non-violent, non-serious (irrespective of priors) and sex offenders. County-level supervision will **not** include:

• Third-strike offenders- those whose third strike was for a non-violent offense would still be on State parole.
• Offenders whose **current** commitment offense is serious or violent, as defined by California's Penal Code §§ 667.5(c) and 1192.7(c).
• High-risk sex offenders,
• Mentally Disordered Offenders
• Offenders on parole prior to October 1.

Offenders who meet the above-stated conditions will continue to be under state parole supervision.

The county Board of Supervisors will designate a county agency to be responsible for post-release supervision and will provide that information to CDCR by August 1, 2011. CDCR must notify counties of an individual's release at least one month prior. Once the individual has been released CDCR no longer has jurisdiction over any person who is under post-release community supervision. No person shall be returned to prison on a parole revocation except for those persons previously sentenced to a term of life.

Parole Revocations

Starting October 1, 2011, all parole revocations will be served in county jail instead of state prison and can only be up to 180 days.

The responsibility of parole revocations will continue under the Board of Parole Hearings until July 1, 2013, at which time the parole revocation process will become a local court-based process. Local courts, rather than the Board of Parole Hearings, will be the designated authority for

determining revocations. Contracting back to the state for offenders to complete a custody parole revocation is not an option. Only offenders previously sentenced to a term of life can be revoked to prison.

CONVICTED FELON VOTING STATUS UNDER THE CJRA

Article II, section 4 of the California Constitution disqualifies from voting those "imprisoned or on parole for the conviction of a felony."[1]

Prior to the Legislature's enactment of the CJRA, court decisions, guidance issued by the Secretary of State and some Elections Code provisions treated being "imprisoned for the conviction of a felony" as synonymous with being "in prison" because every person convicted of and sentenced to serve a felony sentence was required to serve that sentence in state prison.

However, following the changes mandated by the CJRA, "imprisoned for the conviction of a felony" and "in prison for the conviction of a felony" can no longer be considered synonymous because the CJRA requires every person convicted of and sentenced for what CJRA defines to be less serious felonies to serve that sentence in a county *jail*, not in state *prison*.

Specifically, under the CJRA, persons convicted of certain felonies (designated by the CJRA as "low-level" felonies) and sentenced after the Act's effective date of October 1, 2011, must serve their felony sentences in county jail rather than state prison. Consistent with this change, the CJRA also changes the Penal Code's definition of "felony" to include offenses carrying sentences of imprisonment in county jail for terms longer than one year.[2]

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[1] The full text of article II, section 4 reads: "The Legislature shall prohibit improper practices that affect elections and shall provide for the disqualification of electors while mentally incompetent or imprisoned or on parole for the conviction of a felony."

[2] The Act amended the definition of "felony" by amending subdivision (a) of section 17 of the Penal Code (added language in italics):

(a) A felony is a crime that is punishable with death, by imprisonment in the state prison, *or notwithstanding any other provision of law, by imprisonment in a county jail under the*

(footnote cont'd next page)

provisions of subdivision (h) of Section 1170. Every other crime or public offense is a misdemeanor except those offenses that are classified as infractions.

As amended by the Act, subdivision (h) of Penal Code section 11170 states:

(h) (1) Except as provided in paragraph (3), a felony punishable pursuant to this subdivision where the term is not specified in the underlying offense shall be punishable by a term of imprisonment in a county jail for 16 months, or two or three years.

(2) Except as provided in paragraph (3), a felony punishable pursuant to this subdivision shall be punishable by imprisonment in a county jail for the term described in the underlying offense.

(3) Notwithstanding paragraphs (1) and (2), where the defendant (A) has a prior or current felony conviction for a serious felony described in subdivision (c) of Section 1192.7 or a prior or current conviction for a violent felony described in subdivision (c) of Section 667.5, (B) has a prior felony conviction in another jurisdiction for an offense that has all the elements of a serious felony described in subdivision (c) of Section 1192.7 or a violent felony described in subdivision (c) of Section 667.5, (C) is required to register as a sex offender pursuant to Chapter 5.5 (commencing with Section 290) of Title 9 of Part 1, or (D) is convicted of a crime and as part of the sentence an enhancement pursuant to Section 186.11 is imposed, an executed sentence for a felony punishable pursuant to this subdivision shall be served in state prison.

(4) Nothing in this subdivision shall be construed to prevent other dispositions authorized by law, including pretrial diversion, deferred entry of judgment, or an order granting probation pursuant to Section 1203.1.

(5) The court, when imposing a sentence pursuant to paragraph (1) or (2) of this subdivision, may commit the defendant to county jail as follows:

(A) For a full term in custody as determined in accordance with the applicable sentencing law.

(B) For a term as determined in accordance with the applicable sentencing law, but suspend execution of a concluding portion of the term selected in the court's discretion, during which time the defendant shall be supervised by the county probation officer in accordance with the terms, conditions, and procedures generally applicable to persons placed on probation, for the remaining unserved portion of the sentence imposed by the court. The period of supervision shall be mandatory, and may not be earlier terminated except by court order. During the period when the defendant is under such supervision, unless in actual custody related to the sentence imposed by the court, the defendant shall be entitled to only actual time credit against the term of imprisonment imposed by the court.

The CJRA also provides that inmates already serving sentences for conviction of these CJRA-defined low-level felonies in state prison before October 1, 2011, are, upon their release, no longer to be placed on state-administered parole, but instead in a new, parallel system of county-administered, non-custodial supervision named "post-release community supervision."

Finally, the CJRA gives a judge who sentences a person to county jail for the conviction of a CJRA-defined low-level felony the option to order the person to serve a specified, final portion of the term on probation.

Convicted Felons – Voter Eligibility

As of October 1, 2011, there are four scenarios under which a person convicted of a felony can be incarcerated. Under three of the scenarios, the person is ineligible to vote while incarcerated. Under one of the scenarios, the person retains the right to vote while incarcerated. The four scenarios are:

1. **Felony sentence to state prison:** No change. The person has been convicted of a felony and sentenced to state prison. While in state prison, the person is *ineligible to vote*. A person returned to state prison for violating the terms of their parole is also *ineligible to vote.*

2. **Felony sentence to state prison, served in county jail under contract between the state and a county:** No change. The person has been convicted of a felony and sentenced to state prison. Under a contract between the state and a county, the person is serving the state prison sentence in a county jail. While in county jail, the person is *ineligible to vote.*

3. **Felony sentence to county jail:** ***New.*** The person has been convicted of a CJRA-defined low-level felony and sentenced, on or after October 1, 2011, to a term of more than one year in county jail. While in county jail, the person is *ineligible to vote*. A person returned to county jail for violating the terms of post-release community supervision, or for violating probation that was granted for the concluding part of the sentence, is also *ineligible to vote*.

4. **Jail commitment as a condition of probation in lieu of felony sentencing:** No change. The person has been convicted of a felony, but the judge has suspended the imposition or execution of a felony sentence, instead placing the person on probation with the condition that the person serve one year or less in county jail. While in county jail as a condition of this form of probation, the

person *retains the right to vote* because the imposition or execution of the felony sentence was suspended.

There are now three scenarios under which a person convicted of a felony and sentenced to state prison or county jail may be released, subject to parole, post-release community supervision, or probation. Under all three scenarios, the person is ineligible to vote while remaining under these types of supervision.

1. **Parole:** No change. A person who was convicted of a felony, sentenced to state prison, and subsequently placed on state-supervised parole upon release from state prison is, until the period of parole ends, *ineligible to vote*.

2. **Post-Release Community Supervision:** ***New.*** A person who was convicted and sentenced to state prison prior to October 1, 2011, for what is now defined by the CJRA as a low-level felony, and is released from state prison to county-administered post-release community supervision is, until the period of supervision ends, *ineligible to vote.*

3. **Court-approved service of the concluding portion of a felony county jail sentence on probation:** ***New.*** At the time a judge sentences a person to county jail for the conviction of a CJRA-defined low-level felony, the judge has the option to order that the person be released on probation for a specified, concluding portion of the term. This *post*-sentencing probation, which could last more than a year, continues until the end of the full sentence term. Until the period of this form of probation ends, the person is *ineligible to vote*.

Background

Since statehood, the California Constitution has prohibited voting by felons. Until 1974, a person sentenced to prison following conviction of a felony ("infamous crime" in earlier versions of the Constitution) was banned from voting for life. In 1974, the voters amended article II, section 3 of the Constitution to restore the right to vote to convicted felons after they served their sentences and completed parole. Subsequently renumbered, the language of that amendment remains unchanged in today's Constitution:

> The Legislature . . . shall provide for the disqualification of electors while . . . imprisoned or on parole for the conviction of a felony. (Cal. Const., art. II, § 4.)[3]

On December 28, 2006, the Secretary of State's office issued CC/ROV #06403, Subject: Prisoner Voting Rights. The key passage states: "the only persons disqualified from voting by reason of Article II, Section 4, are those who are imprisoned in state prison for, or on parole as the result of, a felony conviction." CC/ROV #06403 was issued following the decision of the California Court of Appeal in *League of Women Voters v. McPherson* (2006) 145 Cal.App.4th 1469.

In *McPherson*, the court held that in cases where a person was convicted of a felony but the trial judge suspended the imposition or execution of sentence and instead ordered the person to serve less than one year in county jail as a condition of probation, the person was not imprisoned for the conviction of a felony and was therefore eligible to vote. (*League of Women Voters v. McPherson, supra,* 145 Cal.App.4th at 1475; see *Stephens v. Toomey* (1959) 51 Cal.2d 864, 870-871.) The court's holding and rationale remain good law. Conviction for a felony, standing alone, does not make a person ineligible to vote. For disenfranchisement to result, conviction must be followed by the court's imposition of a felony sentence of imprisonment. The court formulated its order, however, as a short, simple rule of thumb that did not incorporate the court's rationale. It ordered issuance of a peremptory writ of mandate, directing the Secretary of State "to issue a memorandum informing the county clerks and elections officials that the only persons disqualified from voting by reason of article II, section 4 are those who have been imprisoned in state prison or who are on parole as a result of the conviction of a felony." (*Id.*, at 1486.) CC/ROV #06403 tracked the language of the court's order. The court's order and the CC/ROV accurately reflected the law at the time they were issued. As explained below, they no longer do.[4]

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[3] As noted above, the full text of article II, section 4 reads: "The Legislature shall prohibit improper practices that affect elections and shall provide for the disqualification of electors while mentally incompetent or imprisoned or on parole for the conviction of a felony."

[4] Since CC/ROV #06403 was issued, the Secretary of State has issued two additional documents on the subject of felon disenfranchisement. A brochure entitled "Vote in 2010!" states that, among the qualifications to vote, a person must not be "in prison or on parole for the conviction of a felony." A second brochure entitled "A Voting Guide for Currently or Formerly Incarcerated Californians" states that, to vote, a person must "[n]ot be in prison or on parole as a result of a felony conviction" or "serving a state

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The Governor's Budget for 2011-2012, under the heading "Local Jurisdiction for Lower-Level Offenders and Parole Violators," proposed to re-direct certain defined low-level felony offenders, convicted and sentenced to terms of imprisonment, from state prison to county jails. The Governor's Budget proposed that "offenders without any current or prior serious or violent or sex convictions would become the responsibility of local jurisdictions," serving their felony sentences in county jail rather than state prison. (*Id.*, p. 23.)

As outlined above, there is an important difference between these county jail inmates, who have been convicted and sentenced for a felony, and the county jail inmates in the *McPherson* case, who were convicted of a felony but not sentenced for that felony and instead were placed in county jail as a condition of probation.

Under the heading "Realign Adult Parole to the Counties," the Governor's Budget proposed a similar change for parolees:

> *This proposal would shift the responsibility for adult parole to the counties.* Since these offenders typically live in the community from which they left, county law enforcement and probation are usually more knowledgeable about the offender, suggesting *local supervision of parolees* is a better policy and public safety option. (P. 23, italics added.)

"Imprisoned" is not synonymous with "in prison."

Webster's Third New International Dictionary (1981) defines "imprison" as "to put in prison: confine in a jail."

As this definition shows, "imprisoned" is a broader term than "in prison" because it is not specific as to the place of confinement – it can mean "imprisoned" in a state prison for a felony conviction or "imprisoned" in a county jail for a felony conviction. By contrast, "in prison" is narrower because it is specific to the place of confinement, in this case meaning "state prison," not "county jail."

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prison term in a county jail under contract between state and local officials." For purposes of the present analysis, it is important to note that inmates housed in a county jail pursuant to such contracts with the CDCR have been sentenced to state prison and remain under CDCR jurisdiction.

The Elections Code contains a number of provisions regarding the voting status of felons that incorporate the Constitution's phrase "imprisoned or on parole for the conviction of a felony" verbatim or with minor variations. Section 2150(a)(9)[5] requires the affidavit of registration to show "[t]hat the affiant is currently not imprisoned or on parole for the conviction of a felony." Section 2201 requires a county elections official to cancel a voter's registration "[u]pon proof that the person is presently imprisoned or on parole for conviction of a felony." Section 2212 requires that, based on court records, "[t]he elections official shall, during the first week of April and the first week of September in each year, cancel the affidavits of those persons who are currently imprisoned or on parole for the conviction of a felony." Sentencing a person convicted of a CJRA defined low-level felony to county jail is consistent with the dictionary definition of imprison.

Several other sections of the Elections Code, however, substitute the words "in prison" for the Constitution's term "imprisoned." Section 2101 states that "[a] person entitled to register to vote shall be a United States citizen, a resident of California, not *in prison* or on parole for the conviction of a felony, and at least 18 years of age at the time of the next election." (Emphasis added.) Section 2016 requires printed literature or media announcements made in connection with programs to encourage voter registration to contain the following statement: "A person entitled to register to vote must be a United States citizen, a resident of California, not *in prison* or on parole for the conviction of a felony, and at least 18 years of age at the time of the next election." (Emphasis added.) Section 2300 establishes a publicly-available Voter Bill of Rights that defines a "valid registered voter" as "a United States citizen who is a resident in this state, who is at least 18 years of age and not *in prison* or on parole for conviction of a felony, and who is registered to vote at his or her current residence address." (Emphasis added.) Construed literally, these provisions would not apply to a person serving a sentence in county jail for the conviction of a felony.

When the Elections Code sections using the "in prison" terminology were adopted, there was no practical difference under California law between being "imprisoned" for a felony conviction and being "in prison" for a felony conviction. That is because everyone imprisoned for the conviction of any felony was required to serve that sentence in state prison.

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[5] All statutory references are to the Elections Code unless otherwise noted.

Beginning October 1, 2011, however, the Criminal Justice Realignment Act requires that "low-level felony offenders" – persons CJRA defines as being convicted of specified non-serious, non-sexual, non-violent felonies – who are sentenced to a term of incarceration serve their felony sentences in county jail. Under the Act, these individuals are "*imprisoned* for the conviction of a felony," but they are not "*in prison* for the conviction of a felony."

Parole and Post-Release Community Supervision are functionally equivalent.

Webster's Third New International Dictionary (1981) defines parole as "a conditional and revocable release of a prisoner serving an indeterminate or unexpired sentence in a penal or correctional institution."

Under this definition, Post-Release Community Supervision (PRCS) – a program enacted as a part of the CJRA – is functionally equivalent to parole in the California criminal justice system.

All of the Elections Code voter disqualification provisions discussed above with respect to felony imprisonment also state that a voter is disqualified while "on parole." In addition to those provisions, section 14240(a)(5) permits a poll worker to challenge a person's eligibility to vote on several grounds, including that the person seeking to vote in the polling place is "currently on parole for the conviction of a felony." Before the CJRA, this Elections Code language aligned directly with the terminology and structure of the correctional and rehabilitative system established in the Penal Code. Every felon released from state prison on condition of supervision was "on parole" in a system with "parole officers," administered by the California Department of Corrections and Rehabilitation. All decisions on whether to grant, deny or revoke parole were made by the Board of Parole Hearings.

The pre-CJRA parole system remains unchanged for state prison inmates serving sentences for conviction of more serious felonies. For state prison inmates serving sentences for CJRA-defined low-level felonies, however, the Act creates a parallel program of supervised release. Beginning October 1, 2011, these inmates are no longer released into state-supervised "parole." Instead, they are released into the new, county-administered PRCS program. Like traditional parole, PRCS is mandatory and subject to a detailed supervision agreement. It is the functional equivalent of parole. Absent clear indicia of intent otherwise, PRCS should be viewed, from the standpoint of the electoral

franchise, as indistinguishable from parole: released felons in either status remain ineligible to vote.

Just as determining the voting status of an inmate convicted and sentenced for a felony is not simply a matter of determining whether the inmate is literally "in prison," determining the voting status of a former felony inmate is not simply a matter of determining whether the former inmate is literally "on parole." For example, a person released from federal prison after being convicted and sentenced for a federal felony is released into "supervised release." It is well established that former federal inmates are ineligible to vote in California while they are in the federal supervised release program, even though the program does not use the term "parole."

Several provisions of the CJRA make it clear that PRCS is the functional equivalent of parole. Penal Code section 3000(a)(1) provides in part: "A sentence resulting in imprisonment in the state prison pursuant to Section 1168 or 1170 shall include a period of parole supervision or postrelease community supervision, unless waived, or as otherwise provided in this article."
Penal Code section 3003(e) provides in part: "The following information, if available, shall be released by the Department of Corrections and Rehabilitation to local law enforcement agencies regarding a paroled inmate or inmate placed on postrelease supervision pursuant to Title 2.05 (commencing with Section 3450) who is released in their jurisdictions . . ." Penal Code section 3450(a)(5) provides: "Realigning the postrelease supervision of certain felons reentering the community after serving a prison term to local community corrections programs, which are strengthened through community-based punishment, evidence-based practices, and improved supervision strategies, will improve public safety outcomes among adult felon parolees and will facilitate their successful reintegration back into society." Penal Code section 3451(c)(2) provides in part: "The department shall also inform persons serving a term of parole for a felony offense who are subject to this section of the requirements of this title and of his or her responsibility to report to the county agency responsible for serving that parolee. Thirty days prior to the release of any person subject to postrelease supervision by a county, the department shall notify the county of all information that would otherwise be required for parolees under subdivision (e) of Section 3003." Penal Code section 3452 provides in part: "(a) Persons eligible for postrelease community supervision pursuant to this title shall enter into a postrelease community supervision agreement prior to, and as a condition of, their release from prison. Persons on parole transferred to postrelease community supervision shall enter into a postrelease community supervision agreement as a condition of their release from state prison. (b)

A postrelease community supervision agreement shall specify the following . . ." These are just some examples indicating that PRCS is the functional equivalent of parole. [6]

Express legislative intent is required to overturn long-established principles of law.

California courts have long recognized that "[i]t should not 'be presumed that the Legislature in the enactment of statutes intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication.'" (*Theodor v. Superior Court* (1972) 8 Cal.3d 77, 92, quoting *County of Los Angeles v. Frisbie* (1942) 19 Cal.2d 634, 644 [122 P.2d 526]; accord *Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 6-7.) As recently as 2008, the Court of Appeal expressed this principle in terms directly applicable to the construction of the CJRA:

> If the Legislature intended to effect a substantial change in the law by removing an entire class . . . from [a law's] coverage, it can and surely would do so expressly. An intention to legislate by implication will not be presumed. (*Canister v. Emergency Ambulance Service* (2008) 160 Cal.App.4th 388, 400-401.)[7]

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[6] The CJRA also provides for a new option of post-sentencing probation. At the time a judge sentences a person to county jail for the conviction of a CJRA defined low-level felony, the judge has the option to suspend execution of a concluding portion of the term selected and instead order the person to serve the concluding portion of the term on probation. (Pen. Code § 1170(h)(5)(B).) This concluding period of probation, which could last more than a year, continues until the end of the full sentence term. This form of probation is more akin to traditional parole than to the post-conviction, pre-sentencing probation, conditioned on serving a year or less in county jail, that judges had before the CJRA went into effect and continue to have. A person released on probation pursuant to this new felony sentencing option is, like a parolee, continuing to serve their felony sentence although no longer in custody. Until the period of this form of probation ends, the person is ineligible to vote.

[7] Accord, *Krater v. City of Los Angeles* (1982) 130 Cal.App.3d 839, 845; *Fuentes v. Workers' Comp. Appeals Bd.*, *supra*, 16 Cal.3d at p. 7; *Ramos v. City of Santa Clara* (1973) 35 Cal.App.3d 93, 97 ["subsequent legislation is not presumed to effectuate a repeal of the existing law in the absence of that expressed intent"].

In the case of the CJRA, the Legislature gave no indication that it intended realignment to remove an entire class of convicted felons – CJRA-defined low-level felony offenders – from the coverage of laws that disqualify convicted felons from voting while serving their sentences or on conditional, revocable supervised release. Indeed, there is no indication that the Legislature ever considered the issue. In the entire body of realignment and related budget trailer bills enacted by the Legislature, there is not a single reference to the felon ineligibility provision of article II, section 4 of the California Constitution. Other than conforming amendments to add references to the newly amended Penal Code section 1170(h) to a number of Elections Code sections that already defined certain offenses as felonies, there is not a single word about elections, electors, the electoral franchise, voting, voter registration, voters, qualification or disqualification of voters, voting privileges, or rights. The Legislative Counsel's digests and legislative committee reports for those bills are equally silent with regard to article II, section 4 and do not even mention the conforming amendments to the Elections Code. Thus, the legislation itself, as well as the official material available to the legislators who voted to adopt it, contained no indication, express or otherwise, of any intent to change anyone's eligibility to vote from what it had been under prior law. It is difficult to imagine that the Legislature would act to enfranchise thousands of previously ineligible convicted felons without indicating any intention to do so.

On the contrary, language in many of the realignment provisions indicates that the Legislature considered a felony sentence to serve a term in county jail to be the equivalent of a felony sentence to serve a term in state prison. Previously, "felony" was defined as an offense carrying a punishment of incarceration in state prison. (Former Pen. Code § 17(a).) The Act amended that definition to include offenses carrying a punishment of one of several available sentences of more than one year in county jail. (Pen. Code § 17(a), as amended, cross-referencing Pen. Code § 1170(h) [where there is no term specified in the underlying offense, a sentence to county jail for 16 months or 2 or 3 years].)

In addition, the Assembly Budget Committee Analysis, concurring in Senate amendments to AB 109, Chapter 15, Statutes of 2011, the first of the two realignment bills, shows that the definitional change was part and parcel of the overall realignment project:

> Make various changes to Low Level Offender statutes as follows:
>
> a) Redefine a felony to include imprisonment in a county jail for more than a year;
>
> b) Change all enumerated penalty code sections to include the phrase "pursuant to subdivision (h) of Penal Code

Section (PC) 1170;"

c) Amend PC Section 1170 to include (h), which provides 16 months, two, or three years if the punishment is specified to be served in county jail unless the person has a prior violent, serious, or sex offense (in which case they serve time in state prison); and,

d) Provide that counties can contract with the state to house felony offenders.

Similarly, language in the Act describes inmates released from state prison into the new post release community supervision program as "parolees." For example, Penal Code section 3450(a)(5) provides: "Realigning the postrelease supervision of certain felons reentering the community after serving a prison term to local community corrections programs, which are strengthened through community-based punishment, evidence-based practices, and improved supervision strategies, will improve public safety outcomes among adult felon parolees and will facilitate their successful reintegration back into society." This usage is consistent with the original description of the realignment proposal in the Governor's Budget for 2011-2012, discussed above, proposing to "Realign Adult Parole to the Counties."

A statutory interpretation that avoids possible unconstitutionality is favored.

The California Constitution requires the Legislature to "provide for the disqualification of electors while . . . imprisoned or on parole for the conviction of a felony." (Cal. Const., art. II, § 4.)

California courts presume, as a principle of statutory construction, that the Legislature intends to enact constitutionally valid statutes. (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 229; *In re Kay* (1970) 1 Cal.3d 930, 942.) This presumption requires adoption of "an interpretation that, consistent with the statutory language and purpose, eliminates doubts as to the provision's constitutionality." (*Id.*) The presumption has been applied in a case raising statutory construction issues very similar to those posed by the CJRA. The appellant in that case argued that parole provisions amended as part of the Uniform Determinate Sentencing Law were intended to enfranchise parolees. The Court of Appeal rejected the argument, stating that construing the statutes to enfranchise parolees would be constitutionally impermissible under article II, section 4 of the Constitution. (*Flood v. Riggs* (1978) 80 Cal.App.3d 138, 153 fn.19.)

The enactment of the CJRA requires that the term "in prison" in the Elections Code provisions described above be construed to mean "imprisoned." That construction is consistent with the language of article II, section 4 of the Constitution, with the other Elections Code sections that use the term "imprisoned," and with the intent of the CJRA. An alternative, literal construction of those code sections to apply them only to a person who is in prison would allow persons convicted of felonies to vote, simply because they were sentenced to imprisonment in county jail rather than state prison. That literal construction would raise equally serious doubts about the constitutionality of the CJRA, as would any construction that would allow voting by felons released from state prison into PRCS rather than parole.

Courts will not blindly accept terminology or characterizations employed in legislation when they obfuscate the true effect of the legislation. (Cf., *Weekes v. City of Oakland* (1978) 21 Cal.3d 386, 392 [court must determines the character of a tax from its incidents, not the designation given to it by the Legislature].) An attempt, for example, to amend the Penal Code solely by renaming state prisons as "State Detention Centers" and state parole as "State Supervised Release," while stating an intent that felons imprisoned in State Detention Centers or on State Supervised Release should be entitled to register and vote because they are not "in prison or on parole for the conviction of a felony" under Elections Code section 2101 would be very unlikely to pass constitutional muster.

The differences between the changes in this hypothetical example and the changes the Legislature made in the CJRA are differences of degree, not kind. For the felonies covered by the CJRA, the offenses and terms of imprisonment are unchanged. Only the place of imprisonment is changed, from a state prison to a county jail, for those receiving felony sentences on or after October 1, 2011. Correspondingly, the fact that post-release supervision is mandatory and subject to a detailed supervision agreement remains unchanged. Only the governmental entity responsible for supervision after release from prison changes, from the state to a county, for those released from prison who were serving sentences imposed before October 1, 2011, for the same offenses. Of course, unlike the hypothetical example, the Legislature expressed no intent for the changes made by the CJRA to affect anyone's eligibility to vote. Serious constitutional doubts would be raised if the Secretary of State or local elections officials construed the CJRA, together with the pre-existing Elections Code provisions, as granting the right to vote to persons convicted of the same felonies and sentenced to terms of the same length, simply because they are imprisoned in county jail instead of state prison. Similarly, serious constitutional doubts would be raised if the Act, together with the pre-existing Elections Code provisions, were construed to grant the right to vote to felons released from prison, simply because the program into which they were released had

been renamed from parole to "Post-Release Community Supervision" and placed under county rather than state control.

The Criminal Justice Realignment Act does not disenfranchise anyone who would have been eligible to vote under prior law.

In *McPherson*, the Court of Appeal declined to construe election law to disenfranchise otherwise eligible voters without clear evidence that the Legislature intended the statutes it enacted to have that effect.

> [I]n the absence of any clear intent by the Legislature or the voters, we apply the principle that " '[t]he exercise of the franchise is one of the most important functions of good citizenship and no construction of an election law should be indulged that would disenfranchise any voter if the law is susceptible of any other meaning.' " (*McPherson*, 145 Cal.App.4th at 1482, citation omitted.)

McPherson does not conflict with the canon of statutory construction, discussed above, that long-established principles of law should not be overturned unless the Legislature has clearly shown it intends to do so "either by express declaration or by necessary implication." (*Theodor v. Superior Court, supra,* 8 Cal.3d at 92, quoting *County of Los Angeles v. Frisbie*, *supra*, 19 Cal.2d at 644; accord *Fuentes v. Workers' Comp. Appeals Bd., supra,* 16 Cal.3d at 6-7.) The construction of the CJRA adopted here does not disenfranchise anyone who would have been eligible to vote under prior law. As before, a person convicted of a CJRA-defined low-level felony and sentenced to a term of imprisonment that exceeds the maximum misdemeanor punishment of one year in county jail is ineligible to vote while serving that term. The only significant difference is the facility in which the person is imprisoned. Similarly, a person released from state prison who remains ineligible to vote during a term of PRCS administered by a county would, under prior law, also have been ineligible to vote during a term of parole supervised by the state. On the other hand, a construction of the Act that ignored these parallels would enfranchise thousands of convicted felons that were disenfranchised under prior law with no indication from the Legislature that it intended this result when it adopted the Act.

CONCLUSION

For all the reasons stated above, the Secretary of State's office concludes that the CJRA did not change the voting status of offenders convicted of CJRA-defined low-level felonies, either because they serve their felony sentences in jail instead of prison or

because the mandatory supervision that is a condition of their release from prison is labeled something other than "parole."

Under the CJRA's new provisions, any person convicted of a CJRA-defined low-level felony is disqualified from voting while serving a sentence to county jail, while on probation authorized by the sentencing judge in lieu of serving the concluding part of such a felony county jail sentence, or while under "post-release community supervision" after release from prison.

As in the past, a person remains eligible to vote despite having been convicted of a felony, if they are in county jail as a condition of probation ordered by a judge who elects to suspend the imposition or execution of sentence, and a person convicted of a felony remains ineligible to vote while serving a felony sentence in state prison or while on parole.