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OPINION	:	No. 79-521
of	:	September 26, 1979
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SUBJECT: COMMUNITY RELEASE BOARD'S CALCULATION OF TERMS—In cases where the abstract of judgment fails to reflect the degree of an attempted crime, the Community Release Board must compute the base term in the manner described within.

The Community Release Board has asked for an opinion on the following: question: In calculating terms pursuant to Penal Code section 1170.2, what term should the Community Release Board use as the base term for an attempt to commit a crime which is divided into degrees when the abstract of judgment does not indicate the degree?

CONCLUSION

In calculating terms pursuant to Penal Code section 1170.2, the Community Release Board should determine the base term for an attempt to commit a crime which is divided into degrees in cases where the abstract of judgment does not indicate the degree in the following manner:

1. In any case of attempted robbery, the base term would be two years.

2. In the case of attempted murder or attempted burglary, if the jury or the court, in the case of a court trial or a guilty plea, has failed to determine the degree of the crime pursuant to Penal Code section 1157 or 1192, the attempt is deemed to be of the lesser degree and the base term should be fixed accordingly.

3. In the case of attempted murder or attempted burglary where there has been a determination of the greater degree pursuant to Penal Code section 1157 or 1192, but as a result of a clerical error, the abstract fails to reflect the degree, the sentencing court should be requested to amend the abstract to reflect the greater degree, and the base term should be fixed accordingly.

ANALYSIS

The instant inquiry concerns the procedure to be used by the Community Release Board (CRB) in refixing the state prison terms of prisoners convicted for crimes committed under the Indeterminate Sentencing Law (ISL), that is, for crimes committed prior to July 1, 1977, the effective date of the Uniform Determinate Sentencing Act of 1976. (Stats. 1976, ch. 1139; Stats. 1977, ch. 165.) We must first examine the Determinate Sentencing Law (DSL) and the procedure which has been established for refixing ISL terms to conform with DSL terms for similar offenses. The Uniform Determinate Sentencing Act of 1976 repealed California's 60–year-old ISL and replaced it with the DSL. (*See Way v. Superior Court* (1977) 74 Cal. App. 3d 165.) While the ISL placed emphasis on reformation of the offender, the DSL emphasizes imprisonment as punishment for crime. (Pen. Code, § 1170, subd. (a) (1);[1] *Way v. Superior Court, supra*.) "Under the ISL, the actual prison sentences of felons were determined by the Adult Authority from within very wide statutory ranges." (*Way v. Superior Court, supra*, at p. 170.) The DSL, with some exceptions (e.g., life terms), "requires sentencing judges to impose the 'middle' of three statutorily determined lengths of incarceration for each crime, unless there are 'circumstances in aggravation or mitigation,' in which case the longer or shorter period will be imposed. (Pen. Code, § 1170, subd. (b).)" (*Id*.) There are other rules for computation of sentences for cases of consecutive sentences, and for cases in which "enhancements" are imposed as a result of specific findings of weapons' use, prior convictions, infliction of great bodily harm, or excessive property damage or theft. (§ 1170.1.)

The DSL applies only to persons convicted for crimes committed after its effective date, July 1, 1977. Those convicted for crimes committed before that date are sentenced under the ISL. (§ 1170.1.) Because of the wide range between the possible minimum and

[1] All unidentified section references will be to the Penal Code.

maximum length of an ISL term, an ISL prisoner in many cases would have a longer term than a DSL prisoner convicted for the same crime.[2] To achieve uniformity in sentencing, the CRB is directed by section 1170.2 to refix ISL terms to correspond in a general fashion to DSL terms for the same offense.[3]

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[2] For example, the ISL term for second degree burglary was one to fifteen years (see Stats. 1933, ch. 246, § 1), whereas the DSL term is sixteen months, two years, or three years. (See §§ 18, 461.)

[3] Section 1170.2 provides:

"§ 1170.2.

"(a) In the case of any inmate who committed a felony prior to July 1, 1977, who would have been sentenced under Section 1170 if he had committed it after July 1, 1977, the Community Release Board shall determine what the length of time of imprisonment would have been under Section 1170 without consideration of good-time credit *and utilizing the middle term of the offense hearing the longest term of imprisonment of which the prisoner was convicted increased by any enhancements justified by matters found to be true and which were imposed by the court a: the time of sentencing for such felony.* Such matters include: being armed with a deadly or dangerous weapon as specified in Section 211a, 460, 3024, or 12022 prior to July 1,1977, which may result in a one year enhancement pursuant to the provisions of Section 12022; using a firearm as specified in section 12022.5 prior to July 1, 1977, which may result in a two-year enhancement pursuant to the provisions of Section 12022.5; infliction of great bodily injury as specified in Section 213, 264, or 461 prior to July 1,1977, which may result in a three-year enhancement pursuant to the provisions of Section 12022.7; any prior felony conviction as specified in any statute prior to July 1, 1977, which prior felony conviction is the equivalent of a prior prison term as defined in Section 667.5, which may result in the appropriate enhancement pursuant to the provisions of Section 667.5; and any consecutive sentence.

"(b) If the calculation required under subdivision (a) is less than the time to be served prior to a release date set prior to July 1, 1977, or if a release date had not been set, the Community Release Board shall establish the prisoner's parole date, subject to subdivision (d), on the date calculated under subdivision (a) unless at least two of the members of the Community Release Board after reviewing the prisoner's file, determine that due to the number of crimes of which the prisoner was convicted, or due to the number of prior convictions suffered by the prisoner, or due to the fact that the prisoner was armed with a deadly weapon when the crime was committed, or used a deadly weapon during the commission of the crime, or inflicted or attempted to inflict great bodily injury on the victim of the crime, the prisoner should serve a term longer than that calculated in subdivision (a), in which event the prisoner shall be entitled to a hearing before a panel consisting of at least two members of the Community Release Board as provided for in Section 3041.5. The Community Release Board shall notify each prisoner who is scheduled for such a hearing within 90 days of July 1, 1977, or within 90 days of the date the prisoner is received by or returned to the custody of the

Section 1170.2, subdivision (a), in effect, directs the CRB to calculate what sentence an inmate would have received if he had been sentenced under the DSL. The CRB, under subdivision (a), computes the length of the new term by "utilizing the middle term of the offense bearing the longest term of imprisonment [i.e., the 'base term'[4]] . . . increased by

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Department of Corrections, whichever is later. The hearing shall be held before October 1, 1978, or within 120 days of receipt of the prisoner, whichever is later. It is the intent of the Legislature that the hearings provided for in this subdivision shall be accomplished in the most expeditious manner possible. At such hearing the prisoner shall be entitled to be represented by legal counsel, a release date shall be set, and the prisoner shall be informed in writing of the extraordinary factors specifically considered determinative and on what basis the release date has been calculated. In fixing a term under this section the board shall be guided by, but not limited to, the term which reasonably could be imposed on a person who committed a similar offense under similar circumstances on or after July 1, 1977, and further, the board shall be guided by the following finding and declaration hereby made by the Legislature: that the necessity to protect the public from repetition of extraordinary crimes of violence against the person is the paramount consideration.

"(c) Nothing in this section shall be deemed to keep an inmate in the custody of the Department of Corrections for a period of time longer than he would have been kept in its custody under the provisions of law applicable to him prior to July 1, 1977. Nothing in this section shall be deemed to require the release of an inmate sentenced to consecutive sentences under the provisions of law applicable to him prior to July 1, 1977, earlier than if he had been sentenced to concurrent sentences.

"(d) In the case of any prisoner who committed a felony prior to July 1, 1977, who would have been sentenced under Section 1170, if the felony was commuted on or after July 1, 1977, the good behavior and participation provisions of Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall apply from July 1, 1977, and thereafter. "(e) In the case of any inmate who committed a felony prior to July 1, 1977, who would have been sentenced under Section 1168 if the felony was committed on or after July 1, 1977, the Community Release Board shall provide for release from prison as provided for by this code.

"(f) In the case of any inmate who committed a felony prior to July 1, 1977, the length, conditions, revocation, and other incidents of parole shall he the same as if the prisoner had been sentenced for an offense committed on or after July 1, 1977.

"(g) Nothing in this chapter shall affect the eligibility for parole under Article 3 (commencing with Section 3040) of Chapter 8 of Title I of Part 3 of an inmate sentenced pursuant to Section 1168 as operative prior to July 1, 1977, for a period of parole as specified in subdivision (b) of Section 3000.

"(h) In fixing a term under this section, the Community Release Board shall utilize the terms of imprisonment as provided in Chapter 1139 of the Statutes of 1976 and Chapter 165 of the Statutes of 1977." (Emphasis added.)

[4] The term "base term" is used in section 1170.1, subdivision (f).

any enhancements justified by matters found to be true and which were imposed by the court at the time of sentencing . . . ." Subdivision (b) states that if this calculation results in a period of incarceration shorter than that determined under the ISL, the CRB may initiate an "extended term" procedure to determine whether the inmate should serve a term longer than that calculated under subdivision (a). The longer terms must be justified on the basis of certain objective facts such as, the number of crimes of which the prisoner was convicted, the number of prior convictions, the fact that the prisoner was armed or used a deadly weapon, or the fact he inflicted great bodily harm on the victim. The procedural requirements of the hearing are also set forth in the section.

It should be noted that subdivision (h) of section 1170.2 specifies that the CRB in its precomputation process is to utilize the terms specified in Statutes of 1976, chapter 1139 and Statutes of 1977, chapter 165. There have been further amendments to the punishments for certain offenses. (See, e.g., "Murder. Penalty—Initiative Statute" (Prop. 7) passed by popular vote in General Election of Nov. 7,1978, and Stats. 1978, ch. 579.)

We understand the instant inquiry is directed only at the calculation method set forth in section 1170.2, subdivision (a). In cases of convictions of attempts to commit crimes which are divided into degrees, the CRB wants to know how to determine the "middle term" which will be utilized as the base term in the refixing computation required by subdivision (a) in the absence of any specification of the degree of the attempted crime in the abstract of judgment.

Under the ISL, three crimes, murder, robbery and burglary, were divided into degrees. Under the DSL, murder and burglary are still divided into degrees. Murder which is perpetrated by explosives, poison, lying in wait or torture, which is willful, deliberate and premeditated, or which is committed in the perpetration or attempted perpetration of six specified, serious felonies is of the first degree. All other murder is second degree. (§ 189.) Prior to the DSL, robbery was divided into degrees. Former section 211a (added by Stats. 1923, ch. 127, § 1, and amended by Stats. 1961, ch. 1874, § 1) provided:

> "All robbery which is perpetrated by torture or by a person being armed with a dangerous or deadly weapon, and the robbery of any person who is performing his duties as operator of any motor vehicle, streetcar, or trackless trolley used for the transportation of persons for hire, is robbery in the first degree. All other kinds of robbery are of the second degree."

Under the DSL, the crimes of "armed robbery" or "robbery by torture" are no longer designated as first degree. Sections 211 and 213 define robbery. Sections 12022 and 12022.5 enhance its punishment in cases where a weapon is involved, and section 12022.7 enhances its punishment where there has been infliction of great bodily injury on someone

other than a perpetrator. Section 211a now makes robbery of a streetcar or trolley operator a different kind, rather than a different degree, of robbery.

Burglary is divided into first and second degree. Under the DSL, a burglary of an inhabited dwelling at night is of the first degree and all other burglaries are of the second degree. (§ 460.) Under the 151, an "armed" burglary or a burglary involving an assault were also of the first degree. (See former § 460, as amended by Stats. 1923, ch. 362, § 1.)

As already stated, in refixing terms pursuant to section 1170.2, subdivision (a), the CRB is to utilize the terms specified in Statutes of 1976, chapter 1139, and Statutes of 1977, chapter 165. Section 213, as amended by those statutes, specifically provides any attempted robbery is punishable by imprisonment in state prison for sixteen months, two years or three years. (See also § 18.) Thus, the question of whether under the ISI the crime of attempted robbery was divisible by degree is of no direct concern, since pursuant to section 1170.2, the refixed base term for any attempted robbery would be two years.

However, there is no specific provision of law stating the punishment for attempted murder or attempted burglary. Instead, section 664 provides:

> "Every person who attempts to commit any crime but fails, or is prevented or intercepted in the perpetration thereof, is punishable, where no provision is made by law for the punishment of such attempts, as follows:
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> 1. If the offense so attempted is punishable by imprisonment in the state prison, the person guilty of such attempt is punishable by imprisonment in the state prison for one-half the term of imprisonment prescribed upon a conviction of the offense so attempted; provided, however, that if the crime attempted is one in which the maximum sentence is life imprisonment or death the person guilty of such attempt shall be punishable by imprisonment in the state prison for a term of five, seven, or nine years.
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> "2. If the offense so attempted is punishable by imprisonment in a county jail, the person guilty of such attempt is punishable by imprisonment in a county jail for a term not exceeding one-half the term of imprisonment prescribed upon a conviction of the offense so attempted.
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> "3. If the offense so attempted is punishable by a fine, the offender convicted of such attempt is punishable by a fine nor exceeding one-half the largest fine which may be imposed upon a conviction of the offense so attempted.

"4. If a crime is divided into degrees, an attempt to commit the crime may be of any such degree, and the punishment for such an attempt shall be determined as provided by this section."

As can be seen, subsection 4 of that section clearly provides that an attempt to commit a crime may be divided into degrees. However, this reference to a crime divided into degrees was added by Statutes of 1978, chapter 1166, sections 2, 9 (see also Stats. 1978, ch. 579), effective January 1, 1979. (See former § 664, enacted 1872, amended by Stats. 1923, ch. 295, § 1; Stats. 1931, ch. 481, § 1; Stats. 1953, ch. 713, § 1; Stats. 1976, ch. 1139, § 265; Stats. 1977, ch. 165, § 12.) Former section 664, as amended by Statutes of 1976, chapter 1139, section 265 (which amended version is to be utilized for purposes of computation of terms pursuant to § 1170.2, subd. (a)), provided:

"Every person who attempts to commit any crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable, where no provision is made by law for the punishment of such attempts as follows:

"1. If the offense so attempted is punishable by imprisonment in the state prison, or by imprisonment in a county jail, the person guilty of such attempt is punishable by imprisonment in the state prison, or in a county jail, as the case may be, for a term not exceeding one-half the term of imprisonment prescribed upon a conviction of the offense so attempted; provided, however, that if the crime attempted is one in which the maximum sentence is life imprisonment or death the person guilty of such attempt shall be punishable by imprisonment in the state prison for a term of five, six or seven years.

"2. If the offense so attempted is punishable by a fine, the offender convicted of such attempt is punishable by a fine not exceeding one-half the largest fine which may be imposed upon a conviction of the offense so attempted."

Statutes of 1978, chapter 1166 also amended sections 1157, 1097, 1192.1, 1192.2 and 1260 by adding references to attempts to commit crimes. Two of these sections are pertinent to the instant discussion. Section 1157 provides:

"Whenever a defendant is convicted of a crime or attempt to commit a crime which is distinguished into degrees, the jury, or the court if a jury trial is waived, must find the degree of the crime or *attempted* crime of which he is guilty. Upon the failure of the jury or the court to so determine, the degree of the crime or *attempted crime* of which the defendant is guilty shall

be deemed to be of the lesser degree." (Emphasis added.)

Section 1192 provides:

> "Upon a plea of guilty, or upon conviction by the court without a jury, of a crime or *attempted crime* distinguished or divided into degrees, the court must, before passing sentence, determine the degree. Upon the failure of the court to so determine, the degree of the crime or *attempted crime* of which the defendant is guilty, shall be deemed to be of the lesser degree." (Emphasis added.)

Prior to these recent amendments, these two sections only referred to crimes divided into degrees, not attempts to commit crimes divided into degrees. (See *People v. Dixon* (1979) 24 Cal. 3d 43.) However, an attempt to commit a crime is itself a crime. (§§ 15, 664; *People v. Cummings* (1956) 141 Cal. App. 2d 193, 198 (disapproved on other grounds in *People v. Perez* (1965) 62 Cal. 2d 769, 776 fn. 2).) Thus, courts have recognized attempts to commit burglary may be of either degree. (See, e.g., *Ex parte Hope* (1881) 59 Cal. 423 (attempted first degree burglary), disapproved on other grounds in *In re Bandmann* (1958) 51 Cal. 2d 388, 392; *People v. Horace* (1958) 157 Cal. App. 2d 395 (attempted second degree burglary).) On the other hand, we have found no cases which have recognized the crime of attempted murder of a particular degree. In fact, we have found cases which have recognized the crime of attempted murder not distinguished by degree. (See, e.g., *Neal v. State of California* (1960) 55 Cal. 2d 11, 21; *People v. Statum* (1963) 222 Cal. App. 2d 274.)

We believe the reason why attempted murder had not been divided by degrees may be explained by a review of the history of section 664. Former section 664, as amended by Statutes of 1923, chapter 295, section 1, and Statutes of 1931, chapter 481, section 1, referred to specific crimes, including attempted murder, robbery and burglary in the first degree and fixed the terms of imprisonment for such crimes at 20 years. Statutes of 1953, chapter 713, section 1 amended section 664 to delete references to attempts to commit specific crimes and substituted language which designated a 20–year prison term for an attempt to commit any offense which carried the death sentence or a maximum life prison sentence.

Because of the direct reference to attempted robbery in the earlier version of section 664, several older cases held the crime of attempted robbery was not divisible by degree. (*In re Huson* (1932) 126 Cal. App. 571; *People v. Lee* (1932) 125 Cal. App. 709; *People v. Arguero* (1931) 113 Cal. App. 424; but see *People v. Dahl* (1930) 107 Cal. App. 302 (attempted robbery in the second degree).) After the 1953 amendment, at least one reported case has recognized the crime of attempted first degree robbery. (*People v. Harrison*

(1970) 5 Cal. App. 3d 602, 610.) While the former status of the crime of attempted robbery need not directly concern us in this opinion for reasons already stated, the rationale of the *Huson*, *Lee* and *Arguero* cases is helpful in understanding why attempted murder apparently has never been designated by degree. The court in *In re Huson, supra*, 126 Cal. App. 573, pointed out:

> "It is unnecessary to fix the degree of the crime of attempted robbery. The penalty for an attempt to commit robbery is the same whether the offense be that of robbery of the first, or the second degree."

Under the ISL, first degree murder carried a death or life prison sentence and second degree murder carried a prison sentence of five years to life. (See former Pen. Code, § 190, amended by Stats. 1957, ch. 1968, § 1; Stats. 1973, ch. 719, § 2; Stats. 1976, ch. 1124, § 1.) Thus, the punishment for attempted murder of any degree pursuant to section 664 was 20 years. Courts therefore had no need to comply with sections 1157 or 1192 since the distinction between the degrees of attempted murder was a distinction without a difference. However, on July 1, 1977, when the DSL took effect, the punishment for second degree murder became five, six or seven years. (Former Pen. Code, § 190 as amended by Stats. 1976, ch. 1139, § 123.) Thus, for persons sentenced under the DSL for attempted murder and for persons whose ISL terms for attempted murder would be refixed pursuant to section 1170.2, the degree of the attempted murder has become significant. Under former section 664 (as amended by Stats. 1976, ch. 1139, § 265) the middle base term for attempted first degree murder was six years and the middle base term for attempted second degree murder was three years.[5]

Nevertheless, sections 1157 and 1192, under the ISL and DSL (even prior to their recent amendment effective January 1, 1979), dictated that in cases of conviction for any "crime" which could be divided into degrees, the failure of the jury or the court, in appropriate cases, to specify the degree would result in the conviction being deemed to be of the lesser degree. We have seen that an attempt to commit a crime is itself a crime. We have also seen that even prior to the recent amendments to sections 664, 1157 and 1192 which added references to attempts, courts have in cases of attempted burglary divided the attempts by degree. It appears the failure of courts in the past to divide attempted murder (or attempted robbery) by degree was a result of the fact that there was no distinction in the punishment based upon the degree of the crime. However, for purposes of section 1170.2, subdivision (a), there is a distinction. We find no reason why sections 1157 and 1192 would not be applicable to cases of attempted murder as well as attempted burglary

[5] Presently section 190 specifies a prison term of 15 years to life for second degree murder. Thus, once again under section 664 there appears to be a distinction without a difference between attempted first degree murder and attempted second degree murder.

even prior to the most recent amendment of those sections. Under these circumstances we conclude that in the absence of an appropriate specification of degree pursuant to section 1157 or 1192, convictions for attempted murder or attempted burglary must be of the lesser degree.

In reaching this conclusion we rely on several points. First, our interpretation of sections 664, 1157 and 1192 is in conformity with the apparent intent of the Legislature. It appears the most recent amendments of these sections by Statutes of 1978, chapter 1166, was intended to clarify what the Legislature assumed to be existing law, rather than to change the law. (*Cf. W. R. Grace & Co. v. Cal. Emp. Com.* (1944) 24 Cal. 2d 720, 729.) The legislative Counsel's Digest for Assembly Bill No. 2355 which became Statutes of 1978, chapter 1166 expressly pointed out that under the law existing prior to these amendments there were degrees of attempted murder and that this bill "would further specify that" an attempt to commit a crime divided into degrees could also be of any degree.[6] Moreover, the interpretation of former sections 1157 and 1192 as being applicable to attempts comports with the rule that when a penal statute is susceptible to more than one reasonable construction, the criminal defendant is ordinarily entitled to the construction most favorable to him. (*People v. Superior Court (Douglass)* (1979) 24 Cal. 3d 428, 435; *Walsh v. Dept. Alcoholic Bev. Control* (1963) 59 Cal. 2d 757, 764; *Daudert v. People* (1979) 94 Cal. App. 3d 580, 587.)

There is another reason which compels us to conclude that in the absence of the appropriate specification of the degree of the attempted crime, it must be deemed to be of the lesser degree. That is the lack of a viable alternative method of determining the degree.

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[6] The Legislative Counsel's Digest stated:

"Under existing law, first degree murder is punishable by death or life imprisonment; second degree murder is punishable by 5, 6, or 7 years in prison; attempted first degree murder is punishable by 5, 6, or 7 years under provisions generally applicable to attempts; attempt to kill, or assault upon, specified executive and judicial officials is specifically made punishable by 3, 4, or 5 years in prison; attempted second degree murder is punishable by one-half the term applicable to completed second degree murder, or 2½, 3, or 3 1/2 years under pro visions generally applicable to attempts; and assault with intent to commit murder is specifically made punishable by 2, 3, or 4 years in prison.

"This would specifically make attempted second-degree murder punishable by 3, 4, or 5 years in prison and would further specify that if any crime is divided into degrees, an attempt to commit the crime may be of any such degree. The bill would make related changes.

"This bill also makes additional changes proposed by SB 709, to be operative only if SB 709 and this bill are both chaptered and become effective on January 1, 1979, and this bill is chaptered after SB 709." (Emphasis added.)

In *People v. Hunt* (1977) 19 Cal. 3d 888, 895, the court, citing *In re Candelario* (1970) 3 Cal. 3d 702, 706 footnote 2, made clear that benefits accrue to the defendant when the trier of fact fails to specify the degree of the crime.'" (Emphasis added in *Hunt*.) In *People v. Beam* on (1973) 8 Cal. 3d 625, 629 footnote 2, the Supreme Court stated:

> "Although the jury found that defendant was armed with a deadly weapon at the time of the commission of the robbery it failed to apply such finding to fix the degree of that crime. (See § 211a.) Section 1157 directs that when a defendant is convicted of a crime which is distinguished into degrees the finder of fact 'must' find the degree of the crime, and in the absence of such a determination the defendant shall be deemed' to be guilty of the lesser degree. We cannot assume, contrary to the clear legislative direction, that because a factual finding was made which would have warranted a determination of first degree robbery, the jury unmistakably intended (see *People v. Flobr* (1939) 30 Cal. App. 2d 576, 581 [86 P.2d 862]) to make that determination when it refrained from expressly fixing the degree. The degree of the crime must, in accordance with the statute, be deemed to be of the second degree."

It appears clear from the Supreme Court's pronouncements in the aforementioned cases that under section 1170.2, subdivision (a), the CRB cannot substitute itself for the finder of fact and determine the degree of an offense based upon matters found in court records, probation reports, police reports, etc. Subdivision (a) itself permits "enhancing" a base term in cases of armed (first degree under the ISL) robbery and burglary, but only if the allegation of "being armed with a deadly or dangerous weapon as specified in section 211a [or] 460 . . . prior to July 1, 1977 . . . was "found to be true and . . . imposed by the court . . . ." (See *In re Carson* (1979) 95 Cal. App. 3d 123, 127; see also *In re Lawler* (1979) 23 Cal. 3d 190.)

Thus, the Legislature has addressed itself in a limited way to the problem of precomputation of ISL sentences for crimes divided into degrees. For purposes of section 1170.2, subdivision (a), the Legislature limited the CRB's role to computing matters found to be true and imposed by the court. We believe that as to attempts to commit crimes divided into degrees, the CRB's role under subdivision (a) is similarly limited. The Legislature has provided in section 1170.2, subdivision (b) a specific procedure to permit, under some circumstances, the CRB to increase sentences which it believes would be unjustly reduced under the computation process of subdivision (a). It appears the Legislature intended that this procedure be the exclusive method by which the CRB could look behind a judgment of conviction under the ISL to determine what would have been the appropriate sentence had the DSL been applicable to the criminal conduct. (*Cf. In re Greenwood* (1978)87 Cal. App. 3d 777; *In re Coronado* (1978) 87 Cal. App. 3d 788.)

To summarize at this point, in cases where the abstract of judgment fails to reflect the degree of an attempted crime because of a failure to designate the degree pursuant to sections 1157 or 1192, the CRB must compute the base term for purposes of section 1170.2, subdivision (a) as follows: In the case of attempted robbery, the base term pursuant to section 213 would be two years. In the case of attempted murder, the base term would be three years—the term for attempted second degree murder under sections 190 and 664 as amended by Statutes of 1976, chapter 1139, sections 133 and 265. In the case of attempted burglary, a felony, the base term would be one year—the term for attempted second degree burglary under sections 461 and 664, as amended by Statutes of 1976, chapter 1139, sections 207 and 265.

There still remains the question of what to do where there has been an appropriate finding of degree pursuant to sections 1157 or 1192, but the abstract fails to reflect the degree. "It is not open to question that a court has inherent power to correct clerical errors in its records so as to make these records reflect the true facts." (*In re Candelario, supra*, 3 Cal. 3d at p. 705.) While clerical error can he corrected by the court on its own motion or upon allocation of the parties, judicial error cannot. (*In re Candelario, supra*.) Clerical error is error made in the recording of the judgment, while judicial error is error made in rendering the judgment, that is, in the exercise of judicial discretion. (*In re Candelario, supra*.) Clerical error may be made by the court as well as the clerk; clerical error is "inadvertently made" while judicial error is "made advertently as the result of the exercise of judgment." (*People v. Schultz* (1965) 238 Cal. App. 2d 804, 808.)

In *People v. Hunt, supra*, 19 Cal. 3d 888, at pp. 894–895, the Supreme Court held that in a case where the jury found robbery to be first degree pursuant to section 1157, the failure of the court to recite the finding of degree at the pronouncement of judgment did not result in the degree being reduced. However, the court noted the abstract of judgment contained the specification of degree and thus it was not presented with the issue of "the propriety of correcting a claimed clerical error in the abstract of judgment." (19 Cal. 3d at p. 896 fn. 5.)

In *People v. Thomas* (1978) 84 Cal. App. 3d 281, the court of appeal was presented with the case of a robbery conviction resulting from a *court trial*. The trial judge failed to set the degree before the passing of sentence. Although the abstract of judgment entered on the date of sentencing reflected the crime to be first degree robbery, it was not until six days later that the trial court by ex parte order "amended" the sentence. The court of appeal distinguished *People v. Hunt, supra*, by pointing out that in this case the trier of fact was the judge and thus his failure to specify the degree of the crime resulted in the crime being deemed to be the lesser degree.

It would appear, on the basis of the aforementioned case authority, that if there has been a specification of the degree of a crime or attempted crime by the finder of fact pursuant to sections 1157 or 1192, then failure to include the degree in the abstract of judgment would likely be a result of clerical error. A clear example of clerical error would be the case in which the jury finds the defendant guilty of attempted murder in the first degree, the court expressly sentences the defendant for attempted murder in the first degree, but the abstract fails to note the degree. However, because the court in *Hunt* did not resolve this particular issue and because we cannot conceive of every possible factual situation in which the court might sentence a defendant in disregard of a finding pursuant to sections 1157 or 1192, we conclude that if the failure to record the degree of the attempted crime in the abstract of judgment is in fact a clerical error and there has been an appropriate determination of the greater degree, then the CRB should notify the court or the prosecutor and request correction of the abstract of judgment and that in such case the base term under section 1170.2, subdivision (a) would be that for the attempted crime of the greater degree.

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