

# PROBATION REVOCATION

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This benchguide provides an overview of the procedure for handling revocation of probation proceedings. It is applicable to revocation of both formal and summary, or court-supervised, probation.

## II. PROCEDURE

### A. [§84.2] Checklist: Arraignment on Probation Violation

(1) *Call the case.* If probationer fails to appear, issue a bench warrant for probationer's arrest and summarily revoke probation (if not already revoked). [Pen C §§978.5, 1203.2\(a\)](#)

(2) *When probationer appears with counsel, determine if formal arraignment is waived.* Generally, defense counsel will waive notice of the alleged violation(s) of probation and advisement of rights. Probationer is entitled to written notice of the alleged probation violations on request. For discussion see [§84.9](#).

(3) *When probationer appears without counsel, advise probationer of the alleged violation(s) of probation and his or her constitutional rights, including the right to counsel.* If probationer desires the assistance of counsel, continue the case to allow probationer to obtain private counsel or to speak with the public defender. If the probationer wishes to proceed pro per, obtain a waiver under *Faretta v California* (1975) 422 US 806, 95 S Ct 2525, 45 L Ed 2d 562. For discussion, see [§§84.9–84.11](#).

(4) *Ask probationer whether he or she wishes to admit to or deny the alleged probation violation(s).* For discussion, see [§84.12](#).

(5) *If probationer denies the alleged violation(s):*

- *Assign a date for the probation revocation hearing.* For discussion see [§84.13](#).
- *Hear and decide any request for own-recognizance release or release on bail pending the hearing.* For discussion, see [§84.14](#).

(6) *If probationer admits to the alleged violation(s):*

- *Take an oral waiver of rights from probationer.* For discussion, see [§84.12](#).
- *Order probation to continue on the same or modified terms, reinstate probation on the same or modified terms if summarily revoked before arraignment, or formally revoke probation.* For discussion, see [§§84.22, 84.29](#).

(7) *If probation is formally revoked*

- *When execution of sentence has been suspended, order the judgment into full force and effect and deliver probationer to the proper officer to serve the sentence.* For discussion, see §84.25.
- *When imposition of sentence has been suspended:*
  - *Misdemeanor cases: Impose sentence to county jail and remand probationer to the sheriff's custody.* For discussion, see §84.23.
  - *Felony cases: Schedule sentencing hearing.* Cal Rules of Ct 4.435(b)(1). For discussion, see §84.24.

## **B. [§84.3] Checklist: Probation Revocation Hearing**

(1) *Call the case.*

(2) *Call for presentation of evidence.* For discussion of the allowance of hearsay, illegally seized evidence, and evidence of subsequent offenses, see §§84.18–84.21

(3) *Determine whether the evidence establishes a violation of probation by a preponderance of the evidence.* For discussion see §§84.17, 84.22.

(4) *If the evidence does not establish a violation of probation, reinstate probation if summarily revoked before the hearing.*

(5) *If the evidence does establish a violation of probation, order probation to continue on same or modified terms, set aside the summary revocation order and reinstate probation on same or modified terms, or formally revoke probation.* For discussion see §§84.22, 84.29.

(6) *If probation is formally revoked: See §84.2, step (7).*

## **III. APPLICABLE LAW**

### **A. Preliminary Matters**

#### **1. [§84.4] Grounds for Probation Revocation**

Probation may be revoked or terminated if the interests of justice require it and the court has reason to believe that the probationer has (1) violated any of the conditions of probation, (2) become abandoned to improper associates or a vicious life, or (3) subsequently committed other offenses, regardless of whether the probationer has been prosecuted for the offenses. Pen C §1203.2(a). In exercising its discretion to revoke probation, the court is not strictly limited to the specific grounds set out in Pen C §1203.2(a). *People v Pinon* (1973) 35 CA3d 120, 124, 110 CR 406. Probation may be revoked if the probationer's conduct demonstrates that

the probationer is unfit to remain at large and that his or her continued liberty represents a threat to the health and safety of others. *People v Delles* (1968) 69 C2d 906, 911 n2, 73 CR 389; *People v Breaux* (1980) 101 CA3d 468, 473, 161 CR 653.

Failure to pay restitution or a fine as a condition of probation may serve as a ground for revoking probation only when the court determines that the probationer has willfully failed to pay and has the ability to pay. [Pen C §1203.2\(a\)](#) (restitution); *People v Lawson* (1999) 69 CA4th 29, 35–36, 81 CR2d 283 (restitution); *People v Bethea* (1990) 223 CA3d 917, 922, 272 CR 903 (fine). However, a probation term may be extended for failure to pay restitution regardless of whether the failure to pay was willful. *People v Cookson* (1991) 54 C3d 1091, 1097, 2 CR2d 176. The probation term may be extended up to but not beyond the maximum probation period allowed for the offense. *People v Medeiros* (1994) 25 CA4th 1260, 1267–1268, 31 CR2d 83.

If the court has reason to believe that the probationer has committed a public offense, it may revoke probation even when the state does not prosecute the probationer, the charges are dismissed, or the probationer is acquitted of the offense following a trial on the merits. [Pen C §1203.2\(a\)](#); *In re Coughlin* (1976) 16 C3d 52, 57, 127 CR 337 (acquittal); *People v Ortiviz* (1977) 74 CA3d 537, 540, 141 CR 483 (dismissal at preliminary hearing). For discussion, see §84.21.

The court may not, in addition to revoking probation, punish conduct that amounts to a violation of a probation condition as a contempt of court under [Pen C §166\(a\)\(4\)](#). *People v Johnson* (1993) 20 CA4th 106, 109, 24 CR2d 628.

## 2. [§84.5] Initiating Probation Revocation Proceedings

Probation revocation proceedings may be initiated at any time during the probationary period in one of the following ways ([Pen C §1203.2](#)):

- The probationer may be rearrested without a warrant and brought before the court by a probation officer or peace officer having probable cause to believe that the probationer has violated any term or condition of the probation or committed a new offense;
- The probation officer or the district attorney of the county in which the probationer is supervised may petition the court to revoke probation; or
- The court may issue a warrant for the rearrest of the probationer if the court has reason to believe that the probationer is violating probation.

### 3. [§84.6] Summary Revocation; Tolling Time

On the probationer's rearrest or the issuance of an arrest warrant, the court may summarily revoke probation if it has reason to believe that there is a statutory ground for revocation after reviewing the probation officer's report, the petition to revoke, or other sources. [Pen C §1203.2\(a\)](#). A summary revocation tolls the running of the probationary period and prevents the period from expiring by its own terms before the probationer is arrested and brought before the court. [Pen C §1203.2\(a\)](#) (revocation order must be made within probationary period); *People v Vickers* (1972) 8 C3d 451, 460, 105 CR 305. Summary revocation preserves the court's jurisdiction over the defendant; however, the jurisdiction is limited to determining at a formal revocation hearing whether there is proof that there was a violation during the period of probation, and if so, whether to reinstate or terminate probation. *People v Tapia* (2001) 91 CA4th 738, 740–742, 110 CR2d 747, disapproved on other grounds in 45 C4th 1039, 1061 n10 (after probation had expired, court lacked jurisdiction to extend it; fact that probation had been summarily revoked during the period for defendant's failure to report to his probation officer did not toll the running of the probationary period when no evidence of failure to report was presented at the formal revocation hearing).

All conditions of probation remain in effect after summary revocation until the court formally revokes or reinstates probation. *People v Lewis* (1992) 7 CA4th 1949, 1955, 10 CR2d 376 (probation terms enforceable during period following formal revocation hearing and before formal disposition); *People v Pipitone* (1984) 152 CA3d 1112, 1117, 201 CR 18 (summary revocation only a temporary suspension of probation).

- **JUDICIAL TIP:** The court should summarily revoke probation not only when the probationer has absconded, but also whenever the probationary period may expire before the revocation hearing is held.

Some judges attempt to secure the probationer's voluntary appearance in court by notifying the probationer that the court has been informed that probation has been violated and ordering the probationer to appear on a specified date. Often this notice will produce the probationer's appearance and eliminate the need for a warrant.

### 4. [§84.7] Original Sentencing Judge Need Not Preside at Revocation Proceeding

*People v Arbuckle* (1978) 22 C3d 749, 150 CR 778, which entitles a plea-bargaining defendant to insist that the same judge who accepts the plea also impose sentence, does not apply to probation revocation

hearings. *People v Martinez* (2005) 127 CA4th 1156, 1159–1161, 26 CR3d 234; *People v Beaudrie* (1983) 147 CA3d 686, 693–694, 195 CR 289. *Martinez* held that *People v Ellison* (2003) 111 CA4th 1360, 4 CR3d 713, although distinguishable on its facts, does not hold otherwise. 127 CA4th at 1160–1161.

## 5. [§84.8] Preparation of Probation Report

On a motion or petition to revoke probation, the court must refer the case to the probation department for a written report. [Pen C §1203.2\(b\)](#). The court must read and consider the contents of the probation officer's report in determining whether the probationer has violated the terms of probation. [Pen C §1203.2\(b\)](#). But see *People v Santellanes* (1989) 216 CA3d 998, 1003, 265 CR 281 (reading of the probation report may be delayed until the time of sentencing if other independent evidence establishes a violation of probation).

The court must order an updated or supplemental probation report if a significant period of time has passed since the original report was prepared. [Cal Rules of Ct 4.411\(c\)](#). The Advisory Committee Comment to [Cal Rules of Ct 4.411](#) suggests that that a period of more than six months may constitute a significant period of time, even if the defendant remains incarcerated. See *People v Dobbins* (2005) 127 CA4th 176, 179–182, 24 CR3d 882 (trial court erred in not ordering an updated probation report when eight months had passed between the original report and sentencing on new charges; defendant was released on probation during two of the eight months).

The court may allow a probationer to inspect nonconfidential portions of his or her probation file. [Pen C §1203.10](#); *County of Placer v Superior Court (Stoner)* (2005) 130 CA4th 807, 810–814, 30 CR3d 617.

## B. Arraignment on Probation Violation

### 1. [§84.9] Informing Probationer of Alleged Violation

A probationer who is brought before the court on rearrest or voluntary appearance is entitled to written notice of the alleged violations of probation. [Pen C §1203.2\(b\)](#); *People v Vickers* (1972) 8 C3d 451, 457, 105 CR 305. The probation report prepared in response to the motion or petition to revoke may serve as notice. *People v Baker* (1974) 38 CA3d 625, 629, 113 CR 244. Frequently, the probationer will waive written notice when orally advised by the court, especially when the probationer intends to admit the violation. An oral advisement should specify the date of the original conviction, the date the probationer was placed on probation, the terms of probation, and the nature of the alleged violations. *In re Moss* (1985) 175 CA3d 913, 929, 221 CR 645.

## 2. [§84.10] Advisement of Rights

Following the notice of the alleged violations, the court should advise the probationer of the following rights:

(a) *To formal revocation hearing.* The probationer has the right to a formal hearing on the alleged probation violations; the hearing must be held within a reasonable time after the probationer's arrest. *Morrissey v Brewer* (1972) 408 US 471, 488, 92 S Ct 2593, 33 L Ed 2d 484; *People v Vickers* (1972) 8 C3d 451, 457, 105 CR 305.

(b) *To counsel.* The probationer has a right to be represented by an attorney. If the probationer is indigent and desires the assistance of an attorney, the court must appoint an attorney to represent the probationer without charge. 8 C3d at 461.

(c) *To appear and present evidence on own behalf.* The probationer has the right to be heard in person and to present witnesses and documentary evidence. 8 C3d at 457. Evidence may be admitted at the hearing that would not be admissible in an adversary criminal trial. *Morrissey v Brewer, supra*, 408 US at 489. See §§84.18–84.21.

(d) *To confront and cross-examine adverse witnesses.* *People v Vickers, supra*, 8 C3d at 457.

(e) *To disclosure of evidence to be used against the probationer.* 8 C3d at 457; *In re Love* (1974) 11 C3d 179, 184, 113 CR 89.

(f) *To written statement of the reasons for and evidence relied on in revoking probation.* *People v Vickers, supra*, 8 C3d at 457; see §84.22.

## 3. [§84.11] Appointment of Counsel

When a probationer appears at the arraignment without counsel, the court must inform the probationer of his or her right to counsel at the revocation hearing and ask if counsel's assistance is desired. If the probationer is indigent and requests the assistance of counsel, the court must appoint an attorney. *People v Vickers* (1972) 8 C3d 451, 461, 105 CR 305. If the probationer wishes to retain counsel or seek appointment of a public defender, the court should continue the case for a short period to allow the probationer to procure private counsel or a public defender.

If the court finds the probationer eligible for court-appointed counsel, it must advise the probationer that he or she may be required to pay all or a portion of the cost of counsel if, after the conclusion of the probation revocation proceedings, the court determines that the probationer has the present ability to pay. *Pen C §987.8(f)*.

If the probationer wishes to represent himself or herself at the hearing, the court must obtain a knowing and voluntary waiver of

probationer's right to counsel. *Faretta v California* (1975) 422 US 806, 95 S Ct 2525, 45 L Ed 2d 562. A *Faretta* waiver obtained earlier in the probationer's case is insufficient for the probation revocation hearing. *People v Hall* (1990) 218 CA3d 1102, 1106, 267 CR 494. For a comprehensive discussion of procedures for handling a defendant's request to proceed in pro per, see California Judges Benchguide 54: *Right to Counsel Issues* (Cal CJER).

#### 4. [§84.12] Receiving Probationer's Plea

The probationer may deny the alleged probation violations or waive his or her right to a revocation hearing and admit to the alleged probation violations. The probationer should be discouraged from admitting the violation until given an opportunity to confer with counsel. The probationer, however, may admit to violations over defense counsel's objection. *People v Robles* (2007) 147 CA4th 1286, 1289-1290, 54 CR3d 916.

The court is not required to advise the probationer of the consequences of his or her admission of violation of probation. *People v Garcia* (1977) 67 CA3d 134, 137, 136 CR 398. In addition, the court need not inform the probationer of his or her constitutional rights and obtain an express personal waiver of each before accepting the probationer's plea. *People v Clark* (1996) 51 CA4th 575, 581, 59 CR2d 234 (advisement of right to evidentiary hearing and waiver of that right alone was sufficient); *People v Dale* (1973) 36 CA3d 191, 194, 112 CR 93 (*Boykin/Tahl* advisements not applicable to probation revocation proceedings). However, if the probationer wishes to proceed without counsel and admit the alleged violations, many judges will advise the probationer of his or her rights and secure a knowing and intelligent waiver of each of those rights. See *In re Moss* (1985) 175 CA3d 913, 930, 221 CR 645 (pro per defendant did not waive rights by signing plea form in a subsequent prosecution that provided that the guilty plea could subject defendant to additional penalties in any other case in which defendant was on probation).

#### 5. [§84.13] Setting Date for Revocation Hearing

When the probationer denies the alleged probation violations, the court must set a date for the probation revocation hearing. Although there are no statutory time limits on when a probation revocation hearing should be held, the hearing should be held within a reasonable time after the probationer is taken into custody. *Morrissey v Brewer* (1972) 408 US 471, 488, 92 S Ct 2593, 33 L Ed 2d 484. Some courts have held that delays of up to two or three months are not unreasonable. 408 US at 488 (two

months); *In re Williams* (1974) 36 CA3d 649, 653, 111 CR 870 (two months, 28 days).

When the probation revocation hearing is based on the probationer's arrest on a new criminal charge, the court has discretion to hold the revocation hearing before the criminal proceedings on the new charge. *People v Jasper* (1983) 33 C3d 931, 935, 191 CR 648; *People v Coleman* (1975) 13 C3d 867, 889, 120 CR 384. However, revocation hearings should not be routinely scheduled in advance of the disposition of the new criminal charge. *People v Jasper, supra*, 33 C3d at 935. When the hearing is held before the disposition of the new charge, the probationer's testimony given at the hearing and any evidence derived from the testimony are inadmissible against the probationer at the subsequent trial, except for impeachment or rebuttal if the probationer's testimony on direct examination at the trial is clearly inconsistent with his or her testimony at the revocation hearing. *People v Coleman, supra*, 13 C3d at 889.

If the revocation hearing is held before the criminal proceedings on the new charge, the probationer may be tried on the new charges regardless of the outcome of the hearing. Collateral estoppel does not bar the prosecution from prosecuting a probationer for alleged criminal conduct despite its failure to prove a violation of probation based on the same conduct at the revocation hearing. *Lucido v Superior Court* (1990) 51 C3d 335, 351-352, 272 CR 767.

If the probationer is acquitted on the new charge, the court may still revoke probation at a subsequent revocation hearing if the court has reason to believe, by a preponderance of the evidence, that the probationer committed the offense. *Pen C §1203.2(a)*; *In re Coughlin* (1976) 16 C3d 52, 57, 127 CR 337; see §§84.18, 84.23.

The court may hold the revocation hearing concurrently with the probationer's preliminary hearing on a new felony charge or, if the probationer is charged with a misdemeanor offense, the hearing may be held concurrently with the probationer's trial. *In re Law* (1973) 10 C3d 21, 27, 109 CR 573; *People v Santellanes* (1989) 216 CA3d 998, 1004, 265 CR 281. The court must provide the probationer fair notice of the dual purpose of the preliminary hearing or trial. *In re Law, supra*, 10 C3d at 27.

## 6. [§84.14] Setting Bail or Granting Own-Recognizance Release Pending Hearing

Although there are no state appellate cases that have addressed the probationer's right to release from custody pending a revocation hearing, the United States Court of Appeals has held that the Eighth Amendment does not guarantee a right to bail pending revocation of probation. *In re Whitney* (1st Cir 1970) 421 F2d 337, 338. See also *In re Law* (1973) 10 C3d 21, 26, 109 CR 573 (parolees have no constitutional right to bail

pending parole revocation hearing). However, judges routinely release probationers on their own recognizance or bail.

In determining whether to grant or deny a probationer's request for release on bail pending the revocation hearing, the court must consider the protection of the public, the safety of the victim and the victim's family, the seriousness of the charges constituting the basis for revocation, efforts by the probationer toward rehabilitation, the probationer's previous criminal record, and the probability that the probationer will appear at the revocation hearing. *Cal Const art I, §28(b)(3), (f)(3); Pen C §1275(a); U.S. v Sample* (ED Penn 1974) 378 F Supp 43, 44 (applying factors similar to those in *Pen C §1275(a)* when setting bail pending revocation hearing).

For a comprehensive discussion of bail and own-recognizance release procedures, see California Judges Benchguide 55: *Bail and Own-Recognizance Release* (Cal CJER).

### C. Probation Revocation Hearing

#### 1. [§84.15] Nature of Probation Revocation Hearing

The role of the court in a probation revocation hearing is not to decide the guilt or innocence of the probationer, but to determine whether a violation of probation has occurred and, if so, whether it is appropriate to allow the probationer to retain his or her conditional freedom. *Lucido v Superior Court* (1990) 51 C3d 335, 348, 272 CR 767. The full range of rights and protections afforded a defendant in a criminal trial do not apply to a revocation hearing. For example:

- The probationer is not entitled to a jury trial. *Pen C §1203.2(b); Chamblin v Municipal Court* (1982) 130 CA3d 115, 121, 181 CR 636.
- The standard of proof at a revocation hearing is a “preponderance of the evidence.” For discussion, see §84.17.
- Insanity is not a defense to an act constituting a violation of probation. *People v Breaux* (1980) 101 CA3d 468, 471, 161 CR 653.
- The corpus delicti rule does not apply to a revocation hearing. *People v Monette* (1994) 25 CA4th 1572, 1575, 31 CR2d 203.
- The prosecution is not required to prove that the defendant is the probationer unless the issue is raised by the defendant. *People v Perez* (1994) 30 CA4th 900, 905, 36 CR2d 391.
- The evidentiary rule requiring corroboration of accomplice testimony (*Pen C §1111*) does not apply to a revocation hearing. *People v McGavock* (1999) 69 CA4th 332, 339–340, 81 CR2d 600.

- The reciprocal discovery rules of the [Criminal Discovery Statute \(Pen C §§1054 et seq\)](#) do not apply to a revocation hearing. *Jones v Superior Court* (2004) 115 CA4th 48, 56–62, 8 CR3d 687.

In addition, the rules of evidence are greatly relaxed to allow admission of hearsay, illegally seized evidence, and evidence of crimes not resulting in conviction. For discussion see [§§84.18–84.21](#).

## 2. [\[§84.16\]](#) Scope of Hearing Following Guilty Plea or Verdict in Criminal Case

When a subsequent criminal conviction forms the basis for revocation of probation, the probationer cannot relitigate the factual issues resolved in the earlier criminal proceedings, whether the conviction was the result of a trial or a guilty plea. *Morrissey v Brewer* (1972) 408 US 471, 490, 92 S Ct 2593, 33 L Ed 2d 484; *People v Sturgeon* (1975) 53 CA3d 711, 713, 125 CR 903. However, the probationer may present evidence that he or she is not the person who was convicted, the offense of which the probationer was convicted was other than the one specified as a violation of probation, or the petition to revoke or the probation officer's report is inaccurate. *In re Edge* (1973) 33 CA3d 149, 157, 108 CR 757. In addition, the probationer has a due process right to explain mitigating circumstances and argue that the violation does not warrant revocation. *Morrissey v Brewer, supra*, 408 US at 488; *People v Coleman* (1975) 13 C3d 867, 873, 120 CR 384.

## 3. [\[§84.17\]](#) Standard of Proof

Probation may be revoked if the facts supporting revocation are proven by a “preponderance of the evidence.” *People v Rodriguez* (1990) 51 C3d 437, 441, 272 CR 613. Therefore, evidence insufficient to prove that a probationer committed a criminal offense “beyond a reasonable doubt” may support a finding that probation has been violated. *In re Coughlin* (1976) 16 C3d 52, 57, 127 CR 337; see [§84.21](#).

The evidence must support a conclusion that the probationer's conduct constituted a willful violation of the terms and condition of probation. *People v Galvan* (2007) 155 CA4th 978, 982–985, 66 CR3d 426 (Mexican probationer's failure to report to probation did not constitute willful violation where federal government deported probationer to Mexico immediately following his release from jail); *People v Zaring* (1992) 8 CA4th 362, 375–379, 10 CR2d 263 (court abused discretion by revoking probation for a tardy court appearance caused by circumstances beyond the probationer's control).

#### 4. Determining Admissibility of Evidence

##### a. [§84.18] Illegally Seized Evidence

Evidence obtained as a result of an illegal search or seizure may be considered by the court in determining whether probation has been violated as long as the police conduct was not so egregious as to shock the conscience. *People v Fuller* (1983) 148 CA3d 257, 262, 195 CR 853; *People v Hayko* (1970) 7 CA3d 604, 610, 86 CR 726. However, evidence previously suppressed under Pen C §1538.5 may not be admitted at a revocation hearing. *People v Zimmerman* (1979) 100 CA3d 673, 676, 161 CR 188 (revocation hearing is a “hearing” within the meaning of Pen C §1538.5(d)). If a probationer has filed a Pen C §1538.5 motion in a pending criminal case on which a revocation is based, the revocation hearing should be held after the Pen C §1538.5 hearing. *People v Howard* (1984) 162 CA3d 8, 23, 208 CR 353 (court abuses its discretion when it denies probationer’s motion to continue revocation hearing when probationer’s Pen C §1538.5 motion challenging the admissibility of evidence in concurrent criminal case is likely to be successful).

##### b. [§84.19] Probation Report

Probation may be revoked solely on the basis of the contents of the probation officer’s report. *People v Smith* (1970) 12 CA3d 621, 625, 90 CR 811. However, if the probation report is the sole piece of evidence, it must contain allegations of fact from which a court could reasonably find that the probationer has violated the terms of his or her probation. 12 CA3d at 626.

##### c. [§84.20] Other Hearsay Evidence

Penal Code §1203.2 and case law expressly provide for the admission of hearsay documentary evidence at the revocation hearing. *Morrissey v Brewer* (1972) 408 US 471, 489, 92 S Ct 2593, 33 L Ed 2d 484 (hearing should be flexible enough to consider evidence including letters, affidavits, and other material not admissible in criminal trial); *People v Vickers* (1972) 8 C3d 451, 457, 105 CR 305. However, such evidence is admissible only when there is sufficient indicia of trustworthiness and reliability to support its introduction at the hearing. *People v Maki* (1985) 39 C3d 707, 715, 217 CR 676; *People v Brown* (1989) 215 CA3d 452, 454, 263 CR 391.

Examples of hearsay allowed in evidence include:

- Probation reports (see §84.19).
- A police report containing eyewitness accounts (*People v Turner* (1975) 44 CA3d 753, 756, 118 CR 924).

- A certified abstract of judgment (*People v Rafter* (1974) 41 CA3d 557, 561, 116 CR 281).
- A car rental invoice and hotel receipt (*People v Maki, supra*, 39 C3d at 716).
- A report from program manager of community counseling services stating that probationer had been terminated from drug treatment program due to too many absences (*People v O'Connell* (2003) 107 CA4th 1062, 1065-1067, 132 CR2d 665).
- A drug laboratory report (*People v Johnson* (2004) 121 CA4th 1409, 18 CR3d 230 (unsuccessful *Crawford v Washington* (2004) 541 US 36, 124 S Ct 1354, 158 L Ed 2d 177, challenge to admission; *Crawford* holding based on Sixth Amendment confrontation clause; Sixth Amendment does not govern revocation hearings, and report not testimonial hearsay).
- A police officer's statements relating to the results of a chemical analysis of a substance confiscated from the probationer (*People v Brown, supra*, 215 CA3d at 454).
- Inculpatory statements of the probationer to the probation officer (*People v Monette* (1994) 25 CA4th 1572, 1576, 31 CR2d 203).
- Testimony of a police officer regarding statements made to him or her by another officer to establish probable cause to search a probationer. (*People v Harrison* (1988) 199 CA3d 803, 812-814, 245 CR 204 (*Harvey-Madden* rule inapplicable to revocation hearings)).

A preliminary hearing transcript of a witness's testimony may not be admitted at a revocation hearing unless the witness is unavailable or there is other good cause to excuse the probationer's right to confront and cross-examine the witness. *People v Arreola* (1994) 7 C4th 1144, 1160-1161, 31 CR2d 631 (notice to defendant, before the preliminary hearing, that testimony at that hearing may be used at a subsequent revocation hearing not good cause). The *Arreola* court suggested that as a means of avoiding needless duplication of the taking of testimony, in some instances the preliminary hearing on the charges that give rise to the revocation proceeding may be coordinated with the revocation hearing in a single proceeding. A coordinated proceeding would allow the decision-maker charged with determining whether to revoke probation to observe the demeanor of witnesses who testify at the preliminary hearing. 7 C4th at 1159.

Relying on the holding in *Arreola*, the First Appellate District held that a trial court erred in permitting a probation officer to testify regarding alleged out-of-court statements made by a treatment program

administrator that the defendant violated his probation by consuming alcohol. No justification was offered for the program administrator's absence, and there was no other evidence to corroborate her statements that the defendant smelled of, and tested positive for, alcohol consumption. *People v Shepherd* (2007) 151 CA4th 1193, 1197–1203, 60 CR3d 616 (no good cause shown for relying on officer's hearsay or double hearsay in lieu of live testimony).

The Third Appellate District held that a trial court did not err in allowing a police officer to testify as to a statement made by the victim identifying the defendant from a photo lineup conducted within 30 minutes of the crime. *People v Stanphill* (2009) 170 CA4th 61, 87 CR3d 643. The trial court properly concluded that the victim's identification of the defendant constituted a spontaneous statement for purposes of the Evid C 1240 exception to the hearsay rule. 170 CA4th at 72–77. The Court held that spontaneous statements are a "special breed" of hearsay exception that automatically satisfy a probationer's due process confrontation rights without the court having to find good cause for the witness's absence or to conduct a balancing test, *i.e.*, weighing the probationer's confrontation rights against the good cause the government must show to excuse the confrontation. 170 CA4th at 78–81.

#### d. [§84.21] Evidence of Subsequent Offenses

The court may consider evidence of an offense committed after the offense for which probation was granted in determining whether probation has been violated even though the evidence of guilt is insufficient to convict the probationer. *In re Coughlin* (1976) 16 C3d 52, 57, 127 CR 337 (acquittal following trial on merits). Evidence of a violation of a federal offense, whether or not the probationer was convicted of that offense, is admissible at a revocation hearing. *People v Beaudrie* (1983) 147 CA3d 686, 691, 195 CR 289. The court may revoke probation based on a new offense when the state fails to prosecute the probationer or when the magistrate dismisses the charges against the probationer. Pen C §1203.2(a); *People v Ortiviz* (1977) 74 CA3d 537, 540, 141 CR 483. In addition, a subsequent criminal conviction that is subject to appeal, and therefore not yet final, may serve as a basis for revocation of probation. *People v Avery* (1986) 179 CA3d 1198, 1202, 225 CR 319.

#### 5. [§84.22] Making Findings

If, at the conclusion of the hearing, the court finds that a violation has occurred, it may (1) formally revoke probation and sentence; (2) continue probation on the same or modified terms; or (3) if probation was summarily revoked prior to hearing, set aside the revocation order and

reinstate probation on the same or modified terms. [Pen C §§1203.1, 1203.2\(b\), \(e\)](#); *People v Harris* (1990) 226 CA3d 141, 147, 276 CR 41.

If the court chooses to revoke probation, it must make written findings of fact disclosing the evidence relied on and reasons for revocation. *People v Vickers* (1972) 8 C3d 451, 457, 105 CR 305. However, a court reporter's transcript of the hearing containing the court's oral statement of reasons may serve as a substitute for a written statement. *People v Moss* (1989) 213 CA3d 532, 534, 261 CR 651; *People v Scott* (1973) 34 CA3d 702, 708, 110 CR 402. A defendant waives the right to object on appeal to the trial court's failure to state its reasons for imposing a state prison sentence rather than reinstating probation when the defendant was provided a meaningful opportunity to object at the hearing but failed to do so. *People v Zuniga* (1996) 46 CA4th 81, 83-84, 53 CR2d 557. A "meaningful opportunity to object" refers to procedural due process, which requires notice and an opportunity to be heard but which does not require a court to announce a tentative ruling of its intent to impose a prison term. 46 CA4th at 84 (defendant was represented by counsel at revocation hearing and voiced no objections to sentencing).

If the court chooses to revoke probation because the probationer has failed to pay restitution or a fine, the court must make express findings that the probationer has the ability to pay the restitution or fine and willfully failed to do so. [Pen C §1203.2\(a\)](#); *People v Self* (1991) 233 CA3d 414, 418, 284 CR 458; *People v Bethea* (1990) 223 CA3d 917, 922, 272 CR 903.

## D. Sentencing on Revocation of Probation

### 1. When Imposition of Sentence Suspended

#### a. [§84.23] Misdemeanors and Felonies Generally

When probation is revoked and the imposition of sentence has been suspended, the court may pronounce judgment for any length of time up to the longest period for which the probationer might have been sentenced. [Pen C §1203.2\(c\)](#). In addition, the court is not bound by the terms of a plea bargain and may sentence the probationer to a term longer than the one originally negotiated. *People v Hopson* (1993) 13 CA4th 1, 2-3, 16 CR2d 399 (rejecting its contrary holding in *People v Alkire* (1981) 122 CA3d 119, 175 CR 819); *People v Martin* (1992) 3 CA4th 482, 489, 4 CR2d 548.

In misdemeanor cases, if the probationer is not represented by counsel at sentencing, the court must advise the probationer, either orally or in writing, of his or her right to appeal the judgment, the right to appointed counsel on appeal, and the time for filing a notice of appeal.

However, this advisement is not required if an unrepresented probationer has admitted to a violation of probation. [Cal Rules of Ct 4.306](#).

**b. [§84.24] Felonies**

When sentencing the probationer to state prison, the court is guided by the [Determinative Sentencing Law \(Pen C §§1170-1170.9\)](#) and [Cal Rules of Ct 4.401-4.480](#). In determining the length of the sentence, the court may consider only circumstances existing at the time probation was granted. [Cal Rules of Ct 4.435\(b\)\(1\)](#). But see *People v Harris* (1990) 226 CA3d 141, 145, 276 CR 41 (reinstatement of probation on modified terms is new grant of probation within meaning of [Cal Rules of Ct 4.435\(b\)\(1\)](#)), and court may consider events occurring between time of original grant of probation and reinstatement of probation).

The court may consider the facts of the offense that caused the revocation of probation in deciding whether to sentence consecutively or concurrently for that offense. *People v Leroy* (1984) 155 CA3d 602, 606, 202 CR 88. In a three strikes case, the court is not required to order consecutive sentences if the defendant is sentenced on the new felony before sentence is imposed on the probation violation. *People v Rosbury* (1997) 15 C4th 206, 210, 61 CR2d 635 (defendant not serving another sentence within meaning of [Pen C §667\(c\)\(8\)](#) or [§1170.12\(a\)\(8\)](#) when sentence on new felony imposed). The *Rosbury* court stated, in dicta, that consecutive sentencing might have been required had the trial court first imposed sentence on the probation violation. 15 C4th at 211.

When a specific term is provided for by statute, the court must consider that term when specifying the penalty to be imposed on revocation of probation. For example, in a case in which the defendant pleaded guilty to a violation of [Pen C §647.6\(c\)\(2\)](#), which provides for a prison sentence of two, four, or six years, and in which the defendant, in exchange for a sentence of probation with one year in county jail with a promise that if he violated probation a sentence of no more than three years could be imposed, the court erred in imposing the middle four-year term for the offense and in staying one of the years when the defendant's probation was revoked. Because this sentence was not legally authorized, it was reduced by the appellate court to two years. *People v Velasquez* (1999) 69 CA4th 503, 505-507, 81 CR2d 647.

The court must consider findings previously made and conduct a hearing to (1) consider circumstances in aggravation and mitigation, and any other factor reasonably related to the sentencing decision; (2) choose the appropriate term of the three authorized prison terms which, in the court's discretion, best serves the interest of justice, as required under [Pen C §1170\(b\)](#), and state on the record reasons for imposing the selected term; (3) determine whether to strike any additional punishment for

enhancements charged and found and state on the record the reasons for striking the punishment; (4) determine whether any multiple sentences are to be served concurrently or consecutively and state on the record the reasons for imposing consecutive sentences; (5) decide any issues raised by statutory prohibitions on the dual use of facts and limitations on enhancements, as required under [Cal Rules of Ct 4.420\(c\) and 4.447](#); and (6) pronounce judgment and sentence, and state the reasons for its decision to impose sentence. [Cal Rules of Ct 4.406\(b\), 4.420, 4.435\(b\)\(1\), 4.433\(c\)](#); *People v Jones* (1990) 224 CA3d 1309, 1315, 274 CR 527.

✦ **JUDICIAL TIP:** When proclaiming the reasons for sentencing the probationer to prison, the court should not only state that the probationer is in violation of the terms of his or her probation, but also explain why a sentence to state prison is more appropriate than reinstating probation. See *People v Hawthorne* (1991) 226 CA3d 789, 795, 277 CR 85.

The court must advise the probationer of the parole period provided by [Pen C §3000](#) to be served after expiration of his or her sentence in addition to any period of imprisonment for violation of parole. [Cal Rules of Ct 4.433\(e\)](#).

## 2. [§84.25] When Execution of Sentence Suspended

When probation is revoked and judgment has been previously announced and the execution of sentence suspended, the court must either (1) reinstate probation (see [§84.29](#)), or (2) terminate probation and order that the judgment shall be in full force and effect and that the defendant be delivered over to the proper officer to serve his or her sentence. *People v Medina* (2001) 89 CA4th 318, 321–323, 106 CR2d 895; [Pen C §1203.2\(c\)](#); [Cal Rules of Ct 4.435\(b\)\(2\)](#). The court does not have jurisdiction to reduce the previously imposed sentence once it revokes probation. However, the court retains authority to recall the sentence after the defendant has been committed to custody under [Pen C §1170\(d\)](#) and to impose a lesser sentence. *People v Howard* (1997) 16 C4th 1081, 1095, 68 CR2d 870. The court may order the previously imposed sentence to run consecutively to a sentence imposed during probation for a subsequent offense. *People v Todd* (1994) 22 CA4th 82, 27 CR2d 276. See also *People v Helms* (1997) 15 C4th 608, 612–617, 63 CR2d 620 (sentence for probation violation runs consecutive to sentence for new felony in three strikes case). The court is not required to give a statement of reasons for its decision to order the execution of the suspended sentence. *People v Latham* (1988) 206 CA3d 27, 30, 253 CR 379.

If the originally imposed but suspended sentence is unlawful, the court may order execution of the correct sentence whether it is more or

less severe than the sentence previously imposed. *In re Renfrow* (2008) 164 CA4th 1251, 1254–1256, 79 CR3d 898.

### 3. [§84.26] Credits Toward Sentence

The court must credit the probationer's sentence for time spent in presentence custody, days served as a condition of probation after suspension of imposition of sentence or suspension of execution of sentence, and days credited to the period of confinement for work and good behavior under Pen C §4019. Pen C §§1203.2(c), 2900.5(a). However, the probationer is not entitled to credit for time served for an offense that was committed during the probation period and served as the basis for the probation revocation. *People v Adrian* (1987) 191 CA3d 868, 883, 236 CR 685; *People v Ross* (1985) 165 CA3d 368, 372, 211 CR 595. Also, time spent in a residential treatment or home detention program as a condition of probation does not qualify for Pen C §4019 good time/work time credits on revocation of probation. *People v Cook* (1993) 14 CA4th 1467, 18 CR2d 362 (home electronic monitoring program); *People v Moore* (1991) 226 CA3d 783, 277 CR 82 (alcohol recovery center).

Courts routinely obtain waivers of Pen C §2900.5 custody credits from repeat probation violators who have served substantial amounts of county jail time as a condition of probation and are approaching the one-year jail term limit of Pen C §19.2. The waiver, commonly referred to as a “Johnson waiver” (*People v Johnson* (1978) 82 CA3d 183, 147 CR 55), allows the court to reinstate probation on the condition that the defendant serve additional time in county jail, instead of being faced with the choice of sentencing the defendant to prison or ignoring the violation. *People v Arnold* (2004) 33 C4th 294, 14 CR3d 840; *People v Johnson* (2002) 28 C4th 1050, 1054–1055, 123 CR2d 700. See also *People v Jeffrey* (2004) 33 C4th 312, 14 CR3d 852 (waiver of future credits to be earned in residential drug treatment facility as condition of probation).

When a defendant agrees to waive custody credits after violating probation, the waived credits may not be recaptured when the defendant violates probation again, unless the agreement expressly reserves this right. *People v Burks* (1998) 66 CA4th 232, 234, 77 CR2d 698. Absent such an agreement, custody credits once waived may not be used again. 66 CA4th at 234. A waiver of custody credits will apply to any future prison term should probation ultimately be revoked and a state prison sentence imposed. *People v Arnold, supra*, 33 C4th at 308–309 (waiver applies to any future use of credits); *People v Jeffrey, supra*, 33 C4th at 318–320 (waiver of future credits is waiver of such credits for all purposes). If a defendant is advised by counsel that a waiver will not affect future prison time, but counsel fails to inform the court of this aspect of the waiver, the

defendant's remedy is to seek relief by claiming ineffective assistance of counsel. *People v Burks, supra*, 66 CA4th at 237.

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

#### 4. [§84.27] Ordering Restitution

When the court revokes probation and commits the defendant to prison, it should modify the original judgment by ordering the defendant to pay restitution because the probation condition that requires this payment no longer exists. See *People v Young* (1995) 38 CA4th 560, 565–567, 45 CR2d 177. Some judges believe that this is unnecessary because in their view a restitution obligation, like a restitution fine, survives a revocation of probation. See *People v Arata* (2004) 118 CA4th 195, 201–203, 12 CR3d 757; *People v Chambers* (1998) 65 CA4th 819, 821–823, 76 CR2d 732; Pen C §1202.4(m) (unpaid restitution, when defendant no longer on probation, enforceable like a civil judgment).

*Probation revocation restitution fine.* On revocation of probation, the court must reinstate any probation revocation restitution fine that was ordered and suspended under Pen C §1202.44 at the time probation was initially granted.

#### 5. [§84.28] Commitment to DJJ

On revoking probation, the court, in place of any other sentence, may commit the probationer to the California Department of Corrections and Rehabilitation Division of Juvenile Justice (DJJ) (formerly California Youth Authority) if he or she is otherwise eligible for this commitment. Pen C §1203.2(d). See *Welf & I C §§1731.5 and 1732.7* (eligibility requirements). When sentencing a probationer under 18 years of age, the court may transfer the probationer to the DJJ solely for the purpose of housing the probationer, subject to the approval of the Chief Deputy Secretary for the Division of Juvenile Justice. *Welf & I C §1731.5(c)*.

#### E. [§84.29] Reinstatement of Probation on Same or Modified Terms

If the court does not wish to terminate probation on a finding of a probation violation, it may set aside an order revoking probation and reinstate the probation on the same or modified terms. Pen C §§1203.1, 1203.2(b), (e); *People v Harris* (1990) 226 CA3d 141, 147, 276 CR 41. See also *People v Medina* (2001) 89 CA4th 318, 321–323, 106 CR2d 895 (authority to reinstate probation applicable whether imposition of sentence was suspended or execution of sentence was suspended). A revocation

order may be set aside for good cause on motion made before the pronouncement of judgment. If probation was revoked after judgment was pronounced, the judgment and order may be set aside for good cause within 30 days after the court has notice that the execution of sentence has commenced. [Pen C §1203.2\(e\)](#).

Because a revocation of probation tolls the running of the probation period, a reinstatement of probation on the same terms and conditions effectively extends the original term of probation by the period of revocation. [Pen C §1203.2\(a\)](#). If the court intends to cancel the tolling effect of the revocation, it must state so expressly on the record. *People v DePaul* (1982) 137 CA3d 409, 415, 187 CR 82.

- **JUDICIAL TIP:** The court should always state for the record the new expiration date of the probation period to avoid potential misunderstandings.

When probation is reinstated *before* the original probation period has expired, the court may extend the probation period up to the statutorily prescribed maximum limits. *People v Ottovich* (1974) 41 CA3d 532, 535, 116 CR 120; *People v Jackson* (2005) 134 CA4th 929, 931-932, 36 CR3d 477. In misdemeanor cases, probation 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](#). In felony cases, probation may not exceed five years, unless the maximum sentence provided by law is more than five years, in which case probation may be enforced for a period not to exceed the maximum state prison sentence that could be imposed. [Pen C §1203.1](#).

If an order setting aside the revocation of probation or judgment is made *after* expiration of the original probation period, the court may reinstate probation for the same period and with the same terms and conditions that could have been imposed immediately following conviction. [Pen C §1203.2\(e\)](#). The court may set the probation period without reference to the original probation term or time served under it. *People v Carter* (1965) 233 CA2d 260, 268, 43 CR 440; see *In re Hamm* (1982) 133 CA3d 60, 67, 183 CR 626 ([Pen C §1203a](#) limits misdemeanor probation to maximum three-year increments and therefore is reconcilable with [Pen C §1203.2\(e\)](#)).

## **F. Imposing Sentence at Request of Incarcerated Probationer**

### **1. [§84.30] Procedure Under Pen C §1203.2a**

[Pen C §1203.2a](#) provides a probationer incarcerated in state prison a procedure for requesting disposition of the case in which he or she was released on probation. The probationer may request through counsel, or

directly by written request, to be sentenced in his or her absence without representation by counsel. [Pen C §1203.2a](#). This requirement for a properly attested request, and any necessary waiver applies only to probationers on whom imposition of sentence was suspended in conjunction with the grant of probation. *People v Murray* (2007) 155 CA4th 149, 156–157, 65 CR3d 731.

On receipt of a written notice of a defendant's commitment for another offense from the defendant or prison authorities, the probation officer has 30 days to notify the court that released the defendant on probation. [Pen C §1203.2a](#). The court has 30 days from the receipt of a formal request from the defendant to impose sentence if sentence has not previously been imposed, or to make another final order terminating jurisdiction over the defendant. *In re Walters* (1995) 39 CA4th 1546, 1552–1558, 47 CR2d 279, disapproved on other grounds in 12 C4th 992, 1005 (court lacks jurisdiction to sentence defendant more than 30 days after receipt of request; 30 days does not begin on date of mailing or filing of request). If sentence was previously imposed, the court has 60 days from the notice of commitment to order execution of sentence or to make another final order. [Pen C §1203.2a](#); *People v Hall* (1997) 59 CA4th 972, 983, 69 CR2d 826 (filing of notice of probation violation stating that defendant was arrested by parole officer and transferred to state prison insufficient to trigger 60-day time limit). The failure to meet any one of these three time limits divests the court of jurisdiction to sentence the defendant on the original offense. [Pen C §1203.2a](#); *In re Hoddinott* (1996) 12 C4th 992, 1005, 50 CR2d 706. See also *People v Murray*, *supra*, 155 CA4th at 155–158 (probation officer's failure to timely report probationer's new commitment deprived court of all jurisdiction to order execution of previously imposed sentence; proper remedy for court's error in doing so is reinstatement of the original sentence).

If the probation officer timely notifies the court on learning of the defendant's commitment, the court may act on a grant of probation in a timely manner, regardless of whether the defendant has submitted a formal request. [Pen C §1203.2a](#); *In re Hoddinott*, *supra*, 12 C4th at 1000. The court may exercise its discretion in a variety of ways: (1) It can summarily revoke probation; (2) it can order the defendant produced so that probation can be formally revoked and the defendant can be sentenced; (3) it can order execution of a previously imposed sentence; or, (4) it can continue the defendant on probation. *In re Hoddinott*, *supra*. If the court decides to revoke probation, the defendant must be given notice of the revocation, and the defendant may then file a request for sentencing in absentia. If such a request is filed, it activates the second 30-day deadline within which the court must impose sentence or lose jurisdiction. If no request is

filed, the court retains jurisdiction to impose sentence at a future date. *In re Hoddinott, supra*.

Unless the court orders consecutive sentences, any sentence imposed must commence on the date the probationer was delivered to prison under commitment for the subsequent offense. [Pen C §1203.2a](#); *In re White* (1969) 1 C3d 207, 211, 81 CR 780.

The procedures under [Pen C §1203.2a](#) are not available to defendants committed to county jail for a subsequent offense. [Pen C §1203.2a](#); *People v Madrigal* (2000) 77 CA4th 1050, 1054, 92 CR2d 205; *People v Blanchard* (1996) 42 CA4th 1842, 1847, 50 CR2d 614.

Only the court that released the defendant on the original charge may revoke probation unless the case is formally transferred under [Pen C §1203.9](#) to the county sentencing the defendant on the subsequent offense. [Pen C §1203.2a](#); *People v Klockman* (1997) 59 CA4th 621, 625, 69 CR2d 271.

## 2. [§84.31] Procedure Under Pen C §1381

[Penal Code §1381](#) provides that a defendant who is incarcerated on a misdemeanor or felony conviction may request the speedy resolution of any pending “indictment, information, or any criminal proceeding wherein the defendant remains to be sentenced.” When a defendant is placed on probation with imposition of sentence suspended for one offense and is subsequently incarcerated in state prison for a second offense, the defendant has a choice to request speedy sentencing based on his or her probation violation in absentia under [Pen C §1203.2a](#) (see [§84.30](#)) or under [Pen C §1381](#) under which the defendant has the right to appear with counsel. *People v Wagner* (2009) 45 C4th 1039, 1053–1056, 90 CR3d 26.

Under [Pen C §1381](#), the district attorney of the county in which matters are pending must bring the defendant for sentencing within 90 days of receiving the defendant’s written notice of his or her place of confinement and request to be brought for sentencing. If the defendant is not brought for sentencing 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 pending probation revocation proceeding, not the conviction underlying the original grant of probation. 45 C4th at 1057–1059.

Judgment on conviction of a misdemeanor may be pronounced in defendant’s absence if the defendant is represented by counsel, or the defendant knowingly and intelligently waives the right to be present. [Pen C §§977\(a\), 1193\(b\)](#); *People v Kriss* (1979) 96 CA3d 913, 919, 158 CR 420. Defendant’s presence may be required at sentencing, however, when the defendant is convicted of specified misdemeanor domestic violence or DUI offenses. See [Pen C §977\(a\)\(2\)–\(3\)](#).

In felony cases, the court may pronounce judgment in the defendant's absence when (1) the defendant requests that judgment be pronounced in his or her absence either in open court and on the record or by notarized writing; (2) the defendant requests that he or she be represented by an attorney at sentencing; and (3) the court approves of the defendant's absence. [Pen C §1193\(a\)](#).

### 3. [§84.32] Notice Requirement

Although [Pen C §§1203.2a](#) and [1381](#) are silent concerning any duty to notify an incarcerated probationer that revocation proceedings have been filed, the constitutional right to speedy trial requires that this notice be given. *People v Young* (1991) 228 CA3d 171, 175, 278 CR 784; *People v Johnson* (1987) 195 CA3d 510, 515, 240 CR 748, disapproved on other grounds in 12 C4th 992, 1005. But see *People v Hall* (1997) 59 CA4th 972, 985, 69 CR2d 826 (defendant who had execution of sentence suspended not entitled to notice). Notice is generally imparted when a “hold” or “detainer” has been placed on the probationer, which serves to alert the probationer to the exercise of his or her right to request disposition of the probation matter. *People v Cave* (1978) 81 CA3d 957, 964, 147 CR 371.

- ☛ JUDICIAL TIP: When the court hears a petition to revoke probation alleging that the probationer has been convicted of a subsequent offense and is serving time, the court should ask the district attorney if a “hold” or “detainer” has been filed with the appropriate authorities at the probationer's place of confinement.

If a probationer raises the issue of lack of notice at the formal revocation hearing and the record establishes that the probationer did not receive prompt notice of the pending revocation proceedings, the court should hold an evidentiary hearing on the issue. At this hearing, the court should weigh the prejudicial effect of the delay against any justification for the delay to determine whether the probationer's right to a speedy trial has been violated. *People v Young, supra*, 228 CA3d at 181. If the court concludes that the probationer's speedy trial right has been violated, it must dismiss the petition to revoke probation. *People v Johnson, supra*, 195 CA3d at 516.

For a comprehensive discussion of procedures under [Pen C §§1203.2a](#) and [1381](#), see 3 Witkin & Epstein, *California Criminal Law, Punishment* §§594–599 (3d ed 2000).

### G. [§84.33] Limitations on Probation Revocation Under Proposition 36

Proposition 36, the Substance Abuse and Crime Prevention Act of 2000 (Pen C §§1210, 1210.1, 3063.1), 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) (nonviolent drug possession offenses defined). It also limits the revocation of this mandatory probation for violations that meet certain requirements. Pen C §1210.1(e).

BULLETIN: Penal Code §§1210, 1210.1 and 3063.1 were amended by Stats 2006, ch 63 (SB 1137), effective July 12, 2006. On July 8, 2008, the Alameda County Superior Court issued a judgment granting a writ of mandate and a permanent injunction prohibiting the implementation and enforcement of all provisions of SB 1137. See *Gardner v Schwarzenegger* (Alameda Super Ct, No. RG06278911). This benchguide references Pen C §§1210, 1210.1, and 3063.1 that are in effect, pending the outcome of any further legal action.

#### 1. [§84.34] Drug-Related Probation Violations

If a defendant has been sentenced to probation under Pen C §1210.1(a), and violates his or her probation either by (1) committing a new “nonviolent, drug-possession offense”; (2) committing a misdemeanor for simple possession or use of drugs or drug paraphernalia, being present where drugs are used, failing to register as a drug offender, or engaging in any activity similar to those listed in Pen C §1210(d)(1); or (3) violating a drug-related condition of probation, more than proof that the violation occurred may be required to revoke probation. Proposition 36 sets up a three-tiered probation violation scheme, with different standards and rules, depending on whether the violation is the first, second, or third “drug-related” violation of probation. See §§84.35–84.37.

The term “drug-related condition of probation” includes a probationer’s specific drug treatment regimen, employment, vocational training, educational programs, psychological counseling, and family counseling. Pen C §1210.1(f).

Examples of “drug-related” violations of probation include the failure of the defendant to:

- Appear in drug court as required by conditions of probation, if purpose of the appearance is to assess the defendant’s progress in

treatment (*People v Davis* (2003) 104 CA4th 1443, 1446–1447, 129 CR2d 48).

- Pay restitution where portion of payments included the costs of probation services in monitoring the defendant’s compliance with the treatment program (*In re Mehdizadeh* (2003) 105 CA4th 995, 1000 n12, 130 CR2d 98).
- Attend drug-treatment counseling (*People v Atwood* (2003) 110 CA4th 805, 810, 2 CR3d 67).
- Report to the probation officer, if the missed appointment was for a drug-related purpose, e.g., taking a drug test (*In re Taylor* (2003) 105 CA4th 1394, 130 CR2d 554).
- Report to mental health “gatekeeper” for an initial evaluation for referral and placement in an appropriate drug treatment program (*People v Dagostino* (2004) 117 CA4th 974, 992–993, 12 CR3d 223).

**a. [§84.35] First Violation**

Probation may not be revoked for a first violation, unless (1) the prosecution proves the alleged probation violation, *and* (2) it proves by a preponderance of the evidence that the defendant poses a danger to the safety of others. In the absence of a finding that the defendant is a danger to the safety of others, the court’s only option is to retain the current treatment program or modify the drug-treatment plan. [Pen C §1210.1\(e\)\(3\)\(A\)](#); *In re Mehdizadeh* (2003) 105 CA4th 995, 1005, 130 CR2d 98.

**b. [§84.36] Second Violation**

Probation may not be revoked for a second violation, unless (1) the prosecution proves the alleged probation violation, *and* (2) it proves by a preponderance of the evidence that the defendant poses a danger to the safety of others *or* is not amenable to drug treatment. [Pen C §1210.1\(e\)\(3\)\(B\)](#). In determining whether the defendant is not amenable to drug treatment, the court may consider whether defendant (i) has committed a serious violation of rules at the drug treatment program, (ii) has repeatedly committed violations of program rules that inhibit the defendant’s ability to function in the program, or (iii) has continually refused to participate in the program or asked to be removed from the program. [Pen C §1210.1\(e\)\(3\)\(B\)](#). If the court does not revoke probation, it may modify the drug treatment plan. [Pen C §1210.1\(e\)\(3\)\(B\)](#).

### c. [§84.37] Third Violation

If the defendant violates probation for a third time, he or she is no longer eligible for continued probation under [Pen C §1210.1](#), and probation may be revoked. [Pen C §1210.1\(e\)\(3\)\(C\)](#).

- **JUDICIAL TIP:** The court is not required to revoke probation of a three-time violator. The court may continue the defendant on traditional probation, but not under the protections of Proposition 36. For example, the court may impose some county jail time as a condition of the defendant being continued on probation.

## 2. [§84.38] Non-Drug-Related Probation Violations

If the defendant violates probation by being arrested for an offense other than a nonviolent drug possession offense or by violating a non-drug-related probation condition, the limitations of [Pen C §1210.1](#) do not apply, and the court may modify or revoke probation if the violation is proved. [Pen C §1210.1\(e\)\(2\)](#).

A “non-drug-related” violation of probation may include the failure of the defendant to report to a probation officer when the appointment concerns the probationer’s obligation to maintain a residence or employment, complete other types of counseling, or comply with probation generally. *In re Taylor* (2003) 105 CA4th 1394, 1399 n7, 130 CR2d 554; *People v Johnson* (2003) 114 CA4th 284, 299–300, 7 CR3d 492. Failure to report to the probation by mail is a general non-drug-related violation of probation. *People v Dixon* (2003) 113 CA4th 146, 151–152, 5 CR3d 917 (reporting by mail “could not have involved a drug test, nor was there anything else about reporting by mail that was peculiar to defendant’s drug problems or drug treatment”). And forgery, even if done with the purpose of purchasing drugs, is a non-drug-related violation. *People v Martinez* (2005) 127 CA4th 1156, 1162, 26 CR3d 234.

## 3. [§84.39] Defendants on Probation for Drug Offenses on Effective Date

Defendants who are on probation for a nonviolent, drug-possession offense as of the effective date of [Proposition 36](#) (July 1, 2001) are subject to the same three-tiered probation violation discussed in [§§84.35–84.37](#). [Pen C §1210.1\(e\)\(3\)\(D\)–\(F\)](#). Proposition 36 applies to defendants whose probation was revoked after July 1, 2003, as a result of an arrest occurring before July 1, 2003. *People v Williams* (2003) 106 CA4th 694, 699–700, 131 CR2d 546.

A defendant’s pre-Proposition 36 violations must be considered in determining whether the defendant is eligible for further probation. 106

CA4th at 701–703 (defendant had three prior probation violations and twice failed a condition of probation requiring completion of a drug treatment program; defendant found ineligible for further probation under [Pen C §1210.1\(e\)\(3\)\(F\)](#)).

#### 4. [§84.40] Defendants on Probation for Non-Drug-Related Offenses

The probation requirement of [Proposition 36](#) does not apply to a defendant who commits a nonviolent drug possession offense while on probation for a nonviolent, nonserious offense that is not a nonviolent drug possession offense. *People v Guzman* (2005) 35 C4th 577, 585–590, 25 CR3d 761 (defendant was on probation for inflicting corporal injury and misdemeanor battery on a peace officer when defendant pleaded guilty to drug possession charge; trial court did not err in revoking probation in the corporal injury case and sentencing defendant to prison). *Guzman* also held that the exclusion of probationers who commit nonviolent drug possession offenses while on probation for a nonserious, nonviolent offense does not violate equal protection even though [Proposition 36](#) includes within its provisions parolees who commit nonviolent drug possession offenses while on parole for a nonviolent, nonserious offense. The court held that probationers and parolees convicted of non-drug-related offenses are not similarly situated groups with respect to the purpose of [Proposition 36](#). 35 C4th at 591–593.

#### 5. [§84.41] Custody Status of Defendant Pending Formal Revocation Hearing

If a probationer is alleged to have committed a first or second drug-related violation of his or her probation, the court may not summarily revoke probation and remand the probationer to custody, pending a formal revocation hearing, unless the court has probable cause from the probation report or otherwise to believe the probationer poses a danger to the safety of others or that he or she is a flight risk. *In re Mehdizadeh* (2003) 105 CA4th 995, 999–1007, 130 CR2d 98. Even if custody is otherwise determined appropriate, the court should consider alternatives to incarceration such as setting bail, or ordering placement of the probationer in a residential treatment facility or under home restriction. 105 CA4th at 1007.

#### 6. [§84.42] Revocation of Probation When Defendant Unamenable to Treatment

Distinct from the probation revocations procedures for a violation of probation authorized by [Pen C §1210.1\(e\)](#), is the provision under [Pen C](#)

§1210.1(c) for revocation of probation based solely on a defendant's unamenability to drug treatment.

If at any point during the course of drug treatment the treatment provider notifies the probation department that the defendant is not amenable to the drug treatment being provided, but may be amenable to other drug treatments or related programs, the probation department may request the court to modify the terms of probation to assure that the defendant will receive appropriate treatment. Pen C §1210.1(c)(1).

If the treatment provider notifies the probation department that the defendant is not amenable to any form of treatment under Pen C §1210(b), the probation department may request the court to revoke probation. If it is proved at the revocation hearing that the defendant is not amenable to any form of treatment, the court may revoke probation and impose sentence. Pen C §1210.1(c)(2). For a definition of unamenability to treatment, see §84.36.

#### IV. SPOKEN FORMS

##### A. [§84.43] Summary Revocation

People versus \_\_\_\_\_. The defendant is not present. The [district attorney/probation officer] has filed a [petition to revoke/probation report] setting forth facts justifying the conclusion that the defendant has [describe] in violation of [his/her] probation. The defendant's probation is likely to expire before [he/she] can be returned for a hearing on this alleged violation.

I find that the defendant is in violation of probation based on the facts set forth in the [petition/probation report]. Probation is revoked.

A bench warrant will issue. [There is no bail on the bench warrant./Bail is set at \$\_\_\_\_\_ .]

##### B. [§84.44] Arraignment on Probation Violation

(1) *Call the case:*

The court will call the case of *People versus* \_\_\_\_\_. Is your true name \_\_\_\_\_?

(2) *Advisement of alleged probation violation(s):*

[Mr./Ms.] \_\_\_\_\_, you have been brought before this court for the commencement of proceedings to determine whether you have violated one or more conditions of your probation, and, if so, whether your probation should be permanently revoked.

The record in this case indicates that on [date], you [were found guilty of/pleaded guilty to] the crime of [specify], in the \_\_\_\_\_ County [Superior/Municipal] Court of the State of California. The record further indicates that on [date], you were placed on probation by this court for the term of \_\_\_\_ [months/years] for that crime.

The terms and conditions of probation provided that you [specify conditions of probation].

It has been alleged by the [probation officer/district attorney] that you have violated the terms and conditions of your probation in that you [describe violations].

*(3) Advisement of rights:*

[Mr./Ms.] \_\_\_\_\_, you have certain rights with respect to the alleged violation(s) of your probation.

You are entitled to a formal hearing on the alleged violation at which time the district attorney will be required to present evidence of the alleged violations.

You have the right to appear and present evidence on your own behalf at this hearing. You may request the court to issue subpoenas for any witnesses or other evidence you may want to present.

You have the right to see and hear the witnesses who testify against you and have your attorney question those witnesses.

You have the right to testify if you choose to do so. However, you cannot be forced to testify against yourself.

You have the right to disclosure of evidence that the district attorney intends to use against you.

You have the right to be represented by an attorney throughout these proceedings. If you want an attorney and cannot afford to hire one, the court will appoint an attorney for you at no cost. If an attorney is appointed to represent you and the court later determines that you have the ability to pay, you may be required to pay all or a portion of the cost of the attorney's services.

*(4) Appointment of counsel. Add as appropriate:*

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 with a public defender?

*[If probationer 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]*. You are to return to this court on *[date]*, at \_\_\_ *[a.m./p.m.]*. You should be ready to proceed with *[your own attorney/the public defender]* at that time.

(5) *Receiving probationer's plea:*

*[Mr./Ms.]* \_\_\_\_\_, do you wish to contest the alleged probation violation(s) at a formal hearing, or do you want to admit to the violation(s) at this time?

*[If probationer requests a hearing, add:]*

A formal hearing on revocation of your probation will be held on *[date]*, at \_\_\_ *[a.m./p.m.]*.

*[The defendant will be remanded to custody without bail./Bail is set at \$ \_\_\_\_\_.]*

*Note:* If probationer wishes to admit to the alleged violation, see spoken form at §84.45.

### C. **§84.45** Admission of Probation Violation

(1) *Waiver of rights:*

By admitting to the probation violation(s), you give up the following rights:

To the assistance of an attorney throughout these proceedings. Do you understand and give up this right?

To a formal hearing on the alleged violation(s). Do you understand and give up this right?

To present evidence on your behalf at this hearing. Do you understand and give up this right?

To confront and cross-examine the witnesses against you. Do you understand and give up this right?

To disclosure of evidence to be used against you. Do you understand and give up this right?

To remain silent and not to incriminate yourself. Do you understand and give up this right?

(2) *Taking the admission:*

[To probationer:]

Before admitting to violating your probation, do you have any questions about what such an admission means?

[To probationer's attorney:]

[Mr./Ms.] [name of defense attorney], do you believe you have had sufficient time to discuss this case with your client? Have you discussed with your client [his/her] rights in this matter? Are you satisfied that your client understands [his/her] rights in this case?

[To probationer:]

[Mr./Ms.] \_\_\_\_\_, do you admit to [summarize alleged violation] in violation of your probation? Would you like to explain to the court why you have [summarize alleged violation] in violation of your probation?

(3) *Disposition:*

(a) *Continuing or reinstating probation:*

The court finds the defendant in violation of [his/her] probation on the basis of the defendant's admission that [describe].

[The revocation order is set aside and probation is reinstated./Probation is continued.]

The conditions of probation are modified as follows, [e.g.]:

Defendant is ordered to serve \_\_\_\_ days in county jail beginning [date], at \_\_\_\_ p.m.

Defendant is ordered to perform \_\_\_\_ hours of community service and present proof of completion in this court on [date], at \_\_\_\_ p.m.

The probation period will be extended an additional \_\_\_\_ [months/years]. The new expiration date of probation is [date].

(b) *Formally revoking probation:*

The court finds the defendant in violation of [his/her] probation on the basis of defendant's admission that [describe].

Probation [is/will remain] revoked. The reason(s) for revoking probation [is/are] that the defendant has willfully violated the condition(s) of probation requiring the defendant to [describe], as proved by the defendant's admission.

(c) *Ordering previously imposed sentence into effect:*

On [date], the defendant was sentenced in this case to [county jail/state prison] for [state term] and the execution of this sentence was suspended pending successful completion of a probation term of \_\_\_\_ [months/years]. This sentence is hereby ordered into effect.

The defendant is remanded to the custody of the [sheriff/Department of Corrections and Rehabilitation].

(d) *Imposing sentence:*

[Misdemeanor sentence:]

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

[If defendant does not waive arraignment:]

[Mr./Ms.] \_\_\_\_\_, you were previously charged with violating §\_\_\_\_ of the \_\_\_\_ Code. On [date], you entered a plea of [not guilty/guilty/no contest] to the charge.

[If defendant pleaded not guilty:]

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

[Continue:]

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

[To district attorney:]

Do you wish to make any comments or recommendations before I impose sentence?

[To defense attorney:]

Would you like to make any comments on behalf of your client?

[To defendant:]

Is there anything you would like to say to the court before I impose sentence?

The defendant is sentenced to the county jail for \_\_\_\_ months. The defendant is remanded to the custody of the sheriff.

[Felony sentence:]

A hearing for judgment and sentencing in this case will be held on [date].

[The defendant will be remanded to custody without bail./Bail is set at \$\_\_\_\_\_.]

#### **D. [§84.46] Formal Revocation**

I find the defendant is in violation of the conditions of [his/her] probation. Probation [is/will remain] revoked. The evidence relied on in revoking probation is the statement of facts set forth in the [petition to revoke/probation report] [together with the testimony of \_\_\_\_\_ /and the stipulation that \_\_\_\_\_].

The reason(s) for revoking probation [is/are] that the defendant has willfully violated the condition(s) of probation requiring [him/her] to [specify], as proved by the evidence relied on by this court.

The reporter is ordered to prepare a transcript of these proceedings and to file it with the clerk of the court.

#### **V. [§84.47] ADDITIONAL REFERENCES**

California Criminal Law Procedure and Practice, chap 46 (Cal CEB 2009)  
3 Witkin & Epstein, California Criminal Law, *Punishment* §§577–600 (3d ed 2000)

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