RECURRING ISSUES IN PROBATION APPEALS

by
Vicki Firstman & Patrick McKenna

As is evident from the title, this article will focus on recurring issues in probation appeals. Of course, a necessary predicate to unearthing potential appellate claims is knowledge of the probationary scheme as set out in the statutes, rules of court, and as developed by case law. To that end, this article will cover the general statutory framework, relevant appellate decisions, and will pinpoint possible appellate issues as well as common procedural hurdles.

I. Purpose of Probation

The California Legislature has declared that providing probation services "is an essential element in the administration of justice." (Pen. Code,[1] § 1202.7.) One of the primary goals of probation is, of course, "[t]he safety of the public." (*Ibid*.; accord *People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) The Legislature has also declared that the primary considerations in the granting of probation shall be "the nature of the offense; the interests of justice, including punishment, reintegration of the offender into the community, and enforcement of conditions of probation; the loss to the victim; and the needs of the defendant . . . ." (§ 1202.7; accord *People v. Carbajal*, *supra*, 10 Cal.4th at p. 1120.) It has

[1] All statutory references are to the Penal Code unless otherwise noted.

also been stated that "[t]he declared purpose of a grant of probation is that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from such breach and generally and specifically for the reformation and rehabilitation of the probationer. . . ." (*People v. Rojas* (1962) 57 Cal.2d 676, 682-683, internal quotations omitted; accord § 1203.1, subd. (j); Cal Rules of Ct.,[2] rule 4.410 (a).) "Probation is defined as an act of grace and clemency, which may be granted by the court to a seemingly deserving defendant, whereby he may escape the extreme rigors of the penalty imposed by law for the offense of which he stands convicted. [Citation.]" (*People v. Rojas, supra*, 57 Cal.App.2d at p. 683, internal quotations omitted.) Being an act of grace and clemency, probation is not a matter of right. (*People v. Anderson* (2010) 50 Cal.App.4th 19, 32.)

II. Imposition of Sentence Suspended & Execution of Sentence Suspended

Probation is granted when the trial court suspends imposition or execution of a sentence and places a defendant on conditional and revocable release under the supervision of a probation officer. (§1203, subd. (a).) The court has the discretion to place a defendant on formal probation where he or she must report to the probation officer (§ 1202.8) or on informal or summary court probation, where the defendant is not required to report to a probation officer. (§ 1203b.) In most felony cases, the probation will be formal (§ 1202.8)

[2] All rule citations are to the California Rules of Court.

and in almost all misdemeanor cases, the probation will be court probation. (§ 1203b.)

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.) As discussed further below, the distinction between these two types of sentencing choices becomes one of significant import if and when a defendant's probation is subsequently revoked.

III. 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.) The power to extend probation will be discussed further below in the section on the Tolling and the Modification and Extension of Probation.

IV. 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[3] 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)*, *supra*, 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

[3] Section 1385 gives the trial court discretion to dismiss a criminal action "in the furtherance of justice." This includes "the lesser power to strike factual allegations relevant to sentencing. . . ." (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 504.)

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. These include, among other charges, murder, robbery, kidnaping (§§ 207, 209, 209.5), lewd or lascivious conduct (§ 288), first degree burglary (§§ 459, 460, subd. (a)), any rape under section 261, any rape under section 262 (rape by the spouse of a victim), various violent or forcible sex offenses committed in concert (§ 264.1), assault with intent to commit a sex offense specified in section 220, escape or attempted escape from prison (§ 4530), escape or attempted escape from county jail and other specified facilities (§ 4532), carjacking (§ 215), aggravated mayhem (§ 205), torture (§ 206), continuous sexual abuse of a child (§ 288.5), any witness dissuasion offense listed in section 136.1, inducing false testimony or bribing a witness (§ 137), sodomy in violation of section 286, oral copulation in violation of 288a, sexual penetration in violation of section 289, or 264.1, aggravated sexual assault of a child in violation of section 269; and aggravated arson in violation of section 451.5;

(6) various sexual offenses listed in section 1203.065, subdivision (a), including forcible rape (§ 261, subd. (a)(2)), rape accomplished against the victim's will by threatening to retaliate in the future (§ 261, subd. (a)(6)), various violent or forcible sex offenses committed in concert (§ 264.1), pimping (§ 266h), pandering (§ 266i), providing or transporting a child under 16 for the purpose of a lewd or lascivious act (§ 266j), aggravated sexual assault against a child (§ 269), forcible sodomy (§ 286, subd. (c)((2)(A)), forcible sodomy against a child under the age of 14 (§ 286, subd. (c)(2)(B)), forcible sodomy against a minor 14 years of age or older (§ 286, subd. (c)(2)(C)), sodomy accomplished by threatening to retaliate in the future (§ 286, subd. (c)(3)), various acts of sodomy in concert (§ 286, subd. (d)), various acts of oral copulation committed either by force or by theat of retaliation or in concert (§ 288a, subds. (c)((2) & (3), subd. (d)), certain sexual acts by an adult with a child who is 10 years of age or younger (§ 288.7). certain forcible acts of sexual penetration (§ 289, subd. (a)), certain acts involving the use of a minor to assist in the distribution of obscene matter, or posing or modeling involving sexual conduct (§ 311.4, subd. (b));

(7) convictions for lewd conduct with a child under the age of 14 (§ 288, subd. (a)) and for continuous child molestation under specified circumstances (e.g., forcible acts, infliction of great bodily injury upon the child; use of a weapon during the commission of the offense, offense committed during a kidnaping, etc.);

(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. (§ 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. (§ 11370, subd. (b).)

V. 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.)

VI. The Grant or Denial of Probation

A. Within the Discretion of the Sentencing Court: The Decision to Grant or Deny Probation

& 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 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.)

B. The Probation Report

1. Introduction

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].)

2. Contents of Probation Reports

As provided in section 1203, a probation report must contain:

(1) An investigation into the circumstances surrounding the crime (§ 1203, subd. (b)(1));

(2) The prior adult and juvenile history and record of the defendant (§ 1203, subds. (b)(1) & (b)(2)(B));

(3) A recommendation as to the grant or denial of probation and the conditions of probation, if granted (§ 1203, subds. (b)(2)(A));

(4) The results of the State-Authorized Risk Assessment Tool for Sex Offenders (SARATSO) in cases requiring sex registration (§ 1203, subd. (b)(2)(C));

(5) The recommended restitution fine (§ 1202.4, subd. (b)) and the restitution owed to the victim or to the state Restitution Fund (§ 1203, subd. (b)(2)(D));

(6) A statement from the victim (§ 1203, subd. (h)); and

(7) An evaluation of a defendant's ability to pay the costs of probation (§ 1203, subd. (j)).

The probation report, however cannot include information regarding:

(1) Sealed records of delinquency adjudications pursuant to Welfare and Institutions Code section 389;

(2) Charges disposed of under deferred entry of judgment; and

(3) Police contacts that did not result in arrest or convictions unless supporting information is provided (*People v. Chi Ko Wong* (1976) 18 Cal.3d 698, 719);

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. Other Potential Appellate Issues &

Practice Pointers Relating to Probation Reports

Parties can mutually agree – either orally or in writing – to waive the issuance of a probation report. (§ 1203, subd. (b)(4).) There is some conflict among appellate courts regarding the standard of prejudice to be applied when considering issues relating to the untimeliness or failure to issue a probation report. For example, in a case in which the defendant was eligible for probation, the court's failure to order the issuance – and subsequently to consider – a probation report, the Third District Court of Appeal ruled that the defendant must prove prejudice under *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Dobbins* (2005) 127 Cal.App.4th 176, 182-183.) In *People v. Mariano* (1983) 144 Cal.App.3d 814, however, the First District Court of Appeal ruled that the failure to issue a probation report violates a defendant's fundamental rights and requires automatic remand for resentencing when the trial court fails to consider the contents of a probation report. (*Id*. at pp. 824-825; accord *People v. Mercant* (1989) 216 Cal.App.3d 1192, 1196.) Similarly, a trial court's failure to grant a requested continuance when a defendant had not received the probation report by the statutory deadline was held to render the sentencing hearing "fundamentally unfair" and required automatic resentencing. (*People v. Bohannon* (2000) 82 Cal.App.4th 798, 809, overruled on other grounds in *People v. Zambrano* (2007) 41 Cal.4th 1082, 1135, fn. 13.)

In only a few cases will the failure to issue a probation report serve as a viable appellate issue. Nonetheless, careful review of probation reports can often be crucial and frequently can serve as a beneficial starting point to gain an overview of the case. (See

"Finding Issues in Probation Reports and Other Key Spots in the Record" [Feb. 2012 ADI MCLE];http://www.adi-sandiego.com/PDFs/2012-2_MCLE_Finding_Issues_In_Probation_Reports_c.pdf.) Moreover, in some cases, the probation reports – and any exhibits attached to them – can be fruitful in proving prejudice when other issues are raised on appeal.

C. Factors to Consider in Granting or Denying Probation

A defendant can be absolutely eligible, presumptively ineligible, or absolutely ineligible for probation. If an individual falls within either of the first two categories, then the trial court has discretion to weigh various factors in determining whether to grant or deny probation. In reviewing challenges to the denial of probation on appeal, an appellate court determines whether the court abused its discretion. (*People v. Marquez* (1983) 143 Cal.App.3d 797, 803.) As a practical matter, this can be a high burden and most frequently occurs when a trial court relies on improper factors in denying probation (*People v. Molina* (1977) 74 Cal.App.3d 544, 552-553 [court abuses discretion in denying probation due to belief that defendant has not been adequately punished for past crimes]), or when a trial court erroneously concludes that a defendant is ineligible for probation (*People v. Aubrey* (1998) 65 Cal.App.4th 279, 285-286).

As a general rule, the trial court must state the reasons for denying probation on the record. (§ 1170, subd. (c); *People v. Salazar* (1980) 108 Cal.App.3d 992, 1000.) But, like most rules, it is subject to two notable exceptions:

(1) If the defendant is sentenced to the upper term of imprisonment and the court provides reasons for this sentencing choice, then a separate statement of

reasons is not required as to the denial of probation (*People v. Butler* (1980) 107 Cal.App.3d 251, 254-255); or

(2) If a defendant is presumptively ineligible for probation, then no statement of reasons is required if probation is denied (*People v. Lesnick* (1987) 189 Cal.App.3d 637, 644).

In effect, a statement of reasons is only necessary when a defendant is absolutely eligible for probation and when the trial court has not otherwise provided a valid statement of reasons justifying the imposition of the upper term of confinement. As noted above, absent an appropriate objection, the trial court's failure to articulate its reasons denying probation is forfeited on appeal. (*People v. Scott, supra*, 9 Cal.4th at pp. 353-357.)

Generally speaking, the trial court should consider public safety, the nature of the offense, the interests of justice, the victim's loss, and the defendant's needs as the primary considerations in determining whether to grant probation. (§ 1202.7.) Rule 4.413 provides the appropriate factors for a court to consider in determining when a case is an "unusual" one that would warrant a grant of probation when a defendant is presumptively ineligible. Even if a defendant's case is found to be an "unusual" one, and he or she is therefore eligible for probation, a court may deem him or her unsuitable for probation. Rule 4.414 lists the appropriate criteria that a court should consider in determining whether absolutely eligible and presumptively ineligible defendants are suitable for probation. The criteria provided are not exclusive, and a court may consider any additional criteria reasonably related to the case or defendant. (*People v. McClintock* (1984) 159 Cal.App.3d Supp. 1, 5-6.)

A trial court need not methodically weigh each of the listed criteria in determining

whether a defendant is suitable for probation; rather, the court's ultimate determination must merely be premised on appropriate factors, regardless of the precise balancing approach employed. (See, e.g., *People v. Morado* (1990) 221 Cal.App.3d 890, 894 [applying this rule when a defendant is presumptively ineligible].) Accordingly, when challenging the denial of probation on appeal, focusing on the factors relied upon – as distinguished from the balancing test employed – will more likely lead to success. (See, e.g., *People v. Molina*, *supra*, 74 Cal.App.3d at pp. 552-553; *People v. Aubrey*, *supra*, 65 Cal.App.4th at pp. 282-283.)

D. Pleading and Proof Requirements

1. Introduction

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.

2. Absolute Ineligibility

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 include: sections 667, subdivision (c)(4); 667.61, subdivision (h); 1170.12, subdivision (a)(4); 1203.044, subdivision (b); 1203.06, subdivisions (a)(1), (a)(2), & (a)(3); 1203.066, subdivision (a); 1203.07, subdivision (a); 1203.075; 1203.08; 1203.085; 1203.09; and Health and Safety Code section 11370, subdivisions (a), (b), & (c). Accordingly, if a defendant is deemed ineligible under one of these statutes, counsel should ensure the circumstances rendering the defendant ineligible were both pled and proven.

Other statutes, however, do not contain express pleading and proof requirements. These include: sections 1203, subdivision (k)**;** 1203.055, subdivision (c); 1203.065, subdivision (a); and 18780. If a defendant is deemed ineligible under one of these statutes, counsel may potentially argue that the pleading and proof of the aggravating circumstances are required under the due process clause since absolute probation ineligibility constitutes increased punishment. (See *People v. Lo Cicero*, *supra*, 71 Cal.2d at p. 1191 [absolute probation ineligibility constitutes increased punishment requiring pleading and proof of prior conviction rendering defendant absolutely ineligible].) The *Lo Cicero* court's ruling, however, was not explicitly premised on due process concerns, though subsequent California

Supreme Court decisions have explicitly ruled that circumstances leading to increased penalties for a defendant implicate such concerns. (See, e.g., *People v. Hernandez* (1988) 46 Cal.3d 194, 208, superseded on another point as noted by *People v. Rayford* (1994) 9 Cal.4th 1, 8-9; *People v. Mancebo* (2002) 27 Cal.4th 735, 752-754.) Both *Hernandez* and *Mancebo*, however, dealt with the application of enhancements – and not absolute probation ineligibility – and so arguably, the same due process concerns may not be applicable in probation ineligibility cases. (See *Mancebo*, *supra*, 27 Cal.4th at p. 753.)

Finally, it should be noted that the nature of present and prior convictions that would make a defendant ineligible for probation may not, at times, specifically line up with the traditional statutory requirements of the offense. In such cases, the additional requirements must have been found true. For example, in a case in which the defendant was convicted of three counts of section 288, subdivision (a), he could only be found ineligible for probation if the conduct underlying the convictions constituted "substantial sexual conduct" (§ 1203.066, subd. (a)(8)), terminology that was explicitly defined by statute (§ 1203.066, subd. (b)). (*People v. Bruce G.* (2002) 97 Cal.App.4th 1233, 1246-1247.) Such conduct was never alleged or found true by the jury or the trial court in *Bruce G.*, and therefore the appellate court ruled that the trial court abused its discretion in concluding that the defendant was statutorily ineligible for probation under this provision. (*Id*. at p. 1247.) Due to various mitigating factors regarding the defendant's suitability for probation, the error could not be deemed harmless, and the appellate court remanded the case for resentencing. (*Id.* at p. 1248.)

3. Presumptive Ineligibility

Pleading and proof of a presumptive 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).

Only sections 1203.045, 1203.048, and 1203.049 specifically require pleading and proof of certain circumstances making a defendant presumptively ineligible for probation.

E. Fines, Fees, Restitution, and Probation Conditions

1. Fines, Fees, and Restitution

Though a grant of probation can be a preferable outcome in many cases, it can be quite costly for a criminal defendant. Numerous fines and fees – in addition to victim restitution – can be imposed by the trial court. These costs include the following:

(1) A defendant convicted of a felony must pay a restitution fine pursuant to section 1202.4, subdivision (b). The amount of the fine may range from $240

- $10,000 and is mandatory absent "compelling and extraordinary reasons," which must be stated by the court on the record. (§ 1202.4, subd. (b).) In setting the fine above the $240 minimum, the court may multiply $240 by the number of years a defendant is ordered to serve, multiplied by the number of felony counts. (*Ibid*.) When a count is stayed pursuant to section 654, the fine must also be stayed. (*People v. Carlson* (2011) 200 Cal.App.4th 695, 710.)

If the criminal conduct occurred prior to January 1, 2012, counsel should be on the look-out to see whether there is an ex post facto clause violation. Up until that date, the amount of the restitution fine was $200 - $10,000, and so appellate counsel should ensure that in appropriate cases, the court did not rely upon the present formula provided in Penal Code section 1202.4, subdivision (b) in setting the fine. Additionally, if the amount of the fine is more than the statutory minimum, then the court must consider the defendant's ability to pay; the burden is on the defendant, however, to prove an inability to pay. (§ 1202.4, subd. (d).)

(2) If a defendant is granted probation, then an additional probation revocation restitution fine must be imposed. (§ 1202.44.) The amount of the fine must be the same as the restitution fine imposed under section 1202.4, subdivision (b) and is suspended unless and until probation is revoked. (*People v. Chambers* (1998) 65 Cal.App.4th 819, 823.) At the time of revocation, the court may not increase the amount of this fine or the restitution fine. (*People v. Perez* (2011) 195 Cal.App.4th 801, 805.) A second restitution fine may not be imposed at the time of revocation since the original fine survives the revocation. (*People v. Guiffre* (2008) 167 Cal.App.4th 430, 434.)

(3) The defendant may also owe restitution directly to the victim. (§ 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 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.) In effect, the trial court has broad discretion in setting the restitution amount when it is imposed as a condition of a defendant's probation.

(4) 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. (§§ 1203.1, subd. (b), 1203.1b, 1203.1c.)

2. 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.)

VII. Violation, Revocation and Reinstatement

A. 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).) If the probation department intends to revoke probation and the defendant is not in custody, it has the option of sending a letter giving notice of the violation and specifying a time and place for a pre-revocation hearing. (Levenson, California Criminal Procedure (2007-2008 ed.) § 25.30, p. 1114.) Alternatively, a probationer may be arrested and brought before the court at any time during the probationary period "if the probation officer or a peace officer has probable cause to believe that the probationer is violating any term or condition of his or her probation or conditional sentence." (§ 1203.2, subd. (a).)

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* (April 8, 2013, S192176) ____ Cal.4th _____ [typed opn. p. 6];[4] § 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. . . ." (*People v. Leiva, supra*, ____ Cal.4th at p. _____ [typed opn. p. 5].) There are various due process protections that attach to the revocation procedure, and these are discussed below in the section on Formal Revocation Hearings.

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. (*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

[4] The Lexis cite for *People v. Leiva* is 2013 Cal.Lexis 2885. However, references in this article shall be to the typed opinion.

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.)

B. Summary Revocation & Tolling

There has been a split in the courts of appeal regarding the effect of the tolling provision in section 1203.2, subdivision (a), which provides that "[t]he revocation, summary or otherwise, shall serve to toll the running of the period of supervision." Specifically, courts have disagreed on the following question: Once the court has summarily revoked a defendant's probation, does the tolling provision permit a trial court to find a violation of probation and then reinstate or terminate probation based solely on conduct that occurred *after* the original probationary period ordered by the court has expired?

The California Supreme Court settled this issue on April 8, 2013, when it handed down its decision in *People v. Leiva*, *supra.* To give context to the controversy however, it is helpful to begin with a discussion of *People v. Tapia* (2001) 91 Cal.App.4th 738 (Second Appellate District, Division One), the decision that generated the conflict in the first place.

In *Tapia*, the defendant was placed on felony probation in 1996 for a three-year period, but was involuntarily deported in late 1996. (*People v. Tapia*, *supra*, 91 Cal.App.4th at pp. 739-740.) After the deportation, the trial court was notified that Tapia had failed to report to the probation officer. (*Id*. at p. 740.) As a result, in March of 1997, the court summarily revoked Tapia's probation and issued a bench warrant for his arrest. (*Ibid*.)

Tapia was later arrested after he returned in September of 2000, after the probationary period had run. (*Ibid*.) At a probation hearing in November of 2000, Tapia admitted he had failed to report to his probation officer *after* he returned to the United States in 2000 and further, that he had not shown proof that his return to the United States was legal. (*Ibid*.) Based only on Tapia's admissions concerning conduct that occurred after the expiration of the term of probation, the trial court found him in violation of his probation and revoked and reinstated probation, extending it until March 21, 2003. (*Ibid.*) On appeal, Tapia contended the court had no jurisdiction to extend the term of probation and the Court of Appeal agreed. (*Ibid*.)

The *Tapia* court found that the summary revocation was illegal since the ground for the revocation -- the failure to report in 1996 -- was not later sustained at the contested revocation hearing. (*People v. Tapia, supra,* 91 Cal.App.4th 738, 741-742.) Since the 1996 violation was never proved and the term of probation had expired before Tapia re-entered the United States, the reviewing court held that the trial court lacked jurisdiction to extend the period of probation (*id*. at p. 740) and that the probation revocation order was therefore "void." (*Id.* at p. 742.) "Put another way," the court reasoned, "the jurisdiction retained by the court is to decide *whether* there has been a violation during the period of probation and, if so, *whether* to reinstate or terminate probation. When the court finds there has been no violation during the period of probation, there is no need for further jurisdiction. And where, as here, the term of probation has expired, the defendant is also entitled to an order discharging him from probation. [Citation.]." (*People v. Tapia, supra*, 91 Cal.App.4th at pp. 741-742.)

In *People v. Salas*, S207040 (review granted January 30, 2013), formerly published at 210 Cal.App.3d 974, the Second Appellate District, Division Eight took a stance directly in conflict with the holding in *Tapia*. There, in 2005, the court imposed a four-year prison sentence but suspended its execution and placed defendant on probation for a period of five years. (*People v. Salas*, *supra*, 210 Cal.App.3d at p. 977.) The grant of probation was conditioned, inter alia, upon a six-month jail term. (*Ibid.*) In January of 2006, the probation officer reported that Salas had violated probation by failing to report and failing to pay any of the ordered fines or victim restitution (*Ibid*.) However, the probation officer also informed the court that Salas had apparently been deported to Guatemala before his scheduled release from custody. (*Ibid*.) In response, the trial court summarily revoked Salas' probation and issued an arrest warrant in January 2006. (*Ibid*.)

After Salas returned to the United States, he was charged with additional felony offenses based on an incident that occurred in May of 2011. (*People v. Salas*, *supra*, 210 Cal.App.3d at p. 977.) After a jury trial, Salas was convicted of one misdemeanor count and given a county jail sentence. (*Id*. at p. 978.) In October, 2011, after the conclusion of the trial, the original court permanently revoked Salas' probation and executed the suspended four-year sentence. (*Id*. at p. 978.)

Relying on *Tapia*, Salas contended on appeal that the trial court lacked jurisdiction to revoke probation in October 2011 because (1) his five-year term of probation had already ended, (2) the 2006 failure to report was based on his involuntary deportation; and (3) the

court was without authority to rely on the 2011 conviction as a basis for revocation since that arose after the expiration of the probationary period. (*People v. Salas*, *supra*, 210 Cal.App.4th at p. 978.)

Relying on a construction of the tolling provision in section 1203.2 which has now been invalidated by the Supreme Court's decision in *Leiva*, the *Salas* court held that the 2006 summary revocation suspended the running of the probationary term until a future date where the trial court either reinstated probation, executed sentence, or discharged the defendant from probation. (*People v. Salas*, *supra*, 210 Cal.App.4th at pp. 979-980.) The court therefore concluded that Salas' probationary period had not expired by October of 2011 when Salas was rearrested on the new charges and that Salas had remained subject to the conditions of his probation for this entire period. (*Id.* at p. 980.)

The *Salas* court referred to *Tapia's* interpretation of section 1203.2, subdivision (a) as "narrow," and rejected *Tapia's* conclusion that tolling ends upon expiration of the original probationary period unless the prosecution can prove that a willful violation occurred during that probationary period. (*People v. Salas*, *supra*, 210 Cal.App.4th at p. 980.)

This leads us to the Supreme Court's very recent decision in *Leiva* where the defendant was placed on a grant of felony probation for a period of three years on April 11, 2000. (*People v. Leiva*, *supra*, ____ Cal.4th ____ [typed opn. p. 2].) Among the probation conditions imposed were orders that the defendant report to the probation officer following his release form county jail and that he not reenter the country illegally if he was deported. (*Ibid*.) The defendant, a citizen of El Salvador, was deported on the day he was released

from jail. (*Ibid.*)

Thereafter, in September of 2001, the trial court summarily revoked probation and issued a bench warrant after Leiva failed to appear for a probation violation hearing based, in turn, upon his failure to report to the probation officer. (*People v. Leiva, supra*, ____ Cal.4th ____ [typed opn. p. 2.].) It appears that at the time, the court and probation officer were unaware of Leiva's deportation. (*Ibid.*)

On November 10, 2008, over 5 ½ years after Leiva's probation would have expired, Leiva was brought to court on the probation violation following his arrest on a traffic matter. (*People v. Leiva, supra*, ____ Cal.4th ____ [typed opn. 2.].) By the time of the formal violation hearing on February 13, 2009, the court and parties had become aware of Leiva's involuntary deportation and the prosecutor conceded that he could not show that the 2001 failure to report had been a willful probation violation. (*Leiva*, typed opn p. 3.) Accordingly, defense counsel argued that Leiva's probation must be terminated since there was no evidence of any probation violation during the original term of probation. (*Ibid.*)

However, the trial court found a probation violation based on Leiva's statement that he had failed to report to the probation officer after his return to the United States in 2007. (*People v. Leiva*, *supra*, ____ Cal.4th ____ [typed opn. 3.].) The court then reinstated and modified probation, extending it until June 6, 2011, and imposing further conditions in the event of another deportation and reentry into the county. (*Ibid.*) Leiva appealed the order reinstating and extending probation contending that the trial court lacked authority to reinstate and extend his probation after the original probationary period had expired because

the noticed basis for violation was not sustained and no other violation was proved to have occurred during the three-year probationary period. (*Leiva*, typed opn. p. 6.) Subsequent events ultimately resulted in a permanent revocation of probation later in 2009, followed by Leiva's imprisonment, and another appeal. (*Leiva*, typed opn. pp. 3-4.) In this second appeal, Leiva contended that the trial court lacked authority to impose a prison sentence in 2009 because the earlier order extending probation was invalid. (*Leiva*, typed opn. p. 6.].)

In order to resolve the issues on appeal, 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*, ____ Cal.4th ____ [typed opn. p. 1.], italics added.) Accordingly, the Supreme Court expressed its approval of that portion of the decision in *Tapia* which held that section 1203.2, subdivision (a) permits the trial court to "find a violation of probation and then reinstate and extend the terms of probation [or revoke probation permanently], 'if and only if, probation is reinstated [or revoked] based upon a violation that occurred during the unextended period of probation.' [Citation.]" (*Leiva*, typed opn. p. 20, citing *People v. Tapia*, *supra*, 91 Cal.App.4th at p. 741.)

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*, ____ Cal.4th ____ [typed opn. p. 20.].) The Supreme Court also suggests that this principle applies even if the proved violation was not previously alleged as a basis for the summary revocation of probation. (*People v. Leiva*, *supra*, typed opn. p. 20 & fn. 6.)

An important question remains open after *Leiva*. Dicta in *Leiva* seems to say that the People can seek retroactive revocation of probation so long as the conduct constituting the probation violation occurred during the original probationary period. (*People v. Leiva*, *supra*, ____ Cal.4th ____ [typed opn. p. 20 & fn. 6.].) However, this implication is inconsistent with *Leiva's* actual holding that the trial court loses jurisdiction over the probationer if the ground alleged as the basis for summary revocation is not later sustained. Going forward, we will want to argue in an appropriate case that the court may retain jurisdiction over the defendant only if the ground employed for summary revocation is subsequently found true at the formal revocation hearing.

There is also another important ambiguity that *Leiva* leaves unresolved, and that is the question of whether an entirely new probationary term can be imposed in cases where a formal revocation occurs, as it did in *Tapia* and *Leiva*, after the original probation term has expired. This question is addressed below under Extensions Past the Maximum Term.

C. Formal Revocation Hearing

1. Defendant Stipulates to Violation

A formal revocation hearing may 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.) As a practical matter, a probationer frequently stipulates to the alleged violation, usually because the probationer is often reinstated on the existing probationary term, sometimes with an associated county jail term.

2. 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; *People v. Self* (1992) 233 Cal.App.3d 414, 419; *People v. Ruiz* (1975) 53 Cal.App.3d 715, 718-719.) 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*.)

3. Nature of Proceeding: Burden of Proof & 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. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) 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) Appellate courts have come to differing conclusions on whether the exclusionary rule applies to revocation proceedings. Some courts have found that the rule has no application (*People v. Racklin* (2011) 195 Cal.App.4th 872, 881), while others have found that evidence resulting from egregious police misconduct cannot be admitted (*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.)

D. Sentencing

If a court revokes probation, the nature of the sentence will depend on whether the imposition of sentence had been previously suspended (hereinafter ISS probation), or whether execution of the sentence had been suspended (hereinafter ESS probation). (*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, petn. for rev. pending [prison sentence required] with *People v. Clytus* (2012) 209 Cal.App.4th 1001 [county jail sentence required].)

The batter analysis is found in *Clytus*. By definition, a defendant is "sentenced" following a probation revocation. (Rule 4.435 is entitled "Sentencing on revocation of probation."].) Thus, when the Realignment Act and *Howard* are harmonized, the proper rule is that a defendant subject to an ESS sentence is to be committed to county jail for the period specified in the originally imposed sentence.

VIII. Modification and Extension of Probation

A. 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. If appellate counsel receives a case in which the extension of probation is at issue, counsel should first determine whether probation has been extended up to or past the maximum term. This is vital because each type of extension is subject to different statutes and case law. Both types will be examined in turn.

B. 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.)

The ultimate holding in *Cookson,* however, can be read narrowly or broadly. The Sixth District, in *People v. Medeiros* (1994) 25 Cal.App.4th 1260, discussed *Cookson* and stated that it stood for the general proposition that "[i]t could be a changed circumstance if, after restitution had been set consistent with the probationer's ability to pay, the probationer was nevertheless unable to pay full restitution within the initial term of probation." (*Id*. at p. 1264.) A closer reading of *Cookson*, however, indicates that its ruling was limited to the specific facts of that case. In *Cookson,* the original term of probation was premised on the trial court's belief that the defendant would pay off the full amount during that term. (*People v. Cookson, supra*, 54 Cal.3d at p. 1093.) When the term was close to expiring, the extension was warranted because the defendant had not, in fact, finished paying off the full amount as the court originally believed he would. (*Id*. at pp. 1093-1094.) Accordingly, there was a change in financial circumstances that warranted the extension up to the

maximum term. Such a reading comports with the general rule that an extension, or modification, of probation is only permitted when the circumstances premising the original grant of probation have changed during the course of the probationary term. (*In re Clark*, *supra*, 51 Cal.2d at p. 840.)

Thus, if appellate counsel receives a case in which the probationary term has been extended up to the statutory maximum and it was premised on the failure to pay restitution, counsel should carefully review the reasons justifying the court's decision to set the length of the original probationary term. If the financial circumstances have not changed during the course of probation, then, under a narrow reading of *Cookson*, there has been no change in circumstances.

C. Extensions Past the Maximum Term

1. Introduction

As the Sixth District Court of Appeal 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. (*People v. Medeiros, supra*, 25 Cal.App.4th at pp. 1266-1268.)

2. Is extension past the maximum term still authorized?

Due to the passage of the tolling provision in section 1203.2, subdivision (a)[5], 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

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

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 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 tolling provision in subdivision (a) of section 1203.2 was enacted twenty years after the extension remedy in subdivision (e) had been codified. (Stats. 1977, ch. 358, § 1, p. 1338.) The language of the provision reads: "The revocation, summary or otherwise, shall serve to toll the running of the probationary period." (§ 1203.2, subd. (a).) The tolling provision – unlike the extension procedure outlined in section 1203.2, subdivision (e) – is mandatory, "leaving no ambiguity that...an order revoking probation...immediately suspend[s] the running of the probationary period." (*People v. Salas*, *supra*, 210 Cal.App.4th 974, 978-979.)[6]

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. (*People v. Moody* (2002) 96 Cal.App.4th 987, 993 [express

[6] Please note that *Salas* is not citable since the Supreme Court has granted review.

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.

As noted above, the California Supreme Court's recent opinion in *People v. Leiva, supra*, leaves some ambiguity regarding the merits of this position. The court's commentary on the extension procedure in section 1203.2, subdivision (e), however, was dicta. Further, the meaning of that provision is arguably 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. Pursuant to the rule of lenity, the statute's ambiguity should be resolved in favor of the defendant. (*People v. Manzo* (2012) 53 Cal.4th

880, 889 [with certain exceptions, where a statute is reasonably susceptible to two reasonable interpretations, the rule of lenity requires that a court to adopt the interpretation that favors the defendant].)

Accordingly, until the California Supreme Court rules on this issue, counsel should raise this argument on appeal in appropriate cases.

IX. Failure to Make Restitution

As indicated above, the failure to make restitution payments frequently serves as the basis for many extensions or revocations of probation. Listed below is the general application of the failure to make restitution in each of the different circumstances that may come up on appeal:

(1) Revocation: Violation of probation must be found; failure to make restitution payments – if imposed as a condition of probation – must be willful (*Bearden v. Georgia* (1983) 461 U.S. 660, 672-673; see also *People v. Galvan, supra*, 155 Cal.App.4th at p. 983 [any violation of probation must be committed willfully]);

(2) Ext. Past Max: Must be premised on a violation of probation and subsequent revocation (*People v. Medeiros, supra*, 25 Cal.App.4th at pp. 1266-1268) – thus, the failure to make restitution payments must be willful in order to justify an extension past the maximum term; and

(3) Ext. Up to Max: Must be premised on a change in circumstances – no violation of probation required; a broad reading of *People v. Cookson, supra*, 54 Cal.3d 1091 would indicate that failure to pay off restitution during the original probationary term constitutes a change in circumstances, though a narrow reading of it indicates that the financial circumstances must change throughout

> the course of the probationary term in order to justify the extension.

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).)