FREQUENT ISSUES IN CRIMINAL APPEALS[1]

By Jonathan Grossman

I. PRESENTENCE CREDITS

A. The History of Penal Code section 4019

1. The 1982 Version

Since 1982, section 4019 had provided that for each six-day period of custody, a defendant awaiting sentencing could earn one day for performing assigned labor and another day for satisfactorily complying with the rules and regulations. (§ 4019, subds. (b) and (c); Stats 1982, ch. 1234, § 7.) Thus, a term of six days would be deemed served for every four days spent in actual custody. (1982 version of former § 4019, subd. (f).)

2. Senate Bill 18, Effective January 25, 2010

Effective January 25, 2010, and in response to California's fiscal crisis, the Legislature amended this long-standing version of section 4019. The January 2010 amendment granted four days of credit for every two days served (in other words, a two-for-two formula) for those defendants who had no current or prior convictions for serious or violent felonies and who were not required to register as sex offenders. (Stats. 2009-2010, 3rd Ex.Sess., ch. 28 (S.B.18XXX), § 50.) Of course, credits for defendants with a current

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[1]I would like to acknowledge that portions of this material was written by Vicki Firstman and Patrick McKenna, who are staff attorneys at the Sixth District Appellate Program.

violent felony conviction continued to be limited to 15 percent under Penal Code section 2933.1.

Senate Bill 18 amended section 4019 to read in relevant part:

> (b) (1) Except as provided in Section 2933.1 and paragraph (2), subject to the provisions of subdivision (d), for each four-day period in which a prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has refused to satisfactorily perform labor as assigned by the sheriff, chief of police, or superintendent of an industrial farm or road camp.
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> (c)(1) Except as provided in Section 2933.1 and paragraph (2), for each four-day period in which a prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has not satisfactorily complied with the reasonable rules and regulations established by the sheriff, chief of police, or superintendent of an industrial farm or road camp.
> . . .
>
> (f) <u>It is the intent of the Legislature that if all days are earned under this section, a term of four days will be deemed to have been served for every two days spent in actual custody</u>, except that a term of six days will be deemed to have been served for every four days spent in actual custody for persons described in paragraph (2) of subdivision (b) or (c).

(Emphasis added.)

3. Senate Bill 76, Effective September 28, 2010

Not all that long after the ink was dry on Senate Bill 18, the Legislature stepped in to change the law yet again. This time, it amended section 4019 to return to the old formula for those defendants who would traditionally serve the sentence in the jail. (Stats. 2010, ch. 426,

§ 2 (SB 76), former § 4019, subds. (b), (c) & (f).)[2] Conversely, for those defendants sentenced to state prison, the Legislature enacted section 2933, subdivision (e)(1) to increase credits even beyond that allowed in Senate Bill 18, and provide one day of credit for each day served. Under this formula, a defendant's actual days of custody credit are simply multiplied by two. One case held that a defendant receives the benefit of section 2933 for a "prison" sentence served at the jail under Penal Code section 1170, subdivision (h). (*People v. Hul* (2013) 213 Cal.App.4th 182, 185-187.)

The newly enacted section 2933, subdivision (e)(1) provided:

> Notwithstanding Section 4019 and subject to the limitations of this subdivision, a prisoner sentenced to the state prison under Section 1170 for whom the sentence is executed shall have one day deducted from his or her period of confinement for every day he or she served in a county jail, city jail, industrial farm, or road camp from the date of arrest until state prison credits pursuant to this article are applicable to the prisoner."

(Stats. 2010, ch. 426, § 1 (SB 76); emphasis added.)

As with Senate Bill 18, section 2933 excluded from the increased credits provision those defendants with a current serious felony conviction, with prior convictions for a serious or violent felony, and defendants required to register as sex offenders. (§ 2933, subd. (e)(3).) Defendants with these disqualifying convictions would instead accrue conduct credit at the old 1982 rate. As with Senate Bill 18, credits for defendants with a current violent felony continued to be governed by Penal Code section 2933.1.

In apparent recognition of ex post facto principles prohibiting a retrospective decrease

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[2] Future references to the September 28, 2010 legislation will either be to "former section 4019," "section 2933," or to "Senate Bill 76."

in credits, Senate Bill 18 expressly limited the reduction of credits for locally sentenced defendants to crimes committed on or after the effective date of the amendment. (Former § 4019, subd. (g) (Senate Bill 76).)

Although the statute does not specifically state, the sentencing court is required to calculated actual and conduct presentence credits for one sentenced to prison under Penal Code section 2933. (*People v. Tinker* (2013) 212 Cal.App.4th 1502, 1508-1509.)

4. Criminal Justice Realignment Act, Effective October 1, 2011

The Legislature returned to the presentence credit arena once again via an amendment which was part of the Criminal Justice Realignment Act and became effective on October 1, 2011. The October 2011 amendment deleted credit conduct restrictions on defendants with current convictions for serious felonies, with prior serious or violent felony convictions, and for defendants required to register as sex offenders. (Stats. 2011, ch. 15, § 482, Stats. 2011-2012, ch. 12, § 35.) The new legislation also repealed section 2933, subdivision (e)(1), the provision restricting credits accrued by defendants sentenced to serve time in local custody. The amended statute now grants four days for every two days served (or two-for-two) and the enhanced credits apply to every defendant with the sole exception being those defendants with current convictions for violent felonies. The credits for these defendants remains subject to the 15% limit set forth in section 2933.1. The current version of section 4019 is expressly prospective, stating that it applies only to crimes that were committed on or after October 1, 2011.

The relevant portions of section 4019 currently provide:

(b) Subject to the provisions of subdivision (d), for each four-day period in which a prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has refused to satisfactorily perform labor as assigned by the sheriff, chief of police, or superintendent of an industrial farm or road camp.

(c) For each four-day period in which a prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has not satisfactorily complied with the reasonable rules and regulations established by the sheriff, chief of police, or superintendent of an industrial farm or road camp.

(d) Nothing in this section shall be construed to require the sheriff, chief of police, or superintendent of an industrial farm or road camp to assign labor to a prisoner if it appears from the record that the prisoner has refused to satisfactorily perform labor as assigned or that the prisoner has not satisfactorily complied with the reasonable rules and regulations of the sheriff, chief of police, or superintendent of any industrial farm or road camp.

(e) No deduction may be made under this section unless the person is committed for a period of four days or longer.

(f) It is the intent of the Legislature that if all days are earned under this section, a term of four days will be deemed to have been served for every two days spent in actual custody.

(g) The changes in this section as enacted by the act that added this subdivision shall apply to prisoners who are confined to a county jail, city jail, industrial farm, or road camp for a crime committed on or after the effective date of that act.

(h) The changes to this section enacted by the act that added this subdivision shall apply prospectively and shall apply to prisoners who are confined to a county jail, city jail, industrial farm, or road camp for a crime committed on or after October 1, 2011. Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law.

(I) This section shall not apply, and no credits may be earned, for periods of flash incarceration imposed pursuant to Section 3000.08 or 3454.

B. Litigation Concerning the Amendments

The California Supreme Court determined that the 2010 version of section 4019 applies prospectively only. (*People v. Brown* (2012) 54 Cal.4th 314, 319-328.) Thus, it applies to the portion of the sentence served after the statute was enacted. "To apply former section 4019 prospectively necessarily means that prisoners whose custody overlapped the statute's operative date (Jan. 25, 2010) earned credit at two different rates." (*Id.* at p. 322.) The court does not have discretion to dismiss under Penal Code section 1385 that the defendant suffered a prior strike for purposes of awarding presentence credits. (*People v. Lara* (2012) 54 Cal.4th 896, 900-907.)

The October 2011 version of section 4019 applies only to crimes committed after October 1, 2011. (*People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 47-56; *People v. Kennedy* (2012) 209 Cal.App.4th 385, 395-400; see *Lara, supra,* 54 Cal.4th at p. 906, fn 9.)

A juvenile offense is not a prior serious or violent felony. (*People v. Pacheco* (2011) 194 Cal.App.4th 343, 346.)

C. Multiple Cases

Generally speaking, a defendant cannot receive presentence credits for more than one case at a time. (Pen. Code, § 2900.5.) For example, a defendant receives no presentence time when there is a hold for another case. (*In re Joyner* (1989) 48 Cal.3d 487, 492.)

There are circumstances when "dual credit" is permitted, but the defendant has the

burden to prove "but for" causation, which is not met simply by demonstrating that the conduct for which he seeks credit was "a" basis for the restraint. The defendant is only entitled to dual credits if he is able to show that he "could have been free during any period of presentence custody but for the same conduct that led to the instant conviction and sentence." (*People v. Bruner* (1995) 9 Cal.4th 1178, 1191.) Nor shall the defendant receive presentence in more than one case when consecutive sentences are imposed. (*People v. Adrian* (1987) 191 Cal.App.3d 868, 876-877.)

If the defendant is given two concurrent sentences *at the same time*, he or she receives dual presentence credits. (*People v. Kunath* (2012) 203 Cal.App.4th 906, 909-911; *People v. Adrian* (1987) 191 Cal.App.3d 868, 875-876.) But if the defendant is serving an adjudicated sentence while waiting to adjudicate another case, he cannot receive presentence credits in the second case, even if he receives a concurrent sentence. (*In re Rojas* (1979) 23 Cal.3d 152, 155-156) On the other hand, when the other case was dismissed or reversed, the presentence credits should be awarded to the remaining case. (*People v. Marquez* (2003) 30 Cal.4th 14, 20-21; *People v. Williams* (1992) 10 Cal.App.4th 827, 832-835; see also *People v. Torres* (2012) 212 Cal.App.4th 440, 444-447 [when in custody on two cases and one case was completely served before sentencing, the remainder of credit goes to the other case].)

The defendant receives presentence credits when there is a hold from a juvenile commitment because a juvenile commitment is not punishment. (*People v. Delgado* (2013) 214 Cal.App.4th 914, 919.)

Although no credit can normally be awarded for case while in custody for parole or probation violation unless they are "attributable to proceedings related to the same conduct" (*Bruner, supra,* 9 Cal.4th at p. 1191), a defendant can receive dual credits if the violation was based on the same conduct as the new case and concurrent terms are imposed (*ibid.*; *People v. Williams* (1992) 10 Cal.App.4th 827, 832-834; but see *People v. Stump* (2009) 173 Cal.App.4th 1264, 1273 [not entitled to dual credit when there was a technical violation of parole].)

II. MANDATORY PENALTY ASSESSMENTS AND FEES

The Legislature has added a host of new penalty assessments which makes it more difficult to determine if the court imposed the correct fine. It is important to calculate the correct penalty assessment in order to determine if there is an issue on appeal or a potential adverse consequence. Penalty assessments are mandatory and can be adjusted by the appellate court if the superior court failed to impose the correct amount. (*People v. Talibdeen* (2002) 27 Cal.4th 1151, 1157; *People v. Taylor* (2004) 118 Cal.App.4th 454, 457.) The penalty assessments described below are added to most fines, but they are not added to victim restitution, restitution fines, court operations fees and court facility fees, or most administrative fees such as probation fees, criminal justice administrative (booking) fees, cite and release fees, collection fees, or attorney fees. (See *People v. McCoy* (2007) 156 Cal.App.4th 1246, 1257; *People v. Allen* (2001) 88 Cal.App.4th 986, 992-993; *People v. Martinez* (1999) 73 Cal.App.4th 265.)

A. Penalty Assessments

1. State and County Penalty Assessments

Since 1995, a state penalty assessment of $10 (Pen. Code, § 1464, subd. (a)) and a county penalty assessment of up to $7 has been added to each fine of $10 or portion thereof (Gov. Code, § 76000, subd. (a)). Thus, penalty assessments of $170 would be added to a $100 fine. Each county transferred part of the county penalty assessment to constructing new courthouses. The amount each county transfers is listed in subdivision (e) of Government Code section 76000.

2. State Surcharge

Effective September 30, 2002, a state surcharge of 20 percent is added as a penalty assessment. (Pen. Code, § 1465.7.) Like most penalty assessments, the surchage is considered to be punishment, and the ex post facto clause prohibits applying the surcharge to crimes committed before September 30, 2002. (*People v. High* (2004) 119 Cal.App.4th 1192, 1197.)

3. County Surcharge

Starting January 1, 2003, a county surcharge of *up to* $5 can be assessed on every $10 of a fine or portion thereof. (Gov. Code, § 70372, subd. (a).) An amendment, effective January 1, 2009, made this amount $5 in all cases. Since the county surcharge is similar to the state surcharge, it is subject to the same ex post facto limitations. (*High, supra*, 119 Cal.App.4th at p. 1199.)

The exact assessment before 2009 depended on the amount set by the county board of supervisors. (Gov. Code, § 70375.) One can refer to page iv the Uniform Bail and

Penalty Schedules for the correct amount of surcharge in each county. (See *McCoy, supra,* 156 Cal.App.4th at pp. 1252-1256.)

4. DNA Tests

On November 3, 2004, the voters approved the practice of DNA testing all people who are arrested. To pay for the tests, a penalty assessment of $1 is added to every $10 of a fine or portion thereof. (Gov. Code, § 76104.6, subd. (a).) Imposition of the DNA penalty assessment to a crime occurring before the statute became effective violates the ex post facto clause. (*People v. Batman* (2008) 159 Cal.App.4th 587, 590-591.)

5. DOJ Forensic Lab Fee

Not to be outdone, the Legislature approved a second DNA testing penalty assessment (or DOJ forensic lab fee) of $1 for every fine of $10 or portion thereof, effective July 12, 2006. (Gov. Code, § 76104.7.) This increased to $3 for every fine of $10 or portion thereof, effective June 10, 2010.

6. Emergency Medical Services Fee

Starting in 2007, a county may impose an "Emergency Medical Services" Fund penalty assessment of $2 for every $10 or portion thereof of a fine. (Gov. Code, § 76000.5.)

7. Special Assessments

Further, Penal Code section 1463.27 was enacted which allows counties to assess an additional $250 for every fine, penalty, or forfeiture imposed for violating Penal Code section 273.5 or 243, subdivision (e)(1).

Starting in 2011, there is a $4 penalty assessment for every conviction for a violation

of the Vehicle Code or a local ordinance adopted pursuant to the Vehicle Code, except for parking offenses. (Gov. Code, § 76000.10, subd. (c)(1).)

B. Mandatory Fees

1. Court Operations Fee

Effective August 13, 2003, a court operations (or court security) fee of $20 was added. (Pen. Code, § 1465.8.) The amount increased to $30 on July 28, 2009. This amount increased to $40 on October 19, 2010. The operations fee is assessed for each conviction. (*People v. Schoeb* (2005) 132 Cal.App.4th 861, 865-866.)

It applies to any case, regardless of when the crime was committed. (*People v. Alford* (2008) 42 Cal.4th 749, 754-755.) But the amount to be paid depends on when the defendant was "convicted" by a plea or verdict, not when sentenced. (See *People v. Davis* (2010) 185 Cal.App.4th 998, 1000-1001.) The amount is not stayed if the punishment for a conviction is stayed under Penal Code section 654. (*People v. Sencion* (2012) 211 Cal.App.4th 480, 483-484.) When one conviction is reversed, the fee is reduced accordingly. (*People v. Villa* (2007) 157 Cal.App.4th 1429, 1435.) It cannot be assessed in juvenile cases. (*Edgar v. Superior Court* (2004) 120 Cal.App.4th 1306, 1309.)

2. Court Facilities Fee

Effective January 1, 2009, a court facilities fee of $30 is added. (Gov. Code, § 70373.) It applies per conviction, not per case. The fee also applies to misdemeanors. A fee of $35 is added for each infraction. It does not matter when the crime was committed. (*People v. Cortez* (2010) 189 Cal.App.4th 1436, 1443-1444.) However, it does matter when

the defendant was convicted by plea or verdict. (*Davis, supra,* 185 Cal.App.4th at pp. 1000-1001.)

3. Other Fees

The trial court may order that a defendant reimburse the county for several probation-related costs. The payment of these costs may not be deemed a condition of probation. (*People v. Hart (*1998) 65 Cal.App.4th 902, 907.) Before these costs are imposed, a defendant must be advised that he has a right to a hearing and a judicial determination on his ability to pay. (Pen. Code, §§ 1203.1, subd. (b), 1203.1b, 1203.1c.)

The court can also assess a "criminal justice administrative or booking fee," also known as a booking fee. (Gov. Code, §§ 29550, 29550.1, 29550.2; *People v. McCullough* (2013) 56 Cal.4th 589.)

The court can assess attorney fees for appointed counsel if the defendant has the ability to pay it. (See *People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1397-1399, disapproved on other grounds in *McCullough, supra,* 56 Cal.4th at p. 599; *People v. Viray* (2005) 134 Cal.App.4th 1186, 1217-1218.) Payment of the fee cannot be a condition of probation. (*In re Allen* (1969) 71 Cal.2d 388, 391-392.)

C. Restitution Fines

Under subdivision (b) of section 1202.4, the court must impose a restitution fine when the defendant is convicted. Starting August 3, 1995, the court must impose a parole violation restitution fine of the same amount when the defendant is sentenced to prison; this fine is stayed unless the defendant violates parole. (Pen. Code, § 1202.45, subd. (a).) Effective

August 16, 2004, the court must also impose a probation revocation restitution fine of the same amount when the defendant is placed on probation, and the fine is stayed unless the defendant violates probation. (Pen. Code, § 1202.44.) Effective January 1, 2013, the court shall impose the same amount when the defendant is placed on postrelease community supervision (local supervision of former prisoners) or mandatory supervision under Penal Code section 1170, subdivision (h), and the fine is stayed unless the defendant violates supervised release. (Pen. Code, § 1202.45, subd. (b).)

The restitution fine must be not less than $200 and not more than $10,000 ($100-$1000 for misdemeanor convictions). The minimum restitution fine increased to $240 (or $120 for misdemeanor convictions) in 2012, $280 (or $140) in 2013, and $300 (or $150) in 2014. The ex post facto clause prohibits imposing the parole revocation and probation revocation restitution fine for a crime committed before the effective date of the statute, regardless of when the revocation occurs. (*People v. Callejas* (2000) 85 Cal.App.4th 667, 678.)

4. Victim Restitution

The defendant may also owe restitution directly to the victim. (Pen. Code, § 1202.4.) The amount of restitution paid to the victim is not offset against the restitution fine. (*People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1535.) Restitution may be imposed as a condition of probation under Penal Code section 1203.1, subdivision (a)(3). As is true of all conditions of probation, the restitution amount must be reasonably related to the crime underlying the conviction, the deterrence of future criminality, or the defendant's rehabilitation. (*People v.*

Carbajal (1995) 10 Cal.4th 1114, 1121.) The trial court has broad discretion in setting the restitution amount when it is imposed as a condition of a defendant's probation.

III. PROBATION

A. Imposition of Sentence Suspended and Execution of Sentence Suspended

When probation is granted, the sentencing court has the option of either imposing a prison term and staying its execution during the term of probation or suspending the imposition of sentence. (§§ 1203, subd. (a); 1203.1, subd. (a).) When the sentencing court suspends imposition of sentence, no formal judgment has been entered and the probationer is simply made subject to the terms and conditions of probation for the probationary term selected by the court. (*People v. Howard* (1997) 16 Cal.4th 1081, 1087.) In such situations, the judgment is only final for the limited purpose of allowing the defendant to appeal. (*Ibid*.) Conversely, where the sentencing court has imposed sentence but suspended its execution, the court actually selects a term of imprisonment (lower, middle, or upper term) but suspends the execution of the sentence for the duration of the term of probation. (See e.g., *People v. Taylor* (2007) 157 Cal.App.4th 433, 437.)

B. The Maximum Probation Period

The maximum probationary term for felonies is set out in section 1203.1, subdivision (a) and, with certain exceptions, provides that the probation term shall not exceed five years or the maximum potential prison term. (§ 1203.1, subd. (a).) For misdemeanors, with certain exceptions, the maximum period is three years or the maximum potential period of incarceration in the county jail. (§ 1203a.) However, the trial court retains jurisdiction to

"at any time during the term of probation to revoke, modify, or change its order of suspension of imposition or execution of sentence." (§ 1203.3, subd. (a); accord 1203.2, subd. (b)(1).) If a willful violation of probation has been alleged and sustained, this power includes extending the probationary period. (§§ 1203.2, subd. (e); 1203.3.)

C. Absolute Ineligibility

Certain crimes, either because of the nature of the offense, circumstances attendant to the crime, or the type and number of the defendant's prior convictions, render a defendant absolutely ineligible for probation. It should be noted that some of these statutes expressly state that the trial court lacks section 1385 discretion to dismiss an allegation, admission or finding of any circumstances triggering the probation bar. If such an express limitation is not spelled out in the statute, however, then dismissal in the interests of justice would generally be available to the trial court as an option. (See, e.g., (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.)

The provisions governing "absolute" probation bars are scattered throughout the Penal Code rather than listed in a single statute. As a result, appellate counsel should look for situations where the sentencing court erroneously found that the defendant was statutorily probation-barred and thus failed to exercise its proper sentencing discretion. (See discussion under Pleading and Proof Requirements regarding absolute ineligibility.)

The following are non-exclusive examples of crimes falling under the absolute probation bar:

(1) a defendant convicted of a current felony who has one or two prior felony

convictions for an offense qualifying as a serious or violent felony. (§§ 667, subd. (c)(2); 1170.12, subd. (a)(2).) The exception would occur where the trial court exercises its discretion to dismiss all strike priors in the interest of justice under section 1385;

(2) any of the one-strike sex offenses punishable under section 667.61 (§ 667.61, subd. (h));

(3) a defendant convicted of a serious or violent felony who was on probation for a felony at the time of the commission of the new offense (§ 1203, subd. (k));

(4) convictions under section 1203.055 for crimes against public transit vehicles or occupants with a prior conviction under the same provision;

(5) numerous offenses listed in section 1203.06, where the defendant personally used a firearm during the commission or attempted commission of the offense;

(6) various sexual offenses listed in section 1203.065, subdivision (a);

(7) convictions for lewd conduct with a child under the age of 14 (§ 288, subd. (a)) and for continuous child molestation under specified circumstances (§ 288.5) (§ 1203.066, subds. (b) & (c));

(8) specified drug offenses listed under section 1203.07;

(9) convictions for specified offenses where great bodily injury was inflicted during the commission of the offense. (§ 1203.075);

(10) convictions for specified offenses where an adult defendant has previously been convicted as an adult of specified offenses twice or more within a 10-year period. (§ 1203.08);

(11) convictions for a straight felony (a non-wobbler offense) when the offense was committed while the defendant was on parole for a serious or violent felony (§ 1203.085);

(12) convictions for a serious or violent felony if the offense was committed while the person was on parole (§ 1203.085);

(13) convictions for certain violent offenses and also for first degree burglary where the victim is 60 years of age or older or is disabled where the defendant inflicts

great bodily injury during the course of the offense. (§ 1203.09, subds. (a) & (b));

(14) convictions for specified offenses involving destructive devices and explosives. (§§ 18710-18780);

(15) convictions for specified drug offenses where the defendant has prior convictions for specified offenses (Health & Saf. Code, § 11370, subd. (a)); and

(16) convictions where an adult defendant furnishes or sells specified controlled substances to a minor or who induces a minor to use such a controlled substance (Health & Saf. Code, § 11370, subd. (b)).

D. Presumptive Ineligibility

There are also enumerated offenses where probation may be granted only if the court finds "unusual circumstances" justifying a probation grant. As with the case of absolute probation bars, statutes identifying offenses with presumptive probation bars are also scattered throughout the Penal Code. Some non-exclusive examples follow:

(1) defendants convicted under section 115 of recording or attempting to record false or forged instruments who also have (a) a prior conviction under the same statute or (b) who has been convicted of more than one violation of section 115 with the intent to defraud and where the loss exceeded $150,000;

(2) Certain arsons committed in an area proclaimed by the Governor as being in a state of insurrection or in a state of emergency (§ 454);

(3) first degree burglary (§ 462, subd. (a));

(4) felony custodial institution burglary (§ 462.5);

(5) numerous offenses listed under section 1203, subdivision (e);

(6) theft of more than $100,000 (§ 1203.045);

(7) conviction under section 653j for soliciting a minor to commit specified

felonies (§ 1203.046);

(8) certain computer-related felonies (§ 1203.047);

(9) computer-related crimes with taking or damage in excess of $100,000 (§ 1203.048);

(10) certain sex offenses committed by threatening to use the authority of a public official to incarcerate, arrest or deport the victim or another (§ 1203.065, subd. ((b)(1));

(11) assault with intent to commit a specified sexual offense (§ 1203.065, subd. (b)(1));

(12) convictions for violations of sections 288 or 288.5 where certain circumstances apply (§ 1203.066, subd. (d));

(14) certain drug offenses specified in section 1203.073, subdivision (b);

(15) convictions for using a location designed to suppress law enforcement entry to sell, manufacture or possess for sale specified controlled substances (§ 1203.074);

(16) convictions for assault with a deadly weapon or instrument, battery with physical injury resulting in medical treatment, carjacking, robbery, or mayhem where the victim is 60 years or older or is disabled (§ 1203.09, subd. (f)); and

(17) escape or attempted escape from county jail and other specified facilities (§ 4532).

E. The Grant or Denial of Probation

1. Within the Discretion of the Sentencing Court: The Decision to Grant or Deny Probation and Appropriate Probation Conditions

The decision whether to grant or deny probation is left to the discretion of the sentencing court. (§ 1203, subd. (b)(3); rules 4.4113(a); 4.433(a)(2).) Case law describes this discretion as broad (*People v. Carbajal, supra,* 10 Cal.4th at p. 1120) and an order denying

probation will not be reversed on appeal absent a clear abuse of discretion. (*People v. Ferguson* (2011) 194 Cal.App.4th 1070, 1091.) On review, the trial court will be presumed to have acted "to achieve legitimate sentencing objectives in the absence of a clear showing the sentencing decision was irrational or arbitrary. . . ." (*Ibid*.) The propriety of an order denying probation will be deemed forfeited on appeal absent an objection in the trial court. (*People v. Scott* (1994) 9 Cal.4th 331, 353.)

As with the decision to grant or deny probation in the first place, the court also has broad discretion to set the conditions of probation (*People v. Birkett* (1999) 21 Cal.4th 226, 235; accord *People v. Carbajal, supra,* 10 Cal.4th at pp. 1120-1121; § 1203.1, subd. (j).) The probation conditions may include the imposition of a term of incarceration in the county jail, generally limited to one year. (§§ 19.2; 1203.1, subd. (j).) An appellate challenge to a condition of probation must also be preserved by objection in the trial court (*People v. Welch* (1993) 5 Cal.4th 228, 237), unless the claim consists of a facial constitutional challenge involving a pure question of law (*In re Sheena K.* (2007) 40 Cal.4th 875, 881-882, 888-889).

2. The Probation Report

A probation report is prepared by a probation officer to assist the judge in making a sentencing decision. There are two types of probation reports – preplea and presentencing. While preplea probation reports are authorized by statute (§ 1203.7), they are rarely used. Much more common is the presentencing probation report, which "shall" be prepared prior to judgment in any case where the defendant is eligible for probation. (§ 1203, subd. (b)(1); rule 4.411.) If a defendant is ineligible for probation, a probation report is discretionary,

though rule 4.411 advises that a court *should* still order such a report. (§ 1203, subd. (g).) Absent a waiver, a presentencing report must be made available at least five days prior to sentencing, or – at the request of the defense attorney or prosecutor – nine days prior to sentencing. (§ 1203, subd. (b)(2)(E).) Pursuant to section 1203, subdivision (b)(3), the trial court must state on the record that it has read and considered the probation report prior to sentencing. (*People v. Simon* (1989) 208 Cal.App.3d 841, 852-853 [failure to make the required statement constituted reversible error].)

While a probation report may rely on hearsay (*People v. Valdivia* (1960) 182 Cal.App.2d 145, 148), "fundamental fairness requires that such reports be founded on accurate and reliable information" (*People v. Chi Ko Wong, supra,* 18 Cal.3d at p. 719). Notably, illegally seized evidence may be considered in the probation report as well. (*People v. Brewster* (1986) 184 Cal.App.3d 921, 928-929.) Facts relating to dismissed counts or cases can be considered, so long as the facts of the dismissed counts are "transactionally related" to the convictions. (*People v. Harvey* (1979) 25 Cal.2d 754, 758.) If a defendant signs a *Harvey* waiver, then even dismissed counts that are not transactionally related can be considered so long as the information provided is reliable. (*People v. Arbuckle* (1978) 22 Cal.2d 749, 754.)

A defendant does have the opportunity to refute the validity and sufficiency of the probation report by presenting witnesses on his own behalf. (*People v. Valdivia, supra*, 182 Cal.App.2d at p. 148; § 1170, subd. (b).) The defendant, however, has no right to cross-examine the probation officer who prepared the report (*People v. Smith* (1985) 38 Cal.3d

945, 960), nor any individual who prepared diagnostic reports pursuant to Penal Code section 1203.03 (*People v. Arbuckle*, *supra*, 22 Cal.2d at p. 754). If a defendant does not object to the contents of the probation report, then the issue is forfeited on appeal. (*People v. Santana* (1982) 134 Cal.App.3d 773, 785.)

Generally, in appellate cases considering the inclusion of inappropriate information in the probation report, prejudice may only be shown on appeal when the court explicitly states on the record that it is relying on the inappropriate information in making a sentencing decision. (See, e.g., *People v. Wagoner* (1979) 89 Cal.App.3d 605, 616 [no information in the record that court's sentencing decision would have been different absent the consideration of inappropriate information included in the probation report].)

If a defendant is eligible for probation, the trial court must order a supplemental probation report for sentencing proceedings that occur "a significant period of time" after the original report was prepared. (Rule 4.411(c).) This most frequently occurs when a case is remanded for resentencing. (See, e.g., *People v. Rojas*, *supra*, 57 Cal.2d 676.) Even if a defendant is ineligible for probation, if sentencing occurs a significant period of time after the original probation report was issued, then a supplemental report should be prepared. (Rule 4.411(b).)

3. Pleading and Proof Requirements

While challenging the denial of probation may be difficult on appeal, appellate counsel may have more success in challenging the denial if the prosecution was required – and did not – plead and prove the factors making the defendant absolutely or presumptively

ineligible for probation.

If appellate counsel receives a case in which a defendant has been deemed absolutely ineligible for probation, counsel should review the statute that the trial court relied on in coming to this determination. Some probation ineligibility statutes contain explicit pleading and proof requirements, and therefore counsel should ensure that the prosecution followed these requirements.

As a general rule, when a prior conviction results in the absolute ineligibility of probation, the prior conviction must be both pled and proven. (*People v. Lo Cicero* (1969) 71 Cal.2d 1186, 1191.) Additionally, some statutes that absolutely bar the imposition of probation and contain explicit pleading and proof requirements. (See, e.g., §§ 667, subd. (c)(4), 667.61, subd. (h), 1170.12, subd. (a)(4), 1203.044, subd. (b), 1203.06, subds. (a)(1), (a)(2), & (a)(3), 1203.066, subd. (a), 1203.07, subd. (a), 1203.075, 1203.08, 1203.085, 1203.09; Health & Saf. Code, § 11370, subds. (a), (b), & (c).)

Other statutes, however, do not contain express pleading and proof requirements. (See, e.g., §§ 1203, subd. (k)**,** 1203.055, subd. (c), 1203.065, subd. (a), 18780.) Without a statutory requirement. the pleading and proof of a probation ineligibility statute is not generally deemed mandatory, unless the statute contains an express pleading and proof requirement. (*People v. Dorsch* (1992) 3 Cal.App.4th 1346, 1350-1351.) Additionally, because presumptive ineligibility does not constitute an increased penalty (*In re Varnell* (2003) 30 Cal.4th 1132, 1140-1141), a due process argument is meritless.

A defendant is presumptively ineligible if he commits an offense specified in:

sections 115, subdivision (c); 454, subdivision (c); 462, subdivision (a); 462.5, subdivision (a); 1203, subdivision (e); 1203.045, subdivision (a); 1203.046, subdivision (a); 1203.048, subdivision (a); 1203.049, subdivision (a); 1203.065, subdivision (b); 1203.073, subdivisions (b)(1)-(b)(8); 1203.074, subdivision (a); 1203.09, subdivision (f); and 4532, subdivision (d)(1).

For statutes that direct that certain offenses make the defendant presumptively ineligible, only sections 1203.045, 1203.048, and 1203.049 specifically require pleading and proof.

4. Probation Conditions

Probation conditions are the frequent source of appellate challenges and victories. A condition is generally valid if it is reasonably related to the crime underlying the conviction, the deterrence of future criminality, or the defendant's rehabilitation. (*People v. Carbajal*, *supra*, 10 Cal.4th at p. 1121.) Most frequently, challenges to conditions are made on the basis that a condition is unconstitutionally vague and overbroad. In such cases, the failure to object does not forfeit the issue on appeal. (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 878.)

Appellate counsel should specifically be on the look-out for probation conditions that do not contain a knowledge requirement. For example, a condition stating that a probationer may not associate with anyone "disapproved of by probation" was modified on appeal to require that the probationer *know* that probation disapproved of the individual. (*In re Sheena K, supra*, 40 Cal.4th at p. 878.)

The Third District has deemed all probation conditions to require knowledge, at least

for cases within that judicial district. (*People v. Patel* (2011) 196 Cal.App.4th 956, 960.) So far, no other appellate court has followed *Patel*. (See *People v. Pirali* (2013) 217 Cal.App.4th 1341, 1350-1351; *People v. Moses* (2011) 199 Cal.App.4th 374, 381.) The supreme court has granted review in a civil commitment case on the question of whether a district court of appeal has authority to declare a rule of procedure for the trial courts within its district. (*People v. Tran* (2013) 216 Cal.App.4th 102, review granted Aug. 14, 2013, S211329.)

F. Violation, Revocation and Reinstatement

1. Initiation of the Revocation Process

As noted above, a trial court has authority to modify, revoke or terminate probation at any time during the probationary period. (§§ 1203.2, subd. (b)(1); 1203.3, subd. (a).) Probation may also be modified or terminated, if the defendant deceived the court at the time probation was granted. (*In re Bine* (1957) 47 Cal.2d 814, 817.)

The revocation process is generally divided into two components: the summary revocation and a subsequent formal revocation hearing where a final decision is made whether to reinstate, permanently revoke or terminate probation.

Under section 1203.2, subdivision (a), the court has authority to summarily revoke a defendant's probation "if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation or parole officer or otherwise that the person has violated any of the conditions of his or her [probation], has become abandoned to improper associates or a vicious life, or has subsequently committed other offenses,

regardless whether he or she has been prosecuted for such offenses." (§ 1203.2, subd. (a).)

The revocation procedure may be commenced at any time during the probationary period either by the court on its own motion, or a motion of the probationer, the probation officer, or the district attorney. (§ 1203.2, subd. (b).)

A summary revocation can be ordered without formal hearing and is a legal mechanism by which the running of the probationary period is tolled. (*People v. Leiva* (2013) 56 Cal.4th 498, 504-505; § 1203.2, subd. (a).) Summary revocation also vests the court with "jurisdiction over and physical custody of the defendant and is proper if the defendant is accorded a subsequent formal hearing in conformance with due process. . . ." (*Id.* at p. 505.)

As noted above, the defendant may also petition the court for a revocation of his own probation. (§§ 1203.2, subd. (b); 1203.2a.) This can be helpful to a defendant who has been released on probation but subsequently committed to state prison for another offense. In such cases, if the defendant makes a request that he be sentenced on the case for which he was granted probation either through counsel or by himself in writing, if certain statutory procedures are followed, the court is required to either sentence the defendant or make a final order terminating its jurisdiction over the case. (§ 1203.2a.) Where a proper request has been made, the trial court has a limited time to act or face the loss of jurisdiction. (§ 1203.2a; *In re Hoddinott* (1996) 12 Cal.4th 992.)

A decision revoking probation is reviewed under the substantial evidence standard. (see *People v. Superior Court* (*Jones*) (1998) 18 Cal.4th 667, 681) and great deference is

given to the trial court's decision. (*People v. Pinon* (1973) 35 Cal.App.3d 120, 123.) The discretion of the court to revoke probation is "analogous to its power to grant probation, and the court's discretion will not be disturbed in the absence of a showing of abusive or arbitrary action. [Citation.]" (*People v. Urke* (2011) 197 Cal.App.4th 766, 773.)

2. Summary Revocation and Tolling

The Supreme Court construed the tolling provision of section 1203.2, subdivision (a) and held that the statute "preserves the trial court's authority to adjudicate, in a subsequent formal probation violation hearing, whether the probationer violated probation *during, but not after*, the court-imposed probationary period." (*People v. Leiva*, *supra*, 56Cal.4th at p. 502, emphasis added.)

On the other hand, the Supreme Court also held that in a formal violation hearing held after probation normally would have expired, if the prosecutor "is able to prove that the defendant violated probation before the expiration of the probationary period, a new term of probation may be imposed by virtue of section 1203.2, subdivision (e) and section 1203.3." (*People v. Leiva*, *supra*, 56 Cal.4th at p. 516.)

3. Formal Revocation Hearing

a. Defendant stipulates to violation

A formal revocation hearing might not be necessary if a defendant waives his rights and stipulates to the alleged violation. As is true of a guilty plea, the probationer personally holds the right to admit a probation violation. (*People v. Robles* (2007) 147 Cal.App.4th 1286, 1290.) The probationer must be advised of his rights, and his waiver must be knowing

and intelligent. Notably, however, the due process advisals are not nearly as stringent as those required in taking a standard criminal guilty plea. (See, e.g., *People v. Garcia* (1977) 67 Cal.App.3d 134, 136.)

b. Timeliness, notice and due process requirements

While there are no time limits in which a probation revocation hearing must be held, it should be done as "promptly as convenient after arrest while information is fresh and sources are available." (See *Morrissey v. Brewer* (1972) 408 U.S. 471, 485 [parole revocation case, the reasoning of which has been applied to probation revocation cases].) A probationer's due process rights are implicated by an alleged revocation of probation, and he must be given written notice of the hearing and the alleged violation of probation; additionally, the probationer has the right to disclosure of evidence against him, the right to respond to the charges, the right to cross-examine witnesses against him, and the right to a statement of reasons by the fact-finder if a violation is found true. (*Gagnon v. Scarpelli* (1973) 411 U.S. 778, 786; *Black v. Romano* (1972) 471 U.S. 606, 610; *People v. Tanner* (2005) 129 Cal.App.3d 223, 234.) Pursuant to section 1203.2, subdivision (b), a party alleging a revocation must ensure that the other parties to the proceeding – including the probation department, the prosecutor, the defendant, and the court – receive the notice.

The probationer should have sufficient time to investigate the validity of the allegations. (*People v. Mosley* (1988) 198 Cal.App.3d 1167, 1174.) If the alleged violation is based on a new criminal case, the notice of revocation should specify the violation. (*In re Moss* (1985) 175 Cal.App.3d 913, 929.) A revocation hearing may occur simultaneously

with the preliminary hearing on the new charge, though the defendant should be notified of this. (*Ibid*.)

c. Nature of proceeding: burden of proof and evidentiary concerns

A defendant does not have the right to a jury trial, but only a hearing before a judge. (§ 1203.2, subd. (b).) The prosecution need not prove the violation by proof beyond a reasonable doubt, but only by a preponderance of the evidence. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 441.) On appeal, the appellate court will only determine whether the finding was supported by substantial evidence. The prosecution must prove that a violation of probation is willful, or else it has not met its burden. (*People v. Galvan* (2007) 155 Cal.App.4th 978, 983.)

At a hearing on a probation violation, several different evidentiary rules are notable:

(1) Hearsay evidence is ordinarily not admissible, unless good cause exists for its admission (*People v. Shepherd* (2007) 151 Cal.App.4th 1193, 1202 [good cause exists if declarant unavailable or declarant's presence at hearing would require great difficulty or pose risk of harm]);

(2) Reliable documentary evidence not supported by live testimony is generally admissible (*People v. Maki* (1985) 39 Cal.3d 707, 716), though various courts have come to differing interpretations of this rule (see, e.g., *People v. Brown* (1989) 215 Cal.App.3d 452, 454; *People v. O'Connell* (2003) 107 Cal.App.4th 1062, 1065-1067; *People v. Abrams* (2007) 158 Cal.App.4th 396, 398);

(3) If there was an illegal search or seizure under the Fourth Amendment, the exclusionary rule does not apply to probation revocation hearings unless the discovery of the evidence resulted from egregious police misconduct (*People v. Washington* (1987) 192 Cal.App.3d 1120, 1128);

(4) Section 1111, requiring that testimony of accomplices be corroborated, has no application in revocation proceedings (*People v. McGavock* (1999) 69

Cal.App.4th 332, 339-340)

Further, an acquittal on a criminal charge that also serves as the basis for the probation violation does not bar revocation on the same facts. (*In re Coughlin* (1976) 16 Cal.3d 52, 56.) A conviction on the charge can serve as the basis for the revocation without relitigating the facts, though the defendant must be given the opportunity to provide contradictory evidence. (*People v. Sturgeon* (1975) 53 Cal.App.3d 711, 713.) A defendant's testimony at a revocation hearing cannot later be used in the prosecution's case-in-chief at a related criminal trial, though it can be used to impeach the defendant, should he testify at the trial. (*People v. Weaver* (1985) 39 Cal.3d 654, 660.)

4. Sentencing

If a court revokes probation, the nature of the sentence will depend on whether the imposition of sentence had been previously suspended (ISS), or whether execution of the sentence had been suspended (ESS). (*People v. Howard, supra,* 16 Cal.4th at p. 1092.) When a defendant has been on ISS probation, the revocation judge may choose to sentence the defendant to the low-, mid-, or upper-term based on circumstances that existed at the time probation was originally granted. (Rule 4.435.) If a court previously reinstated probation, and later revoked it, at least one appellate court has ruled that the trial court can then consider events between the initial grant of probation and the reinstatement. (*People v. Harris* (1990) 226 Cal.App.3d 141, 145.) Additionally, events occurring after the original grant of probation may be considered in determining whether to reinstate a defendant on probation or whether to impose a state prison or county jail term. (*People v. White* (1982) 133

Cal.App.3d 677, 680-682.) The trial court must provide reasons on the record for choosing imprisonment as opposed to probation, and for choosing a particular term of imprisonment. (*People v. Cotton* (1991) 230 Cal.App.3d 1072, 1080-1081.)

If a defendant has previously been on ESS probation, the exact sentence previously suspended must be imposed if a defendant is not reinstated on probation. (Rule 4.435(b)(2); *People v. Howard, supra,* 16 Cal.4th at p. 1092.) Under section 1170, subdivision (d), however, a court may recall a sentence within 120 days of its execution. (*Ibid*.) A court may also reinstate a defendant on probation, as opposed to imposing a prison or county jail term. (*People v. Medina* (2001) 89 Cal.App.4th 318, 322-323.)

It should be noted that the passage of the Realignment Act has created an interesting issue regarding the *Howard* rule. Pursuant to the Act, many offenses are now punishable only by incarceration in the county jail. Pursuant to section 1170, subdivision (h)(6), the Act applies "to *any* person sentenced on or after October 1, 2011." (Emphasis added.) Thus, the question arises as to whether a court imposing an ESS sentence must send the defendant to county jail pursuant to the Act rather than to prison as the sentence originally dictated. At present, the cases are in conflict. (Compare *People v. Gipson* (2013) 213 Cal.App.4th 1523 [prison sentence required] with *People v. Clytus* (2012) 209 Cal.App.4th 1001 [county jail sentence required].) The supreme court granted review to resolve this question. (*People v. Scott* (2013) 216 Cal.App.4th 848, review granted 24, 2013, S211670.)

G. Modification and Extension of Probation

1. Modifications

A court may modify probation at any time before the probationary term expires. (§§ 1203.1-1203.3.) A probationer has fewer due process rights when probation is modified than when probation is revoked. (*People v. Minor* (2010) 189 Cal.App.4th 1, 6.) A probationer is entitled only to notice of the intended modification and an opportunity to be heard. (*Ibid.*) Pursuant to section 1203.3, subdivision (b)(1), a defendant is entitled to two days notice on a request to modify or extend probation.

Trial courts have the authority to modify the terms of probation or extend it up to the maximum term so long as a change in circumstances is shown; no violation of probation must be alleged or proven. (*People v. Cookson* (1991) 54 Cal.3d 1091, 1095; see also *In re Clark* (1959) 51 Cal.2d 838, 840 ["[a]n order modifying the terms of probation based upon the same facts as the original order granting probation is in excess of the jurisdiction of the court"].) A trial court must provide reasons on the record justifying the modification. (§ 1203.3, subd. (b)(1)(A).) Section 1203.3 provides for several limitations about how a court may modify the terms and conditions of probation. There are two different types of extensions – extensions of probation up to the maximum term, and extensions of probation past the maximum term. Only the former is governed by the traditional rules regarding probation modifications.

2. Extensions Up to the Maximum Term

Probation can only be extended up to the maximum term if the court finds a change in circumstances justifying the extension. (*People v. Cookson, supra*, 54 Cal.3d at p. 1095.) In effect, extensions up to the maximum term must generally comport with the rules and

requirements of modifications of probation more generally.

Concerns regarding restitution frequently serve as the bases for these extensions. In *Cookson,* for example, the California Supreme Court discussed when the failure to pay off the restitution amount can constitute a change in circumstances that warrants an extension up to the maximum term. (*People v. Cookson, supra,* 54 Cal.3d at p. 1097.) In *Cookson*, the defendant was originally granted a three year term of probation, but because the court found a change in circumstances, it extended the defendant's term to five years, the statutory maximum. (*Id*. at p. 1094.) Ultimately, the *Cookson* court held that the failure to pay off the restitution amount in the original term of probation – even if it was not done willfully – can warrant an extension up to the maximum term. (*Id*. at pp. 1098-1100; see also *People v. Medeiros* (1994) 25 Cal.App.4th 1260, 1264.)

3. Extensions Past the Maximum Term

a. Introduction

As the court noted in *People v. Medeiros*, *supra*, 25 Cal.App.4th 1260, section 1203.2, subdivision (e) provides the sole basis for extending probation beyond the maximum term. (*Id*. at p. 1267.) According to this provision, probation may be extended if a defendant's probation is revoked prior to the expiration of the probationary period; then, "[i]f an order setting aside the judgment, the revocation of probation, or both is made *after the expiration of the probationary period*, the court may again place the person on probation for that period and with those terms and conditions as it could have done immediately following conviction." (§ 1203.2, subd. (e), emphasis added.) Unlike an extension up to the maximum

term, an extension beyond the maximum term must be premised on a prior probation violation that resulted in revocation. (*Medeiros,* at pp. 1266-1268.)

b. Is extension past the maximum term still authorized?

Due to the passage of the tolling provision in section 1203.2, subdivision (a)[3], the extension procedure provided in section 1203.2, subdivision (e) may only now have a vestigial effect. As noted by one appellate court: "because probation revocation serves to toll the running of the probationary period if the defendant is found to have violated probation, an order setting aside the revocation of probation following a probation violation will never be made after the expiration of the probationary period." (*People v. Jackson* (2005) 134 Cal.App.4th 929, 936.) Though the *Jackson* court noted the conflict between the two provisions, no appellate court has yet to specifically reconcile them.

The meanings and intents of these two provisions, however, indicate that the extension procedure provided by section 1203.2, subdivision (e) may no longer have any effect, and therefore a court has no jurisdiction to extend probation past the maximum term. As has been widely acknowledged, section 1203.2, subdivision (e) was enacted in response to *People v. Brown* (1952) 111 Cal.App.2d 406, in which the defendant's probation was revoked prior to the expiration of the probationary term. (*Id.* at p. 408.) The defendant was not arrested, however, until after the probationary period had expired; the trial court's only option under the statutes existing at the time was to impose judgment. (*Ibid*.) The extension procedure

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[3] The tolling provision reads: "The revocation, summary or otherwise, shall serve to toll the running of the period of supervision." (§ 1203.2, subd. (a).)

enacted in section 1203.2, subdivision (e) was designed to remedy the problem presented to the *Brown* court by providing courts with the option of reimposing probation as opposed to ordering a state prison sentence. (See, e.g., *People v. Jackson, supra*, 134 Cal.App.4th at p. 937; *People v. Medeiros, supra*, 25 Cal.App.4th at p. 1265.)

The Legislature knew of the extension remedy at the time the tolling provision was enacted since this remedy already existed. The mandatory language included in the tolling provision, in effect, indicates that this provision was intended to supercede any then-existing conflicting statutory provisions. (See *People v. Moody* (2002) 96 Cal.App.4th 987, 993 [express language of later-enacted statute prevails over general language of previously-enacted statute].) No such mandatory language is contained in the extension provision in section 1203.2, subdivision (e) because this provision was intended only as an option for trial courts and not as a mandatory directive. (See, e.g., *People v. Medeiros, supra*, 25 Cal.App.4th at p. 1265.) Thus, in harmonizing these statutes, the effect of the tolling provision should be followed in order for the extension procedure outlined in subdivision (e) to be utilized. (*People v. Moody, supra,* 96 Cal.App.4th at p. 993, citing *Collection Bureau of San Jose v. Rumsey* (2000) 24 Cal.4th 301, 310 ["If conflicting statutes cannot be reconciled, later enactments supercede earlier ones"].) If such an interpretation of these statutes is followed, then there simply may not be any mechanism to extend the probationary period beyond the maximum term.

Dicta in *People v. Leiva, supra,* 56 Cal.4th 498 seems to state an entirely new probationary term can be imposed in cases where a formal revocation occurs, as it did in

Leiva, after the original probation term has expired. (*Id.* at p. 516 & fn. 6.) Further, the meaning of that provision is rather ambiguous – does the statutory language mean that a completely new term may be granted, or does it mean that the extension can only be up to the maximum term that could have originally been granted? The broader policy concerns underlining the *Leiva* decision do seem, however, to support an argument that an individual cannot be perpetually placed on probation, no matter whether that be done through the tolling provision or extension procedure.

Finally, it should be noted that an individual does not have to be on probation in order to pay restitution. The Penal Code explicitly provides that the restitution amount "may be enforced in the same manner as a judgment in a civil action, if any balance remains unpaid at the end of the defendant's probationary period." (§ 1203, subd. (j).)

IV. CALCULATING THE SENTENCE

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

Yet "a defense attorney who fails to adequately understand the applicable sentencing alternatives, promote the proper application, or pursue the most advantageous disposition for his client may be found incompetent." (*People v. Scott* (1994) 9 Cal.4th 331, 351.) A defendant must make a specific objection to the court's exercise of discretion in sentencing. (*Id.* at pp. 353-354.)

A. Determinate Sentencing Law (DSL)

Step 1: Choose the principal term. The principal term is longest term under the DSL scheme. It is includes a base term and specific enhancements. (§ 1170.1, subd. (a), sen. 2.)

Most crimes carry a base term that includes a lower term, a middle term, and an upper term. Previously, the middle term was presumed to be the sentence, and a court could not impose the upper term unless it found aggravating factors outweighed mitigating factors. (Former § 1170, subd. (b).) The United States Supreme Court held that the finding of aggravating factors, other than prior convictions, must be found by a jury, not a judge. (*Cunningham v. California* (2007) 549 U.S. 270, 288-293.) The state's response was to amend section 1170, subdivision (b) to permit any term the court felt appropriate. The state supreme court held this permitted sentencing or resentencing without the restrictions from *Cunningham*. (*People v. Sandoval* (2007) 41 Cal.4th 825, 843-852.)

A specific enhancement is a conduct enhancement that is specific to the crime (not the person), such as weapons use, infliction of great bodily injury, etc. (Rule 4.405(3); see § 1170.11.) Generally, there is no limit on enhancements to the principal term, but there can be only one weapons enhancement and only one GBI enhancement for any charge.

(§§ 1170.1, subds. (f) & (g), 12022.53, subd. (f).)

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

Usually the court has the discretion to run terms concurrently or consecutively (§ 669, subd. (a)), and if the court does not specify, then the term is presumed to be concurrent (*id.*, subd. (b)). Exceptions: The punishment for escape must be served consecutively (§§ 1370.5, 4530, 4532). When an OR/bail enhancement is imposed, the two cases must be served consecutively (§ 12022.1, subd. (e)). In a strikes case, the punishment for a conviction not arising from the same occasion or set of operative facts must be served consecutively (§§ 667, subd. (c)(6), 1170.12, subd. (a)(6)). With certain sex offenses involving separate victims or separate occasions, the punishment must be served consecutively (§ 667.6, subd. (d)).

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

For subordinate terms, one-third the enhancement may be added. (§ 1170.1, subd.

(a), sen. 3.) Full enhancements may be added to each kidnapping conviction (§ 1170.1, subd. (b)) and for certain sex offenses (§ 1170.1, subd. (h)). A full weapons and GBI enhancement may be added for violations of sections 136.1, 137, and 653f. (§ 1170.15.)

Step 3: Calculate the aggregate term by adding the principal term with the subordinate terms and any general enhancements (or status enhancements, usually priors) and any OR/bail enhancement. (§ 1170.1, subd. (a), sen. 1.)

The same conviction cannot be used as both a prison prior and a serious felony prior (Proposition 8 prior) (*People v. Jones* (1994) 5 Cal.4th 1142, 1152) or a violent felony prior (§ 667.5, subd. (b)), but if the defendant was convicted and sentenced to prison on both serious (or violent) and non-serious (or non-violent) felonies, the prison prior may be imposed. (*People v. Brandon* (1995) 32 Cal.App.4th 1033, 1054.) Otherwise, there is generally not a limitation for using the same prior conviction for multiple general enhancements. (*People v. Coronado* (1995) 12 Cal.4th 145, 157-158 .)

Step 4: Calculate the penalty for escape and consecutive sentences for crimes committed in prison separately and add it to the total sentence. (§ 1170.1, subd. (c).) Calculate the penalty for specified sex offenses separately, as it may be added to the total DSL sentence. (§ 667.6, subds. (c) & (d).) Add the determinate sentence to all other sentences under other schemes. (§ 669, subd. (a); rule 4.451(a).)

B. Realignment Act

A defendant, sentenced on or after October 1, 2011 for certain felony convictions when probation is denied, can serve the sentence in the jail. (Pen. Code, § 1170, subd. (h).)

If the sentence occurred before October 1, 2011, but the conviction was not "final" until afterwards, the defendant does not receive the benefit of the Act. (*People v. Cruz* (2012) 207 Cal.App.4th 664, 672-679.) A defendant cannot serve the sentence in jail if he or she is also serving a concurrent prison sentence. (*People v. Torres* (2013) 213 Cal.App.4th 1151, 1156-1161.)

C. Certain Sex Offenses

For sex offenses listed in section 667.6, the court may impose a concurrent sentence or run a full lower/middle/upper term consecutive along with full terms for conduct enhancements. (§§ 667.6, subd. (c); 1170.1, subd. (h).) A consecutive sentence is mandatory if it involves separate victims or separate occasions. (§ 667.6, subd. (d); rule 4.426.)

D. Indeterminate Sentence (ISL)

An indeterminate sentence is any sentence in which the court imposes life in prison. (§ 1168, subd. (b); *People v. Felix* (2000) 22 Cal.4th 651.) A term of 25 years to life enhancement under Penal Code section 12022.53, subdivision (d) is an indeterminate sentence. (*People v. Sanders* (2010) 182 Cal.App.4th 1626.) Unless required otherwise, ISL's may be run concurrently to each other and concurrently to DSL.

1. Third Strikes Cases (§§ 667, subds. (b)-(i), 1170.12)

A conviction for a serious or violent felony is a strike. (§ 667, subd. (d)(1).) A juvenile adjudication for an offense listed in Welfare and Institutions Code section 707, subdivision (b) is a strike so long as the minor was at least 16 years old when he committed

the offense and there was a serious or violent felony in the petition found true. (*Id.*, subd. (d)(3); *People v. Garcia* (1999) 21 Cal.4th 1.) Even a prior conviction that has been stayed under section 654 is a strike, but enhancing a sentence because of it might constitute cruel and unusual punishment. (See *People v. Benson* (1998) 18 Cal.4th 24, 36, fn. 8; but see *People v. Scott* (2009) 179 Cal.App.4th 920, 926-931 [though court may stay the punishment, it is not required to].)

a. Second strike sentence

A defendant with a prior strike conviction receives a second strike sentence, even if the current offense is not a serious or violent felony. (§ 667, subd. (c)(1).) If one would have been sentenced under DSL, double the principal and subordinate terms. Do not double the time for specific or general enhancements. (*People v. Nguyen* (1999) 21 Cal.4th 197; *People v. Martin* (1995) 32 Cal.App.4th 656.) For ISL, the minimum statutory time it would take the defendant to become eligible for parole is doubled. (*People v. Jefferson* (1999) 21 Cal.4th 86.) Beware that the punishment for convictions not arising from the same occasion or set of operative facts must run consecutively. (§ 667, subd. (c)(6); *People v. Lawrence* (2000) 24 Cal.4th 219; *People v. Deloza* (1998) 18 Cal.4th 585.) The defendant must do 80% of the prison sentence before he or she is eligible for parole. (§ 667, subd. (c)(5).) However, he or she can earn 6 days credit for every four days in jail before sentencing. (See *People v. Philpot* (2004) 122 Cal.App.4th 893, 908.)

b. Sentencing with two prior strikes

Originally, if a defendant was convicted of any felony offense with two prior strikes,

he or she was required to serve a sentence of at least 25 years to life. This is called a third strike case. Now, with Proposition 36, a third strike sentence occurs only if the current offense is a serious or violent felony, a violation of section 261.5, subdivision (d) or 262 or Health and Safety Code section 11370.1 or 11379.8, an offense requiring sex registration under section 290 (unless it is a violation of section 266, 285, 286, subdivision (b)(1) or (e), 288A, subd. (b)(1) or (e), 314, or 311.11), or if the defendant used or was armed with a weapon or firearm or intended to cause great bodily injury. A third strike sentence is imposed for *any* felony if the defendant suffered a prior conviction for prior a violation of section 187 through 191.5, 245, subdivision (d)(3), 286, subdivision (c)(1), 288, subdivision (a) or (b), 288A, subdivision (c)(1), 289, subdivision (j), 653f, or an offense with a life term, or an offense listed in Welfare and Institutions Code section 6600. Otherwise, the defendant receives a second strike sentence. (§ 667, subd. (e)(2)(C); 1170.12, subd. (c)(2)(C).) Defendants who have already received a third strike sentence but would have qualified for a second strike sentence can petition the court within two years for resentencing. (§ 1170.126.) However, the court retains discretion to reimpose a third strike sentence. (§ 1170.126, subd. (f).)

With a third strike sentence, usually, the defendant is simply sentenced to 25 years to life consecutive to any enhancements. (§ 667, subd. (e)(2)(A)(ii).) General enhancements are added to each indeterminate term. (*People v. Williams* (2004) 34 Cal.4th 397, 403-405.) If it would be longer, the minimum indeterminate term would be triple the time for the convictions, though not the enhancements. (*Id.*, subd. (c)(2)(A)(i).) Thus, someone who

received the middle term for violating Penal Code section 288.5 (12 years) would serve 36 years to life plus any enhancements. If it would be longest, take the time one would serve under DSL, turn it into an indeterminate term, and add (again) the enhancements. (*Id.*, subd. (c)(2)(A)(iii).) For example, if the defendant who received the middle term for violating section 288.5 had five prior serious felonies brought and tried separately (five 5 year priors), the defendant would receive under DSL term 37 (=12+25) years. Under the three strikes law, the defendant would receive a sentence of 37 years to life consecutive to 25 years for the enhancements. (*People v. Dotson* (1997) 16 Cal.4th 547, 559.) Again, under ISL, the period the defendant would wait to be statutorily eligible for parole would be tripled. Also stay aware of Three Strike's rules on when a conviction must be imposed consecutively. (§ 667, subd. (c)(6) & (e)(2)(B).) A defendant does not receive prison conduct credits for a third strike sentence (*In re Cervera* (2001) 24 Cal.4th 1073, 1080) but does receive presentence conduct credits (*People v. Philpot* (2004) 122 Cal.App.4th 893, 908).

2. Other Indeterminate Sentences

a. Habitual Sex Offenders (§ 667.71)

b. Habitual Child Molesters (former § 667.72)

c. repeat molesters (§ 667.51, subd. (d))

d. forcible sex with a minor (§§ 269, 288, subd, (i), 288.7)

e. Habitual Criminal Offenders inflicting GBI or force likely to cause GBI (§ 667.7)

f. Habitual Drug Offender (§ 677.75)

g. various normal crimes (see, e.g., §§ 187, 205, 206, 209, 209.5, 236.1, subd. (c)(2), 273ab, 451.5, 4500, 11418.)

h. One Strike sex cases (§ 667.61)