

## FOUR EASY STEPS TO UNDERSTANDING DETERMINATE SENTENCING LAW

By Jonathan Grossman

The courts have recognized the determinate sentencing law (DSL) is “a legislative monstrosity which is bewildering in its complexity.” (*People v. Begnald* (1991) 205 Cal.App.3d 1548, 1551.) “As a sentencing judge wends his way through the labyrinthine procedures of section 1170 of the Penal Code, he wonders, as he utters some of its more esoteric incantations, if perchance the Legislature had not exhumed some long departed Byzantine scholar to create its seemingly endless and convoluted complexities. Indeed, in some ways it resembles the best offerings of those who author bureaucratic memoranda, income tax forms, insurance contracts or instructions for the assembly of packaged toys.” (*Community Release Board v. Superior Court* (1979) 91 Cal.App.3d 814, 815, fn. 1.)

Yet “a defense attorney who fails to adequately understand the applicable sentencing alternatives, promote the proper application, or pursue the most advantageous disposition for his client may be found incompetent.” (*People v. Scott* (1994) 9 Cal.4th 331, 351.) A defendant must make a specific objection to the court’s exercise of discretion in sentencing. (*Scott, supra*, 9 Cal.4th at pp. 353-354.) Thus, there must be an objection to conditions of probation, factors the court finds in aggravation or (does not find) in mitigation, reasons for (not) granting probation, whether extraordinary reasons exist for granting probation, for imposing the upper term, for imposing a consecutive sentence, the reasons given for imposing a consecutive sentence, for not stating reasons in sentencing, for double counting factors in sentencing, for the amount of setting a fine above a statutory minimum, for the amount of victim restitution, and so on. (*Ibid.*) It may be insufficient to simply ask the court not to impose an upper or middle term without stating why certain factors in mitigation should be found true or why certain facts in aggravation should not be found true. Further, the sentencing issue will be waived on appeal without pressing the court to state its reasons.

Over the past five years, the Legislature has removed many complications in the DSL scheme. This has served to both simplify the law and remove many of the protections against unusually long sentences. Nonetheless, most of what one needs to know in determinate sentencing now can be summarized in four steps:

### I. DETERMINATE SENTENCING LAW (DSL)

❶ Choose the **principal term**. The principal term is longest term under the DSL scheme. It includes a base term and specific enhancements. (Pen. Code, § 1170.1, subd. (a), sen. 2.)

Most crimes carry a **base term** that includes a **lower term**, a **middle term**, and an **upper term**. Presume the middle term is proper unless there are reasons to give lower or upper term. (Pen. Code, § 1170, subd. (b); Cal. Rules of Court, rule 4.420(a); *People v. Keaton* (1992) 10 Cal.App.4th 1125, 1132.)

A **specific enhancement** is a conduct enhancement that is specific to the crime (not the person), such as weapons use, infliction of great bodily injury, etc. (Cal. Rules of Court, rule 4.405(c); see Pen. Code, § 1170.11.) Generally, there is no limit on enhancements to the principal term, but there can be only one weapons enhancement and only one GBI enhancement for any charge. (Pen. Code, §§ 1170.1, subds. (f) & (g), 12022.53, subd. (f).)

② A **subordinate term** is any determinate term running consecutively to the principal term. Generally, a person can be sentenced on only one determinate sentence, and separate cases (even from different courts) must be run concurrently or follow the rules for imposing subordinate terms. (Pen. Code, §§ 669, subd. (b), 1170.1, subd. (a), sen. 1; Cal. Rules of Court, rule 4.452.) Beware of double punishment under Penal Code section 654.

Usually the court has the discretion to run terms concurrently or consecutively (Pen. Code, § 669, subd. (a), sen. 1), and if the court does not specify, then the term is presumed to be concurrent (*id.*, par. 2). Exceptions: Escape from custody must be run consecutively (Pen. Code, §§ 1370.5, 4530, 4532). When there is an OR/bail enhancement, the two cases must be run consecutively (Pen. Code, § 12022.1, subd. (e)). In a strikes case, a conviction not arising from the same occasion or set of operative facts must run consecutive (Pen. Code, §§ 667, subd. (c)(6), 1170.12, subd. (a)(6)). With enumerated sex offenses involving separate victims or separate occasions, the conviction must be run consecutive (Pen. Code, § 667, subd. (d)). In one strike cases, involving separate victims or “not a single occasion,” the convictions must be run consecutive (Pen. Code, § 667.61, subd. (g).)

Most subordinate terms must be one-third the middle term. (Pen. Code, § 1170.1, subd. (a), sen. 3.) Exceptions: Full middle term consecutive for kidnapping multiple victims (Pen. Code, § 1170.1, subd. (b)), or violations of Penal Code sections 136.1, 137, 139, subdivision (b), and 653f. (Pen. Code, §§ 1170.13, 1170.15.) Full upper term consecutive for voluntary manslaughter (Pen. Code, § 1170.16), or escape (*ante*) is permitted.

When the punishment for a subordinate term is one-third the middle term and a specific enhancement is added to the punishment, the court usually can only impose one-third the punishment for the enhancement. (Pen. Code, § 1170.1, subd. (a), sen. 3.) Full enhancements may be added to each kidnapping conviction (Pen. Code, § 1170.1, subd. (b)) and for enumerated sex offenses (Pen. Code, § 1170.1, subd. (h)). A full weapons and GBI enhancement may be added for violations of Penal Code sections 136.1, 137, and 653f (Pen. Code, § 1170.15).

③ Calculate the **aggregate term** by adding the principal term with the subordinate terms and any **general enhancements** (or status enhancements, usually priors) (Cal. Rules of Court, rule 4.405(c)) and any OR/bail enhancement. (Pen. Code, § 1170.1, subd. (a), sen. 1.)

The same conviction cannot be used as both a prison prior and a serious felony prior [Proposition 8 prior] (*People v. Jones* (1994) 5 Cal.4th 1142, 1152) or a violent felony prior (Pen. Code, § 667.5, subd. (b)), but if the defendant is convicted and sentenced on both serious (or violent) and non-serious (or non-violent) felonies, the prison prior may be imposed. (*People v. Brandon*

(1995) 32 Cal.App.4th 1033, 1054.)

④ Calculate the penalty for escape and crimes committed in prison separately and add it to the total sentence. (Pen. Code, § 1170.1, subd. (c).) Calculate the penalty for enumerated sex offenses separately, as it may be added to the total DSL sentence. (Pen. Code, § 667.6, subs. (c) & (d).) Add the determinate sentence to all other sentences under other schemes. (Pen. Code, § 669, subd. (a), sen. 3; Cal. Rules of Court, rule 4.451(a).)

## II. ENUMERATED SEX OFFENSES (ESO)

An enumerated sex offenses is a conviction for any crime listed in Penal Code section 667.6, subdivision (c), first sentence. The court may impose a concurrent sentence or run a full lower/middle/upper term consecutive along with full terms for conduct enhancements. (Pen. Code, §§ 667.6, subd. (c); 1170.1, subd. (h).) A consecutive sentence is mandatory if it involves separate victims or separate occasions. (Pen. Code, § 667.6, subd. (d); Cal. Rules of Court, rule 4.426.)

## III. INDETERMINATE SENTENCE (ISL)

An indeterminate sentence is any sentence in which the court imposes life in prison. (Pen. Code, § 1168, subd. (b); *People v. Felix* (2000) 22 Cal.4th 651.) Undecided is whether a life sentence because of GBI from a gun under Penal Code section 12022.53 qualifies as an indeterminate sentence. Unless required otherwise, ISL's may be run concurrently to each other and concurrently to DSL.

### 1. Third Strikes cases (Pen. Code, §§ 667, subs. (b)-(i), 1170.12)

- A prior “strike” conviction

An conviction for a serious or violent felony is a strike. (Pen. Code, § 667, subd. (d)(1).) A juvenile adjudication for an offense listed in Welfare and Institutions Code section 707, subdivision (b) is a strike so long as the minor was at least 16 years old when he committed the offense and there was a serious or violent felony in the petition found true. (*Id.*, subd. (d)(3); *People v. Garcia* (1999) 21 Cal.4th 1.) There does not have to be an express finding that the minor was fit for treatment in the juvenile court. (*People v. Davis* (1997) 15 Cal.4th 1096.) Be alert that any prior conviction which involves a weapon or great bodily injury is a strike, regardless of the charge for which the defendant was convicted. (*People v. Rodriguez* (1998) 17 Cal.4th 253.) Generally, a prior used to enhance the defendant's penalty one way can be used to as a strike. (*People v. Dotson* (1997) 16 Cal.4th 547.) Even a prior conviction that has been stayed under Penal Code section 654 is a strike, but enhancing a sentence because of it may constitute cruel and unusual punishment. (*People v. Benson* (1998) 18 Cal.4th 24, 36, fn. 8.)

- Sentencing with one prior strike

The sentence for a *conviction* is doubled. (Pen. Code, § 667, subd. (c)(1).) If one would have been sentenced under DSL, double the principal and subordinate terms. Do not double the time for specific or general enhancements. (*People v. Nguyen* (1999) 21 Cal.4th 197; *People v. Martin* (1995) 32 Cal.App.4th 656.) For ISL, the minimum statutory time it would take the defendant to become eligible for parole is doubled. (*People v. Jefferson* (1999) 21 Cal.4th 86.) Beware that a conviction not arising from the same occasion or set of operative facts must run consecutive §§ 667, subd. (c)(6); *People v. Lawrence* (2000) 24 Cal.4th 219; *People v. Deloza* (1998) 18 Cal.4th 585.) The defendant must do 80% of the prison sentence before he or she is eligible for parole. (*People v. Hill* (1995) 37 Cal.App.4th 220.) However, normal presentence credits apply. (Pen. Code, § 4019.)

- Sentencing with two prior strikes

This is called a third strike case. The defendant receives a second strike sentence for any new conviction unless: (i) the current offense is a controlled substance charge, in which an allegation under Section 11370.4 or 11379.8 of the Health and Safety Code was admitted or found true; (ii) the current offense is a felony sex offense, defined in subdivision (d) of section 261.5 or 262, or any felony offense that results in mandatory registration as a sex offender pursuant to subdivision (c) of section 290, except for violations of sections 266 and 285, paragraph (1) of subdivision (b) and subdivision (e) of section 286, paragraph (1) of subdivision (b) and subdivision (e) of section 288a, section 311.11, and section 314; (iii) during the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person, or (iv) the defendant has a prior offense which is a “super strike.” (Pen. Code, § 667, subd. (e)(2)(C).) A super strike is a felony conviction which is: (I) a “sexually violent offense” listed in Welfare and Institutions Code section 6600; (II) oral copulation, sodomy, or sexual penetration of a child under 14 years old where the defendant is at least ten years older; (III) lewd conduct with a minor under the age of 14 years; (IV) any homicide or attempted homicide, including manslaughter; (V) solicitation to commit murder; (VI) a violation of Penal Code section 245, subdivision (D)(3); (VII) a violation of Penal Code section 11418; and (VIII) any serious or violent felony with a sentence of life or death. (Pen. Code, § 667, subd. (e)(2)(C)(iv).)

If the defendant with two prior strikes does not qualify for a second strike sentence, then usually, the defendant is simply sentenced to 25 years to life consecutive to any enhancements. (Pen. Code, § 667, subd. (e)(2)(A)(ii).) If it would be longer, the minimum indeterminate term would be triple the time for the convictions, though not the enhancements. (*Id.*, subd. (c)(2)(A)(i).) Thus, someone who received the middle term for violating Penal Code section 288.5 (12 years) would serve 36 years to life plus any enhancements. If it would be longest, take the time one would serve under DSL, turn it into an indeterminate term, and add (again) the enhancements. (*Id.*, subd. (c)(2)(A)(iii).) For example, if the defendant who received the middle term for violating section 288.5 had five prior serious felonies brought and tried separately (five 5 year priors), the defendant would receive under DSL term: 37 (=12+25) years. Under the three strikes law, the defendant would receive a sentence of 37 years to life consecutive to 25 years for the enhancements. (*People v. Dotson* (1997) 16 Cal.4th 547, 559 [but the Court insists this process technically adds the

enhancements only once].) Again, under ISL, the period the defendant would wait to be statutorily eligible for parole would be tripled. Also stay aware of Three Strike's rules on when a conviction must be imposed consecutively. (§ 667, subd. (c)(6) & (e)(2)(B).)

## **2. Other indeterminate sentences**

- a. Habitual Sex Offenders (Pen. Code, § 667.71)
- b. Child rape (Pen. Code, §§ 269, 288.7)
- c. repeat molesters (Pen. Code, § 667.51, subd. (d))
- d. forcible sex with a minor (Pen. Code, § 269)
- e. Habitual Criminal Offenders inflicting GBI or force likely to cause GBI (Pen. Code, § 667.7)
- f. Habitual Drug Offender (Pen. Code, § 677.75)
- g. Various normal crimes (see, e.g., Pen. Code, §§ 187, 205, 206, 209, 209.5, 273ab, 288, subd. (i), 451.5.)
- h. One Strike sex cases (Pen. Code, § 667.61)

## **IV. FREQUENT ADVERSE CONSEQUENCES AND HIDDEN ISSUES**

1. The court miscalculates the determinate sentence because:
  - a. the court imposes a subordinate term which is longer than the principal term;
  - b. enhancements are improperly attached to subordinate terms or the court erroneously believes it cannot add enhancements to certain subordinate terms;
  - c. the court mistakenly puts ESO's and escape/prison crimes in the DSL scheme;
  - d. the court fails to run a mandatory consecutive term consecutively;
  - e. the court treats a general enhancement as a specific enhancement;
  - f. the court miscalculates the aggregate term.
2. The court fails to impose a mandatory fine.
3. The court fails to impose a penalty assessment to fines.
4. The court fails to impose and stay a parole restitution fine equal to the restitution fine.
5. The abstract of judgment or minute order does not accurately reflect the court's actual sentence.
6. The court strikes or dismisses a sentencing allegation but fails to state the reasons in the minutes.
7. The court miscalculates custody credits or fails to realize there was a violent felony conviction which would limit conduct credits to 15%.
8. The court failed to impose five years for committing a serious felony with a prior serious felony conviction; the court does not have the power to strike, stay, or dismiss this prior (Pen. Code, §§ 667, subd. (a), 1385, subd. (b)).
9. Possible adverse consequences in attacking pleas are:
  - a. the sentence could increase after remand;
  - b. certain priors, such as ESO's, serious felonies or strikes, could have been alleged

- (they can be added at any time);
  - c. the defendant could have been charged with a more serious charge; especially in sex cases where s/he might be eligible for punishment under one strike law;
  - d. the defendant could have been charged with sex priors, creating a life case;
  - e. in sex cases, charges could be added for each act, especially if the defendant pled before the preliminary hearing.
10. In delinquency cases, the court failed to declare whether a wobbler is a misdemeanor or felony. (*In re Manzy W.* (1997) 14 Cal.4th 1199.)
  11. The court stays a count under Penal Code section 654, but erroneously imposes the lighter sentence.
  12. The defendant is actually not eligible for probation.
  13. The court imposed a punishment which did not exist when the crime was committed. Examples:
    - a. Parole revocation restitution fines did not exist before August 3, 1995.
    - b. Vandalism punished by Penal Code section 594, subdivision (b)(3), has not existed since March 8, 2000.
  14. The court finds Penal Code section 654 applies but runs the conviction concurrently. A sentence must be stayed, and a concurrent sentence is still a sentence. (*People v. Miller* (1977) 18 Cal.3d 873, 886.)
  15. Typos in the minute order or abstract of judgment

## **OTHER ISSUES**

### **1. Probation**

Instead of imposing or executing a sentence, the court may place the defendant on probation. The factors to consider for imposing probation is listed in California Rules of Court, rule 4.414. Because probation is an act of leniency, the courts will not normally find error if the judge fails to state why probation is denied. (*People v. Lewis* (1991) 229 Cal.App.3d 259, 268.) A defendant may be presumed ineligible for probation by statute (see, e.g., Pen. Code, § 1203, subd. (e)), unless there are extraordinary circumstances (see Cal. Rules of Court, rule 4.413). In some situations, a defendant is conclusively presumed ineligible for probation and cannot be placed on probation unless the court strikes the allegations (e.g., Three Strikes). Some statutes making a defendant conclusively ineligible for probation cannot be stricken.

### **2. Factors in aggravation and mitigation**

Factors in mitigation are listed in California Rules of Court, rule 4.423. There are statutory factors in mitigation enacted under Penal Code sections 278.6, subd. (b), 287.7, and 658. Factors in aggravation are listed under Rule 4.421 and generally under Penal Code sections 1170.7 et seq. A factor not specifically listed may justify an aggravated or mitigated sentence. (Rule 4.408.) A single factor cannot be used to both impose the upper term and to impose an enhancement, and a fact constituting an element of the offense cannot be used to aggravate or enhance a sentence. (Pen.

Code, §§ 1170, subd. (b); rule 4.420(c) & (d).) A plea bargain is reason enough to impose any legal sentence or impose punishment despite the dual use of facts. (Rule 4.412; *People v. Hester* (2000) 22 Cal.4th 290.)

### **3. Strike, stay, dismiss an allegation**

Generally, the court can strike or stay a conviction or enhancement. (Pen. Code, § 1385, subd. (a).) The court can also strike the punishment for an enhancement when it is traditionally permitted. (Pen. Code, § 1385, subd. (c).) There are some statutory prohibitions against striking or staying certain allegations. (See, e.g., Pen. Code, §§ 667.61, subd. (g), 1385, subd. (b), 12022.53, subd. (h).)

### **4. Mandatory minimum fines**

Adverse consequences arise when the court fails to impose fines and other monetary assessments which is required by law. For example, there must be a parole revocation restitution fine equal to the restitution fine whenever the defendant is sentenced to prison. (Pen. Code, § 1202.45.) A \$50 lab fee must be assessed for each drug conviction (Health & Saf. Code, § 11372.5). Except for the amounts set for victim restitution, restitution fines, and parole revocation restitution fines, and certain fees, the court must impose penalty assessments. (*People v. Voit* (2011) 200 Cal.App.4th 1353, 1373.) Omitting to order an AIDS tests when required by law may be corrected at any time. (*People v. Barriga* (1997) 54 Cal.App.4th 67.)