



# PENAL CODE § 1170.9 (VETERANS' TREATMENT) GUIDE FOR JUDGES IN LOS ANGELES COUNTY

OVERVIEW . . . . .	1
I. MOTION FOR A GRANT OF § 1170.9 PROBATION . . . . .	2
• NO <i>SUA SPONTE</i> DUTY TO ADVISE DEFENDANT . . . . .	2
• SIX § 1170.9 PROBATION ELIGIBILITY CRITERIA . . . . .	2
A. TWO STEPS IN THE PROBATION ELIGIBILITY PROCESS . . . . .	3
1. STEP ONE: PROCESS AND PROCEDURE OF INITIAL SCREENING . . . . .	3
a. POSSIBLE CONTINUANCE OF THE § 1170.9 MOTION AND THE PH&S . . . . .	4
b. HIPAA HAZARDS . . . . .	4
c. STEP ONE DETERMINATION, CRITERION #1: SERVICE IN THE UNITED STATES MILITARY . . . . .	5
d. STEP ONE DETERMINATION, CRITERION #2: DEFENDANT HAS A LISTED CONDITION . . . . .	5
STEMMING FROM SERVICE IN THE UNITED STATES MILITARY . . . . .	
2. STEP TWO: PROCESS AND PROCEDURE OF PROBATION ELIGIBILITY CONSIDERATION . . . . .	7
a. STEP TWO HEARING . . . . .	7
b. SUBDIVISION (b)'S SIX CRITERIA ON WHICH JUDGE IS TO RENDER CONCLUSIONS . . . . .	8
CRITERION #1: SERVICE IN UNITED STATES MILITARY . . . . .	8
CRITERION #2: DEFENDANT HAS A LISTED CONDITION STEMMING FROM SERVICE . . . . .	8
IN THE UNITED STATES MILITARY . . . . .	
CRITERION #3: OFFENSE COMMITTED AS A RESULT OF THE LISTED CONDITION. . . . .	9
CRITERION #4: APPROPRIATE TREATMENT FACILITY EXISTS . . . . .	10
CRITERION #5: DEFENDANT AGREES TO PARTICIPATE . . . . .	11
CRITERION #6: DEFENDANT IS OTHERWISE ELIGIBLE FOR PROBATION . . . . .	11
B. DOCUMENTS ASSOCIATED WITH MOTION FOR § 1170.9 PROBATION . . . . .	12
1. AN ASSESSMENT . . . . .	12
a. SOURCES FOR OBTAINING AN ASSESSMENT . . . . .	12
b. CONSIDERATIONS FOR THE COURT IN DECIDING WHETHER TO REQUEST ITS . . . . .	13
OWN ASSESSMENT . . . . .	
2. A PROPOSED, INITIAL TREATMENT PLAN . . . . .	13
3. A VA LETTER . . . . .	13
II. GRANTING PROBATION PURSUANT TO §1170.9 . . . . .	14
A. MINUTE ENTRY . . . . .	14
B. CUSTODY . . . . .	14
C. PROBATION TERMS AND CONDITIONS . . . . .	14
1. CONDITIONS APPROPRIATE TO THE OFFENSE . . . . .	14
2. CONDITIONS APPROPRIATE TO § 1170.9 TREATMENT PLAN . . . . .	15
a. TREATMENT PROGRAM . . . . .	15
b. TIME LIMIT ON LENGTH OF COURT-ORDERED TREATMENT PROGRAM . . . . .	16
c. CONDITIONS TO MONITOR THE PROBATION/TREATMENT PROGRAM . . . . .	16
D. MULTIPLE CASES . . . . .	16
III. MOTION FOR SUBDIVISION (h) RESTORATION RELIEF . . . . .	17
A. OVERVIEW . . . . .	17
B. PROCESS AND PROCEDURE FOR SUBDIVISION (h) MOTION . . . . .	18
1. PROPER JUDGE . . . . .	18

2. PUBLIC HEARING . . . . .	18
3. MANDATORY NOTICE . . . . .	18
4. FORM OF COURT ORDER . . . . .	18
<b>IV. ELIGIBILITY REQUIREMENTS FOR SUBDIVISION (h) RESTORATION RELIEF . . . . .</b>	<b>19</b>
REQUIREMENT A - GRANTED PROBATION, SUBDIVISION (a) PERSON . . . . .	19
REQUIREMENT B - SUBSTANTIAL COMPLIANCE WITH PROBATION CONDITIONS . . . . .	20
REQUIREMENT C - SUCCESSFULLY PARTICIPATED IN TREATMENT . . . . .	20
REQUIREMENT D - NOT REPRESENT A DANGER . . . . .	21
REQUIREMENT E - INTERESTS OF JUSTICE . . . . .	21
<b>V. RESTORATION RELIEF OPTIONS IN SUBDIVISION (h) . . . . .</b>	<b>23</b>
<b>VI. EFFECT OF SUBDIVISION (h) DISMISSAL OF ACTION . . . . .</b>	<b>24</b>
EFFECT A - RELEASE FROM PENALTIES AND DISABILITIES . . . . .	24
EFFECT B - EXCLUDED OFFENSES . . . . .	24
EFFECT C - NO OBLIGATION TO DISCLOSE CONVICTION . . . . .	24
EFFECT D - SEALING OF RECORDS . . . . .	24
EFFECT E - BAR TO FUTURE ACTION . . . . .	25
EFFECT F - MAY BE PLED AS A PRIOR CONVICTION . . . . .	25
EFFECT G - CONSIDERED WHEN ADMINISTRATIVELY REVOKING DRIVER'S LICENSE . . . . .	25
EFFECT H - DNA SAMPLE REMAINS IN DATA BANK . . . . .	25
EFFECT I - RIGHT TO BEAR ARMS NOT RESTORED . . . . .	25
<b>EXAMPLE 1: SAMPLE FORMAT OF ORDER . . . . .</b>	<b>26</b>
<b>EXAMPLE 2: FORM: ABSTRACT OF JUDGMENT . . . . .</b>	<b>31</b>
<b>VA Points of Contact and Program Descriptions</b>	<b>32</b>

## OVERVIEW OF § 1170.9

In any criminal department that conducts misdemeanor or felony sentencing in California, the judge or commissioner may be presented with post-conviction motions made under the authority of Penal Code § 1170.9.<sup>1</sup>

The Legislature addressed § 1170.9 specifically to sentencing judges. This guide is intended to assist judges and commissioners in Los Angeles County in ruling on the two motions authorized by § 1170.9:

Subdivisions (a)/(b) Motion for § 1170.9 Probation. Prior to sentencing, a defendant may, under the combined authority of Subdivision (a)<sup>2</sup> and (b) of § 1170.9, make a motion to the sentencing judge for a grant of § 1170.9 probation. Section 1170.9 probation involves placing the defendant in a treatment program as a discretionary sentencing alternative to either granting traditional § 1203 probation or executing a sentence to jail or prison.

Subdivision (h) Motion for Restorative Relief. In accordance with § 1170.9's scheme, after completing the § 1170.9 treatment program, the defendant may make a Subdivision (h) motion to have the conviction set aside and the action dismissed with statutorily directed consequences. Subdivision (h) provides a discretionary alternative to § 1203.4 expungement.

Section 1170.9 is not amnesty; or a hand out. Section 1170.9 is a “chin up bar” installed by the Legislature for a convicted veteran to reach for and pull himself/herself up:

- Through the program's strict eligibility process,
- Through the emotionally wrenching, soul searching treatment of the military-service-related, mental health condition that resulted in the offense that brought him/her into the criminal justice system usually for the first time in his/her life,
- Through completion of an intensely supervised probation that involves loss of freedom of movement and association, loss of privacy, public acknowledgement of responsibility, and mandatory service to the public to atone for the crime,
- Through the demanding requirements for obtaining the restorative relief under § 1170.9(h), and ultimately
- To attain the goal of reentering the community as a law-abiding citizen.

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<sup>1</sup> The code sections referred to hereinafter are contained in the Penal Code, unless otherwise specified.

<sup>2</sup> The subdivisions referred to hereinafter are contained in § 1170.9, unless otherwise specified.

## I. MOTION FOR A GRANT OF § 1170.9 PROBATION

Based on the legislative history and statutory language, the Legislature did not intend that § 1170.9 probation be granted to a defendant who proves he or she had military service during which a mental health problem arose. That may be enough to be admitted into the hospital systems of the Department of Veterans Affairs (hereinafter VA) and the Department of Defense. Section 1170.9 is more restrictive. The defendant must prove that he or she meets six eligibility criteria before the sentencing judge can consider granting § 1170.9 probation.

A Subdivisions (a)/(b) motion for a grant of § 1170.9 probation is made to the sentencing judge after conviction by either plea or verdict. The criminal offense can be a misdemeanor, felony, or a “wobbler.” Since probation is being requested, the offense cannot be an infraction or a crime designated by law as being ineligible for a grant of probation.

The statute does not state that the Subdivisions (a)/(b) motion must be in writing.

### ◆ **SENATE BILL No. 1110 (approved by Gov on Sep 27, 2014)**

This bill requires the court to inform the defendant that there are certain provisions of law specifically designed for individuals who have active duty or veteran status and who have been charged with a crime. In addition, the defendant must:

- Apprise the court of the defendant’s interest, desire, and willingness to proceed under § 1170.9;
- Request sufficient time to muster the necessary proof to support the court's finding that the defendant is eligible for § 1170.9 probation; and
- Provide the information and argument necessary to demonstrate that all six eligibility criteria are met and that the Subdivisions (a)/(b) motion should be granted.<sup>3</sup>

### ◆ **SIX § 1170.9 PROBATION ELIGIBILITY CRITERIA**

Subdivision (a) describes a person who is eligible for § 1170.9 probation as a person who:

**Criterion #1. Was, or currently is, a member of the United States military.**

**Criterion #2. Has a listed condition\* stemming from his or her service in the United States military.**

*\*“listed condition” as used in this guide refers to an experience or a condition listed in Subdivision (a): sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems.*

**Criterion #3. Committed the offense as a result of that listed condition.**

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<sup>3</sup> See *Amerson, supra*, at 168-169.

Subdivision (a) requires the defendant to allege in the motion for § 1170.9 probation that each of these three criteria is true.

Then, Subdivision (b) expressly requires the sentencing court to conclude whether the defendant “. . . is a person described in Subdivision (a). . . .” That is, does the defendant meet the three criteria set forth above.

In addition, Subdivision (b) presents the following three § 1170.9 probation eligibility criteria:

- Criterion #4.            There is a treatment program available to treat the defendant’s listed condition.**
- Criterion #5.            The defendant agrees to participate in the treatment program.**
- Criterion #6.            The defendant is otherwise eligible for probation.**

## **A. TWO STEPS IN THE PROBATION ELIGIBILITY PROCESS**

The sentencing judge is to address the motion for § 1170.9 probation in two steps:

- An initial screening in accordance with Subdivision (a); and then
- An eligibility consideration in accordance with Subdivision (b).

### **1. STEP ONE: PROCESS AND PROCEDURE OF INITIAL SCREENING**

Subdivision (a) provides as follows:

(a) In the case of any person convicted of a criminal offense who could otherwise be sentenced to county jail or state prison and who alleges that he or she committed the offense as a result of sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems stemming from service in the United States military, the court shall, prior to sentencing, make a determination as to whether the defendant was, or currently is, a member of the United States military and whether the defendant may be suffering from sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems as a result of his or her service. The court may request, through existing resources, an assessment to aid in that determination.

Subdivision (a) requires the sentencing judge to conduct an initial hearing on the defendant’s motion for § 1170.9 probation, before the probation hearing and sentencing

(hereinafter PH&S).<sup>4</sup> The sentencing judge is to make a “determination” concerning Criterion #1 and a “determination” concerning Criterion #2.

<b>INITIAL SCREENING UNDER SUBDIVISION (a)</b>	
<p>In Step One, the defendant <u>MUST ALLEGE THREE THINGS</u>; that he or she:</p>	<p>In Step One, the judge <u>MUST MAKE TWO DETERMINATIONS</u>:</p>
<p>1. “Was, or currently is, a member of the United States military.”  AND  2. <u>Has</u> a listed condition “<u>STEMMING FROM</u> service in the United States military.”  AND  3. Committed the offense as a result of that listed condition.</p>	<p>1. Whether the defendant was, or currently is, a member of the United States military  AND  2. Whether the defendant “<u>MAY BE</u> suffering from” a listed condition “<u>AS A RESULT OF</u> his or her service” in the military.  - - -</p>

**a. POSSIBLE CONTINUANCE OF THE § 1170.9 MOTION AND THE PH&S**

Defense counsel’s exercise of due diligence may not be enough to have the § 1170.9 motion properly prepared and presented to the court within the statutory time required for sentencing after conviction. There may be “good cause” to continue the § 1170.9 motion and consequently the PH&S, in order to provide sufficient time for the defense counsel to:

- Obtain military records, treatment records, criminal records, and clinical opinions;
- Analyze the relationship among military service, the listed condition, and the criminal conduct; and
- Reduce an oral motion to writing that may facilitate the presentation of information to the sentencing judge and allow the motion to be served on the prosecution with sufficient time allowed to prepare and file a response.

**b. HIPAA HAZARDS**

Starting with Step One, when receiving documents filed by counsel and when referring to the contents of those documents for § 1170.9 purposes, the judge must be alert to the privacy and security regulations of the Health Insurance Portability and Accountability Act of 1996 (hereinafter HIPAA). HIPAA requires the judge to be proactive in protecting medical information and records.

Additionally, agencies providing information to the judge will likely have their own privacy and records management requirements; and will usually require the defendant to sign an

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<sup>4</sup> See Subdivision (a); and *People v. Ferguson* (2011) 194 Cal.App.4<sup>th</sup> 1070, 1093.

Authorization for Release of Information before they will provide information to the judge.

**c. STEP ONE DETERMINATION, CRITERION #1: SERVICE IN THE UNITED STATES MILITARY**

For purposes of the initial screening, in addressing Criterion #1, the defendant must allege and then present sufficient evidence for the judge to determine whether he or she was, or currently is, a member of the United States military. The statute contains no further limitation concerning military service. The defendant may be presently on active duty, in the reserve, discharged honorably or otherwise, or retired.

- Criterion #1 does not require combat service.
- There is no minimum period of time that the defendant is required to serve to meet Criterion #1.
- A defendant may be within the scope of Criterion #1 even though the defendant's military discharge disqualifies him or her from receiving benefits from the VA.

Evidence of defendant's membership in the military may include:

- VA records depicting service dates for a discharged veteran or showing qualification for VA benefits;
- Department of Defense records, for example, a DD-214 discharge certificate or an identification card showing entry and discharge dates; or
- A "Statement of Service" on the letterhead of a military unit in which the defendant served or is serving.

**d. STEP ONE DETERMINATION, CRITERION #2: DEFENDANT HAS A LISTED CONDITION STEMMING FROM SERVICE IN THE UNITED STATES MILITARY**

For purposes of the initial screening, in addressing Criterion #2, the defendant must allege that he or she has a listed condition stemming from service in the military. In Step Two, in order to be eligible for a grant of § 1170.9 probation, the defendant will have to present sufficient evidence for the judge to conclude that this allegation is true.

But, in Step One, the initial screening, the defendant has a lower standard of proof to meet. The defendant need only present sufficient evidence for the judge to determine whether it "may be" that:

- He or she is suffering from the alleged listed condition; and

Evidence that the defendant is suffering from the alleged listed condition may include:

- A description of the symptoms of the presence of the alleged listed condition that may be manifested by a person who is suffering from the alleged listed condition.
- The defendant is manifesting behavior that is symptomatic of the presence of the alleged listed condition.

A personality disorder (for example: anxiety, antisocial) is not a "mental health problem for purposes of Criterion #2. It is a person's selection of dysfunctional behavior. Consider: "*Being on military deployment, away from my family, made me so lonely that I have no regard for the welfare or rights others.*"



- The alleged listed condition is a result of his or her service.

Evidence that military service co-existed with the alleged listed condition may not be enough to meet Criterion #2. Other evidence that defendant's alleged listed condition may be "as a result of his or her service" might include one of these three approaches:

Evidence that the alleged listed condition may result from a traumatic circumstance, with supporting evidence:

- A description of a traumatic event that the defendant alleges he/she saw, did, or experienced in the course of military service.
- Evidence that the described traumatic event was sufficient to traumatize a person to the point of developing the alleged listed condition.
- Evidence that the onset of the listed condition may be delayed after the traumatic event.

**OR**

Evidence that the alleged listed condition may result from a period of exposure to a particular environment, with supporting evidence:

- A description of the environment and duration of exposure which the defendant alleges he/she underwent in the course of performing military duties.
- Evidence that the alleged exposure and environment was sufficient to cause a person to develop the alleged, listed condition.

**OR**

Evidence that, though the alleged listed condition pre-existed military service and was dormant when the defendant entered the military, the symptoms of the listed condition became evident or were aggravated as a result of service in the military.

Evidence that the defendant's listed condition was classified by the Department of Defense as being in the "line of duty" or was rated by the VA as being "service connected" is not conclusive evidence that the defendant's listed condition meets the Criterion #2 requirement of "stemming from service in the military." The scopes of "line of duty" and "service connected" include more types of cases than Criterion #2.

- "Line of duty" includes any condition or injury that befalls a person when he/she is in the military and is not: (1) absent without leave; or (2) doing an unauthorized act. The service member is entitled to treatment from the Department of Defense while he remains in the military.
- "Service connected" includes any condition or injury that became evident while the service member is on active duty.

#### CRITERION #2 HYPOTHETICAL

- The defendant alleges he is suffering from a traumatic brain injury (TBI) stemming from service in the military.
- There is evidence that the TBI occurred during a vehicle roll over while the defendant was on active duty.
  - The Department of Defense classified the TBI as being in the "line of duty." Defendant received treatment at a Department of Defense facility while remaining in the military.
  - After his discharge from the military, the VA classified the TBI as "service connected" and the defendant received treatment from the VA.
- § 1170.9: Though on active duty at the time of the roll over, the defendant was off base, on leave, driving his own car, on vacation with friends.

For Criteria #2 purposes, this defendant's TBI is not "stemming from service in the military."

**2. STEP TWO: PROCESS AND PROCEDURE OF PROBATION ELIGIBILITY CONSIDERATION**

Under Subdivision (a), if the judge makes a negative determination on either eligibility Criterion #1 or #2, then the motion for § 1170.9 probation is denied. If the judge makes an affirmative determination on both eligibility Criteria #1 and #2, then the judge proceeds to Step Two under Subdivision (b) which provides as follows:

(b) If the court concludes that a defendant convicted of a criminal offense is a person described in subdivision (a), and if the defendant is otherwise eligible for probation and the court places the defendant on probation, the court may order the defendant into a local, state, federal, or private nonprofit treatment program for a period not to exceed that which the defendant would have served in state prison or county jail, provided the defendant agrees to participate in the program and the court determines that an appropriate treatment program exists.

<b>SUBDIVISION (b)'s SIX ELIGIBILITY CRITERIA</b>	
The Defendant has the burden of showing that	To grant §1170.9 probation, the judge must conclude whether:
<ul style="list-style-type: none"> <li>• Subdivision (b)'s six eligibility criteria are met; and</li> <li>• It is appropriate to grant §1170.9 probation.</li> </ul>	<p>The defendant “is a person described in Subdivision (a),” that is, he/she:</p> <ol style="list-style-type: none"> <li>1. Was, or currently is, a member of the United States military.</li> <li>2. Has a listed condition stemming from his or her military service.</li> <li>3. Committed the offense as a result of that listed condition.</li> </ol> <p>and</p> <ol style="list-style-type: none"> <li>4. An appropriate treatment program exists that has or will admit the defendant into treatment in a timely manner.</li> <li>5. The defendant agrees to participate in that treatment program.</li> <li>6. The defendant is otherwise eligible for probation.</li> </ol>

**a. STEP TWO HEARING**

Step Two may occur as part of the PH&S:

- The defense is to support the motion for § 1170.9 probation, proving, by a preponderance of the evidence, each of the six criteria. (Evidence Code § 115.)
- The prosecution may argue for a grant of § 1203 probation or for denial of probation and an executed custody sentence.
- The judge renders conclusions on the six Subdivision (b) eligibility criteria.
- Section 1202.7 requires the sentencing judge to determine the “needs of the defendant” as part of the probation hearing process. Subdivision (d) of § 1170.9 mandates that, if the sentencing judge concludes that the defendant is a person described in Subdivision (a) [that is, Criteria #1, #2, and #3 are met], then the sentencing judge must use that conclusion in assessing whether the defendant is suitable for a grant of probation.

**b. SUBDIVISION (b)'s SIX CRITERIA ON WHICH THE JUDGE IS TO RENDER CONCLUSIONS**

In Step Two's eligibility consideration, the record should reflect that the sentencing judge exercised discretion in reaching a conclusion on each of the six, Subdivision (b), eligibility criteria.

Even if the defendant meets the six eligibility criteria for § 1170.9 probation, there may be considerations that support denying probation and executing a sentence of incarceration, such as the nature of the criminal conduct or the harm done.

**CRITERION #1: SERVICE IN UNITED STATES MILITARY**

The evidence and argument received by the sentencing judge during Step One and used in rendering a "determination" on Criterion #1 can be the basis in Step Two for rendering a "conclusion" that Criterion #1 has been established by a preponderance of the evidence.

**CRITERION #2: DEFENDANT HAS A LISTED CONDITION STEMMING FROM SERVICE IN THE UNITED STATES MILITARY**

The evidence and argument received by the sentencing judge during Step One and used in rendering a determination on Criterion #2 can be used in Step Two for rendering a conclusion that Criterion #2 has been established by a preponderance of the evidence.

The differences in standards of decision in addressing Criterion #2 in the initial screening in Step One as opposed to rendering a conclusion concerning Criterion #2 in Step Two are:

<b>IN STEP ONE</b>	<b>IN STEP TWO</b>
Whether the defendant "MAY BE SUFFERING FROM" a listed condition.	Whether the defendant IS SUFFERING FROM a listed condition.
The listed condition may be "AS A RESULT OF" his or her service in the military.	The listed condition is "STEMMING FROM" his or her service in the military. That is, the condition originated or derived from performing military duties.

### **CRITERION #3: OFFENSE COMMITTED AS A RESULT OF THE LISTED CONDITION**

In Step One, Subdivision (a):

- Requires only that the defendant allege that Criterion #3 is met;
- Does not require the defendant to support this allegation; and
- Does not require the judge to render a determination concerning Criterion #3.

In Step Two's eligibility consideration, Subdivision (b) requires the sentencing judge to conclude whether it has been established by a preponderance of the evidence that the defendant is a person described in Subdivision (a). Rendering that conclusion requires the judge to render a conclusion on Criterion #3, as well as Criteria #1 and #2.

Expert opinion, other evidence, and argument may be presented to the judge concerning Criterion #3, to include, among other things:

- A description of the type of behavior that is symptomatic of defendant's alleged listed condition.
- Whether that symptomatic behavior is present in the circumstances of the defendant's offense.

#### **EXAMPLE**

*Evidence is presented that:*

- One of the symptoms of the alleged listed condition is:  
Having an exaggerated response when startled.

The circumstances of defendant's offense include:

- An unexpected stimulus caused the defendant to be startled;
- The defendant's responsive behavior to the stimulus was more than what would be expected or appropriate under the circumstances; and
- Defendant's responsive behavior violated the law.

- Whether, at a point in time before entering the military, or before the defendant experienced the circumstance from which the defendant's alleged condition stems, the defendant committed an act similar to the current offense.

#### **EXAMPLE**

- The defendant's offense is an act of domestic violence.
- Defendant alleges that he committed the offense as a result of his listed condition, PTSD.
- Evidence may show whether the defendant committed an act of domestic violence:
  - Before he entered military service; or
  - Before the alleged traumatic event occurred from which his PTSD stems.

Criterion #3 is the foundation of § 1170.9's approach to protecting the public safety by reducing the risk that the defendant will repeat the offense. If the defendant committed the offense as a result of his listed condition, then the § 1170.9 sequence begins:

- The probation program and the treatment focus on defendant's listed condition.

- With successful treatment, the listed condition is no longer provoking the defendant to criminal conduct.
- The successfully treated defendant, no longer a danger to public safety, is restored to his previous position in the community as a law abiding citizen.

Conversely, if the offense were not committed as a result of defendant's listed condition, then:

- Successfully treating the listed condition would not lessen the risk of the defendant committing an offense in the future; and
- The criminal justice system would have no "public safety" or "defendant rehabilitation" or "recidivism reduction" justification for using its resources to provide treatment for the listed condition.

Whether the defendant meets Criterion #3 is a critical question. The Legislature entrusted the judge with the responsibility for answering it with a legal conclusion, not a clinical one. The judge reviews the evidence and argument. Then, applying legal reasoning, the judge reaches a conclusion concerning whether Criterion #3 is met. As found in *People v. Ferguson* (2011) 194 Cal.App.4<sup>th</sup> 1070, 1093, the judge is to conclude whether the defendant has established, by a preponderance of the evidence, that he committed the offense as a result of his listed condition.

NOTE: A decidedly opposite position is taken by The Administrative Office of the Court in its § 1170.9 guide, developed with the County of San Diego Public Defender's Office, and posted on the AOC website January, 2014. The AOC's guidance is that a judge's conclusion is not required for Criterion #3. Rather, the judge is to rely exclusively on the defendant's allegation that he/she committed the offense as a result of the listed condition. In the language of the AOC's guide:

*While the defendant must allege that the criminal conduct was a result of a statutorily eligible condition that stems from his or her military service, the court does not need to make a finding concerning whether there was a connection between the criminal conduct and the condition. The judicial officer's determination is only as to the defendant's military status, whether he or she has a listed condition, and if the condition is a result of military service. If the judicial officer finds that the defendant meets those eligibility requirements, then the defendant is eligible for sentencing consideration under § 1170.9*

#### **CRITERION #4: APPROPRIATE TREATMENT FACILITY EXISTS**

In addressing Criterion #4, the defense may submit evidence that includes:

- A description of the type of treatment program required to treat:
  - The defendant's listed condition; and
  - Any co-occurring conditions (i.e. substance abuse resulting from self-medicating the listed condition).
- A recommendation identifying a specified treatment facility that is:
  - Qualified to provide the required treatment program; and
  - Available to the defendant in a timely manner and within available financial resources.

NOTE: Sometimes, more than one provider will be required to carry out the proposed treatment program.

NOTE: The recommendation should indicate:

- The intensity, length, and intended outcome of the treatment program;
  - Whether the defendant has been accepted by that program;
  - Whether the treatment (bed, therapy) is now available;
  - The treatment facility's eligibility criteria and intake processes; and
  - An alternative to the recommended treatment facility.
- Identification of the person/agency responsible for paying for the treatment
  - Identification of the case management services required to monitor the defendant's progress in the proposed treatment program
  - The identification of the person/agency responsible for paying the costs management.

NOTE: Treatment programs that are usually ordered by the court in cases involving driving under the influence or domestic violence may not be sufficient to adequately address cases in which those offenses are committed as a result of the § 1170.9 veteran's listed condition.

#### **CRITERION #5: DEFENDANT AGREES TO PARTICIPATE**

In addressing Criterion #5, the defense may submit evidence that the defendant agrees to apply for and, if accepted, then participate in the proposed treatment program.

#### **CRITERION #6: DEFENDANT IS OTHERWISE ELIGIBLE FOR PROBATION**

The judge is to conclude whether the defendant is eligible and suitable for probation generally.<sup>5</sup>

NOTE: "Eligible" for Criterion #6 purposes can include a case presumptively ineligible for probation. Satisfying § 1170.9's other five criteria may be used by the judge in finding that the case is an "unusual case," thus overcoming the presumption.

If the case meets Criterion #6 and the other five criteria are met, then the judge may consider whether to grant § 1170.9 probation.<sup>6</sup>

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<sup>5</sup> See *Ferguson, supra*, at 1093.

<sup>6</sup> See *People v. Bruhn* (1989) 210 Cal.App.3d 1195, 1200.

## **B. DOCUMENTS ASSOCIATED WITH MOTION FOR § 1170.9 PROBATION**

The sentencing judge may receive the following documents concerning a motion for § 1170.9 probation:

### **1. AN ASSESSMENT**

While not defined in § 1170.9, “assessment” is referred to in Subdivision (a), indicating that it may be an “aid” in the decisional process. As used in Los Angeles County by the community of persons who are involved in providing treatment for veterans in the criminal justice system, an “assessment” for § 1170.9 purposes refers to a document prepared by a mental health professional. It is not required to be a medical diagnosis or medical evaluation. An assessment may present useful information or opinions concerning one or more of the following: Criteria #1, #2, #3, or #4.

#### **a. SOURCES FOR OBTAINING AN ASSESSMENT**

To obtain an initial assessment to support a motion for § 1170.9 probation, the defendant may look to one or more of the sources that serve Los Angeles County, such as:

- The VA for a treatment eligible defendant;
- Private or public psychiatric assessor or treatment provider;
- Volunteer psychiatric assessor;
- Department of Defense resources for a defendant on active duty; or
- County Mental Health services.

NOTES: To determine the credibility of the assessor, consider the assessor’s credentials, level of expertise, and experience in dealing with veterans’ mental health issues. As with any expert, the weight assigned by the court to the assessment should reflect the information reviewed by the assessor.

For example, since the defendant’s mental health and criminal conduct are key components in Criterion #3, as a matter of professional best practices, the assessor should have an accurate picture of the defendant’s mental condition and the criminal conduct. To form this picture, the assessor should review:

- A plaintiff’s view of defendant’s conduct and what occurred: police report, probation report, prosecution statements.
- The defense view of the defendant’s conduct and what occurred.
- Military records.
- Prior treatment records.

**b. CONSIDERATIONS FOR THE COURT IN DECIDING WHETHER TO REQUEST ITS OWN ASSESSMENT**

In Step One, in making determinations concerning Criteria #1 and #2, Subdivision (a) provides, “The court may request, through existing resources, an assessment to aid in that determination.” This language:

- Does not require an assessment be used by the judge;
- Does not preclude the judge from appointing an expert in accordance with Evidence Code § 730;
- Does not mandate the judge to request a third party to obtain an assessment for use by the court; and
- Does not preclude the judge from looking to the defense to obtain an assessment.

In deciding whether to obtain a judge-acquired assessment, the judge should consider:

- Whether there are “existing resources” able to prepare and pay for a judge-acquired assessment;
- What information and documentation will be given to the assessor and who will provide that material;
- Whether the defendant will willingly cooperate in the preparation of the judge-acquired assessment, candidly discussing with the assessor the defendant’s military experience, listed condition, and criminal conduct; and
- Why the defense may not be obtaining an assessment.

**2. A PROPOSED, INITIAL TREATMENT PLAN**

While not defined in § 1170.9, “treatment plan” is used in Subdivision (b), with an indication that it is to be presented as evidence at the PH&S.

As used in Los Angeles County by the community of persons who are involved in providing treatment to § 1170.9 veterans, a “treatment plan” brings together, for § 1170.9 purposes, information concerning a proposed course of treatment using one or more programs that address the defendant’s listed condition and any co-occurring conditions.

The treatment plan may be prepared by a private or public practitioner.

**3. A VA LETTER**

The defense may submit to the sentencing judge a letter prepared by the VA and addressed to the defendant which:

- Confirms the dates of defendant’s military service;
- Outlines treatment options (list of clinics) for the listed condition that the defendant alleges he is suffering; and
- Recommends that the defendant contact one or more specified clinics and follow the recommendations of the clinicians at those clinics.

The VA letter may be accompanied by a letter to the defendant from a VA or VA-funded clinic describing the clinic’s program.



## **II. GRANTING PROBATION PURSUANT TO § 1170.9**

### **A. MINUTE ENTRY**

To preserve the defendant's opportunity to apply for Subdivision (h) restorative relief after the completion of the treatment program, the sentencing court's minutes should have an entry that notes: "Eligibility criteria met, PC § 1170.9 probation granted."

### **B. CUSTODY**

Section 1170.9 does not limit the sentencing judge's discretion to:

- Impose and then suspend the execution of a sentence to jail (misdemeanor) or prison, as a consequence in the event that there is a formal revocation of the § 1170.9 probation, and then grant § 1170.9 probation; or
- Impose incarceration in jail as a condition of probation and order its execution as punishment; or

<p>NOTE: When considering the execution of a probation term of incarceration, the sentencing judge may weigh the impact of custody on the treatment. Psychological research evidence on PTSD supports the proposition that incarceration may worsen PTSD and make it treatment-resistant.</p>
---

- Impose incarceration in jail as a condition of probation, then stay that condition to be used later to hold the defendant accountable for his offense.
- The stay can be lifted when incarceration will be compatible with the stage of treatment.
- Consider home detention with sufficient restrictions that it constitutes custody.

### **C. PROBATION TERMS AND CONDITIONS**

#### **1. CONDITIONS APPROPRIATE TO THE OFFENSE**

The grant of § 1170.9 probation should include the imposition of probation terms and conditions appropriate to the offense:

- A term of incarceration required by law;
- Payment of fines, fee, and assessments;
- Attendance at offense-related programs; or
- Volunteer work or public service work.

Generally, other than a 4<sup>th</sup> Amendment Waiver, victim restitution, abstaining from alcohol and drugs, or a stay away/protective order, each probation condition is stayed. The

defendant's accountability for the offense is maintained by lifting the stay on each condition when performance will not interfere with treating the defendant's listed condition.

FORM LANGUAGE FOR STAYING CONDITIONS.

The payment of fines, fees, assessments; the performance of public or volunteer work; and enrollment in [insert each offense-related program ordered: Shoplifting Course, MADD] are temporarily stayed until performance is compatible with the stage of treatment.

DOMESTIC VIOLENCE (DV) OFFENSE.

In granting § 1170.9 probation for a DV offense, the judge must issue a protective order, and order the defendant into a 52-week program designed to stop the defendant's domestic violent behavior. (See § 1203.097(c).)

- If the § 1170.9 defendant's domestic violence is the result of a listed condition that Los Angeles County DV programs are not designed to treat, the sentencing judge is authorized by § 1203.097(a)(6), to designate an appropriate counseling program.
- At sentencing, the judge should order a 52-week DV program and stay the condition. During the initial treatment of the defendant's listed condition, it will become clear as to what type of DV program to order, or other appropriate counseling, and when to begin the DV treatment program.

## 2. CONDITIONS APPROPRIATE TO § 1170.9 TREATMENT PLAN

After imposing conditions of probation appropriate to the offense, then the sentencing judge may impose conditions related to the treatment plan.

### a. TREATMENT PROGRAM

Subdivision (b) authorizes the sentencing judge to use a local, state, federal, or private nonprofit treatment program. From the evidence presented at the PH&S, the sentencing judge should:

- Identify an appropriate treatment provider(s) and treatment program(s); and
- Ensure that the defendant's written agreement to participate in the treatment program has been filed with the court.

### b. TIME LIMIT ON LENGTH OF COURT-ORDERED TREATMENT PROGRAM

Subdivision (b) provides a limit on the length of the treatment program into which the judge can order a § 1170.9 defendant.

. . . the court may order the defendant into a . . . treatment program for a **period not to exceed that which the defendant would have served in state prison or county jail** . . . . [Emphasis added.] *People v. Ferguson* (2011) 194 Cal.App.4<sup>th</sup> 1070, 1089. (Hereinafter Subdivision (b) time limit)

The length of the Subdivision (b) time limit in a particular case is not necessarily the maximum possible sentence. Rather, the time limit is the length of the sentence that the defendant “would have served” in prison or jail.

The Legislature did not express the goal it sought to achieve by imposing the Subdivision (b) time limit on the length of the § 1170.9 treatment program. No case law or legislative history has been found that directly addresses the Subdivision (b) time limit.

There is evidence that it may take a § 1170.9 treatment program, on average, 12 to 18 months to achieve a successful outcome for a § 1170.9 defendant in a felony or misdemeanor case. In that light, the Subdivision (b) time limit may not pose a significant concern in felony cases, but would in misdemeanor cases where the sentence the defendant “would have served” is shorter.

In a particular case, where the Subdivision (b) time limit might not provide sufficient time for the treatment program to be successful, the judge may consider:

- Obtaining a waiver from the defendant;
- Consecutively ordering the defendant into segments or phases of the treatment program; or
- Providing the defendant with periodic judicial review where the defendant is present and has the ability to voluntarily withdraw from the treatment program.

#### **c. CONDITIONS TO MONITOR THE PROBATION/TREATMENT PROGRAM**

The sentencing judge may impose probation conditions designed to facilitate monitoring treatment progress. For example:

- Establishing a schedule for the defendant in a felony case to report periodically to the County Probation Department; or
- With the treatment provider’s cooperation, require the defendant to obtain periodic treatment progress reports from the treatment provider and file them with the court; or
- Conducting periodic, in-court, review hearings at which the defendant is present and the judge reviews the treatment progress; or
- Any other resource available to the judge.

### **D. MULTIPLE CASES**

It is not unusual for a § 1170.9 qualified defendant to have acquired several cases, in quick succession.

#### **EXAMPLE**

The sentencing judge has granted § 1170.9 probation in a case involving driving under the influence of alcohol (DUI). Thereafter, two prior cases are identified:

- A two month old DUI conviction; and
- A three month old assault conviction.

The defendant moves the court to modify the two, § 1203 probation cases to become § 1170.9 probation cases.

A suggested approach for responding to the motion on each of the other cases is as follows:

- The other case should be in the venue of Los Angeles County.
- The defendant should have sufficient remaining time on the term of probation in the other case to complete the § 1170.9 treatment program.
- Conclusions rendered in the current case on Criteria #1 (military service), #2 (listed condition resulting for military service), and #4 (available treatment) may be incorporated by reference into the decision in the other case.
- Criterion #3 will likely be the main point of discussion in this motion, whether the defendant can demonstrate, by a preponderance of the evidence, that the offense in the other case is the result of the listed condition.
- Criteria #5 (agree to participate) and #6 (eligible for probation) will also need to be addressed.

### **III. MOTION FOR SUBDIVISION (h) RESTORATIVE RELIEF**

*It is in the interests of justice to restore a defendant who acquired a criminal record due to a mental health disorder stemming from service in the United States military to the community of law abiding citizens. (Subdivision(h)(1).)*

#### **A. OVERVIEW**

After completing the § 1170.9 treatment program, the defendant may make a Subdivision (h) motion seeking to have the conviction set aside and the action dismissed. If the defendant demonstrates, by a preponderance of the evidence, that he or she has met the five requirements set out in Subdivision (h)(1), then the judge has discretion to grant the defendant's Subdivision (h) motion.

Subdivision (h) provides a discretionary alternative to § 1203.4 expungement. Except as otherwise provided in § 1170.9, the Subdivision (h) dismissal of the action "releases the defendant from all penalties and disabilities resulting from the offense" that would otherwise:

- Continue long after the defendant's successful completion of the treatment program and probation; and
- Impede the successfully restored defendant in resuming a law-abiding, self-supporting, community-supporting life style because of:
  - Substantial indebtedness for fines, fees, assessments and costs;
  - The denial of the opportunity to serve as a trial juror (Code of Civil Procedure § 203(a)(5));
  - Disqualification from practicing many licensed trades and professions;
  - Disqualification from holding certain positions of public employment;
  - Disqualification from being able to continue or resume military service; or

- Being denied employment generally.

## **B. PROCESS AND PROCEDURE FOR SUBDIVISION (h) MOTION**

A Subdivision (h) motion may be brought after completing the § 1170.9 treatment program. The statute does not provide that the motion is to be in writing.

- 1. PROPER JUDGE.** The Subdivision (h) motion is to be heard only by the sentencing court or the court which is monitoring the defendant’s performance of § 1170.9 probation.
- 2. PUBLIC HEARING.** The Subdivision (h) motion is to be heard at a public hearing.
- 3. MANDATORY NOTICE.** Notice of the hearing is to be given to the prosecution, the defense, and any victim of the offense not less than 15 days’ prior to the hearing. (Subdivision (h)(1).) The Legislature has not expressly identified the agency responsible for giving the notice for the Subdivision (h) motion. The Los Angeles County District Attorney should agree to provide Subdivision (h) notice to victims in VTRC cases for which it is the prosecutor. Otherwise:

VICTIM OF FELONY. In PC § 1191.1, the Legislature announced that, in a felony case, the victim, or the next of kin of the deceased victim:

- has “. . . the right to attend all sentencing proceedings under this chapter [Chapter 1 of Title 8, entitled ‘The Judgment’]”; and
- “. . . shall be given adequate notice by the probation officer of all sentencing proceedings concerning the person who committed the crime.”

If the Subdivision (h) hearing in a felony case is a “sentencing proceeding” for PC § 1191.1 notice purposes, then the probation officer is to give notice to the victim.

VICTIM OF MISDEMEANOR OR FELONY. In PC § 679.02, which addresses misdemeanor and felony cases, the Legislature announced the statutory right of victims of crimes to be notified “of all sentencing proceedings.” This right is to be “. . . honored and protected by law enforcement agencies, prosecutors, and judges . . . .” (See the Legislature’s 1986 declaration of intent, set forth in PC § 679.)

Based on the Legislature’s 1986 declaration of intent, it may be argued that the subsequently enacted (2013) right to § 1170.9(h)(1) notice is also a “victim right” to be honored and protected by law enforcement agencies, prosecutors, and judges.

- The prosecutor is responsible for having the notice given.
- The judge is not to proceed in the absence of notice.

- 4. FORM OF COURT ORDER.** The court that hears the Subdivision (h) motion is to issue its ruling by a written order setting forth the reasons for so doing. (Subdivision (h)(3).) See EXAMPLE 1: SAMPLE FORMAT OF ORDER (FROM SAN DIEGO).

## IV. ELIGIBILITY REQUIREMENTS FOR SUBDIVISION (h) RESTORATIVE RELIEF

In order to grant the restorative relief set out in Subdivision (h)(4), the judge must first find that the defendant has demonstrated, by a preponderance of the evidence, that all of the following describe the defendant:

### **REQUIREMENT A. He or she was granted probation and was at the time that probation was granted a person described in Subdivision (a). (§ 1170.9(h)(1)(A).)**

Requirement A directs the hearing judge to determine whether:

- The defendant was granted § 1170.9 probation; and
- At that time, the defendant was a person described in Subdivision (a).

In effect, Requirement A directs the Subdivision (h) hearing judge to confirm that at sentencing, the defendant was found eligible for, and was granted, § 1170.9 probation.

Prior to sentencing, the sentencing judge is required to conclude whether the defendant is a person described in Subdivision (a). (PC § 1170.9(b).) At sentencing, the prosecution has the opportunity to present evidence and argument to show that the defendant is not a person described in subdivision (a). If the sentencing judge decides otherwise, the prosecution may file a writ pursuant to PC § 1238(d). (See *People v. Douglas* (1999) 20 Cal.4<sup>th</sup> 85, 92-93.)

Regarding the scope of the Subdivision (h) hearing concerning Requirement A, there is no direct authority. A litigant may request the Subdivision (h) hearing judge to take judicial notice of the minutes of the sentencing judge's decision as evidence of whether there was:

- A finding that the defendant is a person described in Subdivision (a); and
- A grant of § 1170.9 probation.

At the Subdivision (h) hearing, Requirement A does not open a door for the prosecution to have the hearing judge make an independent determination of whether the defendant was, at the time of sentencing, a person described in subdivision (a).

- This would not be consistent with the purposes of § 1170.9.
- No authority was found that the prosecution can have the hearing judge relitigate the sentencing judge's factual finding.
- It would be unfair and not in the interests of justice to deny the defendant the opportunity to petition for the restorative relief provided in Subdivision (h) after the sentencing judge finds the defendant is a person described in subdivision (a), places the defendant into a program of rigorous treatment, and the defendant successfully completes the program.

The extent of the hearing judge's duty concerning Requirement A is to verify that the sentencing judge concluded that the defendant was a person described in subdivision (a) and granted § 1170.9 probation.

**REQUIREMENT B. He or she is in substantial compliance with the conditions of that probation. (§ 1170.9(h)(1)(B).)**

Requirement B directs the hearing judge to determine whether there has been “substantial compliance with the conditions of probation.”

NOTE: VICTIM RESTITUTION. Unlike § 1203.4 expungement, a balance due on court-ordered, victim restitution does not bar the granting of § 1170.9 restoration. Subdivision (h)(3)(A) provides that the action can be dismissed with full, statutory relief awarded, and the defendant remains obligated to pay full victim restitution. The victim’s interests are provided for by:

- Providing the victim with the opportunity to address the judge who is hearing the Subdivision (h) motion.
- Returning the defendant to the income producing community.
- Considering the victim restitution order as civil judgment.
  - The judge issues an abstract of judgment with the written ruling of decision.
  - The victim then has methods for collecting the judgment against the defendant that are not available to the court or the victim in the criminal justice system.

*See EXAMPLE 2, an Abstract of Judgment form used by the SD VTRC and formatted to meet the interests of the victim while preserving the goal of sealing the record.*

**REQUIREMENT C. He or she has successfully participated in court-ordered treatment and services to address the sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems stemming from military service. (§ 1170.9(h)(1)(C).)**

Judge may receive evidence concerning how well the defendant:

- Joined in, took part in, involved himself in, treatment and services.
- Used the available resources.
- Contributed to the treatment program’s activities by inputting his own experience, ideas, time, effort and skills.
- Did or did not: [examples]
  - Timely appear as directed for treatment appointments.
  - Focus his time and attention on meeting his treatment goals.
  - Comply with treatment program requirements.
  - Communicate during treatment sessions; open and engaged.
  - Communicate in a candid and truthful manner with service providers
- Was active or passive in: [examples]
  - Qualifying for program promotion and graduation.
  - Participating in program activities.
  - Voluntarily seeking out and properly utilizing program services.
- Remained sober.
- Complied with the law; avoided incidents involving alcohol abuse or illegal driving; and complied with treatment program requirements and probation conditions.

**REQUIREMENT D. He or she does not represent a danger to the health and safety of others. (§1170.9(h)(1)(D).)**

Judge may receive evidence concerning how well the defendant:

- Accepts responsibility for his criminal conduct.
- Demonstrates empathy for the victim(s) of his/her crime(s).
- Since being convicted and entering the treatment program, demonstrates by conduct that he/she has acquired and is using the treatment-acquired coping skills needed to avoid potentially violent encounters, to live a sober life, and to continue living a law abiding life.
- Deals with others by:
  - Demonstrating self-respect and respect for other persons.
  - Cooperating with other persons.
  - Respecting the property of others.
- Is doing things to repair the harm/damage done by his/her criminal conduct.
- Has completed programs required by the treatment plan: First Conviction/ Multiple Conviction, Anger Management, Domestic Violence, Parenting.

**REQUIREMENT E. He or she has demonstrated significant benefit from court-ordered education, treatment, or rehabilitation to clearly show that granting restorative relief pursuant to Subdivision (h) would be in the interests of justice. (§ 1170.9(h)(1)(E).)**

To support a finding that the defendant has “benefitted” from the treatment, there may be evidence presented of an incident that occurred during or after the treatment program that demonstrates that the defendant has acquired the coping skills needed to control him/herself.

**REQUIREMENT E: “Has Demonstrated Significant Benefit”**

Judge may receive evidence concerning how well the defendant:

Has or has not gained:

- Coping skills.
- Insight into the cause of his/her criminal conduct.
- A support network.
- Other resources.

Is or is not:

- Using treatment-acquired coping skills to develop, renew, maintain and strengthen personal relationships.
- Reunifying with family and pre-crime friends.
- Using treatment-acquired coping skills to resolve conflicts or problems arising in the course of his/her life.
- Accepting responsibility for his actions
- Making preparations for “moving on” after the treatment program to live a life that is self-supported, productive, and successful.
  - Selecting and initiating efforts to accomplish personal goals
  - Selecting and initiating efforts to accomplish career goals.
- Making progress in obtaining occupational training.
- Successfully using the coping skills acquired during the treatment program to handle difficult, life events that arose during probation.
- Acquiring and maintaining employment.



**REQUIREMENT E: “Granting Restorative Relief Would Be In the Interests of Justice”**

In accordance with § 1170.9(h)(2), the judge may receive evidence concerning the defendant's:

- Completion and degree of participation in education, treatment, and rehabilitation as ordered by the court.
- Progress in formal education.
- Development of career potential.
- Leadership and personal responsibility efforts.
- Contribution of service in support of the community.

## V. RESTORATIVE RELIEF OPTIONS IN SUBDIVISION (h)

If the defendant demonstrates, by a preponderance of the evidence, that all five requirements describe the defendant, then the court may take any of the following actions, setting forth the reasons for the actions taken in a written order.

CIRCUMSTANCE	SUBDIVISION (h) RESTORATIVE RELIEF
Defendant is on § 1170.9 probation.	§ 1170.9(h)(3)(A) grants the judge the discretion: <ul style="list-style-type: none"> <li>• To deem all conditions of probation to be satisfied, including fines, fees, assessments, and programs. This authority does not apply to any court-ordered victim restitution; and</li> <li>• To terminate probation prior to the expiration of the term of probation.</li> </ul>
Defendant was convicted of a felony that is a wobbler (i.e., punishable by imprisonment in prison or county jail)	§ 1170.9(h)(3)(B) grants the judge the discretion to reduce the felony to a misdemeanor pursuant to § 17(b).
Under § 1203.4, defendant: <ul style="list-style-type: none"> <li>• Is not now serving a sentence for any offense;</li> <li>• Is not now on probation for any offense other than the current action; and</li> <li>• Is not now charged with the commission of any offense.</li> </ul>	§ 1170.9(h)(3)(C) grants the judge the discretion to: <ul style="list-style-type: none"> <li>• Allow the defendant to withdraw the guilty plea and enter a plea of not guilty,</li> <li style="text-align: center;">or</li> <li>if the defendant has been convicted after trial, to set aside the verdict of guilty;</li> <li style="text-align: center;">and then</li> <li>• Dismiss the action.</li> </ul>

NOTE. The statutory language of § 1170.9:

- Does not expressly address the use of § 1385 in a § 1170.9 case; and
- Does not preclude the use of traditional expungement in accordance with § 1203.4, if the five statutory requirements cannot be found.

## **VI. EFFECT OF THE SUBDIVISION (h) DISMISSAL OF ACTION**

Section 1170.9(h)(3)(C) grants the hearing judge regulated discretion to dismiss the action. However, if the hearing judge determines to dismiss the action, the effect of a Subdivision (h) dismissal is fixed by the statute, § 1170.9(h)(4). The hearing judge does not have discretion to pick and choose among the statutorily determined effects; except the hearing judge has discretion whether, as a restorative action, to seal police records of the arrest and court records of the dismissed action.

Notwithstanding anything to the contrary in § 1203.4, a dismissal of the action pursuant to § 1170.9(h)(3)(C) has the following effects:

**EFFECT A:** Except as otherwise provided in § 1170.9(h)(4), a dismissal of the action pursuant to Subdivision (h) “releases the defendant from all penalties and disabilities resulting from the offense of which the defendant has been convicted in the dismissed action.” (§ 1170.9(h)(4)(A).)

**EFFECT B:** A conviction for one of the following offences cannot be dismissed pursuant to § 1170.9(h)(4):

- (i) Vehicle Code § 42002.1(c)
- (ii) Felony conviction of Penal Code § 261.5(d)
- (iii) Penal Code § 286(c)
- (iv) Penal Code § 288
- (v) Penal Code § 288a(c)
- (vi) Penal Code § 288.5
- (vii) Penal Code § 289(j)
- (viii) A dismissal cannot be applied to “The requirement to register pursuant to § 290.” (§ 1170.9(h)(4)(B).)

**EFFECT C:** When information concerning prior arrests or convictions is requested to be given under oath, affirmation, or otherwise, the defendant is not obligated to disclose:

- the arrest on the dismissed action,
- the dismissed action, or
- the conviction that was set aside.

“The defendant may indicate that he or she has not been arrested when his or her only arrest concerns the dismissed action, except the defendant is required to disclose the arrest, the conviction that was set aside, and the dismissed action in response to any direct question contained in any questionnaire or application for any law enforcement position.” (§ 1170.9(h)(4)(C).)

**EFFECT D:** The court, in its discretion, may “order the sealing of police records of the arrest and court records of the dismissed action, thereafter viewable by the public only in accordance with a court order.” (§ 1170.9(h)(4)(D).)

Example of the success of the sealing effort.

During 2013, EFFECT A [§ 1170.9(h)(4)(A)] restored the defendant's right to possess a firearm, a right revoked as a result of the conviction.

Defendants whose actions were dismissed in 2013 pursuant to § 1170.9(h)(3)(C) and whose records were ordered sealed, thereafter applied for and received government approval to obtain a firearm.

NOTE: § 1170.9(h)(4) was amended to add Subdivision (I) [see below] and since January, 2014, a § 1170.9(h)(3)(C) dismissal does not restore the right to possess a firearm.

- EFFECT E:** A dismissal of the action is “a bar to any future action based on the conduct charged in the dismissed action.” (§ 1170.9(h)(4)(E).)
- EFFECT F:** In any subsequent prosecution, a conviction that was set aside in the dismissed action may be pleaded and proved as a prior conviction and will have the same effect as if the dismissal had not been granted. (§ 1170.9(h)(4)(F).)
- EFFECT G:** A conviction that was set aside in the dismissed action may be considered a conviction for the purpose of administratively revoking or suspending or otherwise limiting the defendant's driving privilege on the ground of two or more convictions. (§ 1170.9(h)(4)(G).)
- EFFECT H:** A dismissal will not remove the defendant's DNA sample and profile in the DNA data bank. (§ 1170.9(h)(4)(H).)
- EFFECT I:** Dismissal of an accusation, information, or conviction pursuant to this section does not authorize a defendant to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction pursuant to Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6. (§ 1170.9(h)(4)(I).)

# EXAMPLE 1: FORMAT OF ORDER

## SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO EAST COUNTY DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	Case No.: XXX XXXXXX
	)	
Plaintiff,	)	ORDER GRANTING RESTORATIVE
	)	RELIEF PURSUANT TO PENAL
v.	)	CODE SECTION 1170.9(h)
	)	
XXXXX XXXXXXXX,	)	
Defendant.	)	

---

Defendant's Motion for Restorative Relief pursuant to subdivision (h) of Penal Code section 1170.9 came on for public hearing on \_\_\_\_\_. The parties submitted evidence and argument. The victim in this action was legally noticed [and attended the court hearing/submitted a letter in support/opposition of the defendant].

BASED ON THE FINDINGS AND REASONS SET FORTH IN ATTACHMENT "A" TO THIS ORDER, WHICH IS INCORPORATED BY THIS REFERENCE, THE COURT ORDERS AS FOLLOWS IN ACCORDANCE WITH SECTION 1170.9(h):

All conditions of probation are deemed to be satisfied in full, including fines, fees, assessments, costs, and programs; but not including any court-ordered victim restitution.

Probation is terminated.

The defendant's plea of guilty in this action is withdrawn and a plea of not guilty is entered.

The conviction[s] in this action [is/are] set aside and this action is hereby dismissed.

Except as otherwise provided in this order, the defendant is released from all penalties and disabilities resulting from the offense[s] of which the defendant has been convicted in the dismissed action. This release includes, without limitation, releasing penalties and disabilities pertaining to:

- The holding of public office; and
- The qualifications to serve as a potential trial juror.

When information concerning prior arrests or convictions is requested to be given under oath, affirmation, or otherwise, the defendant is not obligated to disclose the arrest on the dismissed action, the dismissed action, or the conviction[s] that [was/were] set aside. The defendant may indicate that he has not been arrested when his only arrest

concerns the dismissed action. Except, the defendant is required to disclose the arrest, the conviction[s] that [was/were] set aside, and the dismissed action in response to any direct question contained in any questionnaire or application for any law enforcement position.

A future action based on the conduct charged in the dismissed action is barred.

In any subsequent prosecution for any other offense, the conviction[s] that [is/are] being set aside in the dismissed action[s] may be pleaded and proved as a prior conviction and shall have the same effect as if the dismissal pursuant to this order had not been granted.

[A conviction[s] that [was/were] set aside in the dismissed action may be considered a conviction for the purpose of administratively revoking or suspending or otherwise limiting the defendant's driving privilege on the ground of two or more convictions.]

The defendant's DNA sample and profile in the DNA data bank shall not be removed by the dismissal granted by this order.

Dismissal of an accusation, information, or conviction pursuant to this section does not authorize a defendant to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction pursuant to Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6.

Under the authority of section 1170.9, as a restorative action, the court orders the sealing of police records of the arrest and the court records of the dismissed action, hereafter viewable by the public only in accordance with a court order.

[The Fourth Amendment waiver is deleted.]

[The Protective Order is deleted]

[The defendant *is ordered/remains obligated* to pay court-ordered victim restitution to \_\_\_\_\_ for *damage to property/personal injury* in the amount of \$\_\_\_\_\_ with interest of 10% per annum from the date of this order. The order for victim restitution is a civil judgment and an abstract of judgment shall issue.]

**DATED:** [    ]

\_\_\_\_\_  
JJJJJJ J. JJJJJJJJ  
Judge of the Superior Court

ATTACHMENT "A"  
TO ORDER IN CASE NO: XXX XXXXXX PROVIDING RESTORATIVE RELIEF  
PURSUANT TO PENAL CODE SECTION 1170.9(h)

Based on the records in the file of this case and the evidence and arguments submitted at this hearing, the court makes the following findings for purposes of Penal Code section 1170.9(h):

**PRELIMINARY FINDINGS**

The hearing was properly noticed. The defendant is not now serving a sentence for any offense; is not now on probation for any offense other than in this action; and is not now charged with the commission of any offense.

**SAMPLE LANGUAGE**  
**BACKGROUND**

Growing up, the defendant was a successful, law-abiding civilian with no history of violence. From January, 2000, to February, 2011, defendant successfully served the community as a soldier. The Army entrusted him with the responsibility for the lives and welfare of its soldiers, twice promoting him to non-commissioned officer rank. He served two combat tours, bearing arms, for which he was decorated. He received an honorable discharge and returned to civilian life with an untreated mental disorder that stemmed from his military service. On November 30, 2011, he committed an act of violence that arose from that mental disorder. The act was against his wife.

This action was filed. Following arraignment, the defendant accepted full responsibility for his misconduct by pleading guilty. The defendant was granted Penal Code section 1170.9 probation and in March of 2012, the defendant entered the rigorous, 12 to 18 month, probation monitoring and treatment program of the Veterans Treatment Review Calendar. The treatment plan included a program which addressed the defendant's mental disorder and the co-occurring substance abuse; and the Family Recovery Program component addressed recovery from the relationship violence that occurred on November 30, 2011.

**PENAL CODE section 1170.9(h)(1)(A)-(E) FINDINGS:**

(A) The defendant was granted section 1170.9 probation on March 1, 2012, and was, at the time probation was granted, a person described in subdivision (a) of Penal Code section 1170.9.

(B) The defendant is in substantial compliance with the terms and conditions of that probation.

(C) The defendant has successfully participated in court-ordered treatment and services to address the qualifying condition. During and after the defendant's completion of the treatment program:

- The defendant attended all appointments at the Veterans Administration facilities and at the Veterans Village of San Diego, the residential rehabilitation facility.
- The defendant was candid and truthful when communicating with the treatment providers.

- Every two weeks, at court review hearings, the defendant demonstrated to this Court the ability to exercise self-control and accepting responsibility for his actions, showing progress in treatment.
- The defendant remained sober. All the weekly toxicology screens were negative.
- The defendant complied with the law, his treatment program requirements, and probation conditions, and had no incidents involving violence.
- The defendant did not isolate himself. Rather, the defendant was engaged in the community, reaching out to other veterans by volunteering to help other veterans suffering with service-related trauma; and reuniting with his family.
- As reported by VA treatment provider, the defendant “actively participated in the intense three week Substance Abuse Rehabilitation Program (SARP – CSACC) and then he transitioned to one time per week group attendance. After completing his SARP groups, he began attending weekly SMART recovery meetings. He also engaged in weekly individual therapy sessions to address his PTSD.”

(D) The defendant does not represent a danger to the health and safety of others.

The evidence that the defendant now represents a danger to the health and safety of others, while significant, is limited as to time, that is, the defendant’s conduct on November 30, 2011.

The evidence that the defendant does not now represent a danger to the health and safety of others is:

Before November 30, 2011:

- The defendant’s law abiding, non-violent conduct as he grew to young adulthood;
- The defendant’s eleven years of honorable service in the military with no evidence that the defendant misused violence while in military service;
- The defendant’s 12 years of marriage, without a violent incident.

After November 30, 2011:

- The defendant’s law abiding, non-violent conduct since starting the treatment program;
- The defendant’s full commitment to, and eventual completion of, the extensive, intense treatment program; and
- As reported by VA Veterans Center counselor, Frederick XXXX, the defendant’s “post-conviction conduct demonstrates that he has acquired and is using the coping skills needed to continue living a law abiding, non-violent life. As husband and father, he has reunited with his wife and children, showing empathy for the victims of his criminal conduct, and repairing the damage he did. . . . He respects other persons and poses no danger.”

(E) The defendant has demonstrated significant benefit from court-ordered education, treatment, and rehabilitation that clearly shows that it is in the interests of justice to grant restorative relief pursuant to subdivision (h) of Penal Code section 1170.9.

- The progress reports confirm that the defendant: accepts responsibility for his actions; and is able to make proper decisions in developing, renewing, and maintaining personal relationships, without violence.



- As reported by a treatment provider, “. . . his demonstrated ability to remain focused, motivated and patient is based on his ability to utilize the skills he gained throughout his treatment process.”
  - The mentor’s report of specific events in which the defendant responding peacefully and non-violently to “triggering situations” that included belligerent individuals.
  - The mentor’s report of the defendant’s conduct on one occasion when he encountered a person vandalizing his car; and on another occasion when he confronted two men who were harassing his wife; and on a third occasion when he was falsely accused of providing an adulterated urine sample. The defendant dealt with these stressful events in a controlled, nonviolent manner.
- A letter submitted at the hearing by the victim in which she expresses her support of the defendant receiving restorative relief and states that she has witnessed the rehabilitative effects of treatment on the defendant.
- He has completed one semester towards a masters degree in business administration.
- He is employed in a management position for a company of 250 employees.
- He volunteers his administrative skills in support for his church and a neighborhood, youth athletic league.

For all the reasons set forth in Attachment A above, the defendant will continue to demonstrate significant benefit from the court-ordered education, treatment, and rehabilitation he received.

***END***



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## TREATMENT OPTIONS

1. West LA VA Domiclairy (DOM) – a 300 bed residential rehabilitation and substance abuse recovery program that addresses substance abuse, co-occurring disorders, and has a special track for combat PTSD (post traumatic stress disorder). The program is staffed by VA psychiatrists, psychologists, clinical social workers, case-managers, addiction therapists, and primary medical care staff. The program also allows veterans who are on a low dose of methadone opiate replacement for those with chronic opiate dependence issues. It is generally a 3-4 month program but may be extended up to 6 months and beyond depending on the veterans needs and the clinical treatment team’s recommendations. Because it is a VA run program, every group, drug test, individual appointment and medical procedure is logged into the VA computerized record system.
2. Grant and Per Diem Programs (GPD) – The VA’s umbrella program that contracts with various community providers for residential substance abuse and transitional housing services. Some of the residential treatment programs include The Salvation Army (Haven I Victory Place, Bell Shelter and Hope Harbor), Volunteers of America (Central City Recovery and Hollywood Veterans Center), Mary Lind Foundation (Bimini Recovery Program), New Directions for Veterans, and several others. These programs can provide up to 2 years of stable housing. They focus on treatment but also provide sober transitional housing, permanent housing, job and life skills, etc). The GPD programs provide approximately 1500 beds (in addition to the 300 beds provided with the DOM program).

## JUDICIAL POINTS OF CONTACT

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