

## Justice-Involved Veterans<sup>1</sup>: A decision map of Penal Code section 1170.9

### INTRODUCTION

Penal Code section 1170.9<sup>2</sup> provides judicial officers with the option of sentencing military veterans to treatment instead of prison or jail if they have been convicted of certain classes of crimes, as long as the court finds that 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 their service in the United States military. Subdivision (h) of §1170.9 allows for the court to grant restorative relief for eligible veterans.

This guide gives an overview of §1170.9, outlines the steps to determining its applicability, and articulates some of the issues to consider in cases where the defendant is a justice-involved veteran. Following the design of the attached flowchart, this narrative is divided into four sections corresponding to the linear progression of the case: prior to sentencing, sentencing, sentencing considerations, and post-conviction relief. It is designed to guide judges who preside over criminal courts and are requested to sentence a defendant pursuant to §1170.9.

### PRIOR TO SENTENCING

The court must be able to answer affirmatively to all the following queries before finding that §1170.9 applies to the defendant.<sup>3</sup>

#### **Penal Code section 1170.9(a)**

*Query 1: Is there a conviction?*

While §1170.9 requires a conviction for the sentencing relief described in the statute to be applicable, there are no statutory restrictions concerning how the defendant's conviction is obtained. Thus, defendants who plead guilty, nolo contendere or "no contest", and those who are convicted after a court or jury trial are all eligible for sentencing consideration pursuant to §1170.9.

*Query 2: Could the defendant be sentenced to state prison or county jail?*

A strict reading of the requirement that the criminal offense must allow for sentencing to "state prison or county jail" could imply that the alternative sentencing options under §1170.9 are only applicable to defendants convicted of "wobblers". However, reading the statute as a whole clarifies that this limitation was not intended. Because the court must be able to place the defendant on probation, the crime for which the defendant is convicted must be a misdemeanor or probation-eligible felony. Excluded from §1170.9 relief are felonies that are not probation eligible and offenses, such as infractions, where incarceration is not an option.

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<sup>1</sup> When the term "justice-involved veteran" is used here, it also refers to active duty military personnel.

<sup>2</sup> All code section references hereinafter will be to the California Penal Code, unless otherwise specified.

<sup>3</sup> Because §1170.9 is silent as to the burden of proof to use in making these determinations, Evidence Code section 115 dictates that a preponderance of the evidence standard should be used.

*Query 3: Is the defendant alleging the offense was committed 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?*

A defendant wishing for sentencing consideration under §1170.9 must make an assertion that 1) the criminal conduct was caused by one of the mental health conditions or issues specified in the statute, and 2) that condition stems from service in the United States military. No formal motion requirements are delineated by the statute, hence, an assertion made orally may suffice to initiate the process for sentencing consideration under §1170.9. The court does not need to make a determination that these assertions are true in order to go on to the next step.

*Query 4: Is the defendant a current or former member of the United States military, and, may the defendant be suffering from sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems as a result of that service?*

After the defendant has made the required allegation, the judicial officer must make two determinations prior to sentencing:

- a) Whether the defendant is currently serving, or has served, in the United States Military.

The United States Military consists of five active-duty Services and their respective Guard and Reserve units: the Army, Marine Corps, Navy and Air Force fall under the jurisdiction of the Department of Defense (DoD); the Coast Guard reports to the Department of Homeland Security during peacetime and to the DoD (by way of the Navy) during wartime. Reserve and National Guard units perform as active-duty service members on a part-time basis. Since all branches are equal parts of the United States Uniformed Services, proof of service in any of these branches will meet the §1170.9 military service requirement.

Although there are a number of ways that a defendant may seek to prove his or her military involvement, one common way may be through a Certificate of Release or Discharge from Active Duty. This is also known as a Report of Separation, a DD form 214, or simply a “DD 214”.

In considering the military service requirement, it is important to note what is not needed in order to meet this qualification. The defendant does not need to have been in combat during his or her service to be eligible; although this had originally been required, the statute was amended in 2010 to remove this condition. Moreover, the defendant does not need to have been placed on active duty. The defendant does not need to have been honorably discharged to be eligible under §1170.9. While a defendant’s discharge status may affect his or her ability to receive benefits through the U.S. Department of Veteran’s Affairs, it does not affect his or her eligibility for receiving alternative sentencing under §1170.9.

- b) Whether the defendant may be suffering from one of the listed conditions as a result of their military service. This requirement is two-fold. Not only must the judicial officer determine whether the defendant may have an eligible condition, but the nexus between the condition and military service must also be found to exist. In order to make determinations about mental health conditions and their causes, judicial officers often need evidence to be presented by trained clinicians. Section 1170.9(a) indicates that the court may require, through existing resources, an assessment to aid in its determination. Existing resources may vary in local courts.

Although the request for sentencing consideration pursuant to §1170.9 can be simple, gathering and presenting the evidence needed for a judicial officer to make the required determinations about the defendant's eligibility can be time consuming. Section 1170.9 does not carve out exceptions to the right to be sentenced within 20 days of being found guilty of a felony, pursuant to §1191, or to be sentenced more than 6 hours, but within 5 days, of being found guilty of a misdemeanor, pursuant to §1449. Therefore, a defendant seeking the alternative sentencing options available under this code section may want to consider entering a time waiver to give him or her time to gather the required evidence.

It is noteworthy that the allegation the defendant must make to request sentencing consideration under §1170.9 differs from the determinations that the judicial officer makes, and it is important not to confuse the two. 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.

## **SENTENCING**

The court must be able to answer affirmatively to all the following queries before sentencing the justice-involved veteran under §1170.9. Note that if the defendant pled guilty or no contest and sentencing is to be done before a judge who did not take the plea, the defendant should enter an *Arbuckle* waiver. If the waiver is not given, the judge who negotiated resolution of the case must do the sentencing. (*People v. Arbuckle* (1978) 22 Cal.3d 749, 757.)

### **Penal Code section 1170.9(b)**

*Query 1: Is the defendant otherwise eligible for probation?*

If other factors exist such that the defendant is not eligible for probation, §1170.9 will not apply.

*Query 2: Is the court deciding to place the defendant on probation?*

Section 1170.9 in no way directs or implies that a defendant who meets the other requirements of §1170.9 be placed on probation. Instead, the code creates additional sentencing options for those defendants whom the court decides should be granted probation. Factors that go into deciding whether a justice-involved veteran should be placed on probation and choosing an appropriate treatment program, where applicable, are discussed in more detail in §1170.9(d). (See, “Sentencing Considerations”, below.)

*Query 3: Does the defendant agree to participate in a treatment program?*

While a defendant who requested sentencing consideration pursuant to §1170.9 would presumably agree to participate in a treatment program, he or she should be aware that the program could be in-patient and he or she may be required to be there up to the period of time the defendant would have spent in jail or prison. Under §1170.9(e), the defendant is not eligible to earn early release credit for time spent in a program. (See, “Sentencing Considerations”, below.)

*Query 4: Does an appropriate treatment program exist?*

The court may order the defendant into a local, state, federal or private nonprofit treatment program. If the defendant is not amenable to treatment or there is no appropriate treatment program, then sentencing relief is not available under this statute. It is not the court’s responsibility to locate such a program, although the court may certainly attempt to assist in the process by contacting the county mental health authority, the Veterans Administration or the local Veterans Justice Outreach (VJO) Specialist. In some counties, the probation officer may take on that responsibility. With the exception of established practices in collaborative courts, it will be the defendant’s own responsibility to find an eligible program.

*Query 5: Should the defendant be ordered into a treatment program?*

The code states that the court “may” order a court-involved member of the military or veteran into a treatment program. Thus, even if the defendant meets all eligibility criteria, there is no obligation that the court grant the alternative sentencing allowed for by §1170.9.

## **SENTENCING CONSIDERATIONS**

If the court chooses to grant probation pursuant to §1170.9, an order reflecting that the defendant was found to be a person described by §1170.9(a) and that probation is being granted pursuant to §1170.9(b) will help preserve the record if the justice-involved veteran later applies for post-conviction relief under §1170.9 (h). The following are factors for the court to consider in making the sentencing decision

**Penal Code section 1170.9(c)***Referrals to the county mental health authority and ordering mental health services*

Section 1170.9 does not create an obligation for the local mental health authority to provide new treatment services – the county is only obligated to provide mental health treatment services to the extent that resources are available for that purpose pursuant to Welfare and Institutions Code Section 5600.3. However, Welf. & Inst. Code Sec. 5600.3 does make California veterans a priority in receiving mental health services and also indicates that veterans who are eligible for mental health services through the United States Department of Veterans Affairs should be advised of those services by the county and receive assistance in obtaining them. Similarly, an order for mental health services under §1170.9(c) creates an obligation by the county mental health agency to coordinate an appropriate referral of the defendant to the county veterans service officer. County veterans' service officers are professional veteran advocates on the local level who are often the initial contact in the community to help a veteran obtain services.

An order referring a defendant to a county mental health agency can only be made if the agency has agreed to accept responsibility for the treatment of the defendant. Ideally, the court, the local mental health agency and the county veterans service officer will have an understanding about how to handle referrals under §1170.9(c). But even in the absence of an agreement, it is advisable that any order referring a defendant to the county mental health agency reflect that this referral is made pursuant to this code section.

**Penal Code section 1170.9(d)***Determining the needs of the defendant and the decision whether to grant probation*

Penal Code section 1202.7 articulates the considerations that go into the decision concerning granting probation. The first consideration is the safety of the public. Additional issues to consider are the nature of the offense, the interests of justice, reintegration of the offender into the community, enforcement of probation conditions, the loss to the victim, and the needs of the defendant. Section 1170.9 directs the court to consider the defendant's eligibility under §1170.9 in making the determination of whether a defendant should be placed on probation and ordered into a federal or community-based treatment service program. The code section indicates that the program should have a demonstrated history of specializing in the treatment of mental health problems, including substance abuse, post-traumatic stress disorder, traumatic brain injury, military sexual trauma, and other related mental health problems.

**Penal Code section 1170.9(e)***Sentence credits for residential treatment programs*

A defendant granted probation under this section and being committed to a residential treatment program only earns sentence credits for the actual time he or she serves in residential treatment. Since §1170.9(b) allows for the court to order participation in a treatment program up to the maximum exposure time, a defendant might try to argue that the actual time he or she would

have spent incarcerated would have been less than the maximum because of overcrowding or anticipated “good time” credits. However, §1170.9(e) is explicit about day-for-day credit and rejecting any such argument is legally sound.

### **Penal Code section 1170.9(f)**

#### *Choosing a treatment program*

The code section allows for the court to order a defendant into a specific treatment program. In making the choice of program, §1170.9(f) requires that preference be given to those programs that have a demonstrated history of treating veterans who suffer from sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems as a result of military service. Included for consideration amongst eligible treatment programs are those run by the United States Department of Defense or Veterans Administration.

### **Penal Code section 1170.9(g)**

#### *Collaboration with federal veterans agencies*

The code clarifies that the court and the assigned treatment program may seek to maximize the benefits and services available to the veteran by collaborating with the Department of Veterans Affairs (VA) and the United States Veterans Administration. Although the VA does not generally participate in the legal process, it can offer veteran specific treatment options if the court determines that treatment is a consideration. Moreover, the VA runs a Veterans Justice Outreach (VJO) Program, the purpose of which is to help justice-involved veterans avoid the unnecessary criminalization of mental illness by helping them access Veterans Health Administration services. Veterans Justice Outreach Specialists can assist with direct outreach, assessment, and case management for justice-involved Veterans in local courts and jails, and liaison with local justice system partners. A list of VJO Specialists in California is available from the VA website.

## **POST-CONVICTION RELIEF**

Penal Code section 1170.9, subdivision (h), indicates that when a justice-involved veteran obtains a criminal record as a result of a mental health disorder arising from his or her military service, it is in the interest of justice to provide restorative relief. However, this relief is only available if certain conditions are met.

### **Penal Code section 1170.9(h)(1)**

The court must be able to answer affirmatively to all the following queries before providing restorative relief to the justice-involved veteran.

*Query 1: Has there been at least 15 days notice to the prosecution, defense and any victim of the request to receive restorative relief?*

The hearing on a request for restorative relief must be open to the public and requires that there be proper notice. The legislature was mindful that if there was a victim of the crime, that person must be notified, although their presence at the hearing is not required. Upon request of the victim, the court may consider permitting the victim to make an oral or written statement at the hearing.

*Query 2: Was the defendant found to have been a person as described in 1170.9(a) and granted probation?*

The restorative relief provided for in subdivision (h) is restricted to justice-involved veterans who were previously found to be eligible for relief under §1170.9(a) and placed on probation pursuant to this code section. Although expungement under §1203.4 may still be an option for individuals who were not adjudicated under §1170.9, the additional relief provided by this code section is not available for them.

*Query 3: Has the defendant successfully participated in court-ordered treatment and services to address the military-related mental health issues?*

It is noteworthy that the code uses the term “successfully participated in” rather than “completed”. This wording appears to acknowledge that mental health issues are often life-long conditions and does not set the requirement for restorative relief at an unachievable level.

*Query 4: Does the defendant pose a danger to the health and safety of others?*

Community safety is a significant consideration and the court must find that the justice-involved veteran is not a danger to others.

*Query 5: Has the defendant demonstrated “significant benefit” from the court-ordered education, treatment or rehabilitation such that there is a clear showing that granting the restorative relief is in the interest of justice?*

The code goes beyond merely looking for progress in treatment and requires that the justice-involved veteran has benefitted significantly from treatment or other services that the court may have ordered. Factors to help determine whether granting relief is in the interest of justice are listed in §1170.9(h)(2) and discussed below.

### **Penal Code section 1170.9(h)(2)**

*Determining whether granting restorative relief would be in the interest of justice.*

Penal Code §1170.9(h)(2) lists several factors the court may want to consider when determining whether justice would be served by granting restorative relief. Those factors are the justice-involved veteran’s:

- Completion and degree of participation in court-ordered education, treatment, and rehabilitation;
- Progress in formal education;

- Development of career potential;
- Leadership and personal responsibility efforts;
- Contribution of service in support of the community

However, the code specifies that the court may look at additional relevant information and is not limited to just this list of items. In light of the wide range of factors for the court to consider, it may be helpful to have probation address these issues in any report they make in preparation for the hearing.

### **Penal Code section 1170.9(h)(3)**

*Determining what kind of restorative relief to grant, if any.*

Even if the justice-involved veteran meets all of the conditions of §1170.9, there is no requirement that the court grant the requested restorative relief. However, if the court chooses to provide restorative relief, the options are greater than those available under the expungement statute (§1203.4). The court may:

- Deem all conditions of probation to be satisfied and terminate probation early, even if fines, fees, or assessments have not been fully paid or court-ordered programs have not been completed. Victim restitution has been carved out as not qualifying for this kind of financial forgiveness. Moreover, terminating probation prior to victim restitution being fully paid may make it significantly more difficult for the victim to collect the balance of the restitution. If the court chooses to terminate probation prior to the full payment of victim restitution, consideration should be given to converting the amount of outstanding restitution into a civil judgment. Judicial Council form CR-110, *Order for Restitution and Abstract of Judgment*, can be used for this purpose. If the victim is present at the hearing, the court may wish to inquire of the victim's preference.
- Reduce an eligible felony to a misdemeanor, pursuant to §17(b).
- Grant expungement relief pursuant to §1203.4. However, §1170.9(h)(4) carves out exceptions to the ability to dismiss certain specified charges. A dismissal cannot be given for any of the following convictions: §261.5(d), §286, §288, §288a(c), §288.5, §289(j), and Vehicle Code section 42002.1. The requirement to register as a sexual offender under Penal Code section 290 cannot be dismissed.

Penal Code section §1170.9(h)(4) also indicates that for the dismissed action, the court can order the sealing of the police arrest records and the court records.

If the court grants any restorative relief, the order must be in writing and must set out the reasons for granting the relief.

**Penal Code section 1170.9(h)(4)***Effect of granting restorative relief.*

A justice-involved veteran whose action is dismissed pursuant to §1170.9 is not obligated to disclose the arrest, the court case, or the conviction of the dismissed action, except in response to a direct question contained in a questionnaire or application for any law enforcement position. However, any restrictions imposed by §1203.4 will still apply to a dismissal under §1170.9. A dismissed conviction will still be considered a prior conviction in any subsequent prosecution. Similarly, any suspension or revocation of driving privilege will be unaffected by the dismissal; any conviction associated with the dismissed action will still be considered a prior conviction for the purpose of revoking, suspending, or otherwise limiting driving privileges on the ground of having two or more convictions. (Vehicle Code section 13555.) Any registration requirement pursuant to §290 will remain, even if the underlying conviction is dismissed.

If the court has ordered sealing of the police arrest records and the court records, the records will only be viewable by the public if there is a court order.

**Useful Links:**

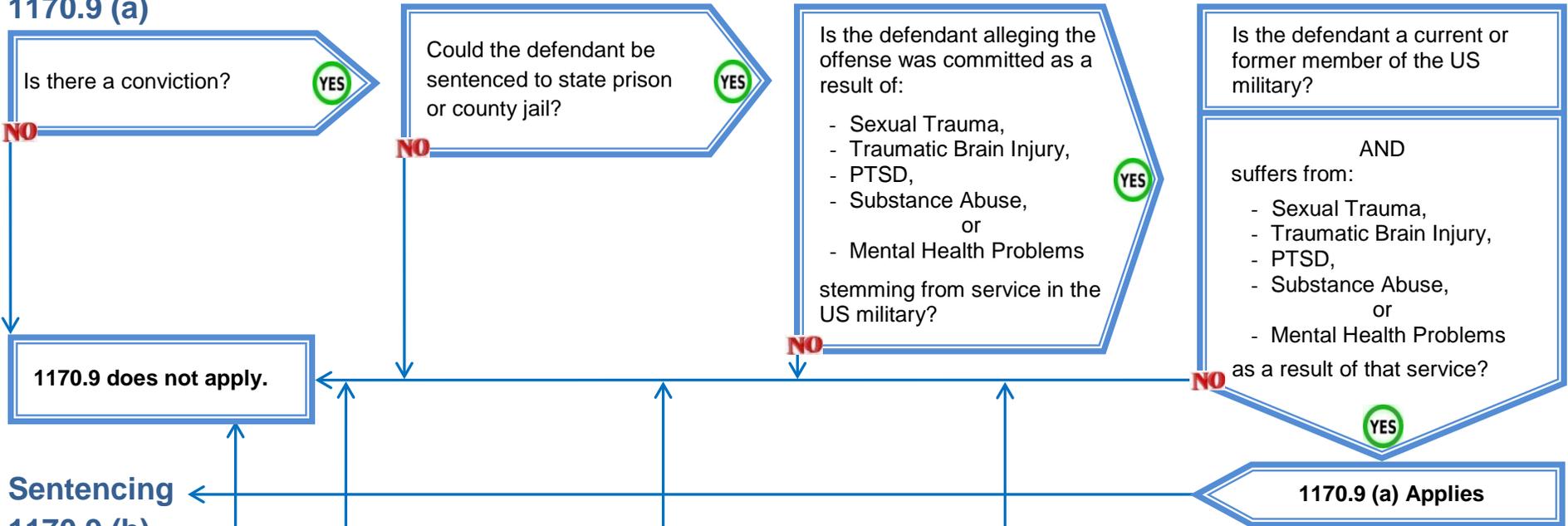
California Association of County Veterans Service Officers <http://www.cacvso.org/>

Unites States Department of Veterans Affairs: <http://www.va.gov/>

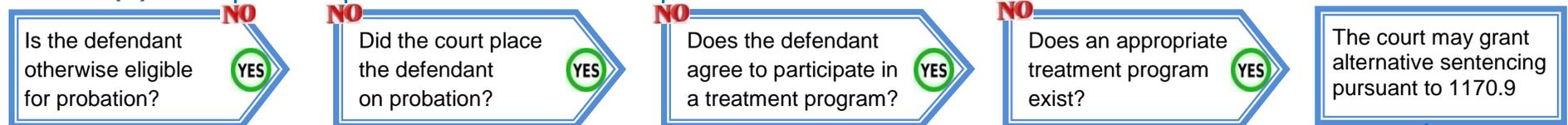
Veteran Justice Outreach Specialists Contacts: <http://www.va.gov/homeless/vjo.asp>

## P.C. 1170.9 DECISION MAP

### Pre-Sentencing 1170.9 (a)



### Sentencing 1170.9 (b)



### Sentencing Considerations

#### 1170.9 (c)

**Referrals to a County Mental Health Authority and Ordering Mental Health Services**

- An order referring defendant to a county mental health agency can only be made if the agency has agreed to accept responsibility for the treatment of the defendant.

#### 1170.9 (d)

**Determining of Needs of Defendant and Decision Whether to Grant Probation**

- Consider defendant's eligibility under 1170.9 (a) in making probation determination and ordering into treatment program.
- Treatment program may be federal or community based. Program must have a demonstrated history of specializing in treatment.

#### 1170.9 (e)

**Credits**

- Defendant earns sentence credits for actual time served in residential treatment.

#### 1170.9 (f)

**Programs**

- Court shall give preference to a treatment program that has a history of successful treatment of veterans. Including but not limited to programs operated by the US Department of Defense or US Veterans Administration.

#### 1170.9 (g)

**Collaboration**

- The court and assigned treatment program may collaborate with the Department of Veterans Affairs and US Veterans Administration to maximize benefits and services provided to the veteran.

## P.C. 1170.9 Post Conviction Relief

### 1170.9 (h)(1)

15+ days notice to

- Prosecution and
- defense and
- victim of offense

YES

NO

**No hearing until proper notice provided.**

Public hearing to determine if ALL of the following applies to the defendant:

- Was granted probation and was a person as described in 1170.9 (a) AND
- Is in substantial compliance with probation conditions AND
- Successful participation in court ordered treatment AND
- Does not represent a danger to health and safety of others AND
- Has significantly benefitted from court ordered treatment to clearly show granting restorative relief is in interest of justice \*

YES

NO

Have all conditions of probation been satisfied? (Including any court ordered restitution payment?)

YES

NO

- Court may consider denying request for relief until restitution is paid;

OR

- Court may consider assigning a civil judgment

YES

NO

**Motion Denied**

### 1170.9 (h)(3)-(4)

Court may do any of the following by written order setting forth reasons for doing so:

- Deem all probation conditions satisfied, including fines, fees, assessments, and programs, and terminate probation prior to expiration of probation. This does not apply to court ordered victim restitution.

AND/OR

- Reduce an eligible felony to a misdemeanor

AND/OR

- Grant relief in accordance with 1203.4

AND

- Order sealing of arrest and court records

#### \*Possible considerations (per 1170.9 (h)(2))

- Completion and degree of participation in court ordered treatment
- Progress in formal education
- Development of career potential
- Leadership and personal responsibility efforts
- Contribution of service in support of the community
- If criteria being considered is obtained from a probation report, consider the age of the info. Request updated report if needed.