

**OVERVIEW OF PROBATION AND
PROBATION REVOCATION LAW**

Revised and Updated

by

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FIRST DISTRICT APPELLATE PROJECT

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PROBATION

A. Introduction

Penal Code Section 1203 permits the trial court to grant probation to a convicted defendant by suspending the imposition or execution of sentence and ordering a "conditional and revocable release in the community under the supervision of a probation officer." (Pen. Code, § 1203, subd. (a).) The primary purpose of probation is the defendant's rehabilitation. (*People v. Scroggins* (1987) 191 Cal.App.3d 502, 505; *People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.)

B. Absolute Statutory Ineligibility

The commission of enumerated crimes makes a defendant statutorily ineligible for probation. (Pen. Code, §§ 667, subd. (c)(4) [prior violent or serious felony conviction]; 667.61, subd. (h) [enumerated sex crimes]; 1170.12, subd. (a)(4) [prior strike–violent or serious felony conviction]; 1203, subd. (k) [commission of a violent or serious felony while on probation]; 1203.044, subd. (b) [theft of over \$50,000 in a single transaction with a prior felony conviction in which §12022.6 excessive taking enhancement was found]; 1203.055, subd. (c) [enumerated crimes on public transit vehicle, with prior conviction under the same section]; 1203.06, subd. (a) [use of firearm in violent crimes]; 1203.065, subd. (a) [enumerated sex crimes]; 1203.066, subd. (a) [lewd acts with child]; 1203.07, subd. (a) [enumerated controlled substances violations], 1203.075, subd. (a) [intentional infliction of great bodily injury in the attempted commission of violent

crimes]; 1203.08, subd. (a) [prior convictions of designated felonies within a 10-year period]; 1203.085, subd. (a) [conviction for offenses punishable by imprisonment in state prison while on parole from violent or serious felony] & subd (b) [conviction for violent felony while on parole from state prison]; 1203.09 [offenses against aged and handicapped]; 12311 [destructive devices].)

For each of these offenses, with three exceptions, statutory subdivisions require that the existence of the fact making the defendant ineligible for probation be alleged in the accusatory pleading, and either admitted by the defendant in open court, or found to be true by the jury or judge. (See also *People v. Lo Cicero* (1969) 71 Cal.2d 1186, 1192-93.) However, Penal Code sections 667.61, subd.(h), 1203, subd.(k), and 1203.065, subd. (a) do not have this requirement.

C. Presumptive Ineligibility

There is a separate group of offenses for which probation may be granted only "in unusual circumstances where the interests of justice would best be served if the person is granted probation." (Pen. Code, §§ 462 [certain burglaries]; 1203, subd. (e) [enumerated crimes involving use of weapons, infliction of great bodily injury, two or more prior convictions]; 1203.045 [theft of amount exceeding \$100,000]; 1203.046, subd. (a) [inducing a minor to commit a violation of §653]; 1203.048 [computer crimes in excess of \$100,000]; 1203.049 [food stamp fraud exceeding \$100,000]; 1203.065, subd. (b) [enumerated sex offenses]; 1203.073, subd. (b)-1203.074 [controlled substances];

1203.09, subd. (f) [enumerated crimes against victims at least 60 years old]; 4532, subd. (c)(1) [escape from jail, court or while traveling between the two].)

The Rules of Court list certain factors that may indicate the existence of unusual circumstances warranting probation eligibility for such offenses.(Rules of Court, rule 4.413.) However, even if unusual circumstances are found and a defendant is deemed eligible for probation, he/she may still be found unsuitable for probation. The Rules of Court also list the criteria to be considered in determining whether an eligible defendant is suitable for probation.(Rules of Court, rule 4.414.)

Penal Code sections 1203.045, 1203.048, subd.(a), 1203.049, and 1203.073 contain statutory subdivisions which require that the existence of the fact making the defendant presumptively ineligible for probation be alleged in the accusatory pleading, and either admitted by the defendant in open court, or found to be true by the jury or judge. Penal Code Sections 462, 1203, subd. (e), 1203.046, subd. (a), 1203.065, subd. (b), 1203.074, 1203.09 and 4532, subd. (c)(1) do not contain these pleading requirements. According to the First District in *People v. Dorsch* (1992) 3 Cal.App.4th 1346, 1349-51, when not statutorily required, “sentencing factors” that make defendants presumptively ineligible for probation need not be alleged and pleaded.

D. Procedure at Sentencing

1. Probation Report

In any case involving a felony for which the defendant is eligible for probation, the court must refer the matter to the probation officer to make a written probation report

"including his or her recommendations as to the granting or denying of probation and the conditions of probation, if granted." (Pen. Code, §§ 1191 and 1203, subd. (b)(2)(A); *People v. Bohannon* (2000) 82 Cal.App.4th 798,808.) In cases involving misdemeanor convictions, the court in its discretion may proceed to sentencing without a probation report. (Pen. Code, §§ 1203, subd. (d) and 1203b.)

The probation report must be made available to the defendant at least five days before sentencing for felony convictions. (Pen. Code, §1203, subd.(b)(2)(D).) The report must be provided to the misdemeanor defendant at least two days before sentencing. (Pen. Code §1203d.) Upon the defendant's request, the report must be made available earlier than the statutory minimum (nine days prior to sentencing for felonies and five days prior to sentencing for misdemeanors). A trial court's failure to grant a requested continuance - - when defendant has not received the probation report by the statutory deadline -- has been held to render the sentencing "fundamentally unfair", requiring a remand for resentencing without inquiring into the question of prejudice. (*People v. Bohannon, supra*, 82 Cal.App.4th at p. 809.)

Hearsay evidence may be included in the probation report.(*People v. Betterton* (1979) 93 Cal.App.3d 406, 414; *People v. Otto* (2001) 26 Cal.4th 200, 212). Illegally seized evidence may be considered as well. (*People v. Brewster* (1986) 184 Cal.App.3d 921, 928-29).

Objections to the contents of the probation report must be raised at sentencing or they are waived for purposes of appeal. (*People v. Welch* (1993) 5 Cal.4th 228.)

A defendant has the right to challenge factual assertions in the probation report by calling witnesses and producing evidence. (Pen. Code, § 1170, subd. (b); *In re Beal* (1975) 46 Cal.App.3d 94, 99;).

2. Statement of Reasons When Probation Denied

The decision to deny probation is a sentencing choice for which the trial court must state reasons on the record. (Pen. Code, § 1170, subd. (c); *People v. Mobley* (1983) 139 Cal.App.3d 320, 324; *People v. Salazar* (1980) 108 Cal.App.3d 992, 1000.)

However, a separate statement of reasons for denying probation is not required if the defendant is sentenced to the upper term and an adequate reason is given for aggravation. (*People v. Butler* (1980) 107 Cal.App.3d 251, 254-55.)

Nor is a statement of reasons for denying probation required if the crime is one which makes the defendant ineligible for probation except in unusual circumstances. (*People v. Langevin* (1984) 155 Cal.App.3d 520, 523; *People v. Lesnick* (1987) 189 Cal.App.3d 637, 644.) The court in *Lesnick* stated, “it would be illogical indeed to require a trial court to set forth reasons for doing something which is mandated by statute absent certain findings.” (Ibid.)

An objection to the trial court’s failure to properly make or articulate reasons for its discretionary sentencing choices must be raised at sentencing or the issue is waived for purposes of appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 353-357.)

3. Challenging the Denial of Probation on Appeal: Abuse of Discretion

The trial court's denial of probation is reviewed for abuse of discretion. The appellate court has found an abuse of discretion only when the trial court has relied on a blatantly improper factor. (See, e.g. *People v. Bolton* (1979) 23 Cal.3d 208 [defendant had several children born out of wedlock]; *People v. Zarig* (1992) 8 Cal.App.4th 362, 375-379 [defendant was 20 minutes late to a modification hearing]; *People v. Molina* (1977) 74 Cal.App.3d 544, 552-553 [court expressly concludes that defendant had not been adequately punished for past crimes].)

Of course, an argument that the trial court abused its discretion in denying probation is waived unless the defense objected at sentencing. (*People v. Scott*, supra, 9 Cal.4th at p. 353.)

E. Probation Conditions

1. Conditions

A trial court has broad discretion to prescribe conditions of probation so long as the conditions serve the purposes of the probation statute. (Pen. Code § 1203.1, subd. (j); *People v. Birkett* (1999) 21 Cal.4th 226, 235.) "A condition of probation will not be held invalid unless 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." (*People v. Lent* (1975) 15 Cal.3d 481, 486; *People v. Balestra* (1999) 76 Cal.App. 4th 57, 65.)

The standard of appellate review of a challenged probation condition is abuse of discretion. (*People v. Carbajal*, supra, 10 Cal.4th at 1121; *People v. Balestra*, supra, 76 Cal.App.4th at 65.)

Many different probation conditions have been approved under this standard. (See, e.g., *People v. Lindsay* (1992) 10 Cal.App.4th 1642, 1644-1645 [abstinence from alcohol for probationer convicted of sale of cocaine]; *People v. Delvalle* (1994) 26 Cal.App.4th 869, 878-879 [order to stay away from places where children congregate because probationer was convicted of attempting to purchase a child]; *People v. Beach* (1983) 147 Cal.App.3d 612, 623-624 [requiring the probationer to perform community service]; *People v. McDowell* (1976) 59 Cal.App.3d 807, 812-814 [requirement that purse snatcher wear leather shoes with metal taps on heels].)

If the probation condition prohibits otherwise legal activity, and is not reasonably related to the crime committed or to future criminality, it will be declared invalid. (See *People v. Fritchey* (1992) 2 Cal.App.4th 829, 835-837 [invalidating requirement that probationer forfeit his truck because the record showed that the court imposed this condition to punish the probationer, and ownership of a truck is not criminal and not reasonably related to future criminality]; *People v. Hackler* (1993) 13 Cal.App.4th 1049, 1060 [requiring the probationer to wear, at all times, a t-shirt announcing his conviction for theft was too incidental to future criminality to be reasonable].)

2. Conditions Affecting Constitutional Rights

A probation condition that infringes upon constitutional rights is subject to special scrutiny. Such a condition must be narrowly drawn and constitute the least restrictive means to serve the dual purposes of rehabilitation and protecting public safety. (*People v. Pointer* (1984) 151 Cal.App.3d 1128, 1139; *In re White*, supra, 97 Cal.App.3d at 148.)

Overbroad restrictions upon a defendant's constitutional rights are not permitted. (*People v. Pointer*, supra, 151 Cal.App.3d at 1136-1141 [invalidating condition against conceiving children]; *People v. Beach*, supra, 147 Cal.App.3d at 620-623 [invalidating condition of banishment from community where defendant lived]; *In re White*, supra, 97 Cal.App.3d at 145-152 [invalidating condition preventing convicted prostitute from being in designated area of city at any time]; *People v. Lopez* (1998) 66 Cal.App.4th 615, 629-630 [condition that probationer refrain from displaying gang related indicia declared overbroad and modified to displaying indicia *known* by probationer to have a gang connotation].)

Properly tailored restrictions upon a defendant's constitutional rights are permissible. (*People v. Wardlow* (1991) 227 Cal.App.3d 360, 366-367 [upholding condition requiring submission to searches without a warrant and mandating random drug testing]; *People v. Miller* (1989) 208 Cal.App.3d 1311, 1314-1316 [upholding condition requiring polygraph testing for a defendant convicted of a child sex crime]; *People v. Lopez*, supra, 66 Cal.App.4th at pp. 628-629 [condition prohibiting association with known gang members].)

Conditions which are vague violate a probationer's due process right to fair and adequate notice. (*In re Angel J.* (1992) 9 Cal.App.4th 1096, 1102 [condition that juvenile probationer must maintain "satisfactory grades" declared vague]; *People v. Lopez*, supra, 66 Cal.App.4th at pp.631-635 [condition prohibiting a probationer from associating with "gang" members was unconstitutionally vague, but modified by inserting the gang definition as set forth in Penal Code section 186.22, subdivisions (e)-(f)].)

While no case was found that specifically announces the standard of appellate review for challenges to probation conditions that infringe on constitutional rights, it would seem that these cases should be reviewed de novo. (See *People v. Cromer* (2000) 24 Cal.4th 889, 899-900 [mixed questions of law and fact reviewed de novo].)

3. Jail Term as a Condition of Probation

A court may impose as a condition of probation a requirement that the defendant be imprisoned in the county jail for up to a total of one year. (Pen. Code, §§ 19.2, 1203.1, subd. (a)(2).) The jail condition is not regarded as punishment, but as part of the supervised plan of rehabilitation. (*People v. Brasley* (1974) 41 Cal.App.3d 311, 315.) A defendant may voluntarily waive the one-year limit, however, giving the court some flexibility "in those cases where a one-year term of local confinement seems inappropriately brief and a prison commitment unduly harsh." (*People v. Bailey* (1983) 140 Cal.App.3d 828, 831, following *People v. Johnson* (1978) 82 Cal.App.3d 183, 187-188.)

4. Appealing Imposition of Probation Condition/Waiver

If the defendant considers the proposed conditions of probation to be unduly harsh, he or she may refuse probation and choose instead to serve the sentence, then challenge the legality of the proposed conditions on appeal. (*People v. Hodgkin* (1987) 194 Cal.App.3d 795, 808-809.) On the other hand, if the defendant chooses instead to accept the terms of probation, this does not preclude a legal challenge to the validity of the conditions on appeal from the order granting probation. (*People v. Miller*, supra, 208 Cal.App.3d at 1314; *In re White*, supra, 97 Cal.App.3d at 146.)

However, trial counsel must object at sentencing to preserve issues for appeal. Failure to object to the reasonableness of a probation condition at sentencing waives any challenge to the condition on appeal. (*People v. Welch*, supra, 5 Cal.4th at 235.)

Failure to object might not, however, bar appellate review of a pure questions of law “that can be resolved without reference to the particular sentencing record developed in the trial court.” (*People v. Welch*, supra, at p. 235; see also *People v. Welch*, supra, at pp. 240-241 (Arabian, J., concurring); *In re Justin S.* (2001) 93 Cal.App.4th 811, 815 [juvenile probationer may challenge overly vague probation condition for first time on appeal]; but see *People v. Gardiner* (2000) 79 Cal.App.4th 148, 151-152 [claims that probation conditions are unconstitutionally vague must be preserved by an objection at sentencing].)

F. Restitution/Cost of Probation

Courts are obligated to impose a restitution fine on the probationer (between \$100 and \$1000 for misdemeanor conviction and between \$200 and \$10,000 for felony conviction) unless it finds compelling and extraordinary reasons not to do so. (Pen. Code, § 1202.4, subd. (b)(1).) Any compelling or extraordinary reason found by the court must be stated on the record. Inability to pay “shall not be considered a compelling and extraordinary reason”. (Pen. Code, § 1202.4, subd. (c).)

No separate hearing and no express findings by the court are procedurally required in determining the amount of the restitution fine. (Pen. Code §1202.4, subd. (d).)

A court may also require a defendant to pay the costs of probation or the costs of confinement in a county jail, provided that the court holds a hearing and determines that the defendant has the ability to pay. (Pen. Code, §§ 1203.1, subd. (b), 1203.1b, 1203.1c.)

Though restitution fines are mandatorily imposed, courts have discretion whether to impose probation costs. Before probation costs may be imposed, however, probationers must be informed of their right to a hearing and a judicial determination of ability to pay. Any waiver of these procedures by the probationer must be knowing and intelligent. (Pen. Code § 1203.1b; *People v. O’Connell* (2003) 107 Cal.App.4th 1062, 1067-1068; *People v. Hall* (2002) 103 Cal.App.4th 889, 892-893.)

While a probationer may be ordered to pay probation costs, payment of these costs cannot be a *condition* of probation. Thus failure to pay probation costs cannot be

considered a violation of probation conditions. (*People v. Hall*, supra, 103 Cal. App.4th at p. 892; *People v. O'Connell*, supra, 107 Cal.App.4th at p. 1068.)

Unauthorized sentencing errors can be raised for the first time on appeal without objection at sentencing. Thus, a restitution fine that exceeds the statutory maximum can be reviewed and reversed on appeal even if no objection was made at sentencing. (*People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1534.)

G. Conviction Set Aside upon Completion of Probation

If the defendant successfully fulfills all the conditions of probation for the entire period of probation, he or she is entitled to have the guilty plea or conviction withdrawn or set aside by the court and the accusations or information dismissed. (Pen. Code, § 1203.4, subd. (a).) The defendant is then released from all penalties and disabilities resulting from the offense of which he or she has been convicted. (*Ibid.*) However, the prior conviction may still be pled and proven (e.g. for enhancement) in a subsequent case. (*People v. Bradley* (1967) 248 Cal.App.2d 887.) Also, the defendant must “disclose the conviction in response to any direct question contained in any questionnaire or application for public office, for licensure by any state or local agency, or for contracting with the California State Lottery.” (Pen. Code § 1203.4, subd.(a).)

Lastly, Section 1203.4 of the Penal Code does not relieve the defendant of “nonpenal restrictions adopted for protection of public safety and welfare.” (*People v. Vasquez* (2001) 25 Cal.4th 1225, 1230-1231.)

VIOLATION AND REVOCATION OF PROBATION

A. Introduction

Penal Code section 1203.2, subd. (a), permits a trial court to revoke probation "if the interests of justice so require and the court, in its judgment, has reason to believe . . . that the person has violated any of the conditions of his or her probation, has become abandoned to improper associates or a vicious life, or has subsequently committed other offenses, regardless whether he or she has been prosecuted for such offense."

B. Due Process Rights

1. Background

The loss of liberty entailed in the revocation of probation is a serious deprivation requiring that the defendant be accorded certain due process rights. The minimum due process requirements for a probation revocation proceeding are: (1) written notice of the claimed violation of probation; (2) disclosure of the evidence against the probationer; (3) an opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (5) a neutral and detached hearing body; and (6) a written statement by the fact-finder as to the evidence relied on and the reasons for revoking probation. (*Gagnon v. Scarpelli* (1973) 411 U.S. 778, 786.)

In *Gagnon*, supra, 411 U.S. at pp. 781-782, the United States Supreme Court applied its *parole* revocation due process jurisprudence to *probation* revocation. Parole

revocation due process rights were established in *Morrissey v. Brewster* (1972) 408 U.S. 471. Before *Gagnon* was decided, however, The California Supreme Court, in *People v. Vickers* (1972) 8 Cal.3d 451, 457-458, had applied the *Morrissey* parole revocation requirements to probation. In *Vickers*, supra, at 458, the court said: “[T]he precise nature of the proceedings for such [probation] revocation need not be identical [to parole revocation proceedings] if they assure equivalent due process safeguards.”

Subsequent California cases concerning the sufficient amount of due process required before probation may be revoked have relied on *Vickers*. The few that have indirectly addressed the question of whether *Gagnon* requires greater due process than *Vickers* have disagreed. (Compare *People v. Mosley* (1988) 198 Cal.App.3d 1167, 1173-1174 [noting that “any uncertainty remaining in the wake of *Vickers* appears to have been quelled by...*Gagnon*... which explicitly requires written notice of any claimed violation as part of the minimal due process requirements in probation revocation cases”] with *People v. Buford* (1974) 42 Cal.App.3d 975, 981 [which continues to cite *Vickers* and *Morrissey* as allowing for “flexible” due process standards without any due process sine qua nons]).

2. Written notice

Concerning written notice, *People v. Mosley*, supra, 198 Cal.App.3d at p. 1174, held that where the defendant was given written notice of certain grounds for violation, it was improper to base a revocation on other grounds not included in the notice, even though the other grounds were shown at the hearing. (See also *In re Moss* (1985) 175 Cal.App.3d 913, concerning the importance of written notice.) However, in *People v.*

Felix (1986) 178 Cal.App.3d 1168, 1171-1172 [First Dist., Div. 3], the court held that the trial court's offer to grant a continuance where the defendant claimed he had not received notice of certain grounds for revocation was sufficient to meet constitutional concerns. *Felix* did not address *Gagnon*, and its ruling may not meet the due process standards of that case. (See *People v. Mosley*, supra, 198 Cal.App.3d at pp. 1173-1174).

3. Motion for revocation

There is scant case law on the question of when a motion to revoke has been made too long after the defendant's violation of probation to satisfy due process concerns. *People v. Villines* (1987) 192 Cal.App.3d 1298, 1303-1304, cites two federal appellate decisions concerning the timeliness of motions to revoke probation: *United States v. Tyler* (5th Cir. 1979) 605 F.2d 851 [due process concerns not satisfied when the alleged violation of probation occurred more than one year before the motion to revoke and a probation officer had previously made a decision not to make a motion] and *United States v. Hamilton* (9th Cir. 1983) 708 F.2d 1412 [unreasonable delay when probation was revoked three years after the violation and the defendant attempted to bring the default to the court's attention].

4. Waiver

Probationer's due process rights may be expressly waived, and may be deemed to have been waived if the defendant, with knowledge of the rights, fails to assert them in a

timely manner. (*In re La Croix* (1974) 12 Cal.3d 146, 153; *People v. Dale* (1973) 36 Cal.App.3d 191, 195.)

5. Summary Revocation

A summary revocation of probation, upon probable cause that a violation of probation has occurred, is accepted practice. Summary revocation “tolls” the clock on the term of probation, and is simply a device by which the defendant may be brought before the court, and jurisdiction retained, before formal revocation proceedings begin. (*People v. Pipitone* (1984) 152 Cal.App.3d 1112, 1117; *People v. Barkins* (1978) 81 Cal.App.3d 30, 32-33; Pen. Code § 1203.2, sub. a.) If, however, it is determined at a subsequent revocation hearing that the defendant did *not* violate the terms of probation, the defendant gets back the time that passed between the summary revocation and the determination that no violation, in fact, occurred. (*People v. Tapia* (2000) 91 Cal.App.4th 738, 743.)

Though *Gagnon*, supra, 411 U.S. at 781-782, would seem to require both a preliminary hearing *and* a final revocation hearing before probation may be revoked, *People v. Coleman* (1975) 13 Cal.3d 867, 895, held that “a unitary hearing will usually suffice in probation revocation cases to serve the purposes of the separate preliminary and formal revocation hearings outlined in *Morrissey*.”

6. Right to Counsel

There is no absolute due process right to counsel in probation revocation proceedings. (*Gagnon*, supra, 411 U.S. at 790.) On the other hand, there are "cases in which fundamental fairness - the touchstone of due process - will require that the State provide at its expense counsel for indigent probationers or parolees." (*Ibid.*) Although there are no rigid guidelines, the United States Supreme Court has suggested that counsel should be provided anytime the defendant makes

a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present. (*Ibid.*)

In California, however, the Supreme Court has proclaimed a right to counsel in probation revocation proceedings as a judicially declared rule of procedure. (*Vickers*, supra, 8 Cal.3d at 461-462.)

7. Standard of Proof/Review

The standard of proof applicable to probation revocation proceedings is proof by a "preponderance of the evidence". (*People v. Rodriguez* (1990) 51 Cal.3d 437, 441.)

In order to overturn a trial court decision that the defendant violated the terms of probation, an appellate court would determine, looking at the record in the light most favorable to the prosecution, whether the record "discloses substantial evidence—that is,

evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find” that the defendant violated the terms of probation. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

C. Evidentiary Issues

1. Hearsay

Documentary evidence, whose source is not live testimony, may be admitted when it is accompanied by reasonable indicia of reliability. (*People v. Maki* (1985) 39 Cal.3d 707,716 [defendant’s signature on a car rental invoice seized from defendant’s home]; *People v. Arreola* (1994) 7 Cal.4th 1144, 1156-1157.) However, a different rule applies to testimonial hearsay. Any attempt by the prosecution to introduce a preliminary hearing transcript in lieu of live witness testimony requires a showing of “good cause before a defendant's right of confrontation at a probation revocation hearing can be dispensed with....” (*People v. Maki*, supra, 39 Cal.3d at 714-716.)

The California Supreme Court has held that it is improper to revoke probation based upon hearsay statements of the sole percipient witness to the claimed violation where there has been no showing of the witness's legal unavailability and no specific finding of good cause to deny the right to confront and cross-examine witnesses. (*People v. Winson* (1981) 29 Cal.3d 711, 719; *People v. Arreola*, supra, 7 Cal.4th at p. 1159.)

In *People v. Arreola*, supra, 7 Cal.4th at pp.1158-1159, the court stated:

If the declarant is available and the same

information can be presented to the trier of fact in the form of live testimony, with full cross-examination and the opportunity to view the demeanor of the declarant, there is little justification for relying on the weaker version. When two versions of the same evidence are available, longstanding principles of the law of hearsay, applicable as well to Confrontation Clause analysis, favor the better evidence.

In *People v. O'Connell*, supra, 107 Cal.App.4th at 1066-1067, the court attributed no error to the trial court's decision to allow into evidence an "'Adult Drug Program Termination Report' prepared by...the program manager..." to show that the defendant had failed to satisfactorily participate in drug counseling sessions as required by the terms of probation. The court analogized this report to the "documentary evidence" *Maki* prong of the *Arreola* hearsay analysis, determining that the report "was prepared contemporaneously to, and specifically for, the hearing where appellant's lack of compliance with the deferred entry of judgment program was at issue", and "such reports were routinely received without undertaking the added burden of calling the author to authenticate it because the reports were prepared in response to a referral from the court." (*People v. O'Connell*, supra, 107 Cal.App.4th at pp.1066-1067.)

2. Exclusionary Rule

Generally, the exclusionary rule does not apply to probation revocation proceedings. (*People v. Harrison* (1988) 199 Cal.App.3d 803, 808.) However, evidence that has been previously suppressed at a preliminary hearing because of an illegal search or seizure may not be introduced at a probation revocation hearing if the criminal charges were dropped and a new complaint or indictment was never filed. (*People v. Zimmerman* (1979) 100 Cal.App.3d 673, 676 [statutory interpretation of Pen. Code §1538].)

Illegally seized evidence will be excluded, moreover, if the police conduct was so egregious as to shock the conscience. (*People v. Washington* (1987) 192 Cal.App.3d 1120, 1128.)

3. Probationer's testimony

The testimony of a probationer at a probation revocation hearing, and its fruits, cannot be used in a later criminal prosecution. (*People v. Coleman*, supra, 13 Cal.3d at 891-892.) However, if the probationer takes the stand at a later criminal trial, the earlier revocation hearing testimony can be used to impeach the probationer's truthfulness. (*Id.* at p. 892.)

4. Collateral Estoppel

The doctrine of collateral estoppel does not generally apply to issues raised in both probation revocation hearings and criminal trials. Thus, facts and issues may be re-litigated regardless of which hearing was held first and what determination was made. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 347-349.) Likewise, refiling of a motion to revoke probation, following dismissal of the first revocation proceeding, is permissible. (*People v. Villines*, supra, 192 Cal.App.3d at 1305.)

It is within the reasonable discretion of the trial court to decide whether to hold a revocation hearing before or after trial for a new offense. (*People v. Jasper* (1983) 33 Cal.3d 931, 935.)

D. Revocation for Failure to Pay Restitution

Probation may not be revoked for failure to comply with a condition requiring payment of a restitution fine "unless the court determines that the defendant has willfully failed to pay and has the ability to pay." (Pen. Code, § 1203.2, subd. (a).) Principles of equal protection prohibit imprisonment of an indigent defendant because of inability to pay a fine, even if the fine was imposed as a condition of probation. (*In re Angel E.* (1986) 177 Cal.App.3d 415, 420.)

E. Sentencing Upon A Finding of Probation Violation

1. Original Sentence Imposed, Not Executed (Execution of Sentence Suspended: ESS)

At the time probation is granted, the trial court may either impose a prison term and stay its execution during the period of probation, or suspend the imposition of sentence. (Pen. Code, § 1203.1, subd. (a).) Under the first scenario (ESS probation) the suspended sentence is immediately appealable even though it has not gone into effect. (Pen. Code, § 1237, sub. (a).) The defendant may not wait to appeal errors in the original sentence until after probation is revoked. (*People v. Preyer* (1985) 164 Cal.App.3d 568, 576.)

If the defendant's probation is subsequently revoked *and not reinstated*, then the trial court must "order that the judgment previously pronounced be in full force and effect and that the defendant be committed to the custody of the Director of Corrections for the term prescribed in that judgment." (Rules of Court, rule 4.435, subd. (b)(2).) Thus, if the trial court revokes and terminates probation, the court cannot modify the originally imposed sentence. (*People v. Colado* (1995) 32 Cal.App.4th 260, 262-263; *People v. Howard* (1997) 16 Cal.4th 1081, 1087-1088.)

After revoking defendant's ESS probation, however, the trial court may chose to reinstate and modify the terms of probation. (*People v. Medina* (2001) 89 Cal.App.4th 318, 322-323.)

The court need not state reasons for refusing to reinstate probation when the execution of the sentence has been suspended. (*People v. Latham* (1988) 206 Cal.App.3d 27, 30.)

2. Original Sentence Not Imposed (Imposition of Sentence Suspended: ISS)

On the other hand, if imposition of the sentence was previously suspended, the trial judge must pronounce sentence at the time of revocation, basing the length of the prison term solely upon the circumstances existing at the time probation was originally granted. (*People v. Goldberg* (1983) 148 Cal.App.3d 1160; Rules of Court 4.435, subd. (b)(1).) The rule only refers to the length of the term (i.e., aggravated, mitigated, or midterm). Events subsequent to the original grant of probation may be considered in determining whether to reinstate the defendant's probation or impose a prison sentence. (*People v. White* (1982) 133 Cal.App.3d 677, 680-682.)

The court *is also* permitted to consider events that occurred after the initial grant of probation and prior to the *reinstatement* of probation in determining the length of a sentence. (*People v. Harris* (1991) 226 Cal.App.3d 141, 145.) As the *Harris* court stated:

We conclude that (Rule of Court 435, subd. (b)(1)) allows consideration of

circumstances preceding a *reinstatement* of probation. The rule bars considering events subsequent to ‘the time probation was granted’ It does not specifically address a situation where, as here, probation is granted, revoked and then, as part of a negotiated disposition, reinstated on modified terms. However, reinstating probation on modified terms appears to be a new *grant* of probation within the meaning of the rules.... Thus, nothing in the language of the rules bars considering events predating a reinstatement of probation.
(*Id.* at pp.145-146.)

The trial court must state its reasons for choosing a particular term of imprisonment when imposition of the sentence was originally suspended. (*People v. Cotton* (1991) 230 Cal.App.3d 1072, 1080-1081.) Furthermore, the court must express reasons for choosing imprisonment instead of reinstating probation.(*Id.* at p. 1081.) Specifically, “the record must establish that the trial court understands that two separate and distinct decisions are involved in its sentencing choice: (1) To revoke probation; and (2) to sentence to state prison rather than place the defendant on probation on new or modified conditions.”(*Ibid.*)

F. Appeals and Waiver

1. Objections to Discretionary Sentencing Choices Waived by Failure to Object

Complaints about the manner in which the trial court exercises its discretion in making sentencing choices, or articulates its supporting reasons, are waived for appellate purposes if counsel fails to object at sentencing. (*People v. Scott*, supra, 9 Cal.4th at 353. See, e.g., *People v. Zuniga* (1996) 46 Cal.App.4th 81, 83-84 [trial court's failure to state reasons for imposing a prison term instead of reinstating probation or modifying terms is not preserved for appeal due to trial counsel's failure to object]; *People v. Kelley* (1997) 52 Cal.App.4th 568, 582 [trial counsel must object to the trial court's failure to consider relevant mitigating factors to preserve the issue for appeal]; *People v. Bautista* (1998) 63 Cal.App.4th 865, 867-868 [trial court's failure to state adequate reasons for requiring sex offender registration as a condition of probation, where registration is discretionary, is waived by lack of a specific objection by trial counsel].) This rule applies to both the defense and the prosecution. (*People v. Tillman* (2000) 22 Cal.4th 300, 303.) Defense counsel's failure to adequately understand and pursue the sentencing alternatives favorable to the defendant may give rise to a claim of ineffective assistance of counsel. (*People v. Scott*, supra, 9 Cal. 4th at p. 351). The California Supreme Court recently reaffirmed the *Scott* waiver rule in *People v. Gonzalez* (2003) 31 Cal. 4th 745.

On the other hand, defense counsel must have a "meaningful opportunity to object" which can only occur if "the parties are clearly apprised of the sentence the court intends to impose and the reasons that support any discretionary choices." (*People v. Scott*, supra, at p. 356.) In *People v. Gonzalez*, supra., the Supreme Court held that parties have a "meaningful opportunity to object" when the trial court articulates its sentencing

decisions during the course of the sentencing hearing and permits objections. A tentative ruling is not required. The Court, in *Gonzalez*, disapproved *People v. Middleton* (1997) 52 Cal.App. 4th 19, a First District/Division Two case which had required a tentative ruling as a pre-requisite to *Scott* waiver. The Court distinguished *People v. Dorsey* (1996) 50 Cal.App. 4th 1216. In that case, parties were denied a meaningful opportunity to object because the trial court took a recess immediately after imposing sentence and did not give either party an actual opportunity to voice objections.

2. Unauthorized Sentencing Errors Not Waived

Unauthorized sentencing errors are not waived by failure to object at the trial court. (*People v. Scott*, supra, at p. 354; *People v. Mancebo* 27 Cal.4th 735, 749, fn. 7.)

G. Pre-Sentence Credits

If probation is revoked, the court must credit any time served as a condition of probation against the prison term. (Pen. Code § 2900.5, subd. (a).) This includes time spent in a “jail...halfway house, rehabilitation facility...or similar residential institution...” (Ibid.) Before sentencing, a trial court must determine the total number of days to be credited a defendant under section 2900.5 for time spent in custody. (Pen. Code § 2900.5, subd. (d).) Whether a facility “should be regarded as sufficiently restrictive as to amount to custody constitutes a factual question....”(*People v. Ambrose* (1992) 7 Cal.App.4th 1917, 1922.)

H. Waiver of Pre-Sentence Credits (*Johnson* Waivers)

Though Penal Code section 19.2 limits confinement time in a county jail, imposed as a condition of probation, to one year, a court can impose more than one year in county jail if the probationer waives credits for previous jail time. This type of waiver is called a “*Johnson* waiver”. (See *People v. Johnson*, supra, 82 Cal.App.3d at 183.) Thus, a defendant “may expressly waive entitlement to section 2900.5 credits against an ultimate jail or prison sentence for past and future days in custody.” (*People v. Johnson* (2002) 28 Cal.4th 1050, 1054-55.) Furthermore, a trial court may “condition a grant or extension of probation upon a defendant's express waiver of past and future custody credits.” (Id. at p. 1055.)

However, this waiver must be knowing and intelligent. (Ibid.) The precise showing required to prove a knowing and intelligent waiver of past credits against a future prison term is an issue on which the Courts of Appeal are divided. Division Three of the First District, in *People v. Burks* (1998) 66 Cal.App.4th 232 at pp. 236-237, held that “a waiver of custody credits is presumptively applicable to any future term of imprisonment” unless a defendant can point to express language on the record showing that he thought he would be able to regain credits if ever sent to prison. Division Two, however, held that a defendant must “understand the full consequences of his waiver”, which “should include an understanding of the impact of that waiver on the amount of

time a defendant may be incarcerated”. (*People v. Ambrose*, supra, 7 Cal. App. 4th at pp.1922-1923.) Some courts require advisements at the time of the waiver stating that it will apply for all time or all purposes, or against a future prison sentence. (See, e.g. *People v. Harris* (1989) 195 Cal. App. 3d 717, 721-26; *People v. Salazar* (1994) 29 Cal. App. 4th 1550, 1553-56.)

This issue regarding the scope of a *Johnson* waiver, and what advisements are required at the time of the waiver, is pending before the California Supreme Court. The Court will decide whether a waiver of pre-sentence credits – made at the time of probation reinstatement in order to avoid prison – necessarily applies against a subsequent prison term. (*People v. Jeffrey*, S105978; *People v. Arnold*, S106444; *People v. Burroughs*, S116659.)