RECENT DEVELOPMENTS IN SENTENCING LAW

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There have been some important changes to the sentencing laws in recent years. The general rule is that if the court resentences a defendant, the court has the discretion to restructure the entire sentence. (*People v. Valenzuela* (2019) 7 Cal.5th 415, 425; *People v. Buycks* (2018) 5 Cal.5th 857, 893.) Thus, all of the sentencing reforms apply. (*People v. Walker* (2021) 67 Cal.App.5th 198, 203-205; *People v. Hargis* (2019) 33 Cal.App.5th 199, 207; see generally *People v. Sandoval* (2007) 41 Cal.4th 825, 846 [a defendant is resentenced according to law in effect at the new hearing].) However, this issue is on review in *People v. Lopez* (2023) 93 Cal.App.5th 1110, 1119 (review granted Nov. 15, 2023, S281488) whether new sentencing rules apply when there is a limited remand to address a certain sentencing issue.

It is important to know which laws have changed and sometimes when they were changed. This material shows where recent changes in sentencing laws fit into the overall sentencing scheme. It covers: (1) determinate sentencing law, (2) aggravating circumstances, (3) enumerated sex offenses, (4) indeterminate terms, (5) double punishment, (6) striking an allegation in the charging document, (7) presentence credits, (8) probation, (9) split sentences, (10) fines, penalty assessments, and fees, and (11) sentencing reform.

Assuming the defendant is entitled to resentencing, if the defendant was a minor when the crime was committed, the case should return to the juvenile court. (*People v. Padilla* (2022) 13 Cal.5th 152, 162; *People v. Keel* (2022) 84 Cal.App.5th 546, 564-565; *People v. Montes* (2021) 70 Cal.App.5th 35, 45-48.) If the defendant was at least 16 years old at the time of the offense, the prosecution can petition the juvenile court to transfer the matter back to adult court.

I. FOUR EASY STEPS TO UNDERSTANDING DETERMINATE SENTENCING LAW

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

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

Thus, there must be an objection to conditions of probation, factors the court finds in aggravation or (does not find) in mitigation, reasons for (not) granting probation, whether extraordinary reasons exist for granting probation, for imposing the upper term, for imposing a consecutive sentence, the reasons given for imposing a consecutive sentence, for not stating reasons in sentencing, for double counting factors in sentencing, for the amount of setting a fine above a statutory minimum, for the amount of victim restitution, and so on. (*Ibid.*)

However, no objection is necessary to correct an unauthorized sentence. (*People v. Scott* (1994) 9 Cal.4th 331, 354.) An unauthorized sentence is not a sentencing decision where the court might have abused its discretion. It is a sentencing decision the court never had the power to make. A "sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case." (*Ibid*.) Also, clerical errors can be corrected without an objection. This usually occurs when the minute order or abstract of judgment lists a penalty the judge did not orally pronounce (see, e.g., *People v. Martinez* (2003) 31 Cal.4th 673, 704; *People v. Zackery* (2007) 147 Cal.App.4th 380, 386-387) or when the minute order or abstract of judgment does not properly list mandatory penalties (see, e.g., *People v. Mitchell* (2001) 26 Cal.4th 181, 185 [penalty assessment not in the abstract of judgment]; see generally *Estate of Douglas* (2022) 83 Cal.App.5th 690, 696.) On the other hand, most sentencing decisions (even those that result in an unauthorized sentence) cannot be challenged if the defendant agreed to them. (Cal. Rules of Court, rule 4.412; *People v. Hester* (2000) 22 Cal.4th 290, 295.)[1]

Most of what one needs to know about determinate sentencing can be summarized in four steps:

❶ Choose the **principal term**. The principal term is the longest term under the DSL scheme. It includes a base term and specific enhancements. (Pen. Code, § 1170.1, subd. (a), sen. 2.)[2]

Most crimes carry a **base term** that includes a lower term, a middle term, and an upper term. The law generally presumes the imposition of the **middle term** unless aggravating circumstances are found true in a trial, the defendant admits them, or they are proven through a certified record of a prior conviction. (§ 1170, subds. (b)(1)-(3); rule 4.420(a)-(d); *People v. Jones* (2022) 79 Cal.App.5th 37, 44.) The Sixth Amendment right to a jury trial requires an aggravating circumstance be proven beyond a reasonable doubt or admitted before the court can impose the upper term, unless the aggravating circumstance is the fact of a prior conviction. (See *Cunningham v. California* (2007) 549 U.S. 270, 288-293.) The court retains discretion to impose the lower term if it finds factors in mitigation. (§ 1170, subd. (b)(1); rule 4.420(a) & (d).)

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[1]Unless otherwise specified, all further references to rules are to California Rules of Court.

[2]Unless otherwise specified, all further statutory references are to the Penal Code.

The amendments to section 1170 apply retroactively. However, some courts say an upper term can be imposed if the defendant agrees to it as part of a plea bargain, even if a factor in aggravation is not properly found true. (See, e.g., *People v. Sallee* (2023) 88 Cal.App.5th 330, 338, review granted Apr. 26, 2023, S278690; *People v. Kelly* (2022) 87 Cal.App.5th 1, 5-6, review granted March 22, 2023, S278503; *People v. Mitchell* (2022) 83 Cal.App.5th 1051, 1058-1059, review granted Dec. 14, 2022, S277314.) Other courts have held the defendant is entitled to remand, but the court or the prosecution may withdraw the plea bargain if the defendant wishes to continue to challenge the imposition of the upper term. (*People v. Fox* (2023) 90 Cal.App.5th 826, 834; *People v. Todd* (2023) 88 Cal.App.5th 373, 378-380, review granted Apr. 26, 2023, S279154.) One court has said the upper term can be imposed based on a fact found true by the jury, even if a factor in aggravation was not pled and proved. (See *People v. Ross* (2022) 86 Cal.App.5th 1346, 1353, review granted Mar. 15, 2023.)

The law sometimes favors imposing the **lower term**. "[U]nless the court finds that the aggravating circumstances outweigh the mitigating circumstances that imposition of the lower term would be contrary to the interests of justice, the court shall order imposition of the lower term if any of the following was a contributing factor in the commission of the offense." (§ 1170, subd. (b)(6).) The mitigating circumstances are (A) psychological, physical, or childhood trauma, including abuse, neglect, exploitation, or sexual violence; (B) the defendant is 25 years old or younger, or (C) the person was a victim of intimate partner violence or human trafficking. (§ 1170, subd. (b)(6); rule 4.420(e).) It is not yet clear if this requires an aggravating factor to be admitted or found true in a trial before even the middle term can be imposed. One court said the statute "created a presumption in favor of a low prison term." (*People v. Flores* (2022) 73 Cal.App.5th 1032, 1038.) Nonetheless, most courts have said the middle term can be imposed even if an aggravating circumstance is not admitted or found true. (See, e.g., *People v. Bautista-Castanon* (2023) 89 Cal.App.5th 922, 929.)

Another statutory mitigating circumstance is if the defendant was a member of the military who may be suffering from sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems as a result of the military service. (§ 1170.91, subd. (a).) Mitigating circumstances justifying striking an enhancement are listed in section 1385, subdivision (c)(2).Other mitigating circumstances are listed in sections 25, subdivision (c) [mental health] and 1016.7 [prior trauma, youthfulness, victim of domestic violence or human trafficking]). Factors are not limited to what is listed by statute or the rules of court; any factor that mitigates culpability can justify a lower sentence. (Rule 4.423(c); see *People v. Whitten* (1994) 22 Cal.App.4th 1761, 1765-1766.)

A **specific enhancement** is a conduct enhancement that is specific to the crime (not the person), such as weapons use, infliction of great bodily injury, etc. (Rule 4.405(c); see § 1170.11.) Except as described in section 1385, there is no limit on enhancements to a term, but there can be only one weapons enhancement and only one GBI enhancement for any offense. (§§ 1170.1, subds. (f) & (g), 12022.53, subd. (f).)

❷ A **subordinate term** is any determinate term running consecutively to the principal term. Generally, a court can impose only one determinate sentence, and separate cases (even from different courts) must be imposed to be served concurrently or follow the rules for imposing consecutive subordinate terms. (§§ 669, subd. (b), 1170.1, subd. (a), sen. 1; rule 4.452.)

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

Most subordinate terms must be one-third the middle term. (§ 1170.1, subd. (a), sen. 3.) However, a consecutive term for kidnapping multiple victims must be a full middle term (§ 1170.1, subd. (b).) Similarly, a consecutive term for violating section 136.1, 137, or 653f must be the full middle term if both victim in the dissuading charges was also a witness in the other offenses. (§§ 1170.13, 1170.15.) A full consecutive middle term shall be imposed for a violation of section 139, subdivision (b). (§ 1170.13.) A full upper term may be imposed for a consecutive voluntary manslaughter (§ 1170.16), or escape (§§ 1370.5, 4530, 4532) conviction.

When the punishment for a subordinate term is one-third the middle term and a specific enhancement is added, the court usually can only impose one-third the punishment for the enhancement. (§ 1170.1, subd. (a), sen. 3.) Full enhancements may be added to each kidnapping conviction (§ 1170.1, subd. (b)) and for enumerated sex offenses (§ 1170.1, subd. (h)). A full weapons and GBI enhancement may be added to violations of sections 136.1, 137, and 653f. (§ 1170.15.)

❸ Calculate the **aggregate term** by adding the principal term with the subordinate terms and any **general enhancements** (or status enhancements, usually priors) (Rule 4.405(c)) and any OR/bail enhancement. (§ 1170.1, subd. (a), sen. 1.)

The same conviction cannot be used both as a prison prior and a serious felony prior (*People v. Jones* (1994) 5 Cal.4th 1142, 1152) or a violent felony prior (§ 667.5, subd. (b)), but if the defendant had been convicted and sentenced on both serious (or violent) and non-serious (or non-violent) felonies, the prison prior may be imposed in the current case. (*People v. Brandon* (1995) 32 Cal.App.4th 1033, 1054.)

A status enhancement for each prior conviction can be imposed only once per commitment under the determinate sentencing scheme, even if there are multiple counts or multiple cases in the commitment. (*People v. Pearson* (1986) 42 Cal.3d 351, 364.) However, priors and conduct enhancements are added to each indeterminate term. (*People v. Williams* (2004) 34 Cal.4th 397, 403-

405.)

❹ To determine the total sentence, calculate the penalty for escape and crimes committed in prison separately and add them to the total sentence. (§ 1170.1, subd. (c).) Calculate the penalty for enumerated sex offenses separately, as it must be added to the total DSL sentence. (§ 667.6, subds. (c) & (d).) Add the determinate terms to indeterminate terms. (§ 669, subd. (a); rule 4.451(a).)

II. AGGRAVATING CIRCUMSTANCES

In order to impose the upper term, an aggravating circumstance must be admitted or proven at trial, but a judge can find an aggravating factor true if it is based on a prior conviction which is proven by certified records of the conviction. (Pen. Code, § 1170, subds. (b)(2) & (b)(3).) Some factors in aggravation exist by statute. (See, e.g., §§ 243.4, subd. (i), 278.6, subd. (a), 422.75, subd. (c), 422.76, 502.9, 515, 525, 1170.7 et seq.) The most common factors in aggravation are found in rule 4.421. Probation officers and prosecutors often throw as many aggravating factors at the court as they can, but they are often duplicative. A fact that normally exists in the commission of the offense should not qualify as an aggravating factor, because "[t]he essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary." (*People v. Rodriguez* (1993) 21 Cal.App.4th 232, 241, internal quotation marks omitted.)

There are some limits to the dual use of factors. "A circumstance which is an element of the substantive offense cannot be used as a factor in aggravation." (*People v. Clark* (1992) 12 Cal.App.4th 663, 666; accord, *People v. Avalos* (1984) 37 Cal.3d 316, 323; rule 4.420(h).) A fact may not be used to impose the upper term if it is an element of an enhancement being imposed for the offense. (§ 1170, subd. (b)(5).) However, the court can use the same factor to give the upper term for multiple offenses imposed fully consecutively (or concurrently) as long as they are reasonably related to the crime for which the upper term is imposed. (*People v. Price* (1984) 151 Cal.App.3d 803, 812, 815-816.)

Many of the factors of aggravation are vaguely written and not well defined by the case law. Some rules have had no cases construing it. This leaves fertile ground for arguing jury instructions were erroneous.

Rule 4.421(a)(1) applies when the crime involved violence, the threat of violence, great bodily injury, or viciousness. This is often misused by probation or prosecution to apply when the crime inherently involves violence or great injury. (See, e.g., *People v. Lincoln* (2007) 157 Cal.App.4th 196, 203-204 [though a shooting is inherently dangerous, the shooting was no more than that of the offense].)

Rule 4.421(a)(3), particularly vulnerable victim, applies only if the victim is in special or unusual danger greater than in other cases. (*People v. Lewis* (2023) 88 Cal.App.5th 1125, 1138, review granted May 17, 2023, S279147; *People v. Loudermilk* (1987) 195 Cal.App.3d 991, 1007; *People v. Smith* (1979) 94 Cal.App.3d 433, 436 ["Vulnerability means defenseless, unguarded,

unprotected, accessible, assailable, one who is susceptible to the defendant's criminal act."]; but see *People v. Stitely* (2005) 35 Cal.4th 514, 575 [the victim was young and could not escape, and the defendant had a position of trust]; *People v. Sandoval* (2007) 41 Cal.4th 825, 842 [whenever the victim was elderly, very young, or disabled].)

Rule 4.421(a)(8), planning or sophistication, can apply to a variety of contexts. (See, e.g., *People v. Begnaud* (1991) 235 Cal.App.3d 1548 [premeditation]; *People v. Forster* (1994) 29 Cal.App.4th 1746 [planned to drive after drinking]; but see People *v. Lewis* (2023) 88 Cal.App.5th 1125, 1139, review granted May 17, 2023, S279147 [using brute force is not sophisticated].) All too often, a high level of sophistication is assigned to defendants who are immature or impulsive. This is a factor that should be challenged more.

Rule 4.421(a)(11), the defendant took advantage of a position of trust. This is often ascribed to those who abuse children, elders, or the disabled. (See, e.g., *People v. Sperling* (2017) 12 Cal.App.5th 1094, 1103 [masseuse abused a disabled victim]; *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1262 [neighbor molester]; *People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [child abuse].)

Rule 4.421(b)(1), conduct that indicates a serious threat to society, has been described to be vague and subjective. (See *People v. Lewis* (2023) 88 Cal.App.5th 1125, 1139, review granted May 17, 2023, S279147.) One court said the circumstance might not apply if the victim was the initial aggressor. (See *People v. Butler* (2023) 89 Cal.App.5th 953, 961.)

Rule 4.421(b)(2) concerns the defendant's record becoming increasing serious. One court has interpreted this to mean the prior convictions must be of increasing seriousness; it is not enough that the current offense was more serious than previous ones. (See *People v. Butler* (2023) 89 Cal.App.5th 953, 961.)

Old case law said a factor in aggravation need not be codified. (See *People v. Hall* (1994) 8 Cal.4th 950, 960.) This was before the United States Supreme Court decided the Sixth Amendment prohibited the imposition of the upper term based on a factor in aggravation increases the maximum potential punishment without a jury finding. Even so, some facts do not qualify as aggravating factors, such as exercising the right to a jury trial (*People v. Colds* (1981) 125 Cal.App.3d 860, 863) or not being a United States citizen (*People v. Johnson* (1988) 205 Cal.App.3d 755, 758). The absence of a mitigating circumstance is not a circumstance in aggravation. (Cf. *People v. Carpenter* (1997) 15 Cal.4th 312, 424; *People v. Davenport* (1985) 41 Cal.3d 247, 289-290.)

III. ENUMERATED SEX OFFENSES (ESO)

An enumerated sex offenses (ESO), sometimes referred to as a violent sex offense, is a conviction for any crime listed in section 667.6. (See *People v. Jones* (1988) 46 Cal.3d 585, 589.) The punishment for enumerated sex offenses must be served consecutively to each other "if the crimes involve separate victims or involve the same victim on separate occasions." (§ 667.6, subd.

(d), ¶ 1.) This term shall be consecutive to the determinate term. (§ 667.6, subd. (d), ¶ 3; *Jones, supra*, at pp. 595-596, 600.) A separate occasion exists if the defendant had a "reasonable opportunity to reflect upon [his or her] actions and nonetheless resumed sexually assaultive behavior." (§ 667.6, subd. (d), ¶ 2; *Jones*, at pp. 98, 104, fn. 2.)

As described in one decision: "Subdivision (d) removes the trial court's discretion to impose a more lenient sentence under section 1170.1 where two or more violent sex crimes are committed against more than one victim or where they are committed against the same victim on more than one occasion. In such an instance, the defendant must serve a full, separate and consecutive sentence for each conviction of an enumerated violent sex offense. [Citations.] Further, the term imposed under section 667.6, subdivision (d) 'shall not be included in any determination pursuant to Section 1170.1.' Thus, when a defendant is convicted of both violent sex offenses and crimes to which section 1170.1 applies, the sentences for the violent sex offenses must be calculated separately and then added to the terms for the other offenses as calculated under section 1170.1." (*People v. Pelayo* (1999) 69 Cal.App.4th 115, 124.)

On the other hand, "[s]ection 667.6, subdivision (c) provides that if a person is convicted of a violent sex offense against a single victim on one occasion, the trial court may, in its discretion, impose a full, separate and consecutive sentence for such an offense. Alternatively, it may sentence the defendant more leniently in the manner prescribed by section 1170.1.' " (*Pelayo, supra,* 69 Cal.App.4th at p. 124.)

The determinate terms under section 1170.1 can be imposed to be served consecutively or concurrently to the ESO portion of the sentence. Thus, if the defendant is convicted of only one ESO, the court has a range of possible sentencing choices, from a concurrent term to a fully consecutive one. (§ 667.6, subd. (c); *Jones, supra,* 46 Cal.3d at pp. 595, 600.)

There are some offenses one might think are ESO but have not been explicitly mentioned. Courts have held that an attempted sex crime is not an ESO. (*People v. Rodriguez* (2012) 207 Cal.App.4th 204, 217; *People v. Cadogan* (2009) 173 Cal.App.4th 1502, 1516; *People v. Thomas* (1990) 218 Cal.App.3d 1477, 1490.) On the other hand, a violation of section 220 is an ESO. (*People v. Wandrey* (2022) 80 Cal.App.5th 962, 973-978, review granted Sept. 28, 2022, S275942 and dismissed Aug. 30, 2023; *People v. Bohannon* (2000) 82 Cal.App.4th 798, 811.) Similarly, a violation of section 269 is an ESO. (*People v. Figueroa* (2008) 162 Cal.App.4th 95, 100; *People v. Jiminez* (2000) 80 Cal.App.4th 286, 291-292; but see *People v. Glass* (2004) 114 Cal.App.4th 1032, 1037 & fn. 10.)

IV. INDETERMINATE TERM

An indeterminate term occurs when the court imposes life in prison. (§ 1168, subd. (b); *People v. Felix* (2000) 22 Cal.4th 651.) An indeterminate term can be 15 years to life or 25 years to life, for example. Some statutes simply say the punishment is "life" in prison. In this situation, the defendant is eligible for parole for the offense in seven years. (§ 3046.) However, it is error to

describe this as seven years to life. (See *People v. Robbins* (2018) 19 Cal.App.5th 660, 678.) Unless required otherwise, indeterminate terms may be served concurrently to each other and concurrently to determinate terms.

1. Third strikes cases (§§ 667, subds. (b)-(i), 1170.12)

A **"strike" conviction** is a conviction for a serious or violent felony. (§ 667, subd. (d)(1).) A juvenile adjudication for an offense listed in Welfare and Institutions Code section 707, subdivision (b) is a strike so long as the minor was at least 16 years old when the offense was committed and a serious or violent felony in the petition was found true. (*Id.*, subd. (d)(3); *People v. Garcia* (1999) 21 Cal.4th 1.) Beware that once the juvenile has been adjudicated for an offense listed in section 707(b), all serious felonies in the petition that were found true are strikes, even if they are not listed in section 707(b). (*Garcia*, at p. 6.) Generally, a prior used to enhance the defendant's penalty one way can also be used as a strike. (*People v. Dotson* (1997) 16 Cal.4th 547.) If the defendant was convicted of two serious felonies from the same act or with the same intent, and the punishment for one of them was stayed, the stayed count does not qualify as a separate strike. (*People v. Vargas* (2014) 59 Cal.4th 635, 640-648.)

Sentencing with one prior strike. The sentence for a conviction is doubled. (§ 667, subd. (c)(1).) If one would have been sentenced under DSL, double the principal and subordinate terms. Do not double the time for specific or general enhancements. (*People v. Nguyen* (1999) 21 Cal.4th 197; *People v. Martin* (1995) 32 Cal.App.4th 656.) For indeterminate terms, the minimum statutory time it would take the defendant to become eligible for parole is doubled. (*People v. Jefferson* (1999) 21 Cal.4th 86.) Beware that a conviction not arising from the same occasion or set of operative facts must be served consecutively. (§§ 667, subd. (c)(6); *People v. Lawrence* (2000) 24 Cal.4th 219; *People v. Deloza* (1998) 18 Cal.4th 585.) The defendant must do at least 80% of time in *prison* before he or she is eligible for parole. (*People v. Hill* (1995) 37 Cal.App.4th 220.) However, normal *presentence* credits apply. (*People v. Jones* (2023) 88 Cal.App.5th 818, 823; *People v. Philpot* (2004) 122 Cal.App.4th 893, 908.)

Sentencing with two prior strikes. The defendant receives a second strike sentence for any new conviction unless: the current offense is a serious or violent felony or (i) the current offense is a controlled substance charge, in which an allegation under Section 11370.4 or 11379.8 of the Health and Safety Code was admitted or found true; (ii) the current offense is a felony sex offense, defined in subdivision (d) of section 261.5 or 262, or any felony offense that results in mandatory registration as a sex offender pursuant to subdivision (c) of section 290, except for violations of sections 266 and 285, paragraph (1) of subdivision (b) and subdivision (e) of section 286, paragraph (1) of subdivision (b) and subdivision (e) of section 288a, section 311.11, and section 314; (iii) during the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person, or (iv) the defendant has a prior offense which is a "super strike." (§ 667, subd. (e)(2)(C).) A **super strike** is a felony conviction which is: (I) a "sexually violent offense" listed in Welfare and Institutions Code section 6600; (II) oral copulation, sodomy, or sexual penetration of a child under 14 years old where the defendant is at

least ten years older; (III) lewd conduct with a minor under the age of 14 years; (IV) any homicide or attempted homicide, including manslaughter; (V) solicitation to commit murder; (VI) a violation of section 245, subdivision (d)(3); (VII) a violation of section 11418; and (VIII) any serious or violent felony with a sentence of life or death. (§ 667, subd. (e)(2)(C)(iv).)

If the defendant with two prior strikes does not qualify for a second strike sentence, then usually the defendant is simply sentenced to 25 years to life consecutive to any enhancements. (§ 667, subd. (e)(2)(A)(ii).) If it would be longer, the minimum indeterminate term would be triple the time for the conviction, though not the enhancements. (*Id.*, subd. (c)(2)(A)(i).) Thus, someone who received the middle term for violating section 288.5 (12 years) would serve 36 years to life plus any enhancements. If it would be the longest term, take the time one would serve under DSL, turn it into an indeterminate term, and add (again) the enhancements. (*Id.*, subd. (c)(2)(A)(iii).) For example, if the defendant received the middle term for violating section 288.5 had five prior serious felonies brought and tried separately (five 5 year priors), the defendant would receive under DSL a term of 37 (=12+25) years. Under the three strikes law, the defendant would receive a sentence of 37 years to life consecutive to 25 years for the enhancements. (*People v. Dotson* (1997) 16 Cal.4th 547, 559.) For an indeterminate term, the period the defendant would wait to be statutorily eligible for parole would be tripled.

2. One strike cases

Section 667.61 is commonly referred to as the "one strike" sentencing scheme. (*Guillory v. Superior Court* (2003) 31 Cal.4th 168, 173; *People v. Hammer* (2003) 30 Cal.4th 756, 761.) The one strike law is not an enhancement but an alternate sentencing scheme. (*People v. Acosta* (2002) 29 Cal.4th 105, 118; *People v. Fuller* (2006) 135 Cal.App.4th 1336, 1343.) This is because an enhancement adds a punishment to a term for an offense. The one strike offense does not do this. Instead, it changes the available punishment to an indeterminate terms when certain conditions are met.

One court has described the one strike law as "tak[ing] something of a Chinese menu approach." (See *People v. Lopez* (2004) 119 Cal.App.4th 355, 360.) It lists the offenses in subdivisions (c) and (n), lists circumstances under subdivisions (d) and (e), and then provides at least six different punishment schemes, depending on how many circumstances exist from each list, the age of the victim, and sometimes the age of the defendant.

A defendant who commits an offense listed under subdivision (c) under one circumstance listed under subdivision (e) against a victim at least 14 years old is punished by 15 years to life. (§ 667.61, subd. (b).) If two or more circumstances in subdivision (e) or if one circumstance in subdivision (d) exists, the punishment is 25 years to life. (§ 667.61, subd. (a).)

However, if the victim is under the age of 14 years, the defendant commits an offense listed in subdivision (c), except for a violation of section 288, subdivision (a), and one of the circumstances listed subdivision (e) exist, then the punishment is 25 years to life. (§ 667.61, subd. (j)(2).) The

punishment is life without parole if there are two circumstances under subdivision (e) or one circumstance under subdivision (d); however, if the defendant is a minor, then the punishment is 25 years to life. (§ 667.61, subd. (j)(1).)

If the defendant commits a forcible sex offense listed in subdivision (n) against a victim under the age of 14 years and one of the circumstances in subdivision (e) exists, then the punishment is 25 years to life. (§ 667.61, subd. (m).) If two of the circumstances in subdivision (e) or one of the circumstances in subdivision (d) exist, then the punishment is life without parole, unless the defendant is a minor, in which case the punishment is 25 years to life. (§ 667.61, subd. (*l*).)

Sometimes, the prosecution alleges a one strike offense with a child or under certain conditions would lead to a sentence of 25 years to life or longer, but the defendant would be subject to a longer punishment due to the victim being under 14 years old. The Supreme Court decided the trial court lacks the authority to impose the longer sentence when it is not properly alleged because the defendant lacks sufficient notice. (*In re Vaquera* (2024) 15 Cal.5th 706, 724.)

Similar to section 667.6, subdivision (d), a consecutive sentence is required if the offenses occurred against a different victim or on a different occasion. (§ 667.61, subd. (i).) Before September 2006, a "single occasion" with the same victim under former section 667.61, subdivision (g) was broader than under section 667.6, subdivision (d); punishments could be concurrent if the offense were committed in close temporal or spacial proximity. (*People v. Jones* (2001) 25 Cal.4th 98, 107.) For offenses committed after the amendment was enacted, the phrase has the same meaning as in section 667.6. (*People v. Rodriguez* (2012) 207 Cal.App.4th 204, 212-213.) However, a concurrent term is permitted if the defendant is punished under subdivision (a), (b), or (j) of section 667.61 for a violation of section 288 or 288.5. (§ 667.61, subd. (i).)

The multiple victim circumstance applies to each offense. (*People v. Morales* (2018) 29 Cal.App.5th 471, 482-485.) Thus, if the defendant commits two offenses against victim A on separate occasions, and one offense against victim B, the court shall impose three consecutive life terms.

The court can combine the one strike law with three strike law; thus, 25 years to life under the one strike law with two prior strikes is 75 years to life (plus 10 years for two prior serious felony convictions if they were brought and tried separately). (*People v. Acosta* (2002) 29 Cal.4th 105, 114-128; *People v. Ervin* (1996) 50 Cal.App.4th 259.)

3. Other aggravated sex offenses

A forcible sex offense with a victim under the age of 14 years when the defendant is at least seven years older is punished by 15 years to life. (§ 269.)

Any intercourse or sodomy by an adult with a child who is 10 years old or younger is punished by 25 years to life. (§ 288.7, subd. (a).) Any oral copulation or sexual penetration under

the same situation is punished by 15 years to life. (§ 288.7, subd. (b); *People v. Cornett* (2012) 53 Cal.4th 1261, 1265-1266.) A minor who aids and abets can be punished under this provision, so long as the perpetrator was an adult. (*People v. Vital* (2019) 40 Cal.App.5th 925, 933-934.)

Kidnapping for purposes of committing a sex offense, robbery, or carjacking is punished by life in prison. (§§ 209, subd. (b)(1), 209.5.) Kidnapping is one of the circumstances for a life sentence under section 667.61. However, the defendant can be punished only once under section 209 and 667.61, subdivision (b). (§ 209, subd. (d).) By the way, kidnapping for ransom or extortion is punished by life in prison, or life without parole if the victim suffers bodily harm. (§ 209, subd. (a).)

V. DOUBLE PUNISHMENT

Section 654 prohibits multiple punishments for the same act and for committing multiple crimes with the same intent or objective. "Whether a defendant may be subjected to multiple punishment under section 654 requires a two-step inquiry, because the statutory reference to an 'act or omission' may include not only a discrete physical act but also a course of conduct encompassing several acts pursued with a single objective. [Citations.] We first consider [whether] the different crimes were completed by a 'single physical act.' ([*People v.*] *Jones* [(2012)] 54 Cal.4th [350,] 358.) If so, the defendant may not be punished more than once for that act." (*People v. Corpening* (2016) 2 Cal.5th 307, 311.) "Only if we conclude that the case involves more than a single act—i.e., a course of conduct—do we then consider whether that course of conduct reflects a single 'intent and objective' or multiple intents and objectives. [Citations.]" (*Id.* at pp. 311-312; see also *People v. Mesa* (2012) 54 Cal.4th 191, 199.) However, multiple punishments can be imposed for crimes of violence against different victims. (*Neal v. State of California* (1960) 55 Cal.2d 11, 20-21.)

Imposing a concurrent terms is still punishment; the only remedy when section 654 applies is staying one of the punishments. (*People v. Deloza* (1998) 18 Cal.4th 585, 594.) When the court stays the punishment for the underlying offense, it must stay the punishment for the conduct enhancements that attach to the offense. (*People v. Bui* (2011) 192 Cal.App.4th 1002, 1011-1014.) Historically, the court had the discretion to stay the longer punishment or the shorter sentence, but the Legislature had amended the statute to require staying the shorter term. (*People v. Kramer* (2002) 29 Cal.4th 720, 723.) Assembly Bill No. 518 (2021-2022 Reg. Sess.) (Stats. 2021, ch. 441, eff. Jan. 1, 2022) restored the court's discretion to stay the longer term. (*People v. Mendoza* (2022) 74 Cal.App.5th 843, 861-862.)

A defendant could not be punished for both an offense and for an enhancement to a different offense involving the same act or intent. For example, a defendant could not be punished for a gang crime and for the gang enhancement attached to a different offense. (*Mesa, supra*, 54 Cal.4th at pp. 195-200; see also *People v. Nguyen* (2015) 61 Cal.4th 1015, 1068; *People v. Ahmed* (2011) 53 Cal.4th 156, 163.) However, the defendant may be punished for assault with a firearm (§ 245, subd. (b)) and with a firearms enhancement. (*People v. Ledesma* (1997) 16 Cal.4th 90.)

The court cannot impose a punishment for an enhancement based on the same factor that is used to impose a life term under the one strike law. (§ 667.61, subd. (f); *People v. Mancebo* (2002) 27 Cal.4th 735, 738, 740.) If, however, an excessive number of factors for imposing a life term under section 667.61 are found true or admitted, the excess factors can be used to enhance the sentence. (§ 667.61, subd. (f).)

Generally, section 654 does not apply to status enhancements. (*People v. Coronado* (1995) 12 Cal.4th 145, 157-158 [DUI with priors and prison prior]; *People v. Walker* (2002) 29 Cal.4th 577, 589 [failure to appear with an OR enhancement].) Section 654 does not apply when the defendant is placed on probation with imposition of sentence suspended. (*People v. Wittig* (1984) 158 Cal.App.3d 124, 137; *People v. Stender* (1975) 47 Cal.App.3d 413, 425.) Section 654 does not apply to offenses punished under section 667.6, subdivision (c). (*People v. Hicks* (1993) 6 Cal.4th 784, 787.) It does apply to one strike offenses. (*People v. Govan* (2023) 91 Cal.App.5th 1015, 1035.)

VI. STRIKING AN ALLEGATION

Historically, there have been some limits on how a court can exercise its discretion to strike or dismiss an allegation under section 1385. Some of the limitations have been eliminated.

Starting in 2018, the court has discretion to dismiss a firearms enhancement. (Sen. Bill. No. 620 (2017-2018 Reg. Sess.) § 2; see *People v. Morelos* (2022) 13 Cal.5th 722, 768; *People v. Parra Martinez* (2022) 78 Cal.App.5th 317, 321-322.) The court may also choose to impose a lesser included firearms enhancement. (*People v. Tirado* (2022) 12 Cal.5th 688, 700.)

Starting in 2019, the court has discretion to dismiss a prior serious felony conviction. (Sen. Bill No. 1393 (2017-2018 Reg. Sess.); Stats. 2018, ch. 1013, §§ 1, 2; *People v. Stamps* (2020) 9 Cal.5th 685, 698-699.) However, the change in the law cannot be applied retroactively to a nonfinal conviction if it would undo the plea bargain, unless the prosecution and the court agree. (*Stamps,* at pp. 705-709.)

A court still cannot strike a special circumstance leading to a sentence of death or life without parole for murder. (§ 1385.1.) The court cannot dismiss a one strike allegation. (§ 667.61, subd. (g); *People v. Wotzke* (2002) 28 Cal.4th 923, 930; *People v. Caparaz* (2022) 80 Cal.App.5th 669, 689-690.) Nor may the court strike an allegation under section 1203.065, subdivision (a) that prohibits probation. (*People v. Bautista-Castanon* (2023) 89 Cal.App.5th 922, 930.)

The court may impose or strike an enhancement or strike its punishment, but the court ordinarily cannot stay the punishment of an enhancement or do nothing with it. (*People v. Langston* (2004) 33 Cal.4th 1237, 1241; *People v. Bay* (2019) 40 Cal.App.5th 126, 139.) However, a court must stay the punishment if it finds imposing it would amount to double punishment. (Rule 4.447(a).)

The Legislature is now encouraging the courts to dismiss enhancements under certain circumstances. New subdivision (c) of section 1385 states that "the court shall consider and afford great weight to evidence offered by the defendant to prove that any [listed] mitigating circumstances." (§ 1385, subd. (c)(2).) The existence of a listed mitigating circumstance "weighs greatly in favor of dismissing the enhancement, unless the court finds that dismissal of the enhancement would endanger public safety. 'Endanger public safety' means there is a likelihood that the dismissal of the enhancement would result in physical injury or other serious danger to others." (*Ibid*.) This provision does *not* apply retroactively. (§ 1385, subd. (c)(7).) However, it does applies at a resentencing hearing held after the new law went into effect. (*People v. Sek* (2022) 74 Cal.App.5th 657, 674.)

The listed mitigating circumstances are: (A) discriminatory racial impact in punishment, (B) multiple enhancements in a single case, (C) an enhancement would result in a sentence of over 20 years, (D) the current offense is connected to mental illness, (E) the current offense is connected to prior victimization or childhood trauma, (F) the current offense is not a violent felony, (G) the defendant was a juvenile when they committed the current offense or the prior offense leading to the enhancement, (H) the enhancement is based on a prior conviction that is more then five years old, and (I) though a firearm was used, it was inoperable or unloaded. (§ 1385, subd. (c)(2).) The mere existence of one of the facts is insufficient; it must be a factor in the commission of the offense. (See *People v. Ortiz* (2023) 87 Cal.App.5th 1087, 1096, review granted Apr. 12, 2023, S278797.)

Subdivisions (c)(2)(B) and (c)(2)(C) state the enhancement "shall" be dismissed when there are multiple enhancements or the enhancement would result in a sentence of over 20 years. One court said "trial courts are to rebuttably presume that dismissal of an enhancement is in the furtherance of justice (and that its dismissal is required) *unless* the court makes a finding that the resultingly shorter sentence due to dismissal 'would endanger public safety.' " (*People v. Walker* (2022) 86 Cal.App.5th 386, 399, review granted March 22, 2023, S278309, emphasis in original.) Several other courts disagreed. (See *People v. Mendoza* (2023) 88 Cal.App.5th 287, 296 [need not consider listed mitigating circumstances if the court finds dismissal would endanger public safety]; *People v. Anderson* (2023) 88 Cal.App.5th 233, 240-241, review granted Apr. 19, 2023, S278786 ["shall" in subdivisions (B) and (C) means dismiss if, giving great weight, it is in the interests of justice or does not endanger public safety; it is not a presumption]; *People v. Ortiz* (2023) 87 Cal.App.5th 1087, 1096-1097, review granted Apr. 12, 2023, S278797.) This issue is on review.

The term "great weight" has been construed before. The determinate sentencing law was enacted in 1977 in an effort to decrease disparate punishments of African Americans. (See *People v. Martin* (1986) 42 Cal.3d 437, 442.) Section 1170 for a while permitted the Board of Prison Terms to request resentencing when it deemed a defendant received a disparate sentence. (*Id*. at p. 441.) The Supreme Court ruled the board's determination that there was a disparate sentence was entitled to "great weight." (*Id*. at p. 446, quoting *People v. Herrera* (1982) 127 Cal.App.3d 590, 600-601.) Thus, a sentencing court could not refuse to resentence someone because it simply disagreed with the judgment of the board. The Supreme Court said "giving great weight to the finding [of the board] does require the court to recall its sentence unless there is substantial evidence of countervailing

considerations which justify a disparate sentence." (*Id*. at p. 448.) In the context of section 1385, "great weight" would mean the court shall dismiss the enhancement if one or more of the factors in subdivision (c)(2) is true, unless "there is substantial evidence of countervailing considerations which justify a" longer sentence (*Martin, supra*, 42 Cal.3d at p. 448) because "the court finds that dismissal of the enhancement would endanger public safety" (§ 1385, subd. (c)(2)).

Some have hoped the new law would make it easier to dismiss a prior strike conviction, especially if it were a juvenile strike. However, the courts have disagreed. (See *People v. Burke* (2023) 89 Cal.App.5th 237, 243; see also *The Assn. of Dist. Attys., etc. v. Gascon* (2022) 79 Cal.App.5th 503, 551, review granted Aug. 31, 2022, S275478 ["the amendments to section 1385 do not appear to apply to allegations of prior serious or violent felony convictions under the three strikes law (see sec. 1385, subd. (c)(1) . . ."].)

VII. PRESENTENCE CREDITS

Defendants receive two forms of presentence credits. They receive actual credit for the actual time in custody, and they receive conduct credits for the time in custody in which there are no disciplinary problems the court is aware of.

Generally a defendant receives one day of actual credit for each day in custody. (§ 2900.5.) The defendant receives credit from the day of the arrest, even if the charging document is filed later (*People v. Schuler* (1977) 76 Cal.App.3d 324, 332) and continues to receive credits until the day of sentencing. The defendant must be in custody on the case to receive presentence credits. (*In re Marquez* (2003) 30 Cal.4th 14, 23-24; *People v. Huff* (1990) 223 Cal.App.3d 1100, 1105; *People v. Murrillo* (1986) 178 Cal.App.3d 232, 237.)

The defendant does not receive credit if he or she waived the award of presentence credits in order to be placed on probation. (*People v. Arnold* (2004) 33 Cal.4th 294, 304-309; *People v. Jeffrey* (2004) 33 Cal.4th 312, 318; *People v. Johnson* (2002) 28 Cal.4th 1050, 1056-1057.)

It becomes complicated when the defendant is in custody for more than one case. "Although the statutory language in section 2900.5 'may appear to have meaning which is self-evident, the appellate courts have had considerable difficulty in applying the words to novel facts.' (*People v. Adrian* (1987) 191 Cal.App.3d 868, 874.) 'Probably the only sure consensus among the appellate courts is a recognition that section 2900.5, subdivision (b), is "difficult to interpret and apply." [Citation.] As we have noted, in what is surely an understatement, '[c]redit determination is not a simple matter." '(*Id.* at pp. 874-875.)" (*In re Marquez* (2003) 30 Cal.4th 14, 19.)

Generally, a defendant can receive credit for only one case at a time. (*In re Rojas* (1979) 23 Cal.3d 152, 155-156.) A "prisoner is not entitled to credit for presentence confinement unless he shows that the conduct which led to his conviction was the sole reason for his loss of liberty during the presentence period." (*People v. Bruner* (1995) 9 Cal.4th 1178, 1191.) The burden is on the defendant to prove pressentence credits are due. (*Id*. at p. 1195.)

1. Consecutive sentences. "[W]hen consecutive terms are imposed for multiple offenses in a single proceeding, only one of the terms shall receive credit for presentence custody, . . . " (*Bruner, supra,* 9 Cal.4th at p. 1192, fn. 9.) No credit is awarded if the defendant is sentenced to serve a term consecutive to another sentence, even if this leads to dead time for a sentence that is recalculated to be one-third the middle term. (§ 2900.5, subd. (b), second sentence; *People v. Santa Ana* (2016) 247 Cal.App.4th 1123, 1135-1143 [though a violation of probation arises from the same conduct]; *People v. Adrian* (1987) 191 Cal.App.3d 868, 876-877.) However, if the defendant completed the previous term before sentencing on the new offense, then presentence credits shall be awarded for the remaining time in custody. (*People v. Torres* (2012) 212 Cal.App.4th 440, 444-447; *People v. Gonzalez* (2006) 138 Cal.App.4th 246, 252-254.)

2. Concurrent sentences. If the defendant is given two concurrent sentences *at the same time*, the defendant receives dual presentence credits. (*People v. Kunath* (2012) 203 Cal.App.4th 906, 909-911; *People v. Adrian* (1987) 191 Cal.App.3d 868, 875-876; see *Bruner, supra,* 9 Cal.4th at p. 1192, fn. 9.) However, if the defendant is serving an adjudicated sentence while waiting to adjudicate another case, he or she cannot receive presentence credits in the second case, even if a concurrent sentence is imposed. (*Rojas, supra,* 23 Cal.3d at pp. 155-156.)

3. Holds. A defendant does not receive presentence credits if there is a hold from another case. (*In re Joyner* (1989) 48 Cal.3d 487, 492.) However, custody credit is awarded when the other case is a juvenile matter because juvenile cases are not punitive. (*People v. Delgado* (2013) 214 Cal.App.4th 914, 919.) On the other hand, a defendant does not receive presentence credits if he or she committed the new offense while in custody serving an NGI commitment. (*People v. Mendez* (2007) 181 Cal.App.4th 861, 864-865; *People v. Callahan* (2006) 144 Cal.App.4th 678, 684-686.)

4. Violations. No credit is awarded for a case while in custody for a parole or probation violation unless they are "attributable to proceedings related to the same conduct" and the court imposes a concurrent term. (§ 2900.5, subd. (b); *Bruner, supra,* 9 Cal.4th at p. 1191; *People v. Shabazz* (2003) 107 Cal.App.4th 1255, 1258.) In other words, a defendant can receive presentence credits on the case and a violation of supervised release if the violation was for the same conduct and a concurrent sentence is imposed. (*People v. Williams* (1992) 10 Cal.App.4th 827, 832-834; *People v. Johnson* (2007) 150 Cal.App.4th 1467, 1485.) However, the defendant was not in custody for the "same conduct" if the violation was based in part on a technical violation of supervised release. (*People v. Stump* (2009) 173 Cal.App.4th 1264, 1273 [no presentence credits for DUI conviction when parole violation was for DUI and the technical violations of consuming alcohol and driving].)

5. Reversals. If a defendant did not receive presentence credits because he or she was in custody on another case, but the conviction in the other case was reversed, then the defendant is entitled to presentence credits in the current case. (*People v. Marquez* (2003) 30 Cal.4th 14, 20-21; *People v. Williams* (1992) 10 Cal.App.4th 827, 832-835; see also *People v. Shropshire* (2021) 70 Cal.App.5th 938, 949 [the sentence in the previous case was reduced].)

6. Conduct credits. Starting in 2011, section 4019 requires presentence conduct credits of two days for every two actual days. (*People v. Brown* (2012) 54 Cal.4th 314, 319-328.) This is two days conduct credit for every two days in custody, not one day of conduct credit for each day in custody. For defendants who served an odd number of days, they do not receive any conduct credits for the last day in custody.

A defendant can receive no more than 15 percent conduct presentence and postsentence credits if the defendant is convicted of a violent felony. (§ 2933.1; *In re Pope* (2010) 50 Cal.4th 777, 784-786 [even if the punishment for the violent felony is stayed under § 654]; *In re Reeves* (2005) 35 Cal.4th 765, 773, 779-780 [applies to consecutive sentences but does not apply to the portion of a *concurrent* sentence served after completion the case with the violent felony]; *In re Mallard* (2017) 7 Cal.App.5th 1220, 1276-1277 [applies to a crime reduced by Prop. 47 to be a misdemeanor consecutive to a violent felony prison sentence].) However, a defendant placed on probation for a case with a violent felony receives normal conduct credits for the time in the jail; if probation is revoked, then the defendant receives reduced presentence conduct credits when sentenced to prison. (*In re Carr* (1998) 65 Cal.App.4th 1525, 1531-1532.)

A defendant does not receive conduct credits for murder if the crime was committed after 1996. (§ 2933.2; *People v. Duff* (2010) 50 Cal.4th 787, 793-799.)

7. Resentencing. Calculations become complicated if a prisoner is resentenced. The Supreme Court has broken down the credits into four phases. "Phase I is the period from the initial arrest to the initial sentencing. . . . Phase II is the period from the initial sentencing to the reversal. . . . Phase III is the period from the reversal to the second sentencing. . . , and phase IV is the period after the second and final sentencing." (*In re Martinez* (2003) 30 Cal.4th 29, 32.) The court calculates actual credits and the conduct credits for phases I and III, but it is up to CDCR to calculate conduct credits for phase II. (*Id.*, at pp. 32-36; *People v. Rojas* (2023) 95 Cal.App.5th 48, 54; *People v. Donan* (2004) 117 Cal.App.4th 784, 792; *People v. Saibu* (2011) 191 Cal.App.4th 1005, 1012-1013.)

VIII. PROBATION

"All defendants are eligible for probation, in the discretion of the sentencing court [citation], unless a statute provides otherwise." (*People v. Aubrey* (1998) 65 Cal.App.4th 279, 282.) When there is a statutory rebuttable presumption against granting probation, the court must state its reasons for granting probation. (*People v. Superior Court (Dorsey)* (1996) 50 Cal.App.4th 1216.) The old law is that probation in a felony case is a privilege or an act of grace by the court. (*People v. Bravo* (1987) 43 Cal.3d 600, 608; *People v. Mehserle* (2012) 206 Cal.App.4th 1125, 1156-1158.) Effective in 2023, the Legislature said "the disposition of any criminal case use the least restrictive means available." (§ 17.2, subd. (a).) "The court presiding over a criminal matter shall consider alternatives to incarceration, including, without limitation, collaborative justice court programs, diversion, restorative justice, and probation." (§ 17.2, subd. (b).)

A defendant may refuse probation. (*People v. Fritchey* (1992) 2 Cal.App.4th 829.) The court may impose the maximum term if the defendant rejects probation. (See *People v. Brown* (2002) 96 Cal.App.4th Supp. 1, 42-43.) A defendant may object to certain conditions and accept probation in order to challenge the conditions on appeal. (*People v. Brauer* (1989) 211 Cal.App.3d 937, 940; *People v. Narron* (1987) 192 Cal.App.3d 724, 730.)

Starting in 2021, the term of probation is limited to two years (§ 1203.1) or one year for misdemeanors (§ 1203a), unless a statute specifies otherwise. This applies to those who were placed on probation before 2021, even if the length of probation was part of the plea bargain. (*People v. Prudholme* (2023) 14 Cal.5th 961, 969.)

Probation can be longer than two years for a violation of a violent felony or certain theft offenses. (§ 1203.1, subd. (*l*).) Probation for domestic violence is at least three years under section 1203.097. (*People v. Rodriguez* (2022) 79 Cal.App.5th 637, 644; *People v. Forester* (2022) 78 Cal.App.5th 447, 455; *People v. Qualkinbush* (2022) 79 Cal.App.5th 879, 895.) Probation for driving under the influence can be longer than two years. (*People v. Schulz* (2021) 66 Cal.App.5th 887, 897.) However, probation for vehicular manslaughter while intoxicated (§ 191.5, subd. (b)) cannot be longer than two years. (See *Bowden v. Superior Court* (2022) 82 Cal.App.5th 735, 742-745.)

1. Reasonableness

A claim that a probation condition is unreasonable is forfeited without an objection. (*People v. Welch* (1993) 5 Cal.4th 228, 237.) The reasonableness of a probation condition is reviewed for abuse of discretion. (*People v. Olguin* (2008) 45 Cal.4th 375, 379.)

"Although a trial court's discretion is broad in [setting a condition of probation], we have held that a condition of probation must serve a purpose specified in Penal Code section 1203.1." (*Olguin, supra,* 45 Cal.4th at p. 379.) Thus: "An adult probation condition is unreasonable if it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality.' [Citation.]" (*People v. Lent* (1975) 15 Cal.3d 481, 486, fn. omitted, quoting *People v. Dominguez* (1967) 256 Cal.App.2d 623, 627; *In re Ricardo P.* (2019) 7 Cal.5th 1113, 1118.) The court's oversight of juveniles can be more intense, and some conditions that might be unreasonable for an adult can be reasonable for a juvenile. (*In re Tyrell J.* (1994) 8 Cal.4th 68, 82.)

"*Lent*'s requirement that a probation condition must be ' "reasonably related to future criminality" ' contemplates a degree of proportionality between the burden imposed by a probation condition and the legitimate interests served by the condition." (*Ricardo P., supra,* 7 Cal.5th at p. 1120.) " 'Not every probation condition bearing a remote, attenuated, tangential, or diaphanous connection to future criminal conduct can be considered reasonable' under *Lent*." (*Id*. at p. 1127.) Thus, for example, a condition to search the probationer's cell phone can be unreasonable if there were no facts to justify it. (*Id*. at pp. 1120-1121.)

2. Vagueness and Overbreadth

A claim that probation conditions are unconstitutionally vague or overbroad based on undisputed facts can be raised on appeal without an objection below. (*In re Sheena K.* (2007) 40 Cal.4th 875, 885-887.) Whether a probation condition is facially vague or overbroad presents a pure question of constitutional law (*Sheena K.*, at pp. 888-889) that is reviewed de novo on appeal. (See *People v. Cromer* (2001) 24 Cal.App.4th 889, 894; see also *In re A.L.* (2010) 190 Cal.App.4th 75, 78.)

The Fourteenth Amendment to the United States Constitution and article I, sections 7 and 15 of the California Constitution guarantee no person shall be deprived of life, liberty, or property without due process of law. The vagueness doctrine bars enforcement of "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. [Citations.] A vague law not only fails to provide adequate notice to those who must observe its strictures, but also impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis**,** with the attendant dangers of arbitrary and discriminatory application. [Citation.] In deciding the adequacy of any notice afforded those bound by a legal restriction, we are guided by the principles that abstract legal commands must be applied in a specific *context,* and that, although not admitting of mathematical certainty, the language used must have *reasonable* specificity. [Citation.]" (*Sheena K., supra,* 40 Cal.4th at p. 890, emphasis in original, internal quotation marks omitted; see also *Grayned v. City of Rockford* (1972) 408 U.S. 104, 108; *Lanzetta v. New Jersey* (1939) 306 U.S. 451, 453.)

"A restriction is unconstitutionally overbroad, on the other hand, if it (1) 'impinge[s] on constitutional rights,' and (2) is not 'tailored carefully and reasonably related to the compelling state interest in reformation and rehabilitation.' [Citations.] The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights – bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement." (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.)

Although a probation violation must be done knowingly or with knowledge of doing what is forbidden, a condition is not vague for not requiring knowledge or willfulness. (*People v. Hall* (2017) 2 Cal.5th 494, 503.) However, the probationer must be able to know what is being banned. A condition to stay away from someone "suspected" to be a gang member was too vague. (*People v. Gabriel* (2010) 189 Cal.App.4th 1070, 1073.) Conditions to "be of good behavior and perform well," and "be of good citizenship and good conduct" was unconstitutionally vague. (*In re P.O.* (2016) 246 Cal.App.4th 288, 299; but see *People v. Rhinehart* (2018) 20 Cal.App.5th 1123, 1129 [condition "be of good conduct and obey all laws" was permissible because it meant obey all laws].) A condition to "[c]onsult with the probation officer without hesitation when you are in need of advice" was unconstitutionally vague. (*In re Anthony L.* (2019) 43 Cal.App.5th 438, 455-456.)

The court cannot ban a probationer from becoming pregnant. (*People v. Dominguez* (1967) 256 Cal.App.2d 623, 627; *People v. Zaring* (1992) 8 Cal.App.4th 362, 371-372; *People v. Pointer* (1984) 151 Cal.App.3d 1128, 1139-1141,)

A court order to leave the country is invalid. (*Alhusainy v. Superior Court* (2006) 143 Cal.App.4th 385, 391-393; *In re Babak S.* (1993) 18 Cal.App.4th 1077, 1084.) A ban on traveling to another country is often invalid. (*In re Daniel R.* (2006) 144 Cal.App.4th 1, 6-8; *People v. Smith* (2007) 152 Cal.App.4th 1245, 1251-1252.)

An order to stay away from all Home Depot stores and their parking lots was valid, even though this excluded the probationer from other stores on the property of the mall. (*People v. Moran* (2016) 1 Cal.5th 398, 402-405.)

The condition to obey all laws is implicit in every grant of probation. (*Olguin, supra,* (2008) 45 Cal.4th at pp. 379-380; *People v. Campos* (1988) 198 Cal.App.4th 917, 921; *People v. Cortez* (1962) 199 Cal.App.2d 839, 844.) Nonetheless, probation cannot be revoked simply because the probationer was arrested. (*People v. Enriquez* (2008) 160 Cal.App.4th 230, 241.)

a. Gangs. A condition to not "frequent" a gang area is vague. (*People v. Leon* (2010) 181 Cal.App.4th 943, 952 [though it is permissible to prohibit not visiting areas known by the defendant to be a gang area or where the probation officer informs]; *In re H.C.* (2009) 175 Cal.App.4th 1067, 1072; *People v. Sanchez* (2003) 105 Cal.App.4th 1240, 1244.) The court can prohibit gang members from being in a courthouse unless a defendant, party, or witness, is permitted to attend as a victim, or may be speaking at a hearing. (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153-1158; see *Leon,* at pp. 952-954 [though cannot ban defendant from courthouse or proceedings not gang related]; but see *People v. Perez* (2009) 176 Cal.App.4th 380, 383-386.)

b. Intimate violence probation. Section 1203.097 requires intimate violence counseling for everyone convicted of a crime described in Family Code section 6211 and placed on probation. (*People v. Rodriguez* (2022) 79 Cal.App.5th 637, 643; *People v. Cates* (2009) 170 Cal.App.4th 545, 549-550.)

c. Sex cases. When the defendant is convicted of a sex offense and placed on probation, section 1203.067, subdivision (b) requires certain conditions of probation: to undergo sex offender counseling for at least one year, waive the right against self-incrimination to undergo polygraph testing, and to waive the psychotherapist-patient privilege. The Supreme Court held the conditions are constitutional. (*People v. Garcia* (2017) 2 Cal.5th 792, 806-812.) However, the probationer has derivative-use immunity for statements that are compelled. (*Id*. at pp. 806-807.) The scope of the questions asked by the polygrapher need not be limited by the court. (*Id*. at pp. 808-809; *In re David C.* (2020) 47 Cal.App.5th 657, 669-670.)

Some conditions of probation imposed on sex offenders can be challenged for being vague. The problem is a lack of an agreed upon definition for pornography or stimulating. Thus, the

condition not to possess pornography was vague. (*People v. Gruis* (2023) 94 Cal.App.5th 19, 23-24; *In re D.H.* (2016) 4 Cal.App.5th 722, 727-729; *People v. Pirali* (2013) 217 Cal.App.4th 1341, 1352-1353; see *United States v. Guagliardo* (9th Cir. 2002) 278 F.3d 868, 872; *Farrell v. Burke* (2d Cir. 2006) 449 F.3d 470, 486.) On the other hand, the condition not to posses material about child pornography was valid. (*United States v. Cope* (9th Cir. 2008) 527 F.3d 944, 956-957.)

A ban on possessing depictions of partial or complete nudity was overbroad. (*In re Carlos C.* (2018) 19 Cal.App.5th 997, 1001-1004; see *United States v. Simons* (8th Cir. 2010) 614 F.3d 475, 483-485; but see *United States v. Holm* (7th Cir. 2003) 326 F.3d 872, 877.)

The condition not to possess "sexually stimulating/oriented material deemed not appropriate by the probation officer" was vague. (*People v. Turner* (2007) 155 Cal.App.4th 1432, 1436; see also *People v. Connors* (2016) 3 Cal.App.5th 729, 737-738; *United States v. Gnirke* (9th Cir. 2015) 775 F.3d 1155.) On the other hand, a condition not to possess "material that has the primary purpose of causing sexual arousal" was not vague. (*In re David C.* (2020) 47 Cal.App.5th 657, 667.)

Federal courts have said the court may ban possession of (1) "any materials with depictions of 'sexually explicit conduct' involving children, as defined by 18 U.S.C. § 2256(2)" and (2) "any materials with depictions of 'sexually explicit conduct' involving adults, defined as explicit sexually stimulating depictions of adult sexual conduct that are deemed inappropriate by [the] probation officer." (*United States v. Gnirke* (9th Cir. 2015) 775 F.3d 1155, 1166.)

A condition of supervised release for a child molester not to access any computer is often seen as being overbroad, at least when an electronic device was not involved in the crime. (See, e.g., *In re Hudson* (2006) 143 Cal.App.4th 1, 9-11; *In re Stevens* (2004) 119 Cal.App.4th 1228, 1239; *People v. Salvador* (2022) 83 Cal.App.5th 57, 67; *United States v. Riley* (9th Cir. 2009) 576 F.3d 1046, 1048-1050 [condition not to possess any material on children was overbroad in a child molest case]; but see *United States v. Antelope* (9th Cir. 2005) 395 F.3d 1128, 1142 [upholding a condition to never be on line].)

Generally speaking, however, conditions of probation prohibiting Internet access have been upheld in cases that involved use of the Internet in the underlying crime. (See, e.g., *People v. Prowell* (2020) 48 Cal.App.5th 1094, 1099; *United States. v. Paul* (5th Cir. 2001) 274 F.3d 155, 168-169.) Other cases have held a complete ban on Internet use to be overbroad, even in cases involving child pornography. (See *United States v. LaCoste* (9th Cir. 2016) 821 F.3d 1187, 1191-1192; *United States v. Blinkinsof* (9th Cir. 2010) 606 F.3d 1110, 1123; *United States v. Freeman* (3d Cir. 2003) 316 F.3d 386, 392; *United States v. Sofsky* (2d Cir. 2002) 287 F.3d 122, 126-127; see *In re Victor L.* (2010) 182 Cal.App.4th 902, 923-927 [conflicting orders on Internet use was vague but could be modified to prohibit access].)

d. Electronic search conditions. A condition of probation permitting the probation officer or law enforcement officer to search electronic devices under the control of the probationer can be unreasonable if the crime does not involve electronic devices. (*Ricardo P., supra,* 7 Cal.5th at pp.

1120-1121; *In re David C.* (2020) 47 Cal.App.5th 657, 662-665; *People v. Cota* (2020) 45 Cal.App.5th 786, 791; *In re Amber K.* (2020) 45 Cal.App.5th 559, 565-567; but see *In re J.S.* (2019) 37 Cal.App.5th 402, 406-411; *People v. Wright* (2019) 37 Cal.App.5th 120, 129-132 [reasonable, not overbroad or violate self-incrimination or privacy].)

An electronic search condition can be reasonable when the crime involved the use of an electronic device. (*People v. Salvador* (2022) 83 Cal.App.5th 57, 65 [met girlfriend through Grindr seven months before domestic violence incident]; *People v. Castellanos* (2020) 51 Cal.App.5th 267, 275-276 [transportation of drugs with cell phones in the car]; *In re Q.R.* (2020) 44 Cal.App.5th 696, 702-705 [recorded sex with girlfriend and extorted her with it]; *People v. Patton* (2019) 41 Cal.App.5th 934, 944-945 [theft of electronic devices alone made the condition reasonable]; but see *People v. Prowell* (2020) 48 Cal.App.5th 1094, 1101-1102 [condition to search "communication devices" instead of "electronic storage devices" was overbroad].)

e. Drugs. Probation is required for nonviolent drug possession cases. (§§ 1210, 1210.1; *People v. Canty* (2004) 32 Cal.4th 1266, 1273; *People v. Superior Court (Jefferson)* (2002) 97 Cal.App.4th 530, 535.) Under Proposition 36 (Gen. Elec. (Nov 7, 2000)), a first time offender of probation is conclusively presumed to be amenable to treatment; a second time has a rebuttable presumption that he is amenable to treatment; and a third time is conclusively presumed not to be amenable and is not eligible for probation. (*People v. Bowen* (2004) 125 Cal.App.4th 101, 106-107.)

3. Violations of Probation

The process of violating probation is not clearly explained in the statutes. The practice can be cobbled together from cases law. It is important to understand there is a distinction between a violation, summary revocation, reinstatement, modification, termination, and revocation of probation.

If a probationer is accused of violating the terms of probation, the probation officer or district attorney may file a **petition** to revoke probation.

Probation cannot be revoked after it has expired. (*People v. Leiva* (2013) 56 Cal.4th 498, 516-518; *In re Daoud* (1976) 16 Cal.3d 879, 882.) Thus, a court may order a **summary revocation** of probation to preserve jurisdiction. (§ 1203.2, subd. (a); *People v. Lewis* (1992) 7 Cal.App.4th 1949, 1955.) Summary revocation " 'is simply a device by which the defendant may be brought before the court and jurisdiction retained before formal revocation proceedings commence.' " (*Lewis,* at p. 1955.)

A defendant is entitled to due process under the Fourteenth Amendment. The "final revocation of probation must be preceded by a hearing . . . . The probationer is entitled to written notice of the claimed violations of his probation; disclosure of the evidence against him; an opportunity to be heard in person and to present witnesses and documentary evidence; a neutral hearing body; and a written statement by the factfinder as to the evidence relied on and the reasons

for revoking probation. [Citations.]" (*Black v. Romano* (1985) 471 U.S. 606, 611-612; *People v. Vickers* (1972) 8 Cal.3d 451, 458; *People v. Mosley* (1988) 198 Cal.App.3d 1167, 1173.) There is a state right to counsel at every violation of probation hearing except for the summary revocation of probation. (*People v. Hall* (1990) 218 Cal.App.3d 1102, 1106-1108; *People v. Bauer* (2012) 212 Cal.App.4th 150, 156-157.) The prosecution's burden is the preponderance of the evidence. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 447.)

Although hearsay is admissible at a violation of probation hearing, the defendant retains a due process right to confrontation. (*People v. Gray* (2023) 15 Cal.5th 152, 168-169.) A showing of good cause is required "before a defendant's right of confrontation at a probation revocation hearing can be dispensed with by the admission of hearsay" in lieu of a witness testifying at all. (*People v. Arreola* (1994) 7 Cal.4th 1144, 1159.) Whether good cause exists is determined on a case-by-case basis. Good cause may exist "(1) when the declarant is 'unavailable' under the traditional hearsay standard (see Evid. Code, § 240), (2) when the declarant, although not legally unavailable, can be brought to the hearing only through great difficulty or expense, or (3) when the declarant's presence would pose a risk of harm (including, in appropriate circumstances, mental or emotional harm) to the declarant." (*Id*. at p. 1160.) The good cause showing must be considered, including the purpose for which the evidence is offered, the significance of the evidence to the factual determination upon which the alleged probation violation is based, and whether other admissible evidence, including the probationer's admission, corroborates the evidence." (*Ibid*.) A court shall determine whether a witness may be considered to be unavailable by considering: the degree of difficulty or expense in securing the declarant to testify at the hearing, whether there exits any risk of physical or emotional harm if required to testify, and the significance of the particular evidence to the court's determination. (*Id*. at pp. 1159-1160; *In re Kentron D.* (2002) 101 Cal.App.4th 1381, 1392.)

"[W]hen a court passes on the ultimate issue of whether probation is to be revoked, the court must decide more than merely whether, in light of an alleged conviction for a new offense, a violation of probation has occurred. If such be the case, the court must go on to decide whether under all the circumstances this violation of probation warrants revocation." (*People v. Coleman* (1975) 13 Cal.3d 867, 895, fn. 22.) The court can instead modify or reinstate probation. " 'If probation is restored there has been in effect, no revocation at all.' " (*Lewis, supra,* 7 Cal.App.4th at p. 1955.) Although the court will often issue an order "**reinstating probation**," this has little legal effect other than to end the period when probation is considered to be summarily revoked. (*Ibid*.) A summary revocation of probation by itself does not extend probation. **(***Leiva, supra,* 56 Cal.4th at pp. 509, 515-518; *People v. Sem* (2014) 229 Cal.App.4th 1176, 1192-1193; *People v. Freidt* (2013) 222 Cal.App.4th 16, 22-24.)

Under sections 1203.2 and 1203.3, the court may **modify** a term of probation due to a violation of a condition of probation or a change in circumstances. This can include extending the term of probation or terminating probation. (*People v. Cookson* (1991) 54 Cal.3d 1091, 1095; *People v. Mendoza* (2009) 171 Cal.App.4th 1142, 1156-1157; see *People v. Nakano* (2023) 89 Cal.App.5th 623, 630.)

"**[T]ermination** of probation or a discharge from probation following completion of the probation term formally end the conditions of probation. When probation is terminated for a violation of probation conditions, judgment must be pronounced if no sentence was imposed at the time probation was granted. [Citation.] When a probationer is discharged, he or she has completed the term of probation, and the court no longer has jurisdiction. (§ 1203.3, subd. (b)(3).)" (*Lewis, supra,* 7 Cal.App.4th at pp. 1955-1956.)

On the other hand, the court may **revoke** probation and sentence the defendant to prison or to jail if the offense falls within section 1170, subdivision (h). (*Lewis, supra*, 7 Cal.App.5th at p. 1953.) There is a difference between execution of sentence suspended and imposition of sentence suspended. When the court places a defendant on probation, either imposition of sentence is suspended or execution of sentence is suspended. When imposition of sentence is suspended, the court does not yet impose a prison sentence (or a sentence under Pen. Code, § 1170, subd. (h).) This decision is suspended unless probation is revoked. When execution of sentence is suspended, the court does announce what the sentence is, but its execution is suspended and will not be enforced unless probation is revoked. If execution of sentence was suspended, the court must impose the sentence if probation is revoked; the court cannot impose a lighter sentence. (*People v. Howard* (1997) 16 Cal.4th 1081, 1095.)

Probation cannot be revoked because of an inability to pay. (*Bearden v. Georgia* (1993) 461 U.S. 660, 667-668.) However, probation can be extended to permit more time for the probationer to pay. Nonetheless, probation cannot be extended beyond the statutory maximum term unless there is a willful violation of probation. (*Cookson, supra,* 54 Cal.3d at p. 1094, 1098-1100; *People v. Mendoza* (2009) 171 Cal.App.4th 1142, 1156-1157.)

IX. SPLIT SENTENCE

"In 2011, the Legislature enacted and amended the Criminal Justice Realignment Act of 2011 addressing public safety (Stats. 2011, ch. 15, § 1; Stats. 2011, 1st Ex. Sess. 2011–2012, ch. 12, § 1 (the Realignment Act or the Act)). . . . Under the terms of the Act, low-level felony offenders who have neither current nor prior convictions for serious or violent offenses, who are not required to register as sex offenders, and who are not subject to an enhancement for multiple felonies involving fraud or embezzlement, no longer serve their sentences in state prison. Instead, such offenders serve their sentences either entirely in county jail or partly in county jail and partly under the mandatory supervision of the county probation officer. (Pen. Code, § 1170, subd. (h)(2), (3), (5).)" (*People v. Scott* (2014) 58 Cal.4th 1415, 1418-1419.) The court retains discretion to terminate mandatory supervision early. (*People v. Camp* (2015) 233 Cal.App.4th 461, 470-475.) The court loses jurisdiction to recall or modify a straight judgment served at jail. (*People v. Antolin* (2017) 9 Cal.App.5th 1176, 1179-1182.)

Mandatory supervision is not the same as probation. (*People v. Rahbari* (2014) 232 Cal.App.4th 185, 192-196.) Instead, "mandatory supervision is more similar to parole than probation." (*People v. Fandinola* (2013) 221 Cal.App.4th 1415, 1423.) Nonetheless, the validity of

a condition of mandatory supervision is reviewed under *Lent*. (*People v. Bryant* (2021) 11 Cal.5th 976, 986; *People v. Brand* (2021) 59 Cal.App.5th 861, 866 [challenge of conditions of mandatory supervision is the same as conditions of probation].)

X. FINES, PENALTY ASSESSMENTS, FEES

As the Legislature increased penalties in the 1990s and 2000s, it sought to balance the state budget with increased fines, fees, and penalty assessments. In the aftermath of the riots in Ferguson, Missouri in 2014, it was discovered that trying to raise funds though the criminal justice system worked against rehabilitation efforts and was exploitive of those who could least afford them. Since then, there has been an effort to reduce the financial burdens, tempered by concerns over lost revenue.

Because a fine is part of a defendant's punishment, a statutory increase in the amount of a fine cannot apply to crimes committed before the legislative change. (*People v. Voit* (2011) 200 Cal.App.4th 1353, 1372 .) Restitution fines are also punishment, and the ex post facto clause applies. (*People v. Callejas* (2000) 85 Cal.App.4th 667, 678.) Because penalty assessments apply to fines, the ex post facto clause applies to penalty assessments. (*People v. High* (2004) 119 Cal.App.4th 1192, 1197.) Conversely, penalty assessments are mandatory and can be imposed by the appellate court if the superior court failed to impose the correct amount. (*People v. Talibdeen* (2002) 27 Cal.4th 1151, 1157; *People v. Taylor* (2004) 118 Cal.App.4th 454, 457.)

1. Fines

Unless a statute specifies otherwise, any felony carries a maximum fine of $10,000, and a misdemeanor carries a maximum fine of $1000. (§ 672.) However, penalty assessments are added to the fines, which can quadruple the monetary bite.

2. Penalty Assessments

Penalty assessments are added to most fines, but they are not added to victim restitution, restitution fines, court security and facility fees, or most administrative fees. (See *People v. McCoy* (2007) 156 Cal.App.4th 1246, 1257; *People v. Allen* (2001) 88 Cal.App.4th 986, 992-993; *People v. Martinez* (1999) 73 Cal.App.4th 265.) Penalty assessments have changed over time. Since it violates the ex post facto clause to impose a penalty assessment before the statute requiring it was enacted, it is important to keep track of what penalty assessments apply at the time of the offense. Properly calculating the penalty assessments is important. If the amount is too high, the client would appreciate it if you can reduce the debt. If the amount is too low, this becomes a potential adverse consequence.

Since 1995, a state penalty assessment of $10 (§ 1464, subd. (a)) and a county penalty assessment of up to $7 has been added to each fine of $10 or portion thereof (Gov. Code, § 76000, subd. (a)). Thus, penalty assessments of $170 would be added to a $100 fine. Each county transferred

part of the county penalty assessment to constructing new courthouses. This amount can vary in some counties.

Effective September 30, 2002, a state surcharge of 20 percent is added as a penalty assessment. (§ 1465.7.)

Starting January 1, 2003, a county surcharge of up to $5 can be assessed on every $10 of a fine or portion thereof. (Gov. Code, § 70372, subd. (a).) The exact assessment can depend on the amount set by the county board of supervisors. (Gov. Code, § 70375; see *McCoy, supra*, 156 Cal.App.4th at pp. 1252-1254.) The correct assessment under section 70732 for Monterey and San Benito Counties was $3 for every $10 of a fine or portion thereof; in Santa Clara County, it was $3.50; and in Santa Cruz County it had been $5 through 2007 and then became $3. An amendment, effective January 1, 2009, made this amount $5 in all cases.

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

Not to be outdone, the Legislature approved a DOJ forensic lab fee of $1 for every fine of $10 or portion thereof, effective July 12, 2006. (Gov. Code, § 76104.7.) This increased to $3 for every fine of $10 or portion thereof, effective June 10, 2010. It increased again to $4, effective June 27, 2012.

Starting in 2007, a county may impose an "Emergency Medical Services" Fund penalty assessment of $2 for every $10 or portion thereof of a fine. (Gov. Code, § 76000.5.) This fee does not apply in every county. It depends on the county board of supervisors adopting it.

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

Starting in 2011, there is a $4 penalty assessment for every conviction for a violation of the Vehicle Code or a local ordinance adopted pursuant to the Vehicle Code, except for parking offenses. (Gov. Code, § 76000.10, subd. (c)(1).)

There are additional penalty assessments for convictions for driving under the influence. (See, e.g.,§ 1463.14, subd. (b) [$50 per conviction]; Veh. Code, §§ 23645 [$50], 23649 [$100].)

3. Fees

Effective August 13, 2003, a court operations assessment (formerly called a court security fee) of $20 is added. (§ 1465.8.) The amount increased to $30 on July 28, 2009. This amount

increased to $40 on October 19, 2010. The fee is assessed for each conviction. (*People v. Schoeb* (2005) 132 Cal.App.4th 861, 865-866.) It applies to any case, regardless of when the crime was committed. (*People v. Alford* (2008) 42 Cal.4th 749, 754-755.) The amount that applies is the amount in effect when the "conviction" occurred, which is when there is a guilty or no contest plea or a guilty verdict. (See *People v. Davis* (2010) 185 Cal.App.4th 998, 1000-1001.) It cannot be assessed in juvenile cases. (*Edgar v. Superior Court* (2004) 120 Cal.App.4th 1306, 1309.)

Effective January 1, 2009, a court facilities fee of $30 is added. (Gov. Code, § 70373.) The wording of the statute suggests it applies per conviction, not per case. The fee also applies to misdemeanors. A fee of $35 is added for each infraction. Again, what matters is when the "conviction" occurred, not when the crime was committed.

4. Restitution fines

Under subdivision (b) of section 1202.4, the court must impose a restitution fine when the defendant is convicted. Starting August 3, 1995, the court must impose a parole revocation restitution fine of the same amount when the defendant is sentenced to prison; this fine is stayed unless the defendant violates parole. (§ 1202.45.) Effective August 16, 2004, the court must also impose a probation revocation restitution fine of the same amount when the defendant is placed on probation, and the fine is stayed unless the defendant violates probation. (§ 1202.44.) The court must impose and stay a mandatory supervision violation restitution fine if the defendant is placed on mandatory supervision. The restitution fine must be not less than $200 and not more than $10,000 ($100-$1000 for misdemeanor convictions). The minimum restitution fine increased to $240 (or $120 for misdemeanor convictions) in 2012, $280 (or $140) in 2013, and $300 (or $150) in 2014.

5. Reform

Assembly Bill No. 1869 (Stats. 2020, ch. 92), effective July 1, 2021, eliminated probation fees (§ 1203.1b), county parole fees (§ 1203.1e), attorney fees (§ 987.4), and certain program fees under sections 1203.016, 1203.018, 1208.2, 1210.15, 3010.8, 4024.4, and 6266. The fees became uncollectible and voidable. (§ 1465.9, subd. (a).) It also eliminated the criminal justice administration (booking) fee under Government Code sections 29550 through 29550.3. (Gov. Code, § 6111.)

Assembly Bill No. 177 (Stats. 2021, ch. 257), effective January 1, 2022, eliminated fees under sections 1001.15, 1001.16, 1001.90, 1202.4, 1203.1, 1203.1ab, 1203.1c, 1203.1m, 1203.4a, 1203.9, 1205, 1214.5, 2085.5, 2085.6, and 2085.7. (§ 1465.9, subd. (b).) It also eliminated a fee for failing to appear for a traffic ticket. (Veh. Code, § 42240.)

In 2019, the court of appeal decided *People v. Dueñas* (2019) 30 Cal.App.5th 1157. The court held that court fees on those who lack the ability to pay violated the equal protection and due process clause. There is also an argument it would violate the excessive fines clause of the Eighth Amendment and article I, section 17 of the state Constitution. The viability of *Dueñas* has been

pending in the Supreme Court for years. (See *People v. Kopp* (2019) 38 Cal.App.5th 47, 96-97, review granted Nov. 13, 2019, S257844.) Nonetheless, the case has caused a major shift on how courts deal with fines and fees. Trial courts have been more willing to impose minimal fines or no fines at all. However, the claim is forfeited on appeal without an objection below. (*People v. Wilson* (2023) 14 Cal.5th 839, 867; *People v. Navarro* (2021) 12 Cal.5th 285, 344.)

XI. SENTENCING REFORM

In the midst of the tough-on-crime waive, there were attempts to even the playing field. An initiative to reform the Three Strikes Law failed in 2004.

The first reform to pass was Proposition 36 in 2000. It was a radical idea at the time, though mild by today's standards. Instead of waging a war on drugs by putting everyone in prison, the proposal was to require probation and drug treatment in cases concerning nonviolent drug possession. Although there was resistence from prosecutors and judges, it was largely successful. Another Proposition 36 in 2012 amended the three strikes law to permit second strike sentences for those who had two prior strikes if the new felony is not a serious felony or a sex offense, and it provided a mechanism for petitioning for resentencing. Medical marijuana was legalized in 1996 and marijuana was generally legalized in 2016 by initiative. These were the obvious areas in need for reforming the sentencing laws.

The next impetus for sentencing reform was the crisis from prison overcrowding. The Legislature increased presentence conduct credits in January 2010, September 2010, and October 2011. The Criminal Justice Realignment Act of 2011 (Stats. 2011, ch. 15, § 1; Stats. 2011, 1st Ex. Sess. 2011–2012, ch. 12, § 1) reduced the prison population by directing sentences for minor felonies to be served in local jails.

In 2014, the voters approved Proposition 47, which reduced many petty thefts and drug possession offenses to misdemeanors. Proposition 57 in 2016 was sponsored by Governor Brown and provided legal authorization for CDCR to reduce its population by granting early parole for nonviolent offenders and by moving back to juvenile court many offenders who were minors when the crime was committed.

The focus then shifted to enhancements. Senate Bill No. 620 (2017-2018 Reg. Sess.) (Stats. 2017. ch. 682, § 2), effective January 1, 2018, authorized court to dismiss firearms enhancement. Senate Bill No. 1393 (2017-2018 Reg. Sess.; Stats. 2018, ch. 1013, §§ 1, 2), effective January 1, 2019, authorized dismissing the prior serious felony conviction. Senate Bill No. 180 (2017-2018 Reg. Sess.), effective January1, 2018, eliminated the three-year drug trafficking prior. Senate Bill No. 136 (2019-2020 Reg. Sess.; Stats. 2019, ch. 590, § 1), effective Jan. 1, 2020, eliminated most prison priors, and Senate Bill No. 483 (2021–2022 Reg. Sess.; Stats. 2021, ch. 728, § 3) provided a mechanism for dismissing prison priors for those in prison whose convictions were final.

The reform movement picked up momentum around 2018, and the focus shifted toward reducing racial disparity in the criminal justice system. For example, the Better than *Batson* law was passed in 2020. The Racial Justice Act was passed in 2022.

The Legislature passed a series of bills to make it easier for a defendant to have the sentence recalled under current section 1172.1. (Assem. Bill No. 2942 (2017-2018 Reg. Sess.), amending Pen. Code, § 1170, subd. (d); Stats 2018, ch. 1001, § 1, effective Jan. 1, 2019; Assem. Bill No. 1540 (2021 Reg. Sess.) (Stats. 2021, ch. 719) [moving section 1170, subdivision (d)(1) to new section 1170.03]; Assem. Bill. No. 200 (2022 Reg. Sess.) (Stats. 2022, ch. 58) [renumbered section 1170.03 to be section 1172.1]; Assem. Bill No. 600 (2023 Reg. Sess.) (Stats. 2023, ch. 446) § 2; Assem. Bill No. 88 (2023 Reg. Sess.) (Stats. 2023, ch. 795) § 1.5.) Although many call the law that went into effect on January 1, 2024 "AB 600," it is actually AB 88 that went into effect, though they are similar. The new law permits the court to recall the sentence on its own at any time based on a change in the law since the original sentence. (§ 1172.1, subd. (a)(1).) The court has the power to reduce the sentence and to reduce the conviction to a lesser included offense or a lesser *related* offense. (§ 1172.1, subd. (a)(3).) However, the court shall not reduce a conviction that was the result of a plea bargain without the approval of the district attorney. (§ 1172.1, subd. (a)(4).) The court may consider the defendant's behavior and rehabilitation while in custody. (§ 1172.1, subd. (a)(5).) The defendant does not have the right to file a petition for resentencing under this statute, and the court need not rule on any such petition. (§ 1172.1, subd. (c).)

A common issue arising in many of the sentencing reform bills is whether they apply retroactively. Changes in the Penal Code are generally presumed to apply prospectively, unless the Legislature intends otherwise. (§ 3). However, it is presumed the Legislature intended laws potentially reducing a sentences would apply retroactively to convictions that are not final, unless there is a clear indication otherwise. (*In re Estrada* (1965) 63 Cal.2d 740, 745-747.) The reason why it is presumed the Legislative intends the law to apply retroactively is that it would amount to vindictiveness to not extend the ameliorative change to all who could benefit from it, unless there is a sound legislative policy in place. (See, e.g., *People v. DeHoyos* (2018) 4 Cal.5th 594, 603 [*Estrada* did not apply when the Legislature established a procedure for convicts to petition for relief]; *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 308-310 [same]; *In re Pedro T.* (1994) 8 Cal.4th 1041, 1048-1049 [a temporary increase in auto theft punishment as an experiment to deter the crime did not permit reducing sentences to convictions that were not final when the statutory punishment was reduced after the experiment ended].)

"A judgment becomes final when the availability of an appeal and the time for filing a petition for certiorari with the United States Supreme Court have expired." (*People v. Buycks* (2018) 5 Cal.5th 857, 876; accord *People v. Nasalga* (1996) 12 Cal.4th 784, 789, fn. 5.) One reason why the *Estrada* principle applies only to nonfinal convictions is that traditionally the court loses jurisdiction to change a felony judgment once the defendant is sentenced to prison. (See *People v. Esquivel* (2021) 11 Cal.5th 671, 678.) Thus, a court retains jurisdiction to modify a sentence when the defendant is on probation. (*Ibid.*; *People v. McKenzie* (2020) 9 Cal.5th 40, 43.) One court, however, held a delinquency matter is final when the time for appealing is over, though the ward

remained on probation. (*In re Hunter W.* (2023) 88 Cal.App.5th 358, 368-371.)

A final conviction can become nonfinal if the judgment is vacated on habeas corpus (*People v. Padilla* (2022) 13 Cal.5th 152, 162) or by granting a petition to resentence the defendant (*People v. Monroe* (2022) 85 Cal.App.5th 393, 399-401; *People v. Keel* (2022) 84 Cal.App.5th 546, 564-565; *People v. Montes* (2021) 70 Cal.App.5th 35, 45-48). However, a final conviction remains final when the court corrects a clerical error in the sentence (*People v. Magana* (2021) 63 Cal.App.5th 1120, 1127), when it holds a *Franklin* hearing (*People v. White* (2022) 86 Cal.App.5th 1229, 1238; *People v. Lizarraga* (2020) 56 Cal.App.5th 201, 206-207), or when it considers a petition for resentencing but denies it (*People v. Vizcarra* (2022) 84 Cal.App.5th 377, 393; *People v. Guillory* (2022) 82 Cal.App.5th 326, 335-336). The courts have created other exceptions, leading to inconsistencies in the law. For example, a capital murder conviction is final after the Supreme Court affirms on appeal but reverses the penalty phase verdict. (*People v. Wilson* (2023) 14 Cal.5th 839, 870.) Some courts draw a distinction between sentencing reforms that make some terms unauthorized (such as a prison prior) and other reforms that simply give the judge discretion to impose a shorter sentence. The question of whether vacating the judgment makes the conviction no longer final for purposes of discretionary sentencing decisions is again pending in the Supreme Court. (See *People v. Lopez* (2023) 93 Cal.App.5th 1110, 1119, review granted Nov. 15, 2023, S281488.) One court complained that *Estrada* has become the appellate word "de jour." (See *People v. Owens* (2022) 78 Cal.App.5th 1015, 1026-1027.)

Sometimes, a judgment would be reversed on appeal and the law changes while the case has returned to the superior court. The prosecution often argues that a full resentencing hearing would be beyond the scope of the remittitur. It is generally true that a superior court's jurisdiction is limited to the scope of the remittitur. (*People v. Deere* (1991) 53 Cal.3d 705, 713.) However, when the court resentences the defendant for one reason, it has the power to restructure the entire sentence. (*Buycks, supra,* 5 Cal.5th at p. 893) This is because "a criminal sentence is, like an atom, indivisible: '[A]n aggregate prison term is not a series of separate independent terms, but one term made up of interdependent components. The invalidity of one component infects the entire scheme.' " (*People v. Walker* (2021) 67 Cal.App.5th 198, 206.) "By correcting one part of [a defendant's] sentence, the trial court is resentencing the defendant and, in so doing, is not only permitted, but also obligated to look at the facts and the law in effect at the time of that resentencing, including ' "any pertinent circumstances which have arisen since the prior sentence was imposed." ' " (*Id*. at p. 205.) The law presumes the sentencing law in effect at the time of the new sentencing hearing applies. (*Ibid*.; *People v. Ramirez* (2019) 35 Cal.App.5th 55, 64.)

If the elements of an offense have changed before the conviction is final, the conviction can be reversed, but the defendant can be retried, even if there was insufficient evidence under the new law for a conviction. (*In re J.R.* (2018) 22 Cal.App.5th 805, 821-822; *People v. Figueroa* (1993) 20 Cal.App.4th 65, 71-73.)

Even if a change in the law applies retroactively, it might not apply to a defendant who has entered into a plea bargain unless the prosecution and the court agree not to undo the plea bargain.

(*People v. Stamps* (2020) 9 Cal.5th 685, 705-709 [prior serious felony conviction].) During the period of get-tough-on-crime, defendants sometimes complained that new laws violated the terms of the plea bargain. Defendants would, for example, plead to certain offenses that were not strikes or did not require sex offender registration only to suffer the fate when the laws changed. The view of the courts was that any plea bargain impliedly includes any change in the law. (*Doe v. Harris* (2013) 57 Cal.4th 64, 70.) When the changes in the law benefitted the defendant, the prosecution made the same complaint. Some courts have continued to say a plea bargain includes a change in the law. (See, e.g., *People v. Baldivia* (2018) 28 Cal.App.5th 1071, 1077-1078 [Prop. 57].) Other courts have balked. In 2020, the Supreme Court decided that an ameliorative change in sentencing applied retroactively generally cannot lead to a reduction of the length of the sentence the parties had agreed to. (*Stamps, supra,* 9 Cal.5th at pp. 705-709.)

Stamps does not apply to an open plea. (*People v. Henderson* (2021) 67 Cal.App.5th 785, 788-789.) Nor does it apply to recalling the sentence under Penal Code section 1172.1. (*People v. Cepeda* (2021) 70 Cal.App.5th 456, 463-464.)

Depending on the statutory scheme, *Stamps* might not apply. Courts have found it does not apply to dismissing a prison prior under SB 483 because the prior is no longer valid. However, further reduction in the sentence under SB 483 may not be permitted if the defendant agreed to a certain sentence as part of the plea bargain. (*People v. Coddington* (2023) 96 Cal.App.5th 562, 569-570.)

For the amendments to section 1170, some courts have held that the amendments apply retroactively to nonfinal convictions, but the defendant cannot change the plea bargain unless the prosecution and the court agree. (*People v. De la Rosa Burgara* (2023) 97 Cal.App.5th 1054, 1062-1063; *People v. Fox* (2023) 90 Cal.App.5th 826, 834; *People v. Todd* (2023) 88 Cal.App.5th 373, 378-380, review granted Apr. 26, 2023, S279154.) Other courts have held the defendant cannot receive any relief if there was a plea bargain because it was agreed the court could impose the upper term. (*People v. Sallee* (2023) 88 Cal.App.5th 330, 338, review granted Apr. 26, 2023, S278690; *People v. Kelly* (2022) 87 Cal.App.5th 1, 5-6, review granted March 22, 2023, S278503; *People v. Mitchell* (2022) 83 Cal.App.5th 1051, 1058-1059, review granted Dec. 14, 2022, S277314.) This question is pending in the Supreme Court.

Courts have also been split as to whether shortening probation could lead to withdrawing the plea if the bargain specified the length of probation. (Compare *People v. Prudholme* (2023) 14 Cal.5th 961, 979 with *Bowden v. Superior Court* (2022) 82 Cal.App.5th 735, 746-747.)

CONCLUSION

Sentencing laws are some of the most complicated areas in the law. They are constantly changed. This can create issues on appeal. It is also an area where adverse consequences can arise. Instead of feeling intimidated, an opportunistic practitioner looks at sentencing issues for potential issues.