APPEALS FROM ORDERS AFTER JUDGMENT

By: Patrick McKenna

APPEALS FROM ORDERS AFTER JUDGMENT

by Patrick McKenna (Staff Attorney, Sixth District Appellate Program)

A. Introduction.

There is no constitutional right to appeal from an order or judgment in criminal cases; instead, the right is statutory. (*People v. Mazurette* (2011) 24 Cal.4th 789, 792.) In California, criminal defendants' appellate rights predominantly stem from Penal Code section 1237,[1] which provides:

> An appeal may be taken by the defendant from both of the following:
>
> (a) Except as provided in Sections 1237.1, 1237.2, and 1237.5, from a final judgment of conviction. A sentence, an order granting probation, or the commitment of a defendant for insanity, the indeterminate commitment of a defendant as a mentally disordered sex offender, or the commitment of a defendant for controlled substance addiction shall be deemed to be a final judgment within the meaning of this section. Upon appeal from a final judgment the court may review any order denying a motion for a new trial.
>
> (b) From any order made after judgment, affecting the substantial rights of the party.

(§ 1237.) Most of the appeals that we handle are authorized by subdivision (a), typically following the imposition of sentence after a jury trial or guilty plea. But, as subdivision (b) makes clear, these are not the only types of appeals that can result from a criminal proceeding. This article will focus on those appeals – that is, those following orders after judgment that affect a defendant's substantial rights.

---

[1]Unless otherwise specified, all future statutory references are to the Penal Code.

Rare is the case where counsel will be placed in a position to argue whether a particular order affects his or her client's "substantial rights." As background, however, such a determination does not turn on whether a party's claim is meritorious (see *Teal v. Superior Court* (2014) 60 Cal.4th 595, 600 [eligibility determination for section 1170.126 petition is appealable]), or even whether the appeal is initiated by the non-moving party (*People v. Loper* (2015) 60 Cal.4th 1155, 1162-1163 [denial of compassionate release motion appealable when motion was properly initiated by prison authorities). Instead, the analysis depends "on the nature of the claim and the court's ruling thereto." (*Teal, supra*, 60 Cal.4th at p. 600, citations omitted.)[2]

The focus of this article is on those post-judgment orders that are most frequently litigated on appeal and, accordingly, whose appealability is not in question.[3] Due to the

---

[2]Just because a defendant has the right to appeal from a specific post-judgment order does not necessarily mean that, if appellate counsel files a "no issue brief," he or she is entitled to have the appellate court independently review the record. (*People v. Serrano* (2012) 211 Cal.App.4th 496, 502-504.) In these circumstances – when the appeal is not the first as of right – the client may still file a supplemental brief on his or her behalf, though no independent review will occur. (*Id.* at p. 503.) If counsel files a "no issue brief" and the court issues an order stating that the procedures outlined in *Serrano* are applicable to the case, a prompt objection should be filed if counsel believes that independent review of the record is required under *People v. Wende* (1975) 25 Cal.3d 436. In the objection, counsel should explain why *Wende* is applicable.

[3]I should note one caveat: the article will *not* discuss appeals dealing with the Three Strikes Reform Act (hereinafter referred to as "Prop. 36") and the Safe Neighborhoods and School Act (hereinafter referred to as "Prop. 47"). Other than some pending cases in the California Supreme Court, Prop. 36 litigation has substantially declined in the last year. My colleague Bill Robinson comprehensively covered this litigation at our 2014 seminar. Similarly, Prop. 47 litigation has also begun to decline, and Stephanie Clarke ably discussed it at FDAP's recent seminar. The respective handouts can be found on SDAP's and FDAP's

disparate nature of the various post-judgment orders, there will be few overarching themes applicable to all appeals falling under section 1237, subdivision (b). Instead, this article's aim is to provide guidance regarding each specific topic area.

B. Appeals Arising From Sections 1237.1 and 1237.2.

1. Relevant Statutory Provisions.

Certain post-judgment orders may deal with issues that could have been raised at a defendant's initial sentencing hearing but were not. Appeals arising under sections 1237.1 and 1237.2 serve as illustrative examples.

Section 1237.1 deals with the calculation of presentence credits and was recently amended, effective January 1, 2016. Under the present version of this statute, counsel cannot challenge presentence credits on appeal unless the claim was presented at the time of sentencing, "or if the error is not discovered until after sentencing, the defendant first makes a motion for correction of the record in the trial court, which may be made informally in writing. The trial court retains jurisdiction after a notice of appeal has been filed to correct any error in the calculation of presentence custody credits upon the defendant's request for correction." (§ 1237.1.)

Section 1237.2, effective January 1, 2016, provides a comparable provision for "the imposition or calculation of fines, penalty assessments, surcharges, fees, or costs." (§ 1237.2.) Unlike section 1237.1, this statute includes the express caveat that it "only applies

---

websites.

in cases where the erroneous imposition or calculation of fines, penalty assessments, surcharges, fees, or costs is the sole issue on appeal." (§ 1237.2.) Accordingly, if a challenge to fines or fees is not the only issue presented on appeal, counsel should feel free to raise this issue as part of the opening brief without first seeking correction by the trial court. If the only potential appellate issue relates to fines or fees, then counsel *must* first raise it in the trial court. Nonetheless, nothing in section 1237.2 prohibits counsel from first seeking correction of fines or fees with the trial court, even if there are non-fines/fees issues also being raised on appeal. (§ 1237.2 ["The trial court retains jurisdiction after a notice of appeal has been filed to correct any error in the imposition or calculation of fines, penalty assessments, surcharges, fees, or costs upon the defendant's request for correction"].)

While section 1237.1 does not contain the same express limitation included in section 1237.2, the former version of section 1237.1 similarly contained no such provision and was interpreted as applying only to cases where a credits issue was the sole claim raised on appeal. (*People v. Acosta* (1996) 48 Cal.App.4th 411, 420.) Moreover, the former version of section 1237.1 was limited only to credits issues that were ministerial or clerical in nature – for example, a claim that the trial court improperly counted the days a defendant was in custody, as opposed to a claim that the court applied the wrong version of section 4019 in determining them. (*People v. Delgado* (2012) 210 Cal.App.4th 761, 766 [considering claim that the trial court applied the wrong version of a credits statute – even when the issue was not raised below and was the sole issue presented on appeal].) Conversely, former section 1237.1 did not prohibit a defendant from first raising a credits issue with the trial court

before later challenging it on appeal; the 2016 amendment to section 1237.1 further clarifies this point. (§ 1237.1 ["The trial court retains jurisdiction after a notice of appeal has been filed to correct any error in the calculation of presentence custody credits upon the defendant's request for correction"].)

Nothing in the amended version of section 1237.1 seems to warrant departure from the analysis regarding the original statute. Indeed, the Legislature is presumed to know of existing judicial decisions and to enact and amend statutes in light of them. (*Estate of Banergee* (1978) 19 Cal.3d 527, 537.) Accordingly, the Legislature's failure to include the express limitation provided in section 1237.2 can be inferred as showing its knowledge that such a limitation was already implied by the statute. Nonetheless, appellate counsel should be aware that no appellate court has had the opportunity to consider the amended statute's language.

Regardless of the issues being raised on appeal, challenging a credits or fines/fees issue in the trial court may be the best approach in many cases, allowing for a more expeditious resolution of the issue. If the request is denied, then the issue can still be raised on appeal. In this circumstance, a timely notice of appeal should be filed, and, if a current appeal is pending, appellate counsel should move to consolidate the latter appeal with the initial appeal or, alternatively, request that the court consider the appeals together.

2. Selected Credits Issues.

Calculating credits is unlikely to be any appellate advocate's favorite task.[4] In many respects, it is remarkably tedious. Nonetheless, as relevant to potential litigation under section 1237.1, a few selected credits issues are highlighted here.[5]

Most criminal defendants are entitled to credits for actual time spent in custody prior to sentencing (see § 2900.5, subd. (a) [hereinafter referred to as "actual credits"]) as well as worktime and good behavior credits (see §§ 4019, 2933.1, 2933.2, 2933.5 [hereinafter referred to as "conduct credits"]).

The calculation of actual credits is more straightforward than the calculation of conduct credits. Most commonly, this involves calculating the number of days that a client has been in custody – usually county jail – leading up to the sentencing hearing; the probation report – as confirmed by the minute order and transcript from the sentencing hearing – is typically the most useful tool in doing this. It is not at all uncommon for the trial court to be off by a few days in its calculations; in such circumstances, counsel should attempt to correct this with the trial court pursuant to section 1237.1. Indeed, such an error would be exactly the type of ministerial error discussed by *Delgado, supra*, 210 Cal.App.4th at p. 766.

---

[4] I doubt I am the only attorney who has told people that my lack of talent in math and science was the reason I went to law school.

[5] For a lengthier discussion of possible credits issues, I encourage counsel to review "Presentence Custody Credits: A Step-by-Step Guide," available on CCAP's website.

While the calculation of actual credits is usually straightforward, there are a few potential complications worth mentioning here. First, if a client pleads guilty or no contest (or admits an alleged violation of probation), he or she may have waived all or a portion of his or her presentence credits as part of the plea agreement. (See *People v. Johnson* (2002) 28 Cal.4th 1050, 1054-1055.) Appellate counsel should review the scope of any waiver to ensure that it was properly applied in a given case. Second, while most of our clients will earn their presentence credits by time spent in county jail, section 2900.5, subdivision (a) does not restrict the accrual of presentence credits to this particular custodial context, also allowing for credits to be earned for time spent in a "camp, work furlough facility, halfway house, rehabilitation facility, hospital, prison, juvenile detention facility, []similar residential institution," or for home detention imposed pursuant to sections 1203.016 or 1203.018. (§ 2900.5, subd. (a).)[6] Accordingly, if appellate counsel's client did not spend time prior to sentencing in county jail, he or she should review whether the nature of the presentencing program entitles the client to actual credits – and conduct credits under section 4019 – and whether the trial court made the proper determination in this regard. Third, excess credits can reduce a client's fines. Effective January 1, 2016, each day of excess credit can reduce applicable fines at a minimum rate of $125 per day; previously, the minimum rate was $30 per day. (§ 2900.5, subd. (a).) Thus, in a case where the client accrued excess credits, appellate counsel should ensure that trial counsel properly brought a motion to reduce the

[6] Counsel should review the version of section 2900.5 in effect at the time the alleged offense occurred. At different points in time, time spent in different types of custodial

client's fines; if this was not done, appellate counsel should seek correction with the trial or appellate court.

Some of these principles were at play in *People v. Morris* (2015) 242 Cal.App.4th 94, a case handled by my colleague Bill Robinson. In *Morris*, the defendant was originally sentenced to a four year state prison sentence before having his conviction reduced to a misdemeanor under Prop. 47. (*Id.* at p. 97.) At the time he was resentenced, the defendant had accrued several hundred additional days of credits, exceeding the sentence imposed for the newly reclassified misdemeanor conviction. (*Id.* at p. 101.) Counsel argued that pursuant to the version of section 2900.5 in effect at the time the offense was committed in January 2013, the excess credits could be applied to the defendant's restitution fine. (*Id.* at pp. 101-102.) After the commission of defendant's crime, section 2900.5 had been amended to prohibit excess credits from being credited off that particular fine. (*Ibid.*) The Sixth District agreed with the defendant's argument, allowing for the elimination of the defendant's restitution fine, specifically relying on the ex post facto clause in reaching this conclusion. (*Id.* at pp. 102-103.) Accordingly, even though the calculation of actual credits is usually straightforward, new issues can continually arise, particularly now with the passage of Prop. 47. Careful review by appellate counsel is imperative.

The calculation of conduct credits can be complicated and depends on the nature of the offense, the date it was committed, and the defendant's presentence custodial setting. Needless to say, an entire seminar topic could be spent going through the applicable rules

---

settings was – and was not – eligible under section 2900.5.

and exceptions; for more detail, I encourage counsel to reference the article listed in footnote 5. In short, counsel should ensure that the right version of the conduct credits statute was applied to a particular client.

3. Selected Fines and Fees Issues.

When I first began working as an appellate attorney, I despised reviewing a client's fines and fees. The quagmire of relevant statutes was overwhelming and, as with calculating credits, it required utilizing math skills that I had purposefully ignored since high school. After reviewing hundreds of transcripts in staff cases, assist cases, and those sent to me for *Wende* reviews, I've finally developed some comfort with them.

If I accomplish nothing else, I want to encourage counsel to thoroughly review every fine and fee imposed on their clients. The reality is that trial courts mess these up all the time. And while some errors may only benefit the client by $10 or $20, other errors can be hugely significant. For example, one client of mine had $5,610 in excess fines and fees reversed when the trial court imposed various fines and fees twice (*People v. Rios* (2013) 222 Cal.App.4th 542, 575-577); a second client had a restitution fine lowered from $12,320 to $8,800 when the court exceeded the statutory maximum and counsel failed to object to the fine's calculation on ex post facto grounds (*People v. Martinez* (2014) 226 Cal.App.4th 1169, 1188-1190). Conversely, when you have weak issues on appeal, but the trial court negligently failed to impose mandatory fines and fees, it may be in the client's best interest to abandon. Simply put, these things can matter a lot to our indigent clientele.

Here, I briefly highlight a few different issues that routinely come up in cases. As noted above, these can first be raised with the trial court pursuant to section 1237.2 before being challenged on appeal as an order after judgment. Regardless of whether a particular fine or fee is discussed here, counsel should always refer back to the statutory language in determining whether a particular fine or fee is authorized. Moreover, CCAP has a terrific Fines and Fees Chart on their website that can serve as a great starting point for your research.

A few years back, there was a lot of litigation regarding the booking fees imposed pursuant to Government Code sections 29550, 29550.1, and 29550.2. The statute that sets forth the fee applicable to a particular client depends on the arresting agency. The relevant statute can affect the amount imposed and whether a client's ability to pay can be considered before imposing it. Much of the prior litigation on this issue largely dealt with whether a defendant who had not objected to a booking fee imposed pursuant to Government Code section 29550.2 on ability to pay grounds could subsequently challenge it on appeal; in *People v. McCullough* (2013) 56 Cal.4th 589, this issue was decided adversely to our clients – an objection below is required. While litigation of booking fees has subsequently declined, in a recent unpublished decision (*People v. Santiago* (H042067)), the Sixth District reversed a booking fee imposed pursuant to Government Code section 29550; the trial court set the fee in the amount of $259.50 – the standard amount imposed in Santa Clara County cases – but the appellate court found that there was no evidence that this had any relation to the actual amount of the booking costs, as required by the statute.

In almost all cases, a restitution fine will be imposed pursuant to section 1202.4, as well as either a corresponding probation revocation fine (§ 1202.44) or parole revocation fine (§ 1202.45). As effective January 1, 2014, if a defendant is convicted of a felony, the amount should be between $300 and $10,000; the proscribed statutory minimum was $200 prior to December 31, 2011, $240 from January 1, 2012 to December 31, 2012, and $280 from January 1, 2013 to December 31, 2013. Commonly, the amount imposed will be based on the formula provided in section 1202.4, subdivision (b)(2), which calls for taking the statutory minimum and multiplying it by the number of years of the defendant's sentence and the number of convictions he or she sustained. Appellate counsel should check the year in which the crime was committed and determine whether the record indicates the court's desire to impose the statutory minimum or otherwise utilize the formula proscribed in the statute. If such a desire is indicated – and the trial court exceeds the statutory minimum by setting it based on the statute's current language as opposed to the version applicable when the crime was committed – then counsel may want to bring an ex post facto claim, which, even absent an objection below, can be raised via an ineffective assistance of counsel claim. (*Martinez*, *supra,* 226 Cal.App.4th at pp. 1188-1190.)

In many drug cases, there are often problems with the lab and drug program fees imposed pursuant to Health and Safety Code section 11372.5 and 11372.7. The former fee is imposed in the amount of $50 per conviction for any of the offenses specified in the statute. The latter fee is imposed in the amount of $150 per conviction for a broader array of specified offenses. Both of these fees are subject to penalty assessments, which presently

increase the fee 310% from the base amount. (See, e.g., *People v. Hamed* (2013) 221 Cal.App.4th 928, 935.) Often, the trial court may forget to impose one or both of these fees as relating to certain eligible convictions; while there is some case law indicating that the failure to impose a drug program fee constitutes an implied finding of an inability to pay, the failure to impose the former fee – with associated penalty assessments – constitutes an unauthorized sentence. (See *People v. Staley* (2992) 10 Cal.App.4th 782, 785 [absent evidence to the contrary, determination of ability to pay drug program fee implicit in court's order].) Counsel should review the date of the offense to determine the amount of the relevant penalty assessments.[7]

As noted above, there are many other possible issues relating to fines and fees. Counsel should be sure to review the relevant statutory language as to each fine and fee imposed by the trial court.[8]

C. Restitution Orders.

At the time a defendant is sentenced, the trial court may delay the determination of the restitution owed to the alleged victim. In such a circumstance, a timely notice of appeal

---

[7] My colleague Jonathan Grossman has drafted a helpful article with more information on penalty assessments. It is available on our website.

[8] Absent the limitations in sections 1237.1 and 1237.2, a court has jurisdiction to correct many errors relating to credits and fines or fees, to the extent the error constitutes an unauthorized sentence. Even beyond this context, counsel should ensure that the term imposed by the trial court was authorized since such errors can be corrected at any time. (*In re Birdwell* (1996) 50 Cal.App.4th 926, 931.) If the error hurt the client, it can be raised on appeal. If the error helped the client, this constitutes an adverse consequence, and the client should be advised accordingly.

should still be filed from the sentencing hearing, with a subsequent notice of appeal filed after an adverse restitution finding.

A victim has a statutory and state constitutional right to restitution. (Cal. Const. Art. I, § 28, subd. (b); see also § 1202.4, subd. (a)(1) [restitution right in criminal proceedings]; Welf. & Inst. Code, § 730.6 [restitution right in juvenile delinquency proceedings].) The restitution amount cannot be less than the full amount of the losses sustained by the victim. (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1225.) Only compelling and extraordinary reasons – which do *not* include a defendant's inability to pay – can warrant a court's decision not to impose restitution. (*People v. Ortiz* (1997) 53 Cal.App.4th 791, 799-800.)

On appeal, a restitution order is reviewed for an abuse of discretion. (*People v. Fortune* (2005) 129 Cal.App.4th 790, 794.) Generally speaking, a restitution order will be upheld when there is a factual and legal basis for the award. (*People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1542.)

Many possible appellate issues can stem from a restitution order. Here, several considerations are discussed.

First, counsel should determine whether payment of restitution was ordered as a condition of the client's probation. If so, pursuant to section 1203.1, subdivision (a)(3), the trial court has broad discretion in crafting a restitution order that fosters the client's rehabilitation while also promoting public safety. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) In such circumstances, the restitution ordered need not directly stem from the client's underlying conviction, though it still must be reasonably related to the crime or the

defendant's future criminality. (*Id.* at p. 1124; see also *In re I.M.* (2005) 125 Cal.App.4th 1195, 1208-1211.) In contrast, when a defendant's restitution is not ordered as a condition of probation, it is generally limited to losses directly caused by the defendant's criminal conduct (*People v. Lai* (2006) 138 Cal.App.4th 1227, 1248), and absent a *Harvey*[9] waiver, cannot be imposed in relation to counts for which the defendant was acquitted (*People v. Beck* (1993) 17 Cal.App.4th 209, 215). In light of these principles, appellate counsel will face a much greater burden in reversing a restitution order imposed as a condition of probation.

Section 1202.4 does not limit restitution to the person against whom the crime was committed. Those closely related to the victim who suffered an economic loss due to the crime are also entitled to restitution. (*People v. O'Neal* (2004) 122 Cal.App.4th 817, 820 [brother of child molest victim entitled to restitution for counseling services].) Moreover, a victim need not be a human being in order to be the subject of a restitution order. (*People v. Bartell* (2009) 170 Cal.App.4th 1258, 1262 [Wells Fargo Bank was victim of forgery and therefore was an appropriate subject of a restitution award].) Agencies carrying out their pre-assigned tasks that result from a crime are not victims entitled to restitution. (*People v. Torres* (1997) 59 Cal.App.4th 1, 4 [law enforcement cannot recoup investigation costs as part of restitution order].)

As for the types of losses that can be the subject of a restitution order, section 1202.4, subdivision (f) provides a lengthy and non-exclusive list; simply put, any loss reasonably

---

[9] *People v. Harvey* (1979) 25 Cal.3d 754, 758.

extending from the criminal conduct can be an appropriate subject for a restitution order. (See, e.g., *People v. Keichler* (2005) 129 Cal.App.4th 1039, 1046-1047.) In determining the amount of the incurred loss, a court need not use an exact method of calculation, but only a rational one. (*Carbajal, supra*, 10 Cal.4th at p. 1121.) For example, the value of stolen or damaged property is generally governed by the cost of replacing or repairing the property. (*People v. Foster* (1993) 14 Cal.App.4th 939, 946.) A victim's estimate regarding the loss serves as prima facie proof supporting the restitution amount; the burden then shifts to the defense to prove the value is incorrect. (*Gemelli, supra*, 161 Cal.App.4th at pp. 1543-1544.)

The prosecution must provide proof that the defendant is responsible for the losses underlying the order. In *People v. Scroggins* (1987) 191 Cal.App.3d 502, the appellate court reversed a restitution order premised on property taken during three burglaries in the defendant's apartment complex; while the defendant had pled guilty to receiving stolen property from another apartment, there was no proof that he was responsible for the losses stemming from the three other burglaries, and restitution premised on those losses was therefore inappropriate. (*Id.* at pp. 504-505.) In *People v. Holmberg* (2011) 195 Cal.App.4th 1310, the Sixth District reversed a restitution order for the loss of two Ethernet cables. The loss of the cables allegedly occurred as a result of a financial burglary; in reversing the award for the cables, the appellate court rejected the prosecution's argument that "though the police did not recover the cables, they did recover other stolen computer-related equipment from defendant's home," and accordingly, that it was "reasonable to believe that the person who stole the other equipment and brought it to the defendant's home

also brought the cables." (*Id.* at p. 1325.) Such an assumption did not constitute sufficient evidence, and the award was reversed. (*Id.* at pp. 1324-1325.)

The aforementioned principles provide a general scope of the relevant law governing restitution orders. Appellate counsel should carefully review the subjects of a restitution order, ensuring that the prosecution provided sufficient proof that the order was premised on losses incurred as part of the defendant's criminal conduct and that the trial court employed a rational method in calculating the amount.

D. Selected Issues Relating to Probationary Grants.

In 2013, Vicki Firstman and I spoke at the SDAP seminar about potential appellate issues stemming from probationary grants. While this was largely prompted by the deluge of appeals we were seeing from Santa Clara County regarding the seemingly never-ending extensions of probationary terms, our talk – and its associated article – went much broader than that. Since that time, much of the relevant law has not substantially changed, and I urge appellate counsel to review the article located on SDAP's website.

Nonetheless, I write here about one specific topic that has begun to be litigated with increasing frequency: the ability of trial courts to restrict a probationer from using medical marijuana as a condition of probation. Most commonly, litigation over this issue arises from a defendant's request to modify the terms of his or her probation. As with probation modifications initiated by the prosecution or probation department, a modification can only occur if a change in circumstances has been shown. (See *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 denial of a request to modify probation is reviewed for an abuse of discretion. (*People v. Moret* (2009) 180 Cal.App.4th 839, 844 (lead opn. of Haerle, J.).)

Typically, the issue of whether a change in circumstances has been shown is not outcome determinative on appeal; assuming that the defendant only requested the use of medical marijuana after the initial sentencing hearing – and that request was authorized by a valid card authorizing the defendant's use – a change of circumstances has been shown. Nonetheless, various appellate courts have provided drastically differing modes of analysis in considering such claims. In *Moret, supra*, 180 Cal.App.4th 839, for example, the court issued three separate opinions that yielded agreement, by two justice, as to only a single issue of waiver particular to the case. (*Id.* at pp. 844-848, 852 (lead opn. of Haerle, J.), 857-860 (conc. opn. of Richman, J.).) In *People v. Leal* (2012) 210 Cal.App.4th 829, the First District attempted to set forth a uniform method of analyzing such claims: first, considering the validity of the defendant's medical marijuana card; second, analyzing the request under the principles set forth in *People v. Lent* (1975) 15 Cal.3d 481; and third, balancing public safety needs with the rehabilitative efforts of the client. (*Leal, supra*, 210 Cal.App.4th at pp. 837-845.) In *People v. Hughes* (2012) 202 Cal.App.4th 1473, however, the Fourth District found no reason to depart from the traditional *Lent* analysis. (*Id.* at p. 1479.)

Leal is the most thoroughly reasoned of the opinions, though it may be less favorable for our clients since it adds elements – or reasons to reject our claims – beyond the

traditional *Lent* analysis. Moreover, in establishing the reasonableness of a court's request, there really does seem to be no reason to utilize anything but the *Lent* analysis. Under that analysis, a probationer should be entitled to use medical marijuana since such use is, by definition, related to a proper medical purpose. Nonetheless, what needs to be argued in a particular case may very well depend on the facts at issue; the circumstances of the instant offense, the probationer's criminal history, and the specific medical use of the marijuana can be outcome determinative. If this issue arises in one of your cases, please feel free to contact SDAP. We have sample briefing done in a variety of different cases.

E. Record Clearance Motions.

Motions for record clearance, commonly referred to as "expungements," are governed by section 1203.4. Nonetheless, this provision does not "expunge" the conviction, nor render it "a legal nullity." (*People v. Holman* (2013) 214 Cal.App.4th 1438, 1463, citations omitted.) Convictions expunged pursuant to section 1203.4 may still be treated as convictions for some purposes; for example, they can be used as prior convictions in a future case, and they may be used as a crime of moral turpitude to impeach a witness. (*Ibid.*) As the aforementioned scenarios indicate, the remaining effects of expunged convictions are largely limited to future prosecutions; most other potential effects stemming from the felony conviction will be nullified. (See *Stephens v. Toomey* (1959) 51 Cal.2d 864, 870-871.) Accordingly, the denial of such a request can have a huge impact on an individual client.

Subdivision (a) of section 1203.4 identifies three different factual scenarios where record clearance can occur; they include when the defendant (1) "has fulfilled the conditions

of probation for the entire period of probation," (2) "has been discharged prior to the termination of the period of probation," or (3) "in any other case in which a court, in its discretion and the interests of justice, determine that a defendant should be granted" the available relief. (*Holman, supra*, 214 Cal.App.4th at p. 1459.) The requested relief is mandatory in the first two scenarios, but – as indicated by the statute's plain language – is discretionary in the third scenario. (*Ibid.*)

Most appellate litigation focuses on the second scenario – whether a defendant "has been discharged prior to the termination of the period of probation."[10] In *People v. Butler* (1980) 105 Cal.App.3d 585, for example, the appellate court reversed the denial of the defendant's record clearance motion. (*Id.* at p. 589.) The defendant had been found in violation of probation, and his probationary term was extended for a medical evaluation to be conducted; the medical evaluation showed that he was totally disabled and, prior to the expiration of the extended term, he was discharged from probation. (*Id.* at p. 588.) The appellate court found that, in this circumstance, the trial court lacked any discretion but to grant the expungement request. (*Id.* at p. 589; see also *People v. Hawley* (1991) 228 Cal.App.3d 247, 250 [early termination based on defendant's good conduct mandated granting motion; the nature of the underlying offense – so long as it was not one of those enumerated under section 1203.4, subdivisions (b) and (c) – was irrelevant to the analysis],

---

[10] As to the third scenario, the trial court appears to have nearly unbridled discretion as to the factors it can consider. As to the first scenario, this is a factual determination, the consideration of which is essentially premised on whether the probationer has sustained any violations, and whether all required programs have been completed and all fines and fees

Holman, supra, 214 Cal.App.4th at p. 1468 [relief mandatory when probation terminated early, even when the payment of several fines and fees were extended], *People v. Seymour* (2015) 239 Cal.App.4th 1418, 1436-1437 [unpaid restitution surviving the probationary term does not bar requested relief when defendant's probation was terminated early].) This series of cases reiterate that so long as a defendant is terminated early from probation, the existence of other factors does not authorize a court from denying the requested relief. The same conclusion, however, is not warranted when the early termination of probation is premised on the defendant's poor probationary performance and a prison sentence in other felony cases is impending. (See *People v. Johnson* (2012) 211 Cal.App.4th 252, 263-264.)

As the aforementioned case law implies, this is one area of the law that is largely beneficial for our clients. Trial courts appear hesitant to grant such relief, largely relying on erroneous factors to circumvent the plain language of section 1203.4. Still, appellate courts have been unafraid to reverse such denials, and appellate counsel should thoroughly review the applicable case law and the client's own probationary history in cases where this issue arises.

F. Factual Innocence Motions.

Motions for a finding of factual innocence and the destruction of arrest records are not particularly common. Nonetheless, my very first case on the SDAP panel – which I lost – was just such a case, and they do recur with enough frequency to warrant discussion here.

---

have been paid.

Such motions are governed by section 851.8. Subdivision (c) of this statute provides in relevant part:

> In any case where a person has been arrested, and an accusatory pleading had been filed, but where no conviction has occurred, the defendant may, at any time after dismissal of the action, petition the court for a finding that the defendant is factually innocent of the charges for which the arrest was made.

A finding of factual innocence "shall not be made unless the court finds that no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made." (§ 851.8, subd. (b).) On appeal, a reviewing court should defer to any factual findings supported by substantial evidence but should still independently review the record to determine whether there was no reasonable cause for the initial arrest. (*People v. Adair* (2003) 29 Cal.4th 897, 906.)

The California Supreme Court has defined the burden governing such motions in even less favorable terms than those laid out in the plain language of section 851.8. "Defendants must 'show that the state should never have subjected them to the compulsion of the criminal law – because no objective factors justified official action." (*Adair, supra*, 29 Cal.4th at p. 909, citations omitted.) "[T]he record must exonerate, not merely raise a substantial question as to guilt." (*Ibid.*, citations omitted.)

In considering a petition for factual innocence, a trial court must apply an objective standard. (*Adair, supra,* 29 Cal.4th at p. 905.) A determination of a motion's merit is not limited only to evidence presented at trial but can also include any other relevant evidence known at the time of arrest or learned thereafter. (*Id.* at pp. 903-904.) A motion should be

granted if there is no reasonable cause as to even one element of a charge. (See *People v. Laiwala* (2006) 143 Cal.App.4th 1065, 1070 [defendant factually innocent of theft of trade secret when no reasonable cause that object, in fact, constituted a trade secret].)

Laiwala may be the sole published case on this issue where the client prevailed on appeal. In *People v. Esmali* (2013) 213 Cal.App.4th 1449, for example, a rape case was dismissed due to a lack of evidence at the preliminary hearing; absent factual findings regarding the alleged victim's credibility, the appellate court could not conclude that the defendant's factual innocence motion should have been granted. (*Id.* at p. 1461.) In *People v. Medlin* (2009) 178 Cal.App.4th 1092, the appellate court reversed the granting of a factual innocence motion; there, the defendant had been charged with violating section 368, requiring criminal negligence in taking care of a dependent adult where the negligence was likely to produce great bodily injury or death. (*Id.* at p. 1104.) While the main claim of alleged negligence in *Medlin* was based on an expert's misunderstanding of the case's factual underpinnings, the appellate court concluded that the remaining circumstances were sufficient on their own to justify the defendant's initial arrest. (*Ibid.*) Finally, in *People v. Gerold* (2009) 174 Cal.App.4th 781, the denial of a factual innocence motion was affirmed; there was little doubt that the defendant committed the alleged conduct, and his subsequent not guilty by reason of insanity finding did nothing to dictate that the defendant's factual innocence motion must be granted. (*Id.* at p. 791.)

Given the wealth of bad defense cases on the issue, appellate counsel – if confronted with such an appeal – should focus less on potential credibility issues or affirmative

defenses, instead aiming the analysis at the lack of evidence as to a required element of the charge.

G. Conclusion.

The aforementioned discussion provides an overview of the law governing some of the most common types of orders after judgment.[11] While not as factually complex as appeals stemming from jury trials, such orders can have a remarkable effect on our clients. Careful review of these orders is required.

[11] Motions pursuant to section 1016.5 were originally intended to be discussed in the course of this article. However, counsel should refer back to the article by Vicki Firstman and Michael Mehr from the 2014 SDAP seminar, where immigration issues were thoroughly discussed. There is little to add beyond what is included in that thorough article.