

CALIFORNIA JUDGES BENCHGUIDES

Benchguide 75

MISDEMEANOR SENTENCING

[REVISED 2008]



ADMINISTRATIVE OFFICE
OF THE COURTS

EDUCATION DIVISION/CENTER FOR
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I. [§75.1] SCOPE OF BENCHGUIDE

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 six hours and not more than five 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 six hours and not more than five 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 ten 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 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 §75.17.*

(2) *If defendant appears without counsel, advise defendant of the right to counsel and ascertain whether he or she desires assistance of counsel. If defendant answers in the affirmative, 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. [Note: 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 §75.18.*

(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 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. If defendant or defense counsel makes a motion for new trial or in arrest of judgment, or a question about defendant's sanity is raised, hear the matter or obtain time waiver from defendant and continue the matter for hearing at a later date. For discussion, see §§75.10–75.16.*

(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 §75.56.*

(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 [§75.19](#).

(9) *Request and receive any comments and/or evidence from the district attorney, including any statements from the victim(s).* For discussion, see [§75.19](#).

(10) *Determine whether to grant or deny probation.* For discussion, see [§75.56](#).

(11) *If probation is denied:*

- *Render judgment of county jail term and/or fine.* For discussion, see [§§75.27-75.29](#).
- *If defendant is convicted of multiple counts:*
 - *Impose 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 [§75.42](#).
 - *State whether sentences are to run concurrently or consecutively.* For discussion, see [§75.43](#).
- *If applicable, order defendant to pay restitution to any victim(s) for economic losses. [Pen C §1202.4\(f\)](#).* For discussion, see [§§75.30-75.36](#).
- *Impose a restitution fine of not less than \$100 and not more than \$1000. [Pen C §1202.4\(b\)](#).* For discussion, see [§75.37](#).
- *Calculate custody and conduct credits and subtract total from imposed county jail term and/or fines.* For discussion, see [§§75.44-75.48](#).
- *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 [§75.59](#).
- *Specify term of probation.* For discussion, see [§75.58](#).
- *Specify conditions of probation.* For discussion, see [§§75.60-75.62](#).

- *If service of time in county jail is made a condition of probation, calculate custody and conduct credits and subtract from jail term. For discussion, see §§75.44–75.47.*
- *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 §75.64.*

(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 §§75.50–75.52.*

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 Jackson* (1987) 193 CA3d 393, 403, 238 CR 327 (illness); *People v Dunn* (1986) 176 CA3d 572, 575, 222 CR 273 (retirement); *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:

- *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. [Pen C §1449](#). 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. [Pen C §1449](#).
- *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. [Pen C §1449](#); see [§§75.11–75.15](#).
- *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. [Pen C §1449](#); see [§75.16](#).

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 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 who has applied for probation is entitled to release on 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. [Pen C §1275](#).

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](#), the court must refer the defendant to the probation department for an assessment of the risk of recidivism posed by the defendant, which the court must consider in sentencing. [Pen C §1203\(d\)](#). The risk assessment tool, called the State-Authorized Risk Assessment Tool for Sex Offenders (SARATSO) is being phased in by the

Sex Offender Punishment, Control, and Containment Act of 2006 (see specifically [Pen C §§290.03–290.08](#)). By July 1, 2008, each county probation department will be required to assess every eligible defendant for whom it prepares a report under [Pen C §1203](#). [Pen C §290.06\(a\)\(5\)](#).

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).

[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\(a\)](#); see [§75.16](#).

(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\(b\)](#); see [§§75.11–75.15](#).

C. Motions Before Judgment

1. [§75.11] Motion for New Trial

A defendant may file a motion for new trial after the jury has rendered a verdict ([Pen C §1179](#)), or after the court has rendered a decision in a nonjury trial (see *In re Rothrock (1939) 14 C2d 34, 40, 92 P2d 634*). When the court grants a new trial, the parties are placed in the same position as if no trial had been held. [Pen C §1180](#).

a. [§75.12] Timeliness of Motion

The motion must be made and decided before (a) judgment, (b) the making of an order granting probation, or (c) the commitment of the defendant for narcotics addiction or insanity, whichever occurs first. [Pen C §1182](#). The defendant waives the right to move for a new trial by failing

to make the motion in a timely manner. *People v Pineda* (1967) 253 CA2d 443, 449, 62 CR 144.

- **JUDICIAL TIP:** Some counties have local rules providing that prejudgment motions must be made within a specific period of time before the date of sentencing. In the absence of such a rule, the court may want to ask defense counsel, at the time sentencing is scheduled, to file any anticipated motions by a specified date before the sentencing date. This gives the sentencing judge an opportunity to review any motions well before the sentencing hearing. However, if a motion is made initially at the sentencing arraignment and the court is not prepared to hear the motion, the court should try to obtain a waiver of time for sentencing from the defendant and reschedule the hearing for a later date, at which time the motion can be heard.

b. [§75.13] Grounds for Motion

Grounds for a new trial include:

- The improper absence of the defendant at trial (Pen C §1181(1)).
- Jury misconduct (Pen C §1181(2)–(4)).
- Court error or prosecutorial misconduct (Pen C §1181(5)).
- A verdict contrary to law or evidence (Pen C §1181(6)–(7)).
- Discovery of new material evidence that could not, with reasonable diligence, have been produced at trial (Pen C §1181(8)).
- Unavailability of the court transcript when the right to a transcript is not waived (Pen C §1181(9)).
- The court’s refusal to hear a motion for new trial (Pen C §1202).
- The court’s failure to rule on the motion before pronouncing judgment or making an order granting probation (Pen C §1202).

In addition to these statutory grounds, the court may grant a new trial when an error has occurred resulting in the denial of the defendant’s right to a fair trial and the defendant has had no earlier opportunity to raise the issue. *People v Mayorga* (1985) 171 CA3d 929, 940, 218 CR 830; see, e.g., *People v Fosselman* (1983) 33 C3d 572, 582, 189 CR 855 (ineffective assistance of counsel); *People v Davis* (1973) 31 CA3d 106, 109, 106 CR 897 (defendant deprived of testimony of material witness).

c. [§75.14] Modification of Verdict

The court may modify a verdict to a lesser necessarily included offense or to a lesser degree of the same charged crime if the court is not convinced that the evidence justifies the verdict, but concludes that the evidence is sufficient to support the lesser offense. [Pen C §1181\(6\)](#); *People v Lagunas* (1994) 8 C4th 1030, 1034, 36 CR2d 67. If the court finds that the evidence justifies conviction of a lesser-related offense, the court's only remedy is to grant a new trial; it may not modify the verdict to reflect a conviction of the offense. 8 C4th at 1034. Modification of a verdict to a lesser punishment is also permitted in cases in which the court or jury has the statutory authority to recommend or determine punishment as part of the verdict. [Pen C §1181\(7\)](#).

2. [§75.15] Motion in Arrest of Judgment

A defendant may file a motion in arrest of judgment for an order that judgment may not be rendered on a plea, finding, or guilty verdict. [Pen C §1185](#). The effect of an order arresting judgment is to place the defendant in the same position as before the trial was conducted. [Pen C §1187](#). The motion must be made and determined before pronouncement of judgment. [Pen C §1185](#).

The motion may be based on any of the following defects appearing on the face of the complaint, unless the objection has been waived by the defendant's failure to demur before the entry of his or her plea ([Pen C §§1012, 1185](#)):

- The court does not have jurisdiction of the charged offense ([Pen C §1004\(1\)](#)).
- The complaint does not meet the specificity requirements of [Pen C §§950 and 952](#) ([Pen C §1004\(2\)](#)).
- The complaint improperly joins offenses ([Pen C §1004\(3\)](#)).
- The facts do not constitute a public offense ([Pen C §1004\(4\)](#)).
- The facts, if true, constitute a legal justification, excuse, or other legal bar to the prosecution ([Pen C §1004\(5\)](#)).

Although it is typically up to the defendant to bring the motion in arrest of judgment, the court may, on its own motion, arrest the judgment for any of these defects in the accusatory pleading. [Pen C §1186](#).

3. [§75.16] Motion To Determine Competency

When the court believes the defendant is mentally incompetent, it must delay sentencing until the issue of the defendant's competency has been heard and determined. [Pen C §§1201\(a\), 1449](#). Note that [Pen C](#)

§1367 refers to the defendant’s mental incompetency, while Pen C §§1201(a) and 1449 use the term “insanity.” However, the two terms are synonymous in this context, because the procedures for determining the defendant’s insanity under Pen C §§1201(a) and 1449 are those found in Pen C §§1367.1–1375.5. A court cannot impose sentence on an individual who is mentally incompetent. Pen C §1367. A person is mentally incompetent who, as a result of a mental disorder or developmental disability, is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner. Pen C §1367.

The issue of mental competence may be raised initially by the defendant, defense counsel, or the court on its own motion. Pen C §1367.1(a). When defense counsel informs the court that counsel believes the defendant is, or may be, mentally incompetent, the court must suspend the criminal proceedings and order the defendant to a county health care facility for a 72-hour evaluation and treatment under Welf & I C §5150. Pen C §§1367.1(b)–(c), 4011.6. If defense counsel believes that the defendant is competent, the court may nevertheless order the evaluation and treatment. Pen C §1367.1(b). If, after completion of the treatment, the court still believes that the defendant may be incompetent, the court may certify the case for a formal competency hearing. Pen C §§1367.1(d), 1368(b), 1369. Sentencing proceedings remain suspended until the defendant is found mentally competent. Pen C §§1367.1(c), 1368(c).

BULLETIN: The Second District Court of Appeal has declared that Pen C §1367.1 is unconstitutional, holding that the statute deprives misdemeanor defendants of equal protection. The court found no compelling state interest to require a misdemeanor defendant, believed to be incompetent because of a mental disorder, to submit to involuntary evaluation and treatment under the Lanterman-Petris-Short Act instead of, or before, a competency determination. *Pederson v Superior Court (2003) 105 CA4th 931, 939–942, 130 CR2d 289*. The court directs all trial courts to handle misdemeanor cases according to Pen C §1368, in the same manner as felony cases. 105 CA4th at 943. CJER has chosen to retain the discussion in this section pending further case law developments and/or legislative revision of the codes.

For a more comprehensive discussion of court procedures under Pen C §§1367.1, 1368, and 4011.6, see California Judges Benchguide 63: *Competence To Stand Trial* (Cal CJER).

D. Pronouncement of Judgment and Sentence

1. Rights of Defendant

a. [§75.17] 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 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. [§75.18] 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. [§75.19] 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 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. [§75.20] 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 §1203.72. 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. [§75.21] 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. [§75.22] 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. [§75.23] Testimony of Defense Witnesses

The defendant may call witnesses 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. 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. [§75.24] 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](#). Instead 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 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. [§75.25] 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. [§75.26] 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. [§75.27] 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. [§75.28] 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 must 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 §75.29.

State penalty assessment. A ten dollar state penalty must be levied for every ten dollars, or fraction of this amount, of the fine imposed. [Pen C §1464\(a\)\(1\)](#). When the defendant has committed multiple offenses, the penalty must be based on the total fine for each offense. [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\(d\)](#). The state penalty does not apply to the following ([Pen C §1464\(a\)\(3\)](#)):

- Any restitution fine.
- Any penalty authorized by [Govt C §76000](#).
- The state surcharge authorized by [Pen C §1465.7](#).

Additional assessments. In addition to the state penalty assessment imposed under [Pen C §1464](#), the following penalty assessments and fees must be imposed:

- 20-percent state surcharge on the base fine. [Pen C §1465.7](#).
- County penalty of \$7 for every \$10, or fraction of this amount, of the fine imposed. [Govt C §76000](#).
- State court construction penalty of up to \$5 for every \$10, or fraction of this amount, of the fine imposed. [Govt C §§70372\(a\), 70375\(b\)](#).
- Court security fee of \$20. [Pen C §1465.8](#).
- Criminal laboratory analysis fee of \$50 and drug program fee of \$150 for a violation of specified controlled substances offenses. [Health & S C §§11372.5, 11372.7](#).
- DNA Identification Fund penalties of \$10 ([Govt C §76104.6](#)) and \$1 ([Govt C §76104.7](#)) for every \$10, or fraction of this amount, of the fine imposed.

c. [§75.29] 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 to 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 dollars per day. [Pen C §§1205\(a\), 2900.5\(a\)](#).

A defendant may be imprisoned for nonpayment of a restitution fine or a victim restitution order (see [§§75.30–75.37](#)) under the provisions of [Pen C §1205](#) if the defendant has also defaulted on the payment of other fines. [Pen C §1205\(e\)](#).

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 Justice (formerly California Youth Authority) to serve a term until the fine is satisfied. [Welf & IC §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, 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 same standard of living to which the defendant has become accustomed. 19 CA3d at 1025.

d. [§75.30] 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\(b\)](#). A sentence without a restitution award to the victim (or an alternative statement of extraordinary reasons for not awarding restitution) 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) [§75.31] 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 a minor victim, 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).
- Economic loss of support of surviving spouse of homicide victim. *People v Giordano* (2007) 42 C4th 644, 68 CR3d 51.
- Loss of support of children of homicide victim. *People v Harvest* (2000) 84 CA4th 641, 652–653, 101 CR2d 135 (defendant ordered to pay child support for victim's children).
- 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 adult victim when relocating away from defendant if relocation necessary for victim's personal safety or emotional well-being. [Pen C §1202.4\(f\)\(3\)\(I\)](#).
- Expenses to retrofit residence or vehicle if the victim is permanently disabled as a direct result of the crime. [Pen C §1202.4\(f\)\(3\)\(K\)](#).

(2) [§75.32] Persons Entitled to Restitution

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 [§75.31](#)), and other individuals who have sustained economic loss as described in [Pen C §1202.4\(k\)\(3\)](#).

(3) [§75.33] Right to Hearing

The defendant has the right to a hearing to dispute the court's determination of the amount of restitution. [Pen C §1202.4\(f\)\(1\)](#); *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\(b\)](#).

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 Rivera* (1989) 212 CA3d 1153, 1161, 261 CR 93. The defendant does not have a right to confront and cross-examine witnesses, including the probation officer who prepared the report. *People v Arbuckle* (1978) 22 C3d 749, 754, 150 CR 778. The court may consider the recommendations in the report despite their hearsay character (*People v Cain* (2000) 82 CA4th 81, 87, 97 CR2d 836), as long as the court independently determines the amount of restitution (*People v Hartley* (1984) 163 CA3d 126, 130, 209 CR 131).

A victim has a right to appear at sentencing personally or by counsel to express his or her views regarding restitution. [Pen C §1191.1](#); see [§75.24](#).

(4) [§75.34] 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 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) [§75.35] Waiver of Full Restitution

The court must order full restitution unless it finds compelling and extraordinary reasons for not doing so. [Pen C §1202.4\(f\)–\(g\)](#). The court must state these reasons on the record. [Pen C §1202.4\(f\)–\(g\)](#). In such event, the court must order as a condition of probation that the defendant perform specified community service, unless the court finds and states on the record compelling and extraordinary reasons not to require community service. [Pen C §1202.4\(n\)](#). If probation is revoked, the court must impose restitution. [Pen C §1202.4\(n\)](#).

A defendant’s inability to pay is not a compelling and extraordinary reason that justifies failing to impose restitution. [Pen C §1202.4\(g\)](#). It also cannot be considered in determining the amount of restitution. [Pen C §1202.4\(g\)](#).

(6) [§75.36] 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. [§75.37] Restitution Fine

In addition to paying restitution to any crime victim(s), a defendant must pay a restitution fine of not less than \$100 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 \$100 ([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 as to 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](#), and the state surcharge of [Pen C §1465.7](#). [Pen C §1202.4\(e\)](#); [Govt C §76000\(a\)\(3\)](#). 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. [§75.38] 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 [§75.37](#)). [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. [§75.39] 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. [§75.40] Criminal Registration

Defendants convicted of gang-related offenses enumerated in [Pen C §186.30](#), sex offenses enumerated in [Pen C §290](#), narcotics offenses enu-

merated in Health & S C §11590, arson (Pen C §§451, 453), or attempted arson (Pen C §455) 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. [§75.41] Commitment to Division of Juvenile Justice

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 Justice (formerly California Youth Authority) 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 Justice, see 3 Witkin & Epstein, California Criminal Law, *Punishment* §§76–91 (3d ed 2000).

5. [§75.42] 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* §§129–177 (3d ed 2000).

6. [§75.43] 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, either through 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 Levingston* (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 violates equal protection to extent length of sentence exceeds maximum felony sentence permissible for these offenses).

7. Credits Toward Sentence

a. [§75.44] Custody Credits

A defendant must receive credit against his or her jail term or credit against any fine imposed, including base fines and restitution fines, at no less than \$30 per day for the following (Pen C §2900.5(a)):

- Time spent in jail, camp, work furlough facility, halfway house, rehabilitation facility, hospital, prison, juvenile detention facility, or similar residential facility.
- Days served as a condition of probation.
- Days credited for good time and work time under Pen C §4019. See §§75.45–75.47.

If the court has imposed both a jail term and 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 on a proportional basis, including, but not limited to, base fines and restitution fines. 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 only be given 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 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).

b. Conduct Credits

(1) [§75.45] Entitlement to Credits

When a defendant receives a sentence of imprisonment and/or fine or a jail term as a condition of probation of six days or more, the court must deduct from the sentence 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, industrial camp, or 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 worktime or 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 but 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) [§75.46] Calculating Credits

For each six-day period in 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 days are earned under Pen C §4019, a term of six days is deemed to have been served for every four days spent in actual custody. Pen C §4019(f). The courts of appeal are divided as to how to calculate conduct credits.

One line of cases calculates conduct credits by multiplying the number of days in actual presentence custody by one half. *People v Moore* (1989) 211 CA3d 1400, 1420, 260 CR 134; *People v Levitt* (1984) 156 CA3d 500, 519, 203 CR 276; *In re Allen* (1980) 105 CA3d 310, 315, 164 CR 319. The other line of cases holds that conduct credits are given only in increments of four days and calculates the credits by dividing the number of actual presentence custody days by four and then multiplying this number by two. No credit is given for days remaining after dividing by four. *People v King* (1992) 3 CA4th 882, 886, 4 CR2d 723; *People v Bravo* (1990) 219 CA3d 729, 731, 268 CR 486; *People v Smith* (1989) 211 CA3d 523, 527, 259 CR 515. Most courts employ the latter method of calculating conduct credits.

(3) [§75.47] Denying 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.

c. [§75.48] 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 sets forth 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\(d\)](#).

d. [§75.49] 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 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).

For a comprehensive discussion of custody and conduct credits, see 3 Witkin & Epstein, California Criminal Law, *Punishment* §§390–407 (3d ed 2000).

8. Advisements to Defendant

a. [§75.50] 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 identical language 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 8.782. The superior court 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, as in the courts of appeal, establishes his or her indigency. Cal Rules of Ct 8.786(a). The appointment of counsel is discretionary for any other indigent defendants. Cal Rules of Ct 8.786(a).

The rules regulating appeals in misdemeanor cases are contained in Cal Rules of Ct 8.780–8.793 and Pen C §§1466–1469.

b. [§75.51] 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 the required Department of Justice form 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.

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. [§75.52] 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](#). 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](#). 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](#). Defendants convicted of an infraction are not entitled to relief under [Pen C §1203.4a](#). [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\(a\)](#).

E. Alternatives to Jail

1. [§75.53] 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. [§75.54] 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 confinement 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 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. [§75.55] Home Detention

Voluntary program. Low-risk defendants committed to jail or defendants participating in a work furlough program may participate in a home detention program during their sentence instead of confinement in 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\(e\)](#).

Involuntary program. 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 parti-

cipate 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\(e\)](#).

F. [§75.56] 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 *People v Axtell, supra*, 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 two days before the time fixed for consideration of the report and pronouncement of judgment. On the defendant's request, the report must be provided five days beforehand. [Pen C §1203d](#); see *People v Bohannon* (2000) 82 CA4th 798, 808–809, 98 CR2d 488 (failure to provide report within this five-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 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. [§75.57] 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](#). Secondly, 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. [§75.58] 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](#);

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. [§75.59] 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. [§75.60] Conditions of Probation

The court has broad discretion to impose reasonable conditions on a grant of probation 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 requiring restitution to the victim, serving time in jail, or participating in counseling programs, are specifically authorized by statute. Other conditions are mandatory if the defendant has committed a specific crime. See [§75.61](#). 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 [§75.62](#).

a. [§75.61] 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 \$100 and not more than \$1000. [Pen C §1202.4\(a\)\(3\), \(b\), \(m\)](#). See [§§75.30–75.37](#).

When the defendant is convicted of assault, battery, or assault with a deadly weapon on a victim 65 years of age or older, the defendant must make restitution for the cost of medical or psychological treatment incurred by the elderly victim. [Pen C §1203.1j](#). A defendant convicted of sexual assault on a minor must make restitution for medical or psychological treatment incurred by the minor victim. [Pen C §1203.1g](#).

- *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 [§75.38](#).

- *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 §4140](#) or [§4142](#) (unlawful possession or 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 [§75.39](#).

- *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 discussion of mandatory drug treatment for persons convicted of nonviolent drug possession offenses, see [§75.63](#).

- *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 treat-

ment program or, if none is available, another appropriate counseling program. [Pen C §1203.097](#). For a comprehensive discussion of mandatory and discretionary probation conditions in domestic violence cases, see California Judges Benchbook: Domestic Violence Cases in Criminal Court, §§5.39–5.52 (Cal CJER 4th ed 2007).

- *Work camp*. If road camps, farms, or other public work 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 case*. The court must impose, as a condition of probation in all domestic violence cases, 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, §5.40 (Cal CJER 4th ed 2007).

- *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 as outlined in [§75.40](#) 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 [§75.51](#).

b. [§75.62] 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 as 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 Lopez* (1998) 66 CA4th 615, 623–629, 78 CR2d 66.
- 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 the 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.
- A prohibition against entering a specified geographic area. *In re White* (1979) 97 CA3d 141, 145, 158 CR 562.
- 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* §§546–572 (3d ed 2000).

5. [§75.63] 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 3 Witkin & Epstein, California Criminal Law, *Crimes Against Public Peace and Welfare* §§126A–126M (3d ed 2000).

6. [§75.64] 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. [§75.65] 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) 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 §75.18.

(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], you were previously 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?

[If defense counsel indicates that he or she desires to make a motion for new trial, a motion in arrest of judgment, or a motion to determine the defendant's competency, proceed to hear and rule on the motion (Steps 4-5)]

(4) *Rulings on motion for new trial (Pen C §§1179-1182). Add as appropriate:*

[*Motion for new trial denied*]

The motion for new trial is denied.

[*Or*]

The motion for new trial is denied, but as to count ___ the [*verdict/finding*] is modified to set the degree of the offense at second degree.

[*Or*]

The motion for new trial is denied, but as to count ___ the [*verdict/finding*] is modified to find the defendant guilty of the lesser and necessarily included offense of _____.

[*Continue*]

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

[*Motion for new trial granted*]

The motion for new trial is granted because [*state the grounds under Pen C §1181*]. The case is continued to [*date*], at ___ [*a.m./p.m.*] in Department ___ [*for setting for trial/for trial*].

(5) *Rulings on motion in arrest of judgment (Pen C §§1185-1188). Add as appropriate:*

[*Motion in arrest of judgment denied*]

The motion in arrest of judgment is denied. Is there any further legal cause why judgment may not now be pronounced?

[*Motion in arrest of judgment granted*]

The motion in arrest of judgment is granted because [*state the grounds under Pen C §1004*]. The defendant is [*remanded/released on bail in the amount of \$___/discharged and bail is exonerated*].

(6) *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\(d\)](#)].

(7) *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?

(8) *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 (\$100–\$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 ____.

(9) *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 10]

[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 8].

(10) Advise defendant of appeal right (not applicable if defendant pleaded guilty or is represented by counsel) (*Cal Rules of Ct 8.782, 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 to run from 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, fine in excess of \$500, or likely to suffer significant adverse collateral consequences (Cal Rules of Ct 8.786(a))]

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

[Continue]

It is your responsibility to keep 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?

(11) 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 [ten days (under Pen C §186.30)/five 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 [five working days (under Pen C §290)/ten days (under Pen C §186.33(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 five 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 five working days.

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

(12) *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. [§75.66] ADDITIONAL REFERENCES

California Criminal Law Procedure and Practice, chaps 35, 36, 38, (Cal CEB 2007)

3 Witkin & Epstein, California Criminal Law, *Punishment* §§76-106, 129-177, 244-246, 390-407, 502-572 (3d ed 2000)

6 Witkin & Epstein, California Criminal Law, *Criminal Judgment* §§90-125, 132-148 (3d ed 2000)

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