# Probation, Mandatory Supervision, Parole, and Postrelease Community Supervision: Understanding the Differences

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# I. Introduction

Until 2011, there were two primary forms of revocable supervision in California: probation and parole. With the passage of the Realignment Act, the Legislature added two new supervision schemes: mandatory supervision and postrelease community supervision (PRCS). The Legislature also converted parole revocation proceedings from administrative to judicial hearings.

These materials will provide an overview of all four of these supervision and revocation frameworks, addressing their unique features, the rules governing revocation proceedings, and the consequences of sustained violations.[1] While there are many similarities between all four forms of supervision – and the Legislature intended to create a uniform revocation framework – each form of supervision has unique features to which different statutes and due process protections apply.

Appeals from criminal and revocation proceedings regularly uncover a wide array of errors related to these four supervision schemes. A comprehensive understanding of the core elements of each supervised release framework is essential to identifying potential appellate issues for our clients.

# II. Probation

## A. Overview

Rather than impose a state prison or county jail sentence, a trial court has the option of suspending an offender's sentence and placing them on probation. "'[P]robation' means the suspension of the imposition or execution of a sentence and the order of conditional and revocable release in the community under the supervision of a probation officer." (Pen. Code, § 1203, subd. (a).)[2] "During the probationary period, the court retains jurisdiction over the defendant [citations], and at any time during that period the court may, subject to statutory restrictions, modify the order suspending imposition or execution of sentence (§ 1203.3)." (*People v. Howard* (1997) 16 Cal.4th 1081, 1092.)

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[1] These materials do not address probation in the juvenile delinquency context.

[2] All statutory references are to the Penal Code, unless otherwise indicated.

"Probation is generally reserved for convicted criminals whose conditional release into society poses minimal risk to public safety and promotes rehabilitation." (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) "Probation is neither 'punishment' (see § 15) nor a criminal 'judgment' (see § 1445). Instead, courts deem probation an act of clemency in lieu of punishment [citation], and its primary purpose is rehabilitative in nature [citation]." (*Howard*, *supra*, 16 Cal.4th 1081, 1092.)[3] Because "a grant of probation is an act of grace or clemency, . . . an offender has no right or privilege to be granted such release." (*People v. Moran* (2016) 1 Cal.5th 398, 402.) Unlike a prison or jail sentence, "[i]f a defendant believes the conditions of probation are more onerous than the potential sentence, he or she may refuse probation and choose to serve the sentence." (*People v. Olguin* (2008) 45 Cal.4th 375, 379.)

When granting probation, "the court shall place the defendant or probationer in and under the charge of the probation officer of the court, for the period or term fixed for probation." (§ 1203.1, subd. (j).) Section 1203.1, subdivision (j), vests trial courts with broad discretion to impose conditions of probation, the violation of which can lead to reimprisonment. (§ 1203.1, subd. (j).) While the county probation department is charged with supervising probationers, "[i]t is well settled that courts may not delegate the exercise of their discretion to probation officers." (*In re Pedro Q.* (1989) 209 Cal.App.3d 1368, 1372; accord *People v. O'Neil* (2008) 165 Cal.App.4th 1351, 1358.)

When placing a defendant on probation, the trial court may, as a condition of probation, order the person to serve a county jail term. (§ 1203.1, subd. (a).) However, absent a valid waiver, the court may not impose a jail term of greater than one year as a condition of probation. (§ 19.2; *People v. Bailey* (1983) 140 Cal.App.3d 828, 830.)

### B. Eligibility and Suitability

Unless a statute expressly bars a trial court from granting probation to specified offenders, probation is an option even for defendants convicted of some of the most serious offenses, including in certain homicide cases. In fact,

[3] However, as will be discussed, probation is akin to punishment in the ameliorative sentencing amendment retroactivity context. (See, e.g., *People v. Quinn* (2021) 59 Cal.App.5th 874, 882-883.)

defendants are presumptively eligible for probation in most cases. (Cal. Rules of Court, rule 4.413(a).)[4]

By the same token, that a person is statutorily eligible for probation does not mean the trial court must find them suitable and grant probation. Rule 4.414 sets forth seventeen factors that may inform the trial court's decision whether to grant probation to an eligible defendant, with nine of the factors pertaining to the conviction offense(s) (rule 4.414(a)) and eight factors pertaining to the individual defendant (rule 4.414(a)). A reviewing court asks whether the trial court abused its direction in refusing to grant probation to an eligible defendant. (*People v. Downey* (2000) 82 Cal.App.4th 899, 909.)[5]

While there are probation ineligibility clauses scattered throughout the Penal Code (as well as other codes, such as the Health and Safety Code as well as the Vehicle Code), the first statute to examine for determining probation ineligibility is section 1203.

Section 1203, subdivision (k), contains the statute's only blanket prohibition against granting probation: "Probation shall not be granted to, nor shall the execution of, or imposition of sentence be suspended for, any person who is convicted of a violent felony, as defined in subdivision (c) of Section 667.5, or a serious felony, as defined in subdivision (c) of Section 1192.7, *and who was on probation for a felony offense at the time of the commission of the new felony offense*." As the italicized language indicates, this provision does not outright preclude probation for defendants convicted of serious or violent felonies (i.e., strikes). Rather, it prohibits trial courts from granting probation when the person has been convicted of a strike committed while on probation for a felony offense.

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[4] All references to rules are to the California Rules of Court.

[5] It should be remembered that, despite the abundance of case law unfavorably defining the abuse of discretion standard, it "is not a unified standard; the deference it calls for varies according to the aspect of a trial court's ruling under review. The trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious." (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-712, internal footnotes omitted.)

Subdivision (e) of section 1203, in turn, identifies several circumstances in which trial courts may not grant probation without first finding – with reasons stated on the record (§ 1203, subd. (f)) – the case is an "unusual" one where "the interests of justice would best be served if the person is granted probation[.]" The presumptively disqualifying considerations set forth in section 1203, subdivisions (e)(1)-(12), generally concern the seriousness of the offense, the manner in which the offense was carried out, the numerosity of prior convictions, the nature of one or more prior convictions, and the severity of an injury to the victim.

In determining whether to grant probation notwithstanding a defendant's presumptive ineligibility, trial courts should consider the factors set forth in rule 4.413(c). The factors are broken down into two primary categories: those relating to why a given limitation has been placed on an offender's eligibility for probation (rule 4.413(c)(1)) and those relating to the defendant's particular culpability (rule 4.413(c)(2)). Courts may also consider the results of a risk/needs assessment. (Rule 4.413(c)(3).)

The terms "unusual cases" and "interests of justice" are narrowly construed, and rule 4.413 is "'limited to those matters in which the crime is either atypical or the offender's moral blameworthiness is reduced.'" (*People v. Stuart* (2007) 156 Cal.App.4th 165, 178.) If one of the criteria of rule 4.413 is met, the trial court may, but is not required to, find the case unusual. (*Ibid.*) As with the ultimate decision whether to grant probation, "[t]he standard for reviewing a trial court's finding that a case may or may not be unusual is abuse of discretion." (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831.)

It is generally difficult to convince an appellate court that a trial court abused its discretion by finding an eligible defendant unsuitable for probation by arguing the facts of the case of the case warranted a grant of probation. However, trial courts have been known to deny probation based on a mistaken understanding of the defendant's eligibility, including when it comes to determining whether a person is presumptively ineligible for probation. Thus, for example, in *People v. Lewis* (2004) 120 Cal.App.4th 837, the Court of Appeal concluded the trial court mistakenly believed the probation ineligibility clause for willfully inflicting great bodily injury (§ 1203, subd. (e)(3)) did not require the intentional infliction of great bodily injury and therefore remanded the matter for a new sentencing hearing to reconsider the defendant's eligibility for probation. "[W]here the record *affirmatively* discloses that the trial court *misunderstood* the scope of its

discretion, remand to the trial court is required to permit that court to impose sentence with full awareness of its discretion[.]" (*People v. Fuhrman* (1997) 16 Cal.4th 930, 944, emphasis in original.)

Other statutory prohibitions against trial courts granting probation apply to defendants with prior strike convictions (§ 667, subd. (c)(4); § 1170.12, subd. (a)(4)), certain sex offenses (§ 667,61, subd. (h); § 1203.065, subd. (a); 1203.066, subd. (a)), certain current and prior offenses involving the use of firearms (§ 1203.06, subds. (a)(1)-(2)), public transit offenses (§ 1203.055, subd. (c)), a conviction for aggravated arson (§ 1203.065, subd. (a)(3)), certain drug offenses (§ 1203.07, subd. (a)); Health & Saf. Code, § 11370, subds. (a)-(b)), certain offenses involving the infliction of great bodily injury (§ 1203.075; 1203.09), a history of prior felony convictions (§ 1203.08), certain offenses committed while on parole (§ 1203.085), and certain offenses involving explosives or destructive devices (§ 18780).

In order for many of these probation ineligibility statutes to apply, the prosecutor must plead and prove them. (See *People v. Lo Cicero* (1969) 71 Cal.2d 1186, 1191.) Unless specifically prohibited by statute, a defendant may move to strike a probation ineligibility finding by way of section 1385.

### C. ISS v. ESS Grants of Probation

A trial court may grant probation by either suspending the imposition of a sentence (ISS) or by imposing a specific sentence and suspending its execution (ESS). (*People v. Segura* (2008) 44 Cal.4th 921, 932.) Our Supreme Court has addressed "the important distinction, in probation cases, between orders suspending imposition of sentence and orders suspending execution of previously imposed sentences." (*Howard*, *supra*, 16 Cal.4th at p. 1087.)

When a trial court grants probation by suspending imposition of sentence, no particular sentence is indicated, which means "no judgment is then pending against the probationer," and "the court unquestionably would have had full sentencing discretion on revoking probation." (*Ibid.*; see also § 1203.2, subd. (c) ["Upon any revocation and termination of probation the court may, if the sentence has been suspended, pronounce judgment for any time within the longest period for which the person might have been sentenced"].)

On the other hand, when, upon granting probation, a trial court imposes a specific sentence but suspends its execution, "a judgment has been entered and the terms of the sentence have been set even though its execution is

suspended pending a term of probation." (*People v. Scott* (2014) 58 Cal.4th 1415, 1424.) In that situation, "the court has no authority, on revoking probation, to impose a lesser sentence[.]" (*Howard*, *supra*, 16 Cal.4th at p. 1095; see also § 1203.2, subd. (c) ["if the judgment has been pronounced and the execution thereof has been suspended, the court may revoke the suspension and order that the judgment shall be in full force and effect"].)[6]

Although the granting of either form of probation – ISS or ESS – is considered an appealable order (see § 1237, subd. (a)), neither form of probation results in final judgment. (*People v. Chavez* (2018) 4 Cal.5th 771, 781.) For this reason, it has been held that an ISS grant of probation does not become a final judgment for determining a defendant's eligibility for retroactive application of an ameliorative sentencing amendment until the trial court's power to pronounce judgment (i.e., sentence the defendant) expires. (*People v. McKenzie* (2020) 9 Cal.5th 40, 46-47.) The Supreme Court will decide whether the same is true of an ESS grant of probation in *People v. Esquivel* (Mar. 26, 2020, B294024) 2020 WL 1465895 [nonpub. opn.], review granted August 12, 2020, S262551.

Failure to appeal from an ESS grant of probation precludes a defendant from challenging the length of the suspended prison or jail term upon its imposition following revocation. (*People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1421.)

### D. Length of Probationary Term

Effective January 1, 2021, most probationary terms for felony convictions may not exceed two years. (§ 1203.1, subd. (a); Stats.2020, c. 328 (A.B.1950), § 2.) There are exceptions. For example, for defendants convicted of violent felonies (see § 667.5, subd. (c)) or "an offense that includes specific probation lengths within its provisions," probation may last "for a period of time not exceeding the maximum possible term of the sentence[.]" (§ 1203.1, subd. (m)(1).) In addition, when a defendant is convicted of certain felony theft

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[6] At the same time, the trial court does not have to execute the previously suspended sentence upon revoking an ESS grant of probation. "[W]hen a judge suspends execution of a prison term, the message being conveyed is that the defendant is on the verge of a particular prison commitment. Nonetheless, upon violation and revocation of probation under such circumstances, the sentencing court retains discretion to reinstate probation." (*People v. Medina* (2001) 89 Cal.App.4th 318, 323.)

offenses where total losses exceed $25,000, the court may impose a probationary term of up to three years. (§ 1203.1, subd. (m)(2).)

If a person was placed on probation for a period in excess of two years for an offense not included in section 1203.1, subdivision (m), prior to the effective date of A.B. 1950, and the judgment is not yet final, the person is entitled to a retroactive reduction of the length of the probationary term. (See, e.g., *Quinn*, *supra*, 59 Cal.App.5th at p. 883; *People v. Sims* (2021) 59 Cal.App.5th 943, 964.)

"In all probation cases, if the court has not seen fit to revoke the order of probation and impose sentence or pronounce judgment, the defendant shall at the end of the term of probation or any extension thereof, be discharged by the court subject to the provisions of these sections." (§ 1203.3, subd. (b)(3).)

### E. Early Termination of Probation

"[U]pon the payment of any fine imposed and the fulfillment of all conditions of probation, probation shall cease at the end of the term of probation, *or sooner*, in the event of modification." (§ 1203.1, subd. (j), emphasis added.) Section 1203.3, subdivision (a), in turn, provides: "The court may at any time when the ends of justice will be subserved thereby, and when the good conduct and reform of the person so held on probation shall warrant it, terminate the period of probation, and discharge the person held."

Probation, of course, may terminate early as well by virtue of revocation and execution of sentence. (*People v. Johnson* (2012) 211 Cal.App.4th 252, 262.)

### F. Section 1203.4 Relief

Pursuant to section 1203.4, a person who completes their term of probation following a guilty or no contest plea may move to have their plea set aside and the underlying charges dismissed if the defendant "(1) has fulfilled the conditions of probation for the entire period of probation, (2) has been discharged prior to the termination of the period of probation, or (3) in any other case in which a court, in its discretion and the interests of justice, determines that a defendant should be granted the relief available under section 1203.4." (*People v. Seymour* (2015) 239 Cal.App.4th 1418, 1429-1430, internal quotation marks omitted.)

Relief is mandatory under the first two scenarios identified in *Seymour* and discretionary under the third. (*Id*. at p. 1430.) A person is not eligible for relief under section 1203.4 if the early termination of probation is attributable to a probation revocation and execution of sentence. (*Johnson*, *supra*, 211 Cal.App.4th at p. 262.) Nor is a person entitled to section 1203.4 relief when they have completed their full probationary terms but not fulfilled all of their conditions of probation, including the payment of victim restitution. (*People v. Chandler* (1988) 203 Cal.App.3d 782, 787-789.) On the other hand, when a person has been discharged early based on good conduct, a trial court cannot deny section 1203.4 relief based solely on the fact that the person did not finish paying off victim restitution within that shortened period of probation. (*Seymour*, *supra*, 239 Cal.App.4th at p. 1436.)

A person cannot use section 1385 to set aside their convictions as a substitute for section 1203.4 *after* the period of probation has expired. (*Chavez*, *supra*, 4 Cal.5th at pp. 783-784.) Note: the defendant in *Chavez*, although eligible for relief under section 1203.4, sought relief under section 1385 because dismissal under the former statute "would not have relieved Chavez of negative immigration consequences." (*Id*. at pp. 778-778.)

### G. Plea Withdrawal under Section 1018

Section 1018 governs trial court motions to withdraw a guilty or no contest plea. The statute allows the filing of a plea withdrawal motion to be brought within six months of an order granting probation. All other defendants must bring such a motion before judgment is pronounced.

### H. Modification or Extension of Probation

Section 1203.2, subdivision (b)(1), authorizes the trial court to modify probation on its own motion or upon request of the probationer, the probation officer, or the prosecutor. Although probation may be modified or extended in the absence of a proven or admitted violation, "[a] change in circumstances is required before a court has jurisdiction to extend or otherwise modify probation." (*People v. Cookson* (1991) 54 Cal.3d 1091, 1095; see also *People v. Medeiros* (1994) 25 Cal.App.4th 1260, 1263.) Citing *Cookson*, the Sixth District Court of Appeal has noted that: "A change in circumstance equates to a 'fact' not available at the time of the original order." (*People v. Mendoza* (2009) 171 Cal.App.4th 1142, 1157, some internal quotation marks omitted; see also *In re Clark* (1959) 51 Cal.2d 838, 840 ["An order modifying the terms of probation based upon the same facts as the original order granting

probation is in excess of the jurisdiction of the court, for the reason that there is no factual basis to support it"].)

The most common ground for modifying or extending probation without a violation finding is the defendant's non-willful failure to pay victim restitution within the originally imposed term of probation. (See, e.g., *Cookson*, *supra*, 54 Cal.3d 1091.)

When a trial court chooses to extend probation for reasons not amounting to a violation, it may do so only up to the maximum length of probation authorized by statute. (*Medeiros*, *supra*, 25 Cal.App.4th at p. 1264.) Thus, when the original period of probation imposed is shorter than the statutory maximum period, a trial court may extend the period of supervision up to the statutory maximum but not beyond it. (*Ibid*.) By parity of reasoning, where the originally imposed period of probation was for the same length of time as the statutory maximum, a trial court cannot extend the probationary term (except as noted below).

Section 1203.2, subdivision (e), sets forth the only authority for extending probation beyond the statutory maximum length. (*Id*. at p. 1267.) Under that provision, "If an order setting aside the judgment, the revocation of probation, or both is made after the expiration of the probationary period, the court may again place the person on probation for that period and with those terms and conditions as it could have done immediately following conviction." (§ 1203.2, subd. (e).) This subdivision may not be used to extend probation beyond the statutory maximum period "where the trial court has merely modified probation in the absence of a violation due to changed circumstances." (*Medeiros*, *supra*, 25 Cal.App.4th at p. 1266.) "The policy behind subdivision (e) was to give courts an alternative to imprisoning probationers after expiration of their probationary terms when their dereliction did not warrant it." (*Id*. at p. 1267.) In other words, this extension mechanism is one that exists to benefit the probationer. Without it, if a person were to violate probation and there was insufficient (or no) time remaining on the probationary term to reinstate it, the court would have no choice but to impose a state prison or jail sentence, even if the court believed execution of sentence was unwarranted.

"[A] trial court's order, issued after the defendant's probationary term ha[s] expired, and purporting to extend the defendant's probation, [constitutes an act] in excess of jurisdiction and [is] void." (*Hilton v. Superior Court* (2014) 239 Cal.App.4th 766, 773, citing *In re Bakke* (1986) 42 Cal.3d 84.)

## I. Mandatory Conditions of Probation

Separate materials are available on FDAP's website devoted to the trial court's authority to impose discretionary conditions of probation and suggestions on how to attack the imposition of such conditions as unreasonable and/or unconstitutional. This section, therefore, will focus only on mandatory conditions of probation.

While a trial court generally will not abuse its discretion by imposing mandatory conditions of probation, they remain subject to challenge, albeit not under *In re Ricardo P.* (2019) 7 Cal.5th 1113 or *People v. Lent* (1975) 15 Cal.3d 481. Mandatory conditions can be challenged in one of three ways:

- The factual predicate required by statute is not supported by substantial evidence;
- The condition is facially unconstitutional; or
- The condition is unconstitutional as applied to the particular probationer.

Section 1203.02 provides a good example of a mandatory condition of probation that could be ripe for a fact-based challenge to its imposition. The statute provides:

> The court, or judge thereof, in granting probation to a defendant convicted of any of the offenses enumerated in Section 290 of this code shall inquire into the question whether the defendant at the time the offense was committed was intoxicated or addicted to the excessive use of alcoholic liquor or beverages at that time or immediately prior thereto, and if the court, or judge thereof, believes that the defendant was so intoxicated, or so addicted, such court, or judge thereof, shall require as a condition of such probation that the defendant totally abstain from the use of alcoholic liquor or beverages.

(§ 1203.02.) Here, a probation condition banning the use alcohol is mandatory only if the trial court believes the defendant was intoxicated or addicted to alcohol when they committed the sex offense in question. If the record lacks substantial evidence that the person was so intoxicated or addicted, imposition of the condition – though mandatory – should be subject to reversal. (See *People v. Rasmuson* (2006) 145 Cal.App.4th 1487 [holding that

where a statute imposes a mandatory duty upon making a factual finding – rather than simply permits the court to act in some way – the correct appellate standard of review is substantial evidence and not abuse of discretion].)

Challenging the constitutionality of a mandatory condition would proceed along the same lines as challenging the constitutionality of a discretionary condition. Therefore, these materials will not repeat the analysis offered in the aforementioned separate probation condition materials available on FDAP's website. However, an example of a constitutional challenge to a mandatory probation condition can be found in *People v. Garcia* (2017) 2 Cal.5th 792, where the Supreme Court rejected Fifth Amendment challenges to mandatory probation conditions (§ 1203.067, subds. (b)(3)-(4)) requiring convicted sex offenders to participate in polygraph examinations and waive the psychotherapist-patient privilege.

In addition to sections 1203.067, subdivision (b)(3)-(4), there are many other statutorily mandated probation conditions for driving, controlled substance, sex, weapons, domestic violence, child abuse, computer, public transit, and other offenses. An appellate attorney handling a case with any such convictions should look up any seemingly objectionable conditions imposed to determine whether they were mandatory in order to assess whether and how they can be challenged. In addition, appellate counsel should determine if there were any mandatory conditions that were *not* imposed, which may give rise to a potential adverse consequence to proceeding with the appeal. Unfortunately, these mandatory probation conditions are not found in one uniform location. They are found in various sections throughout the Penal, Health and Safety, and Vehicle Codes (and perhaps other codes such as the Business and Professions Code).

### J. Victim Restitution

When a person is granted probation, and the court imposes victim restitution, the court may only do so as a condition of probation. (*People v. Waters* (2015) 241 Cal.App.4th 822, 830, relying on § 1202.4, subd. (m) ["In every case in which the defendant is granted probation, the court shall make the payment of restitution fines and orders imposed pursuant to this section a condition of probation"].)

The court may not impose victim restitution after the period of probation has expired. (*Waters*, *supra*, 241 Cal.App.4th at p. 831; *Hilton*, *supra*, 239

Cal.App.4th at p. 769.) However, "where defendant's own requests played a role in delaying the proceedings and defendant did not object to a continuance of the restitution hearing to a date beyond his probationary term, he can be understood to have consented to the continuance." (*People v. Ford* (2015) 61 Cal.4th 282, 288.)

The permissible scope of a victim restitution order imposed as a condition of probation is broader than when restitution is imposed in conjunction with a prison or jail sentence. "[W]hen a court imposes a prison sentence following trial, section 1202.4 limits the scope of victim restitution to losses caused by the criminal conduct for which the defendant sustained the conviction." (*People v. Woods* (2008) 161 Cal.App.4th 1045, 1050.) On the other hand, "California courts have long interpreted the trial courts' discretion to encompass the ordering of restitution as a condition of probation even when the loss was not necessarily caused by the criminal conduct underlying the conviction." (*Carbajal*, *supra*, 10 Cal.4th at p. 1121, citing § 1203.1.) Victim restitution imposed as a condition of probation should be reviewed under the abuse of direction standard articulated in *Lent* and *Ricardo P.* (*Carbajal*, *supra*, 10 Cal.4th at p. 1123 ["the restitution condition must be reasonably related either to the crime of which the defendant is convicted or to the goal of deterring future criminality"].)

## K. Probation Revocation

### 1. General Overview

"A court may revoke probation 'if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation officer or otherwise that the person has violated any of the conditions of his or her probation[.]'" (*People v. Galvan* (2007) 155 Cal.App.4th 978, 981, quoting § 1203.2, subd. (a).) The probationer bears the burden of demonstrating on appeal that the trial court abused its discretion in revoking probation. (*People v. Self* (1991) 233 Cal.App.3d 414, 417.) However, when challenging the sufficiency of the evidence, the outcome usually comes down to whether the true finding on the violation allegation is supported by substantial evidence. (See, e.g., *People v. Urke* (2011) 197 Cal.App.4th 766, 773.)

A probation revocation hearing is not a criminal proceeding. (*Minnesota v. Murphy* (1984) 465 U.S. 420, 435, fn. 7; *People v. Shepherd* (2007) 151 Cal.App.4th 1193, 1198 ["probation revocation is not part of a criminal prosecution"].) As a result, "the facts supporting revocation of probation may

be proven by a preponderance of the evidence." (*People v. Rodriguez* (1990) 51 Cal.3d 437, 439.) There is also no right to a jury trial on a probation violation allegation. (*People v. Dale* (1973) 36 Cal.App.3d 191, 195.)

### 2. Summary Revocation

Section 1203.2 authorizes the trial court to summarily revoke probation upon being presented with reason to believe a person has violated a condition of probation. (*People v. Leiva* (2013) 56 Cal.4th 498, 505.) "Such summary revocation gives the court jurisdiction over and physical custody of the defendant and is proper if the defendant is accorded a subsequent formal hearing in conformance with due process." (*Ibid.*, internal quotation marks omitted.) Summary revocation "shall serve to toll the running of the period of supervision." (§ 1203.2, subd. (a).)

Tolling pursuant to section 1203.2, however, is "not a mechanism for extending that probationary period beyond its statutory time limits." (*People v. Sem* (2014) 229 Cal.App.4th 1176, 1192, relying on *Leiva*.) Instead, "tolling following summary revocation is a procedural mechanism for preserving the [trial] court's jurisdiction to adjudicate whether a probation violation has occurred during the previously imposed probationary period[.]" (*Ibid.*)

If probation is reinstated, the period of summary revocation counts toward the calculation of the expiration date of the probationary term. (*Leiva*, *supra*, 56 Cal.4th at p. 518, fn. 7.)

### 3. Willfulness Requirement

"It is well established that a probation violation must be willful to justify revocation of probation." (*People v. Rodriguez* (2013) 222 Cal.App.4th 578, 594, disapproved on other grounds by *People v. Hall* (2017) 2 Cal.5th 494, 503, fn. 2.) "Just as most criminal statutes – in all their variety – are generally presumed to include some form of mens rea despite their failure to articulate it expressly, so too are probation conditions generally presumed to require some form of willfulness, unless excluded expressly or by necessary implication." (*Hall*, *supra*, 2 Cal.5th at p. 502, quoting *In re Jorge M.* (2000) 23 Cal.4th 866, 872, internal quotation marks omitted.)

Not only must the trial court find that the probationer's conduct violated a condition of probation, but, additionally, "the evidence must support a conclusion the probationer's conduct constituted a willful violation of the

terms and conditions of probation." (*Galvan*, *supra*, 155 Cal.App.4th at p. 982; see also *People v. Zaring* (1992) 8 Cal.App.4th 362, 378-379.) "Where a probationer is unable to comply with a probation condition because of circumstances beyond his or her control and defendant's conduct was not contumacious, revoking probation and imposing a prison term are reversible error." (*People v. Cervantes* (2009) 175 Cal.App.4th 291, 295.)

"'The word "wil[l]fully" . . . implies that the person knows what he is doing[.]'" (*Hall*, *supra*, 2 Cal.5th at p. 501, quoting *In re Trombley* (1948) 31 Cal.2d 801, 807.) Stated another way: "To do a thing wilfully is to do it knowingly." (*People v. Calvert* (1928) 93 Cal.App. 568, 573.) Section 7 defines the term "willfully" in the following manner: "The word 'willfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage." (§ 7, subd. (1).) The California Supreme Court has held that "'willfulness' also denotes a requirement of proof that the defendant knew of his duty to act: a failure to act cannot be intentional or purposeful unless the defendant knew he was under a duty to act." (*People v. Davis* (2005) 126 Cal.App.4th 1416, 1436, citing *People v. Garcia* (2001) 25 Cal.4th 744, 752.) "The word 'willfully' implies a 'purpose or willingness' to make the omission. (§ 7.) Logically one cannot purposefully fail to perform an act without knowing what act is required to be performed." (*Garcia*, *supra*, 25 Cal.4th at p. 752.)

#### 4. Procedural Due Process Rights

In *Morrissey v. Brewer* (1972) 408 U.S. 471, the United States Supreme Court identified the following minimum procedural requirements of due process in the parole revocation context:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

(*Morrissey*, *supra*, 408 U.S. at p. 489.) In between arrest and a formal revocation hearing, due process also requires a preliminary probable cause hearing "to determine whether there is . . . reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions." (*Id*. at p. 486.)

For the purpose of determining the process due at revocation proceedings, probationers are constitutionally indistinguishable as a group from parolees. (*Gagnon v. Scarpelli* (1973) 411 U.S. 778, 782; accord *People v. Vickers* (1972) 8 Cal.3d 451, 458.) "*Morrissey* is thus equally applicable in the case of a revocation of probation insofar as it assures that revocation can be had only with due process protections. However, the precise nature of the proceedings for such revocation need not be identical if they assure equivalent due process safeguards." (*Vickers*, *supra*, 8 Cal.3d at p. 458.) While most of the procedural rights identified in *Morrissey* apply to probation revocation proceedings, California does not generally require a probable cause hearing prior to a formal revocation hearing. (*People v. Coleman* (1975) 13 Cal.3d 867, 894-895.)

When the prosecution proceeds on an unnoticed theory at a probation violation hearing, and the court does not offer to entertain a continuance motion seeking additional time to prepare a defense to any unnoticed allegations, the person's due process rights have been violated. (*People v. Mosley* (1988) 198 Cal.App.3d 1167, 1173-1175; *People v. Self* (1991) 233 Cal.App.3d 414, 419; *People v. Felix* (1986) 178 Cal.App.3d 1168, 1172.)

Whether a parolee's due process rights were violated by the failure to comply with the minimum safeguards announced in *Morrissey* presents "a mixed question of law and fact implicating constitutional rights," which an appellate court must review de novo. (*People v. Byron* (2016) 246 Cal.App.4th 1009, 1013.)

### 5. Admission of Hearsay

The Due Process Clause of the Fourteenth Amendment to the United States Constitution affords probationers a limited right to confront witnesses at revocation hearings. (*People v. Johnson* (2004) 121 Cal.App.4th 1409, 1411, citing *Black v. Romano* (1985) 471 U.S. 606, 610, 612.) Therefore, courts may not admit unsubstantiated or unreliable evidence as substantive evidence at a probation revocation hearing. (*People v. Brown* (1989) 215 Cal.App.3d 452, 454, citing *People v. Maki* (1985) 39 Cal.3d 707, 715.) Hearsay testimony

must bear a substantial degree of trustworthiness and sufficient indicia of reliability to be used legitimately at a probation revocation hearing. (*Brown*, *supra*, 215 Cal.App.3d at p. 454.)

There is ample California case law "approving the use of various forms of documentary evidence at probation revocation hearings despite hearsay objections." (*Johnson*, *supra*, 121 Cal.App.4th at p. 1411, citing *Maki*, *supra*, 39 Cal.3d at pp. 716-717 [car rental and hotel receipts]; *Brown*, *supra*, 215 Cal.App.3d at p. 455 [officer's testimony regarding laboratory test results for cocaine sample]; *People v. O'Connell* (2003) 107 Cal.App.4th 1062, 1066-1067 [report from director of drug counseling program].) Appellate courts have also approved, under the framework applicable to documentary evidence, the admission of a probation officer's testimony relating the contents of another probation officer's report and the results of the officer's review of the department's computer records to establish a probationer's non-compliance with certain probation conditions. (*People v. Abrams* (2007) 158 Cal.App.4th 396, 404; *People v. Gomez* (2010) 181 Cal.App.4th 1028, 1038.)

While documentary evidence that would otherwise be inadmissible hearsay may be used in a revocation proceeding without offending the probationer's right to confrontation if accompanied by reasonable indicia of reliability, testimonial hearsay is generally not admissible at a probation revocation hearing without a finding of good cause. (*People v. Arreola* (1994) 7 Cal.4th 1144, 1156-1157.) To allow otherwise would violate the probationer's due process right to confront adverse witnesses. (*Ibid.*; see also *People v. Winson* (1981) 29 Cal.3d 711, 717 [noting that the requirement of good cause for the substitution of live witness testimony with hearsay testimony is compelled by the United States Supreme Court's federal due process jurisprudence].)

As *Arreola* noted: "the need for confrontation is particularly important where the evidence is testimonial, because of the opportunity for observation of the witness's demeanor. [Citation.] Generally, the witness's demeanor is not a significant factor in evaluating foundational testimony relating to the admission of evidence such as laboratory reports, invoices, or receipts, where often the purpose of this testimony simply is to authenticate the documentary material, and where the author, signator, or custodian of the document ordinarily would be unable to recall from actual memory information relating to the specific contents of the writing and would rely instead upon the record of his or her own action." (*Arreola*, *supra*, 7 Cal.4th at p. 1157.)

"[W]hether good cause exists is determined on a case-by-case basis." (*Arreola*, *supra*, 7 Cal.4th at p. 1160.) "Broadly, good cause exists '(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." (*Shepherd*, *supra*, 151 Cal.App.4th at p. 1200, quoting *Arreola*, *supra*, 7 Cal.4th at p. 1160.) "Moreover, the good cause showing must be considered together with other relevant circumstances, 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 admissions, corroborates the evidence." (*Shepherd*, *supra*, 151 Cal.App.4th at p. 1200.)

A split of authority has arisen as to whether the *Arreola* test needs to be satisfied if the hearsay comes within an established hearsay exception, such as the one for spontaneous statements (Evid. Code, § 1240). *People v. Stanphill* (2009) 170 Cal.App.4th 61,78, and *People v. Gray* (April 30, 2021, B302236) both held no further showing of good cause is required if the statement by an unavailable witness in question is covered by a firmly rooted hearsay exception. On the other hand, *People v. Liggins* (2020) 53 Cal.App.5th 55, 67, held: "Where the prosecution offers an out-of-court statement as a substitute for live testimony, there will always be some value to the defendant's right to confront the speaker. Whether, in the circumstances, that right is so essential as to overcome the state's showing of good cause for offering hearsay can only be determined by situational weighing of the *Arreola* balancing factors."

### 6. Exclusion of Unconstitutionally Obtained Evidence

Neither the Fourth Amendment nor the Fifth Amendment exclusionary rule applies to probation revocation hearings. Consequently, evidence obtained in violation of either constitutional provision may be admitted at probation revocation proceedings unless the police misconduct at issue shocks the conscience or offends our sense of justice. (*People v. Nixon* (1982) 131 Cal.App.3d 687, 693-694 [Fourth Amendment]; *People v. Washington* (1987) 192 Cal.App.3d 1120, 1128 [Fourth Amendment]; *People v. Harrison* (1988) 199 Cal.App.3d 803, 810, 815 [Fourth Amendment]; *People v. Racklin* (2011) 195 Cal.App.4th 872, 881 [Fifth Amendment].) In fact, even evidence that has already been suppressed under the Fourth Amendment at a criminal

defendant's preliminary hearing may subsequently be used as the basis to revoke probation so long as the manner in which the evidence was obtained does not shock the conscience or offend our sense of justice. (*People v. Lazlo* (2012) 206 Cal.App.4th 1063, 1070-1071.)

Most of the above-cited authorities are rooted in the "Truth in Evidence" provision of Article I, section 28 of the California Constitution, which, added by voter initiative, provides, in relevant part: "Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court" (Cal. Const. art. I, § 28, subd. (f)(2).) The California Supreme Court has interpreted this provision to mean "the electorate intended to mandate admission of relevant evidence, even if unlawfully seized, to the extent admission of the evidence is permitted by the United States Constitution." (*In re Lance W.* (1985) 37 Cal.3d 873, 887-888.) Because "[t]he United States Supreme Court has not directly addressed whether the exclusionary rule applies in probation revocation hearings" (*Lazlo*, *supra*, 206 Cal.App.4th at p. 1070), appellate courts in California have unanimously construed the state constitution as requiring the admission of unlawfully seized evidence at probation revocation proceedings.

### 7. Competency

Although probation revocation proceedings are not generally considered criminal prosecutions, case law has long established that where "criminal proceedings had initially been suspended without imposition of sentence, the trial court lacked power to impose sentence upon the revocation of probation unless appellant was then presently sane." (*People v. Humphrey* (1975) 45 Cal.App.3d 32, 36.)

In 2014, the Legislature codified this rule. Section 1368 now expressly applies to individuals facing probation revocation proceedings and requires the suspension of revocation proceedings pending a competency trial when there is substantial evidence of incompetency. When it comes to the competency trial contemplated by section 1369, individuals facing revocation proceedings are treated differently from criminal defendants in one key respect. "Only a court trial is required to determine competency in a proceeding for a violation of probation[.]" (§ 1369, subd. (g).) This differential treatment is unsurprising given the absence of a jury trial right at revocation proceedings.

In addition, Penal Code section 1370, which sets forth the commitment procedures that govern after a criminal defendant has been found incompetent, now applies to individuals found incompetent during probation revocation proceedings as well.

### 8. Timing of Revocation Hearing

No statute sets a deadline for holding a probation revocation hearing. To make out a claim of unreasonable delay, a probationer would have to demonstrate prejudice. (See *In re Coughlin* (1976) 16 Cal.3d 52, 61.)

If the prosecution seeks to revoke a person's probation based on new criminal conduct, the revocation hearing may be held before or after trial on the criminal charges. (*Coleman*, *supra*, 13 Cal.3d 867, 889.) However, because the order in which criminal and probation revocations are held could affect whether a person elects to testify at a revocation hearing, the California Supreme Court had adopted the following judicially declared rule of evidence:

> [U]pon timely objection the testimony of a probationer at a probation revocation hearing held prior to the disposition of criminal charges arising out of the alleged violation of the conditions of his probation, and any evidence derived from such testimony, is inadmissible against the probationer during subsequent proceedings on the related criminal charges, save for purposes of impeachment or rebuttal where the probationer's revocation hearing testimony or evidence derived therefrom and his testimony on direct examination at the criminal proceeding are so clearly inconsistent as to warrant the trial court's admission of the revocation hearing testimony or its fruits in order to reveal to the trier of fact the probability that the probationer has committed perjury at either the trial or the revocation hearing.

(*Ibid.*)

### 9. No Violation May Be Sustained for Conduct Committed After Expiration of Probation

Section 1203.3 limits the trial court's authority to "revoke, modify, or change" a probation order to "any time during the term of probation." (§ 1203.3, subd.

(a).) The same statutory subdivision provides that a trial court "may at any time when the ends of justice will be subserved thereby, and when the good conduct and reform of the person so held on probation shall warrant it, terminate the period of probation, and discharge the person held." (*Ibid*.) Additionally, "[i]n all probation cases, if the court has not seen fit to revoke the order of probation and impose sentence or pronounce judgment, the defendant shall at the end of the term of probation or any extension thereof, be discharged by the court subject to the provisions of these sections." (§ 1203.3, subd. (b)(3).)

When read in concert, it is clear that "those statutes that provide for the . . . grant of probation require the terms and conditions of probation be enforced during the specifically imposed length of term of probation." (*People v. Lewis* (1992) 7 Cal.App.4th 1949, 1954-1955.) This means a "defendant is not free of these restrictions until the probation period has terminated or he or she has been discharged by law from the probationary term." (*Id*. at p. 1955.) By the same token, though, a necessary corollary must be that "termination of probation or a discharge from probation following completion of the probation term formally end[s] the conditions of probation." (*Ibid*., emphasis removed.) "[B]y operation of law, once [the person's] probation expired, that condition of probation ceased to exist." (*In re Barber* (2017) 15 Cal.App.5th 368, 374.) "Nothing in the legislative history suggests the Legislature intended to permit the trial court to find a violation of probation based on conduct that occurred after the probationary period had expired." (*Leiva*, *supra*, 56 Cal.4th at p. 514.)

Thus, if it appears the person's probation should have expired before commission of the violation in question, a revocation order can be challenged as an act in excess of the trial court's jurisdiction. (See *In re Griffin* (1967) 67 Cal.2d 343, 347 ["The jurisdictional concept involved in the cases holding that the court is without power to revoke probation after the end of the probationary term is not lack of jurisdiction of the cause but excess of jurisdiction"].)

### 10. Consequences of a Sustained Probation Violation

Upon sustaining a violation and revoking probation, trial courts have three options: (1) reinstate probation on the same terms; (2) reinstate probation on modified terms; or (3) terminate probation and sentence the person to prison or county jail. (*People v. Bolian* (2014) 231 Cal.App.4th 1415, 1420.) If a court elects to terminate probation and sentence a person eligible for sentencing

under section 1170, subdivision (h), the court may impose a split sentence rather than a straight county jail commitment.

As noted above, should the court choose the third option, the court's range of sentencing choices turns on whether the person received an ISS or ESS grant of probation. In the former situation, the court can impose any sentence authorized by law. (*Ibid*.) In the latter scenario, the court must execute the previously suspended sentence. (*Id*. at pp. 1420-1421.)

### 11. Appealing an Order Revoking Probation

"[A]n order revoking probation or modifying its terms is appealable as an 'order made after judgment, affecting the substantial rights of the party.'" (*Lazlo*, *supra*, 206 Cal.App.4th at p. 1067, fn. 3, quoting § 1237, subd. (b).)

If a person appeals from an order revoking probation following an admitted violation, a certificate of probable cause is required to challenge the validity of the admission. (*People v. Billetts* (1979) 89 Cal.App.3d 302, 307; see also § 1237.5; Rule 8.304(b).) No certificate is required to challenge issues related to a non-stipulated sentencing matter following an admitted probation violation. (*Ibid*.)

## L. Flash Incarceration

Section 1203.35, subdivision (a)(1), provides that, "[i]n any case in which the court grants probation . . . , the county probation department is authorized to use flash incarceration for any violation of the conditions of probation . . . if, at the time of granting probation . . . , the court obtains from the defendant a waiver to a court hearing prior to the imposition of a period of flash incarceration." The statute defines flash incarceration as "a period of detention in a county jail due to a violation of an offender's conditions of probation . . . . The length of the detention period may range between one and 10 consecutive days." (§ 1203.35, subd. (d).) If a person does not agree to sign a flash incarceration waiver, the court may not deny probation for that reason (§ 1203.35, subd. (a)(1)), but an alleged violation that otherwise might be addressed via flash incarceration will likely then be addressed via a petition for revocation of probation.

### M. Credits

When a person is sentenced to state prison or county jail following revocation of probation, local time previously served in jail in the same case – including as a condition of probation – must be credited against the subsequent state prison or county jail sentence. (§ 2900.5, subd. (a); *People v. Arnold* (2004) 33 Cal.4th 294, 300.) This rule applies to custody in a "camp, work furlough facility, halfway house, rehabilitation facility, hospital, prison, juvenile detention facility, or similar residential institution" as well as "days served in home detention pursuant to Section 1203.016 or 1203.018[.]" (§ 2900.5, subd. (a).)

In addition to the actual custody credits described above, day-for-day presentence conduct credits must be granted for, inter alia, time spent in a county jail – including for a period of flash incarceration – or in home detention pursuant to section 1203.016. (§ 4019.)

There are, however, exceptions to these credit-earning rules. One such exception involves dual credits. Section 2900.5, subdivision (b), provides:

> For the purposes of this section, credit shall be given only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted. Credit shall be given only once for a single period of custody attributable to multiple offenses for which a consecutive sentence is imposed.

Consistent with this statutory language, "[a] defendant 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. A criminal sentence may not be credited with jail or prison time attributable to a parole or probation revocation that was based only in part upon the same criminal episode." (*People v. Johnson* (2007) 150 Cal.App.4th 1467, 1485, citing *People v. Bruner* (1995) 9 Cal.4th 1178, 1191.) The flip-side of this rule, however, is that where probation has been revoked for exactly the same conduct that forms the basis of a new charge, then credit on both the new criminal case and the case in which probation has been revoked is appropriate. (*Ibid.*)

To obtain dual credits, the probationer must establish that the conduct that led to the new conviction was a "dispositive" or "but for" cause of the

presentence custody in the probation case as well. (*Ibid*.) Courts strictly enforce this rule of but-for causation. So, for example, if a person violates probation by committing a new offense of driving under the influence, time spent in jail awaiting resolution of the new criminal charge and the probation violation is not credited against the probation case if the revocation hold is premised on a condition of probation prohibiting the person from consuming alcohol (even though the act of consuming alcohol was part of the same course of conduct at issue in the new criminal case). (See *People v. Stump* (2009) 173 Cal.App.4th 1264, 1266-1267.)

Another exception to the probationer's right to presentence credits upon revocation of probation can be found in the practice of entering into credit waivers. A *Johnson* waiver "enables a sentencing court to reinstate a defendant on probation after he or she has violated probation, conditioned on service of an additional county jail term, as an alternative to imposing a state prison sentence." (*Arnold*, *supra*, 33 Cal.4th at pp. 297-298, discussing *People v. Johnson* (1978) 82 Cal.App.3d 183.) In construing *Johnson* waivers, our Supreme Court has held that "when a defendant knowingly and intelligently waives jail time custody credits after violating probation in order to be reinstated on probation and thereby avoid a prison sentence, the waiver applies to any future use of such credits should probation ultimately be terminated and a state prison sentence imposed." (*Arnold*, *supra*, 33 Cal.4th at p. 298.) In a companion case to *Arnold*, the Supreme Court applied the same rule to the waiver of *future* residential treatment program credits to conclude that when probationer enters a *Johnson* waiver of future custody credits to be earned in a residential treatment facility, the waiver is for all purposes, "including application of such credits to a subsequently imposed prison term in the event probation is revoked." (*People v. Jeffrey* (2004) 33 Cal.4th 312, 318.)

When presented with a purported *Johnson* waiver, it is critical to examine the scope of the waiver and whether the waiver was knowingly and intelligently entered. It has long been recognized that "a waiver is 'an intentional relinquishment or abandonment of a known right or privilege[.]'" (*People v. Panizzon* (1996) 13 Cal.4th 68, 85, quoting *Johnson v. Zerbst* (1938) 304 U.S. 458, 464.) Generally, in order for there to a be valid waiver of a right, the waiver must be made knowingly, intelligently, and voluntarily. (See, e.g., *Panizzon*, *supra*, 13 Cal.4th at p. 80 [right to appeal]; *People v. Nelson* (2012) 53 Cal.4th 367, 374-375 [*Miranda* rights]; *People v. Collins* (2001) 26 Cal.4th 297, 305 [jury trial right].)

> "[T]he valid waiver of a right presupposes an actual and demonstrable knowledge of the very right being waived. [Citations.]" (*Jones v. Brown* (1970) 13 Cal.App.3d 513, 519, 89 Cal.Rptr. 651.) It "'[i]s the intelligent relinquishment of a known right after knowledge of the facts.' [Citation.]" (*City of Ukiah v. Fones* (1966) 64 Cal.2d 104, 107, 48 Cal.Rptr. 865, 410 P.2d 369.) The burden is on the party claiming the existence of the waiver to prove it by evidence that does not leave the matter to speculation, and doubtful cases will be resolved against a waiver.

(*People v. Vargas* (1993) 13 Cal.App.4th 1653, 1662.) "The voluntariness of a waiver is a question of law which appellate courts review de novo." (*Panizzon*, *supra*, 13 Cal.4th at p. 80.)

### N. Fines and Fees

There are a number of fines and fees specific to probationers. For example, section 1203.1b, subdivision (a), authorizes imposition of a probation supervision fee (as well as a fee covering the cost of preparing a presentence probation report). These fees are subject to an ability to pay determination. (§ 1203.1b, subds. (a)-(b); see also *People v. Neal* (2018) 29 Cal.App.5th 820, 826.) Effective July 1, 2021, however, these probation-related fees (and others) will be repealed, and unpaid fees already assessed will be deemed uncollectible and unenforceable pursuant to Assembly Bill No. 1869.

Other assessments may be imposed to cover the cost of court-ordered conditions of probation, including drug testing (§ 1203.1ab), an ignition lock device (§ 1203.1bb), and polygraph testing (*Brown v. Superior Court* (2002) 101 Cal.App.4th 313, 317). Such costs cannot be imposed *as a condition of probation*. (See, e.g., *People v. Hall* (2002) 103 Cal.App.4th 889, 892.)

There are also offense-specific fines and fees that may be imposed when granting probation. (See, e.g., § 1203.097 [domestic violence cases].)

In addition, when granting probation, the court must suspend a probation revocation restitution fine in the same amount of the restitution fine imposed pursuant to section 1202.4, subdivision (b). (§ 1202.44.) The probation revocation restitution fine only becomes effective upon revocation of probation. (*Ibid*.)

A court must impose a restitution fine (§ 1202.4, subd. (b)) when granting probation. Upon revocation of probation and execution of a jail or prison sentence, a trial court lacks authority to impose a second restitution fine. (*People v. Chambers* (1998) 65 Cal.App.4th 819, 823.)

The failure to appeal from an order granting probation and challenge any fines or fees imposed at that time estops the defendant from challenging those same fines and fees on appeal from a subsequent revocation, unless the fines and fees were unauthorized. (See *Ramirez*, *supra*, 159 Cal.App.4th at p. 1421 [addressing this principle more broadly, not in the context of fines and fees].)

### O. Proposition 36 Probation

Section 1210.1 et seq. – added by voters through the passage of Proposition 36 – sets forth a separate probation scheme for defendants convicted of non-violent drug possession offenses. These materials will not discuss Proposition 36 probation, as the FDAP website contains a separate set of materials on this topic.

## III. Mandatory Supervision

### A. Overview

"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)." (*Scott*, *supra*, 58 Cal.4th at p. 1418.) "Under the terms of the Act, low-level felony offenders . . . no longer serve their sentences in state prison." (*Ibid.*) "Under the Realignment Act, qualified persons convicted of nonserious and nonviolent felonies are sentenced to county jail instead of state prison. [Citation.] Trial courts have discretion to commit the defendant to county jail for a full term in custody, or to impose a hybrid or split sentence consisting of county jail followed by a period of mandatory supervision." (*People v. Catalan* (2014) 228 Cal.App.4th 173, 178; see § 1170, subd. (h).)

"During the period of mandatory supervision, the defendant shall be supervised by the county probation officer in accordance with the terms, conditions, and procedures generally applicable to persons placed on probation, for the remaining unserved portion of the sentence imposed by the court." (§ 1170, subd. (h)(5)(B).) As with probation, "[a]ny proceeding to

revoke or modify mandatory supervision under this subparagraph shall be conducted pursuant to either subdivisions (a) and (b) of Section 1203.2 or Section 1203.3." (*Ibid*.)

Prior to the adoption of the Realignment Act, "all felony sentences [in California] were served in prison." (*People v. Kelly* (2013) 215 Cal.App.4th 297, 301.) Thus, according to the California Supreme Court, "the Realignment Act *significantly* changes the punishment for some felony convictions." (*Scott*, *supra*, 58 Cal.4th at p. 1418, emphasis added; see also *People v. Wilcox* (2013) 217 Cal.App.4th 618, 621 ["These unique circumstances are born of the Criminal Justice Realignment Act of 2011"].)

Section 17.5 codifies key legislative findings made in support of the Realignment Act. Chief among these legislative findings is the notion that "[r]ealigning low-level felony offenders who do not have prior convictions for serious, violent, or sex offenses to locally run community-based corrections programs, which are strengthened through community-based punishment, evidence-based practices, improved supervision strategies, and enhanced secured capacity, will improve public safety outcomes among adult felons and facilitate their reintegration back into society." (§ 17.5, subd. (a)(5).) The Legislature further declared that the type of "community-based punishment" contemplated by the Realignment Act includes "correctional sanctions and programming encompassing a range of custodial and noncustodial responses to criminal or noncompliant offender activity." (§ 17.5, subd. (a)(8).) It was the opinion of the Legislature that "California must reinvest its criminal justice resources to support community-based corrections programs and evidence-based practices that will achieve improved public safety returns on this state's substantial investment in its criminal justice system." (§ 17.5, subd. (a)(4).)

### B. Eligibility and Suitability

To be eligible for a split sentence with a period of mandatory supervision, one must first be more generally eligible for non-prison sentencing under the Realignment Act pursuant to section 1170, subdivision (h). Any penal statute that references punishment for a felony pursuant to section 1170, subdivision (h), contemplates a county jail commitment rather than a state prison sentence. If a statute generally refers to punishment as a felony without specifying a sentencing triad or where a sentence is to be served, a conviction under that statute requires a state prison sentence. (§ 18, subd. (a).)

A person is ineligible for a county jail commitment if they have a current or prior strike conviction (including an out-of-state prior), are required to register as a sex offender, or are sentenced pursuant to an enhancement for multiple felonies involving fraud or embezzlement. (§ 1170, subd. (h)(3).) A court lacks the authority to strike a jail-ineligibility finding in order to avoid imposing a state prison sentence. (*People v. Avignone* (2017) 16 Cal.App.5th 1233, 1237.) In some circumstances, constitutional principles of equal protection may compel a county jail commitment for certain offenses rather than a state prison sentence. (See, e.g., *People v. Noyan* (2014) 232 Cal.App.4th 657, 660 [finding that section 4573.5 violates equal protection by requiring a state prison sentence when convictions for more serious related offenses are served in county jail].) The prosecution is not required to plead and prove that a prior conviction renders a person ineligible for a county jail sentence. (*People v. Griffis* (2013) 212 Cal.App.4th 956, 959.) A person is ineligible for a split sentence if subject to deportation upon release from the custodial portion of their sentence. (*People v. Arce* (2017) 11 Cal.App.4th 613, 616.)

If a person is eligible for county jail sentencing under section 1170, subdivision (h), the statute establishes a presumption in favor of imposing a split sentence by providing: "Unless the court finds that, in the interests of justice, it is not appropriate in a particular case, the court, when imposing a sentence pursuant to paragraph (1) or (2), shall suspend execution of a concluding portion of the term for a period selected at the court's discretion." (§ 1170, subd. (h)(5)(A); see also rule 4.415(a).) When refusing to impose a split sentence, the trial court must provide reasons on the record for denying mandatory supervision. (Rule 4.415(e).)

When considering whether to deny mandatory supervision, the court must take into account "factors that are specific to a particular case or defendant," such as:

(1) Consideration of the balance of custody exposure available after imposition of presentence custody credits;

(2) The defendant's present status on probation, mandatory supervision, postrelease community supervision, or parole;

(3) Specific factors related to the defendant that indicate a lack of need for treatment or supervision upon release from custody; and

(4) Whether the nature, seriousness, or circumstances of the case or the defendant's past performance on supervision substantially outweigh the benefits of supervision in promoting public safety and the defendant's successful reentry into the community upon release from custody.

(Rule 4.415(b).)

Once a court decides to impose a period of mandatory supervision, it must then choose how much of the sentence should be served in custody and how much in the community under supervision. Factors to consider in making this decision include:

(1) Availability of appropriate community corrections programs;

(2) Victim restitution, including any conditions or period of supervision necessary to promote the collection of any court-ordered restitution;

(3) Consideration of length and conditions of supervision to promote the successful reintegration of the defendant into the community upon release from custody;

(4) Public safety, including protection of any victims and witnesses;

(5) Past performance and present status on probation, mandatory supervision, postrelease community supervision, and parole;

(6) The balance of custody exposure after imposition of presentence custody credits;

(7) Consideration of the statutory accrual of post-sentence custody credits for mandatory supervision under section 1170(h)(5)(B) and sentences served in county jail under section 4019(a)(6);

(8) The defendant's specific needs and risk factors identified by a risk/needs assessment, if available; and

(9) The likely effect of extended imprisonment on the defendant and any dependents.

(Rule 4.415(c).)

A trial court's decision whether to impose a split sentence that includes a period of mandatory supervision as well as its decision how to structure the split should it elect to impose one is reviewed under the abuse of discretion standard on appeal.

Unlike in the probation context, a "defendant has no right to refuse a sentence including mandatory supervision[.]" (*People v. Rahbari* (2014) 232 Cal.App.4th 185, 195.)

### C. Early Termination of Mandatory Supervision

"Under the general common law rule, a trial court is deprived of jurisdiction to resentence a criminal defendant once execution of the sentence has commenced." (*People v. Karaman* (1992) 4 Cal.4th 335, 344.) The Legislature, however, may carve out exceptions to this common law rule. (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 455.) The Legislature has created such an exception when it comes to split sentences: "The period of supervision shall be mandatory, and may not be earlier terminated except by court order." (§ 1170, subd. (h)(5)(B).)

In *People v. Camp* (2015) 233 Cal.App.4th 461, the reviewing court expressly considered whether the Legislature granted trial courts the authority to modify both the custodial term of a split sentence and the period of mandatory supervision after execution of that sentence had already commenced. The trial court in *Camp* "terminated Camp's mandatory supervision and modified his sentence" by converting a 14-month jail term to a time-served 364-day county jail commitment. (*Camp*, *supra*, 233 Cal.App.4th at p. 466.) After closely scrutinizing former sections 1170, subdivision (h)(5)(B)(i), 1203.2, and 1203.3, *Camp* ultimately concluded that "the trial court did not act in excess of its jurisdiction in terminating Camp's mandatory supervision and in modifying his sentence." (*Id.* at p. 476.) Of particular significance to *Camp* was section 1203.3, subdivision (b)(1)(A), which provides: "If the sentence or term or condition of probation or the term or any condition of mandatory supervision is modified pursuant to this section, the judge shall state the reasons for that modification on the record." (§ 1203.3, subd. (b)(1)(A); see also *Camp*, *supra*, 233 Cal.App.4th at pp. 470-471 [noting this provision allowing trial courts to modify a split sentence – not just the terms of mandatory supervision – after execution of sentence has commenced serves as an exception to the common law rule]; accord *People v. Antolin* (2017) 9 Cal.App.5th 1176, 1181 ["When a defendant is serving the

jail portion of a split sentence, . . . execution of the concluding portion of the jail term has not yet begun and the common law rule would not deprive the trial court of jurisdiction (at least as to the concluding portion of the sentence)"].)

*Camp* demonstrates that a trial court – after imposing a split sentence and suspending execution of a concluding portion of that sentence – retains jurisdiction to modify the sentence pursuant to sections 1203.2 and 1203.3, a power that includes the ability to change the overall length of a split sentence when terminating mandatory supervision. (*Camp*, *supra*, 233 Cal.App.4th at p. 472 [explaining that section 1203.2, subdivision (c), which requires a trial court to impose the previously suspended custodial sentence without modification when revoking and refusing to reinstate an ESS grant of probation, does not apply to split sentences].)

### D. Conversion of Straight County Jail Commitment to Split Sentence

While a trial court has the authority to modify a split sentence any time, a trial court may not modify a straight county jail sentence at the defendant's request to convert it to a split sentence with a period of mandatory supervision more than 120 days after execution of sentence has begun. (*Antolin*, *supra*, 9 Cal.App.5th at pp. 1179-1183; see also § 1170, subd. (d)(1) [limiting the court's authority to recall a sentence on its own motion to within 120 days of execution].) Such a conversion, however, may be ordered after 120 days if the recall request is initiated by the prosecutor or the county correctional administrator. (§ 1170, subd. (d)(1) [affording such recall power to trial court "at any time" upon the recommendation of the prosecutor or county correctional administrator].)

### E. Victim Restitution

As noted above, when victim restitution is imposed as a condition of probation, the amount need not be limited to the victim's actual losses. However, in the context of a split sentence (or a straight county jail commitment), the rule that applies to state prison sentences governs: "the scope of a victim restitution order issued in connection with a sentence pursuant to section 1170(h) is limited to those losses caused by the crime or crimes of which the defendant was convicted." (*Rahbari*, *supra*, 232 Cal.App.4th at p. 187.)

## F. Conditions of Mandatory Supervision

As with probation, these materials will not discuss the trial court's authority to impose discretionary conditions of mandatory supervision because separate materials on that subject are available on FDAP's website. It should be noted that the California Supreme Court has granted review to decide whether the validity of conditions of mandatory supervision should be assessed under the same standard applicable to conditions of probation. (See *People v. Bryant* (2019) 42 Cal.App.5th 839, review granted February 19, 2020, S259956.)

## G. Mandatory Supervision Revocation

### 1. General Overview

"During the period of mandatory supervision, the defendant shall be supervised by the county probation officer in accordance with the terms, conditions, and procedures generally applicable to persons placed on probation, for the remaining unserved portion of the sentence imposed by the court." (§ 1170, subd. (h)(5)(B).) As with probation, "[a]ny proceeding to revoke or modify mandatory supervision under this subparagraph shall be conducted pursuant to either subdivisions (a) and (b) of Section 1203.2 or Section 1203.3." (*Ibid*.)

When the Legislature amended section 1203.2 to apply beyond probation to include mandatory supervision (as well as parole and PRCS), its "stated intent was to provide for a uniform supervision revocation process for petitions to revoke probation, mandatory supervision, postrelease community supervision, and parole." (*People v. Johnson* (2018) 29 Cal.App.5th 1041, 1047-1048, quoting *People v. DeLeon* (2017) 3 Cal.5th 640, 647, quoting Stats. 2012, ch. 43, § 2, subd. (a), internal quotation marks omitted.) Not surprisingly, then, in the mandatory supervision context, "[t]he prosecution must prove the grounds for revocation by a preponderance of the evidence," and trial courts have the same discretion to revoke mandatory supervision as they do when it comes to revoking probation. (*People v. Buell* (2017) 16 Cal.App.5th 682, 687.)

### 2. Summary Revocation

No case law addresses summary revocation pursuant to 1203.2, subdivision (a), in the mandatory supervision context. However, there is no reason to

believe the construction given this provision in the probation context – that summary revocation is not a mechanism for extending probation but rather is a tool to "preserve the trial court's jurisdiction to determine whether a defendant violated probation during the court-imposed period of probation" (*Leiva*, *supra*, 56 Cal.4th at p. 518) – does not apply to mandatory supervision as well.

In a case addressing summary revocation in the PRCS context, it has been noted that, "[a]lthough *Leiva* was concerned with probation, section 1203.2, subdivision (a), applies to PRCS as well, and it would be anomalous to view the tolling provision as having a different meaning in the context of PRCS. Section 1203.2 was amended in 2012 to make its provisions regarding revocation of supervision, which previously had applied only to probation, apply also to mandatory supervision, PRCS and parole. (Stats. 2012, ch. 43, § 30.)" (*Johnson*, *supra*, 29 Cal.App.5th at pp. 1047-1048.) It would be equally anomalous to assign section 1203.2's summary revocation tolling provision a different meaning when it comes to mandatory supervision.

### 3. Willfulness Requirement

"It is well established that a probation violation must be willful to justify revocation of probation." (*Rodriguez*, *supra*, 222 Cal.App.4th at p. 594.) While there does not appear to be any published case law applying this rule to mandatory supervision revocation proceedings, there are unpublished cases that explicitly do so. (See, e.g., *People v. Miranda* (Oct. 30, 2018, A154533) 2018 WL 5617122, at *2.)

### 4. Procedural Due Process Rights

The Legislature unequivocally declared its intent to import the procedural due process protections articulated in *Morrissey* into the mandatory supervision revocation framework, as follows: "By amending subparagraph (B) of paragraph (5) of subdivision (h) of Section 1170 [mandatory supervision], subdivision (f) of Section 3000.08 [parole], and subdivision (a) of Section 3455 of the Penal Code [PRCS] to apply to probation revocation procedures under Section 1203.2 of the Penal Code, it is the intent of the Legislature that these amendments simultaneously incorporate the procedural due process protections held to apply to probation revocation procedures under *Morrissey v. Brewer* (1972) 408 U.S. 471, and *People v. Vickers* (1972) 8 Cal.3d 451, and their progeny." (Stats. 2012, ch. 43, § 2, subd. (b).)

### 5. Admission of Hearsay

The same rules that govern the admission of hearsay at probation revocation hearings discussed above apply to mandatory supervision revocation hearings. (*Buell*, *supra*, 16 Cal.App.5th at p. 689.)

### 6. Exclusion of Unconstitutionally Obtained Evidence

In light of the California Constitution's Truth-in-Evidence provision and the manner in which it has been applied at probation revocation proceedings, there is no reason to believe the Fourth or Fifth Amendment exclusionary rules apply to mandatory supervision revocation proceedings, unless the official misconduct at issue shocks the conscience or offends our sense of justice. (See, e.g., *Nixon*, *supra*, 131 Cal.App.3d at pp. 693-694 [applying this rule in the probation revocation hearing context].)

### 7. Competency

If a doubt arises as to whether a person facing mandatory supervision revocation proceedings is mentally competent, such proceedings must be suspended pending a competency trial. (§ 1368, subds. (a)-(b).)

When it comes to the competency trial contemplated by section 1369, individuals facing revocation proceedings are treated differently from criminal defendants in one key respect. "Only a court trial is required to determine competency in a proceeding for a violation of probation, mandatory supervision, postrelease community supervision, or parole." (§ 1369, subd. (g).) This differential treatment is unsurprising given the absence of a jury trial right at revocation proceedings.

In addition, section 1370, which sets forth the commitment procedures that govern after a criminal defendant has been found incompetent, now applies to individuals found incompetent during mandatory supervision revocation proceedings as well. Section 1370 treats individuals found incompetent to face mandatory supervision revocation proceedings differently from other defendants in the following respect: "With the exception of proceedings alleging a violation of mandatory supervision, the criminal action remains subject to dismissal pursuant to Section 1385." (§ 1368, subd. (d).) For such a person, if the person cannot be restored to competency, "the court shall reinstate mandatory supervision and may modify the terms and conditions of supervision to include appropriate mental health treatment or refer the

matter to a local mental health court, reentry court, or other collaborative justice court available for improving the mental health of the defendant." (*Ibid*.)

### 8. Timing of Revocation Hearing

As with probation, no statute sets a deadline for holding a mandatory supervision revocation hearing. To make out a claim of unreasonable delay, an individual subject to mandatory supervision would have to demonstrate prejudice. (See *In re Coughlin* (1976) 16 Cal.3d 52, 61.)

### 9. Consequences of a Sustained Mandatory Supervision Violation

Upon sustaining a violation and revoking mandatory supervision, trial courts have three options: (1) reinstate mandatory supervision on the same terms; (2) reinstate mandatory supervision on modified terms; or (3) terminate mandatory supervision and execute the previously suspended concluding portion of the person's sentence. (See, e.g., *People v. Lopez* (2020) 57 Cal.App.5th 409, 414, review granted January 27, 2021, S266016.)

### 10. Appealing an Order Revoking Mandatory Supervision

An order revoking mandatory supervision or modifying its terms is appealable as an "order made after judgment, affecting the substantial rights of the party." (§ 1237, subd. (b); see *Buell*, *supra*, 16 Cal.App.5th at p. 687.)

There is no case law addressing whether a person who appeals from an order revoking mandatory supervision following an admitted violation must obtain a certificate of probable cause in order to challenge the validity of the admission. (But see *Billetts*, *supra*, 89 Cal.App.3d at p. 307 [holding a certificate is required for this purpose in the probation revocation context]; see also § 1237.5; rule 8.304(b).) Neither section 1237.5 nor rule 8.304(b) mentions mandatory supervision, which would suggest a certificate is not required. A certificate would certainly not be required to challenge issues related only to a non-stipulated sentencing mater following an admitted mandatory supervision violation.

## H. Flash Incarceration

Section 1203.35, subdivision (a)(1), provides that, "[i]n any case in which the court . . . imposes a sentence that includes mandatory supervision, the county probation department is authorized to use flash incarceration for any violation of the conditions of . . . mandatory supervision if, at the time of . . . ordering mandatory supervision, the court obtains from the defendant a waiver to a court hearing prior to the imposition of a period of flash incarceration." The statute defines flash incarceration as "a period of detention in a county jail due to a violation of an offender's conditions of . . . mandatory supervision. The length of the detention period may range between one and 10 consecutive days." (§ 1203.35, subd. (d).) If a person does not agree to sign a flash incarceration waiver, an alleged violation that otherwise might be addressed via flash incarceration will likely then be addressed via a petition for revocation of mandatory supervision.

## I. Credits

"During the period when the defendant is under [mandatory] supervision, unless in actual custody related to the sentence imposed by the court, the defendant shall be entitled to only actual time credit against the term of imprisonment imposed by the court." (§ 1170, subd. (h)(5)(B).) Therefore, when the court revokes mandatory supervision and orders the person to serve out the remainder of the previously suspended sentence, the person is entitled to actual – but not conduct – credits against the sentence for time spent on mandatory supervision.

"Any time period which is suspended because a person has absconded shall not be credited toward the period of supervision." (*Ibid.*) Thus, if a person is placed on mandatory supervision for three years and absconds for one year the person will end up on mandatory supervision for four years from their initial placement (assuming the trial court does not revoke mandatory supervision and execute the previously suspended sentence as a sanction for absconding).

If a defendant has presentence credits in excess of the custodial portion of a split sentence, those excess credits should be applied to reduce the period of mandatory supervision. (See § 1170, subd. (a)(3) ["The court shall advise the defendant that they shall serve an applicable period of . . . mandatory supervision, and order the defendant to report to the parole or probation office closest to the defendant's last legal residence, unless the in-custody

credits equal the total sentence, including both confinement time and the period of . . . mandatory supervision"]; see also *People v. Steward* (2018) 20 Cal.App.5th 407, 426 ["we construe section 1170(a)(3) to provide that excess custody credits apply to reduce a period of PRCS"].)

### J. No Parole or PRCS After Mandatory Supervision

A person who completes the period of mandatory supervision (or a straight Realignment Act county jail sentence) is unconditionally released and is under no obligation to serve out a period of parole or PRCS. (See *People v. Cruz* (2012) 207 Cal.App.4th 664, 671-672; *Wilcox*, *supra*, 217 Cal.App.4th 618, 624.)

### K. Finality for Retroactivity Purposes

A split sentence does not become final for the purposes of determining a person's entitlement to the retroactive application of an ameliorative sentencing amendment until the period of mandatory supervision ends. (*People v. Conatser* (2020) 53 Cal.App.5th 1223, 1229, review granted November 10, 2020, S264721; *People v. Diaz Martinez* (2020) 54 Cal.App.5th 885, review granted, November 10, 2020, S264848.)

## IV. Parole

### A. Overview

"The Legislature finds and declares that the period immediately following incarceration is critical to successful reintegration of the offender into society and to positive citizenship. It is in the interest of public safety for the state to provide for the effective supervision of and surveillance of parolees, including the judicious use of revocation actions, and to provide educational, vocational, family, and personal counseling necessary to assist parolees in the transition between imprisonment and discharge. A sentence resulting in imprisonment in the state prison pursuant to Section 1168 or 1170 shall include a period of parole supervision or postrelease community supervision, unless waived, or as otherwise provided in this article." (§ 3000, subd. (a)(1).)

These materials address parole supervision and revocation but do not discuss parole suitability hearings or any other parole-related issues that precede a person's release on parole.

### B. Certain Offenders Must Serve a Parole Term upon Release from Prison

Upon completion of a state prison sentence, a person must serve a period of parole supervision if the prison sentence was for one the following crimes:

(1) A serious felony as described in subdivision (c) of Section 1192.7.

(2) A violent felony as described in subdivision (c) of Section 667.5.

(3) A crime for which the person was sentenced pursuant to paragraph (2) of subdivision (e) of Section 667 or paragraph (2) of subdivision (c) of Section 1170.12 [a third strike sentence].

(4) Any crime for which the person is classified as a high-risk sex offender.[7]

(5) Any crime for which the person is required, as a condition of parole, to undergo treatment by the State Department of State Hospitals pursuant to Section 2962 [commitment as an offender with a mental health disorder].

(§ 3000.08, subdivision (a)(1)-(5).) "[A]ll other offenders released from prison shall be placed on [PRCS]." (§ 3000.08, subd. (b).)

### C. Transfer from Parole to PRCS

On occasion, people who are released from state prison are mistakenly placed on parole rather than PRCS. Section 3000.08, subdivision (l), addresses this scenario, as follows: "Any person released to parole supervision . . . shall, regardless of any subsequent determination that the person should have been released pursuant to [the provision governing PRCS], remain subject to [parole supervision] after having served 60 days under [parole] supervision[.]"

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[7] "A High Risk Sex Offender (HRSO) is an inmate or parolee required to register pursuant to the Sex Offender Registration Act, including PC sections 290(c), 290.001, 290.002, 290.003, 290.004, 290.005, 290.006, 290.007, or 290.008, and who also has been assessed by the Department pursuant to sections 3573(a) and (b) and based on his or her score on the risk assessment, has been designated as a HRSO." (Cal. Code Regs., tit. 15, § 3580; see also *People v. Toussain* (2015) 240 Cal.App.4th 974, 983-984.)

One appellate court has interpreted the authority found in section 1203.2, subdivision (b)(1), "to 'modify . . . supervision of the person' to encompass the remedy granted by the trial court here, namely an order *modifying supervision* by transferring supervision from parole to PRCS." (*People v. Johnson* (2020) 45 Cal.App.5th 379, 400, emphasis in original.) "[A] defendant who believes he has been mistakenly placed on parole supervision rather than PRCS *also* has the ability to file an appeal with CDCR, and if unsuccessful, to pursue a petition for writ of habeas corpus." (*Id*. at p. 401, emphasis in original.)

Section 3000.08, subdivision (l), imposes a 60-day time limit on seeking a transfer from parole to PRCS. The Court of Appeal in *Johnson* declined to "decide whether the 60-day rule means that a *determination* that the parolee was misclassified must be made before the parolee serves 60 days on parole supervision, or whether, as the trial court concluded, the trigger for the end of the 60-day period is the parolee's *challenge* to CDCR's classification." (*Id*. at p. 403, emphasis in original.) Instead, the reviewing court concluded the 60-day limit had not elapsed because, after subtracting the time the person had spent in custody on parole violations, which do not count against a person's parole term, he had not been on parole yet for 60 days. (*Id*. at pp. 404-405, relying on § 3056, subd. (a) ["When a parolee is under the legal custody and jurisdiction of a county facility awaiting parole revocation proceedings or upon revocation, he or she shall not be under the parole supervision or jurisdiction of the department"].)

### D. Length of Parole Term

Effective August 6, 2020, parole terms have been greatly reduced for nearly all inmates released on or after July 1, 2020. (§ 3000.01, subd. (b); see also Stats. 2020, ch. 29 (S.B.118), § 18.) Now inmates released following completion of any determinate term must serve a two-year parole term, and inmates released following completion of an indeterminate term must serve a three-year period of parole. These new parole lengths do not apply to individuals paroled after serving a sentence for a conviction that requires registration as a sex offender (or to individuals for whom the newly prescribed parole lengths would result in an increased period of parole). (§ 3000.01, subd. (d).)

A person subject to a two-year parole term must be considered for possible discharge from parole within 12 months of release from confinement and

must be discharged "[i]f at the time of the review the inmate has been on parole continuously for 12 months since release from confinement without a violation and the inmate is not a person required to be treated as described in Section 2962[.]" (§ 3000.01, subd. (b)(1).) A person subject to a three-year term of parole must also be considered for possible discharge from parole within 12 months of release from confinement, but there are no mandatory discharge criteria. (§ 3000.01, subd. (b)(2).)

For all parolees, "[u]pon successful completion of parole, or at the end of the maximum statutory period of parole specified in this section, whichever is earlier, the inmate shall be discharged from parole." (§ 3000.01, subd. (c); see also § 3000, subd. (b)(6).)

For offenders released on parole prior to July 1, 2020, section 3000, subdivision (b), sets forth the maximum parole term lengths for offenders not placed on parole for life. The statute distinguishes between offenders sentenced before and after July 1, 2013. Most individuals sentenced on or after July 1, 2013 are required to serve a three-year parole term, though individuals sentenced for certain violent felonies (§ 667.5, subds. (c)(3), (c)(4), (c)(5), (c)(6), (c)(11), or (c)(18)) may be placed on parole for up to ten years, "unless a longer period of parole is specified in Section 3000.1." (§ 3000, subd. (b)(2)(B).) Certain sex offense convictions mandate a parole term of 10 or 20 years. (§ 3000, subd. (b)(3) & (b)(4)(A).)[8]

A person placed on parole before July 1, 2020, after serving a sentence for first or second degree murder (§ 3000.1, subd. (a)(1)) or certain sex offense (§ 3000.1, subd. (a)(2)) is subject to parole supervision for life. However, lifer parolees previously imprisoned for first degree murder or second degree murder shall be discharged from parole after seven years or five years, respectively, "unless the board, for good cause, determines that the person will be retained on parole." (§ 3000.1, subd. (b).) "In the event of a retention on parole pursuant to subdivision (b), the parolee shall be entitled to a review by the board each year thereafter." (§ 3000.1, subd. (c).) Section 3001 sets forth the criteria for early discharge from parole for non-lifer parolees.

[8] The statute further provides alternative parole term lengths – not discussed here – for people released on parole before July 1, 2013.

### E. Limitations on a Court's Authority to Terminate Parole

A trial court lacks the authority to terminate parole pursuant to section 1385, as "[a] period of parole is not a criminal action or a part thereof as contemplated by section 1385." (*People v. VonWahlde* (2016) 3 Cal.App.5th 1187, 1197-1198.)

*VonWahlde* agreed with the defendant's contention that "the trial court had the authority to terminate parole *supervision*," but the question was not squarely before the Court of Appeal in that case. (*Id.* at p. 1198, emphasis in original.) More recently, another appellate court described this statement from *VonWahlde* as dictum and reached the opposite conclusion in a case that did present the issue, concluding: "the trial court erred in interpreting section 1203.2 to mean it had the authority to terminate 'parole supervision,' and in ordering that defendant 'not be supervised for the remainder of his parole term.'" (*People v. Johnson* (2020) 58 Cal.App.5th 363, 369.)

### F. Extension of the Parole Period

There are two ways in which a person's parole term can be extended: when a parolee absconds and when a parolee is returned to custody for a parole violation. "Time during which parole is suspended because the prisoner has absconded or has been returned to custody as a parole violator shall not be credited toward any period of parole unless the prisoner is found not guilty of the parole violation." (§ 3000, subd. (b)(6).) This provision echoes section 3064, which provides: "From and after the suspension or revocation of the parole of any prisoner and until his return to custody he is an escapee and fugitive from justice and no part of the time during which he is an escapee and fugitive from justice shall be part of his term." (§ 3064.) Section 3056, subdivision (a), additionally provides: "When a parolee is under the legal custody and jurisdiction of a county facility awaiting parole revocation proceedings or upon revocation, he or she shall not be under the parole supervision or jurisdiction of the department."

While parole can be extended by as many days as a person has absconded, there are limits as to how much time spent in custody on a violation can be used to extend the parole term. For example, for a parolee who has been placed on parole for three years, section 3000, subdivision (b)(6)(A) specifies that, "[e]xcept as provided in Section 3064, in no case may a prisoner subject to three years on parole be retained under parole supervision or in custody

for a period longer than four years from the date of his or her initial parole."[9] Thus, when all of these provisions are read in concert, it is clear that only up to an additional year can be added to a person's parole term to account for a period in which the person has been returned to custody for a parole violation. (See *People v. Pearl* (2009) 172 Cal.App.4th 1280, 1290-1291; but see also *People v. Townsend* (2020) 53 Cal.App.5th 888, 895 [rejecting the parolee's argument that "section 3000(b)(6)(A)'s four-year limit on parole means the Department's ability to extend his parole term during periods of reincarceration expired . . . four years after his parole began" and holding that "where a parolee absconds early, section 3064 tolls the initial four-year maximum period of parole" such that time spent in custody more than four years after a person's initial placement on parole can be used to extend the parole term].)

### G. Mandatory Conditions of Parole

"Any inmate who is eligible for release on parole . . . shall be given notice that he or she is subject to terms and conditions of his or her release from prison." (§ 3067, subd. (a).) Parolees are subject to discretionary and mandatory conditions of parole. These materials address only mandatory conditions of parole. Separate materials are available on FDAP's website on challenging conditions of supervision. Many, though not all, mandatory parole conditions apply to individuals convicted of sex offenses.

Mandatory parole conditions can be challenged in one of three ways:

- The factual predicate required by statute is not supported by substantial evidence;
- The condition is facially unconstitutional; or
- The condition is unconstitutional as applied to the particular probationer.

#### 1. Search and Seizure

All parolees are "subject to search or seizure by a probation or parole officer or other peace officer at any time of the day or night, with or without a search warrant or with or without cause." (§ 3067, subd. (b)(2).) As a result, unlike a search initiated pursuant to a discretionary warrantless probation search

[9] There are similar limitations for parolees serving terms longer than three years. (See § 3000, subds. (b)(6)(B)-(C).)

condition, for which an officer must have advance knowledge of the condition, so long as an officer is aware that a person is on parole, a warrantless search may be carried out. (*People v. Middleton* (2005) 131 Cal.App.4th 732, 739-740.) A parole search executed with advance knowledge the person is on parole "is reasonable within the meaning of the Fourth Amendment as long as it is not arbitrary, capricious or harassing." (*People v. Reyes* (1998) 19 Cal.4th 743, 752; see also § 3067, subd. (d).)

### 2. Sex Offenses

"Every inmate who has been convicted for any felony violation of a 'registerable sex offense' described in subdivision (c) of Section 290 or any attempt to commit any of the above-mentioned offenses and who is committed to prison and released on parole pursuant to Section 3000 or 3000.1 shall be monitored by a global positioning system for life." (§ 3004, subd. (b).)

"[W]hen a person is released on parole after having served a term of imprisonment in state prison for any offense for which registration is required pursuant to Section 290, that person may not, during the period of parole, reside in any single family dwelling with any other person also required to register pursuant to Section 290, unless those persons are legally related by blood, marriage, or adoption." (§ 3003.5, subd. (a).)

"[I]t is unlawful for any person for whom registration is required pursuant to Section 290 to reside within 2000 feet of any public or private school, or park where children regularly gather." (§ 3003.5, subd. (b).) This latter restriction was found unconstitutional as applied to a substantial number of parolees in San Diego County because "[b]lanket enforcement of the residency restrictions against these parolees has severely restricted their ability to find housing in compliance with the statute, greatly increased the incidence of homelessness among them, and hindered their access to medical treatment, drug and alcohol dependency services, psychological counseling and other rehabilitative social services available to all parolees, while further hampering the efforts of parole authorities and law enforcement officials to monitor, supervise, and rehabilitate them in the interests of public safety." (*In re Taylor* (2015) 60 Cal.4th 1019, 1023.)

All individuals "released on parole for an offense that requires registration pursuant to Sections 290 to 290.023" must participate in and complete an approved sex offender management program, waive the privilege against self-incrimination and participate in polygraph examinations as part of such a

program, and waive the psychotherapist-patient privilege. (§ 3008, subds. (d)(1)-(4).)

Upon request from the victim, a person paroled after completing a sentence for a registerable sex offense must be subject to "an order that the parolee not contact or communicate with the victim of the crime, or any of the victim's family members." (§ 3053.6, subds. (a)-(b).)

As is the case for probationers convicted of offenses included within section 290, a parole condition banning the use of alcohol is mandatory *if* parole authorities believe the person was intoxicated or addicted to alcohol when they committed the sex offense in question. (§ 3053.5.)

When a person is paroled "after having served a term of imprisonment for [certain sex offenses] in which one or more of the victims was under 14 years of age, and for which registration is required pursuant to the Sex Offender Registration Act, it shall be a condition of parole that the person may not, during his or her period of parole, enter any park where children regularly gather without the express permission of his or her parole agent." (§ 3053.8)

### 3. Domestic Violence

When a person is paroled following a sentence for domestic violence offenses, upon request, a condition of parole must be imposed requiring compliance with a protective order. (§ 3053.2, subd. (a).) A condition requiring participation in a batter's program may also be imposed. (§ 3053.2, subd. (b).)

### 4. Hate Crimes

Individuals paroled after serving a prison sentence for a hate crime are subject to a condition of parole, "absent compelling circumstances," directing them "to refrain from further acts of violence, threats, stalking, or harassment of the victim, or known immediate family or domestic partner of the victim, including stay-away conditions when appropriate." (§ 3053.4.) Such a person may also be ordered, as a condition of parole, "to complete a class or program on racial or ethnic sensitivity, or other similar training in the area of civil rights[.]" (*Ibid*.)

## H. Parole Revocation

### 1. General Overview

Prior to passage of the Realignment Act, the Board of Parole Hearings "was responsible for conducting parole revocation hearings." (*DeLeon*, *supra*, 3 Cal.5th at p. 647.) As part of the Realignment Act, the Legislature added section 3000.08, which "authorized the superior courts to exercise jurisdiction over most parole revocation proceedings." (*Id*. at p. 651, fn. 4.) Subsequently, "the Legislature amended section 1203.2 to incorporate parole into the statutes governing revocation of probation, mandatory supervision, and postrelease community supervision." (*Id*. at p. 647.) "Together, sections 1203.2 and 3000.08 establish a statutory framework for parole revocation." (*Ibid*.)

### 2. Summary Revocation

No case law addresses summary revocation pursuant to 1203.2, subdivision (a), in the parole context. However, there is no reason to believe the construction given this provision in the probation context – that summary revocation is not a mechanism for extending probation but rather is a tool to "preserve the trial court's jurisdiction to determine whether a defendant violated probation during the court-imposed period of probation" (*Leiva*, *supra*, 56 Cal.4th at p. 518) – does not apply to parole as well. (See *Johnson*, *supra*, 29 Cal.App.5th at pp. 1047-1048 [finding it would be anomalous to assign section 1203.2's summary revocation tolling provision a different meaning when it comes to PRCS].)

Summary revocation may operate differently though when the person is taken into custody for a possible parole violation by virtue of section 3056, subdivision (a), which provides: "When a parolee is under the legal custody and jurisdiction of a county facility awaiting parole revocation proceedings or upon revocation, he or she shall not be under the parole supervision or jurisdiction of the department." Thus, if a person's parole is summarily revoked and the person is taken into custody, the days in custody do not count against the period of supervision, thereby extending the period of parole, an outcome not permitted by *Leiva* in the probation context. (See also *Johnson*, *supra*, 45 Cal.App.5th at pp. 404-405 [concluding the 60-day limit set forth in section 3000.08, subdivision (l), had not elapsed because, after subtracting the time the person had spent in custody on parole violations,

which do not count against a person's parole term per section 3056, subdivision (a), he had not been on parole yet for 60 days].)

### 3. Willfulness Requirement

"It is well established that a probation violation must be willful to justify revocation of probation." (*Rodriguez*, *supra*, 222 Cal.App.4th at p. 594.) While there does not appear to be any published case law applying this rule to parole revocation proceedings, there are unpublished cases that explicitly do so. (See, e.g., *People v. Quiroz* (Apr. 22, 2016, E063105) 2016 WL 1633299, at *4; *People v. Green* (Jan. 31, 2019, A155744) 2019 WL 397128, at *1.)

### 4. Procedural Due Process Rights

The *Morrissey* procedural due process rights (set forth above in detail in section II.K.4) apply with full force to parole revocation proceedings. (*DeLeon*, *supra*, 3 Cal.5th at p. 649; see also Stats. 2012, ch. 43, § 2, subd. (b).) In fact, they apply more fully in the parole revocation context, in which they were originally developed.

For example, *Morrissey* held that in between arrest and a formal revocation hearing, due process also requires a preliminary probable cause hearing "to determine whether there is . . . reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions." (*Morrissey*, *supra*, 408 U.S. at p. 486.) California does not generally require a probable cause hearing prior to a formal probation revocation hearing. (*Coleman*, *supra*, 13 Cal.3d at pp. 894-895.) A question arose after jurisdiction over parole revocation proceedings switched from the Board of Parole Hearings to trial courts whether such a probable cause hearing must be held in parole revocation proceedings anymore. The California Supreme Court then confirmed that "the *Morrissey* preliminary hearing requirement applies to parole revocation proceedings conducted in superior court." (*DeLeon*, *supra*, 3 Cal.5th at p. 644.) *DeLeon* "decline[d] to resolve whether an outer time limit [for holding a preliminary probable cause hearing] is constitutionally compelled" and simply "reiterate[d] *Morrissey*'s command that the preliminary hearing should occur 'as promptly as convenient after arrest.'" (*Id.* at p. 659, quoting *Morrissey*, *supra*, 408 U.S. at p. 485.) The trial court's failure to hold a timey probable cause hearing on request is evaluated for prejudice under the federal constitutional harmless beyond a reasonable doubt standard found in *Chapman v. California* (1967) 386 U.S. 18, 24. (*DeLeon*, *supra*, 3 Cal.5th at p. 660.)

### 5. Timing of Revocation Hearing

It has been held that, "in parole revocation proceedings, a parolee is entitled to arraignment within 10 days of an arrest for a parole violation, a probable cause hearing within 15 days of the arrest, and a final [revocation] hearing within 45 days of the arrest." (*Williams v. Superior Court* (2014) 230 Cal.App.4th 636, 643, disapproved on other grounds by *DeLeon*, *supra*, 3 Cal.5th at p. 653.) As noted above, the Supreme Court in *DeLeon* chose not to adopt this part of *Williams*' holding as it pertains to the timing of the probable cause hearing, though it did not conclude *Williams* was wrongly decided on this point either. *DeLeon* simply left this question open for another day.

To make out a claim of unreasonable delay, a parolee would have to demonstrate prejudice. (See *In re Coughlin* (1976) 16 Cal.3d 52, 61.)

### 6. Admission of Hearsay

The same rules that govern the admission of hearsay at probation revocation hearings discussed above in section II.K.5 apply to parole revocation hearings. (See *Gagnon*, *supra*, 411 U.S. at p. 782; *Vickers*, *supra*, 8 Cal.3d at p. 458. [both standing for the proposition that when determining the process due at revocation proceedings, probationers are constitutionally indistinguishable as a group from parolees].) Applying the limited due process right to confrontation that governs revocation hearings, including the *Arreola* good cause standard and the balancing test found in *United States v. Comito* (9th Cir.1999) 177 F.3d 1166, the Court of Appeal in *In re Miller* (2006) 145 Cal.App.4th 1228 reversed a judgment revoking parole.

### 7. Exclusion of Unconstitutionally Obtained Evidence

In *Pennsylvania Board of Probation and Parole v. Scott* (1998) 524 U.S. 357, 364-366 the United States Supreme Court held that the Fourth Amendment exclusionary rule does not apply to parole revocation proceedings because: (1) parolees are not entitled to the same due process rights as criminal defendants; and (2) parole revocation proceedings are not criminal proceedings, and the exclusionary rule has no application "beyond the criminal trial context." Unconstitutionally obtained evidence, therefore, can only be excluded at a parole revocation proceeding if its admission shocks the conscience or offends our sense of justice. (See, e.g., *Nixon*, *supra*, 131

Cal.App.3d at pp. 693-694 [applying this rule in the probation revocation hearing context].)

### 8. Competency

If a doubt arises as to whether a person facing parole revocation proceedings is mentally competent, such proceedings must be suspended pending a competency trial. (§ 1368, subds. (a)-(b).)

When it comes to the competency trial contemplated by section 1369, individuals facing revocation proceedings are treated differently from criminal defendants in one key respect. "Only a court trial is required to determine competency in a proceeding for a violation of probation, mandatory supervision, postrelease community supervision, or parole." (§ 1369, subd. (g).) This differential treatment is unsurprising given the absence of a jury trial right at revocation proceedings.

Section 1370.02 sets forth the commitment procedures that apply to individuals found incompetent during parole revocation proceedings. Of note, when an individual on parole – but not for murder or certain sex offenses – is found incompetent, the revocation petition must be dismissed, and the trial court may take specified actions "using the least restrictive option to meet the mental health needs of the defendant[.]" (§ 1370.02, subd. (b).) For individuals on parole for murder or certain sex offenses, efforts must be made to restore the person to competency. (§ 1370.02, subd. (c)(1).)

### 9. Parole Agency-Initiated Revocation Petitions and Intermediate Sanctions

Rather than seek revocation for a suspected parole violation, the parole agency has discretion on its own to impose additional parole conditions and other "intermediate sanctions," such as a period of flash incarceration in jail for up to ten days. (§ 3000.08, subds. (d) & (e); see also Cal. Code Regs., tit. 15, § 3764 [describing the following possible intermediate sanctions short of revocation: "delete or modify conditions of parole"; "add special conditions of parole"; "[r]efer to a local community program" for "treatment which can be obtained in a community facility or program"; and "the use of Electronic In-Home Detention monitoring"].) In fact, the Legislature expressly "encouraged" the use of flash incarceration as an intermediate sanction. (§ 3000.08, subd. (d).) It is only upon determining that "intermediate sanctions up to and including flash incarceration are not appropriate" that "the

supervising parole agency shall, pursuant to Section 1203.2, petition . . . to revoke parole." (§ 3000.08, subd. (f).)

If the parole agency files a revocation petition, it "shall include a written report that contains additional information regarding the petition, including the relevant terms and conditions of parole, the circumstances of the alleged underlying violation, the history and background of the parolee, and any recommendations." (*Ibid.*) The Legislature left it to the Judicial Council to "adopt forms and rules of court to establish uniform statewide procedures to implement this subdivision, including the minimum contents of supervision agency reports." (*Ibid.*) In response to this delegation of authority, the Judicial Council adopted rule 4.541, which provides, in part: "a report filed by the supervising agency in conjunction with a petition to revoke parole . . . must include the reasons for that agency's determination that intermediate sanctions without court intervention as authorized by Penal Code sections 3000.08(f) . . . are inappropriate responses to the alleged violations." (Rule 4.541(e).) The Advisory Committee Comment to rule 4.541 reiterates that section 3000.08, subdivision (f), "require[s] the supervising agency to determine that the intermediate sanctions authorized by section[] 3000.08(d) . . . are inappropriate responses to the alleged violation *before* filing a petition to revoke parole[.]" (Emphasis in original; see also *Williams*, *supra*, 230 Cal.App.4th at p. 665, quoting rule 4.541(e) ["Parole's report filed with its revocation petition must state the specific reasons (individualized to the particular parolee, as opposed to a generic statement) for its determination that intermediate sanctions 'are inappropriate responses to the alleged violations'"].)

If it appears the supervising parole agency has not complied with the intermediate sanctions requirements set forth in section 3000.08 and rule 4.541, the parolee may file a demurrer and move for dismissal of the revocation petition. (See, e.g., *People v. Perlas* (2020) 47 Cal.App.5th 826, 836 [affirming the denial of a demurrer]; *People v. Hronchak* (2016) 2 Cal.App.5th 884, 891-892 [affirming the denial of a demurrer]; *People v. Osorio* (2015) 235 Cal.App.4th 1408, 1412-1416, disapproved on other grounds by *DeLeon*, *supra*, 3 Cal.5th at p. 646 [reversing the denial of a demurrer].)

### 10. District Attorney-Initiated Revocation Petitions and Intermediate Sanctions

The Legislature drafted a parallel but not identical framework when it is the district attorney and not the parole agency that seeks revocation of a person's

parole supervision. Subdivision (b)(1) of section 1203.2 provides that "[u]pon . . . the petition of . . . the district attorney, the court may modify, revoke, or terminate supervision of the person pursuant to this subdivision, except that the court shall not terminate parole pursuant to this section." (§ 1203.2, subd. (b)(1).) Once the district attorney has filed a parole revocation petition, "[t]he court shall refer . . . the petition to the . . . parole officer." (*Ibid.*) The parole officer must then prepare a "written report" for the court. (*Ibid.*) "After the receipt of a written report from the . . . parole officer, the court shall read and consider the report and . . . the petition and may modify, revoke, or terminate the supervision of the supervised person . . . if the interests of justice so require." (*Ibid.*) The district attorney's power to file a parole revocation petition "does not affect the authority of the supervising [parole] agency to impose intermediate sanctions, including flash incarceration, to persons supervised on parole pursuant to Section 3000.[0]8[.]" (§ 1203.2, subd. (g).)

The Legislature did not identify what must be included in the "written report from . . . the parole officer" that a trial court must obtain on receipt of a parole revocation petition or delegate to the Judicial Council the responsibility for identifying the minimum contents of such reports. Nevertheless, Division Seven of the Second District Court of Appeal concluded that, "given subdivision (g), of section 1203.2, which preserves the supervising parole agency's authority to impose less restrictive sanctions, the parole officer's report under [section 1203.2,] subdivision (b)(1) should include an intermediate sanctions assessment." (*People v. Zamudio* (2017) 12 Cal.App.5th 8, 15.) "Even if not required by statute or the California Rules of Court," *Zamudio* continued, "the best practice would be for the parole officer to address the appropriateness of intermediate sanctions to assist the court in exercising its discretion in the interest of justice. Such an assessment would also serve as a check on potentially overzealous deputy district attorneys[.]" (*Ibid.*) *Zamudio* has been followed on this point by *People v. Kurianski* (2020) 54 Cal.App.5th 777, 781, and *People v. Castel* (2017) 12 Cal.App.5th 1321, 1328.

In sum, whether a parole revocation petition is filed by the parole agency or the district attorney, at some point prior to a hearing on the revocation petition, the parole agency must file a written report and intermediate sanctions short of revocation should be considered.[10]

[10] It is an open question as to whether a district attorney-initiated parole revocation petition must be referred to the supervising parole agency for a written report and consideration of intermediate sanctions in the case of a

### 11. Consequences of a Sustained Parole Violation

For non-lifer parolees, if the trial court conducts a revocation hearing and finds the person has violated a condition of parole, the trial court has a range of options available to it, including reinstatement of parole on modified conditions or imposition of a county jail term not to exceed 180 days. (§ 3000.08, subds. (f)-(g).)

For lifer parolees, if the trial court conducts a revocation hearing and finds the person has violated a condition of parole, "the person on parole shall be remanded to the custody of the Department of Corrections and Rehabilitation and the jurisdiction of the Board of Parole Hearings for the purpose of future parole consideration." (§ 3000.08, subd. (h).) Trial courts have no discretion to impose a more lenient disposition after sustaining a violation allegation against a lifer parolee.

In light of section 3000.08, subdivision (h), the severe consequences of a sustained parole violation for lifer parolee cannot be overstated. *People v. Wiley* (2019) 36 Cal.App.5th 1063 serves as a stark reminder just how unforgiving the rule set forth in section 3000.08, subdivision (h), can be. In *Wiley*, the trial court sustained a single allegation that the lifer parolee violated his curfew condition. (*Wiley*, *supra*, 36 Cal.App.5th at p. 1066.) Because Wiley was on parole following a murder conviction, citing section 3000.08, subdivision (h), the trial court stated: "'I have to find a violation and return the parolee to CDCR and the jurisdiction of BPH for a determination

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lifer parolee. That issue has been briefed in A159914. *Zamudio*, *Castel*, and *Kurianski* all involved non-lifer parolees.

*Zamudio* also held that a district attorney's petition to revoke parole is sufficient on its face – and therefore not subject to demurrer – even though it is not initially accompanied by a written report and does not explain why intermediate sanctions have been deemed inappropriate. (*Zamudio*, supra, 12 Cal.App.5th at p. 15.) Both *Zamudio* and *Castel* rejected an equal protection challenge to the disparate treatment afforded parolees facing revocation proceedings initiated by the parole agency and the district attorney. (*Id.* at pp. 16-17; *Castel*, *supra*, 12 Cal.App.5th at pp. 1327-1328 [both finding the two groups not similarly situated for equal protection purposes because revocation petitions filed by the district attorney usually involve new criminal law violations, while revocation petitions filed by the parole agency may allege a broader array of violations that fall short of criminal offenses].)

of how to respond to that violation. Is that what I want to do? No. And, you know, that's on the record. But it's what I feel like I have to do.'" (*Ibid*.)

### 12. No Right to Dismissal under Section 1385

*VonWahlde* left open the question "whether a parole revocation proceeding – as opposed to parole itself – constitutes 'an action' within the purview of section 1385, or whether a superior court has authority under that statute to dismiss such a proceeding or, for example, factual allegations contained in the parole revocation petition." (*VonWahlde*, *supra*, 3 Cal.App.5th at p. 1198, fn. 6.)

Squarely presented with that open question, *Wiley* subsequently concluded section 1385 does not authorize a trial court to dismiss a parole revocation petition "in furtherance of justice." (*Wiley*, *supra*, 36 Cal.App.5th at p. 1065.)[11]

### 13. Appealing an Order Revoking Parole

"A parole revocation order is a postjudgment order affecting the substantial rights of the party, and is therefore appealable." (*Osorio*, *supra*, 235 Cal.App.4th at p. 1412.)

There is no case law addressing whether a person who appeals from an order revoking parole following an admitted violation must obtain a certificate of probable cause in order to challenge the validity of the admission. (But see *Billetts*, *supra*, 89 Cal.App.3d at p. 307 [holding a certificate is required for this purpose in the probation revocation context]; see also § 1237.5; rule 8.304(b).) Neither section 1237.5 nor rule 8.304(b) mentions parole – and parole does not involve a challenge to the person's conviction or criminal sentence – which would suggest a certificate is not required. (See *People v. Kraus* (1975) 47 Cal.App.3d 568, 573 ["The only statutory requirement for a certificate of probable cause is in Penal Code section 1237.5 which refers only to appeals 'from a judgment of conviction'"]; accord *People v. Arriaga* (2014) 58 Cal.4th 950, 959; but see § 1237.5 [which has been amended since *Kraus* to apply to admitted probation violations].) A certificate would certainly not

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[11] Oddly, in *Perlas*, an opinion authored by the same justice as *Wiley* – and without mentioning *Wiley* – the reviewing court chose to "express no view on the availability of relief or the showing made by Perlas in support of his section 1385 request to dismiss." (*Perlas*, *supra*, 47 Cal.App.5th at p. 836.)

be required to challenge issues related only to a non-stipulated sanction imposed following an admitted parole violation.

## I. Credits

Section 2900.5, subdivision (c), provides that for the purpose of awarding *presentence* custody credits, the "'term of imprisonment' includes . . . any period of imprisonment prior to release on parole and any period of imprisonment and parole, prior to discharge[.]" (§ 2900.5, subd. (c).) *In re Sosa* (1980) 102 Cal.App.3d 1002 construed the plain language of section 2900.5, subdivision (c), to mean that custody credits in excess of a prisoner's term of imprisonment should be applied to reduce the prisoner's time on parole, as that period of parole is considered part of the term of imprisonment. (See also *In re Ballard* (1981) 115 Cal.App.3d 647, 649.)

"[C]ase law recognizes that time served in excess of the determinate term must be credited against the prisoner's parole period." (*In re Bush* (2008) 161 Cal.App.4th 133, 141, citing *In re Carter* (1988) 199 Cal.App.3d 271, 273, and *People v. Lara* (1988) 206 Cal.App.3d 1297, 1301-1303.) Accordingly, it has long been held that excess *postsentence* credits should be applied to a period of parole where an inmate was improperly denied postsentence conduct credits (see e.g. *In re Reina* (1985) 171 Cal.App.3d 638, 642; *Carter*, *supra*, 199 Cal.App.3d at p. 273) and where an inmate's sentence has been reduced due to an intervening change in law (see, e.g., *Lara*, *supra*, 206 Cal.App.3d at p. 1303; *In re Randolph* (1989) 215 Cal.App.3d 790, 795) or successful appeal (see, e.g., *In re Kemper* (1980) 112 Cal.App.3d 434). Other circumstances that technically do not involve excess credits but do result in excess prison time have also been found to require a corresponding reduction in an ensuing period of parole. (See, e.g., *In re Young* (2004) 32 Cal.4th 900, 909, fn. 5 [holding that "a sentence reduction under section 2935" – for "heroic acts" in custody – "may still benefit petitioner by reducing his parole period"].)

Excess credits do not, however, automatically reduce the time a person must spend on a special period of parole after gaining release from custody via Proposition 47 (§ 1170.18, subd. (d)) or Senate Bill No. 1437 (§ 1170.95, subd. (g)) resentencing petitions. (*People v. Morales* (2016) 63 Cal.4th 399, 403 [Proposition 47]; *People v. Wilson* (2020) 53 Cal.App.5th 42, 46 [Senate Bill No. 1437].)

### J. Mootness

"[A] case becomes moot when a court ruling can have no practical effect or cannot provide the parties with effective relief." (*Lincoln Place Tenants Ass'n v. City of Los Angeles* (2007) 155 Cal.App.4th 425, 454.) *DeLeon* rejected the argument that an appeal from a parole revocation "is not moot because [a parolee] faces disadvantageous collateral consequences from the fact that he was found in violation of parole." (*DeLeon*, *supra*, 3 Cal.5th at pp. 645-646.) Nevertheless, *DeLeon* elected to use the case before it "to decide what procedure should govern parole revocation proceedings under the Realignment Act," noting that "[t]he issue 'is likely to recur, might otherwise evade appellate review, and is of continuing public interest.'" (*Id.* at p. 646, quoting *People v. Morales*, *supra*, 63 Cal.4th at p. 409.)

Appellate courts routinely exercise their discretion to reach moot issues – including fact-specific ones – in the parole revocation context. For example, in *Osorio*, *supra*, 235 Cal.App.4th at pp. 1411 & 1415, the Court of Appeal exercised its discretion to hold, in a case that was moot because the parolee had completed the custodial term imposed for his parole violation, that "the trial court should have sustained the demurrer to the petition for revocation," because "the facts alleged in the petition for revocation of parole" did not "warrant revocation of parole[.]" More recently, in *People v. Austin* (2019) 35 Cal.App.5th 778, 786, 788, the reviewing court exercised its discretion to determine whether a parole condition was vague "as applied" – a fact-driven inquiry – after a parolee had already completed his 180-day jail term for violating the condition in question.

It is not surprising that reviewing courts would take this approach in appeals from parole revocation proceedings. Many issues in these appeals are likely to evade review because, for non-lifer parolees, the maximum custodial term that can be imposed for a parole violation is 180 days (§ 3000.08, subd. (g)), a period shorter than the duration of most appeals. As one appellate court remarked in a related context: "The maximum length of incarceration for a PRCS violation is brief (180 days) (Pen. Code, § 3455, subd. (d)), and a person cannot be under PRCS for more than three years (*id.*, § 3455, subd. (e)). Thus, an appeal from an order revoking PRCS may become subject to a mootness claim before a decision can be rendered." (*People v. Gonzalez* (2017) 7 Cal.App.5th 370, 381, disapproved on other grounds by *DeLeon*, *supra*, 3 Cal.5th at p. 646.) This concern is especially acute when one takes into account any credits for time served to which a parolee may be entitled and the time it takes after an appellate court's decision for the remittitur to issue.

On the subject of credits, the fact that a person has been released from prison and placed on parole does not moot out a challenge to their presentence or postsentence credits, as "[a]ny credits to which they are entitled may reduce their parole periods." (*Reina*, *supra*, 171 Cal.App.3d at p. 642.)

Lastly, in assessing whether an appeal from a parole revocation order is moot, it is important to remember that "[t]ime during which parole is suspended because the prisoner . . . has been returned to custody as a parole violator shall not be credited toward any period of parole unless the prisoner is found not guilty of the parole violation." (§ 3000, subd. (b)(6).) This means prevailing on appeal – even after a person has completed a sanction for violating parole – could provide meaningful relief by shortening the person's remaining time on parole.

## V. PRCS

### A. Overview

The 2011 passage of "the Criminal Justice Realignment Act changed the paradigm for . . . postconviction supervision of persons convicted of certain felony offenses." (*People v. Espinoza* (2014) 226 Cal.App.4th 635, 639.) Now, with the exception of "high-level offenders," who remain subject to a parole term upon release from prison, "[a]ll other released persons are placed on [PRCS]." (*People v. Armogeda* (2015) 233 Cal.App.4th 428, 434.) Division Six of the Second District Court of Appeal summarized PRCS as follows:

> PRCS . . . is similar, but not identical, to parole. A felon who qualifies for PRCS may be subject to supervision for up to three years after his or her release from prison. (§ 3451, subd. (a).) This supervision is conducted by a county agency . . . rather than by the state's Department of Corrections and Rehabilitation. [Citations.] The supervised person may be subject to various sanctions for violating the conditions of his or her PRCS, including incarceration in the county jail, but may not be returned to state prison for PRCS violations.

(*People v. Gutierrez* (2016) 245 Cal.App.4th 393, 399.)

### B. Most Individuals Released from Prison Serve a PRCS Term

All individuals released from prison are required to serve a PRCS term except for people released following sentences served for the following convictions, who must serve a parole term:

(1) A serious felony as described in subdivision (c) of Section 1192.7.

(2) A violent felony as described in subdivision (c) of Section 667.5.

(3) A crime for which the person was sentenced pursuant to paragraph (2) of subdivision (e) of Section 667 or paragraph (2) of subdivision (c) of Section 1170.12 [a third strike sentence].

(4) Any crime for which the person is classified as a high-risk sex offender.

(5) Any crime for which the person is required, as a condition of parole, to undergo treatment by the State Department of State Hospitals pursuant to Section 2962 [commitment as an offender with a mental health disorder].

(§ 3451, subd. (b).)

### C. Transfer from PRCS to Parole

"A person released to postrelease community supervision pursuant to subdivision (a) shall, regardless of any subsequent determination that the person should have been released to parole pursuant to Section 3000.08, remain subject to [PRCS supervision] after having served 60 days under [PRCS] supervision[.]" (§ 3451, subd. (d).) Thus, a person mistakenly placed on PRCS cannot be transferred to parole once they have already served 60 days on PRCS. For a discussion of the corresponding statute in the parole supervision framework, see *Johnson*, *supra*, 45 Cal.App.5th 379, analyzing section 3000.08, subdivision (l).

### D. Length of PRCS Term

A PRCS term shall be "for a period not exceeding three years immediately following release[.]" (§ 3451, subd. (a).)

### E. Early Termination of PRCS

Under most circumstances, PRCS can last for a maximum of three years. (§ 3456, subd. (a)(1).) However, the supervising agency has discretion to discharge "[a]ny person on postrelease supervision for six consecutive months with no violations of his or her conditions of postrelease supervision that result in a custodial sanction[.]" (§ 3456, subd. (a)(2).) In addition, the supervising agency must discharge any "person who has been on postrelease supervision continuously for one year with no violations of his or her conditions of postrelease supervision that result in a custodial sanction[.]" (§ 3456, subd. (a)(3).)

*People v. Superior Court (Ward)* (2014) 232 Cal.App.4th 345, 349, 352-353, held that flash incarceration is a "custodial sanction," and, therefore, a period of flash incarceration within the applicable timelines renders a person on PRCS ineligible for early release under subdivisions (a)(2) or (a)(3) of section 3456.

### F. Extension of the PRCS Period

There are two ways in which a person's PRCS term can be extended: when a person absconds from PRCS or when a person's PRCS is summarily revoked. Section 3455, subdivision (e), provides: "A person shall not remain under supervision or in custody pursuant to this title on or after three years from the date of the person's initial entry onto postrelease community supervision, except when his or her supervision is tolled pursuant to Section 1203.2 or subdivision (b) of Section 3456."

There is no limit on the number of days a person's PRCS can be extended by virtue of absconding.

There is a split of authority as to whether tolling attributable to summary revocation can extend PRCS *beyond* the statutory maximum term of three years or simply *within* the statutory maximum.

In *Leiva*, the California Supreme Court held that the tolling provision found in section 1203.2, subdivision (a), operates only to "preserve the trial court's jurisdiction to determine whether a defendant violated probation during the court-imposed period of probation[.]" (*Leiva*, supra, 56 Cal.4th at p. 518.) In arriving at this conclusion, *Leiva* expressly rejected the Attorney General's argument that the statute's use of the word "toll" is synonymous with

"extend." (*Id*. at p. 509.) Instead, the Supreme Court made it clear that "[c]onstruing the word 'toll' as 'extend' in the context of section 1203.2(a) would be contrary to our statutes that authorize the courts to grant probation for a period not to exceed a specified time[.]" (*Ibid*.)

Division Two of the First District Court of Appeal addressed whether *Leiva*'s reasoning compelled the same construction of section 1203.2's tolling provision in the PRCS context. (*Johnson*, *supra*, 29 Cal.App.5th 1041.) *Johnson* answered this question in the affirmative, noting that, "[a]lthough *Leiva* was concerned with probation, section 1203.2, subdivision (a), applies to PRCS as well, and it would be anomalous to view the tolling provision as having a different meaning in the context of PRCS." (*Id*. at p. 1047.) *Johnson* found support for this position in the fact that when the Legislature amended section 1203.2 to apply beyond probation to include parole, mandatory supervision, and PRCS, its "stated intent was to provide for a uniform supervision revocation process for petitions to revoke probation, mandatory supervision, postrelease community supervision, and parole." (*Id*. at pp. 1047-1048, quoting *DeLeon*, *supra*, 3 Cal.5th at p. 647, *quoting* Stats. 2012, ch. 43, § 2, subd. (a), internal quotation marks omitted.) *Leiva* led *Johnson* to conclude that "when PRCS is revoked and later reinstated, the period of revocation does not automatically extend the length of the originally imposed period of supervision." (*Johnson*, *supra*, 29 Cal.App.5th at p. 1048.) *Johnson*, therefore, held that "a reasonable reading of *Leiva* compels the conclusion that the length of the supervisory period is not automatically extended when PRCS is reinstituted after revocation, although a trial court may choose to extend the original expiration date for PRCS *within the maximum statutory period*." (*Id*. at p. 1050, emphasis added.)

In *People v. Braud* (2020) 56 Cal.App.5th 962, 969-970, Division Five of the First District Court of Appeal agreed with *Johnson* that a trial court may not *automatically* extend a PRCS term beyond the statutory maximum period of three years to account for a period of summary revocation but held a trial court *may choose* to do so as an act of discretion. *Braud* purported to find supports for its position in section 3455, subdivision (e), maintaining the statute "expressly allows a court to extend the supervision period beyond the three-year limit." (*Id*. at p. 968.) Section 3455, subdivision (e), provides: "A person shall not remain under supervision or in custody pursuant to this title on or after three years from the date of the person's initial entry onto postrelease community supervision, except when his or her supervision is tolled pursuant to Section 1203.2 or subdivision (b) of Section 3456."

*Braud* should not go unchallenged. *Leiva* teaches, however, that tolling pursuant to section 1203.2 is "not a mechanism for extending that probationary period beyond its statutory time limits." (*Sem*, *supra*, 229 Cal.App.4th at p. 1192.) Instead, "tolling following summary revocation is a procedural mechanism for preserving the [trial] court's jurisdiction to adjudicate whether a probation violation has occurred during the previously imposed probationary period[.]" (*Ibid.*) And *Johnson* held that this construction of section 1203.2's tolling provision applies with equal force to PRCS. (*Johnson*, *supra*, 29 Cal.App.5th at p. 1048.)

If the state files a PRCS revocation petition based on an alleged violation that occurred within the originally imposed term but the trial court cannot hold a hearing on the petition before that term expires, section 3455, subdivision (e), by reference to section 1203.2, explicitly allows the person to "remain under supervision" past when their term would otherwise expire in order to adjudicate the revocation petition – but no longer. Construing section 3455, subdivision (e), in this manner would authorize keeping a person under supervision for this limited purpose for more than three years from the date of the person's initial entry onto PRCS *without extending the period of supervision*. Reading the statute in this fashion is the only way to harmonize it with *Leiva* and does no violence to the statute's plain meaning. The statute simply operates by reference to section 1203.2's tolling provision, which has been authoritatively construed by the Supreme Court as a jurisdiction preservation tool, not as a mechanism for extending the period of supervision. (*Sem*, *supra*, 229 Cal.App.4th at p. 1192.)

*Braud* also left open the question whether a period of flash incarceration can extend a PRCS termination date beyond the three-year statutory maximum. (*Braud*, *supra*, 56 Cal.App.5th at p. 970.) There is good reason to believe it cannot.

Flash incarceration is a tool available to the county supervising agency *in lieu of* seeking revocation of PRCS. (See § 3455, subd. (a) [the county supervising agency may only seek revocation of PRCS after determining that intermediate sanctions, including flash incarceration, are not appropriate].) Thus, flash incarceration does not involve a revocation of any kind and does not implicate the section 1203.2 tolling provision referenced in section 3455, subdivision (e). *Ward* has clarified that flash incarceration does not actually extend PRCS; rather, in some circumstances, it can serve to prevent PRCS from terminating early. (*Ward*, *supra*, 232 Cal.App.4th at p. 352 [holding that a period of flash incarceration can render a person ineligible for early

termination of PRCS pursuant to section 3456, subdivision (a)(3)].) Moreover, if, per *Johnson*, the actual revocation of probation does not extend a term of PRCS (*Johnson*, *supra*, 29 Cal.App.5th at p. 1048), why would a period of flash incarceration have the opposite effect? As *Ward* observed, "it is clear that the Legislature did not think of flash incarceration as different from custody served after a court-ordered revocation; it is simply different in degree but serves the same purpose." (*Ward*, *supra*, 232 Cal.App.4th at p. 350.)

### G. Mandatory Conditions of PRCS

People on PRCS are subject to discretionary and mandatory conditions of PRCS. These materials address only mandatory conditions of PRCS. Separate materials are available on FDAP's website on challenging conditions of supervision.

The PRCS framework conveniently lists all mandatory conditions in one statute (§ 3453):

Postrelease community supervision shall include the following conditions:

(a) The person shall be informed of the conditions of release.

(b) The person shall obey all laws.

(c) The person shall report to the supervising county agency within two working days of release from custody.

(d) The person shall follow the directives and instructions of the supervising county agency.

(e) The person shall report to the supervising county agency as directed by that agency.

(f) The person, and his or her residence and possessions, shall be subject to search at any time of the day or night, with or without a warrant, by an agent of the supervising county agency or by a peace officer.

(g) The person shall waive extradition if found outside the state.

(h) (1) The person shall inform the supervising county agency of the person's place of residence and shall notify the supervising county agency of any change in residence, or the establishment of a new residence if the person was previously transient, within five working days of the change.

(h) (2) For purposes of this section, "residence" means one or more locations at which a person regularly resides, regardless of the number of days or nights spent there, such as a shelter or structure that can be located by a street address, including, but not limited to, a house, apartment building, motel, hotel, homeless shelter, and recreational or other vehicle. If the person has no residence, he or she shall inform the supervising county agency that he or she is transient.

(i) (1) The person shall inform the supervising county agency of the person's place of employment, education, or training. The person shall inform the supervising agency of any pending or anticipated change in employment, education, or training.

(i) (2) If the person enters into new employment, he or she shall inform the supervising county agency of the new employment within three business days of that entry.

(j) The person shall immediately inform the supervising county agency if he or she is arrested or receives a citation.

(k) The person shall obtain the permission of the supervising county agency to travel more than 50 miles from the person's place of residence.

(l) The person shall obtain a travel pass from the supervising county agency before he or she may leave the county or state for more than two days.

(m) The person shall not be in the presence of a firearm or ammunition, or any item that appears to be a firearm or ammunition.

(n) The person shall not possess, use, or have access to any weapon listed in [various statutes].

(o) (1) Except as provided in paragraph (2) and subdivision (p), the person shall not possess a knife with a blade longer than two inches.

(o) (2) The person may possess a kitchen knife with a blade longer than two inches if the knife is used and kept only in the kitchen of the person's residence.

(p) The person may use a knife with a blade longer than two inches, if the use is required for that person's employment, the use has been approved in a document issued by the supervising county agency, and the person possesses the document of approval at all times and makes it available for inspection.

(q) The person shall waive any right to a court hearing prior to the imposition of a period of "flash incarceration" in a city or county jail of not more than 10 consecutive days for any violation of his or her postrelease supervision conditions.

(r) The person shall participate in rehabilitation programming as recommended by the supervising county agency.

(s) The person shall be subject to arrest with or without a warrant by a peace officer employed by the supervising county agency or, at the direction of the supervising county agency, by any peace officer when there is probable cause to believe the person has violated the terms and conditions of his or her release.

(t) The person shall pay court-ordered restitution and restitution fines in the same manner as a person placed on probation.

Mandatory parole conditions can be challenged in one of three ways:

- The factual predicate required by statute is not supported by substantial evidence;
- The condition is facially unconstitutional; or
- The condition is unconstitutional as applied to the particular probationer.

In addition to the mandatory conditions of PRCS, the supervising agency may impose "[a]ny additional postrelease supervision conditions" so long as they are "reasonably related to the underlying offense for which the offender spent

time in prison, or to the offender's risk of recidivism, and the offender's criminal history, and be otherwise consistent with law." (§ 3454, subd. (a); see also § 3454, subd. (b) [suggesting additional discretionary conditions of PRCS].)

## H. PRCS Revocation

### 1. General Overview

"If the supervising county agency has determined, following application of its assessment processes, that intermediate sanctions as authorized in subdivision (b) of Section 3454 are not appropriate, the supervising county agency shall petition the court pursuant to Section 1203.2 to revoke, modify, or terminate postrelease community supervision." (§ 3455, subd. (a).) Because PRCS revocation proceedings are conducted pursuant to the same framework that applies to probation revocation proceedings – section 1203.2 – the basic elements are the same as probation revocation proceedings: the prosecution bears the burden of proof by a preponderance of the evidence, there is no right to a jury trial, and the minimum procedural due process rights articulated in *Morrissey* govern unless the Legislature has provided for greater protections.

### 2. Summary Revocation

As noted above in section IV.F., both *Johnson* and *Braud* purported to construe summary revocation pursuant to section 1203.2 in the PRCS context as consistent with the Supreme Court's reading of it in *Leiva*.

### 3. Willfulness Requirement

"It is well established that a probation violation must be willful to justify revocation of probation." (*Rodriguez*, *supra*, 222 Cal.App.4th at p. 594.) While there does not appear to be any published case law applying this rule to PRCS revocation proceedings, there are unpublished cases that explicitly do so. (See, e.g., *People v. Moon* (Dec. 5, 2019, B294215) 2019 WL 6605415, at *2.)

### 4. Procedural Due Process Rights

The *Morrissey* procedural due process rights (set forth in detail in section II.K.4 above) apply with full force to PRCS revocation proceedings. (*DeLeon*, *supra*, 3 Cal.5th at p. 649; see also Stats. 2012, ch. 43, § 2, subd. (b).)

When "a person subject to PRCS is arrested for an alleged violation of his or her PRCS terms, that person is first brought before the supervising agency, which determines whether probable cause supports the alleged PRCS violations. (§ 3455, subd. (b)(1).)" (*Gutierrez*, *supra*, 245 Cal.App.4th at p. 402.) After pointing out that "*Morrissey* requires only an informal hearing to determine whether reasonable grounds exist for the revocation of PRCS, conducted by 'someone not directly involved in the case,'" *Gutierrez* found that standard satisfied where "[t]he record does not suggest that the probation officer who conducted the probable cause hearing was involved in appellant's arrest." (*Ibid*., quoting *Morrissey*, *supra*, 408 U.S. at p. 485; see also *Byron*, *supra*, 246 Cal.App.4th 1009 [finding the probable cause hearing prescribed by the PRCS framework complied with *Morrissey*].)

### 5. Timing of Revocation Hearing

"The revocation hearing shall be held within a reasonable time after the filing of the revocation petition." (§ 3455, subd. (c).)

To make out a claim of unreasonable delay, a person on PRCS would have to demonstrate prejudice. (See *In re Coughlin* (1976) 16 Cal.3d 52, 61; accord *Gutierrez*, *supra*, 245 Cal.App.4th at p. 403.) A delay has been found prejudicial in this context where, "if the PRCS revocation matter had been timely addressed pursuant to appellant's demand, any term of incarceration imposed as a sanction for violating PRCS would have had to run concurrent to the jail sentence he was then serving in Monterey County." (*People v. Murdock* (2018) 25 Cal.App.5th 429, 436.)

### 6. Admission of Hearsay

The same rules that govern the admission of hearsay at probation revocation hearings discussed above in section II.K.5 apply to PRCS revocation hearings. Although there are no published decisions addressing the admission of hearsay at a PRCS revocation hearing, unpublished decisions appear to be unanimous in applying the limited due process right to confrontation that governs probation revocation hearings, including the

*Arreola* good cause standard and the balancing test found in *United States v. Comito* (9th Cir.1999) 177 F.3d 1166. (See, e.g., *People v. Taylor* (May 5, 2016, A143008) 2016 WL 2627583, at *6.)

### 7. Exclusion of Unconstitutionally Obtained Evidence

In light of the California Constitution's Truth-in-Evidence provision and the manner in which it has been applied at probation revocation proceedings, there is no reason to believe the Fourth or Fifth Amendment exclusionary rules apply to PRCS revocation proceedings, unless the official misconduct at issue shocks the conscience or offends our sense of justice. (See, e.g., *Nixon*, *supra*, 131 Cal.App.3d at pp. 693-694 [applying this rule in the probation revocation hearing context].)

### 8. Competency

If a doubt arises as to whether a person facing PRCS revocation proceedings is mentally competent, such proceedings must be suspended pending a competency trial. (§ 1368, subds. (a)-(b).)

When it comes to the competency trial contemplated by section 1369, individuals facing revocation proceedings are treated differently from criminal defendants in one key respect. "Only a court trial is required to determine competency in a proceeding for a violation of probation, mandatory supervision, postrelease community supervision, or parole." (§ 1369, subd. (g).) This differential treatment is unsurprising given the absence of a jury trial right at revocation proceedings.

Section 1370.02 sets forth the commitment procedures that apply to individuals found incompetent during PRCS revocation proceedings. Of note, when an individual on PRCS is found incompetent, the revocation petition must be dismissed, and the trial court may take specified actions "using the least restrictive option to meet the mental health needs of the defendant[.]" (§ 1370.02, subd. (b).)

### 9. Intermediate Sanctions

Rather than seek revocation for a suspected PRCS violation, the supervising agency has discretion on its own to impose additional PRCS conditions and other "intermediate sanctions," such as a period of flash incarceration in jail for up to ten days. (§ 3453, subds. (b)-(c).) In fact, the Legislature expressly

"encouraged" the use of flash incarceration as an intermediate sanction. (§ 3454, subd. (b).) It is only upon determining that "intermediate sanctions . . . are not appropriate" that "the supervising county agency shall, pursuant to Section 1203.2, petition to revoke . . . [PRCS]." (§ 3455, subd. (a).)

If the supervising county agency files a revocation petition, it "shall include a written report that contains additional information regarding the petition, including the relevant terms and conditions of [PRCS], the circumstances of the alleged underlying violation, the history and background of the violator, and any recommendations." (*Ibid.*) The Legislature left it to the Judicial Council to "adopt forms and rules of court to establish uniform statewide procedures to implement this subdivision, including the minimum contents of supervision agency reports." (*Ibid.*) In response to this delegation of authority, the Judicial Council adopted rule 4.541, which provides, in part: "a report filed by the supervising agency in conjunction with a petition to revoke . . . [PRCS] must include the reasons for that agency's determination that intermediate sanctions without court intervention as authorized by [section 3454(b)] are inappropriate responses to the alleged violations." (Rule 4.541(e).) The Advisory Committee Comment to rule 4.541 reiterates that section 3455, subdivision (a), "require[s] the supervising agency to determine that the intermediate sanctions authorized by [section 3454, subdivision (b)] are inappropriate responses to the alleged violation *before* filing a petition to revoke parole[.]" (Emphasis in original.)

If it appears the supervising county agency has not complied with the intermediate sanctions requirements set forth in section 3000.08 and rule 4.541, the parolee may file a demurrer and move for dismissal of the revocation petition. (See, e.g., *Perlas*, *supra*, 47 Cal.App.5th at p. 836 [affirming the denial of a demurrer in the parole revocation context]; *Hronchak*, *supra*, 2 Cal.App.5th at pp. 891-892 [affirming the denial of a demurrer in the parole revocation context]; *Osorio*, *supra*, 235 Cal.App.4th at pp. 1412-1416 [reversing the denial of a demurrer in the parole revocation context].)

### 10. Consequences of a Sustained PRCS Violation

If the trial court conducts a revocation hearing and finds the person has violated a condition of PRCS, the trial court has three options available to it:

(1) Return the person to postrelease community supervision with modifications of conditions, if appropriate, including a period of incarceration in a county jail.

(2) Revoke and terminate postrelease community supervision and order the person to confinement in a county jail.

(3) Refer the person to a reentry court pursuant to Section 3015 or other evidence-based program in the court's discretion.

(§ 3455, subd. (a).)

Any county jail term imposed by the trial court for a PRCS violation may not exceed 180 days. (§ 3455, subd. (d).)

A trial court "lacks authority to run a period of confinement for a PRCS violation consecutively to a sentence in another criminal case." (*People v. Garcia* (2018) 22 Cal.App.5th 1061, 1063.)

"As applied to nonviolent drug possession offenders and violators of drug-related conditions of [PRCS], section 3455, which permits the incarceration of those persons under circumstances not permitted by Proposition 36, unconstitutionally amends Proposition 36 and to that extent is invalid." (*Armogeda*, *supra*, 233 Cal.App.4th at p. 436.)

### 11. Appealing an Order Revoking PRCS

An order revoking PRCS "is appealable under Penal Code section 1237, subdivision (b) because, we conclude, such an order affects the substantial rights of the party." (*Gonzalez*, *supra*, 7 Cal.App.5th at p. 380.)

There is no case law addressing whether a person who appeals from an order revoking PRCS following an admitted violation must obtain a certificate of probable cause in order to challenge the validity of the admission. (But see *Billetts*, *supra*, 89 Cal.App.3d at p. 307 [holding a certificate is required for this purpose in the probation revocation context]; see also § 1237.5; rule 8.304(b).) Neither section 1237.5 nor rule 8.304(b) mentions PRCS – and PRCS does not involve a challenge to the person's conviction or criminal sentence – which would suggest a certificate is not required. (See *Kraus*, *supra*, 47 Cal.App.3d at p. 573 ["The only statutory requirement for a certificate of probable cause is in Penal Code section 1237.5 which refers only

to appeals 'from a judgment of conviction'"]; accord *Arriaga*, *supra*, 58 Cal.4th at p. 959; but see § 1237.5 [which has been amended since *Kraus* to apply to admitted probation violations].) A certificate would certainly not be required to challenge issues related only to a non-stipulated sanction imposed following an admitted PRCS violation.

### I. Credits

Section 1170, subdivision (a)(3), requires that trial courts "shall advise the defendant that they shall serve an applicable period of parole, *postrelease community supervision*, or mandatory supervision, and order the defendant to report to the parole or probation office closest to the defendant's last legal residence, unless the in-custody credits equal the total sentence, including both confinement time and the period of parole, *postrelease community supervision*, or mandatory supervision." (Emphasis added.)

In light of this statutory provision, "excess custody credits apply to reduce a period of PRCS." (*Steward*, *supra*, 20 Cal.App.5th at p. 426.) *Steward* disagreed with *Espinoza*, *supra*, 226 Cal.App.4th 635, *People v. Tubbs* (2014) 230 Cal.App.4th 578, and *People v. Superior Court (Rangel)* (2016) 4 Cal.App.5th 410 – all of which came to the opposite conclusion – in part, because *Espinoza* and *Tubbs* were decided before section 1170, subdivision (a)(3) was amended to include PRCS, and *Rangel* did not address the statute, though it had already been enacted.

### J. Mootness

Many issues in PRCS appeals are likely to evade review. As one appellate court remarked: "The maximum length of incarceration for a PRCS violation is brief (180 days) (Pen. Code, § 3455, subd. (d)), and a person cannot be under PRCS for more than three years (*id.*, § 3455, subd. (e)). Thus, an appeal from an order revoking PRCS may become subject to a mootness claim before a decision can be rendered." (*Gonzalez*, *supra*, 7 Cal.App.5th at p. 381.) This concern is especially acute when one takes into account any credits for time served to which a person on PRCS may be entitled and the time it takes after an appellate court's decision for the remittitur to issue. But, as occurred in *Gonzalez*, reviewing courts will often exercise their discretion to reach the merits of moot recurring issue of public importance that might otherwise evade review. (*Ibid.*)