

CALIFORNIA JUDGES BENCHGUIDES

**Benchguide 75**

**MISDEMEANOR SENTENCING**

[REVISED 2014]



JUDICIAL COUNCIL  
OF CALIFORNIA

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This benchguide provides an overview of the procedure for sentencing persons convicted of misdemeanors. It includes procedural checklists, a brief summary of the law, and a sentencing script. Sentencing provisions for infractions and traffic violations are covered in Benchguide 82: *Traffic Court Proceedings* (Cal CJER). Sentencing provisions in DUI cases are covered in Benchguide 74: *Sentencing Guidelines for Common Misdemeanors and Infractions* (Cal CJER) and Benchguide 81: *DUI Proceedings* (Cal CJER).

### **II. PROCEDURE**

#### **A. [§75.2] Checklist: Setting Date for Sentencing**

(1) *Following a guilty verdict or guilty plea, advise defendant of the right to be sentenced not less than 6 hours and not more than 5 days after the verdict or plea. Pen C §1449. Ask defendant if he or she waives time for sentencing.*

(2) *If defendant does not waive time:*

- *Set time for sentencing not less than 6 hours and not more than 5 days after the verdict or plea; or*
- *Refer the case to the probation department for the preparation of a probation report and set time for sentencing within 20 judicial days. Pen C §1449.*

(3) *If defendant waives time:*

- *Proceed to arraignment for judgment and sentence if defendant desires to be sentenced immediately; or*
- *Set sentencing date within 10 days, or later with defendant's consent, if defendant indicates that he or she will make a prejudgment motion at the hearing; or*
- *When defendant requests a probation report and/or the court refers the case to the probation department, set sentencing date within a reasonable period of time, allowing enough time for the preparation of the report. For discussion, see §75.6.*

(4) *Hear and decide any request for release on bail pending sentencing.* For discussion, see §75.8.

(5) **Optional:** *Request parties to submit any prejudgment motions within a specified period of time before the date set for sentencing.*

### **B. [§75.3] Checklist: Sentencing Hearing**

(1) *Call the case and ask for appearances.* The defendant is not required to be present unless he or she was ordered to appear when the sentencing date was scheduled or the defendant is to be sentenced for a domestic violence offense. For discussion, see §75.11.

(2) *If defendant appears without counsel, advise defendant of the right to counsel and ask whether he or she desires assistance of counsel.* If defendant answers yes, postpone sentencing to allow defendant to obtain private counsel or to speak with the public defender. If defendant wishes to proceed in pro per, obtain a waiver under *Faretta v California* (1975) 422 US 806, 95 S Ct 2525, 45 L Ed 2d 562.

☛ **JUDICIAL TIP:** The court is not required to advise the defendant of the right to counsel if the right has been waived earlier in the proceedings, unless the defendant appeared with counsel at an earlier hearing. For discussion, see §75.12.

(3) *If defendant agreed to a plea bargain before another judge, obtain a waiver from defendant of his or her right to be sentenced by that judge.* For discussion, see §§75.4–75.5.

(4) *Ask defendant whether he or she waives formal arraignment for judgment and sentence.* If defendant does not waive arraignment, advise of the nature of the charge(s), the plea, and the verdict (if any). For discussion, see §75.10.

(5) *Ask defendant whether he or she has any legal cause why judgment should not be pronounced.* For discussion, see §75.10.

(6) *If a probation report was ordered, state for the record that the report was received, read, and considered.* Pen C §1203(b)(3). Confirm that defendant has received and read a copy of the report. For discussion, see §75.50.

(7) *If a report was not ordered, inform the parties of the information to be considered by the court in determining sentence.* Grant a continuance, on defendant's request, to allow defendant to prepare an answer or rebuttal to the information. Pen C §1203(d).

(8) *Request and receive any comments and/or evidence from defendant or defense counsel to answer or rebut the contents of the probation report or other information considered by the court.* For discussion, see §75.13.

(9) *Request and receive any comments and/or evidence from the district attorney, including any statements from the victim(s).* For discussion, see §75.13.

(10) *Determine whether to grant or deny probation.* For discussion, see §75.50.

(11) *If probation is denied:*

- *Render judgment of county jail term and/or fine.* For discussion, see §§75.21–75.23.
- *If defendant is convicted of multiple counts:*
  - *Impose a sentence on each count and stay execution of sentence of any count to which the Pen C §654 double punishment prohibition is applicable.* For discussion, see §75.36.
  - *State whether sentences are to run concurrently or consecutively.* For discussion, see §75.37.
- *If applicable, order defendant to pay restitution to any victim(s) for economic losses.* Pen C §1202.4(f). For discussion, see §§75.24–75.30.
- *Impose a restitution fine of not less than \$150 and not more than \$1000.* Pen C §1202.4(b). For discussion, see §75.31.
- *Calculate custody and conduct credits and subtract the total from the imposed county jail term and/or fines.* For discussion, see §§75.38–75.43.
- *The clerk must enter the judgment in the minutes, stating briefly the offense for which defendant was convicted and any prior convictions.* Pen C §1207.

(12) *If probation is granted:*

- *Suspend imposition of judgment or impose judgment and suspend its execution.* For discussion, see §75.53.
- *Specify term of probation.* For discussion, see §75.52.
- *Specify conditions of probation.* For discussion, see §§75.54–75.56.
- *If service of time in county jail is made a condition of probation, calculate custody and conduct credits and subtract the total from the jail term.* For discussion, see §§75.38–75.43.
- *Ask defendant whether he or she understands the conditions of probation and accepts probation on those conditions. If defendant rejects probation, impose sentence (Step 11, above).* For discussion, see §75.58.

(13) Advise defendant of his or her appeal rights (unless defendant pleaded guilty or is represented by counsel), the right to rehabilitation, and, if applicable, the duty to register with local law enforcement authorities. For discussion, see §§75.44–75.46.

### III. APPLICABLE LAW

#### A. Preliminary Matters

##### 1. Proper Sentencing Judge

###### a. [§75.4] General Rule

Although it is the preferred practice to have the judge who presided over the trial pronounce judgment and sentence, a different judge may do so. *People v Downer* (1962) 57 C2d 800, 816, 22 CR 347. But see *People v Strunk* (1995) 31 CA4th 265, 275, 36 CR2d 868 (blanket procedure directing that all sentencing matters be handled by one judge without explicit agreement by defendant or showing of good cause violates defendant's right to independent, full, and fair sentencing hearing).

When a judge accepts a plea bargain and retains sentencing discretion under the agreement, an implied term of the bargain is that this judge will impose sentence. *People v Arbuckle* (1978) 22 C3d 749, 756, 150 CR 778. If the judge who took the defendant's plea is unavailable for sentencing because of internal court administrative practices, the defendant has the right to withdraw the plea. 22 C3d at 757. See *People v Pedregon* (1981) 115 CA3d 723, 726, 171 CR 468 (error for another judge to impose sentence when visiting judge who accepted plea had returned to his permanent assignment). The *Arbuckle* rule does not apply when the judge's unavailability arises from circumstances clearly beyond the power of the court, such as the judge's resignation, retirement, illness, or death. *People v Dunn* (1986) 176 CA3d 572, 575, 222 CR 273 (retirement); *People v Jackson* (1987) 193 CA3d 393, 403, 238 CR 327 (illness); *People v Watson* (1982) 129 CA3d 5, 7, 180 CR 759 (death).

###### b. [§75.5] Arbuckle Waiver

The defendant's right to be sentenced by the same judge can be waived; however, the courts of appeal are divided as to whether a defendant waives this implied term of the plea bargain by silence when a different judge imposes sentence. The Third and Fourth District Courts of Appeal have held that a defendant waives *Arbuckle* rights by failing to object to a second judge at the sentencing hearing. *People v Adams* (1990) 224 CA3d 1540, 1544, 274 CR 629; *People v Serrato* (1988) 201 CA3d 761, 764, 247 CR 322. The Fifth District Court of Appeal held in *People v Rosaia* (1984) 157 CA3d 832, 840, 203 CR 856, that, before a sentencing

judge can accept a defendant's silence or acquiescence as a waiver, the judge must be satisfied that the defendant has knowledge of his or her *Arbuckle* rights. See also *People v Horn* (1989) 213 CA3d 701, 709, 261 CR 814 (silence does not constitute waiver, but failure to object is relevant in determining whether *Arbuckle* right was term of plea).

- **JUDICIAL TIP:** If the sentencing judge did not receive defendant's plea, the judge should ask the defendant whether he or she has any objection to the judge's pronouncement of judgment and sentence.

## 2. Time for Pronouncement of Judgment and Sentence

### a. [§75.6] General Rule

The court must pronounce judgment not less than six hours nor more than five days after a plea, finding, or verdict of guilty, unless the defendant waives the time for sentencing and wishes to be sentenced immediately. Pen C §1449. The court may extend the time for sentencing for the following reasons (Pen C §1449):

- *Probation referral.* The court may delay sentencing for 20 judicial days in order to refer the case to the probation department for preparation of a presentence report. The defendant or probation officer may request a postponement of sentencing of not more than 90 additional days to allow for preparation of the report.
- *Prejudgment motions.* The court may extend the time for sentencing by not more than ten days to hear and determine a motion for new trial or in arrest of judgment. See 6 Witkin & Epstein, California Criminal Law, *Criminal Judgment* §§100–137 (new trial motion), 138–140 (arrest of judgment motion) (4th ed 2012).
- *Determination of defendant's sanity.* If the court has reasonable ground to believe that the defendant is insane, it may delay the time for sentencing and commit the defendant to custody until the issue of sanity has been heard and determined.

### b. [§75.7] Incarcerated Defendant

A defendant who is subsequently incarcerated on a new misdemeanor or felony conviction before being sentenced on the current charge must be sentenced in the pending matter within 90 days of the district attorney's receipt of written notice from the defendant indicating the defendant's place of confinement and his or her desire to be brought for sentencing. Pen C §1381. If the defendant is not sentenced within the 90-day period and a continuance has not been granted on the defendant's request or by his or her consent, the court must dismiss the case on the motion of the

district attorney or the defendant. Pen C §1381. Judgment may be pronounced in the defendant's absence if the defendant is represented by counsel, or if the defendant knowingly and intelligently waives the right to be present. Pen C §1193(b); *People v Kriss* (1979) 96 CA3d 913, 919, 158 CR 420.

For an outline of the procedure for handling the sentencing of a defendant subsequently convicted of a crime and incarcerated in a federal correctional institution located in California, see Pen C §1381.5.

### **3. [§75.8] Release of Defendant Pending Sentence**

A defendant in a misdemeanor case who has applied for probation may be admitted to bail as a matter of right pending pronouncement of judgment and sentence. Pen C §1272(1), (2). The court has discretion to release a defendant who has *not* applied for probation. Pen C §1272(3). When setting bail, the court must consider the protection of the public, the seriousness of the offense for which the defendant was convicted, the defendant's previous criminal record, and the probability that the defendant will appear at the sentencing hearing. Public safety is the primary consideration. Pen C §1275(a)(1). In addition, the court may consider factors such as the information included in an own-recognition investigative report prepared under Pen C §1318.1. Pen C §1275(a)(1).

The court may set reasonable bail conditions related to public safety. *In re McSherry* (2003) 112 CA4th 856, 860–863, 5 CR3d 497 (trial court had authority to place restrictions on defendant's bail pending appeal of his conviction of multiple counts of misdemeanor school loitering; restriction requiring defendant to stay at least 200 yards from places where children congregate was reasonable and related to public safety given defendant's prior criminal history of child sexual abuse).

### **4. [§75.9] Referral of Sex Offenders for Probation Report**

If the defendant is convicted of an offense requiring registration as a sex offender under Pen C §§290–290.023, or if the probation officer recommends that the court at sentencing order the defendant to register as a sex offender under Pen C §290.006, the court must refer the defendant to the probation department for an assessment of the risk of recidivism posed by the defendant. Pen C §1203(d). The assessment must be performed using the State-Authorized Risk Assessment Tool for Sex Offenders (SARATSO) (see specifically Pen C §§290.03–290.09). The court must consider this report at sentencing. Pen C §1203(d). Each county probation department is required to assess every eligible defendant whether or not a report is prepared under Pen C §1203. Pen C §290.06(a)(6).

Probationers who pose a high risk of recommitting sex crimes, as determined by SARATSO, are subject to intensive and specialized probation supervision. Pen C §1203f.

### **B. [§75.10] Arraignment for Judgment**

The court must inform a defendant who appears for judgment of the nature of the charge, the plea to the charge, and any verdict returned on the plea. Pen C §1200. Generally, defense counsel will waive arraignment for the purpose of imposing sentence. The court must then ask the defendant whether he or she has any legal cause to show why judgment should not be pronounced. Pen C §1200; *Stenback v Municipal Court* (1969) 272 CA2d 27, 31, 76 CR 917 (court may render judgment only if defendant fails to show legal cause why judgment should not be pronounced). This inquiry is called the “allocution.”

Penal Code §1200 does not entitle the defendant, in response to the trial court’s allocution, to offer an unsworn personal statement in mitigation of punishment. Any such statement must be made under oath and subject to cross-examination. *People v Evans* (2008) 44 C4th 590, 80 CR3d 174.

Penal Code §1201 defines the following as legal causes why judgment should not be pronounced:

(a) *Insanity*. If the court has reasonable ground for believing defendant to be insane, the court must try the question of defendant’s insanity in accordance with Pen C §1369. Pen C §1201(a).

➤ **JUDICIAL TIP:** Competency is rarely raised for the first time at the sentencing hearing. Competency issues generally surface earlier in the criminal proceedings. See California Judges Benchguide 63: *Competence To Stand Trial* (Cal CJER) for a comprehensive discussion of court procedures under Pen C §§1368–1370.

(b) *Good cause in arrest of judgment or for new trial*. If the defendant has good cause to offer, either in arrest of judgment or for a new trial, the court may, in its discretion, order the judgment to be deferred, and proceed to decide the motion. Pen C §1201(b).

➤ **JUDICIAL TIP:** Prejudgment motions are rarely made at the sentencing hearing. The California Supreme Court disapproves of this practice. “Defense counsel has a professional duty, if not legal obligation, to notify the court and opposing counsel whenever feasible that the defense contemplates making a new trial motion at the time set for sentencing, and to indicate the proposed grounds for the motion.” *People v Braxton* (2004) 34 C4th 798, 807 n2, 22 CR3d 46.

## C. Pronouncement of Judgment and Sentence

### 1. Rights of Defendant

#### a. [§75.11] Right To Be Present

A defendant has a constitutional right to be present at the pronouncement of judgment and sentence. Cal Const art I, §15. However, judgment in a misdemeanor case generally may be pronounced against the defendant in his or her absence if the defendant is represented by counsel or if the defendant knowingly and intelligently waives the right to be present. Pen C §§977(a)(1), 1193(b); *People v Kriss* (1979) 96 CA3d 913, 919, 158 CR 420; see *People v Shelby* (1980) 108 CA3d Supp 7, 11, 166 CR 707 (court may not sentence defendant who fails to appear on day of sentencing, unless court has before it sufficient facts that absence is voluntary).

The court may order the presence of a defendant at sentencing. However, courts may not have blanket policies requiring the personal appearance of all misdemeanor defendants at sentencing. The decision to order a defendant's presence must be made on a case-by-case basis. *Olney v Municipal Court* (1982) 133 CA3d 455, 462, 184 CR 78.

*Domestic violence exception.* A defendant charged with a misdemeanor involving domestic violence (as defined in Fam C §6211) or a misdemeanor violation of Pen C §273.6 (violation of protective order) must be present at sentencing. Pen C §977(a)(2).

*DUI exception:* The court may, in an appropriate case, order a defendant charged with a misdemeanor offense involving driving under the influence to be present at sentencing. Pen C §977(a)(3). The subject misdemeanor DUI offenses are Pen C §191.5(b), Veh C §23103 as specified in Veh C §23103.5, Veh C §23152, and Veh C §23153.

#### b. [§75.12] Right to Counsel

A defendant has a constitutional right to retained or appointed counsel at the pronouncement of judgment. Cal Const art I, §15; *Mempa v Rhay* (1967) 389 US 128, 137, 88 S Ct 254, 19 L Ed 2d 336; *In re Cortez* (1971) 6 C3d 78, 88, 98 CR 307. When a defendant appears without counsel, the court must advise the defendant of his or her right to counsel and ask if the defendant desires assistance of counsel. *In re Roberts* (1953) 40 C2d 745, 748, 255 P2d 784. When the defendant wishes to retain counsel or seek the appointment of a public defender, the court should postpone sentencing for a brief period to allow the defendant to procure counsel or a public defender.

If the court finds the defendant eligible for court-appointed counsel, it must advise the defendant that he or she may be required to pay all or a portion of the cost of counsel if, after the conclusion of the criminal

proceedings, the court determines that the defendant has the present ability to pay. Pen C §987.8(f).

The court is not required to inform a defendant of the right to counsel when the defendant has been advised of, and waived, the right to counsel at an earlier stage of the criminal proceedings. *In re Fresquez* (1967) 67 C2d 626, 634, 63 CR 271. The previous waiver remains in effect and the defendant has the burden of taking affirmative action to reinstate the right. *In re Turrieta* (1960) 54 C2d 816, 821, 8 CR 737. However, when a significant time has elapsed between the initial advisement and sentencing, the court must again inform the defendant of the right to counsel. 54 C2d at 820 (two-year interval); see *People v Hall* (1990) 218 CA3d 1102, 1106, 267 CR 494 (two-year interval); *In re Pickett* (1972) 25 CA3d 1158, 1164, 102 CR 487 (14-month interval).

When a defendant who was represented by counsel before sentencing appears, without explanation, in pro per, the court must advise the defendant of the right to counsel, whether or not the defendant was informed earlier of the right. *People v Maldonado* (1965) 237 CA2d Supp 902, 904, 47 CR 470 (court erred in allowing defendant to proceed in pro per when case file disclosed an attorney of record and no substitution of counsel).

If the defendant wishes to proceed in pro per, the court must obtain a knowing and voluntary waiver of his or her right to counsel. *Faretta v California* (1975) 422 US 806, 95 S Ct 2525, 45 L Ed 2d 562; *In re Johnson* (1965) 62 C2d 325, 334, 42 CR 228. For discussion of the taking of a *Faretta* waiver, see California Judges Benchguide 54: *Right to Counsel Issues* (Cal CJER).

## **2. Admissible Evidence at Sentencing Hearing**

### **a. [§75.13] Probation Report**

If the case is referred to the probation officer, the court may consider the contents of the officer's report. Pen C §1203(d). However, before the court may do so, there must be a substantial basis for believing that the information contained in the report is accurate and reliable. *People v Peterson* (1973) 9 C3d 717, 727, 108 CR 835. Information collected in a probation report includes (Pen C §§1203(b)(2), 1203.1k, 1203.10):

- The defendant's background and prior criminal history;
- The circumstances surrounding the commission of the offense;
- The probation officer's recommendation for or against probation and conditions of probation, if granted;
- A recommendation of the amount of the restitution fine the defendant should be required to pay under Pen C §1202.4(b); and

- A recommendation of the amount of restitution to the victim or the Restitution Fund that the defendant should be required to pay under Pen C §1202.4(f).

If the defendant is convicted of an offense requiring registration as a sex offender under Pen C §290, the probation report must include the results of the State-Authorized Risk Assessment Tool for Sex Offenders (SARATSO), if applicable. See Pen C §§290.04–290.06. Pen C §1203(b)(2)(C). Probationers who pose a high risk of recommitting sex crimes, as determined by SARATSO, are subject to intensive and specialized probation supervision. Pen C §1203f. See §75.9.

The report may include facts relating to counts dismissed as part of a plea bargain that are transactionally related to the offense to which the defendant pleaded guilty. *People v Harvey* (1979) 25 C3d 754, 758, 159 CR 696.

The following information should not be included in the probation report or considered by the sentencing court:

- *Evidence suppressed as a product of an unlawful search and seizure after a Pen C §1538.5 hearing.* *People v Belleci* (1979) 24 C3d 879, 888, 157 CR 503 (sentencing court erred by not striking suppressed evidence from probation report). However, with the passage of Proposition 8, which added Cal Const art I, §28(d) to the California Constitution, the validity of the *Belleci* decision is in question. See *People v Moore* (1988) 201 CA3d 877, 885, 247 CR 353 (evidence suppressed under Pen C §1538.5 inadmissible only if exclusion mandated by Fourth Amendment exclusionary rule). See also *People v Brewster* (1986) 184 CA3d 921, 928, 229 CR 352 (illegally seized evidence suppressed in unrelated matter is admissible).
- *Arrests not resulting in convictions.* Records of arrests and police contacts that did not result in conviction should not be included in the probation report or considered by the sentencing judge unless supporting factual information is included and the information is not presented in a misleading manner. *People v Ratcliffe* (1981) 124 CA3d 808, 823, 177 CR 627; *People v Calloway* (1974) 37 CA3d 905, 909, 112 CR 745.
- *Arrests for charges that were successfully diverted.* On successful completion of diversion or a deferred entry of judgment program, the arrest on which the diversion was based is deemed never to have occurred. Pen C §§1000.4(a) (drug deferred entry of judgment), 1000.12(c) (child abuse and neglect counseling), 1001.9(a) (misdemeanor diversion), 1001.33(a) (cognitive devel-

opmental disability diversion), 1001.55(a) (misdemeanor diversion), 1001.75(a) (parental diversion).

- *Arrests or convictions for marijuana offenses specified in Health & S C §11361.5 that are subject to destruction two years from the date of conviction or from the date of arrest if the defendant was not convicted.* Health & S C §11361.7; *People v Boyd* (1979) 24 C3d 285, 292, 155 CR 367; *People v Fick* (1980) 107 CA3d 892, 897, 166 CR 106.
- *Juvenile records sealed under Welf & I C §389.*

If the case is not referred to a probation officer, the court may consider any information concerning the defendant that could have been included in a probation report. Pen C §1203(d). When the case is not referred to a probation officer, the court must advise the defendant of the information to be considered, and on the defendant's request the court must grant a continuance before judgment to allow the defendant to answer or controvert this information. Pen C §1203(d).

#### **b. [§75.14] Pre-Plea Probation Report**

The court, with the defendant's consent, may use a pre-plea probation report instead of a Pen C §1203 presentence report in determining sentence. Pen C §1203.7. The information contained in a pre-plea probation report is similar to that included in a Pen C §1203 presentence report, including the probation officer's recommendation for or against the defendant's release on probation. Pen C §1203.7.

#### **c. [§75.15] Defendant's Alternative Sentencing Report**

The defendant or defense counsel may file a report providing a study of the defendant's background and personality and suggesting a rehabilitation program. Pen C §1204. When such a report is filed, the district attorney or probation officer must be allowed to reply to the report or evaluate the suggested program. Pen C §1204.

#### **d. [§75.16] Psychological Evaluation of Defendant**

As part of the probation investigation, the court may require a defendant who is convicted of a misdemeanor offense in which a minor was a victim of abuse or neglect (Pen C §§270–273) to undergo a psychological evaluation to determine the extent of counseling necessary for successful rehabilitation. Pen C §1203h. The results of the examination must be included in the probation report, and the court may require counseling as a condition of probation. Pen C §1203h.

### e. [§75.17] Testimony of Defense Witnesses

The defendant may call witnesses, including himself or herself, to contradict, explain, or otherwise rebut information contained in the probation report. Pen C §§1203(d), 1204; *People v Gelfuso* (1971) 16 CA3d 966, 972, 94 CR 535; *People v Valdivia* (1960) 182 CA2d 145, 148, 5 CR 832. However, the defendant has no right to court-appointed experts. *People v Stuckey* (2009) 175 CA4th 898, 96 CR3d 477 (request for appointment of a psychotherapist and a drug treatment counselor denied). And the defendant does not have the right to cross-examine the probation officer who prepared the report. *People v Arbuckle* (1978) 22 C3d 749, 754, 150 CR 778 (Sixth Amendment right of confrontation inapplicable at sentencing stage of criminal proceedings).

### f. [§75.18] Victim's Statements

The victim of the crime, the parent(s) or guardian(s) of a minor victim, or the next of kin of a deceased victim has the right to appear, in person or by counsel, at the sentencing proceeding. Pen C §1191.1. The victim, or up to two of the parents or guardians of a minor victim, or the next of kin of a deceased victim may reasonably express his, her, or their views concerning the crime, the person responsible, and the need for restitution. Pen C §1191.1. The court must consider these statements in imposing sentence and state on the record its conclusion of whether the defendant poses a threat to public safety if granted probation. Pen C §1191.1.

On November 4, 2008, California voters adopted Proposition 9 (Victims' Bill of Rights Act of 2008: Marsy's Law), adding Cal Const art I, §28(e), which broadens the definition of "victim" to include the victim's spouse, parents, children, siblings, or guardian and, if the victim is deceased, a minor, or physically or psychologically incapacitated, a lawful representative of the victim. Proposition 9 also added Cal Const art I, §28(d), providing that a court in its discretion may extend the right to be heard at sentencing to any person "harmed" by the defendant. No definition of "harmed" is provided, but is likely broader than "victim." These constitutional provisions appear to allow the trial court to depart from Pen C §1191.1, which restricts comments to victims or immediate family members.

In lieu of or in addition to a personal appearance, the victim, the parent(s) or guardian(s) of a minor victim, or the next of kin of a deceased victim may file with the court a written, audiotaped, or videotaped statement or a statement stored on a CD-ROM, DVD, or any other recording medium acceptable to the court. Pen C §1191.15(a). The court may hear and consider other out-of-court or unsworn statements about the circumstances of the crime and the characteristics of the defendant

relevant to sentencing as long as the defendant has notice that the statements will be accepted and has an opportunity to respond. *People v Mockel* (1990) 226 CA3d 581, 586, 276 CR 559 (consideration of letters from friends and family of the victim did not violate defendant's due process right to fair hearing). However, the defendant does not have the right to cross-examine the victim or other source of these statements. *People v Huber* (1986) 181 CA3d 601, 635, 227 CR 113; *People v Zikorus* (1983) 150 CA3d 324, 333, 197 CR 509.

### 3. [§75.19] Rendition and Entry of Judgment

At the time fixed for pronouncing judgment, if no sufficient cause is alleged or appears to the court why judgment should not be pronounced, the court must render judgment of a fine or imprisonment or both. Pen C §§1202, 1445. The rendition of judgment is the oral pronouncement of sentence in open court. *People v Moran* (1973) 33 CA3d 724, 728, 109 CR 287; *People v Blackman* (1963) 223 CA2d 303, 307, 35 CR 761. The defendant does not waive the court's duty to pronounce judgment orally by waiving formal arraignment for judgment. *People v Prater* (1977) 71 CA3d 695, 702, 139 CR 566. When judgment is rendered, the clerk must enter it in the minutes, stating the offense for which the defendant was convicted and any prior convictions. Pen C §1207.

### 4. [§75.20] Punishment for Misdemeanors

Except when a different punishment is prescribed by statute, every misdemeanor is punishable by imprisonment in county jail not exceeding six months and/or a fine not exceeding \$1000. Pen C §19. If the misdemeanor is punishable by imprisonment in county jail but no fine is prescribed, the court may impose a fine not exceeding \$1000 in addition to the prescribed imprisonment. Pen C §672. For a list of sentencing terms for common misdemeanors, see California Judges Benchguide 74: *Sentencing Guidelines for Common Misdemeanors and Infractions* (Cal CJER).

#### a. [§75.21] Imprisonment

Many misdemeanor offenses are punishable by county jail terms of up to one year. A sentence may not exceed one year except on conviction of more than one offense when consecutive sentences have been imposed. Pen C §19.2.

- **JUDICIAL TIP:** When the court imposes a sentence to county jail, it should state the date on which the defendant must surrender to the custody of the county sheriff to serve his or her term.

### b. [§75.22] Fine; Penalty Assessments

Unless provided otherwise by statute, the maximum fine for a conviction of a misdemeanor is \$1000. Pen C §§19, 672. A judgment that the defendant must pay a fine, with or without other punishment, may also direct that payment be made within a limited time or in installments on specified dates. Unless the defendant is so directed, the fine is payable immediately. Pen C §1205(a).

☛ **JUDICIAL TIP:** When the court imposes a fine, it should state the due date(s) for payment of the fine.

A judgment may also direct that the defendant be imprisoned until the fine is satisfied. Pen C §1205(a). For discussion of imprisonment in satisfaction of a fine, see §75.23.

*Fees added to total fine.* The criminal laboratory analysis fee of \$50 (Health & S C §11372.5) and drug program fee of \$150 (Health & S C §11372.7) for specified controlled substance offenses are defined as increases to the total fine and are subject to all the required penalty assessments. *People v Sierra* (1995) 37 CA4th 1690, 1694–1696, 44 CR2d 575; *People v Martinez* (1998) 65 CA4th 1511, 1520–1522, 77 CR2d 492.

*State penalty assessment.* A \$10 state penalty must be levied for every \$10, or part of \$10, of the fine imposed. Pen C §1464(a)(1). When the defendant has committed multiple offenses, the state penalty assessment must be based on the total fine for all the offenses. Pen C §1464(b). If a fine is suspended in whole or in part, the penalty must be reduced in proportion to the suspension. Pen C §1464(b). When a defendant is imprisoned to satisfy the fine, the court may waive all or any part of the state penalty if payment would work a hardship on the defendant or his or her immediate family. Pen C §1464(d).

*State surcharge.* A state surcharge of 20 percent must be levied on the base fine. Pen C §1465.7.

*Additional penalty assessments.* In addition to the state penalty assessment imposed under Pen C §1464, the following penalty assessments must be imposed:

- County penalty of up to \$7 for every \$10, or part of \$10, of the fine imposed. Govt C §76000.
- State court construction penalty of \$5 for every \$10, or part of \$10, of the fine imposed. Govt C §70372.
- Penalty for support of emergency medical services of \$2 for every \$10, or part of \$10, of the fine imposed. Govt C §76000.5.
- DNA Identification Fund penalties of \$1 (Govt C §76104.6) and \$4 (Govt C §76104.7) for every \$10, or part of \$10, of the fine imposed.

*Additional assessments.* The following assessments must be imposed on conviction for each misdemeanor violation even if a fine is not imposed or stayed:

- Court operations assessment of \$40. Pen C §1465.8.
- Court facilities assessment of \$30. Govt C §70373.

*Additional fine for commission of designated sex offense.* A defendant convicted of any sex offense specified in Pen C §290(c) is subject to a mandatory \$300 fine for a first conviction and a mandatory \$500 fine for a second or subsequent conviction. This fine is in addition to any imprisonment or fine, or both, imposed for the commission of the underlying offense. Pen C §290.3(a).

### **c. [§75.23] Imprisonment To Satisfy Fine**

A judgment requiring the defendant to pay a fine immediately or within a limited time or in installments on specified dates may also direct that, if the defendant fails to pay as required, the defendant may be imprisoned until the defaulted installment is satisfied or until the fine is satisfied in full. Pen C §1205(a). The judgment may further direct that imprisonment for failure to pay a fine will begin at, or continue after, the expiration of any imprisonment imposed as a part of the punishment or of any other imprisonment to which the defendant may previously have been sentenced. Pen C §1205(a).

The judgment must specify the extent of imprisonment for nonpayment, which cannot exceed the maximum term for which the defendant could be sentenced to jail for the offense. Pen C §1205(a); *People v Lein* (1928) 204 C 84, 87, 266 P 536. See Pen C §19.2 (one-year limit on imprisonment in county jail applicable to commitment for default in payment of fine). A defendant must receive credit on the fine for each day he or she is held in custody for nonpayment at the rate specified in the judgment. Pen C §1205(a). The minimum conversion rate is \$30 per day. Pen C §§1205(a), 2900.5(a).

Restitution fines (see §75.31) and restitution orders (see §§75.24–75.29) may not be converted to jail time under the provisions of Pen C §1205. Pen C §1205(f).

When the court sentences a person who was under 21 years of age at the time of the arrest to the payment of a fine and the fine is not paid, the court may remit the fine, in whole or in part, or commit the defendant to a place of confinement approved by the California Department of Corrections and Rehabilitation Division of Juvenile Facilities to serve a term until the fine is satisfied. Welf & I C §1735.

The court may not imprison a defendant for nonpayment when the failure results from the defendant's indigency rather than a refusal to pay.

*In re Antazo* (1970) 3 C3d 100, 115, 89 CR 255. An indigent defendant must be provided alternatives to imprisonment similar to those available to a nonindigent offender. 3 C3d at 116. The court may direct the indigent defendant to pay the fine in installments under Pen C §1205(a) or perform specified work to satisfy the fine. See *Williams v Illinois* (1970) 399 US 235, 244 n21, 90 S Ct 2018, 26 L Ed 2d 586. If the defendant refuses to utilize these alternatives, or fails to meet the conditions of the offered alternative, the defendant's indigency ceases to be dispositive, and the defendant may be imprisoned. *In re Antazo, supra*, 3 C3d at 116.

In determining whether a defendant is financially unable to pay a fine, the court may consider such factors as the defendant's income, bank accounts, and ownership of a home, car, or other tangible or intangible property; the number of dependents; the cost of sustenance for the defendant and his or her dependents; and the amount of the fine. *People v Lewis* (1971) 19 CA3d 1019, 1023, 97 CR 419. The court is not required to allow the defendant to prefer his or her creditors to the obligation to the state for payment of the fine, nor is it required to allow the defendant to maintain the standard of living to which the defendant has become accustomed. 19 CA3d at 1025.

#### **d. [§75.24] Victim Restitution**

The court must order payment of restitution to any victim who has suffered economic loss as a result of the defendant's criminal conduct. Pen C §1202.4(a)(3)(B), (f); see Cal Const art I, §28(b)(13)(A). A sentence without a restitution award to the victim is invalid; however, the court may properly add a restitution order later. See Pen C §1202.46; *People v Rowland* (1997) 51 CA4th 1745, 1750-1752, 60 CR2d 351.

#### **(1) [§75.25] Losses Subject to Restitution**

The restitution ordered must sufficiently reimburse the victim for all economic losses incurred, including the following:

- The replacement or repair costs of any stolen or damaged property. Pen C §1202.4(f)(3)(A).
- Medical expenses, including expenses for mental health counseling. Pen C §1202.4(f)(3)(B)-(C).
- Future medical expenses. *People v Phelps* (1996) 41 CA4th 946, 950, 48 CR2d 855 (restitution order for future medical expenses in amount stipulated by defendant).
- Wages or profits lost because of injury suffered by the victim and, if the victim is a minor, the wages or profits lost by the minor's parents or guardians while caring for the victim. Pen C §1202.4(f)(3)(D).

- Lost wages or profits of the victim or the victim's guardians or parents because of time spent as a witness or in assisting the police or prosecution. Pen C §1202.4(f)(3)(E).
- Future lost wages. *People v Fulton* (2003) 109 CA4th 876, 880 n2, 887, 135 CR2d 466 (lost wages associated with future postsurgery recovery).
- Sick leave if the victim is unable to go to work because of injuries inflicted by the defendant. *In re K. F.* (2009) 173 CA4th 655, 665-666, 92 CR3d 784.
- Interest, at the rate of 10 percent per year, that accrues from the date of sentencing or loss, as determined by the court. Pen C §1202.4(f)(3)(G).
- Actual and reasonable attorneys' fees and other costs of collection accrued by a private entity on behalf of the victim. Pen C §1202.4(f)(3)(H).
- Expenses incurred by an adult victim when relocating away from the defendant if relocation is necessary for the victim's personal safety or emotional well-being. Pen C §1202.4(f)(3)(I).
- Expenses to retrofit a residence or vehicle if the victim is permanently disabled as a direct result of the crime. Pen C §1202.4(f)(3)(K).
- Expenses to monitor an identity theft victim's credit report and to repair the victim's credit for a period of time reasonably necessary to make the victim whole. Pen C §1202.4(f)(3)(L).

• **(2) [§75.26] Persons Entitled to Restitution**

The California Constitution defines a victim, for purposes of restitution, as (Cal Const art I, §28(e)):

- A person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act.
- The person's spouse, parents, children, siblings, or guardian, and a lawful representative of a crime victim if the victim is deceased, a minor, or physically or psychologically incapacitated.

The term "victim" does not include a person in custody for an offense, the accused, or a person whom the court finds would not act in the best interests of a minor victim. Cal Const art I, §28(e).

Restitution under Pen C §1202.4 is generally limited to direct victims, *i.e.*, to persons and to public or private entities against whom the crime was committed. *People v Torres* (1997) 59 CA4th 1, 25, 68 CR2d

644; Pen C §1202.4(k)(2) (“victim” may be corporation, business trust, estate, partnership, association, joint venture, or governmental agency). Other persons entitled to restitution include the immediate surviving family of the victim (Pen C §1202.4(k)(1)), parents and guardians of a minor victim (see §75.25), and other individuals who have sustained economic loss as described in Pen C §1202.4(k)(3).

### (3) [§75.27] Right to Hearing

The defendant has the right to a court hearing to dispute the amount of restitution or the manner in which it is to be made. Pen C §§1202.4(f)(1), 1203(d), 1203.1k; *People v Carbajal* (1995) 10 C4th 1114, 1125, 43 CR2d 681. Advisement of this right is a precondition to enforcement of the restitution order by a victim. Pen C §1214(b).

A victim has a right to appear at sentencing personally or by private counsel to express his or her views regarding restitution. Cal Const art I, §28(b)(8), (c)(1); Pen C §1191.1. This right also extends to:

- The victim’s spouse, parents, children, or guardian (Cal Const art I, §28(e); Pen C §1191.1);
- The lawful representative of the victim who is deceased, a minor, or physically or psychologically incapacitated (Cal Const art I, §28(e)); and
- The next of kin of a deceased victim (Pen C §1191.1).

The hearing does not require the formalities of a trial. *People v Foster* (1993) 14 CA4th 939, 946–947, 18 CR2d 1. The defendant’s due process rights are satisfied when the probation report gives notice of the restitution claimed, and the defendant has an opportunity to contest the figures in the report. *People v Foster, supra*. The defendant has no right to a jury trial on the restitution issues. *People v Chappelone* (2010) 183 CA4th 1159, 1183–1184, 107 CR3d 895. The defendant does not have a right to confront and cross-examine witnesses, including the probation officer who prepared the report. *People v Cain* (2000) 82 CA4th 81, 86–88, 97 CR2d 836. The court may consider the recommendations in the report despite their hearsay character (82 CA4th at 87), as long as the court independently determines the amount of restitution (*People v Hartley* (1984) 163 CA3d 126, 130, 209 CR 131).

### (4) [§75.28] Order

To the extent possible, the restitution order must identify the victim(s) and losses to which it pertains, and must be of a dollar amount sufficient to reimburse the victim(s) for every determined economic loss incurred. Pen C §1202.4(f)(3). The court is vested with broad discretion in

setting the amount of restitution. *People v Balestra* (1999) 76 CA4th 57, 63, 90 CR2d 77. It may use any rational method of fixing this amount that is reasonably calculated to make the victim whole. 76 CA4th at 63-64. The court's order may be based on the amount of loss claimed by the victim or on any other showing to the court. Pen C §1202.4(f).

If the court cannot ascertain the amount of restitution at the time of sentencing, the court may order that it will determine the amount later. Pen C §1202.4(f). The court retains jurisdiction over the defendant for purposes of imposing or modifying restitution until the losses are determined. Pen C §1202.46.

If the victim has received compensation from the state Restitution Fund for losses, the court must order the defendant to make payment to the fund for the amount paid to the victim. Pen C §1202.4(f)(2).

#### **(5) [§75.29] No Waiver of Full Restitution**

On November 4, 2008, California voters adopted Proposition 9 (Victims' Bill of Rights Act of 2008: Marsy's Law), which amended Cal Const art I, §28(b), removing language allowing the waiver of a portion or all victim restitution if there are compelling and extraordinary reasons for not ordering full restitution. Proposition 9 effectively negates provisions in Pen C §§1203.3(b)(4), 1202.4(f), (g) and (n), authorizing the reduction of restitution for compelling and extraordinary reasons.

#### **(6) [§75.30] Order for Income Deduction**

If restitution is ordered, the court must enter a separate order for income deduction on determination of the defendant's ability to pay. Pen C §1202.42(a). The court must stay this order until the county agency responsible for collection determines that the defendant has failed to pay without good cause. Pen C §1202.42(b)(1).

For a more detailed discussion of victim restitution, see California Judges Benchguide 83: *Restitution* (Cal CJER).

#### **e. [§75.31] Restitution Fine**

In addition to paying restitution to any crime victim(s), a defendant must pay a restitution fine of not less than \$150 and not more than \$1000. Pen C §1202.4(a)(3), (b). The court must consider the following factors in setting the amount of the fine in excess of \$150 (Pen C §1202.4(d)):

- The defendant's inability to pay, including future earning capacity;
- The seriousness and gravity of the offense and the circumstances of its commission;
- Any economic gain derived by the defendant as a result of the crime;

- The extent to which any other person suffered losses as a result of the crime, including pecuniary losses to the victim or his or her dependents, and intangible losses, such as psychological harm;
- The number of victims involved in the crime; and
- Any other relevant factors.

Ability to pay the restitution fine is presumed, and the defendant bears the burden to prove lack of ability. Pen C §1202.4(d); *People v Romero* (1996) 43 CA4th 440, 448–449, 51 CR2d 26. The court is not required to make express findings about the factors bearing on the amount imposed. Pen C §1202.4(d). In addition, the defendant is not entitled to a separate hearing to contest the fine. Pen C §1202.4(d).

The court may waive imposition of a restitution fine if there are compelling and extraordinary reasons for doing so, and the court states those reasons on the record. Pen C §1202.4(b)–(c); *People v Tillman* (2000) 22 C4th 300, 302, 92 CR2d 741. A defendant’s inability to pay may not be considered a compelling and extraordinary reason to waive the fine. Pen C §1202.4(c). The court may consider the defendant’s inability to pay only when increasing the amount of the restitution fine beyond the statutory minimum. Pen C §1202.4(c). When imposition of the fine is waived, the court must order community service as a condition of probation absent compelling and extraordinary reasons not to require the service. Pen C §1202.4(n). The court must impose restitution when probation is revoked. Pen C §1202.4(n).

Restitution fines are exempt from the penalty assessments of Pen C §1464 and Govt C §§76000, 76000.5, 76104.6 and 76104.7, and from the state surcharge of Pen C §1465.7. Pen C §1202.4(e). Counties may impose a fee to cover the administrative costs of collecting the restitution fine in an amount not exceeding 10 percent of the fine imposed, to be added to the fine and included in the court order. Pen C §1202.4(l).

For a more detailed discussion of restitution fines, see California Judges Benchguide 83: *Restitution* (Cal CJER).

#### **f. [§75.32] Probation Revocation Restitution Fine**

When a defendant receives a conditional sentence or a sentence that includes a period of probation, the court must impose an additional probation revocation restitution fine in the same amount as that imposed under Pen C §1202.4(b) (see §75.31). Pen C §1202.44. This additional fine is suspended and does not become effective unless and until the defendant’s conditional sentence or probation is revoked. Pen C §1202.44. The court must order the probation revocation restitution fine unless there are compelling and extraordinary reasons for not doing so. Pen C §1202.44.

**g. [§75.33] Mandatory AIDS Testing**

The court must order any person convicted of a misdemeanor violation of Pen C §261.5 (unlawful sexual intercourse), §266c (inducing sexual act through false representation creating fear), §286(b)(1) (sodomy with person under age 18), §286(e) (sodomy while incarcerated), §286(h) (sodomy with mentally disordered person while confined in state hospital), §288a(b)(1) (oral copulation with person under age 18), §288a(e) (oral copulation while incarcerated), or §288a(h) (oral copulation with mentally disordered person while confined in state hospital)—whether or not a fine or sentence is imposed—to submit to a blood test for evidence of antibodies to the probable causative agent of acquired immune deficiency syndrome (AIDS). Pen C §1202.1. In addition, a defendant convicted of a misdemeanor violation of Pen C §288(c)(1) (lewd and lascivious act on a child aged 14 or 15 by person at least ten years older) must submit to a blood test if the court finds probable cause to believe that bodily fluids capable of transmitting HIV have been transferred from the defendant to the victim. Pen C §1202.1. A defendant tested under Pen C §1202.1 must be notified of the results of the blood test. Pen C §1202.1(a).

Results of the test may later be used to charge the defendant with a violation of Pen C §647f (prostitution following prior conviction and positive AIDS test) or to enhance a sentence under Pen C §12022.85 (commission of sexual offense with knowledge that defendant carries AIDS virus). Pen C §1202.1(c).

A defendant convicted of Pen C §647(b) must submit to testing for AIDS. Pen C §1202.6. First time offenders, in addition to submitting to testing, must participate in an AIDS prevention education program. Pen C §1202.6(a).

**h. [§75.34] Criminal Registration**

A defendants convicted of any of the gang-related offenses enumerated in Pen C §186.30, sex offenses enumerated in Pen C §290, narcotics offenses enumerated in Health & S C §11590, or possession or manufacture of combustible material or incendiary device with arson intent (Pen C § 453) must register with the chief of police or sheriff in the city or county in which he or she resides. Pen C §§186.30, 290(b), 457.1(b); Health & S C §11590(a).

**i. [§75.35] Commitment to Division of Juvenile Facilities**

The court may commit a defendant who was under 21 years of age at the time of arrest to the California Department of Corrections and Rehabilitation Division of Juvenile Facilities if the defendant meets the eligibility requirements outlined in Welf & I C §§1731.5 and 1732.7.

For a comprehensive discussion of commitment to the Division of Juvenile Facilities, see 3 Witkin & Epstein, California Criminal Law, *Punishment* §§86–101 (4th ed 2012).

### 5. [§75.36] Multiple Punishment (Pen C §654)

When the defendant is convicted of two or more offenses, the court must determine whether Pen C §654 precludes punishment for one or more of the counts. Under Pen C §654(a), an act or omission that is punishable in different ways by different provisions of the Penal Code must be punished under the provision that provides for the longest potential term of imprisonment, but in no event can it be punished under more than one. Although Pen C §654 is self-limiting as to violations of the Penal Code, it has been interpreted to apply to any criminal statute. *In re Hayes* (1969) 70 C2d 604, 605, 75 CR 790.

In determining whether Pen C §654 applies to a case involving multiple convictions, the court may conduct a postplea evidentiary hearing regarding factual issues concerning multiple punishment and proper sentencing. *People v Ross* (1988) 201 CA3d 1232, 1240, 247 CR 827 (court not limited to evidence presented to trier of fact before entry of verdict or guilty plea in resolving Pen C §654 issues). The court may also review the probation report in determining the applicability of Pen C §654. *People v Rosenberg* (1963) 212 CA2d 773, 776, 28 CR 214.

If the court concludes that Pen C §654 prohibits sentencing on one or more of the offenses of which the defendant has been convicted, the proper procedure is to sentence the defendant on each count and stay execution of sentence of the lesser counts. The stay of execution becomes permanent on completion of the unstayed term. *People v Miller* (1977) 18 C3d 873, 886, 135 CR 654. In addition, the court must stay the use of the stayed convictions for penal and administrative purposes. *People v Conner* (1986) 176 CA3d 716, 719, 222 CR 311; *People v Duarte* (1984) 161 CA3d 438, 448, 207 CR 615. But see *People v Ward* (1986) 188 CA3d 459, 474, 233 CR 477 (*Duarte* order unnecessary absent potential administrative sanctions). The court may not impose concurrent sentences in an attempt to satisfy the double punishment prohibition. *People v Miller, supra*, 18 C3d at 887.

For a comprehensive discussion of the double punishment prohibition of Pen C §654, see 3 Witkin & Epstein, California Criminal Law, *Punishment* §§248–302 (4th ed 2012).

### 6. [§75.37] Concurrent or Consecutive Sentences

When the defendant is convicted of multiple offenses, whether in the same or different proceedings, the court, on sentencing the defendant to the second or subsequent judgment, must determine whether the terms of

imprisonment will run concurrently or consecutively. Pen C §669. Penal Code §669 is applicable only when judgment has been imposed and executed in both the prior and present proceedings. *People v Gray* (1986) 176 CA3d 520, 523, 222 CR 29. If the court does not indicate whether the sentences on separate counts are to be served concurrently or consecutively, they are considered concurrent. *People v Downey* (2000) 82 CA4th 899, 912–913, 98 CR2d 627.

If the court fails to determine how successive judgments will run in relation to each other at the time of sentencing, through either inadvertence or lack of awareness of a previous judgment, it may determine that the sentences are to run consecutively if (a) the inadvertence or prior judgment is brought to the court's attention within 60 days from the start of the defendant's imprisonment on the second or subsequent judgment, and (b) the court makes its determination within 60 days of this notice. Pen C §669. When the court fails to make its determination within this 60-day period, the second or subsequent judgment will run concurrently with the previous judgment. Pen C §669. The court may make this deferred sentencing decision outside the defendant's presence. Pen C §669. However, a court may not deliberately defer its determination of whether a defendant's sentence will run concurrently or consecutively. *In re Calhoun* (1976) 17 C3d 75, 82, 130 CR 139.

In determining whether sentences are to run consecutively or concurrently, the court may consider the nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, the defendant's character, and the defendant's amenability to rehabilitation. *People v Livingston* (1982) 136 CA3d 724, 729, 186 CR 417; *People v Morales* (1967) 252 CA2d 537, 547, 60 CR 671. A court's conclusion that a defendant committed perjury may be considered as it bears on the defendant's character and prospects for rehabilitation. *People v Redmond* (1981) 29 C3d 904, 913, 176 CR 780; *In re Perez* (1978) 84 CA3d 168, 171, 148 CR 302. The court may not consider the defendant's refusal to accept a plea bargain or the defendant's exercise of the right to a jury trial. *In re Lewallen* (1979) 23 C3d 274, 278, 152 CR 528. A defendant must be afforded notice and an opportunity to respond to any evidence considered by the court in determining whether to impose a consecutive or concurrent sentence. *In re Calhoun, supra*, 17 C3d at 83.

The court can impose consecutive sentences without limit. Pen C §19.2 (jail term on imposition of consecutive sentences may exceed one year). When the defendant is convicted of multiple misdemeanor violations of "wobbler" offenses, the court can impose consecutive sentences even though the term of imprisonment exceeds the statutory maximum term that could have been imposed had the violations been charged as

felonies. *People v Hibbard* (1991) 231 CA3d 145, 149, 282 CR 351 (imposition of ten-year term composed of consecutive sentences for 12 alcohol- and drug-related traffic misdemeanors). But see *People v Powell* (1985) 166 CA3d Supp 12, 22, 212 CR 454 (imposition of consecutive sentences for multiple “wobbler” offenses may not exceed maximum felony sentence permissible for these offenses).

## 7. Credit for Time Served

### a. [§75.38] Credit for Presentence Custody

A defendant must receive credit against his or her jail term or credit against any fine imposed—including, but not limited to base fines—on a proportional basis, at no less than \$30 per day for actual time spent in presentence confinement. Pen C §2900.5(a).

Credit is available for time spent in jail, camp, work furlough facility, halfway house, rehabilitation facility, hospital, prison, juvenile detention facility, or similar residential institution. The defendant may also receive credit for days served as a condition of probation under court order, days credited to the period of confinement under Pen C §4019 (see §75.41), and days served in home detention under Pen C §1203.018. Pen C §2900.5(a).

If the court has imposed both a jail term and a fine, credit for days spent in presentence custody must first be applied to the jail term, and thereafter any remaining days must be applied to the fine—including, but not limited to, base fines—on a proportional basis. Pen C §2900.5(a). When the defendant is convicted of a crime that requires a mandatory minimum period of jail time, any time spent in presentence custody in facilities other than the county jail must be credited to the mandatory jail time. Pen C §2900.5(f).

Custody credits may be given only when the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted. Pen C §2900.5(b). The Supreme Court held in *In re Joyner* (1989) 48 C3d 487, 256 CR 785, that a period of time previously credited against a sentence for unrelated offenses cannot be deemed attributable to proceedings resulting in a later-imposed sentence unless the defendant demonstrates that he or she would have been at liberty during the period were it not for a restraint relating to the proceedings resulting in the later sentence. In other words, dual credits against separately imposed concurrent sentences for unrelated offenses are to be granted only on a showing of strict causation. 48 C3d at 489.

A defendant is not entitled to credit for a period of presentence custody if, during that period, the defendant has already begun serving time for another offense, including time served as a condition of probation. *In re Rojas* (1979) 23 C3d 152, 156, 151 CR 649; *People v Ayon* (1987) 196 CA3d 1114, 1117, 242 CR 300. See *In re Nickles* (1991)

231 CA3d 415, 282 CR 411, and *People v Odom* (1989) 211 CA3d 907, 259 CR 827, for application of the *Joyner* strict causation test when a defendant is subject to a parole or probation hold or revocation.

If, after sentencing, the court is informed by the Department of Corrections and Rehabilitation that the defendant is not entitled to presentence credit because he or she was serving a prior prison sentence when sentenced by the court, the court may amend the sentence to strike the provision for presentence credit that was part of the defendant's plea bargain. The court may make this amendment only after giving the defendant notice and an opportunity to be heard. *In re Williams* (2000) 83 CA4th 936, 942, 100 CR2d 144.

Credit must be given only once for a single period of custody attributable to multiple offenses for which a consecutive sentence is imposed. Pen C §2900.5(b).

### (1) [§75.39] Court Determination of Presentence Credits

It is the duty of the sentencing court to determine the dates of any admission to and release from custody before sentencing and the total number of days to be credited. Pen C §2900.5(d). The court must award credits against the sentence for each day in custody, up to and including the day of sentencing. *People v Smith* (1989) 211 CA3d 523, 527, 259 CR 515. Any partial day of custody must be treated as one full day for credit purposes. *In re Jackson* (1986) 182 CA3d 439, 442, 227 CR 303. When the probation report specifies all the relevant custody dates and the total credit calculation, and the parties do not dispute the dates and calculation, the court is not required to make express findings of the custody dates or make an independent calculation of the credits as long as the calculation is accurate. *People v Blunt* (1986) 186 CA3d 1594, 1601, 231 CR 588. The total number of days to be credited must be included in the abstract of judgment. Pen C §2900.5(d).

### (2) [§75.40] Waiver of Credits

A defendant may knowingly and intelligently waive his or her Pen C §2900.5 presentence custody credits. *People v Johnson* (2002) 28 C4th 1050, 1054-1055, 123 CR2d 700; *People v Correll* (1991) 229 CA3d 656, 659, 280 CR 2665.

A defendant may waive custody credits as a condition of probation. *People v Correll, supra*. *Correll* held that the waiver of custody credits is reasonably related to the court's ability to rehabilitate the defendant and to deter future criminality because it expands the trial court's options for dealing with a future violation of probation. 229 CA3d at 660.

Future custody credit for time to be spent in a residential drug treatment program may also be waived, even though the amount of credit

is not known at the time of the waiver. *People v Ambrose* (1992) 7 CA4th 1917, 1920, 9 CR2d 812. The courts of appeal are split as to whether trial courts may require such waivers as a standard practice when imposing probation. See *People v Torres* (1997) 52 CA4th 771, 60 CR2d 803 (yes: waiver encourages defendant to complete treatment); *People v Juarez* (2004) 114 CA4th 1095, 1103–1106, 8 CR3d 238 (no); *People v Penoli* (1996) 46 CA4th 298, 302, 53 CR2d 825 (no: court must exercise sentencing discretion in each case).

## **b. Conduct Credits**

### **(1) [§75.41] Entitlement to Credits**

In addition to receiving credit for each day actually spent in presentence custody, the defendant may receive good conduct credits during presentence confinement. Pen C §4019. When a defendant receives a sentence of imprisonment and/or fine or a jail term as a condition of probation of four days or more, the court must deduct from the sentence the time spent in custody during which the defendant satisfactorily performed labor assigned to him or her and complied with the rules and regulations of the facility. Pen C §§2900.5(a), 4019. Conduct credits are awarded for time spent in a city or county jail, an industrial farm, or a road camp. Pen C §4019(a). Conduct credits are not awarded for time spent in nonpenal institutions. *People v Waterman* (1986) 42 C3d 565, 569, 229 CR 796 (confinement in state hospital under Pen C §1370); *People v Sage* (1980) 26 C3d 498, 502, 165 CR 280; *People v Downey* (2000) 82 CA4th 899, 920, 98 CR2d 627 (defendant not entitled to conduct credits for time spent in residential drug rehabilitation program); *People v Nubla* (1999) 74 CA4th 719, 731, 88 CR2d 265 (defendant not entitled to conduct credits for time served at California Rehabilitation Center, but is entitled to conduct credits for time spent at CRC or county jail after defendant is found unfit for continued CRC commitment and before execution of sentence); *People v Moore* (1991) 226 CA3d 783, 787, 277 CR 82 (alcohol recovery center). But see *People v Mobley* (1983) 139 CA3d 320, 323, 188 CR 583 (equal protection required award of conduct credit for time spent in “Discovery House” drug rehabilitation program as condition of own-recognition release). A defendant who participates in a private or county-operated work furlough program is entitled to conduct credits. Pen C §1208(f); *In re Starr* (1986) 187 CA3d 1550, 1554, 232 CR 487. However, conduct credits are not available for time served in a Pen C §4024.2 work release program. *People v Wills* (1994) 22 CA4th 1810, 27 CR2d 925 (work project participant not in custody).

## (2) [§75.42] Calculating Conduct Credits

For each four-day period during which a defendant is committed, the defendant earns one day of work-time credit if the defendant satisfactorily performs labor assigned, and one day of good-time credit if the defendant satisfactorily complies with the rules and regulations of the facility. Pen C §4019(b)–(c). If all credit days are earned under Pen C §4019, a term of four days is deemed to have been served for every two days spent in actual custody. Pen C §4019(f).

There are two methods of calculating conduct credits. Under either method, conduct credits are always an even number:

- “Statutory” formula: Divide the number of actual presentence custody days by 2 (discarding any remainder, or rounding down to a whole number) and then multiply this number by 2. *In re Marquez* (2003) 30 C4th 14, 25–26, 131 CR3d 911; *People v Smith* (1989) 211 CA3d 523, 527, 259 CR 515.
- “Shortcut” formula: If actual presence custody days are an even number, then the conduct credits are the same. If actual presentence custody days are an odd number, subtract one day.

To arrive at the total amount of credit to which a defendant is entitled, add the custody (actual time) credit to the conduct credits. For example, if a defendant is sentenced to 10 days in county jail, and has presentence actual time credit of 3 days, the defendant will receive an additional two days of conduct credit, for a total credit of five days against the 10-day sentence.

## (3) [§75.43] Denying Conduct Credits

The court may deprive a defendant of all or part of accumulated good-time credits if the defendant misbehaves at any time during the confinement period. Pen C §4019(c); *In re Walrath* (1980) 106 CA3d 426, 431, 164 CR 923. The court may deny a defendant work-time credits only when the opportunity to work has been properly withheld, *e.g.*, because the defendant has refused to perform labor or violated the rules and regulations of the facility. Pen C §4019(b), (d); *People v Johnson* (1981) 120 CA3d 808, 815, 175 CR 59. Before the court may withhold conduct credits, the defendant must be provided prior notice and an opportunity to rebut the findings of jail violations and present any mitigating factors. *People v Duesler* (1988) 203 CA3d 273, 277, 249 CR 775. The prosecution has the burden to show that a defendant is not entitled to conduct credits. 203 CA3d at 276.

For a comprehensive discussion of custody and conduct credits, see 3 Witkin & Epstein, California Criminal Law, *Punishment* §§464–483 (4th ed 2012).

## **8. Advisements to Defendant**

### **a. [§75.44] Right To Appeal**

After imposing sentence or making an order deemed to be a final judgment on conviction after trial, including an order granting probation, the court must orally or in writing advise a defendant not represented by counsel of the right to appeal to the appellate division of the superior court, the time for filing a notice of appeal, and the right to appointed counsel on appeal. Cal Rules of Ct 4.306; Pen C §1466. This notice is not required following a guilty plea. *People v Serrano* (1973) 33 CA3d 331, 337, 109 CR 30 (court interpreted similar rule requiring notice in superior court containing language identical to that found in Cal Rules of Ct 4.306).

The defendant must file a written notice of appeal with the court clerk within 30 days after rendition of judgment or the making of the order. Cal Rules of Ct 8.853(a). The appellate division must appoint counsel for a defendant on request if the defendant is subject to incarceration or a fine of more than \$500 or is likely to suffer significant adverse collateral consequences as a result of the conviction, and the defendant was represented by appointed counsel in the trial court or establishes his or her indigency. Cal Rules of Ct 8.851(a)(1). The appointment of counsel is discretionary for any other indigent defendants. Cal Rules of Ct 8.851(a)(2).

The rules regulating appeals in misdemeanor cases are contained in Cal Rules of Ct 8.850–8.890 and Pen C §§1466–1469.

### **b. [§75.45] Duty To Register**

*Narcotics offenders.* The court must advise a defendant of any registration requirements under Health & S C §11590 when the defendant is released on probation or discharged on payment of a fine. Health & S C §11593. Specifically, the court must tell the defendant to register with the chief of police or sheriff in the city or county in which he or she resides, and ask the defendant to read and sign any form that may be required by the Department of Justice stating that the duty to register has been explained. Health & S C §11593. The court or the probation officer must obtain the address at which the defendant expects to reside on release or discharge and report it within three days to the Department of Justice. Health & S C §11593. Defendants convicted of misdemeanor violations of

Health & S C §11357, §11360, or §11377 are not subject to the registration requirements. Health & S C §11590(c).

*Sex offenders.* The court must make the same advisements to a defendant subject to the registration requirements under Pen C §290 when the defendant is granted conditional release without supervised probation or discharged on payment of a fine. Pen C §290.017(d). If the defendant is released from formal probation, the probation department must inform the defendant of his or her duty to register. Pen C §290.017(c).

*Gang-related crime offenders.* The court must advise a defendant convicted of gang-related offenses of his or her duty to register with the local chief of police or sheriff under Pen C §186.30. Pen C §186.31. The specific registration requirements for gang-related crime offenders are outlined in Pen C §186.32.

*Arson offenders.* The probation department, and not the court, must inform a defendant of any registration requirements under Pen C §457.1 when the defendant is released on probation or discharged on payment of a fine. Pen C §457.1(b), (e).

If the defendant is sentenced to a term in county jail, it is the responsibility of the jail authorities, before release or discharge from custody, to advise the defendant of his or her duty to register. Pen C §§290.017(a), 457.1(c); Health & S C §11592.

### **c. [§75.46] Right to Rehabilitation**

The court must inform the defendant, either orally or in writing, of his or her right to apply for relief from all penalties and disabilities resulting from a misdemeanor conviction after the passage of one year from the date of pronouncement of judgment. Pen C §1203.4a(a), (c)(1). This right to relief is available provided the defendant successfully performs his or her sentence and leads a law-abiding life during that period. Pen C §1203.4a(a). Relief is afforded by permitting the withdrawal of a plea of guilty or no contest or by setting aside a verdict of guilty and dismissing the accusatory pleading. Pen C §1203.4a(a). The court, in its discretion and in the interests of justice, may grant the relief available under Pen C §1203.4a(a) to a defendant who does not satisfy all the requirements of Pen C §1203.4a(a) if, after the passage of one year from the date of pronouncement from judgment, the defendant has fully complied with and performed his or her sentence and currently is not serving a sentence for another offense or charged with any crime. Pen C §1203.4a(b).

A defendant who is granted probation may apply for relief from all penalties and disabilities resulting from the conviction on the successful completion of probation. Pen C §1203.4. Notice of this right to relief must be contained in the defendant's probation papers. Pen C §1203.4(a)(1).

## **D. Alternatives to Jail**

### **1. [§75.47] Work Furlough; Weekend Sentence**

Work furlough may be available to defendants who are sentenced to county jail, imprisoned in jail for nonpayment of a fine, or ordered to serve time in jail as a condition of probation. Pen C §1208(b). Under this arrangement, the defendant is allowed to continue his or her regular employment or participate in job training or educational programs. When the defendant is not working or participating in the training or educational programs, he or she is confined in a facility designated for work furlough confinement. Pen C §1208(d). Participation in a work furlough program is subject to the approval of the work furlough administrator. Pen C §1208(b); *People v Superior Court (Peterson)* (1992) 12 CA4th 16, 23, 14 CR2d 685 (court does not have jurisdiction to place defendant directly in work furlough). The court may preclude a defendant's participation by ordering, at the time of sentencing, that the defendant not be granted work furlough. Pen C §1208(b).

Under Pen C §1209, the court may allow the defendant to serve his or her jail time on weekends. If jail weekends are given, the court should indicate the day and hour that the defendant is to report to jail and the day and hour of release.

### **2. [§75.48] Sheriff's Work Alternative Program**

The defendant may be eligible for participation in the Sheriff's Work Alternative Program (SWAP) in which the defendant performs manual labor instead of being confined in the county jail. Pen C §4024.2. The SWAP program allows the defendant to deduct one day from his or her jail term for each day of labor. Pen C §4024.2(a). In addition, the defendant may be allowed to receive work-release credit for participation in education programs, vocational training, or substance abuse programs on an hour-for-hour basis. Pen C §4024.2(b)(2).

Mandatory work release programs may be authorized in counties in which the average daily inmate population is 90 percent or more of mandated capacity. Pen C §4024.3. The criteria and procedures of the mandatory programs are identical to those of the voluntary programs under Pen C §4024.2.

### **3. [§75.49] Home Detention**

Defendants committed to jail or granted probation, or defendants participating in a work furlough program, may voluntarily participate or involuntarily be placed in a home detention program during their sentence instead of being confined in the county jail. Pen C §1203.016. A defendant must be approved for the program by the correctional

administrator in charge of the program. Pen C §1203.016(d). The court may restrict or deny a defendant's participation in the program. Pen C §1203.016(e).

If the correctional administrator determines that conditions in the jail facility warrant early release of misdemeanor defendants due to the lack of jail space, the county board of supervisors may authorize the correctional administrator to require defendants to participate in an involuntary home detention program during their sentence. Pen C §1203.017. A defendant must be approved for the program by the correctional administrator in charge of the program. Pen C §1203.017(d). The court may restrict or deny a defendant's participation in the program. Pen C §1203.017(e).

### **E. [§75.50] Probation**

Probation is the suspension of the imposition or the execution of sentence and the order of conditional and revocable release into the community under the supervision of the court or a probation officer. Pen C §1203(a). Probation is not a right of the defendant but an act of clemency by the court, the granting or denial of which is within the court's discretion. *People v Axtell* (1981) 118 CA3d 246, 256, 173 CR 360.

The primary considerations in granting probation are the safety of the public; the nature of the offense; the loss to the victim; the needs of the defendant; and the interests of justice, including punishment, reintegration of the defendant into the community, and enforcement of conditions of probation. Pen C §1202.7. See 118 CA3d at 255 (decision to grant or deny probation must be based on whether confinement is necessary to protect public, whether defendant can best be rehabilitated through imprisonment or normal community conduct, and whether probation would unduly undermine seriousness of offense).

Any probation report ordered by the court must be made available to the court, the district attorney, and defense counsel at least 2 days before the time fixed for consideration of the report and pronouncement of judgment. On the defendant's request, the report must be provided 5 days beforehand. Pen C §1203d; see *People v Bohannon* (2000) 82 CA4th 798, 808-809, 98 CR2d 488, disapproved on other grounds in 41 C4th 1082, 1185 n13 (failure to provide report within this 5-day period denies defendant due process and requires remand for resentencing). The time within which the report must be made available may be waived by a written stipulation of the district attorney and defense counsel or by an oral stipulation in open court. Pen C §1203(b)(2)(E). If the defendant is not represented by counsel, the court must order the probation officer to discuss the contents of the report with the defendant. Pen C §1203d. At the sentencing hearing, the court must state for the record that it has read and considered the probation report. Pen C §1203(b)(3). Failure to make this

on-the-record statement may result in the reversal of the sentence. *People v Gorley* (1988) 203 CA3d 498, 506, 250 CR 15.

- **JUDICIAL TIP:** A decision by the sentencing judge to refer a case to a probation officer for an investigation and report will be greatly influenced by the policies and practice of the court and the probation department. In some counties, most misdemeanor cases are referred to the probation department. In others, only specific types of misdemeanor cases are referred. It is therefore important for the new judge to become familiar with the policies in his or her county.

### 1. [§75.51] Types of Probation

The court may grant one of two types of probation in misdemeanor cases:

(1) *Formal probation.* Formal probation is the suspension of the imposition or execution of sentence and the order of conditional and revocable release into the community under the supervision of a probation officer. Pen C §§1203(a), 1203.1(a).

(2) *Conditional sentence.* A conditional sentence, also referred to as court or summary probation, is the suspension of the imposition or execution of sentence and the order of conditional and revocable release into the community subject to the conditions of the court without the supervision of a probation officer. Pen C §§1203(a), (d), 1203b. A conditional sentence may be pronounced without referring the case to the probation officer. Pen C §1203b. If the case is not referred to the probation officer, the court may consider any information concerning the defendant that could have been included in a probation report. Pen C §1203(d).

A conditional sentence places greater responsibilities on the court than formal probation, requiring the court to perform two functions normally carried out by the probation officer. First, the court must furnish the defendant a written statement of the terms and conditions of the probation. Pen C §1203.12. Second, it must order the defendant to report to the court, so that the defendant's conduct may be supervised. Pen C §1203.1; *People v Municipal Court* (Lozano) (1956) 145 CA2d 767, 773, 303 P2d 375.

- **JUDICIAL TIP:** Formal probation is often appropriate in cases in which the defendant is required to pay a substantial sum in restitution to a victim or to complete an extended rehabilitation program and the court does not have the time or resources to monitor the defendant's progress. A grant of formal probation should always be preceded by the preparation of a probation report.

## 2. [§75.52] Length of Probation

The period of probation in misdemeanor cases may not exceed three years unless the maximum sentence provided by law exceeds three years, in which case probation may be enforced for a period not to exceed the maximum county jail sentence that could be imposed. Pen C §1203a. The probationary period may exceed three years if, for instance, the court imposes consecutive suspended sentences based on multiple charges, and the maximum sentence for all the charges exceeds three years. See *Fayad v Superior Court* (1957) 153 CA2d 79, 82, 313 P2d 669 (defendant placed on probation for three years and six months after receiving seven consecutive six-month sentences). Statutory exceptions to the three-year rule are as follows:

- Pen C §272(a)(1) (contributing to delinquency of a minor—five years),
- Pen C §273a (abusing or endangering health of a child—minimum four years),
- Pen C §273d(c)(1) (inflicting cruel or inhuman corporal punishment on a child—minimum three years),
- Veh C §§23152, 23153 (DUI offenses—minimum three years and maximum five years under Veh C §23600(b)), and
- Health & S C §11550(a) (under the influence of controlled substance—five years).

If the court fails to specify a term of probation, it is deemed to be for the maximum jail sentence that could be imposed. *People v Blakeman* (1959) 170 CA2d 596, 599, 339 P2d 202 (simple order of “sentence suspended” resulted in six-month probation period for one count of battery).

## 3. [§75.53] Imposition or Execution of Sentence Suspended

In granting probation, the court may either suspend the imposition of sentence or suspend the execution of sentence. Pen C §§1203(a), 1203.1(a). The decision to suspend imposition of sentence or impose sentence and suspend its execution will be influenced by how much discretion the court wishes to retain in sentencing the defendant should he or she violate probation. If the court wishes to retain the full range of sentencing options in the event of a future probation violation, it should suspend the imposition of sentence. By doing so, the court, on revoking probation, may sentence the defendant for any length of time up to the maximum possible sentence for the offense committed, less conduct and custody credits. Pen C §§1203.2(c), 2900.5(a). If, at the time probation was granted, sentence was imposed and its execution suspended, the court revoking probation must order the previously imposed sentence into

effect. Pen C §1203.2(c). The court does not have jurisdiction to reduce the previously imposed sentence once it revokes probation. *People v Howard* (1997) 16 C4th 1081, 1087–1088, 68 CR2d 870; *People v Nubla* (1999) 74 CA4th 719, 726–728, 88 CR2d 265.

- **JUDICIAL TIP:** When the court imposes sentence and suspends its execution, it should inform the defendant that if he or she violates the terms and conditions of probation and formal revocation of probation results, the court will have no discretion to incarcerate the defendant for any term less than the term just imposed. This statement will underscore the importance of the defendant’s compliance with the terms of probation and the irreversible consequences of noncompliance.

For a comprehensive discussion of sentencing on revocation of probation, see California Judges Benchguide 84: *Probation Revocation* (Cal CJER).

#### **4. [§75.54] Conditions of Probation**

The court has broad discretion to impose reasonable conditions on a grant of probation that are necessary to secure justice, make amends to society and any individuals injured by the defendant’s criminal actions, and foster the defendant’s rehabilitation. Pen C §1203.1(j); *In re Bushman* (1970) 1 C3d 767, 776, 83 CR 375, disapproved on other grounds in 15 C3d at 486 n1. Some conditions, such as restitution to the victim, time in jail, or participation in counseling programs, are specifically authorized by statute. Other conditions are mandatory if the defendant has committed a specific crime. See §75.55. In addition to imposing any statutory conditions of probation, the court may fashion specific conditions reasonably related to the offense committed and aimed at deterring future criminal conduct. See §75.56.

##### **a. [§75.55] Statutory Conditions**

Statutory conditions the court may impose on a grant of probation include:

- *Jail time and fine.* The court may imprison the defendant in county jail for not more than the maximum jail term that could be imposed and/or fine the defendant no more than the maximum fine provided by law in the case. Pen C §1203.1(a). Many code provisions require the defendant to serve a minimum jail term or pay a minimum amount of fine. See California Judges Benchguide 74: *Sentencing Guidelines for Common Misdemeanors and Infractions* (Cal CJER).

- *Victim restitution order and restitution fine.* The court must order payment of restitution to any victims for economic losses and impose a restitution fine of not less than \$150 and not more than \$1000. Pen C §1202.4(a)(3), (b), (m). See §§75.24–75.31.

- *Probation revocation restitution fine.* The court must impose an additional probation revocation restitution fine in the same amount as that imposed under Pen C §1202.4(b). Pen C §1202.44. This additional fine is suspended and does not become effective unless and until the defendant's conditional sentence or probation is revoked. Pen C §1202.44. See §75.32.

- *AIDS education.* Defendants convicted of the following offenses must participate in an AIDS education program if the offense involved intravenous use of a controlled substance: Health & S C §11350(a) or §11377(a) (possession of specified narcotics), Health & S C §11550 (use of specified narcotics), Bus & P C §4142 (unlawful sale of hypodermic needle or syringe), or Pen C §647(f) (under the influence in public place). Pen C §1001.10; *People v Henson* (1991) 231 CA3d 172, 180, 282 CR 222. In addition, defendants convicted of Pen C §647(a) (lewd conduct in public) or Pen C §647(b) (prostitution) are required to participate in an AIDS education program. Pen C §1001.10.

For discussion of mandatory AIDS testing and education for persons convicted of specified sex offenses, see §75.33.

- *Controlled substance testing and use prohibition.* When the court has reason to believe that the defendant is or has been a user of controlled substances, it may require the defendant to submit to periodic tests to determine whether the defendant is addicted to a controlled substance. Health & S C §11551(a). A marijuana user may not be subject to this condition. Health & S C §11553. When a defendant is convicted of possession, use, sale, or other furnishing of a controlled substance, the court, on recommendation of the probation officer, must require the defendant not to use or be under the influence of any controlled substance and to submit to drug testing at the request of the probation officer. Pen C §1203.1ab.

- *Controlled substance education or treatment.* The court must order a defendant convicted of possession of a controlled substance to undertake education or treatment if such a service is locally available and the defendant is likely to benefit from the service. Health & S C §11373(a).

For a discussion of mandatory drug treatment for persons convicted of nonviolent drug possession offenses, see §75.57.

- *Alcohol use prohibition.* The court must require a defendant convicted of a sex offense enumerated in Pen C §290 to refrain from the use of alcohol if the court finds that the defendant was intoxicated or

addicted to alcohol at the time the offense was committed. Pen C §1203.02.

- *Completion of batterer's treatment program.* Defendants convicted of domestic abuse offenses must successfully complete a batterer's treatment program or, if none is available, another appropriate counseling program. Pen C §1203.097(a). For a comprehensive discussion of mandatory and discretionary probation conditions in domestic violence cases, see California Judges Benchbook: Domestic Violence Cases in Criminal Court, §§7.24-7.25 (Cal CJER 2014).

- *Work camp.* If road camps, farms, or other public work venues are available, the court may require the defendant to work at such places instead of serving time in jail. Pen C §1203.1(c).

- *Reimbursement of costs of emergency response.* The defendant may be required to pay restitution to a public agency for the costs of an emergency response. Pen C §1203.1(e). At the sentencing hearing, the defendant has the right to confront witnesses and present evidence to refute the amount claimed to be due to the public agency. Pen C §1203.1f.

- *Employment and account of earnings.* The court may require the defendant to work and earn money for the support of his or her dependents or for payment of any fine or restitution, to keep an account of his or her earnings, to report the earnings to the probation officer, and to apply them as directed by the court. Pen C §1203.1(d).

- *Counseling or education programs for persons convicted of child abuse or neglect.* The court may require a defendant convicted of child abuse or neglect to participate in counseling and/or education programs, including, but not limited to, parent education or parenting programs operated by community colleges, school districts, other public agencies, or private agencies. Pen C §1203.1(i)(1).

- *Stay-away order.* The court may order a defendant convicted of a sex offense requiring criminal registration under Pen C §290 to stay away from the victim and the victim's residence or place of employment and to have no contact with the victim in person, by telephone or electronic means, or by mail. The order may be made at the request of the victim or in the court's discretion. Pen C §1203.1(i)(2).

- *Criminal protective order in domestic violence cases or sexual offense cases.* The court must consider issuing an order restraining the defendant from any contact with the victim in cases in which the defendant has been convicted of a crime of domestic violence, a misdemeanor violation of Pen C §261.5 (unlawful sexual intercourse), or any crime that requires the defendant to register as a sex offender under

Pen C §290. Pen C §136.2(i). The order may be valid for up to 10 years, as determined by the court. Pen C §136.2(i)(1). The duration of the order must be based on the seriousness of the facts before the court, the probability of future violations, and the safety of the victim and his or her immediate family. Pen C §136.2(i)(1). This protective order may be issued by the court regardless of whether the defendant is sentenced to the state prison or a county jail, or whether imposition of sentence is suspended and the defendant is placed on probation. Pen C §136.2(i)(1). Additionally, the court must impose, as a condition of probation for a crime in which the victim is a person defined in Fam C §6211, a criminal protective order protecting the victim from further acts of violence, threats, stalking, sexual abuse, and harassment, and, if appropriate, containing residence exclusion or stay-away conditions. Pen C §1203.097(a). See California Judges Benchbook: Domestic Violence Cases in Criminal Court, §§7.12, 7.24 (Cal CJER 2014).

- *Community service.* The court may require a defendant convicted of a nonviolent or nonserious offense who is ordered to participate in community service to perform the service by removing graffiti or by doing house repairs or yard services for senior citizens or senior centers. Pen C §1203.1(g)–(h).

- *Criminal registration.* The criminal registration requirements outlined in §75.34 are applicable to defendants released on probation. For a discussion of notice of criminal registration that defendants must be given on release from probation, see §75.45.

#### **b. [§75.56] Nonstatutory Conditions**

The court is not limited to imposing statutory conditions of probation. It may fashion any condition that serves one of the purposes of probation listed in Pen C §1203.1(j) (*i.e.*, to secure justice, make amends to society or victims of defendant's crime, and to foster rehabilitation of the defendant). *People v Carbajal* (1995) 10 C4th 1114, 1120, 43 CR2d 681. A condition of probation will be upheld unless it (1) has no relationship to the crime for which the defendant was convicted, (2) relates to conduct that is not criminal, and (3) requires or forbids conduct that is not reasonably related to future criminality. *People v Lent* (1975) 15 C3d 481, 486, 124 CR 905; *People v Dominguez* (1967) 256 CA2d 623, 627, 64 CR 290. A probation condition that regulates conduct that is not criminal is valid if that conduct is reasonably related to the crime for which the defendant was convicted or to future criminality. *People v Lent*, *supra*, 15 C3d at 486; *People v Carbajal*, *supra*, 10 C4th at 1121.

Conditions of probation must be stated in the probation order with sufficient precision to give notice to the defendant of what is required of

him or her and to allow the court to determine whether any condition has been violated. *People v Hernandez* (1991) 226 CA3d 1374, 1380, 277 CR 444, disapproved on other grounds in 5 C4th at 237. In addition, to prevent a successful challenge to any condition on appeal, the court should state clearly on the record the relationship between the crime and the conditions sought to be imposed. *People v Clark* (1982) 130 CA3d 371, 386, 181 CR 682.

Examples of probation conditions that have passed the *Lent-Dominguez* test include the following:

- A restraint from engaging in an otherwise lawful business. *People v Burden* (1980) 105 CA3d 917, 920, 166 CR 542.
- Participation in an AIDS education program. *People v Patillo* (1992) 4 CA4th 1576, 1579, 6 CR2d 456, disapproved on other grounds in 5 C4th at 237.
- Submission to warrantless searches. *People v Bravo* (1987) 43 C3d 600, 607, 238 CR 282; *People v Balestra* (1999) 76 CA4th 57, 65–68, 99 CR2d 77.
- Submission to alcohol and drug testing at the probation officer’s discretion. 76 CA4th at 68–69.
- Home detention. *People v Reinertson* (1986) 178 CA3d 320, 325, 223 CR 670.
- A prohibition from going near probationer’s own property. *People v Watkins* (1987) 193 CA3d 1686, 1689, 239 CR 255.
- A prohibition against associating with persons known to have criminal records. *People v Robinson* (1988) 199 CA3d 816, 818, 245 CR 50.
- A prohibition against associating with known gang members and displaying symbols known to be gang-related. *People v Leon* (2010) 181 CA4th 943 949–950, 104 CR3d 410; *People v Lopez* (1998) 66 CA4th 615, 623–629, 78 CR2d 66.
- A prohibition from going near school campuses during school hours provided the condition is sufficiently precise. *People v Barajas* (2011) 198 CA4th 748, 760–762, 131 CR3d 412 (probation condition modified to read “You’re not to knowingly be on or within 50 feet of any school campus during school hours unless you’re enrolled in it or with prior permission of the school administrator or probation officer”)
- A waiver of custody credits under Pen C §2900.5. *People v Johnson* (2002) 28 C4th 1050, 1054–1058, 123 CR2d 700.

- Submission to periodic polygraph examinations. *Brown v Superior Court* (2002) 101 CA4th 313, 319–321, 124 CR2d 43 (court must impose restrictions on examiner’s questions); *People v Miller* (1989) 208 CA3d 1311, 1314, 256 CR 587.
- A restriction on access to the Internet when use of the Internet is related to the crime. *People v Harrison* (2005) 134 CA4th 637, 641–647, 36 CR3d 264 (defendant convicted of possessing child pornography).

Probation conditions that have been held invalid include the following:

- A prohibition against pregnancy. *People v Zaring* (1992) 8 CA4th 362, 373, 10 CR2d 263.
- A probation officer’s approval of defendant’s residence. *People v Bauer* (1989) 211 CA3d 937, 944, 260 CR 62.
- Wearing of a T-shirt publicly proclaiming defendant as a thief. *People v Hackler* (1993) 13 CA4th 1049, 1059, 16 CR2d 681.
- A waiver of the knock and notice requirements of Pen C §§844 and 1531. *People v Freund* (1975) 48 CA3d 49, 58, 119 CR 762.

For a comprehensive discussion of conditions of probation, including illustrations of both valid and invalid conditions, see 3 Witkin & Epstein, California Criminal Law, *Punishment* §§652–679 (4th ed 2012).

### 5. [§75.57] Mandatory Probation Under Proposition 36

Proposition 36 requires sentencing of specified defendants convicted of “nonviolent drug possession offenses” to probation with a mandatory drug treatment component. Pen C §1210.1. See Pen C §1210(a) (non-violent drug possession offenses defined). Courts must impose, as a condition of probation, completion of a drug treatment program not to exceed 12 months, with optional aftercare of up to six months. Pen C §§1210(b), 1210.1(c)(3). The court may also require that the defendant participate in vocational training, family counseling, literacy training, and/or community service. Pen C §1210.1(a). But the court may not incarcerate the defendant as a condition of probation. Pen C §1210.1(a).

See Pen C §1210.1(b) for conditions that render defendants ineligible for mandatory probation under Pen C §1210.1.

For a comprehensive discussion of Proposition 36, see 2 Witkin & Epstein, California Criminal Law, *Crimes Against Public Peace and Welfare* §§164–175 (4th ed 2012).

## 6. [§75.58] Rejection of Probation

A defendant has the right to refuse a grant of probation and to receive his or her sentence. *In re Bushman* (1970) 1 C3d 767, 776, 83 CR 375, disapproved on other grounds in 15 C3d at 486 n1. Generally, a defendant will refuse probation if he or she considers any proposed conditions of probation to be more harsh or objectionable than the sentence the court would otherwise impose. 1 C3d at 776. However, if the defendant does not object to the imposition of a probation condition at the sentencing hearing, he or she waives the right to challenge the condition on appeal. *People v Welch* (1993) 5 C4th 228, 236-237, 19 CR2d 520. The courts of appeal are split on whether the *Welch* waiver rule applies even when defendant alleges that a probation condition is unconstitutional. See *People v Gardineer* (2000) 79 CA4th 148, 151-152, 93 CR2d 863 (yes); *In re Justin S.* (2001) 93 CA4th 811, 814-815, 113 CR2d 466 (no: failure of minor to object in juvenile court did not foreclose minor from raising claims on appeal).

- **JUDICIAL TIP:** The court should always ask the defendant if he or she understands the proposed terms and conditions of probation and accepts probation on those terms and conditions.

## IV. [§75.59] SCRIPT: PRONOUNCEMENT OF JUDGMENT AND SENTENCE

(1) *Call the case and ask for appearances:*

People v \_\_\_\_\_. Is your true name \_\_\_\_\_?

Counsel, may I have your appearances?

(2) *Address the appointment of counsel. Add as appropriate:*

[Mr./Ms.] [name of defendant], do you have an attorney whom you have hired to represent you in this matter? Do you want to be represented by an attorney in this case? Would you like to speak to a public defender?

[If defendant indicates that he or she wishes to be represented by an attorney, add]

I will continue this case for \_\_\_\_ days to allow you time to speak to [your own attorney/the public defender]. Pronouncement of judgment and sentence is scheduled for [date], at \_\_\_\_ [a.m./p.m.] You should be ready to proceed with [your own attorney/the public defender] at that time.

**Note:** The court does not have to inform the defendant of the right to counsel if the defendant has waived the right earlier in the proceedings,

unless the defendant appeared with counsel at an earlier hearing. For discussion, see §75.12.

(3) *Arraign the defendant (Pen C §§1200, 1201):*

[Mr./Ms.] [name of defense attorney], do you waive formal arraignment for judgment and sentence?

[If defendant does not waive arraignment]

[Mr./Ms.] [name of defendant], in this case, Case Number \_\_\_\_, you were charged with violating section(s) \_\_\_\_ of the \_\_\_\_\_ Code. On [date], you entered a plea of [not guilty/guilty/no contest] to the charge(s).

[If the defendant pleaded not guilty]

On [date], a [jury/court] returned a verdict finding you guilty of a violation of section(s) \_\_\_\_ of the \_\_\_\_\_ Code.

[Continue]

Is there any legal cause why judgment should not now be pronounced?

(4) *Acknowledge consideration of probation report and/or other information:*

This matter was referred to the probation department for preparation of a presentence report. Let the record show that I have received, read, and considered the report filed on [date], and consisting of \_\_\_\_ pages. I have also received, read, and considered [list all items considered, including alternative sentencing report filed by defense counsel and letters from victims].

[Mr./Ms.] [name of defense attorney], have you received a copy of the report? Have you had an opportunity to read the report?

[Or]

A presentence report was not ordered in this case. However, I have received, read, and considered [state the information considered as required under Pen C §1203(d)].

(5) *Request and receive comments and/or evidence from the parties:*

[Mr./Ms.] [name of defense attorney], do you have any comments, recommendations, or additional evidence relating to the matter of probation and sentence that you would like to present?

[Defense counsel responds]

[Mr./Ms.] [name of district attorney], do you have any comments, recommendations, or additional evidence to present as to the matter of probation and sentence?

[District attorney responds]

[Mr./Ms.] [name of defendant], is there anything that you would like to say to the court on your behalf before you are sentenced?

(6) *Pronounce judgment and sentence. No-probation sentence:*

[Sentence to county jail]

Probation is formally denied. It is the judgment of this court that the defendant be imprisoned in the county jail of \_\_\_\_\_ County for a term of \_\_\_\_ [days/months]. [The defendant is to surrender to the custody of the sheriff on [date]/The defendant is remanded to the custody of the sheriff.]

[Subtract custody and conduct credits]

Under the provisions of Penal Code section 2900.5, the defendant is entitled to a credit against this jail term of \_\_\_\_ days, which is attributable to the defendant's presentence detention from [date] to [date]. In addition, the defendant is entitled to good-time and work-time credits amounting to \_\_\_\_ days in accordance with Penal Code section 4019.

[Imposition of fine and penalty assessments]

Probation is formally denied. It is the judgment of this court that the defendant pay a fine of \$\_\_\_\_ and penalty assessments of \$\_\_\_\_. The fine is to be paid [immediately/by [date]/in installments of \$\_\_\_\_ on the following dates [specify]].

[Imposition of fine with imprisonment for default of payment]

Probation is formally denied. It is the judgment of this court that the defendant pay a fine of \$\_\_\_\_ and penalty assessments of \$\_\_\_\_. The fine is to be paid [immediately/by [date]/in installments of \$\_\_\_\_ on the following dates [specify]]. It is further the order of this court that if the defendant defaults on payment, the defendant be imprisoned in the county jail of \_\_\_\_\_ County until the fine is satisfied, for a term of one day's imprisonment for each \$\_\_\_\_ of the fine remaining unpaid.

[Imposition of restitution fine (\$150-\$1000) (Pen C §1202.4(b))]

The court imposes a restitution fine of \$\_\_\_\_ to be deposited in the state Restitution Fund. The fine is to be paid [immediately/by [date]/in installments of \$\_\_\_\_ on the following dates [specify]].

[If applicable]

In setting the amount in excess of the minimum fine, the court has considered [specify factors].

[Apply custody credit toward fines. Add as appropriate]

Under Penal Code section 2900.5, the defendant's fines are reduced by \$\_\_\_\_ for the period of the defendant's presentence detention from [date] to [date]. The fines were credited at \$\_\_\_\_ per day.

[Order of restitution (Pen C §1202.4(f))]

It is further the judgment of this court that the defendant pay restitution in the sum of \$\_\_\_\_ to [name of victim] [by [date]/in installments of \$\_\_\_\_ on the following dates [specify]].

[Multiple count cases; decision to run multiple sentences concurrently or consecutively]

It is the judgment of this court that the sentence of \_\_\_\_ [days/months] for Count \_\_\_\_ shall run [concurrently/consecutively] with the sentence of [days/months] for Count \_\_\_\_.

(7) Pronounce judgment and sentence. Probation granted:

[Imposition of sentence suspended]

Imposition of sentence is suspended for a period of \_\_\_\_ [months/years], during which time the defendant is placed on [formal probation in the care, custody, and control of the probation officer of \_\_\_\_\_ County/court probation].

[Or]

[Execution of sentence suspended]

It is the judgment of this court that the defendant be imprisoned in the county jail for a term of \_\_\_\_ [days/months] and/or pay a fine of \$\_\_\_\_ plus penalty assessments of \$\_\_\_\_. The execution of this sentence is suspended for a period of \_\_\_\_ [months/years], during which time the defendant is placed on [formal probation in the care, custody, and control of the probation officer of \_\_\_\_\_ County/court probation].

[Mr./Ms.] [name of defendant], if you should return to this court by violating your probation and your probation is formally revoked, the court will have no choice but to send you to county jail for the full length of the term just stated. Do you understand that?

[Continue]

[State conditions of probation]

The terms and conditions of probation are as follows:

[Examples]

- The defendant is ordered to obey all laws.
- The defendant is ordered to serve \_\_\_ days in county jail beginning [date], at \_\_\_ [a.m./p.m.]
- Under the provisions of Penal Code section 2900.5, the defendant is entitled to a credit against this jail term of \_\_\_ days, which is attributable to the defendant's presentence detention from [date] to [date]. In addition, the defendant is entitled to good-time and work-time credits amounting to \_\_\_ days in accordance with Penal Code section 4019.
- The defendant is ordered to pay a fine of \$\_\_\_\_\_ in installments of \$\_\_\_\_\_ to be paid on the following dates [specify].
- The defendant is ordered to pay a restitution fine of \$\_\_\_\_\_ to be deposited in the state Restitution Fund.
- The court imposes an additional probation revocation restitution fine in the same amount, but this fine is suspended unless the defendant's probation is revoked.
- Under Penal Code section 2900.5, the defendant's fines are reduced by \$\_\_\_\_\_ for the period of the defendant's presentence detention from [date] to [date]. The fines were credited at \$\_\_\_\_\_ per day.
- The defendant is ordered to pay restitution to [name of victim] in the amount of \$\_\_\_\_\_, to be paid in monthly installments of \$\_\_\_\_\_.
- The defendant is ordered to perform \_\_\_ hours of community service and to present proof of completion in this court on [date], at \_\_\_ [a.m./p.m.]
- The defendant is ordered to submit to urinalysis or other testing to detect the use of dangerous drugs, as directed by the probation officer.

[Continue]

[Determine whether the defendant accepts probation]

[Mr./Ms.] [name of defendant], do you fully understand the terms and conditions of probation that I have just ordered? Do you accept probation

on those terms and conditions, and will you abide by all the conditions of probation?

*[If the defendant accepts probation, proceed to Step 8]*

*[If the defendant refuses probation]*

The defendant has refused to accept probation on the terms and conditions ordered by this court. Therefore it is the judgment of this court *[follow procedure under Step 6]*.

*(8) Advise defendant of appeal right (not applicable if defendant pleaded guilty or no contest or is represented by counsel). Cal Rules of Ct 8.853(a), 4.306; Pen C §1466):*

*[Mr./Ms.] [name of defendant]*, it is the duty of this court to advise you of your right to appeal to the appellate division of the superior court of this county from the judgment of this court in *[imposing sentence/ imposing sentence and suspending execution of sentence and granting you probation/suspending imposition of sentence and granting you probation]*. If you want to file an appeal, there is a 30-day limit within which you must act by filing a written Notice of Appeal. This 30-day period starts today.

Your Notice of Appeal must be filed with the clerk of this court and it must be signed by you or your attorney. It must clearly specify what it is you are appealing from, and whether you are appealing from the whole judgment or just part of it.

*[If defendant is subject to jail term or fine in excess of \$500, or is likely to suffer significant adverse collateral consequences (Cal Rules of Ct 8.851(a))]*

If you appeal and you do not have the money to hire an attorney, the appellate division of the superior court will appoint an attorney to represent you on appeal.

*[All other defendants]*

If you appeal and you do not have the money to hire an attorney, the appellate division of the superior court may appoint an attorney to represent you on appeal.

*[Continue]*

It is your responsibility to keep the appellate division of the superior court advised of your current mailing address. The court will contact you to see whether you have a right to free counsel after you have filed the Notice of Appeal.

Do you understand your right to appeal as I have explained it to you? Do you understand that unless your present attorney is going to file a Notice of Appeal for you, it is your duty to file your own Notice of Appeal, and it must be done within 30 days from today?

Do you have any questions that you want to ask the court about your right to appeal?

(9) *Advise the defendant of the duty to register with local law enforcement authorities. Add as appropriate:*

[Mr./Ms.] [name of defendant], you are required to register, under [Pen C §186.30/Pen C §290/Health & S C §11590], with the chief of police in the city in which you now reside, or with the sheriff if you live in an unincorporated area. You have [10 (under Pen C §186.30)/5 working days (under Pen C §290)/30 days (under Health & S C §11590)] in which to register. You will be asked to sign a registration form and you will be photographed and fingerprinted.

If you should move to a new address, it is your responsibility to notify, in writing within [5 working days (under Pen C §290.013)/10 days (under Pen C §186.32(b) and Health & S C §11590)], the law enforcement agency with whom you are registered of your new address.

[Defendants registering under Pen C §290]

You must update your registration with the chief of police or sheriff each year within 5 working days of your birthday. In addition, if you change your name, you must provide written notification of your name change to the chief of police or sheriff within 5 working days.

Do you have any questions that you want to ask the court about your duty to register?

(10) *Advise the defendant of the right to rehabilitation (Pen C §§1203.4a, 1203.4):*

[Mr./Ms.] [name of defendant], if you successfully perform the sentence that I have imposed today, you may, one year from today's date, request the court to [withdraw your plea of guilty/withdraw your plea of no contest/set aside the guilty verdict] and dismiss the accusatory pleading. The court will grant this relief and release you from all penalties and disabilities resulting from your conviction if you are not then serving a sentence for any offense or under charge of the commission of any crime, and have lived an honest and upright life and conformed to and obeyed the laws of the land.

You may make this application and change of plea in person or by your attorney, or by the probation officer authorized in writing. Should you

be subsequently prosecuted for any other offense, the conviction may be pleaded and proved and will have the same effect as if relief had not been granted.

Do you have any questions that you want to ask the court about your rights to relief?

#### **V. [§75.60] ADDITIONAL REFERENCES**

California Criminal Law Procedure and Practice, chaps 35, 36, 38  
(Cal CEB 2014)

3 Witkin & Epstein, California Criminal Law, *Punishment* §§18-36,  
102-127, 306-308, 464-483, 601-679 (4th ed 2012)

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